

EUR Research Information Portal

Resistance to third-party litigation funding in Europe

Publication status and date:

Published: 26/11/2025

Document Version

Publisher's PDF, also known as Version of record

Citation for the published version (APA):

Cordina, A. (2025). *Resistance to third-party litigation funding in Europe: A legal-comparative, economic and empirical analysis*. [Doctoral Thesis, Erasmus University Rotterdam]. Erasmus Universiteit Rotterdam (EUR).

[Link to publication on the EUR Research Information Portal](#)

Terms and Conditions of Use

Except as permitted by the applicable copyright law, you may not reproduce or make this material available to any third party without the prior written permission from the copyright holder(s). Copyright law allows the following uses of this material without prior permission:

- you may download, save and print a copy of this material for your personal use only;
- you may share the EUR portal link to this material.

In case the material is published with an open access license (e.g. a Creative Commons (CC) license), other uses may be allowed. Please check the terms and conditions of the specific license.

Take-down policy

If you believe that this material infringes your copyright and/or any other intellectual property rights, you may request its removal by contacting us at the following email address: openaccess.library@eur.nl. Please provide us with all the relevant information, including the reasons why you believe any of your rights have been infringed. In case of a legitimate complaint, we will make the material inaccessible and/or remove it from the website.

Resistance to Third-Party Litigation Funding in Europe

A legal-comparative, economic and empirical analysis

Weerstand tegen Third-Party Litigation Funding in Europa

Een rechtsvergelijkende, economische en empirische analyse

Thesis

to obtain the degree of Doctor from the
Erasmus University Rotterdam
by command of the
rector magnificus

Prof. dr. ir. A.J. Schuit

and in accordance with the decision of the Doctorate Board.
The public defence shall be held on Wednesday 26 November 2025

at 15.30 hrs

by

Adrian Cordina

born in Victoria, Gozo, Malta.

Doctoral Committee

Promotors: Prof. mr. dr. X.E. Kramer
Prof. mr. dr. L.T. Visscher

Other members: Prof. dr. M. Faure
Prof. dr. A. Stadler
Dr. J. Sorabji

Table of Contents

Table of Contents	i
Acknowledgements	vi
Chapter 1	1
Introduction to the Research	1
1.1. Research Background	2
1.2. Research Questions	7
1.3. Societal and Academic Relevance	11
1.4. Literature Review	12
1.5. Methodology	17
1.5.1. Legal-doctrinal and Comparative Research	17
1.5.2. Law-and-economics	18
1.5.3. Empirical Research	19
1.6. Structure of the Research Project	22
Chapter 2	24
The Cost of Litigation and Alternative Means of Funding	24
2.1. Introduction	25
2.2. Litigation Costs and Access to Justice in Europe	26
2.3. Litigation Funding in Europe	29
2.3.1. Personal Funds of the Litigant	31
2.3.2. Public Legal Aid	32
2.3.3. Legal Expenses Insurance	37
2.3.3.1. Before-the-Event Legal Expenses Insurance (BTE LEI)	37
2.3.3.2. After-the-Event Legal Expenses Insurance (ATE LEI)	43
2.3.4. Contingency Fee-Like Agreements	44
2.3.5. Assignment of Claims	48
2.3.6. Public or Non-Profit Self-Funding Funds	50
2.4. Conclusion	53
Chapter 3	55
Third-Party Funding: Practice, Regulatory Frameworks and Resistance	55
3.1. Introduction	56
3.2. Third-Party Funding in Europe	57
3.2.1. Overview	57
3.2.2. Operational Practice	61
3.2.3. Sources of Resistance	66

3.3. Tracing the Origins and Global Evolution of TPF	70
3.3.1. United States	70
3.3.2. Australia	73
3.3.3. International Arbitration	74
3.3.3.1. Commercial Arbitration	74
3.3.3.2. Investment Arbitration	75
3.4. Third-Party Funding Regulation in Europe	76
3.4.1. European Union	76
3.4.1.1. Representative Actions Directive	76
3.4.1.2. Model Rules, Guidelines and Self-regulatory Codes of Conduct	78
3.4.1.3. EP Resolution on Responsible Private Funding of Litigation and EC Mapping Study	79
3.4.2. Netherlands	82
3.4.3. Germany	85
3.4.4. England and Wales	87
3.4.4.1. The ALF Code	87
3.4.4.2. Case Law	88
3.4.4.3. Competition Law Class Actions	89
3.5. Commodification, Corrective Justice and Law-and Economics	92
3.6. Conclusion	95
Chapter 4	97
Agency Risks and Third-Party Funding in Europe: Is Resistance Justified?	97
4.1. Introduction	98
4.2. Law-and-economics and Litigation Funding	100
4.2.1. Compensation versus Deterrence	102
4.2.2. Property Rights, Risk Transfer and Public Goods	106
4.2.3. Agency Theory in Law-and-Economics	107
4.3. (Multi) Principal-Agent Relationships in Litigation Funding	109
4.3.1. The Principal-Agent Relationship	109
4.3.2. Agency Theory in Legal Services	111
4.3.3. The Hourly Fee Model	112
4.3.4. Legal Insurance	116
4.3.5. Contingency Fee-Like Agreements	122
4.4. Agency Risks and Third-Party Funding in Europe	126
4.4.1. TPF in Individual Litigation	126
4.4.2. TPF in European Collective Redress Procedures	130
4.4. Conclusion	134

Chapter 5	136
Multi-Agency Relationships in European TPF Regulation: Unpacking the Resistance	136
5.1. Introduction	137
5.2. Economic Theories of Regulation	138
5.2.1. Public Interest Theories	138
5.2.2. Private Interest Theories	141
5.2.3. Agency Theory in Regulation	143
5.3. The Interest Group Landscape in TPF across Europe	144
5.3.1. Business Groups	144
5.3.1.1. Large Corporates	144
5.3.1.2. Funders	145
5.3.1.3. Legal Insurers	146
5.3.2. Legal Professional Associations	147
5.3.2.1. Profession-wide Associations	147
5.3.2.2. Collective Redress Lawyers Associations	151
5.3.3. Consumer Organisations and Class Representatives	152
5.4. Insights for Designing TPF Regulation	155
5.4.1. Self-Regulation	155
5.4.2. Public Regulation	156
5.5. Conclusion	158
Chapter 6	160
An Empirical Investigation into Third-Party Funding in Europe	160
6.1. Introduction	161
6.2. Review of Existing Empirical Research	164
6.3. The TPF Market and Business Model	166
6.4. Conflicts of Interest	171
6.4.1. Degree of Conflict	171
6.4.2. Influence on the Litigation	174
6.4.3. TPF Pricing	178
6.5. Interest Group Activity and Regulation	180
6.6. Conclusion	183
Chapter 7	185
Conclusions	185
7.1. Resistance to TPF in Europe and its Implications	186
7.2. Access to Justice, Litigation Costs and Funding	187
7.3. TPF Regulatory Frameworks and Practice in Europe	188

7.4. Status Quo of the Resistance to TPF	190
7.5. The Reasons for the Resistance	192
7.6. Justifiability of the Resistance	194
7.6.1. Principal-Agent Analysis	194
7.6.2. Empirical Analysis	196
7.7. Future Outlook	197
Bibliography	202
Books, Articles, Book Chapters and Reports	202
Websites / Blogs	225
List of Regulations and Soft Law Instruments	232
List of Cases	236
Appendices	239
Appendix A	239
Appendix B	240
Summary	243
Samenvatting	248
Curriculum Vitae	254
Portfolio	256

Acknowledgements

Firstly, I would like to thank Professor Xandra Kramer for her excellent supervision, support and unwavering guidance, and for giving me the opportunity to be part of the VICI team researching such an important topic. It has been a privilege to contribute to the project. I would also like to express my gratitude to Professor Louis Visscher for his continued incisive advice throughout the research period. I am deeply grateful for their exceptional mentorship, which has taught me the value of intellectual curiosity, critical thinking and perseverance. My sincere thanks go also to members of the doctoral committee, Professor Michael Faure, Professor Astrid Stadler and Dr. John Sorabji for taking the time to review the thesis and for providing constructive criticism on the final draft. Thanks also to Dr. Sorabji for welcoming me to conduct research at UCL for 3 months and for generously sharing his thoughts on litigation funding.

I would like to extend my heartfelt gratitude to my dear colleagues Eduardo and Antonia for their kind support throughout our shared PhD journey. I have learned a great deal from them and will always appreciate the time we spent together in the Netherlands, both in and outside the university.

My sincere thanks go also Adriani for her supervision and to the other members of the VICI team, Masood, Carlota, Eva and Jos for their expertise, thoughtful feedback and kindness, which made our collaboration not only productive but also enjoyable. I would also like to express my appreciation to other colleagues; Georgia, Emma, Erlis, Alexandre, Betül, Johannes, Mykolas, Tommaso and Jonathan, for their collegiality and the many insightful discussions we shared. I owe my gratitude also to student assistant Renee Kolpa for her invaluable assistance.

Thanks also to the interview respondents for enriching the thesis with practical insights. Their expertise and real-life experience have been indispensable to this research and have helped ground the study in practice.

My special thanks go also to my family without whom pursuing this PhD would not have been possible, and to my friends for their reassurance and encouragement. Finally, to my dearest Molly, for standing by me with endless support, patience and humour every step of the way.

Gozo, September 2025

Chapter 1

Introduction to the Research

1.1. Research Background

This research deals with the development of third-party funding (TPF) of litigation in Europe, the resistance it has met and the extent to which this resistance is justified. It will do so using comparative, economic and empirical analyses. In recent years, this topic and its role in European civil justice systems have garnered significant attention among scholars, regulators and stakeholders.¹ Various TPF regulatory initiatives have emerged at the European Union (EU) level and across European jurisdictions, along with numerous publications, as well as heightened activity from interest groups.² This growing attention is driven by the increasing relevance of TPF in facilitating access to justice in Europe, particularly in the context of complex and collective litigation, for which TPF is often indispensable.³ At the same time, it raises fundamental questions about regulatory oversight, potential conflicts of interest and the commercialisation of the civil justice system.⁴

The question of regulating TPF in domestic or cross-border litigation is being deliberated in EU policy-making circles, especially in light of the 2020 Consumer Representative Actions Directive (RAD) and its implementation by the Member States. The RAD emphasises the significance of litigation funding of consumer collective redress procedures, and regulates it to some extent.⁵ Of particular importance is the European Parliament (EP)'s adoption of the 2022 Resolution on Responsible Private Funding of Litigation (following the 'Voss Report'), which aims to establish a more comprehensive regulatory regime for the TPF market in the EU,⁶ as well as the subsequent European Commission (EC)'s

¹ See e.g. Xandra Kramer and Ilja Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2021) 2 *Revista Ítalo-Española de Derecho Procesal* 165; Louis Visscher and Michael Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 (3) *Journal of Consumer Policy* 455; Susanne Augenhöfer and Adriani Dori, 'The Proposed Regulation of Third Party Litigation Funding – Much Ado about Nothing?' (2023) 20 (5) *Zeitschrift für das Privatrecht der Europäischen Union* 198; Jérôme Saulnier, Klaus Müller and Ivan Koronhalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', European Parliament Research Service (March 2021); Rachael Mulheron, 'A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study. A Report for Submission to the Legal Services Board' (Legal Services Board 2024); European Law Institute (ELI), 'Principles Governing the Third Party Funding of Litigation' (August, 2024); European Commission DG Justice and Consumers, 'Mapping Third Party Litigation Funding in the European Union' (2025); US Chamber of Commerce Institute for Legal Reform, 'Uncharted Waters: Analysis of TPLF in European Collective Redress' (Institute for Legal Reform, 15 October 2019) <<https://instituteforlegalreform.com/research/uncharted-waters-analysis-of-tplf-in-european-collective-redress/>> accessed 29 August 2024.

² *Ibid.*

³ Mulheron (n 1); Xandra Kramer, Ianika Tzankova, Jos Hoevenaars and Karlijn van Doorn, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?* (Eleven 2024).

⁴ Saulnier, Müller, Koronhalyova (n 1); US Chamber of Commerce Institute for Legal Reform (n 1); Adrian Cordina, 'Is it all that Fishy? A Critical Review of the Concerns surrounding Third Party Litigation Funding in Europe' (2021) 14 (4) *Erasmus Law Review* 270; W. Bradley Wendel, 'Alternative Litigation Finance and Anti-commodification Norms' (2014) 63 (2) *DePaul Law Review* 655; Section 3.5 and Chapter 4.

⁵ Directive 2020/1828/EU of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1 (RAD). See also, Kramer and Tillema (n 1).

⁶ European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)).

extensive mapping exercise of European litigation funding.⁷ This coincides with increased attention towards collective actions and their funding in Europe, which often concern interests of the general public. This development has been most notably demonstrated by the Dieselgate emissions scandal, which gave rise to collective actions in a number of Member States, including the Netherlands and Germany.⁸ Collective actions and TPF have also featured heavily in the United Kingdom (UK) in 2023 following the significant Supreme Court's 'Paccar' decision⁹ and in 2024 following the ITV TV show named 'Alan Bates vs the Post Office' on the Post Office Scandal. The dramatisation highlighted the various issues that can arise with TPF, when a third-party funded group action followed the UK's most widespread miscarriage of justice.¹⁰

The concept of TPF has historically been viewed and described in a largely unfavourable light, particularly in Europe.¹¹ Today, as it has developed into a global multi-billion Euro industry, one can still find an intermittent stream of articles and policy analyses by think-tanks which might cause one to think that it should be avoided at all costs or, at least, heavily regulated.¹² Even if today it is most often not outright condemned and its value of enabling access to justice in various situations acknowledged, TPF is still considered by critics to entail significant risks of abuse, to be immoral, and to unduly commodify the civil justice system.

By contrast, other authors, members of the judiciary, practitioners, organisations involved in civil litigation and representatives of the funding industry view TPF as an essential development for access to justice and a well-functioning society. These have a more positive view, while also recognising certain risks associated with the practice.¹³ The main objective of the research in this book is to investigate the underlying reasons for the resistance, scepticism, and increased scrutiny that third-party funding (TPF) has attracted in the former quarters, and to assess whether such concerns are

⁷ European Commission DG Justice and Consumers (n 1); Alexandre Biard, 'The Age of Consumer Law Enforcement in the European Union: High Hopes or Wishful Thinking?' (2023) *European Journal of Risk Regulation* 1-12 4 <<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/age-of-consumer-law-enforcement-in-the-european-union-high-hopes-or-wishful-thinking/E51DA630C0D24F8987A0660B9B9C8EC7>> accessed 12 March 2024.

⁸ Dieselgate concerned the sale of Volkswagen cars fitted with defeat devices to cheat emissions tests to millions of consumers worldwide; see Section 3.4.1.1.

⁹ *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* Case ID: 2021/007; Rachael Mulheron, 'The Funding of the United Kingdom's Class Action at a Cross-Roads' (2023) *King's Law Journal*, (1-27) <<https://www.tandfonline.com/doi/full/10.1080/09615768.2022.2161350>> accessed 13 March 2024; See also Section 3.4.4.

¹⁰ In the scandal, hundreds of subpostmasters were falsely accused and convicted of financial crimes due to flaws in the Post Office's software system; Alan Bates, 'Alan Bates: Why I wouldn't beat the Post Office today' *Financial Times* (London, 12 January 2024) <https://www.ft.com/content/1b11f96d-b96d-4ced-9dee-98c40008b172?trk=feed_main-feed-card_comment-text> accessed 7 June 2024; *Alan Bates v Post Office Limited* [2019] EWHC 3408 (QB).

¹¹ Section 2.3.

¹² Wendel (n 4); Cordina (n 4); Catherine Rogers, *Ethics in International Arbitration, 1st edn* (OUP 2014) 177-179; Alexander Bruns, 'Third-party financing in the Perspective of German Law: Useful Instrument for Improvement of the Civil Justice System or Speculative Immoral Investment?' (2012) 8 (3) *Journal of Law, Economics and Policy* 525; US Chamber of Commerce Institute for Legal Reform (n 1); Section 3.2.3 and Chapter 5.

¹³ Kramer and Tillema (n 1); Visscher and Faure (n 1); ELI (n 1); ILFA, 'Resourcing the Rule of Law in Europe' (ILFA, 26 June 2023) <<https://www.ilfa.com/news>> accessed 29 March 2024; Sections 5.3.1.2, 5.3.2.2 and 5.3.3.

justified. In doing so, the research adopts a mixed-methods research approach, integrating legal-doctrinal and comparative legal research with economic theory and empirical research.

The wider context in which the development of TPF takes place is the civil justice system. Across virtually all major jurisdictions worldwide, including those in Europe, civil justice systems have faced budgetary constraints over the past few decades. In addition, there has been increasing litigation volumes, delays, complexity and costs.¹⁴ The obstacles certain individuals and entities face in pursuing meritorious and socially desirable claims, be it individually or collectively, have therefore increased. This poses a significant challenge to access to justice when there is unlawful harm.¹⁵ Access to justice is an internationally recognised fundamental human right, including in Articles 6 and 13 of the European Convention on Human Rights and in Article 47 of the Charter of Fundamental Rights of the European Union, and is Goal 16 of the United Nations Sustainable Development Goals. It is in the face of these challenges and the pursuit of access to justice that TPF has become more prominent.

TPF can be broadly defined as an arrangement whereby a third party, who has no other link to a dispute, provides the funding for some or all of a party's litigation costs in return for either a share of the proceeds in case of success, or for some other form of remuneration. Funding is provided on a non-recourse basis, meaning that if the case is unsuccessful, the funder will not receive a fee in return for the funding provided.¹⁶

TPF is one type of private, or market-based, funding of dispute resolution. Others include contingency fees arrangements, legal expenses insurance (LEI) and assignment of claims.¹⁷ The main public means of litigation funding takes the form of legal aid. Chapter 2 of this research will explore all these forms of funding and delineate the context out of which TPF emerges.

TPF can be used for both individual and collective claims and the industry has been expanding at a rapid pace in the last few years in a number of jurisdictions around the world. This is especially true in common law jurisdictions, including for instance, Australia, the United States (US) and England and Wales.¹⁸ So far, the use of TPF has been more limited within the EU, with Germany and the

¹⁴ Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (Eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing 2010); Xandra Kramer and Shusuke Kakiuchi, 'Austerity in Civil Procedure and the Role of Simplified procedures' (2015) 8 (4) *Erasmus Law Review* 139, 139; Cordina (n 4); Masood Ahmed and Xandra Kramer, 'Global Developments and Challenges in Costs and Funding of Civil Justice' (2021) 14 (4) *Erasmus Law Review* 181, 181.

¹⁵ Ahmed and Kramer (n 14).

¹⁶ Saulnier, Müller, Koronthalyova (n 1); Gianmarco Solas, *Third Party Funding: Law, Economics and Policy* (CUP 2019).

¹⁷ 'Contingency fees refer to a payment agreement prior to the end of a dispute resolution procedure, in which the lawyer receives a share of the proceeds of the dispute if the client is successful and nothing if the client is unsuccessful. Legal expenses insurance on the other hand is insurance taken out in the form of the payment of a premium, either before a dispute starts to cover the insured's litigation costs (BTE), or alternatively, after the dispute starts, to cover the insured's future litigation costs (ATE)' Cordina (n 4) 270; See also Solas (n 16).

¹⁸ Deminor, 'Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends', (Deminor 2022) <<https://drs.deminor.com/en/litigation-funding-from-a-european-perspective>> accessed 29 August 2024; Saulnier, Müller and Koronthalyova (n 1).

Netherlands forming the largest TPF markets within the union.¹⁹ The UK remains the largest market in Europe.²⁰ The industry in Europe was estimated at around one billion Euro in 2019 by one estimate,²¹ and at 1.6 billion Euro in 2022 by another.²² By 2025, TPF in Europe was expected to account for approximately 3 billion Euro, 16 percent of a total of 18 billion Euro globally.²³ TPF is expected to play an increasingly important role in the provision of legal services in Europe in the years ahead, with climate change and other global crises potentially giving rise to a significant number of claims.²⁴ Nevertheless, in many other jurisdictions in Europe, TPF has yet to gain a significant foothold and remains relatively underdeveloped.²⁵

The modern landscape of commercial TPF is predominantly centred around a very small number of very high-value claims in Europe.²⁶ These claims offer the potential for substantial returns, making them particularly attractive to funders. They include claims which would not have been possible to bring otherwise.²⁷ This focus on high-value claims is evident in areas such as collective redress frameworks, where groups of claimants seek compensation, usually from corporations. Third-party funded claims also involve litigation between companies, including cases involving Small and Medium Enterprises (SMEs) pursuing claims against larger adversaries.²⁸ Additionally, TPF is extensively used in international commercial and investment arbitration.²⁹ Professional funders have more recently started to broaden their investment portfolios to include smaller lawsuits, and some have provided pro bono funding, while new funders are also crowdfunding litigation.³⁰ Nevertheless, TPF in Europe remains unavailable to support individuals, who have limited or no prior litigation experience, with lower valued claims. In contrast to the US, where consumer TPF - funding to individual claimants with lower valued claims - is relatively common, this practice has not developed to a notable degree in Europe.³¹

¹⁹ Ibid.

²⁰ Ibid.

²¹ Saulnier, Müller and Koronthalyova (n 1) 3-7.

²² Deminor (n 18).

²³ Ibid.

²⁴ Ibid.

²⁵ European Commission DG Justice and Consumers (n 1) 641.

²⁶ John Peysner, 'Playing the Man not the Ball', in Willem H. van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 56; European Commission DG Justice and Consumers (n 1) 641-647; Section 3.2.1.

²⁷ Victoria Shannon Sahani, 'Rethinking the Impact of Third-party Funding on Access to Civil Justice' (2020) 69(2) DePaul Law Review 611, 617-8; Section 3.2.1.

²⁸ Saulnier, Müller, Koronthalyova (n 1).

²⁹ International Council for Commercial Arbitration (ICCA), 'Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration, (ICCA reports series, no. 4, 2018).

³⁰ Saulnier, Müller, Koronthalyova (n 1); European Commission DG Justice and Consumers (n 1) 646-648; Section 3.2.1.

³¹ Ronen Avraham and Anthony Sebok, 'An Empirical Investigation of Third Party Consumer Litigant funding' (2019) 104 Cornell Law Review 1133, 1135.

As mentioned, while TPF is often acknowledged as providing access to justice in certain situations where it would otherwise not be available, one can also often encounter a considerable degree of scepticism shown towards it. Despite its growing relevance, third-party funding has long been met with resistance in various jurisdictions.³² Today, there is a growing movement aimed at regulating commercial TPF as a whole in Europe. Nonetheless, it remains largely unregulated outside of collective redress, if one excludes self-regulation, jurisprudence and professional ethical rules.³³

This research focuses on developments of TPF in the EU as a whole, as well as England and Wales. A certain degree of negative regard towards TPF is evident at the EU level following recent regulatory developments, including the adoption of the RAD. The RAD allows TPF in collective consumer redress, though be it under rather strict conditions.³⁴ A far more critical position was adopted in the 'Voss Report', which subsequently received the support of the EP.³⁵ While it briefly acknowledged that TPF may promote access to justice, it emphasised the following concerns in its proposal for a directive to further regulate commercial TPF. It was stated in the report that with TPF;

a material risk of injustice can arise. That risk includes litigation funders being able to take advantage of claimants, or those 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 materially disadvantaged. The risks can be particularly acute where those expecting to benefit from litigation are consumers, 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 [...] 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 [...] 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

³² Willem H. van Boom, 'Litigation Costs and Third-party Funding', in Willem van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 5; Note 12; Section 2.3.

³³ Cordina (n 4).

³⁴ Visscher and Faure (n 1) 473-474. The RAD rejects American-style class (group) actions with market-based solutions for funding; Alexandre Biard and Xandra E. Kramer, 'The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity?' (2019) 27 *Zeitschrift Für Europäisches Privatrecht* Zeup 249, 257; Csongor István Nagy, *Collective Actions in Europe. A Comparative, Economic and Transsystemic Analysis* (Springer Open 2019), 59-60.

³⁵ European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation (2020/2130(INL)); European Parliament (n 6); Adrian Cordina, 'The Time is Ripe? Proposed Regulation of Third Party Litigation Funding in the European Union' (Conflict of Laws, 25 October 2021) <<https://conflictoflaws.net/2021/the-time-is-ripe-proposed-regulation-of-third-party-litigation-funding-in-the-european-union/>> accessed 9 September 2024; Axel Voss, 'The EU Must Regulate Third Party Litigation Funding' (The Parliament, 9 December 2021) <<https://www.theparliamentmagazine.eu/news/article/protecting-eu-consumers>> accessed 9 September 2024; Astrid Stadler, 'Third-Party Funding in Collective Redress' in Xandra Kramer, Stefaan Voet, Lorenz Kodderitsch, Magdalena Tulibacka and Burkhard Hess, *Delivering Justice: A Holistic and Multidisciplinary Approach* (Bloomsbury Publishing 2022) 151-152.

effectively transfers wealth to an unharmed investor, while claimants who have suffered a harm risk receiving little or no redress.³⁶

This passage from the Voss Report captures the main concerns surrounding TPF and the causes expressed for resisting it. It is also one of the most notable instances where a bleak picture of TPF is clearly conveyed. Hereby, a significant EU legislative institution is imploring that TPF should be actively and substantially restricted. Following up on the EP's adoption of the Voss Report, the EC published an extensive mapping study and stakeholder consultation on TPF in 2025.³⁷ This highlights the EU's ongoing evaluation of the practice, signalling that further regulatory initiatives may be on the horizon.

While resistance is most prominent at the EU level, the research also examines several selected European jurisdictions, particularly those in which the TPF industry is most developed. These are England and Wales, the Netherlands and Germany.³⁸ As Chapter 3 will show, out of these three jurisdictions, TPF seems to be regarded most positively in England and Wales and the Netherlands.³⁹ While it is also well-developed in Germany, it appears to face greater scepticism and regulatory caution in the context of collective actions.⁴⁰

1.2. Research Questions

The research examines TPF's resistance by integrating economic theory and empirical research, with the aim of addressing the research questions outlined in this section: namely whether this resistance is justified. As shown in the quote from the Voss Report above, a major concern is conflicts of interest within TPF agreements. From an economic perspective, TPF provides an interesting case study of the different incentives and interests involved among the actors in a litigation funding agreement.⁴¹

³⁶ European Parliament (35) 7-9, 26.

³⁷ European Commission DG Justice and Consumers (n 1); Section 3.4.1.

³⁸ Saulnier, Müller, Koronthalyova (n 1); Deminor (n 18).

³⁹ There are instances of resistance towards TPF in these two jurisdictions as well. See Sections 3.4.2 and 3.4.4. The Paccar decision in England and Wales stands out as a notable judicial expression of such resistance. R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) Case ID: 2021/007.

⁴⁰ For instance, in 2013, in response to the 2013 Commission Recommendation on collective redress, the German government expressed 'that no incentives should exist to profit from litigation'; Ilja Tillema, 'Entrepreneurial Mass Litigation: Balancing the Building Blocks' (Doctoral thesis at Erasmus University Rotterdam 2019) 53; Cordina (n 4) 271; Section 3.4.1.1. See also Astrid Stadler, 'German Collective Actions - Is Litigation Funding in a Dead End?' in Xandra Kramer, Jos Hoevenaars, Betül Kas and Erlis Themeli, *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 259 and the German implementation of the RAD with the Consumer Rights Enforcement Act ("Verbraucherrechtsetzungsgesetz" or "VDuG") which limits funders' success fees to 10%. Many deem this cap as too restrictive; Wolfgang Hau, 'Private Funding' in Burkhard Hess, Margaret Woo, Loïc Cadiet, Séverine Menétrey, and E Vallines García (Eds) *Comparative Procedural Law and Justice, Part III - Access to Justice and Costs of Litigation* (2024) 28-29; Augenhöfer and Dori (n 1) 204; Section 3.4.3.

⁴¹ Jef De Mot, Michael Faure and Louis Visscher, 'TPF and its Alternatives: An Economic Appraisal' in Willem H. van Boom (ed) *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 34-41; Visscher and Faure (n 1); Michael Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the

Rational choice theory and the principal-agent framework are the primary tools employed in the research. The extent to which conflicting interests within TPF differ from those found in other accepted forms of private funding of litigation is examined.⁴² Under this framework, actors are expected to advance their own interests, and in their relationships with other actors, interests may align or conflict to varying degrees.⁴³ Means through which relationships and contracts can be designed such that conflicts of interest are mitigated are also examined. This analysis will address the question of whether TPF in Europe is inherently more risk-laden than other funding options in terms of conflicts of interest, and is therefore to be resisted and restricted. Are the interests and incentives in TPF structured in such a way that it is more or less likely that claimants will be routinely taken advantage of or that unmeritorious litigation will be brought forward? Answers to these questions are provided by the law-and economics analysis.

Furthermore, under this framework, the regulation of TPF and the dynamics of the interest group landscape are also examined. Interest groups and stakeholders which are active around TPF policy include business organisations, funders' associations, lawyers' associations and consumer organisations.⁴⁴ The positions they adopt on TPF, under which incentives, their relationships with policymakers and the influence this can have on TPF regulation are examined. This helps answer further the questions on the sources and nature of the TPF resistance, and addresses the implications this may have on regulation. Key lessons for TPF regulation are then identified from this economic analysis.

Finally, semi-structured interviews with experts and stakeholders in the field, which provide further nuance, insights and critical analysis are integrated into the research. They provide the respondents' subjective views and experiences on the issues surrounding TPF. The methods used will be discussed further in Section 1.5.

Against this backdrop, this research seeks to provide answers as to how and why TPF has been met with scepticism, scrutinised and resisted, particularly in consideration of the calls for stricter regulation. It also addresses the normative question of to what extent this resistance is warranted, taking into account insights from law-and-economics. In other words, is the resistance to TPF in Europe justified? Or alternatively, to what extent should TPF be accepted in Europe? These questions

Tripartite Contract, and the Lens of Theory' (2016) 39 (1) University of New South Wales Law Journal 165; See also Sections 1.4 and 1.5 and Chapter 4.

⁴² For a more comprehensive introduction on law-and economics and the principal-agent framework, see Sections 1.5, 4.2.3, 4.3.1 and 4.3.2.

⁴³ Ibid.

⁴⁴ Adrian Cordina, 'The Regulation of Litigation Funding in Europe: An Application of Principal-Agent Theory' in Xandra Kramer, Masood Ahmed, Adriani Dori and María Carlota Ucín (Eds) *Sustaining Access to Justice in Europe: New Avenues for Costs and Funding* (Hart 2025).

are framed within the framework of the goals of civil justice systems being ensuring access to justice and the deterrence of unlawful or socially undesirable behaviour.⁴⁵

More specifically, the overarching research question reads as follows;

How has TPF developed in Europe, what has impeded its wider acceptance, and to what extent is the resistance it encounters warranted?

This research question is divided into the following sub-questions;

1. What is the legal and practical state of affairs with regard to litigation funding and TPF in Europe, particularly in the EU, the Netherlands, Germany and England and Wales? How, and to what extent, is resistance to TPF reflected in the EU and in these jurisdictions?
2. What are the benefits and drawbacks of TPF in Europe from a law-and-economics perspective? How does the principal-agent problem in TPF compare with alternative private funding arrangements?
3. How and why do various stakeholders and interest groups support or oppose the use of TPF? What implications could this have on TPF discourse, perception and regulation?
4. How does TPF operate in practice and what are the experiences and perceptions of selected stakeholders in TPF? Specific questions addressed are: what type of claims do funders fund; what is their area of law, value and chance of success; to what extent do funders control or influence funded cases' decisions and strategies; what likely effects does TPF have on settlements and the resolution of claims; and how do the claimants perceive their TPF arrangement, compared to other potential funding options?
5. Should the use of TPF civil justice systems in Europe should be approached with caution or rather encouraged? How can the identified drawbacks be effectively addressed or mitigated?

This research investigates these key questions by first providing a background overview of the historical, practical and legal state of affairs with regard to litigation funding and TPF on a European-wide level in Chapter 2. Chapter 3 then narrows the focus to examine TPF more thoroughly in the EU and in the specific jurisdictions of the Netherlands, Germany and England and Wales. Despite not being an EU member state anymore and not bound by the RAD or future EU regulation, England and Wales is a relatively very developed and influential European jurisdiction in the field of TPF. Its inclusion in this study is therefore essential to understanding the broader European context and regulatory landscape surrounding litigation funding.⁴⁶

⁴⁵ For a more detailed discussion on these goals see Sections 2.2 and 4.2.

⁴⁶ Section 3.4.4.

Economic theory, and agency theory in particular, is then incorporated in Chapter 4 to analyse the behaviour of the actors in this phenomenon. The analysis focuses in particular on the interactions between the funder, the lawyer and the claimant in these jurisdictions. The benefits of TPF will be confronted with its drawbacks, which constitute the primary sources of criticism and resistance to its adoption. The most significant ongoing criticism is the principal-agent problem, where conflicts of interests arise between the principal (the claimant) and the agent(s) (the lawyer and funder). Under this framework, the problem arises when the claimant is, to varying degrees, unaware of whether the agent(s) are representing their best interests when acting on their behalf.⁴⁷ The research then compares this problem in TPF with the problem in other means of litigation funding in Europe. These other means include hourly billing, contingency fee-like arrangements⁴⁸ and LEI, given that they are alternative funding arrangements. In order to fully address the research questions, the research aims to identify the degree to which each funding mechanism exacerbates or mitigates the principal-agent issue.

Various interest groups are also active in lobbying and campaigning on TPF in Europe. These groups include the business community, funder associations, insurers, legal professional associations and consumer organisations. The stances adopted by these groups on TPF, as well their potential influence on regulatory developments, are also examined in Chapter 5. The research extends agency theory to the TPF policymaking question. The stakeholders and interest groups active in the area are mapped out, and the research outlines the reasons why different groups support or oppose TPF, and the implications this could have for regulation. The existing literature is built upon by reviewing and adapting agency theory with respect to litigation funding in the European context.

The specific diverging situations in each of the selected jurisdictions will be taken into account in the economic analysis, given for instance the varying acceptance and prevalence of contingency fee-like arrangements and LEI. For instance, in England and Wales, the use of damages based agreements and conditional fee agreements is permitted and relatively widespread, in contrast to their limited acceptance in the Netherlands and Germany.⁴⁹ Private funding in both individual and collective litigation will be explored, and any distinctions between the two will be highlighted. With regard to the collective redress scenario, the relevant rules on funding in the RAD, and those in the selected jurisdictions, will also be taken into consideration. This thorough examination will shed light on how and why TPF is, or has been, resisted in Europe, and if this resistance is warranted. It will serve as the backdrop for an empirical examination of these questions.

⁴⁷ For a more comprehensive introduction into agency theory, see Sections 1.5. Sections 4.2.3, 4.3.1 and 4.3.2.

⁴⁸ For instance, 'conditional' fee arrangements in England and Wales.

⁴⁹ See Sections 3.4.2-3.4.4.

The research further contributes to the literature by collecting primary empirical data and insights to explore and describe the industry in Chapter 6, in order to more comprehensively answer the research questions numbered 4 and 5. The data will be scrutinised against the law-and-economics insights and predictions through the use of semi-structured interviews. Respondents include funders, lawyers, group representatives in third-party funded collective litigation, academics and representatives from the business community. The methodology for the empirical research will be addressed in greater detail in Section 1.5.

1.3. Societal and Academic Relevance

This research topic is highly relevant as it explores an emergent and increasingly significant funding mechanism which contributes to tackling one of the most pressing issues in the legal landscape in Europe: the lack of sufficient litigation funding. Funding is an essential precondition to access to justice. As referred to earlier, the decline in the provision of legal aid, combined with increasing litigation costs and growing complexity of mass claims, often with international dimensions, have exacerbated the access to justice problem. Yet, certain market-based litigation funding options like TPF continue to face significant resistance. TPF as an industry has expanded rapidly in recent years but has so far remained, to a certain extent, unregulated outside of collective redress, despite some of the challenges it might pose.

As will be discussed in the next section (1.4), TPF is at the time of writing a hot topic, benefitting from a significant amount of literature. Even the empirical aspect of TPF in Europe, which was until recently under-researched, has received increased attention during the time of writing of this research.⁵⁰ The empirical research carried out in this study included users of TPF, a category of respondents which the existing research has largely not addressed. However, this study focuses mostly on other stakeholders such as funders and lawyers.⁵¹ Along with the comparative and economic analyses, this research serves to build upon the existing literature and provide additional context and valuable insights, in answering the research questions posed.

The insights gained from this mixed-methods research can inform a wide range of audiences, both in Europe and beyond. These include policymakers, scholars and other stakeholders in the industry such as legal practitioners, businesses, consumer organisations and other non-governmental or supranational bodies with an interest in litigation funding. Comprehensive research that specifically

⁵⁰ Kramer and others (n 3); Mulheron (n 1); European Commission DG Justice and Consumers (n 1).

⁵¹ Sections 1.5 and Chapter 6. The EC's 2025 mapping study includes insights from organisations which have benefitted, or could potentially benefit from TPF. European Commission DG Justice and Consumers (n 1). See also a similar study on class representatives; Class Representatives Network (CRN), 'Selecting Funders and Negotiating Litigation Funding Agreements' (CRN, September 20, 2024) <<https://classrepresentativesnetwork.org/research-and-reports/>> accessed 30 September 2024.

focuses on the industry as it stands in Europe, the reasons behind resistance to it and whether such resistance is justified is relatively scarce and nascent, especially when compared to the research on common law jurisdictions.⁵² Furthermore, this research is particularly timely as the industry continues to gain traction across the continent and the debate over its merits and demerits intensifies. The debate on this industry could be deemed as being polarised, with approaches ranging from rare calls to outright ban the practise, at least in class actions, to advocating for no regulatory intervention at all. For instance, in Europe, TPF is currently prohibited in Ireland and Greece.⁵³ Some have argued that TPF should be prohibited on the basis of being immoral, and the US Chamber of Commerce's Institute for Legal Reform has expressed that 'policymakers should consider prohibiting [TPF] in class actions'.⁵⁴ The International Legal Finance Association (ILFA), on the other hand, emphasises TPF's benefits and campaigns against any further regulation.⁵⁵ This research presents a scientific and balanced approach to understanding the phenomenon.

1.4. Literature Review

The existing body of literature extensively surveys the historical and doctrinal underpinnings of TPF.⁵⁶ Early common law doctrines of maintenance and champerty,⁵⁷ alongside the prohibitions of contingency fee agreements and assignment of claims in civil law jurisdictions,⁵⁸ have served to restrict TPF. However, their relevance diminished significantly in recent years. It has been outlined that these doctrines, which have their roots in Greek and Roman legal systems, and were further reinforced by Christian doctrine, resulted in general prohibitions of interference in others' litigation claims, for profit or otherwise.⁵⁹ The shift in perception was secured with the rise of the welfare state

⁵² See note 1; Wendel (n 4); Charles Silver, 'Litigation Funding versus Liability Insurance: What's the difference' (2014) 63 (2) DePaul Law Review 617; Shannon Sahani (n 27); Maya Steinitz, 'Whose claim is This Anyway? Third-Party Litigation Funding' (2011) 95 (4) Minnesota Law Review 1268.

⁵³ David Capper, 'Litigation Funding in Ireland' 14(4) Erasmus Law Review 211; Saulnier, Müller, Koronthalyova (n 1).

⁵⁴ Bruns (n 12); US Chamber of Commerce Institute for Legal Reform, 'Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later' (Institute for Legal Reform, 27 January 2020) <<https://instituteforlegalreform.com/research/selling-more-lawsuits-buying-more-trouble-third-party-litigation-funding-a-decade-later/>> accessed 29 August 2024, 31.

⁵⁵ ILFA, 'International Legal Finance Association (ILFA) submits letter to the European Commission on Voss Report's proposal to impose overburdensome regulation' (ILFA, 7 March 2022) <<https://www.ilfa.com/news>> accessed 13 March 2024; ILFA (n 13).

⁵⁶ Willem H. van Boom (ed.), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017); Christopher Hodges, John Peysner and Angus Nurse, 'Litigation Funding: Status and Issues' (2012) 55 Oxford Legal Studies Research Paper, 151; Maya Steinitz, 'Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements' (2019) 53 (2) UC Davis Law Review 1073; Solas (n 16).

⁵⁷ Maintenance refers to the act of assisting another to bring a claim, whereas champerty refers to the 'division of the spoils' following the litigation. Rachael Mulheron, *The Modern Doctrines of Maintenance and Champerty* (OUP 2023) 4; see also Section 3.2.3.

⁵⁸ *Pacta de quota litis* and *redemptio litis*; the prohibitions in continental jurisdictions on lawyers receiving a share of the compensation and on the transfer of claims by assignment or purchase; Solas (n 16) 18-26.

⁵⁹ Victoria Shannon, 'Harmonizing Third-Party Litigation Funding Regulation' (2015) 36(3) Cardozo Law Review 861, 874; Max Radin, 'Maintenance by Champerty' (1935) 24 California Law Review 48, 68; Anthony J. Sebok, 'The Inauthentic Claim' (2011) 64 (1) Vanderbilt Law Review 61; Willem H. Van Boom, 'Insuring vs. Investing in Litigation: A Comparative History of Litigation Insurance and Claim Investment' (2020) 8 (1) Comparative Legal History 2, 5-7.

and the establishment of legal aid as a fundamental component of Western democracies, during which time restrictions on private funding also began to be dismantled.⁶⁰ Private professional third party funders came to the fore in recent years, particularly following the 2009 financial crisis.⁶¹ The literature describes how, after initially gaining prominence in Australia, TPF has since spread across the common law world and into continental Europe.⁶²

TPF in Europe therefore marks a trend in civil litigation financing, wherein the funding of litigation has, over time, shifted from public sources, that is, legal aid, to private sources. This is due to, amongst others, the increasing cost of legal aid schemes and cuts in public expenditure in civil justice, and the increasing number, complexity and duration of cases, including mass claims and cross-border cases.⁶³ The literature emphasises the access to justice problems which can arise without these funding mechanisms. Individuals who cannot afford the risks and ever-increasing costs of litigation are increasingly resorting to go to court unrepresented or completely lack access to justice.⁶⁴ SMEs and groups of claimants would likewise be unable to bring their claims forward. TPF therefore presents itself as one solution to this problem of insufficient access to justice for certain claimants. Nevertheless, the ‘commodification’, and the ‘meddling’ in others’ claims for profit is still often seen as ‘distasteful’,⁶⁵ in addition to the other objections and concerns which will be addressed later on.

In Europe, the increase in collective redress claims, driven by globalisation and digitisation, is also bringing about increased TPF. Collective redress litigation is significantly complex and expensive, and lacks alternative means of financing.⁶⁶ Evidence from the Netherlands and in the UK indicates that collective actions for damages rely on TPF to be initiated.⁶⁷ In terms of regulation, on the European level, insofar as TPF is allowed in national law, the RAD allows TPF in collective actions, albeit under strict conditions.⁶⁸ The directive notably enables courts to assess whether funders have interests conflicting with the consumers’ collective interests. Amongst others, it subjects TPF to judicial scrutiny to prevent abuse, assess whether funders unduly influence procedural decisions taken by the ‘qualified entity’ and if they have sufficient resources. The ELI/UNIDROIT Model European Rules of Civil Procedure, a 2020 soft law instrument, also touches on TPF in collective actions.⁶⁹ The ELI’s 2024

⁶⁰ Solas (n 16) 28-122; Cordina (n 4) 274.

⁶¹ Steinitz (n 52) 1283-1284.

⁶² Ibid; Samuel Issacharoff, ‘Litigation Funding and the Problem of Agency Cost in Representative Actions’ (2014) 63(2) *DePaul Law Review* 561; Tillema (n 40); Solas (n 16).

⁶³ See generally R. Daniel Kelemen, *Eurolegalism – The Transformation of Law and Regulation in the European Union* (HUP 2011) 63-71; Van Boom (n 32).

⁶⁴ Andrew Higgins, ‘The costs of civil justice and who pays?’ (2017) 37 *Oxford Journal of Legal Studies* 687, 687-688; John Sorabji, ‘Legal Expenses Insurance and the Future of Effective Litigation Funding’ (2021) 14 (4) *Erasmus Law Review* 189, 189-191.

⁶⁵ Wendel (n 4); Solas (n 16) 246-249; Cordina (n 4); Section 3.5.

⁶⁶ Kramer and others (n 3) 64-65; Mulheron (n 9) 23; Mulheron (n 57) 103-104.

⁶⁷ Ibid.

⁶⁸ Biard and Kramer (n 34); Fernando Gascón Inchausti, ‘A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November’ (2021) 2 *Zeitschrift für das Privatrecht der Europäischen Union* 61.

⁶⁹ See Section 3.4.1.2.

Principles Governing the Third Party Funding of Litigation, on the other hand, focus exclusively on TPF. They exemplify the growing attention it has received by offering a comprehensive set of 'light-touch' soft law guidelines for its regulation and use in Europe.⁷⁰

In England and Wales, there is an established body of case law on TPF, and the Association of Litigation Funders provides self-regulation through a Code of Conduct for litigation funders. In both Germany and the Netherlands, funding agreements might be subject to judicial review on public policy grounds. Within the domain of collective redress, the WAMCA ('Wet afwikkeling massaschade in collectieve actie') and the Dutch Claimcode of 2019 establish specific rules for the use of TPF in the Netherlands.⁷¹

Recent literature also addresses the economics of TPF, and its advantages and disadvantages, including the agency problems it may give rise to.⁷² TPF has been conceptualised as a market solution where private actors bargain over litigious assets to produce socially efficient outcomes.⁷³ TPF is recognised as mitigating the market failure of negative externalities by facilitating private enforcement through litigation.⁷⁴ TPF can step in when litigation is costly and outcomes are uncertain. In the collective redress scenario in particular, claimants are not incentivised to organise in cases of dispersed losses due to 'rational apathy'.⁷⁵ Individuals are rationally apathetic when they decide it is in their best interest not to litigate when the expected costs of doing so outweigh the expected benefits.⁷⁶ Risk aversion on the part of the claimants may also further impede the pursuit of meritorious litigation, given the prospect of bearing significant costs if the case is unsuccessful.⁷⁷ If access to justice is facilitated where it would not otherwise be available due to litigation, positive externalities of deterrence are also generated, contributing to the provision of a public good.⁷⁸

⁷⁰ Ibid.

⁷¹ Sections 3.4.2 - 3.4.4.

⁷² De Mot, Faure and Visscher (n 41); Visscher and Faure (n 1); Duffy (n 41); Chapter 4.

⁷³ Sebok (n 59); Solas n (14) 126-130; Section 4.2.2.

⁷⁴ A market failure is a situation where scarce resources are not allocated to their highest valued uses. It arises because perfectly competitive and efficient markets rarely exist in reality. Common causes of market failure include information asymmetries, externalities, market power, and the under-provision of public goods. See Sections 4.2. and 4.2.1.

⁷⁵ De Mot, Faure and Visscher (n 41); Michael G. Faure and Franziska Weber, 'Dispersed Losses in Tort Law – An Economic Analysis' (2015) 6 (2) *Journal of European Tort Law* 163; Franziska Weber, 'Towards an Optimal Mix of Public and Private Enforcement in Consumer Law' (EDLE Doctoral Thesis 2012) 79; For a detailed discussion on the costs and risks of litigation see Section 2.2.

⁷⁶ Ibid.

⁷⁷ De Mot, Faure and Visscher (n 41) 33; Section 2.2.

⁷⁸ For this research's analysis of TPF's role with 'externalities', 'deterrence' and 'public goods' see Section 4.2. Public goods are characterised by non-rivalry and non-exclusion, and tend to be undersupplied due to collective action and free rider problems, causing a market failure. William B. Rubenstein, 'Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action' (2006) 74 (3) *UMKC Law Review* 709; Jürgen G. Backhaus, Alberto Cassone and Giovanni B. Ramello, 'The law and economics of class action litigation: setting the research agenda' in Jürgen G. Backhaus, Alberto Cassone and Giovanni B. Ramello (eds.) *The Law and Economics of Class Actions in Europe* (Edward Elgar, 2012); Marco de Morpurgo, 'A Comparative Legal and Economic Approach to Third-party Litigation Funding' (2011) 19 (2) *Cardozo Journal of International & Comparative Law* 343, 382-383.

However, during the funded claim process, a better-informed funder with a stronger bargaining position might be interested in extracting high shares of the damages or exert control on case decisions, including those on settlements, to the detriment of the claimants.⁷⁹ Claimants who are less exposed to risk may also engage in ‘moral hazard’ and seek funding on weak claims.⁸⁰ It may also cause an overall increase in the volume of (including unmeritorious) litigation.⁸¹ As will be discussed in this research, this is subject to the gatekeeper role funders themselves have of conducting thorough due diligence on each funding request to determine the claim’s value and chance of success.⁸² Furthermore, information asymmetry might lead less well-resourced consumers to underestimate the future costs of a funding arrangement.⁸³ In spite of these potential issues, TPF is in general viewed positively in the law-and-economics literature.⁸⁴ Law-and-economics perspectives on TPF specifically tailored to the particularities of the selected European jurisdictions have been largely lacking as models are abstracted from the particularities of legal systems.⁸⁵ This research seeks to address this gap.

By contrast, economic theory of regulation, particularly those based on private interest and public choice perspectives, have seldom been specifically applied to the regulatory process governing litigation funding. The lobbying against TPF by bodies such as the US Chamber of Commerce, which represent large corporates, is frequently referred to in the literature.⁸⁶ However, studies which have given a comprehensive picture of interest group activity and campaigning and the implications this could have in relation to TPF in Europe have largely been lacking. This study aims to provide a more comprehensive analysis of these interactions.⁸⁷

Empirical studies provide further essential insights into the TPF landscape. Among the most notable studies are the 2024 report on TPF commissioned by the Legal Services Board of England and Wales,

⁷⁹ For this research’s analysis of the principal-agent problem in TPF see Sections 4.4.1 and 4.4.2.

⁸⁰ Moral hazard refers to situations where one party is more likely to take risks at the expense of another, because information asymmetry prevents the other party from becoming aware of the former’s change of behaviour. See also Section 4.3.3.

⁸¹ Bruno Deffains and Claudine Desrieux, ‘To Litigate or Not to Litigate? The Impacts of Third-party Financing on Litigation’ (2014) 43 *International Review of Law & Economics* 178; David S. Abrams and Daniel L. Chen, ‘A Market for Justice: A First Empirical Look at Third Party Litigation Funding’ (2013) 15 (4) *University of Pennsylvania Journal of Business Law* 1075; Cordina (n 4).

⁸² De Mot, Faure and Visscher (n 41); Sections 4.3.5 - 4.4.2; Chapter 6.

⁸³ Van Boom (n 32) 21; de Morpurgo (n 78) 367-368.

⁸⁴ Contingency fees are also well regarded in the law-and-economics literature. Both contingency fees and TPF are considered as better able at tackling agency problems than hourly fees. Visscher and Faure (n 1) 462-463; See also Chapter 4.

⁸⁵ A study which adapts formal models to specific jurisdictions is Dominique Demougin and Felix Maultzsch, ‘Third-Party Financing of Litigation: Legal Approaches and a Formal Model’ (2013) 60 (3) *CESifo Economic Studies* 525.

⁸⁶ Deborah R. Hensler, ‘So You Are Thinking About Adopting a Class Action Regime? Lessons from the US’ (2023) 42 (1) *Civil Justice Quarterly* 3, 4; Peysner (n 26); W. Bradley Wendel, ‘Paying the Piper but not Calling the Tune: Litigation Financing and Professional Independence’ (2018) 52 (1) *Akron Law Review* 1; Alexandre Biard, ‘Je t’aime moi non plus’: Why Europe Needs Strong Collective Redress’ in Xandra Kramer, Stefaan Voet, Lorenz Kodderitsch, Magdalena Tulibacka and Burkhard Hess, *Delivering Justice: A Holistic and Multidisciplinary Approach* (Bloomsbury Publishing 2022) 94; Solas (n 16) 248-249.

⁸⁷ Cordina (n 44); Paul H. Rubin, ‘Public Choice and Tort Reform’ (2005) *Public Choice* 124 (1-2) 223.

and the 2023 book authored by Dutch researchers on the desirability of a revolving fund for collective redress in the Netherlands.⁸⁸ They highlight the growing appetite for empirical research in the field. Both integrate qualitative and quantitative empirical research of the industry and give a comprehensive picture of TPF, in the UK and the Netherlands respectively. Moreover, the 2021 European Parliament Research Service (EPRS) Study on Responsible Private Funding of Litigation; European Added Value Assessment, made use of interviews and provided an overview of the market organisation for the industry in Europe as a whole. It highlighted for instance the number and size of the active litigation funders and the nature of the services they offer. Following the EP's resolution adopting the Voss Report, the EC published the extensive 'Mapping Third Party Litigation Funding in the European Union' in March 2025, which also includes national reports as well as legal and practical analyses of TPF. It is primarily based on insights collected from a variety of stakeholders across the EU and a number of non-EU Member States, including the UK.⁸⁹

Prior to these publications, the following studies in jurisdictions outside of Europe should be mentioned. In 2019, Avraham and Sebok offered the first 'comprehensive' empirical study regarding the situation of consumer TPF in the US.⁹⁰ The authors acquired data related to around 200,000 funded and unfunded⁹¹ cases from 'one of the largest financing firms'. They quantitatively portray, summarise and analyse the features of the dataset veering away from the usual criticism, which is carried out 'in an environment of anecdote and speculation'.⁹² This study provides some valuable insights, but as noted earlier, consumer TPF does not feature in Europe and can also vary considerably from commercial TPF in the agreement structure. TPF has been almost exclusively dedicated to claims in commercial and collective redress cases in Europe valued at millions of Euros, but professional funders can fund a broad range of cases, including those of relatively lower monetary value.⁹³ In earlier literature, there were very few published empirical studies, including two on commercial TPF in Australia using data about 113 funded cases in the jurisdiction.⁹⁴

⁸⁸ Mulheron (n 1); Kramer and others (n 3).

⁸⁹ European Commission DG Justice and Consumers (n 1); Section 3.4.1.3. Another notable study on TPF, published in 2012, utilising interviews was: Cento Veljanovski, 'Third-Party Litigation Funding in Europe' (2012) 8 (3) *Journal of Law, Economics and Policy* 405.

⁹⁰ Avraham and Sebok (n 31).

⁹¹ Cases which the firm decided not to fund.

⁹² Among their findings were that funders carry out thorough due diligence, refusing to follow through on half of the funding requests. This indicates that they only fund what they deem to be meritorious lawsuits. The funding agreements are 'complex and opaque', which possibly misleads unsophisticated consumers and leads them to underestimate the actual price of the agreement. The payment actually returned to the funders is lower than what is contractually obliged and what is sometimes speculated when ex post adjustments are accounted for. The authors hypothesise that these renegotiations happen because consumers find out that they have to pay more than what they expected. Furthermore, the reputation and experience of the lawyers/law firms was found to have an impact on differential treatment by funders to clients at every stage of the process. See also Section 3.2.3.

⁹³ European Commission DG Justice and Consumers (n 1) 646-648.

⁹⁴ Abrams and Chen (n 81); Daniel L. Chen, 'Can markets stimulate rights? On the alienability of legal claims' (2015) 46 (1) *The RAND Journal of Economics* 23.

The literature also addresses TPF of collective redress and its funding at the EU level and of the selected jurisdictions, especially from a legal-doctrinal and comparative perspective.⁹⁵ The legal-doctrinal literature on TPF in individual litigation and in international arbitration has been burgeoning in recent years.⁹⁶ This research aims to build upon the existing literature by providing targeted analyses of TPF in both individual and collective litigation in the selected jurisdictions, complemented by economic and empirical research, with the view of addressing the research questions at hand.

1.5. Methodology

1.5.1. Legal-doctrinal and Comparative Research

As indicated above, this research employs a multidisciplinary approach, integrating four methodological frameworks: legal-doctrinal analysis, comparative legal study, law-and-economics and empirical research. Chapter 2 will provide a brief examination of the civil justice funding problem, along with an overview of various litigation funding solutions. The development and legal framework of TPF in Europe, and in the jurisdictions of the Netherlands, Germany and England and Wales is then outlined in Chapter 3. The method used in these Chapters will mainly be legal-doctrinal analysis, but will also include historical and comparative elements. These parts will be complemented by definitions and analyses of key legal concepts, such as access to justice as a fundamental human right, as well as related doctrine and case law concerning TPF. The legal sources used will be treaties, EU directives and regulations, judgements and other subsidiary material, national legislation and jurisprudence, and legal scholarship. EU legislation in this field is only present in the area of consumer collective redress.

The rationale for investigating the research question by focusing on the selected jurisdictions is their prominence in developments on TPF. The largest TPF markets in Europe are in these three countries and they are where collective redress is most prevalent.⁹⁷ These jurisdictions adopt diverging approaches to funding with regard to matters such as cost-shifting rules and allowing contingency fee-like arrangements. Their collective procedures vary. The composition of the private litigation funding market also differs across the jurisdictions. TPF in international arbitration, while briefly reviewed in this research, will largely be outside the scope of this research.⁹⁸ It will serve to further

⁹⁵ Amongst others in Kramer and Tillema (n 1); Stadler (n 35); Mulheron (n 57).

⁹⁶ ICCA (n 29); Section 3.3.2.

⁹⁷ Saulnier, Müller, Koronthalyova (n 1), Deminor (n 18); Cordina (n 4); CMS, 'European Class Action Report' (CMS, 2024) <https://cms.law/en/int/publication/cms-european-class-action-report-2024?utm_source=lawnowandutm_medium=referralandutm_campaign=Class%Action%Report2024>; Sections 3.4.2-3.4.3.

⁹⁸ Section 3.3.3.

contextualise TPF within the EU and the selected jurisdictions. The findings from this analysis establish the legal context necessary for subsequent theoretical and empirical work.

1.5.2. Law-and-economics

Building on the comparative law foundation, the research will proceed by taking a positive law-and-economics⁹⁹ approach to the TPF phenomenon in Chapter 4. It does so to primarily examine the incentives of the parties in the tripartite relationship within a TPF arrangement,¹⁰⁰ but also TPF's external effects on societies. By examining whether there are risks of claimants being significantly disadvantaged, or whether there are risks of other negative social outcomes, the justifiability of the resistance can be addressed. Law-and-economics' primary framework is rational choice theory, a deductive approach where actors are assumed to seek to maximise their expected utility.¹⁰¹ After positive analyses, normative conclusions are then drawn with regard to recommendations on the enactment of efficient regulation or case law. The main criterion of efficiency employed is Kaldor Hicks efficiency, where changes which bring about an increase in utility for some individuals which exceeds the decrease in utility suffered by others are favoured, with the losers potentially being compensated.¹⁰² Distributive justice is considered to be of secondary importance. This central concept of efficiency thus has to be distinguished from the other prevalent approach to normative recommendations to policy making in this field; the doctrinal view on justice. For doctrinal scholars and legal philosophers like Dworkin, the goal of justice is often non-consequentialist respect for individual rights.¹⁰³

An essential aspect of the economic analysis involves comparing TPF with other currently accepted litigation funding practices such as hourly fees and LEI. Contingency fees will also be compared with TPF, given that they are also an alternative private funding option, to the extent they are permitted in the jurisdictions. In this research, a particular emphasis is placed on the application of the principal-agent framework, whereby rational claimants as principals delegate decision-making in the litigation

⁹⁹ 'A positive analysis provides statements of what the law and its effects are and it aims at explaining and predicting law and its consequences.' Alessio M. Paccès and Louis T. Visscher, 'Methodology of Law and Economics' in Bart van Klink and Sanne Taekema (Eds.), *Law and Method: Interdisciplinary Research into Law* (Series Politika, nr 4 Tübingen: Mohr Siebeck, 2011), 85. Available at SSRN: <https://ssrn.com/abstract=2259058>.

¹⁰⁰ With collective actions, group representatives are included which makes it a four-player relationship.

¹⁰¹ For a more comprehensive introduction to law-and-economics as a methodological framework see Paccès and Visscher (n 99). See also Section 4.2 on how law-and-economics relates to litigation funding.

¹⁰² Pareto efficiency, on the other hand, is achieved when no one can be made better off without making at least one individual worse off. Paccès and Visscher (n 99); Klaus Mathis, *Efficiency Instead of Justice - Searching for the Philosophical Underpinnings of the Economic Analysis of Law* (Springer 2009) 31-49.

¹⁰³ Hanoch Steinman, 'Are tradeoffs between justice and welfare possible? Calabresi and Dworkin on the normative foundations of law and economics' (2005) 64 (1-2) *Maryland Law Review* 250; Mathis (n 102); Louis Kaplow and Steven Shavell, 'Fairness versus Welfare: Notes on the Pareto Principle, Preferences and Distributive Justice' (2003) (Ser. Nber Working Paper Series, no. 9622) National Bureau of Economic Research.

to principals such as lawyers and funders.¹⁰⁴ The analysis identifies agency risks and misalignments of interest specific to TPF, and determines whether these risks are also present in other comparable arrangements. It then assesses whether TPF is treated differently regarding shared agency problems. If shared agency problems exist, the response - whether acceptance or resistance - should, in principle, align with the approach adopted toward similar arrangements.

Regulation and the interest group landscape in TPF will also be analysed from an economic perspective.¹⁰⁵ The role of public and private interest theories of regulation in explaining TPF's resistance are examined.¹⁰⁶ Public interest theories assume a benevolent and omniscient regulator which intervenes to correct market failures, whereas private interest theories take into account the role of interest groups and the self-interest of the regulator in shaping regulation. The private interest dynamic, in particular, can provide a more in-depth explanation for the resistance to TPF and raises the question of whether such resistance only serves certain interest groups' private interests or genuinely serves the public interest. If driven by private interests, questions on the justifiability of the resistance are also raised. Key lessons for TPF regulation are then identified. For instance, the analysis will consider not only the economics of public regulation, but also of self-regulation, as currently practised by the Association of Litigation Funders in England and Wales.¹⁰⁷

1.5.3. Empirical Research

Following the theoretical framework, this research project will then proceed by taking on empirical methods. While not the main basis of analysis, primary empirical data is collected to add further context and to explore this industry in its current state. It will also aim to put to test the findings arrived at in the theoretical part, in the context of the research questions posed.

The empirical research in Chapter 6 takes the form of qualitative semi-structured interview research. It also discusses some of the key empirical findings from other recent European studies which were mentioned in Section 1.4. For the present study, interviews were conducted to gather perceptions and experiences related to the research questions, on the basis of a pre-prepared list of questions, the majority of which were open-ended.¹⁰⁸ Specifically, the questions concerned aspects such as the types and value of funded claims, the funders' case selection process, conflicts of interest in TPF agreements,

¹⁰⁴ Sections 4.2.3 and 4.3.

¹⁰⁵ Chapter 5.

¹⁰⁶ George J. Stigler, 'The Theory of Economic Regulation' (1971) 2 (1) *The Bell Journal of Economics and Management Science* 3; Richard A. Posner, 'Theories of Economic Regulation' (1974) 5 (2) *The Bell Journal of Economics and Management Science* 335; Gary Becker, 'A Theory of Competition Among Pressure Groups for Political Influence' (1983) 98 (3) *The Quarterly Journal of Economics* 371; Johan den Hertog, 'Review of Economic Theories of Regulation' (2010) Tjalling C. Koopmans Research Institute Discussion Paper Series 10-18.

¹⁰⁷ Sections 3.4.4.1 and Section 4.5.1.

¹⁰⁸ Appendix A; For further discussion on the strategy adopted for the empirical research see also Section 6.1.

pricing issues, the broader impacts of TPF, and the participants' perceptions and experiences with TPF. They were designed to establish whether TPF is becoming available in the individual consumer sector, whether there are risks of frivolous claims and of conflicts of interests being larger than those found in alternative funding arrangements, and whether such risks would, in the view of the interviewees, be a legitimate cause for resistance and restrictive regulation. Moreover, they gain insights as to whether the price of TPF can be considered excessive and on the stakeholders' general perceptions on TPF.

Participants included (senior) representatives of professional funders, lawyers involved in funded litigation, class representatives, academics and business representatives in the Netherlands, Germany and England and Wales. These interviews took place online or in-person and lasted up to an hour each. Respondents were selected on the basis of being leading practitioners with extensive practical experience and expertise on TPF in Europe. They hold leading roles in litigation funding firms, law firms, third-party funded litigation, academia, and in industry and legal professional associations. There was roughly an equal number of interviewees from each of the selected jurisdictions. They were approached following liaison with the author's supervisors and colleagues, and following recommendations by the respondents themselves. Assurances of anonymity and confidentiality were provided in the interview invites. As to the response rate, approximately two-thirds of the invitations sent by the author were accepted and led to interviews.

A total of sixteen interviews were conducted, five of them in-person, eleven of them via video-call. All the interviews were carried out with respondents from the selected jurisdictions. Six of the interviews were with respondents from England, and the rest from continental Europe; six from the Netherlands and four from Germany. In terms of professional capacities, six of the interviewees were senior representatives of litigation funders, eight were lawyers involved in funded litigation, one was a class representative, and one was a representative of the business community. The senior representatives worked for litigation funding firms that varied in size, ranging from large firms to smaller ones. Five of the respondents also hold academic positions. Five of the respondents who practise as lawyers act mostly on the plaintiff side, with one representing the defence side more often. The respondents were for the most part approached and invited to participate via email, with one of them contacted via the LinkedIn platform. Consumer organisation representatives and group representatives involved in third-party funded collective actions appeared to be more difficult to secure interviews with, compared to other stakeholders. As the representatives of the claimants making use of TPF, understanding their experience and perceptions is essential, and could provide a promising avenue for future academic research.¹⁰⁹ This research included a class representative from England and Wales, contributing valuable TPF-user insights to the study.

¹⁰⁹ Section 7.7.

As mentioned, all the respondents were prominent stakeholders in TPF. Although their responses may not fully represent all stakeholders, the industry has a relatively small pool of stakeholders, which enhances the validity of the data and findings of this research's empirical study. Moreover, the findings of this study, to a large extent, are corroborated by those of other empirical research on TPF referenced earlier.¹¹⁰ Most of the interviews were held with participants who are involved in the funding of claimants, or acting for claimants, not for defendants. This is intended to provide a more detailed understanding of the relationships within TPF agreements. However, more favourable perceptions of TPF were to be expected from this category of respondents, due to its role in facilitating financial support for the cases these stakeholders pursue. In total, 2 of the 16 interviewees were stakeholders representing the perspectives of defendants. They offered more critical perspectives on TPF. This imbalance in representation was taken into account in the data analysis.

The interviews were conducted between 2022 and 2024. The interviews with Dutch respondents took place online. The in-person interviews in England were conducted during the author's research visit at UCL Faculty of Laws from April to July 2023. Most of the interviews with German respondents took place during a summer school in which the interviewer participated at the Institute of Law and Economics at the University of Hamburg in June 2024. Twelve of the sixteen interviews were audio-recorded, and for nine of them, informed consent was granted for references and quotations to be used in publications.

The audio-recorded responses were then transcribed verbatim, anonymised and stored securely. The transcripts were then sent to the respondents, who were asked if they wished to revise their answers. Two of the respondents opted to revise the transcript. In case direct anonymous quotations or references are used, respondents were contacted and shown the quotes to be used and the relevant context for the quotes was provided. The results of the whole interview research were also shared with the respondents. The transcripts, audio recordings and informed consent forms were stored in an online drive. Access was given to the author's supervisors, in accordance with the data management plan which was compiled, in order for them to check that the research is done properly. The transcripts, which do not include personal data that could directly or indirectly identify the respondents, will be uploaded to the Erasmus University Rotterdam Data Repository for access by other researchers.

The indicative guide used for the interviews can be found in Appendix A. While the actual interviews' structures varied, each interview addressed some or most of the key themes referred to earlier and indicated in the interview guide. The data was then categorised, and patterns were identified and analysed in accordance with their relevance to these core topics.

¹¹⁰ Section 1.4.

Among the issues with the interviews as a research method, are the quality of self-reported information and whether they can be used just for description, or also for explanation. Participants may under-report or over-report behaviour depending on its self-perceived desirability, but this was addressed in the interview design and the subsequent analysis. Participants may not be able to easily articulate how they would behave, and in economics people are assumed to behave ‘as if’ they know the mechanics under which they behave.¹¹¹ However informed and experienced actors such as professional funders, senior lawyers and class representatives can act as ‘key informants’. Finally, the information gathered served to further revise and modify the initial working hypotheses and to add context and critical analysis to the findings.¹¹²

The final phase of the research involved the analysis and triangulation of the empirical data collected in light of the insights drawn from the legal-doctrinal, comparative and law-and-economics, analyses. The empirical research ultimately informs, builds on and complements the other methods by obtaining more in-depth and nuanced insights. The triangulation of the different research methods is used to further understand the field, to cross-verify the insights gained and to provide robust answers to the research questions posed.

1.6. Structure of the Research Project

The work is designed to answer the central research question, and is structured as follows, in accordance with the steps referred to in Section 1.5.

Chapters 2 and 3 provide an analysis of the development of different means of litigation funding in Europe, and of how and why the practise of TPF has been, and is still, viewed with scepticism. They demonstrate how, and to what extent, such resistance is reflected in the current regulatory framework of the EU and of the Netherlands, Germany and England and Wales. This implies a brief tracing and sketching of the history of the legal debate on TPF in each legal system, and an overview of the jurisprudence and rules related to the practice. This analysis will be used to set the stage for further analysis from a law-and-economics and empirical perspective on the same question. TPF’s emergence (alternatively resistance) in Europe is outlined beginning with the common law world, where the development of modern private funding mechanisms preceded that in continental Europe. The process of how the common law doctrines restricting TPF, and the arguments forming their basis, gave way to acceptance, first in Australia, then in other jurisdictions, is briefly explored. Section 3.4.1 examines the lead-up to the rules on TPF as laid down in the RAD, and also the ongoing discussions

¹¹¹ Martha A. Starr, ‘Qualitative and Mixed-methods Research in Economics: Surprising Growth, Promising Future: Qualitative Research in Economics’ (2014) 28 (2) *Journal of Economic Surveys* 238; Paccos and Visscher (n 99).

¹¹² *Ibid*; Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert M. Kritzer (Eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010).

to regulate the practice as a whole on an EU level. The following sections lay out the situation in the Netherlands, Germany and England and Wales respectively.

Chapter 4 proceeds by taking a law-and-economics view to the research question. The benefits and drawbacks of TPF are laid out. The most important drawback identified is the principal-agent problem, where the principal (the claimant) lacks information about the level of effort put in by the self-interested agent(s) (lawyer, funder) on their behalf. TPF's drawbacks are then compared with other litigation funding mechanisms in Europe such as contingency fee-like arrangements and LEI, given that they are alternative funding arrangements.

Chapters 5 examines European TPF regulation from an agency theory perspective and Chapter 6 contains an empirical analysis with the aim of assessing whether and to what extent the resistance towards TPF is justified. This is done through semi-structured interviews with stakeholders. Chapter 7 presents the conclusions and consolidates the main findings.

Chapter 2

The Cost of Litigation and Alternative Means of Funding

2.1. Introduction

TPF is perhaps the ‘most important development in civil justice of our time’¹ and, as discussed in the previous Chapter, has attracted the attention of scholars, regulators and the media around the world.² TPF did not emerge out of a vacuum. It was in recent years, especially after the 2009 financial crisis, that professional commercial third-party funders came to the fore. The crisis brought about increased budgetary caution and disputes amongst companies, a search for alternative investments, and cuts to legal aid, all of which facilitated the rise of TPF as an alternative litigation funding option.³ Beyond commercial litigation, TPF has also become increasingly prevalent in Europe’s collective redress landscape.⁴

TPF, and by extension, any kind of result-based arrangement in litigation, have faced a long history of prohibition and restrictions in Europe. Doctrines of champerty and maintenance in England and Wales and prohibitions of result-based fee arrangements and assignment of claims in continental Europe, have in recent decades been started to be relaxed, as delineated further in this Chapter. TPF today remains a sensitive and controversial issue. However, it tends to be accepted as part of the reality of civil litigation and is viewed positively as a means to facilitate access to justice.⁵ This emergent practice has developed into a fully-fledged global industry in its own right with projections of continuing rapid growth.⁶

This chapter specifically discusses and reflects on the context which led to the emergence and development to TPF as a novel way to fund high-value commercial and collective litigation in Europe. While the chapter does not focus on TPF per se, it examines the cost of litigation which necessitates alternative means of funding.⁷ An analysis of these other available means of funding, and their limitations is undertaken, with a view to understanding the rise of and necessity of TPF. The funding options discussed in this chapter are self-funding through fixed and hourly lawyer fees, public legal aid, LEI, contingency fee-like arrangements, the assignment of claims model and public or non-profit self-funding funds. Some of these means of funding are widely accepted and available, whereas others may be restricted, depending on the jurisdiction. For instance, public legal aid and BTE LEI are widely accepted today, in contrast to result-based agreements.

¹ Maya Steinitz, ‘Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements’ (2019) 53 (2) UC Davis Law Review 1073. TPF is also often referred to as ‘litigation finance’ or ‘legal finance’ in the US.

² Ibid; Section 1.1.

³ Gianmarco Solas, *Third Party Funding: Law, Economics and Policy* (CUP 2019) 35-36; Maya Steinitz, ‘Whose claim is This Anyway? Third-Party Litigation Funding’ (2011) 95 (4) Minnesota Law Review 1268, 1283-1284.

⁴ Sections 3.2 and 3.3.

⁵ See e.g. Victoria Shannon Sahani, ‘Rethinking the Impact of Third-party Funding on Access to Civil Justice’ (2020) 69(2) DePaul Law Review 61, 617-8.

⁶ On the development of the TPF industry see Section 3.2.

⁷ ‘Alternative’ means of funding refers to funding from sources other than a litigant’s personal resources.

Along these lines, this chapter pays particular attention to the costs of litigation in Section 2.2. The ever-increasing nature of these costs have given rise to access to justice issues and to the need for alternative means of funding. The development, current use, levels of acceptance and regulatory frameworks on different funding methods of litigation funding are outlined Section 2.3. It focuses on Europe, and in particular on the Netherlands, Germany and England and Wales, while referencing developments in other important jurisdictions - in particular Australia and the United States where relevant. The essential features of the other available funding options, including self-funding through fixed and hourly lawyer fees, public legal aid, LEI, contingency fee-like arrangements, the assignment of claims model and public or non-profit self-funding funds are discussed in Section 2.3. The context, limitations, and legal restrictions of these alternative means of funding are essential to understanding the rise of TPF.

This chapter finishes with concluding remarks in Section 2.4. TPF itself will be examined in greater detail in the following chapter, Chapter 3, with particular attention given to its market structure, sources of resistance, practical operation and regulatory frameworks.

2.2. Litigation Costs and Access to Justice in Europe

Litigation or arbitration proceedings are usually resorted to when a party, or a group of parties, attempts to enforce legal rights and obtain a remedy when these rights have been harmed and/or when obligations have not been honoured and attempts at a pre-trial settlement have failed. It is the means through which the right of access to justice is guaranteed.⁸ Access to justice has been acknowledged as a fundamental human right in numerous international instruments, including in Articles 6 and 13 of the European Convention on Human Rights, Article 47 of the Charter of Fundamental Rights of the European Union and in point 16 in the United Nations Sustainable Development Goals. It also constitutes a fundamental pillar of the rule of law.⁹

Litigation, by nature, involves costs and potential benefits for claimants. The ‘cost dimension’¹⁰ is a fundamental aspect of civil justice and legal dispute resolution. From an individual’s perspective, it accounts for a major consideration when one is faced with the prospect of legal proceedings. The usually substantial litigation costs play a crucial role throughout the process of resolving a dispute through the civil justice system. They influence decisions such as on whether to initiate a lawsuit and

⁸ European Agency for Fundamental Rights, Handbook on European Law Relating to Access to Justice (Publications Office of the European Union 2016) 16.

⁹ Masood Ahmed and Xandra Kramer, ‘Global Developments and Challenges in Costs and Funding of Civil Justice’ (2021) 14 (4) Erasmus Law Review 181, 181.

¹⁰ Adrian Zuckerman, ‘Justice in Crisis: Comparative Perspectives in Civil Procedure’ in Adrian Zuckerman (Ed) *Civil Justice in Crisis* (OUP 1999) 3.

on whether to settle earlier or later, and for what amount. The same goes for cost allocation rules.¹¹ In systems where each party bears its own costs, winning a case will still burden the winning party with the legal costs. Even in systems that follow the ‘loser pays’ rule - as is the case in most European jurisdictions - litigation costs are usually not fully reimbursed.

This cost dimension involves the financial aspects of resolving legal disputes; that is, lawyer fees, court fees, experts, witnesses, bailiff costs, translation costs and other costs such as travel and communication costs for the persons involved during the proceedings.¹² The more complex the case, the higher the costs of lawyer fees in particular, as the work needed to litigate can range up to hundreds of hours. Costs are also borne by the suppliers of dispute resolution services, notably national justice systems. These costs are ‘public-financed and user-financed’.¹³ They cover amongst others legal aid schemes and state courts and tribunals, their staff salaries and their overall administration. Similar costs are borne by private and autonomous providers of ADR, however, these tend to be privately funded.¹⁴ In the case of collective actions, additional costs are involved, including those related to admissibility or certification, ‘book building’ and communication with the class members, and distribution of the compensation.¹⁵

Beyond the financial aspect, the cost dimension also involves the party accounting for the chance of losing the case and having to bear its own costs, and reimbursing adverse costs to the winning party (if the ‘loser pays’ rule or English rule is applicable). ‘Risk aversion’ on the part of the claimant can therefore play a significant role.¹⁶ The cost dimension could also be more broadly defined to include, amongst others, the time involved for dispute resolution which varies widely between jurisdictions and in accordance with the complexity of the case. It could also include the prospects of enforceability in case of success of the claim, which depends on the solvency and liquidity of the defendant, and the opportunity cost, that is, what the resources used for litigation would have been used for had the claimant chosen not to litigate. In other words, litigation involves a significant degree of risk. In addition, it involves psychological costs¹⁷ and the chance of judicial errors being made.¹⁸ These various aspects, beyond the mere financial cost aspect, make the decision to engage in litigation not a light

¹¹ In the US, each side bears its own costs, whereas in Europe the prevailing rule is that the losing party pays the adverse costs.

¹² For a fuller examination of the costs involved, see amongst others Adriani Dori, Vincent Richard, ‘Litigation Costs and Procedural Cultures – New Avenues for Research in Procedural Law’ in Xandra E. Kramer, Burkhard Hess (Eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2016) 303 - 352.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Xandra Kramer, Ianika Tzankova, Jos Hoevenaars and Karlijn van Doorn, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?* (Eleven 2024)105-107; Section 3.2.2.

¹⁶ Jef De Mot, Michael Faure and Louis Visscher, ‘TPF and its Alternatives: An Economic Appraisal’ in Willem H. van Boom (ed) *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 33; Section 1.4.

¹⁷ Michaela Keet, Heather Heavin, Shawna Sparrow, ‘Anticipating and Managing the Psychological Cost of Civil Litigation’ (2017) 34 (2) Windsor Yearbook of Access to Justice 73.

¹⁸ Richard Posner, ‘An Economic Approach to Legal Procedure and Judicial Administration’ (1973) 2(2) The Journal of Legal Studies 399.

one by any means. One may often rationally decide not to attempt to enforce their rights and seek redress due to cost barriers. Furthermore, in addition to the harm caused by the act which may need redress, lacking access to justice can exacerbate negative impacts on wellbeing and health.¹⁹

In the absence of funding from sources other than personal finances, the costs and risks of litigation inevitably lead to some potential claimants to rationally decide not to initiate meritorious legal action, be it individually or collectively. This is due to rational apathy and the expected costs of pursuing the action being higher than the expected benefits, even though resolving the dispute might be in the public interest.²⁰ If legal action is actually started, the constraints the litigation costs impose lead to some claimants to not effectively pursue the claim to its completion, or to defendants to not effectively defend against claims brought against them.²¹ The massive increase in litigation costs in recent years, compounded by a lack of alternative funding options, has exacerbated the access to justice problem in Europe.²²

In terms of the notable features regarding litigation costs in the jurisdictions studied in this research, there is the highly regulated and predictable cost structures in Germany and the relative predictability of the costs in the Netherlands. By contrast, litigation in England and Wales is characterised by its highly expensive nature, as well as by the complexity and unpredictability of the costs.²³ The prevailing opinion in Europe, including the Netherlands,²⁴ Germany²⁵ and much more so in England and Wales,²⁶ is that litigation costs and the inherent risks constitute a major obstacle to civil justice.

There are several funding options through which the litigation costs can be covered. The various forms of litigation funding include the payment of the traditional fixed or hourly lawyer fees, which are unrelated to the outcome, from a variety of sources. They also include the more recent result-based fee structures such as contingency fees and TPF,²⁷ often referred to as ‘entrepreneurial

¹⁹ Hazel Genn, ‘When Law is Good for Your Health: Mitigating the Social Determinants of Health through Access to Justice’ (2019) 72 (1) *Current Legal Problems* 159.

²⁰ Franziska Weber, ‘Towards an Optimal Mix of Public and Private Enforcement in Consumer Law’ (EDLE Doctoral Thesis 2012) 79; See also Sections 1.4, 4.1 and 4.2.

²¹ De Mot, Faure and Visscher (n 16) 32. Insights from behavioural law and economics suggest that cognitive biases such as over-optimism and the framing of outcomes as losses or gains can also significantly influence decisions on whether to start a claim and on settlement. Jennifer K Robbenolt, ‘Litigation and Settlement’ in Eyal Zamir and Doron Teichmann (Eds) *The Oxford Handbook of Behavioral Economics and the Law* (OUP 2018) 625-634.

²² See generally, R. Daniel Kelemen, *Eurolegalism – The Transformation of Law and Regulation in the European Union* (HUP 2011) 63-71; Willem H. van Boom, ‘Litigation Costs and Third-party Funding’, in Willem van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017); Zuckerman (n 10).

²³ Ilja Tillema, ‘Entrepreneurial Mass Litigation: Balancing the Building Blocks’ (Doctoral thesis at Erasmus University Rotterdam 2019).

²⁴ Mark L. Tuil, ‘The Netherlands’ in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (Eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing 2010).

²⁵ Matthias Kilian, ‘Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience’ (2003) 30(1) *Journal of Law and Society* 31.

²⁶ Beibei Zhang, ‘Third Party Funding for Dispute Resolution: a Comparative Study of England, Hong Kong, Singapore, the Netherlands and Mainland China’ (DPhil thesis, University of Groningen 2019).

²⁷ Some funding models like conditional fee agreements used in England and Wales contain elements of both.

litigation'.²⁸ With respect to who bears the litigation costs, these are most commonly borne by the litigants themselves. In cases of alternative litigation funding, they could be borne by the welfare state via legal aid, by lawyers or law firms through contingency fee-like arrangements, by insurers through LEI, and by third parties through TPF. All of these means of funding will be discussed in the next section.

In cases of result-based arrangements, the above-mentioned costs are for the most part not borne by the claimants. The litigation costs which are borne by the claimants in these cases could include the After-the-Event (ATE) insurance premiums, success fees and/or shares of the proceeds for the insurers, lawyers and/or third-party funders. After resolution of the dispute, these could be borne by the claimant or by the defendant, depending on the variation of the cost shifting rules in use, or on judicial discretion.²⁹ However, despite the English loser pays rule, it has to be said from the outset that, when it comes to TPF in England and Wales, it seems to be very rare that these 'third-party' or success fee costs are borne by the losing defendant and recovered by the claimant in case of claimant success.³⁰ In the Netherlands, it is unclear to what extent the success fee would be recoverable.³¹

Though the focus of this research is on TPF, it will not be examined in isolation from all those other available funding options. To varying degrees, these alternatives share characteristics with TPF, and will serve as a means to contextualise the development of TPF and as a point of comparison throughout. The next section therefore discusses the evolution of these co-existing litigation funding methods in Europe.

2.3. Litigation Funding in Europe

All litigation needs to be funded in some way or another. This section sets the stage and illustrates how TPF fits into the broader European litigation funding landscape, by providing an overview of the different litigation funding options. The shortcomings of these options, and the gaps they leave, help explain the role TPF has acquired in European legal systems.

Up to around two centuries ago, one faced many restrictions when attempting to get litigation funded by a third party, i.e. a party to which the legal claim was not connected. In common law jurisdictions,

²⁸ Xandra Kramer and Ilja Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2021) 2 *Revista Ítalo-Española de Derecho Procesal* 165, 167.

²⁹ The general rule, with exceptions, is that the losing party pays the litigation costs.

³⁰ Tets Ishikawa, 'An Unfair Tax on Accessing Justice,' (*Law Society Gazette*, 22 August 2022) <<https://www.lawgazette.co.uk/commentary-and-opinion/an-unfair-tax-on-accessing-justice/5113445.article>> accessed 29 August 2024; On recoverability see also Sections 2.3.4. 3.4.4.2 and 4.2.1.

³¹ Barbara Rozema, 'Financiering van collectieve acties: wie draait op voor de succesvergoeding van de financier?' (NTBR, 21 July 2023)

<https://new.navigators.nl/document/id7c8e2510c88b4c7b961b6afbf698542a?ctx=WKNL_CSL_87&tab=tekst> .

under the doctrines of maintenance and champerty, it was illegal for third parties to support, maintain, stir up, or fund litigation in return of a share of the proceeds, for fears of increases in the volume of litigation and frivolous litigation.³² The prohibitions to enter into *pacta de quota litis* and *redemptio litis* existed in civil law jurisdictions, meaning that lawyers were prohibited from receiving a share of the damages and from transferring claims by assignment or purchase.³³ These long-established doctrines broadly prohibited involvement in others' legal claims, whether for profit or otherwise. They originate from the Greek and Roman legal systems, but their relevance has diminished significantly in recent decades.³⁴ A further dynamic that may have played a role in the continuation of these prohibitions was Christianity as it viewed litigation itself, and anything which promoted it, as an 'evil', which was only to be pursued as a last resort.³⁵

The shift in perception was secured with the rise of the welfare state and the establishment of legal aid as a fundamental component of Western democracies, during which time restrictions on private funding also began to be dismantled. In other words, public legal aid gave rise to the first major challenge to the funding restrictions and led to a significant expansion of access to justice in European jurisdictions. Market-based funding in the form of LEI followed in continental Europe.³⁶ However, when it comes to result-based fee arrangements and TPF, acceptance came much later, and they have retained vestiges of resistance and scepticism up to this day. For instance, contingency fees are still not allowed in most of continental Europe,³⁷ and TPF is not allowed in Greece and Ireland.³⁸

Sub-sections 2.3.1 to 2.3.6 provide a comprehensive overview of the various means through which litigation funding in Europe can be funded, as well as their respective limitations. These sections outline the development and the essential features of the funding options potentially available to litigants other than TPF, with the main ones being self-funding through fixed and hourly lawyer fees, public legal aid, LEI, contingency fee-like arrangements, the assignment of claims model and the option of non-profit self-funding funds. While other options do exist, they fall outside the scope of

³² Christopher Hodges, John Peysner and Angus Nurse, 'Litigation Funding: Status and Issues' (2012) 55 Oxford Legal Studies Research Paper.

³³ Solas (n 3) 18-26; Section 1.4.

³⁴ Victoria Shannon, 'Harmonizing Third-Party Litigation Funding Regulation' (2015) 36(3) *Cardozo Law Review* 861, 874; Adrian Cordina, 'Is it all that Fishy? A Critical Review of the Concerns surrounding Third Party Litigation Funding in Europe' (2021) 14 (4) *Erasmus Law Review* 270, 274.

³⁵ Max Radin, 'Maintenance by Champerty' (1935) 24 *California Law Review* 48, 68; Anthony J. Sebok, 'The Inauthentic Claim' (2011) 64 (1) *Vanderbilt Law Review* 61; Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (2nd Edition, Wolter Kluwer 2017) 140; Willem H. Van Boom, 'Insuring vs. Investing in Litigation: A Comparative History of Litigation Insurance and Claim Investment' (2020) 8 (1) *Comparative Legal History*; Cordina (n 34) 274.

³⁶ See for instance, Solas (n 3) 38-122; Felice Batman and Marianne Vasara Aaltonen (Eds), *Histories of Legal Aid: A Comparative and International Perspective* (1st ed, Palgrave Macmillan, 2022) 5; Van Boom (n 35).

³⁷ Section 2.3.4.

³⁸ Jérôme Saulnier, Klaus Müller and Ivan Koronthalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', European Parliament Research Service (March 2021); David Capper, 'Litigation Funding in Ireland' 14(4) *Erasmus Law Review* 211.

this research and will not be examined in detail. These options include litigation crowdfunding, bank loans and trade union funding.

2.3.1. Personal Funds of the Litigant

Lawyer fees, and the rest of the litigation costs, appear to be most commonly paid by the litigants themselves on an hourly fee basis, using their own financial resources. For instance, research on Germany in 2007 shows that the personal funds of the litigant constituted 47% of funds for civil procedure costs, making it the largest source of litigation funding, with LEI and public legal aid following at 35% and 8% respectively.³⁹ More recent data on the composition of the overall European litigation services market in general is scarce.⁴⁰ However, it is widely agreed that personal funds remain a primary source of financing in the legal industry, as was also confirmed in interview research conducted by the author as part of this study.⁴¹

In Europe, up until the late 1990s when some elements of result-based fee arrangements started to be introduced in England and Wales, fixed, and the much more common, hourly fees, were by far the predominant way lawyers would get remunerated. In contrast, in the US, contingency fees had been available since the 1800s.⁴² Lawyer fees usually take the lion's share of the costs of a legal dispute; in the Netherlands, for instance, they make up around 70 to 90% of the total litigation costs.⁴³ In the collective redress context, where litigation costs run into the millions of Euros, lawyer fees also constitute the vast majority of the litigation costs.⁴⁴

Particularly in England and Wales, it is increasingly acknowledged that hourly fee retainers are not only getting out of reach for individuals of average means,⁴⁵ but their combination with the loser pays rule means that only the wealthiest can consider litigation without considerable financial backing.⁴⁶ While lawyers do sometimes offer their services on a pro bono basis, this happens on very isolated occasions.⁴⁷ For instance, a 2015 survey conducted by The Law Society of England and Wales, found

³⁹ Burkhard Hess and Rudolf Hübner, 'Germany' in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (Eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing 2010) 357.

⁴⁰ Saulnier, Müller and Koronthalyova (n 38) 3.

⁴¹ Sections 3.2.1 and 6.3; See also Suzi Ring and Emma Jacobs, 'Why the billable hour is still king in the legal world' *Financial Times* (London, 27 January 2025) <<https://www.ft.com/content/7750aff2-0677-4ba9-b571-4e02cf83950d>> accessed 2 May 2025.

⁴² Yannick Gabuthy and Eve-Angeline Lambert, 'English Rule and Frivolous Suits: Conditional Versus Hourly Fees' (2011) 7 (1) *Review of Law & Economics* 72.

⁴³ Tillema (n 23) 219.

⁴⁴ Kramer and others (n 15).

⁴⁵ Civil Justice Council (CJC), 'The Law and Practicalities of Before-The-Event (BTE) Insurance: An Information Study' (Civil Litigation Review Working Group BTE Insurance, 2017) 14.

⁴⁶ David Capper and Anthony Sebok, 'A Brief history of Third-party Litigation Funding in the UK, US and Elsewhere in the Common Law' in Steven Friel (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020) 14.

⁴⁷ In Germany, lawyers are required to charge minimum fees for their services, whereas in jurisdictions like the US and Australia, lawyers are expected to provide some pro bono services. Kilian (n 25).

that an average of only 19 hours of pro bono work was undertaken annually by the 1,502 participants.⁴⁸

In continental civil law jurisdictions, legal services tend to be much less expensive than common law jurisdictions. However, they are also becoming increasingly prohibitive for non-commercial claimants. In Germany, lawyer fees are statutorily fixed and comparatively inexpensive, whereas in the Netherlands they are negotiable as long as they are reasonable and 2012 estimations have arrived at a range of 170 to 470 Euros per hour.⁴⁹

In the collective redress context, litigation is also occasionally funded by the representative organisation itself, including through membership fees, or from philanthropic funds. However, these resources are usually very limited, especially when considering the substantial costs associated with collective proceedings.⁵⁰ In this type of litigation in Europe, especially when collective actions are brought for damages or compensation, TPF has become indispensable.⁵¹

2.3.2. Public Legal Aid

A critical source of funding certain claimants can resort to is public legal aid. Legal aid systems in Europe provide taxpayer funding for legal services to those who cannot afford them. To qualify for legal aid, the income level of the applicants usually has to fall below a certain threshold. The right to legal aid is enshrined in European human rights law.⁵² A number of European Court of Human Rights (ECtHR) landmark decisions such as *Airey v Ireland* (1979)⁵³ and *Steel and Morris v the United Kingdom* (2005)⁵⁴ clarified and refined this right, with regard to ensuring effective legal representation, giving consideration to the financial resources of the party and the prospects of success.⁵⁵ The Court of Justice of the European Union (CJEU) also extended the right to legal persons, after taking into consideration additional factors such as whether the entity is for-profit or non-profit and the subject matter and importance of the litigation in question.⁵⁶ The Legal Aid Directive also

⁴⁸ The Law Society, 'The Pro Bono Work of Solicitors: PC Holder Survey 2015' (2015).

⁴⁹ Tillema (n 23) 219. Some Dutch law firms show that they charge within this range on their websites. For instance; Law & More Attorneys, 'Rates' (Lawandmore) <<https://lawandmore.eu/rates/>> Accessed 29 August 2024.

⁵⁰ Kramer and others (n 15) 107-108.

⁵¹ Deminor, 'Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends', (Deminor 2022) <<https://drs.deminor.com/en/litigation-funding-from-a-european-perspective>> accessed 29 August 2024; Saulnier, Müller and Koronthalyova (n 38).

⁵² In Article 6(3)(c) the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

⁵³ *Airey v. Ireland*, European Court of Human Rights, Application no. 6289/73, 1979.

⁵⁴ *Steel and Morris v. the United Kingdom*, European Court of Human Rights, Application no. 68416/01, 2005.

⁵⁵ Xandra Kramer, 'Legal Aid', in Basedow Jürgen and others (Eds.), *Encyclopedia of Private International Law* (Edward Elgar Publishing Limited 2017).

⁵⁶ *Ibid.*

establishes minimum standards for public legal aid in EU Member States and requires non-discrimination for cross-border cases.⁵⁷

The central role public legal aid has played in recent decades in European jurisdictions has been gradually diminishing. Its replacement with private, or market-based, sources of litigation funding may be susceptible to considerable resistance, primarily due to commodification and profit motive concerns.⁵⁸

In the aftermath of World War II's destruction, the provision of alternative litigation funding in Western Europe was predominantly supplied through public legal aid. This emerged in the context of a significant rebuilding effort, rapidly expanding European economies and working-age populations, individual prosperity and productivity. The welfare state as a whole reached its peak at the end of the 60s.⁵⁹ Thereafter, in a wider context of an austerity and privatisation drive with respect to all kinds of public services, including civil justice systems, the sources of litigation funding have shifted increasingly towards market-based alternatives.⁶⁰ Amongst other reasons for this shift were the increasing cost and inefficiencies of legal aid schemes themselves,⁶¹ and the increasing number, complexity and duration of cases, including mass claims and cross-border cases.⁶² By the late 1990s, it was widely accepted by scholars and policymakers that civil justice systems across Europe were in need of reform. Most jurisdictions engaged in reforms to address the aforementioned ailments, including gradually, or drastically, transitioning from public legal aid schemes.⁶³ They promoted instead private sector alternatives such as LEI and result-based arrangements including contingency fee-like arrangements and TPF.⁶⁴ Austerity measures have increased ever since and this shift was accelerated after the 2009 financial crisis.⁶⁵ Nevertheless, public legal aid remains available and essential for substantial parts of the population.

⁵⁷ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

⁵⁸ Section 3.5.

⁵⁹ See generally, Tony Judt, *Postwar Europe: A History of Europe since 1945* (Penguin Press, 2005). This is the case for most of North-Western Europe. In other countries, like the Southern European ones of Spain, Portugal and Greece, which were under autocratic rule until the 70s, the welfare state actually expanded after this period. After the 1960s, Europe's largest ever baby-boom generation began transitioning from tax contributors to beneficiaries, primarily through state pensions and increased use of medical and social services. In combination, this generation has significantly higher life expectancies than prior generations and younger generations have markedly lower birth rates. An additional strain on public coffers occurred in the form of reductions in corporate and top income tax rates. See e.g. Thomas Piketty, *Capital and Ideology* (HUP 2019).

⁶⁰ Xandra Kramer, Carlota Ucin and Adriani Dori, 'Challenges to Access to Civil Justice in Europe' in Margaret Y.K. Woo and Cornelis Hendrik van Rhee (Eds), *Comparative Civil Procedure* (Edward Elgar 2025).

⁶¹ In certain cases, the ballooning cost, for instance in England and Wales, where the general legal aid system's costs grew 'out of all reasonable proportion with the amounts at stake'; Zuckerman (n 10) 37.

⁶² See generally; Kelemen (n 22) 63-71; Van Boom (n 22).

⁶³ Zuckerman (n 10).

⁶⁴ See e.g. Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (TSO 2009).

⁶⁵ Tillema (n 23) 52, 139, 213.

In the European collective redress context, public funding has traditionally been available through subsidisation of certain consumer representative organisations. Public bodies could pursue collective redress through (semi) public enforcement. However, these have proved to be insufficient.⁶⁶ With the recent RAD, Member States were required to ensure by the 25th of December 2023, that litigation costs do not prevent collective actions, and as such, they could provide assistance to qualified entities bringing the claims, which may take the form of public legal aid.⁶⁷

In England and Wales, legal aid holds limited relevance in individual commercial cases where legal persons are involved, and public funding for group litigation is rarely granted as well.⁶⁸ Over the past decades, particularly following the enactment of the Access to Justice Act 1999 and the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, a severe reduction in the availability of legal aid occurred. In his 2010 review of civil costs and funding in England and Wales, conducted prior to the implementation of the LASPO, Jackson gave a bird's eye take on developments in the legal aid system, demonstrating the steady decline in coverage;

When the legal aid scheme was set up, approximately 80% of the population was eligible for civil legal aid. In 1986 some 63% of the population was eligible for civil legal aid. By 2000 that figure had dropped to 50%. By 2007 the figure had dropped to 29%. In other words more than two thirds of the population were ineligible for legal aid on financial grounds. The subsequent downturn in the economy and resulting changes to people's income and capital has however lead to an increase in the eligible population figure to 36%... it remains one of the most comprehensive schemes in the world, as confirmed by recent studies.⁶⁹

Low pay rates and bureaucracy further deter attorneys from engaging in cases funded by civil legal aid. Today, legal aid in England and Wales is available only for a very limited type of civil legal services,⁷⁰ which in effect, has resulted in more litigants-in-person and individuals not litigating at all.⁷¹ This dramatic decline was one of the main reasons for the promotion by Jackson and others of alternative funding sources such as LEI and result-based arrangements. Ultimately, while Jackson did not recommend an expansion to the legal aid scheme, he also cautioned against any further cutbacks either.⁷²

⁶⁶ Kramer and Tillema (n 28) 169.

⁶⁷ RAD Articles 20, 24; Sections 2.3.6 and 3.4.1.1.

⁶⁸ Neil Andrews, 'English Systems of Multiparty Litigation' in Brian Fitzpatrick and Randall Thomas (Eds), *The Cambridge Handbook of Class Actions* (CUP 2021) 154.

⁶⁹ Jackson (n 64) 68-69.

⁷⁰ Tillema (n 23) 167.

⁷¹ John Sorabji, 'Legal Expenses Insurance and the Future of Effective Litigation Funding' (2021) 14 (4) *Erasmus Law Review* 189, 191.

⁷² Jackson (n 64) 67, 70.

In the Netherlands, by contrast, legal aid has not suffered from the same severe declines as in England and Wales. Nevertheless, the Dutch legal aid system has also been under strain and subject to cuts.⁷³ Legal persons with limited resources can also resort to legal aid,⁷⁴ and recipients do not need to be nationals or residents to be covered as long as their legal interests lie within the Dutch legal sphere of influence.⁷⁵ However, recipients might have to cover some of the litigation costs depending on their level of financial resources and legal aid will only be granted for strong and high enough value claims.⁷⁶ In 2021, the Legal Aid Board in the Netherlands estimated that over 36% of the Dutch population would qualify for legal aid if need be,⁷⁷ down from almost half in the 1990s.⁷⁸ In spite of that, from 1994 to 2012, spending on legal aid more than doubled, but has remained at similar levels ever since.⁷⁹

In Germany, on the other hand, expenditure on legal aid is comparatively low but this is due to inexpensive litigation costs and the broad availability of LEI.⁸⁰ It has been argued that the lower fees lawyers receive under legal aid disincentivises them to take on cases in this jurisdiction, despite being obliged to do so. This may lead them to seek to serve clients through alternative funding methods.⁸¹

It is noteworthy that if the legally aided party loses the case, they could be liable to the legal expenses of the winning party - this could be the case in England and Wales, Germany and the Netherlands,⁸² and this would constitute a very serious impediment to the recipient. Legal aid only partly takes away the cost risk unlike other contemporary private funding methods.⁸³ Meanwhile, in England and Wales, the reverse problem was also flagged by the Jackson report; 'in most cases there was one-way costs shifting, which meant that successful defendants did not get their costs.'⁸⁴

⁷³ Caroline Klein Haarhuis and Ben C.J. van Velthoven, 'Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands' (Scholarly Publications Leiden University, 2010); Tillema (n 23) 213.

⁷⁴ Legal Aid Act (Wet op de rechtsbijstand), Article 12.

⁷⁵ Virginie Rouas, *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (University of London Press 2022) 193.

⁷⁶ Legal Aid Act (n 74).

⁷⁷ Raad voor Rechtsbijstand/Legal Aid Board, 'Legal Aid in the Netherlands a broad outline - Edition: May 2021' (2021) <<https://www.rvr.org/english/>> accessed 5 November 2024, 4.

⁷⁸ Erhard Blankenburg, 'Civil Justice: Access, Cost, and Expedition. The Netherlands' in Adrian Zuckerman (Ed), *Civil Justice in Crisis* (OUP 1999).

⁷⁹ Raad voor Rechtsbijstand/Legal Aid Board (n 77).

⁸⁰ Hess and Hübner (n 39) 356.

⁸¹ Ibid; Michael G. Faure and Franziska Weber, 'Dispersed Losses in Tort Law – An Economic Analysis' (2015) 6 (2) *Journal of European Tort Law* 163, 171.

⁸² The Civil Legal Aid (Costs) Regulations 2013, Section 114; Tillema (n 23) 100; Matthias Kilian and Francis Regan, 'Legal expenses insurance and legal aid—two sides of the same coin? The experience from Germany and Sweden' (2004) 11 (3) *International Journal of the Legal Profession* 233, 239; Hess and Hübner (n 39) 358; Kilian (n 25); Haarhuis and van Helthoven (n 73) 3.

⁸³ Kilian and Regan (n 82) 239; International Bar Association (IBA), 'Legal Expenses Insurance and Access to Justice', (IBA, 2019).

⁸⁴ Jackson (n 64) 67.

Legal aid remains indispensable in family and criminal law matters in all jurisdictions. These areas are typically not covered by BTE LEI, which will be discussed in the next section. As such, these two funding options are complements to each other, rather than substitutes.⁸⁵

Nevertheless, the recent history of public legal aid schemes has been a sorry one, particularly in England and Wales, marked by sharp decreases in coverage and increasing limitations. It is presently unrealistic to expect a significant reversal in political support for an expansion of public legal aid schemes in Europe, especially when considering their low popularity levels among other areas of the welfare state.⁸⁶ The prioritisation of criminal legal aid over civil legal aid is another reason for the state of affairs.⁸⁷ Funding from alternative means therefore becomes essential for those who cannot afford the fees involved in legal assistance, not to mention the other litigation costs. Without alternative funding methods, individuals would either increasingly resort to going to court unrepresented, where this is allowed, or lack access to justice altogether,⁸⁸ resulting in an overall under-deterrence of wrongdoing by the legal system. As will be explained later on, unlike BTE LEI, it is currently unlikely that TPF by itself will fill the void left by the decline in legal aid in individual claims, given its lack of presence in the individual consumer sector.⁸⁹ Contingency fees are also not suitable for low-value individual claims.⁹⁰

It may also be the case, that a broad availability of private funding methods as a whole would still result in an under-deterrence effect by the legal system, and the solution might be (re-)expanding the legal aid system, as unlikely as that might be. If so, it is important that the problems associated with legal aid, which were just examined, are taken account of.⁹¹ As this research will progressively reveal, the shift from public sources of litigation funding to private sources, or the privatisation, commercialisation and commodification of litigation funding, has often sparked criticism, despite its seeming inevitability. Dissatisfaction is also evident with the latest market-based model, TPF.⁹² To address this issue, a possible solution which is often proposed is the use of ‘self-funding’, public or non-profit, funds specifically set up for collective claims. These dedicated or specialised funds might be better suited as a substitute or complement to TPF and could also be extended to less well-resourced individuals with individual claims, rather than just collective claims. They will be explored in Section 2.3.6.

⁸⁵ IBA (n 83); Kilian and Regan (n 82) 239-242.

⁸⁶ Richard Lewis, ‘Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice?’ (2011) 74 (2) *The Modern Law Review* 272, 274; Sorabji (n 71).

⁸⁷ Hazel Genn, *Judging Civil Justice* (CUP, 2009) 37-45.

⁸⁸ Andrew Higgins, ‘The costs of civil justice and who pays?’ (2017) 37 *Oxford Journal of Legal Studies* 687, 687.

⁸⁹ Sections 2.3.3.1 and 3.2.

⁹⁰ Section 4.3.4.

⁹¹ See also: Jef de Mot, Ben Depoorter and Michael Faure, ‘The Multiplication Effect of Legal Insurance’ (2016) 13(1) *NYU Journal of Law & Business* 1, 30.

⁹² Section 3.5.

2.3.3. Legal Expenses Insurance

A common private or market-based litigation funding method which plays a fundamental role in securing access to justice in Europe is LEI. Modern LEI products originated on the European continent back in the early 1900s as a response to increasing car accidents, making it the earliest widespread market-based alternative funding source.⁹³ LEI can be obtained through the payment of premiums, either *before* a dispute arises to cover potential litigation costs (Before-The-Event - BTE) or, alternatively, *after* the dispute has already started, to cover the anticipated litigation expenses (After-the-Event - ATE).

2.3.3.1. Before-the-Event Legal Expenses Insurance (BTE LEI)

BTE LEI can potentially provide broad population coverage in many jurisdictions and is aimed towards financing both claimants and defendants. In practice, however it is far more commonly used by defendants.⁹⁴ The expansion of LEI coverage corresponded and was caused by the growth in litigation in civil justice systems.⁹⁵ Both in Europe and in the US, LEI was seen as controversial when it was first introduced, as it was perceived as possibly being immoral and as fuelling litigation. There was also the fear of 'moral hazard'. Being less exposed to the risks and costs of litigation, policyholders would, in theory, take less care in avoiding accidents.⁹⁶ Moreover, there was the moral objection of the wrongdoer not being punished directly by the claimant.⁹⁷ Nowadays, however, LEI is widely accepted, with one of the reasons being that insurers indirectly 'punish' or deter wrongdoers through the use of incentives.⁹⁸ With regard to this history, some analogies can be drawn with the modern controversy surrounding TPF and other result-based arrangements. A comparison between these two different categories of funding, and an analysis of the reasons underlying their differing levels of acceptance will be provided later on in this section and in Section 4.3.4.

⁹³ Kilian (n 25); Van Boom (n 35) 15-16; See also: Richard Lewis, 'The Relationship Between Tort Law and Insurance in England and Wales' in Gerhard Wagner (Ed.) *Tort Law and Liability Insurance* (Springer Wien New York, 2005) 71 for the historical development in England and Wales.

⁹⁴ De Mot, Depoorter and Faure (n 91).

⁹⁵ Charles Silver, 'Litigation Funding versus Liability Insurance: What's the difference' (2014) 63 (2) DePaul Law Review 617.

⁹⁶ For a discussion on moral hazard, see Section 4.3.3.

⁹⁷ On litigation funding and corrective justice, see Section 3.5.

⁹⁸ On the initial reluctance towards LEI, see Renée Charlotte Meurkens, 'Punitive Damages, The Civil Remedy in American Law, Lessons and Caveats for Continental Europe' (Doctoral Thesis, Maastricht University 2014) 38. See also Section 4.3.4; Van Boom (n 35) 3; Tom Baker and Peter Siegelman, 'The law and economics of liability insurance: A theoretical and empirical review' in Jennifer Arlen (ed) *Research Handbook on the Economics of Torts* (Edward Elgar Publishing 2013) 169.

BTE LEI is very common in some continental European jurisdictions like Germany,⁹⁹ the Netherlands¹⁰⁰ and Sweden,¹⁰¹ whereas in others, like England and Wales, it is more limited. In England and Wales, the maintenance and champerty doctrines led to a late introduction of LEI and it is now a limited phenomenon, but expanding.¹⁰² The level of predictability of the legal costs in the jurisdiction also plays a major role in the prevalence of BTE LEI. This explains why LEI is more widespread in Germany, where lawyer and court costs are based on statutory scales of fees, whereas in England and Wales, litigation costs are uncertain, making it difficult for insurance providers to estimate prices and risks effectively.¹⁰³ Furthermore, the success of a widespread LEI scheme depends on the concept that a large number of members of the pool will never draw any payments from it, which easily off-sets the costs incurred by the relatively small amount who will at some point need to be indemnified.¹⁰⁴ The large risk pool in Germany, for example, was built gradually across a 100 years, which might make it difficult to replicate in limited LEI jurisdictions.¹⁰⁵

BTE LEI is taken out in the form of the payment of premiums before a dispute starts, to cover some or all of the insured's litigation costs. BTE LEI is more common and less expensive than ATE LEI, as there is less risk for the insurer having to pay out. Its potential for widespread population coverage also makes it more appealing as a public policy priority in the context of access to justice. Nevertheless, in general, it remains less of a priority than other types of insurance such as household or motor vehicle insurance. It is especially less of a priority to those of low income.¹⁰⁶

LEI is specifically regulated in the EU by the Solvency II Directive,¹⁰⁷ which sets up a very general framework, requiring adequate financial reserves to be held by insurers and stipulates, amongst others, that the insured must be able to freely choose the lawyer. However, this choice is in reality often restricted to a panel of lawyers, or in-house lawyers, who have a pre-existing relationship with the insurer, as choosing one's own lawyer is only available through higher premiums.¹⁰⁸ In effect, the terms of insurance packages are not regulated in European jurisdictions, but are only subject to some state oversight. While legal aid is based more on public policy considerations, LEI ultimately follows business principles.¹⁰⁹

⁹⁹ In 2017, 22 million households in Germany had insurance coverage for litigation; Astrid Stadler, 'Third Party Funding of Mass Litigation in Germany: Entrepreneurial Parties – Curse or Blessing?' in Loïc Cadet, Burkhard Hess and Marta Requejo Isidro (Eds), *Privatizing Dispute Resolution* (Nomos 2019) 209, 212.

¹⁰⁰ Haarhuis and van Helthoven (n 73).

¹⁰¹ IBA (n 83).

¹⁰² Willem H. van Boom, 'Financing civil litigation by the European insurance industry', in Mark Tuil and Louis T. Visscher (Eds), *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical and Economic Analysis* (Cheltenham: Edward Elgar 2010) 92; See also: Kilian (n 25) 32; IBA (n 83).

¹⁰³ Kilian (n 25); Kilian and Regan (n 82) 240; Sorabji (n 71).

¹⁰⁴ Kilian and Regan (n 82).

¹⁰⁵ *Ibid.* 240.

¹⁰⁶ *Ibid.* 246, 252.

¹⁰⁷ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

¹⁰⁸ IBA (n 83).

¹⁰⁹ Kilian and Regan (n 82) 234.

In practice, coverage provided by LEI;

varies between providers and jurisdictions, including areas of law, types of services covered, financial caps and excesses, and waiting periods. The majority of LEI policies do not cover damages payable to, or by, the policyholder as part of a legal dispute – it simply covers the policyholder’s legal expenses incurred through the course of obtaining legal advice or representation.¹¹⁰

If recoverable, the amount of the damages recoverable by the insurer are usually capped, as these might potentially be too large for some defendants. If the insurance contract also covers damages or compensation owed to others, it is characterised as ‘liability insurance’ rather than as BTE LEI alone. The liability of the insurer would be automatic once the insurable event occurs, that is, when policyholders become engaged in covered litigation.¹¹¹

Similarly to other funding methods, claims must be of reasonably high value relative to the costs and have reasonable chances of success to be funded by insurers. BTE LEI is more common in non-commercial litigation in the form of household and motor insurance cover¹¹² and in damages for minor injuries and small consumer disputes.¹¹³ Coverage for family law disputes is usually limited, and non-litigation legal advice is excluded.

BTE LEI can be sold as a stand-alone policy or as an add-on to another insurance bundle such as home insurance. An important difference from an access to justice perspective is that more people would be cheaply insured through add-on LEI. However, awareness of coverage might be more limited as LEI through add-on policies is not prominently advertised, leaving more consumers unaware that they are insured once they become involved in a legal dispute. Stand-alone policies are more expensive as they involve more marketing efforts. They are also not sold together with other forms of insurance that consumers would be more willing to buy, resulting in a smaller risk-pool and less overall coverage.¹¹⁴

In England and Wales, BTE LEI was first sold in 1976, and in 2008, 22 million people were covered in some form. By 2014, it covered almost 3 in 5 adults.¹¹⁵ The use of BTE LEI has been encouraged by Sir Rupert Jackson in his civil justice costs and funding review for Small and Medium Enterprises

¹¹⁰ IBA (n 83).

¹¹¹ Michelle Boardman, ‘Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation’ (2012) *Journal of Law, Economics and Policy* 8(3) 673.

¹¹² Hodges, Peysner and Nurse (n 32) 11; Stadler (n 99) 212.

¹¹³ Hodges, Peysner and Nurse (n 32); Peysner (n 26).

¹¹⁴ Kilian and Regan (n 82) 236.

¹¹⁵ Lewis (n 86) 278; Richard Lewis, ‘Compensation Culture Reviewed: Incentives to Claim and Damages Levels’ (2014) *Journal of Personal Injury Law*, 209 <<https://ssrn.com/abstract=2467110>> accessed 3 October 2024.

(SMEs), and for individuals as an add-on to household insurance.¹¹⁶ Suggestions have also been made for it to be an add-on to motor vehicle insurance,¹¹⁷ and for it to be mandatory and have universal coverage.¹¹⁸ In the case of motorists for instance, insurance is already mandatory. However, awareness of BTE LEI, and of the extent of its coverage when insured, is still limited and challenges on its ability of helping people on low incomes still remain, as BTE insurance was never meant to replace public legal aid.¹¹⁹ It has also been criticised for limiting the free choice of lawyer and for its complexity.¹²⁰ While insurance policies include specific caps of cover, limiting indemnity to a certain point, such limits are rarely exceeded.¹²¹ Lawyers in England and Wales are expected to discuss with clients if they can be covered by insurance policies.¹²² Most BTE policies exclude coverage for funding group actions.¹²³

LEI in the Netherlands is more commonly sold as a ‘stand-alone’ product, as opposed to as the ‘add on’ model more prevalent in England and Wales. In the Dutch context, LEI developed in parallel with legal aid cuts. Since the 1970s, it provides families with broader coverage than just motor vehicle accident insurance. It has grown significantly since the 1980s, with higher income households being more likely to hold LEI. By 2014, approximately 2.5 million households were covered by family policies.¹²⁴

In Germany, legal protection insurance is pervasive and the industry has been growing steadily, with the largest provider being ARAG SE.¹²⁵ In 2007, 35% of litigation was funded by BTE LEI¹²⁶ and by 2010, the penetration rate of general household BTE LEI was around 50%.¹²⁷ In 2021, 23.4 million out of 41 million households in Germany had legal protection insurance coverage, and the number of insurance contracts rose by around 21 percent since 2000.¹²⁸ LEI has for instance funded hundreds

¹¹⁶ Jackson (n 64) Chapter 8.

¹¹⁷ Lewis (n 86) 277.

¹¹⁸ Sorabji (n 71).

¹¹⁹ CJC (n 45) xii-xiii.

¹²⁰ Ibid. (n 157) 7-8.

¹²¹ Ibid. 23, 49. The limit for consumers is £50,000–£100,000, for SMEs, it is £100,000 or higher.

¹²² Solicitors Regulation Authority (SRA) Code of Conduct 2011 Indicative Behaviour 1.16 (now reflected more generally under the duty to act in the client’s best interests and to give clients information they need to make informed decisions in the SRA Code of Conduct for Solicitors, RELs and RFLs 2018, Articles 3.1 and 8.6).

¹²³ CJC (n 45) Section C(6)(b); Rachael Mulheron, ‘The Funding of the United Kingdom’s Class Action at a Cross-Roads’ (2023) *King’s Law Journal*, (1-27) <<https://www.tandfonline.com/doi/full/10.1080/09615768.2022.2161350>> accessed 13 March 2024.

¹²⁴ Haarhuis and van Veldhoven (n 73); Kramer and others (n 15) 75; Verbond van Verzekeraars, ‘Dutch Insurance Industry in Figures’ (Verbond van Verzekeraars, 2016) <<https://www.verzekeraars.nl/media/1751/verzekerd-van-cijfers-2016-eng.pdf>> 46, accessed 29 August 2024. A similar situation can be observed in Sweden; legal aid was reduced while LEI was encouraged; Solas (n 3) 162.

¹²⁵ Statista, ‘Vertragsbestand der Rechtsschutzversicherung in Deutschland von 1990 bis 2022’ (Statista, 2023) <<https://de.statista.com/statistik/daten/studie/6599/umfrage/vertragsbestand-der-rechtsschutzversicherung-seit-1990/>> accessed 29 August 2024.

¹²⁶ Hess and Hübner (n 39) 357; Tillema (n 23) 102.

¹²⁷ Van Boom (n 102).

¹²⁸ Statista (n 125).

of thousands of individual Dieselgate claims in Germany.¹²⁹ LEI is nowadays an automatic inclusion in an insurance bundle, rather than a stand-alone policy.¹³⁰ This funding method is however only available for individual litigation and is subject to several exceptions.¹³¹ Despite its widespread use, ‘those with limited income take out LEI policies far less than those with disposable income, and LEI is apparently the insurance of lowest priority for those with limited financial resources.’¹³² As to the choice of lawyer, individual free choice of lawyer, instead of the one recommended by the insurer through insurer established legal advice hotlines, is only allowed for a higher premium. The Council of Bars and Law Societies of Europe (CCBE) has suggested that insurers are inadvertently leading the insured to become involved with lawyers who have a pre-existing working relationship with the insurer.¹³³ Legal risks have not been considered as serious enough in Germany for compulsory BTE LEI to be introduced.¹³⁴

The International Bar Association (IBA) suggests that;

in both widespread and limited LEI jurisdictions, the ability to purchase broader coverage through a higher premium could be a barrier to the ‘forgotten middle’ having proper access to justice: as people in this category are less likely to have the disposable income to spend on higher premiums, they would be restricted from having broader LEI coverage.¹³⁵

BTE insurance is typically not available for collective proceedings because of exclusions of collective actions or because of the difficulties in combining coverage for all of the represented claimants.¹³⁶ In Germany, it is not available for companies and consumer associations.¹³⁷ This makes alternative funding options essential for certain types of litigation to be able to proceed. TPF has proved to be particularly useful in tackling these funding deficits, as will be shown later on.

BTE LEI is today generally accepted and highly regarded among scholars and practitioners who invariably propose expansions in coverage.¹³⁸ Nevertheless, the above-mentioned areas of concern,

¹²⁹ Wolfgang Hau, ‘Private Funding’ in Burkhard Hess, Margaret Woo, Loïc Cadiet, Séverine Menétrey, and E Vallines García (Eds), *Comparative Procedural Law and Justice, Part III -Access to Justice and Costs of Litigation* (2024) 17; Adrian Ladbury, ‘German Legal Protection Insurers’ Dieselgate Payouts Top €1.5bn’ (Commercial Risk, June 28, 2023) <<https://www.commercialriskonline.com/german-legal-protection-insurers-dieselgate-payouts-top-e1-5bn/>> accessed 29 August 2024.

¹³⁰ IBA (n 83) 20.

¹³¹ Stadler (n 99) 212.

¹³² IBA (n 83) 21.

¹³³ IBA (n 83) 28.

¹³⁴ Kilian (n 25).

¹³⁵ IBA (n 83) 6.

¹³⁶ CJC (n 45) 59-61; Astrid Stadler, ‘Third-Party Funding in Collective Redress’ in Xandra Kramer, Stefaan Voet, Lorenz Kodderitsch, Magdalena Tulibacka and Burkhard Hess, *Delivering Justice: A Holistic and Multidisciplinary Approach* (Bloomsbury Publishing 2022).

¹³⁷ Hau (n 129) 17.

¹³⁸ Meurkens (n 98) 38; Sorabji (n 71); IBA (n 83).

including exclusions, limitations on coverage, restrictions on the free choice of lawyer and the associated potential of conflicts of interest, have been identified. The issue of control over the litigation decisions, such as on settlements, is also present. These issues can also feature with TPF. Depending on whether the doctrine of subrogation applies under the insurance contract, the insurer often acquires almost complete control of the litigation on behalf of the litigant. However, this transfer receives little attention in contemporary discourse. Once the insurable civil lawsuit starts (after the insurer pays for repairing the damage caused, for instance, to a damaged car), the insurer becomes subrogated to the rights of insured.¹³⁹ As Silver spells out with regard to the of similarities of insurance with TPF in the US;

The policyholder will likely be the nominal plaintiff in the lawsuit and may also have a financial stake in it, such as an uninsured loss or a deductible. But the carrier may fund the subrogation action, control it, and be the real party in interest for much of the case, having stepped into the policyholder's shoes by acquiring its right to sue. Although third-party funding of lawsuits has spawned considerable controversy, there is no equivalent debate over the propriety of insurer-financed subrogation lawsuits. This is true even though subrogation involves claim transfers and often claim-sharing, and clearly increases the resources that are available to support litigation.¹⁴⁰

This indicates that, although similar conflicts of interest arise in LEI as in TPF, they are less frequently highlighted and provoke considerably less debate. In fact, 'there seems to be rather little comparative law research on legal expenses insurance, especially when one considers how much attention is paid to other private financing models'.¹⁴¹ This is particularly concerning given that, in Europe, BTE LEI often involves a much larger number of non-commercial, non-sophisticated litigants, who face a substantial discrepancy in bargaining power with insurers. TPF, by contrast, involves smaller numbers of sophisticated, commercially experienced parties who are better positioned to protect their interests.¹⁴²

A fuller examination, which includes economic considerations, analyses and comparisons on conflicts of interests and on the question of why TPF, in particular, has in recent years been attracting more resistance and controversy in Europe when compared to LEI, will follow in Chapters 3 and 4.

¹³⁹ Silver (n 95) 635; Tom Baker, 'What Litigation Funders Can Learn About Settlement Rights from the Law of Liability Insurance' (2023). Theoretical Inquiries of Law, Forthcoming, University of Pennsylvania, Institute for Law and Economics Research Paper No. 23-41, available at SSRN: <https://ssrn.com/abstract=4638617>; Section 4.3.4.

¹⁴⁰ Silver (n 95) 635.

¹⁴¹ Hau (n 129) 7.

¹⁴² Section 3.2.1.

2.3.3.2. *After-the-Event Legal Expenses Insurance (ATE LEI)*

ATE LEI is taken out after the dispute starts, to cover part of, or all of the insured's litigation costs. In Europe, ATE insurance developed primarily in England and Wales, where it emerged as a response to increased adverse cost risk faced by claimants. This development occurred in the late 1990s, when legal aid began to be replaced by 'conditional' fee arrangements (CFAs) as a means to preserve access to justice for those of Middle Income Not Entitled for Legal Aid (MINELAs).¹⁴³ Prior to that, professional conduct rules for lawyers did not allow payments related to a successful outcome.¹⁴⁴

Currently, ATE insurance in Europe, like TPF, is predominantly used in a smaller number of higher value commercial litigation. It is most commonly purchased by claimants without BTE facing the risk of losing their case, and in the event of success, the risk of the defendants becoming insolvent.¹⁴⁵ ATE insurance is different from insurance in the classical sense. In ATE insurance cases, the premium is often only collected by insurers in case of success. In some cases, the premium can also be structured as a percentage of the recovered amount, making it similar in many respects, and a competitor, to contingency fee agreements and TPF.¹⁴⁶ However, this type of insurance does not usually provide day-to-day funding but provides indemnity,¹⁴⁷ often complementing TPF arrangements. Insurers may also cover the risk of loss of the amount invested by third-party funders themselves.¹⁴⁸ Furthermore, third-party funders can require claimants to secure ATE insurance to protect against the risk of adverse costs, with funders themselves sometimes covering the premiums.¹⁴⁹

In Ireland for instance, where TPF is prohibited,¹⁵⁰ an exception was carved out for ATE. ATE here was considered as not illegal under the principles of maintenance and champerty. This judgement distinguished between ATE insurance and TPF by claiming that ATE insurance brought about access to justice, unlike TPF, which constituted 'trafficking in litigation'.¹⁵¹ This could indicate that, despite the close similarities, ATE is generally viewed more positively than TPF in some jurisdictions.

¹⁴³ See amongst others; John Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding* (Palgrave Macmillan, 2014); Section 2.3.4.

¹⁴⁴ Jackson (n 64) Chapter 10.

¹⁴⁵ In certain cases, defendants also make use of ATE insurance; Jackson (n 64) 81.

¹⁴⁶ van Boom (n 102) 99-100; See also, International Council for Commercial Arbitration (ICCA), 'Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration, (ICCA reports series, no. 4, 2018) 35.

¹⁴⁷ ICCA (n 146) 35.

¹⁴⁸ Tanya Lansky and Thomas Kohlmeier, 'ATE Insurance and Litigation Funding' (Deutscher Anwaltspiegel Dispute Resolution, 22 October 2019) <<https://www.deutscheranwaltspiegel.de/disputeresolution/dispute-resolution/ate-insurance-and-litigation-funding/>> accessed 9 September 2024.

¹⁴⁹ Rachael Mulheron, 'A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study. A Report for Submission to the Legal Services Board' (Legal Services Board 2024) 89.

¹⁵⁰ Capper (n 38).

¹⁵¹ *Greenclean Waste Management Ltd v Leahy p/a Maurice Leahy and Co solicitors (No 2)* [2014] IEHC 314. See also Capper (n 38).

2.3.4. Contingency Fee-Like Agreements

Another method through which the costs of dispute resolution can be privately funded is through contingency fee-like agreements. Contingency fee agreements refer to agreements in which the lawyer or the law firm funds the litigation costs. The lawyers, in turn, receive a share of the proceeds of the dispute if the claim is successful, and nothing if the claim is unsuccessful.¹⁵² In the US, the use of such arrangements by is widespread, in particular by individual claimants.¹⁵³ They have been available for around two centuries and are synonymous with its legal culture.¹⁵⁴

However, in the traditionally more conservative European legal culture, these agreements have been not been looked at very favourably and are largely prohibited.¹⁵⁵ The 2013 Code of Conduct for European Lawyers drawn up by the CCBE prohibits them on the basis that they may encourage ‘speculative litigation’ and ‘abuse’.¹⁵⁶ The EC expressly provided in 2013 that contingency fees should only in exceptional cases be allowed, driven by the concern that they may encourage ‘abusive litigation’, a fear which is also reflected in the RAD.¹⁵⁷ These prohibitions are increasingly being loosened and circumvented, which might signal that the traditionally more conservative European legal culture is becoming more receptive to the classical American notion that public goods could be delivered by the private sector.¹⁵⁸

Contingency fee-like agreements have of late started to be used to fund litigation in England and Wales. With CFAs (which are distinct from contingency fees), if claimants lose, they pay no fee, if they win, the lawyers claim their regular hourly fees plus an additional success fee. This success fee does not take the form of a percentage of the proceeds. The lawyers would therefore be assuming the risk of adverse costs, however in these cases they can, and often do, make use of ATE LEI, transferring the risk to insurers. In 1999, the full CFA success fee and the ATE premium were made recoverable from the losing party.¹⁵⁹ This led to the losing defendants, typically funded by liability insurers, being

¹⁵² Winand Emons, ‘Legal Fees and Lawyers’ Compensation’ in Francesco Parisi (Ed.), *The Oxford Handbook of Law and Economics, Volume 3: Public Law and Legal Institutions* (OUP, 2017).

¹⁵³ *Ibid.* 248.

¹⁵⁴ Stephan Landsman, ‘The History of Contingency and the Contingency of History’ (1998) 47(2) *DePaul Law Review* 261.

¹⁵⁵ Virginia G. Maurer, Robert E. Thomas and Pamela A. DeBooth, ‘Attorney Fee Arrangements: The U.S. and Western Perspectives’ (1999) 19(2) *Northwestern Journal of International Law & Business* 272. In France, for instance, the ‘no win, no fee’ agreement (*pacte de quota litis*) is generally considered to be ‘shocking’ and ‘inappropriate’, and French law prohibits it but allows a success fee on top of the lawyer fees. See Rouas (n 75) 194.

¹⁵⁶ CCBE, *Model Code of Conduct for European Lawyers*, Article 3.3; Hau (n 129) 32.

¹⁵⁷ European Commission (2013) ‘Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law’ at para. 30 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013H0396>>; Cordina (n 34); Section 3.4.1.1.

¹⁵⁸ Kelemen (n 22) 66. In the Dutch collective redress context, they are circumvented for example by the creation of ad hoc special purpose vehicles which operate on a contingency fee basis in mass claims. See Tillema (n 23) 58; Section 2.3.5. Law firms sometimes also have this arrangement with the liable party as part of the settlement agreement. Kramer and Tillema (n 28); see also Maurer and others (n 155); Section 4.2.2.

¹⁵⁹ Access to Justice Act (1999) Chapter 22.

potentially liable to the 'triple whammy' of normal costs, success fees and ATE premium. The situation was exacerbated by claimants with CFAs not being incentivised to control the costs which were being incurred on their behalf. The 'cost wars' ensued in the form of satellite litigation over the issue of cost-shifting.¹⁶⁰ While the costs of litigation covered by liability insurers did rise, no increase in the overall volume of litigation was noted due to the introduction of CFAs with recoverable success fees.¹⁶¹

Following the Jackson reforms and the LASPO in 2012, the success fees and the insurance premiums of CFAs ceased to be recoverable from the losing defendant in case of success. They must instead be paid by the claimant out of the damages, but they are capped at 25% of damages in personal injury cases.¹⁶² The reform was in turn criticised as restricting funding by lawyers and NGOs involved in transnational claims against multinational enterprises.¹⁶³ CFAs are not very common in commercial claims.¹⁶⁴

Prior to 2013, damages-based agreements (DBAs), the term used for contingency fee agreements in England and Wales, were only available for employment matters. The introduction of the Jackson costs reforms, the LASPO and the subsequent Damages-Based Agreements Regulations in 2013 made DBAs lawful for all contentious and non-contentious matters.¹⁶⁵ Being very similar to American contingency fee agreements, they were introduced as a supplement to CFAs in civil disputes. DBAs allow lawyers to receive up to 50 percent of the client's recovery in case of success.¹⁶⁶ Nevertheless, despite being revolutionary for the jurisdiction, DBAs are rarely used in England and Wales, unlike the US. This is in spite of the potential return to lawyers working through a DBA being potentially far greater than under a CFA. With CFAs, lawyers can only acquire a success fee of up to 100 per cent of their base rate fees from the client upon success.¹⁶⁷

One principal reason for the lack of DBA use has been considered to be the prohibition of 'hybrid' forms of DBA, whereby a DBA is combined with other forms of funding. An example of a hybrid DBA is where a portion of the fees is paid for the duration of the claim irrespective of the outcome, for instance through a reduced hourly rate, and a portion paid in case of success.¹⁶⁸ The ban on hybrid

¹⁶⁰ Hodges, Peysner and Nurse (n 56) 29.

¹⁶¹ Lewis (n 86) 278; Paul Fenn, Veronica Grembi and Neil Rickman, 'No Win, No Fee', Cost-shifting and the Costs of Civil Litigation: A Natural Experiment' (2017) *The Economic Journal* 142.

¹⁶² The Legal Aid, Sentencing and Punishment of Offenders Act (2012), which also dramatically reduced the availability of public legal aid. See also Zhang (n 26) 33.

¹⁶³ Rouas (n 75) 105.

¹⁶⁴ CJC (n 45) 15; Capper and Sebok (n 46) 14.

¹⁶⁵ Rachael Mulheron, 'The Damages-Based Agreements Regulations 2013: Some Conundrums in the "Brave New World" of Funding' (2013) 32(2) *Civil Justice Quarterly* 241.

¹⁶⁶ Up to 25% for personal injury claims, 35% for employment matters, 50% for commercial cases. The Damages-Based Agreements Regulations (2013), Regulation 4. See also, Mulheron (n 123) 7.

¹⁶⁷ Lucy Pert and Anthony Sebok, 'Third-party Litigation Financing and Lawyers' Ethical Obligations' in Steven Friel (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020) 75.

¹⁶⁸ *Ibid.* 75; Masood Ahmed, 'Revisiting Hybrid Damages-Based Agreements' (2022) 1 *Journal of Personal Injury Law* 33, 33.

DBAs seems to have been put in place because of a concern that hybrid DBAs ‘could encourage litigation behaviour based on a low risk/high returns approach’,¹⁶⁹ or perhaps due to pressure from ‘powerful vested interests’.¹⁷⁰ There have been increasing calls for amendment to these rules, including by Mulheron and Bacon.¹⁷¹ A recent landmark decision, *Zuberi v Lexlaw*, authoritatively confirms that hybrid DBAs are permissible.¹⁷² Concerns have however been raised by Ahmed with regard to the use of DBAs by non-commercial clients, in particular because there is currently no requirement for non-commercial clients to obtain independent advice prior to entering into DBAs.¹⁷³

Furthermore, DBAs cannot be entered into in order to fund opt-out collective proceedings before the Competition Appeal Tribunal, but CFAs and ATE insurance are not prohibited.¹⁷⁴ The cited rationale behind this was to distance the class action regime from associations with US-style class actions.¹⁷⁵ Contingency fees could;

‘unduly distort the incentives to bring cases’, and ‘[c]reate an incentive for lawyers to focus only on the largest cases, neglecting smaller, meritorious claims, as the amount received by the legal firm is directly proportional to the number of claimants, rather than the amount of work done’.¹⁷⁶

The above passage highlights the lingering relics of resistance towards contingency fees in the jurisdiction. The fears and perverse incentives alluded to here are also brought with regard to TPF and will be analysed more thoroughly in the following Chapters.

In continental Europe, contingency fee-like agreements are even less common. As to the selected jurisdictions for this research, in Germany, there are exceptions to the historically complete ban on contingency fees under Section 49b of the Federal Code for the Legal Profession, pursuant to a judgement by the Federal Constitutional Court.¹⁷⁷ This case held that the prohibition ‘ran contrary to the constitutional guarantee of the professional freedom of lawyers as service providers.’¹⁷⁸ They are now only allowed in the very limited scenario where the claimant would not be able to file a claim

¹⁶⁹ John Hyde, ‘Government rules out hybrid DBAs’ (Law Society Gazette, 10 November 2014)

<<https://www.lawgazette.co.uk/law/government-rules-out-hybrid-dbas/5044959.article>> accessed 29 August 2024.

¹⁷⁰ Rachel Rothwell, ‘Jackson Warns against ‘Vested Interests’ on DBAs’ (Law Society Gazette, 21 October 2014) <<https://www.lawgazette.co.uk/law/jackson-warns-against-vested-interests-on-dbas/5044478.article>> accessed 29 August 2024.

¹⁷¹ Rachael Mulheron and Nicholas Bacon, ‘The 2019 DBA Reform Project Explanatory Memorandum’ (October 2019) <[https://www.qmul.ac.uk/law/media/law/docs/research/Doc-3---Explanatory-Memorandum-\(13-Oct-2019\).pdf](https://www.qmul.ac.uk/law/media/law/docs/research/Doc-3---Explanatory-Memorandum-(13-Oct-2019).pdf)> accessed 29 September 2024.

¹⁷² Ahmed (n 168) 34.

¹⁷³ Ibid. 41.

¹⁷⁴ Competition Act (1998), Section 47C(8).

¹⁷⁵ Mulheron (n 123) 5.

¹⁷⁶ Ibid. 19.

¹⁷⁷ BVerfG 1 BvR 2576/04.

¹⁷⁸ Peter Gottwald, *Litigation in England and Germany: Legal Professional Services, Key Features and Funding* (Gieseking-Verlag, 2010) 170.

otherwise.¹⁷⁹ As the following section will explain in more detail, the newly introduced ‘Legal Tech’ Act in Germany has also increased the permissibility of contingency fees to a limited extent.¹⁸⁰

Regarding the legal landscape in the Netherlands, in accordance with the Code of Conduct of the Dutch Bar Association, contingency fees are in general prohibited,¹⁸¹ showcasing the traditional continental resistance;

lawyers are prohibited from working for a purely contingent fee. Alternative fee arrangements, including limited upside percentage sharing, are, however, allowed as long as the lawyer also receives a salary sufficient to cover his or her costs independent from the outcome.¹⁸²

As part of a 10-year experiment by the Dutch Bar Association which ran from 2014 to 2024, lawyers have been permitted to enter into result-based fee agreements in personal injury and death claims cases.¹⁸³

As will be highlighted in the following section on assignment of claims, within some continental European jurisdictions, including in the German and Dutch collective redress contexts, special purpose vehicles that are set up ad hoc to protect the interests of groups of aggrieved parties have not been bound by the restrictions on contingency fees placed on attorneys.¹⁸⁴

The restrictions placed on contingency fees may be seen as a contributing factor to the emergence and development of the TPF in Europe, albeit at a later stage than in Australia, which is also characterised by a regulatory framework that combines the loser pays rule and prohibitions of contingency fees.¹⁸⁵ With regard to the US, despite the widespread use of contingency fees in the US, TPF still carved out a role in the litigation market, as most lawyers and law firms who operate on a contingency fee basis can face constraints in the size and complexity of the claims they can fund. These limitations often arise from opportunity costs and insufficient capital reserves to make good for substantial losses.¹⁸⁶

¹⁷⁹ German Federal Code for Lawyers, available at https://www.gesetze-im-internet.de/englisch_brao/englisch_brao.html; See also, Stadler (n 99) 222.

¹⁸⁰ Section 2.3.5.

¹⁸¹ English Version of the Code of Conduct of the Netherlands Bar Association: The Rules of Conduct of Advocates 1992’ (CCBE 3 December 2008), Rule 25 (Clause 1) (Dutch Bar Association’s Code of Conduct).

¹⁸² Rein Philips, ‘Netherlands’, in Simon Latham (ed), *The Law Reviews - The Third Party Litigation Funding Law Review, Fifth Edition* (2022), 135; See also Kramer and others (n 15) 45-46.

¹⁸³ Kramer and others (n 15) 45-46.

¹⁸⁴ Tillema (n 23) 105, 216.

¹⁸⁵ Samuel Issacharoff, ‘Litigation Funding and the Problem of Agency Cost in Representative Actions’ (2014) 63(2) *DePaul Law Review* 561, 567-570.

¹⁸⁶ Anthony J. Sebok and W. Bradley Wendel, ‘Duty in the Litigation-Investment Agreement: The Choice between Tort and Contract Norms When the Deal Breaks down’ (2013) 66 *Vanderbilt Law Review* 1831, 1834.

2.3.5. Assignment of Claims

Another option for litigation funding is through assigning, transferring or selling the claim to someone else. The assignment of claims model is sometimes considered a form of TPF. It refers to the funding of litigation by parties who become owners of single claims or a bundle of claims that have been assigned to them. With assignment of claims, the party who has standing before the court becomes the assignee, following a transaction with the original claimholder(s)/assignor(s). Hereby, the assignee funds and litigates the claim, in return for remuneration or for a percentage of the proceeds, taking into account the risk of loss. The difference between assignment and the situation with TPF, is that with TPF the claimant remains the same and usually retains a much greater degree of control on the litigation.¹⁸⁷

This funding model has also not been readily accepted in most jurisdictions. In some European codes of civil procedure such as that in France, parties must have an interest of their own in the subject matter of the case.¹⁸⁸ In Germany, this is also the case. Corrective justice as a principle between the claimholder and the wrongdoer is emphasised;

albeit not explicitly formulated, the clear intention of the Civil Procedure Code is that parties must litigate on their own behalf and in their own interest. Case law has accepted limited exceptions. There are, however, additional requirements in case of assignments if the assignor retains an economic interest in the outcome of the litigation, to protect the defendant from abuse. Assignees must, for example, have sufficient financial resources to meet an adverse cost order.¹⁸⁹

Regardless of these legal principles, the assignment of claims model has been used in collective proceedings in Germany and the Netherlands. The assignee in Germany and the Netherlands is usually a special purpose vehicle (SPV) specifically created by consumer associations or private entities for the purpose of pursuing collective claims.¹⁹⁰ In the field of competition law, infringements by price-fixing cartels, which harm SMEs and consumers, have led to the creation of SPVs offering the enforcement of the claims after agreeing with the claimants for a success fee. A notable SPV is Cartel Damage Claims (CDC)¹⁹¹, which is active in nearly all cartel cases in Europe.¹⁹² Such assignees usually enter into a litigation funding agreement with a third-party funder.¹⁹³

¹⁸⁷ Capper and Sebok (n 46).

¹⁸⁸ Astrid Stadler, 'German Collective Actions - Is Litigation Funding in a Dead End?' in Xandra Kramer, Jos Hoevenaars, Betül Kas and Erlis Themeli, *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 157.

¹⁸⁹ *Ibid*; See also Section 3.5.

¹⁹⁰ Tillema (n 23) 105.

¹⁹¹ Cartel Damage Claims <www.carteldamageclaims.com>

¹⁹² Stadler (n 99) 214-215.

¹⁹³ Saulnier, Müller and Koronthalyova (n 38) 59.

Legal tech companies and online platforms which pursue large amounts of consumer claims, like myRight in the case of claims against Volkswagen or Flightright in the case of cancelled and delayed flights, also operate on an assignment of claims basis in Germany.¹⁹⁴ The 2014 Directive on competition law infringements provides for the possibility that an ‘action for damages’ may also be brought ‘by someone acting on behalf of one or more alleged injured parties [...] or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim’.¹⁹⁵

This funding model has not been used on a large scale.¹⁹⁶ It is hardly used in England and Wales¹⁹⁷ and in international arbitration¹⁹⁸ but, as mentioned, it has recently become more common in the Netherlands and Germany, particularly in collective claims.¹⁹⁹ In England and Wales, in contrast with the acceptance of TPF and DBAs, the assignment of claims model is restricted. Debts are in principle treated as property rights and are presumptively assignable. On the other hand, claims in contract and tort are not. A valid assignment of these claims requires a legitimate interest in the claim on behalf of the assignee.²⁰⁰ An exemption to these restrictions on assignment of claims is found in insolvency cases where funders buy such claims from the insolvent company rather than fund the claims directly.²⁰¹

As discussed, this funding model is of particular importance in Germany, mainly due to the limited options of collective redress mechanisms available under national laws.²⁰² In effect, it attempts to emulate a class action procedure, but this did not happen without creating legal controversies. In cases where the claimant acts commercially, i.e., for profit, there have been questions over the legality of this model. Nevertheless, in recent landmark judgements such as ‘Lexfox’, ‘Airdeal’ and ‘Financialright’, the legal validity of the collective opt-in assignment model was fundamentally acknowledged by the German Federal Court of Justice (BGH).²⁰³ Among the issues decided on in the ‘Financialright’ case, was whether bundling claims with differing chances of success would constitute a conflict of interest. Since some claims may have a stronger chance of success than the weaker claims

¹⁹⁴ Stadler (n 99) 215.

¹⁹⁵ Art. 2 (4) of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

¹⁹⁶ Andrea Pinna, ‘Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims’, in Mark Tuil and Louis T. Visscher (Eds), *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical and Economic Analysis* (Edward Elgar Publishing, 2010) 99-100.

¹⁹⁷ Hodges, Peysner and Nurse (n 56) 84.

¹⁹⁸ ICCA (n 146) 28.

¹⁹⁹ Tillema (n 23); Stadler (n 211).

²⁰⁰ Capper and Sebok (n 46) 12.

²⁰¹ ICCA (n 146) 41.

²⁰² Astrid Stadler, ‘Third-Party Funding in Collective Redress’ in Xandra Kramer, Stefaan Voet, Lorenz Kodderitsch, Magdalena Tulibacka and Burkhard Hess (Eds), *Delivering Justice: A Holistic and Multidisciplinary Approach* (Bloomsbury Publishing 2022); Section 3.4.3.

²⁰³ David Markworth, ‘Coding a Collective Consumer Redress Vehicle in Germany: How Debt Collection Services Became Consumer Allies and what that Means for Directive 2020/1828’ (2023), 12 (2) *Journal of European Consumer and Market Law* 89, 90-91.

that are bundled, the settlement may be less favourable than it would otherwise be for the individual assignors with stronger claims. The BGH found against such a claim, as being brought on a collective basis improves the likelihood of success of the claims in the first place, and for the reason that the assignor is well informed on the assignment through the contractual agreement.²⁰⁴

Given that in Germany legal advice can only be supplied by lawyers, the 2021 German ‘Legal Tech Act’ was enacted to regulate debt collection providers, i.e., the entities which fund claims on the basis of the assignment of claims model. It confirms the model’s legality even if it includes legal assessment and advice by the entity associated with the assignment. The Act also provides for the providers’ ability to cooperate with third-party funders as long as their intervention is limited to funding and information rights. Furthermore, it establishes registration, disclosure and supervisory requirements and allows for a limited increase in the permissibility of contingency fees to put lawyers more on a level playing field with debt collection service providers. The Act provides consumer protection measures and extensive information requirements for the debt collection service providers; they must disclose to the consumer information on the success fee, on whether there are other options for the consumer to enforce the claim, if cost risks are to be covered by a litigation funder, if and how the debt collection service provider is entitled to conclude a settlement, and the details of the supervisory authority responsible for the provider.²⁰⁵

In sum, it is evident from the above analysis that the assignment model, which has close parallels with TPF, has also encountered significant reluctance to full acceptance within European civil justice systems.

2.3.6. Public or Non-Profit Self-Funding Funds

Another possibility to fund litigation through public means, or through a combination of public and private initiatives, is through funds specifically created for the purpose. This option is however not very common and has not yet found its way in Europe, despite significant interest in it.²⁰⁶ The Fonds d’aide aux actions collectives in Quebec, the Class Proceedings Fund in Ontario²⁰⁷ and the Public Fund to Finance Class Action Lawsuits in Israel²⁰⁸ seem to be the only three examples of such public funds

²⁰⁴ German Federal Court of Justice (BGH), 13.6.2022, VIa ZR 418/21.

²⁰⁵ The Act to Promote Consumer-oriented Offers in the Legal Services Market (Gesetz zur Förderung verbrauchergerichter Angebote im Rechtsdienstleistungsmarkt) of 10 August 2021; Markworth (n 203) 90. For the regulation of TPF in Germany see Section 3.4.3.

²⁰⁶ Particularly in the common law world, but also in civil law jurisdictions. See Rachael Mulheron, *Class Actions and Government* (CUP 2020) 170; Kramer and others (n 15).

²⁰⁷ Stefaan Voet, ‘Costs and Funding of Collective Redress Proceedings’ in Astrid Stadler, Emmanuel Jeuland and Vincent Smith (Eds), *Collective and Mass Litigation in Europe: Model Rules for Effective Dispute Resolution* (Edward Elgar Publishing Limited, 2020) 278-9.

²⁰⁸ Eli Bukspan, ‘The Israeli Public Class Action Fund: New Approach for Integrating Business and Social Responsibility’ in Brian Fitzpatrick and Randall Thomas (Eds), *The Cambridge Handbook of Class Actions* (CUP 2021).

worldwide. These funds are exclusively dedicated to providing funding for collective (class) actions and may take different forms. Whilst the funds in Canada are self-funding in the sense that the funds receive part of the proceeds from successful class actions to fund future actions,²⁰⁹ in Israel a yearly budget is allocated.²¹⁰

This alternative has also caught the attention of European policymakers. The RAD, in Recital 70 and Article 20, does make indirect reference to such a possibility by providing that;

Having regard to the fact that representative actions further the public interest by protecting the collective interests of consumers, Member States should retain or take measures aiming to ensure that qualified entities are not prevented from bringing representative actions under this Directive due to the costs associated with the procedures. Such measures could include limiting applicable court or administrative fees, granting the qualified entities access to legal aid, where necessary, or providing qualified entities with public funding to bring representative actions, including structural support or other means of support. However, Member States should not be required to finance representative actions.²¹¹

Similar developments which occurred earlier in England and Wales concerned the possible implementation of a Contingency Legal Aid Fund and a Supplementary Legal Aid Scheme. However, despite the positive recommendations by Jackson, these did not materialise.²¹² While making reference to their availability in small scale in Australia and Canada, he recommended their introduction as non-profit self-funding funds. They would be administered either by a private or public body, which would fund eligible claimants, including individuals and companies with limited resources, and in the event of success, the funds receive a percentage from the proceeds.

If well designed and structured, these funds hold the promise of facilitating access to justice in instances where it would otherwise not be available. The almost entirely self-funded and more socially focused Fonds d'aide aux actions collectives in Quebec,²¹³ seems to be the most successful example. It funded around 45 percent of the pending class actions in the province as of 2020.²¹⁴

One might reasonably expect that a number of such funds could soon start being established across Europe, at least when it comes to collective claims. This is in consideration also of the provision

²⁰⁹ Voet (n 207) 278-9.

²¹⁰ Bukspan (n 208).

²¹¹ Recital 70 of the RAD.

²¹² Jackson (n 64).

²¹³ The Fonds was initially supported by capital injections from government subsidies. Catherine Piché, 'Transparency and Oversight of Class Actions Funding in Canada', in Xandra Kramer, Jos Hoevenaars, Betül Kas and Eris Themeli, *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 289.

²¹⁴ *Ibid.* 289. See also Voet (n 207).

regarding public assistance in the RAD to facilitate the bringing of collective actions. These funds would operate in conjunction with market-based funding, as such public funds would still most probably be insufficient to cover more of the prohibitive litigation costs.²¹⁵ They would also serve to provide access to justice for claims that funders decline to fund due to commercial reasons.

In the Netherlands for instance, a research report from 2023 that was commissioned by the Ministry of Justice to investigate the usefulness and necessity of a revolving litigation fund for mass claims in the Dutch legal system, found that it was too early for it to be implemented.²¹⁶ This was based on the considerations that ‘no final judgments have yet been rendered in damages cases, the rapidly developing funding market, the as yet not evident difficulties in obtaining funding (in damages cases), as well as uncertainties surrounding (European) regulation’.²¹⁷ There was also uncertainty over the amounts of damages in WAMCA cases and the level of public and stakeholder support for the fund.²¹⁸

Another related source of funding is the use of unclaimed funds from successful collective actions. A significant portion of the compensation may remain unclaimed by the class members, particularly in the case of ‘opt-out’ collective actions. In England and Wales, under the competition law class action regime, such undistributed revenues are designated to be received by the Access to Justice Foundation, a charity which supports the funding of free legal advice across the jurisdiction.²¹⁹ In the EU, under Article 9.7 of the RAD, Member States have the possibility to establish rules on the destination of outstanding funds, which could include *cy près* financing for a potential litigation fund.²²⁰

From an access to justice perspective, the lack of such public or non-profit self-funding litigation funds, particularly for collective redress, along with the insufficiencies in other means of funding discussed in this chapter, amplifies the need for sufficient availability of TPF. While individual commercial claims may often still be financed through means such as LEI or the claimant’s own resources, compensatory collective redress in Europe lacks viable funding alternatives to TPF.²²¹

²¹⁵ Ibid. 294.

²¹⁶ Kramer et al, ‘Usefulness, Necessity, Design and Costs of a (revolving) Litigation Fund for Collective Actions’ (Report for the Scientific Research and Documentation Centre, WODC, 2023). See English summary: <<https://www.rijksoverheid.nl/documenten/rapporten/2023/09/18/tk-bijlage-1-brief-tk-2023-volledige-tekst-wodc-onderzoek-processenfonds>>.

²¹⁷ Ibid.

²¹⁸ Ibid. 27-28; See also Section 3.4.2.

²¹⁹ Rachael Mulheron, ‘The Conundrum of Undistributed Residues under the United Kingdom’s Collective Proceedings Regime’ (2024) 23 (2) Competition Law Journal 79; Access to Justice Foundation <<https://atjf.org.uk/>>; On the competition law class action regime see Section 3.4.4.3.

²²⁰ Kramer and others (n 15) 139, 164-165.

²²¹ Ibid; Mulheron (n 149).

2.4. Conclusion

This chapter has provided an analysis of litigation funding options other than TPF, offering a contextual and legal backdrop to the emergence of TPF as a significant, albeit controversial, development in European civil litigation. By examining mechanisms such as public legal aid and Legal Expenses Insurance (LEI), as well as more recent forms like result-based fee arrangements and assignment, it outlined the various ways in which litigation has traditionally been funded, and how limitations in these options have paved the way for increased use of TPF.

First, the issues created by increasing litigation costs, particularly in large collective redress cases, and by the continuing demise of legal aid were discussed. While the crisis facing the legal aid sector is at its greatest in the jurisdiction of England and Wales, there are no indications of a reversal of fortunes in the jurisdictions of the Netherlands and Germany either.

The chapter then reflected on the shift from public to private sources of funding and the fundamental role of BTE LEI as a market-based funding option in civil justice systems. BTE LEI is widely accepted, despite initial hesitance and its various limitations. Result-based arrangements were then discussed, with England and Wales leading the way in Europe in terms of allowing their use in civil litigation as a potential substitute for the unavailability of legal aid. In the Netherlands and Germany, contingency fee-like agreements are in general prohibited, despite their structure being used to a certain extent in collective redress. Moreover, the England and Wales' competition class action regime specifically prohibits DBAs. The assignment of claims model, which can be classified as a result-based agreement, also encounters various forms of resistance and legal challenges within the regulatory frameworks of the selected jurisdictions. It is therefore evident from the outset that this category of arrangements is significantly more resisted than other means of funding such as LEI and public legal aid. Being also a result-based arrangement, TPF also suffers from similar resistance. This resistance will be examined in further detail the following chapter.

This chapter also raised questions, which will be addressed later, on why LEI, as a private means of funding, is broadly accepted, whereas result-based agreements are resisted, in the quest for addressing access to justice issues. This chapter also examined and advocated for the future establishment of a promising yet unused alternative to TPF as a tool for improving access to justice and deterrence; that of public or non-profit self-funding funds.

Despite the aforementioned historical prohibitions on result-based arrangements, this chapter also highlighted indications of evolving attitudes which signify a broader shift in how civil justice systems are responding to funding limitations. A trend can be identified whereby the legal services market in Europe is being gradually liberalised with the introduction of alternative funding models. The

groundwork laid in this chapter sets the stage for a deeper analysis in the next chapter, which will focus on TPF itself. It will examine its operational mechanics, market structure, regulatory frameworks, and the sources of resistance that continue to shape its role in European civil justice systems.

Chapter 3

Third-Party Funding: Practice, Regulatory Frameworks and Resistance

3.1. Introduction

The previous chapter identified and examined the context which led to the emergence of TPF and its role amid other litigation funding options. This chapter continues the discussion on the niche TPF fills in the European (and international) legal services market and initiates the discussion on the resistance it has faced and still faces. It investigates the regulatory frameworks and debate on TPF in selected jurisdictions and in the international arbitration and EU regimes. The level of acceptance towards TPF still varies across European jurisdictions and legal cultures. This chapter does not attempt to give a complete and exhaustive description of the regulation and debate on TPF. It highlights selected general characteristics, in view of their relevance to the research questions on the sources and nature of the resistance towards TPF in Europe.

The doctrines forbidding or restricting TPF in England and Wales have been eased, whereas in the Netherlands and Germany, TPF was never explicitly forbidden or allowed.¹ In all jurisdictions, there is now in place a system of sparse formal regulation and a patchwork of soft law instruments and case law, providing some restrictions and guidelines to address the risks of the practise. TPF is nowadays a global phenomenon but its origins as the modern industry that it is can be firmly placed in common law litigation in jurisdictions such as Australia, England and Wales and the US, with litigation in continental civil law jurisdictions following suit. How TPF is regulated in international arbitration is also addressed in this chapter. This provides a wider context and useful points of comparison with how it is regulated in domestic and cross-border litigation in Europe. Despite TPF being to a large extent more widespread in the common law world and in international arbitration, the focus of this research is on developments in Europe, where major recent developments on the issue of regulation have been taking place. This chapter shows that despite the significant interest in TPF and its growth, it is still largely unregulated outside of collective redress, especially at the formal statutory level. This lack of regulation does not mean, however, that TPF has not been opposed, and the focus of this chapter is to identify the level of, and the reasons for, resistance, or alternatively, acceptance, in the regulation and legal policy and scholarly (and media) debate at the EU level and in the selected European jurisdictions.

As to the selected jurisdictions, TPF is most well-established in England and Wales.² It seems to be most resisted in Germany, at least in collective redress. In the EU, it is subject to ongoing debate and

¹ Section 3.4.

² The largest TPF market is found in England and Wales, followed by Germany and the Netherlands. See Jérôme Saulnier, Klaus Müller and Ivan Koronhalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', European Parliament Research Service (March 2021) 8. It was also the most popular European jurisdiction for collective redress actions in 2025, followed by the Netherlands and Germany; CMS, 'European Class Action Report' (CMS, 2024) <https://cms.law/en/int/publication/cms-european-class-action-report-2024?utm_source=lawnwandutm_medium=referralandutm_campaign=Class%Action%Report2024>; Sections 3.4.2-3.4.3. These three jurisdictions lead the way in Europe in terms of developments related to TPF in Europe. See also Sections 1.1 and 3.4.2 - 3.4.5.

discussion as to how it should be regulated. This chapter will analyse the ways through which TPF is resisted, including through legal challenges, through the raising of ethical concerns, restrictive regulation, and through public campaigns and advocacy efforts raising awareness of the potential dangers. An important recurring component of the debate on TPF, and reasons cited for resistance, is the undesirability of having a compensation culture and the possible ethical misgivings about entrepreneurial litigation in Europe, in particular about the commodification or commercialisation of legal claims. These concerns will be scrutinised, and the stage will also be set for the law-and-economics analysis of the resistance in the subsequent chapters. While this chapter focuses mostly on the questions of how and why TPF is resisted, the subsequent chapters will also address the justifiability of the resistance from economic and empirical perspectives.

This chapter therefore starts the discussion on TPF by providing overviews on TPF as a practice and on the sources of resistance and scrutiny in Section 3.2. It then gives a comparative overview of TPF in Section 3.3. Section 3.3.1.1 briefly examines TPF in the US. Entrepreneurial litigation in the US goes further back than in any other jurisdiction, with the rise of contingency fees. Section 3.3.1.2 examines Australia, where TPF's development as an industry in its own right occurred earlier than in other jurisdictions. The regulatory status quo in international commercial arbitration, which mainly revolves around soft law and guidelines to the extent adopted by parties and arbitral tribunals, will then be briefly explored in Section 3.3.2.1. TPF in international investment arbitration is also briefly surveyed in Section 3.3.2.2. These brief overviews will serve to better contextualise the situation in the EU, the Netherlands, Germany and England and Wales, which constitute the focus of this research. The commodification of legal claims aspect will be examined in Section 3.5, and some concluding thoughts will be provided in Section 3.6.

3.2. Third-Party Funding in Europe

3.2.1. Overview

The preceding chapter examined the development, characteristics and limitations of different litigation funding options in Europe, which explains in part the need for, and the rise of TPF in Europe. This section will delve deeper into TPF, by providing a more comprehensive overview of the market, of the way it operates in practice and of the resistance it encounters.

As mentioned in the preceding chapter, TPF constitutes a major development in civil justice. TPF can be broadly defined as an arrangement whereby a third party, who has no other link to a dispute, provides the funding for some or all of a party's litigation costs in return for a share of the proceeds in case of success, or for another form of remuneration. The funding is provided on a non-recourse basis, meaning that if the case is unsuccessful the funder will receive nothing in return for the funding

provided. This non-recourse element sets TPF apart from loans. Bank loans, by contrast, provide the funds on which interest is payable and involves an unconditional obligation to repay both. A meritorious claim against a solvent defendant is viewed by funders as an asset to invest in.³ TPF can also be carried out for motivations other than profit,⁴ but the focus of this research will remain on for-profit TPF. Most third-party funders are privately held entities, but a few, like Burford Capital and Omni Bridgeway, are publicly held companies.

TPF is utilised to support both individual claims and collective actions. The associated industry has expanded rapidly in recent years⁵ especially in common law jurisdictions, including for instance Australia, the US and England and Wales.⁶ So far, the use of TPF has been more limited in the EU. The industry in Europe, which has also been growing at a steady rate, was estimated at around 1 billion Euro in 2019 by one estimate,⁷ and at 1.6 billion Euro in 2022 by another.⁸ It is projected to keep growing rapidly.⁹ By 2025, TPF in Europe was expected to account for nearly 3 billion Euro; 16 percent of a total of 18 billion Euro globally.¹⁰ It is generally expected to play an increasingly important role in the provision of legal services in Europe in the years ahead, with climate change and other global crises potentially giving rise to a significant number of claims.¹¹ Nevertheless, in many other jurisdictions in Europe, TPF has yet to gain a significant foothold and remains relatively underdeveloped.¹²

Professional commercial TPF in Europe is today almost exclusively dedicated to high-value claims, that is, claims with a value which runs into the millions of Euros.¹³ This finding is supported by the empirical research conducted as part of this study.¹⁴ This small number of claims is most often of a commercial nature and involve commercial litigation and international commercial arbitration

³ Jonathan Barnes, 'England' in Steven Friel (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020) 28.

⁴ W. Bradley Wendel, 'Paying the Piper but not Calling the Tune: Litigation Financing and Professional Independence' (2018) 52 (1) *Akron Law Review* 1, 4; Ravi Nayer and Razzaq Ahmed, 'Pro bono, philanthropic, charitable and 'revenge' funding' in Steven Friel (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020).

⁵ Saulnier, Müller and Koronthalyova (n 2) at I; Adrian Cordina, 'Is it all that Fishy? A Critical Review of the Concerns surrounding Third Party Litigation Funding in Europe' (2021) 14 (4) *Erasmus Law Review* 270; 270-272.

⁶ Deminor, 'Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends', (Deminor 2022) <<https://drs.deminor.com/en/litigation-funding-from-a-european-perspective>> accessed 29 August 2024; CMS (n 2); See Saulnier, Müller and Koronthalyova (n 2) 8; Cordina (n 5) 270-272.

⁷ Saulnier, Müller and Koronthalyova (n 2) 3-7.

⁸ Deminor (n 6).

⁹ The EPRS Report projected that the industry will grow at an average annual rate of 8.8% per year in the following 5 years, and that globally, it yields higher returns than other financial investments. Saulnier, Müller and Koronthalyova (n 2) 3-7.

¹⁰ Deminor (n 6).

¹¹ Saulnier, Müller and Koronthalyova (n 2).

¹² European Commission DG Justice and Consumers, 'Mapping Third Party Litigation Funding in the European Union' (2025).

¹³ *Ibid.* 12.

¹⁴ Section 6.3.

proceedings.¹⁵ They can concern matters related to insolvency, shareholder disputes, contract disputes, intellectual property disputes, insurance disputes, tax appeals, and so on. Funders are apprehensive about taking on high-value personal injury or divorce cases involving ‘one-shotters’,¹⁶ perhaps because of negative media coverage,¹⁷ but there are rare instances where such cases have been funded.¹⁸ High-value cases with strong prospects of success against solvent defendants, i.e., ‘heavyweight cases’,¹⁹ are in general the ones which interest funders, as they present opportunities for substantial returns on their investments.

TPF is therefore also commonly used in collective redress frameworks, including SMEs and consumers grouping together to litigate against larger opposition and in the collective enforcement of competition law after SPVs bundle or aggregate claims. Given the prohibitions on contingency fees and the absence of public funding, TPF is often the only funding option available for collective actions for damages in Europe, as evidence in the jurisdictions of the Netherlands and England and Wales has shown.²⁰ There has been a notable increase in collective actions in Europe in recent years.²¹

TPF is also used in international investment arbitration which involves states²² and in the enforcement of judgements or awards after the resolution of claims in cases of refusal of payment.²³ Professional funders have nowadays started to diversify their investment portfolios to include smaller lawsuits,²⁴ and some have provided pro bono funding²⁵ while new funders are also crowdfunding litigation.²⁶ In Europe, unlike the US, consumer TPF, that is, funding to a much larger number of individual non-

¹⁵ John Peysner, ‘Playing the Man not the Ball’, in Willem H. van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 56; European Commission DG Justice and Consumers (n 12) 11-12; Saulnier, Müller and Koronthalyova (n 2).

¹⁶ As opposed to repeat-players. See Marc Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 (1) *Law & Society Review* 95.

¹⁷ Peysner (n 15).

¹⁸ Steven Friel, ‘Introduction’ in Steven Friel (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020). See, *Ahkmedova v Ahkmedov* [2020] EWHC 1526 (Fam) [68].

¹⁹ Peysner (n 15); Cordina (n 5) 271.

²⁰ Xandra Kramer, Ianika Tzankova, Jos Hoevenaars and Karlijn van Doorn, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?* (Eleven 2024) 105-107; Rachael Mulheron, ‘The Funding of the United Kingdom’s Class Action at a Cross-Roads’ (2023) *King’s Law Journal*, (1-27) <<https://www.tandfonline.com/doi/full/10.1080/09615768.2022.2161350>> accessed 13 March 2024.

²¹ CMS (n 2).

²² Maya Steinitz, ‘Third-Party Funding: Investment Arbitration’ (2021) University of Iowa College of Law Legal Studies Research Paper Series; Section 3.3.2.2.

²³ Gianmarco Solas, *Third Party Funding: Law, Economics and Policy* (CUP 2019) 151-152; Omni Bridgeway, for instance, carries out enforcement funding. See Wieger Wielinga, ‘Enforcement Funding and Management of cross-border Claims: Litigation funding on the rise’ (Business Law Magazine, 11 November 2021) <<https://www.deutscheranwaltspiegel.de/businesslaw/enforcement-funding-and-management-of-cross-border-claims-26632/>> accessed 16 October 2024; Saulnier, Müller and Koronthalyova (n 2).

²⁴ Ianika N. Tzankova and Xandra E. Kramer, ‘From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands’ in A Uzelac and S. Voet (Eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 97; European Commission DG Justice and Consumers (n 12) 646-648.

²⁵ For instance, England and Wales funder Therium has provided funding pro bono; Jane Croft, ‘Therium sets up pro bono scheme to tackle legal aid gaps’ *Financial Times* (11 March 2019) <<https://www.ft.com/content/72a099a2-41b1-11e9-9bee-efab61506f44>> accessed 16 October 2024.

²⁶ Saulnier, Müller and Koronthalyova (n 2) 8.

sophisticated claimants with lower value matters, many of whom have little or no prior litigation experience, is not widespread.²⁷

Despite its growth, TPF still seems to only form a very small market share of the whole litigation market. For example, in Germany, a 2007 study showed that between 0.2%-0.8% of litigation was funded by third-party litigation funders as opposed to 35% by way of BTE LEI.²⁸ According to more recent research carried out by EPRS and by litigation funder Deminor in 2021 and 2022 respectively, TPF does not represent more than 0.8% of the legal services market in Europe.²⁹ More quantitative research on the share of litigation funded by different funding means is needed in order to better understand TPF's role in civil justice. The growth of the TPF market in recent years has been considerable, however all indications point to a situation where the share of other means of funding still dwarf that of TPF.³⁰

TPF is available for, and has historically been viewed as enabling access to justice, to the impecunious, and to insolvent companies and small companies who would not be able to pursue valid claims otherwise.³¹ It is nowadays, however, often and to a large extent, used by well-resourced companies as a balance sheet strengthening exercise, using the saved financial resources on other areas of their enterprise instead.³²

The vast majority of funding is provided to claimants, since funders can obtain a share of the recovery in case of success, which is not the case with defendants, unless counterclaims are involved. Furthermore, third-party funders also engage in portfolio funding, which is becoming more common, especially in common law jurisdictions, but still seems to be quite rare in continental Europe.³³ Hereby, funders finance a bundle of claims from a specific client, which can include lower value ones, but the risk of loss is spread over the whole bundle. Through portfolio funding, they can include also the funding of defending against claims or the funding of non-monetary cases.

²⁷ Ronen Avraham and Anthony Sebok, 'An Empirical Investigation of Third Party Consumer Litigant funding' (2019) 104 *Cornell Law Review* 1133, 1135; Cordina (n 5) 271; Section 1.4.

²⁸ Ilja Tillema, 'Entrepreneurial Mass Litigation: Balancing the Building Blocks' (Doctoral thesis at Erasmus University Rotterdam 2019) 102.

²⁹ Saulnier, Müller and Koronthalyova (n 2) 5; Deminor (n 6).

³⁰ Including in England and Wales. Peysner (n 15) 72.

³¹ Victoria Shannon Sahani, 'Rethinking the Impact of Third-party Funding on Access to Civil Justice' (2020) 69(2) *DePaul Law Review* 611, 617-8.

³² Beibei Zhang, 'Third Party Funding for Dispute Resolution: a Comparative Study of England, Hong Kong, Singapore, the Netherlands and Mainland China' (DPhil thesis, University of Groningen 2019) 16; Solas (n 23); International Council for Commercial Arbitration (ICCA), 'Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration, (ICCA reports series, no. 4, 2018) 21.

³³ Maya Steinitz, 'The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm' (2022) 63(3) *William & Mary Law Review* 939, 978; Solas (n 23) 141-142.

Being mostly unavailable to defendants, TPF has sometimes been criticised as leading to an unfair advantage for plaintiffs over defendants.³⁴ From an economic perspective, it would eventually lead to frivolous litigation, over-deterrence of economic activity, undersupply of products and reductions in social welfare.³⁵ However, this criticism is dulled by the fact that other funding sources, such as liability insurance, are available to defendants.³⁶ More importantly, as touched upon in various points of this research, what alternative funding sources appear to do is remove obstacles to accessing civil justice and level the playing field for claimants and plaintiffs who would otherwise be ‘systematically outgunned’ by defendants.³⁷

Funding portfolios of cases has been deemed by Steinitz to be ‘economically functionally equivalent, or at least a very close approximation, to outright investment in a law firm’, and that these investments in law firms will likely outgrow the funding of single cases.³⁸

Funders report that their returns are driven by judicial activity and are less correlated to market conditions or economic activity than other forms of investments.³⁹ However, unfavourable economic conditions would probably lead to more demand for litigation funders, as they ‘tend to generate business when companies face increased liquidity challenges and other forms of uncertainty’.⁴⁰

3.2.2. Operational Practice

This section comments on the practices and operations of commercial third-party funders, with the goal of providing insights into their business methods and strategies. With regard to this topic, commercial third-party funders have been known to ‘operate in relative anonymity in small markets’.⁴¹ They do not make their rates available to the public, ‘do not report the details of their business practices to their shareholders (if they are publicly traded), and fight to protect the details of their contracts and contract negotiations from adverse parties in discovery’.⁴²

³⁴ Alexander Bruns, ‘Third-party financing in the Perspective of German Law: Useful Instrument for Improvement of the Civil Justice System or Speculative Immoral Investment?’ (2012) 8 (3) *Journal of Law, Economics and Policy* 525.

³⁵ Franziska Weber, ‘Towards an Optimal Mix of Public and Private Enforcement in Consumer Law’ (EDLE Doctoral Thesis 2012) 86; see also Section 4.2.1 for more on the question of deterrence from an economic perspective.

³⁶ Section 2.3.3.1; Jef de Mot, Ben Depoorter and Michael Faure, ‘The Multiplication Effect of Legal Insurance’ (2016) 13(1) *NYU Journal of Law & Business* 1; Gerhard Wagner, ‘Tort law and liability insurance’ in Michael Faure (ed), *Tort Law and Economics, Encyclopaedia of Law and Economics*, Second Edition (Edward Elgar 2009) 377, 379.

³⁷ Stephen C. Yeazell, ‘Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial’ (2004) 1(3) *Journal of Empirical Legal Studies* 943, 954-955. See also, Silver (n 52).

³⁸ Steinitz (n 33) 943.

³⁹ Burford Capital Annual Report 2021; Cento Veljanovski, ‘Third-Party Litigation Funding in Europe’ (2012) 8 (3) *Journal of Law, Economics and Policy* 405.

⁴⁰ *Ibid.*

⁴¹ Willem H. van Boom, ‘Third-Party Financing in International Investment Arbitration’ (2011) <<https://ssrn.com/abstract=2027114>> accessed 4 October 2024, 30.

⁴² Avraham and Sebok (n 27) 1135; see also, Catherine Rogers, *Ethics in International Arbitration*, 1st edn (OUP 2014) 183.

However, there is today increased awareness of these practices, partly due to recent empirical research with funders and other stakeholders in third-party funded litigation.⁴³ Section 6.3. of this research entitled ‘The TPF Market and Business Model’ contains the findings of this author’s empirical research on this question. Increased case law on TPF and sources like Annual Reports from publicly traded funders like Burford Capital can also reveal more details on the dispute funding process.⁴⁴

It is worth noting that while generalising comments can be made, funders’ operational practices can differ across funding firms, branches, jurisdictions and markets. Nevertheless, examining these practices is essential as this can provide insights into the incentives, risk management strategies, and decision-making processes that shape third-party funders’ operations.

TPF is largely provided, either directly to corporate claimants, or directly to law firms (in common law jurisdictions). Lawyers and claimants could also choose to seek funding through a specialist broker who advises on potential funding options.⁴⁵ Some law firms hold limited funding capabilities when compared to large litigation funders. Funders can provide a steady stream of funding by way of paying for the claimant law firm’s cases’ hourly fees. With TPF, even when law firms operate through contingency fees, they would still be able to pay the salaries of their lawyers. As to commercial claimants and businesses, TPF allows them to hire law firms that generally work on an hourly fee basis.⁴⁶

In terms of collective redress funding, it appears that the identification and initiation of a potential collective action may come from any of the parties involved. It may come from the claimants, from the law firm or from the funder.⁴⁷ The parties may then proceed to ‘book building’, that is seeking out the group members to become part of the collective action, and to enter into a litigation funding agreement with the funder. This may involve marketing and publicity efforts, and the provision of information on the costs and benefits of participating in the third-party funded collective action. This can be of particular importance in the case of competing collective actions on the same matter. Having a large number of participants in the collective is in the interest of the funder as this would entail a

⁴³ See ICCA (n 32) 24-33; Kramer and others (n 20); Rachael Mulheron, ‘A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study. A Report for Submission to the Legal Services Board’ (Legal Services Board 2024); European Commission DG Justice and Consumers (n 12).

⁴⁴ Despite being mainly active in common law jurisdictions, Burford Capital is the largest funder worldwide and one of the few publicly listed funders. In 2021, it worked with most of the largest global law firms. The Annual Reports provide publicly available data on their investments, with very useful insights on contemporary funding operations which may shed light on industry-wide practices, including those in Europe. On TPF case law, see Sections 3.4.2 - 3.4.4.

⁴⁵ ICCA (n 32) 22-23. An example of such a broker in the Netherlands is Claimshare. See website: Claimshare, <<https://www.claimshare.com/>> accessed 3 October 2024.

⁴⁶ Burford Capital (n 39).

⁴⁷ Simone Degeling and Michael Legg, ‘Undue Influence, Litigation Funding and Book Building in Group Proceedings’ (2023) 42 (3) *Civil Justice Quarterly* 247; Kramer and others (n 20) 101-103.

larger claim value and decreasing average cost per claimant due to economies of scale.⁴⁸ Some codes of conduct stipulate that funders should ensure that independent advice on the litigation funding agreement is given to claimants prior to its execution.⁴⁹

As to funding agreements, a wide range of funding structures are used and the returns to funders can take different forms. For instance, in a simple individual litigation funding agreement, some or all of the costs of a claim is funded and the typical funding structure provides that, upon conclusion of a successful claim, the funder would receive the return of the funded capital, in addition to a multiple of the funded costs and/or an entitlement to a percentage of the proceeds that may increase or decrease over time and/or depending on the size of the judgement or award. The terms of each funding agreement can vary with each case;

The larger or more complex a matter, the more likely an individually designed transactional structure is used to fit the needs of the matter and to accommodate what are often multiple parties with different economic interests and to align interests and incentivise rational economic behaviour.⁵⁰

As corroborated also by respondents in the empirical research undertaken in this study, when funders receive funding requests, a thorough assessment on the value, merits, time of resolution, enforceability of the claim and quality of legal counsel is conducted.⁵¹ Only around four to five percent of the cases are accepted for funding, according to ILFA.⁵² The most important criterion for funding remains the value of the claim.⁵³ Litigation funders in Europe usually obtain between twenty and fifty percent of the proceeds.⁵⁴ This depends on the specifics of the claim; for instance, the higher the value of the claim, the lower the percentage needed for the funder to cover its costs. Some funders operate under the ‘rule of ten’, which means that funders will only provide funding for claims whose estimated value is at least ten times the amount of the costs of pursuing it.⁵⁵ This ensures that the claimants receive the majority of the proceeds. By giving them a higher stake in the outcome, claimants are also

⁴⁸ Degeling and Legg (n 47); Louis Visscher and Michael Faure, ‘Mass Harm from a Law and Economics Perspective – The Case for Collective Action’ in Tomas Arons and Rianka Rijnhout (Eds) *Mass Harm in Europe: Compensation and Civil Procedures* (Intersentia, 2023); Section 4.4.2.

⁴⁹ Degeling and Legg (n 47); ALF Code of Conduct for Litigation Funders Article 9.1; Sections 3.4.1.2 and 3.4.4.1.

⁵⁰ Burford Capital (n 39) 17.

⁵¹ Mulheron (n 43) 34-35; Section 6.3.

⁵² Ibid. See also International Legal Finance Association (ILFA) submits letter to the European Commission on Voss Report’s proposal to impose overburdensome regulation (ILFA, 7 March 2022) <<https://www.ilfa.com/news>> accessed 13 March 2024.

⁵³ ICCA (n 32) 25-26.

⁵⁴ European Commission DG Justice and Consumers (n 1) 12, 650-651; Saulnier, Müller and Koronthalyova (n 2) 22; Mulheron (n 43) 107; Veljanovski (n 39) 424.

⁵⁵ Tom Baker, ‘What Litigation Funders Can Learn About Settlement Rights from the Law of Liability Insurance’ (2023). Theoretical Inquiries of Law, Forthcoming, University of Pennsylvania, Institute for Law and Economics Research Paper No. 23-41, Available at SSRN: <https://ssrn.com/abstract=4638617>; European Commission DG Justice and Consumers (n 1) 12, 647; Section 6.3.

more likely to bring strong cases and participate effectively in the litigation, aligning their incentives with those of the funders.⁵⁶

Thereafter, through the funders' internal portfolio management processes with in-house legal professionals, the developments of funded cases are monitored. Regular contact is maintained with claimants in this regard and risk and value assessments are conducted regularly. In addition to receiving reports from the lawyers, funders keep themselves informed, including through reviewing court documents.⁵⁷ It could well be the case that claimants regard this oversight and involvement by the funder positively 'in terms of budget management and legal, strategic, or technical expertise, beyond the mere provision of capital.'⁵⁸

It is useful to distinguish at this juncture between passive and active funding. With passive funding, the control and management of the case is left to the claimants and their lawyers. With active funding, the funder involves itself more in the control and the management. The funder could even have the claim assigned to it, and thereby acquire complete control, employing the assignment of claims model examined in the previous chapter.⁵⁹ Typically, TPF agreements are carefully drafted to avoid funder control but some sort of influence or voice is reserved to the funder, for example in settlement decisions.⁶⁰ This level of control and management also depends on the regulatory frameworks or the potential of cost sanctions in the event the funded claim does not succeed after trial.⁶¹

The funded claims can resolve in various ways; they can be resolved through a negotiated settlement between the litigants, either before or after going to trial. Some cases do not end amicably and go all the way through the formal dispute resolution process, including appeal(s). The duration of a funded case depends on its complexity and the schedule of the relevant tribunal.⁶² In a small number of matters, funders make a secondary sale of all or a portion of the funded claim prior to its resolution.⁶³ Funding is usually provided in tranches or stages, and the funder and the claimant can agree between themselves to terminate the funding of a claim in case the prospects of recovery turn to the worse. The funder can also retain the right to refuse funding of subsequent rounds and the claimant could seek other sources of funding.⁶⁴ With respect to the desirability of termination rights for funders, Steinitz and Field assert with respect to commercial claims that;

⁵⁶ Ibid. For the economics of alignment of interests, see Chapter 4. On the 'rule of ten' see also Section 6.3.

⁵⁷ *Burford Capital* (n 39).

⁵⁸ *ICCA* (n 32) 28.

⁵⁹ *Veljanovski* (n 39) 408; *Solas* (n 23) 138-148; Section 2.3.5.

⁶⁰ *ICCA* (n 32) 28; Section 6.4.2; European Commission DG Justice and Consumers (n 12) 12.

⁶¹ For instance, the RAD restricts the influence a funder can have on a consumer collective redress case in the EU. In England and Wales, a judgement did not apply the *Arkin Cap* and held a funder responsible for third-party costs due to its 'massive' control over the proceedings in question. *Laser Trust v. CFL Finance Ltd* [2021] EWHC 1404 (Ch) 21 May 2021. www.bailii.org/ew/cases/EWHC/Ch/2021/1404.html; *Cordina* (n 5) 277.

⁶² *Burford Capital* (n 39).

⁶³ Ibid.

⁶⁴ Maya Steinitz, 'The Litigation Finance Contract' (2012) 54(2) *William & Mary Law Review* 455, 473.

Commercial claims are generally only about money. When a case is fundamentally about money damages, it is easiest to view it as an investment opportunity that can be abandoned for better opportunities. Other forms of litigation that currently receive financing, such as divorce cases, involve many issues beyond money, particularly when the couple has children. Staged funding of such litigation, with its ability to eliminate a plaintiff's ability to continue its claim, is hard to justify normatively.⁶⁵

Other types of non-commercial cases where termination is hard to justify can include mass torts where significant personal harm is done to the victims.⁶⁶

At the resolution of the legal dispute, successful funded claimants are compensated their share. Sometimes, when the losing party refuses to pay, further enforcement funding may be needed. Today, many funders offer enforcement services and have in-house asset-tracing to assist in this regard.⁶⁷

This section offered a comprehensive overview on how TPF operates in practice, making use of the available data. Other research, including the EC's mapping study and England and Wales' Civil Justice Commission (CJC)'s review of the industry, both published in 2025, provide further insights into these practices.⁶⁸ As is evident from this section, some generalising statements can already be made on the funders' dispute funding process. Funders are highly selective of the cases they take on, funding only very small percentages of the cases presented to them. Only claims with a high estimated value and strong prospects of succeeding are funded. This makes the likelihood of a proliferation of frivolous litigation, which do not yield any deterrence or access to justice benefits, due to TPF, highly improbable. Funders also have economic interests not to fund weak claims, as will be explored in more detail in Chapter 4. Moreover, TPF does not feature in the individual consumer sector in Europe and as such, should not be regarded as a practice which could potentially be exploitative to consumers in individual litigation.⁶⁹ Funded parties are usually sophisticated repeat-players, who stand to benefit from the additional strategic expertise funders may bring to the litigation. Termination rights may however lead to meritorious cases being discontinued prematurely, raising potential access to justice issues.⁷⁰

⁶⁵ Maya Steinitz and Abigail C. Field, 'A Model Litigation Finance Contract' (2014) 99(2) *Iowa Law Review* 711, 743.

⁶⁶ On termination rights, see also Section 6.4.2.

⁶⁷ ICCA (n 32) 41-42; Solas (n 23) 151-152; See also note 23.

⁶⁸ European Commission DG Justice and Consumers (n 12); Section 3.4.4.3.

⁶⁹ See Chapter 4 for the economic analysis of information asymmetries between claimants, lawyers and funders and of the resistance to TPF in general.

⁷⁰ See also Section 6.4.2.

3.2.3. Sources of Resistance

As pointed out, TPF has been heavily resisted throughout the years, and the resistance has persisted, albeit to an increasingly lesser degree, in recent years. This section starts to outline some of the main sources from which resistance originates, which is essential for the purposes of this research. Sections 3.3 to 3.5 continue this exploration, by examining how this resistance is reflected in European regulatory frameworks and debate, including through the relevant restrictions and cultural legal traditions.

In terms of individual litigation, a longstanding and self-evident source of resistance in common law jurisdictions can be found in the traditional common law doctrines forbidding maintenance and champerty. Maintenance simply refers to the act of assisting another to bring a claim, and the related doctrine no longer has any practical effect in England and Wales. Champerty, on the other hand, refers to the ‘division of the spoils’ following the litigation, and while the doctrine has been greatly narrowed in scope, it can still be of relevance in constraining certain forms of litigation funding in the jurisdiction.⁷¹ As will be shown in the next sections, civil law jurisdictions do not have an equivalent to these doctrines, apart from the prohibitions of contingency fee agreements and assignments of claims. Nowadays, TPF in individual litigation in Europe, which does not involve the consumer sector, attracts far less resistance than TPF in collective litigation.

With regard to the collective redress context, in the last couple of decades, the most stringent opposition, or calls for restrictive regulation of TPF, has been of a political nature, rather than driven by legal doctrines. It has mostly been emanating from the business sector, an observation which is supported by this study’s empirical research.⁷² The most notable and prominent figurehead of this form of resistance has been the US Chamber of Commerce, with its affiliates, the ‘Institute for Legal Reform’, and the now defunct ‘Justice Not Profit Organisation’.⁷³ The Chamber is the world’s largest business organisation representing the interests of more than three million businesses, but funded mostly by multinational corporations.⁷⁴ With a lobbying expenditure of \$70 million in 2023, it ranks among the largest lobbying organisations by expenditure.⁷⁵ Back when commercial TPF started to establish a foothold the US in 2009, the Institute for Legal Reform published ‘Selling Lawsuits, Buying

⁷¹ Rachael Mulheron, *The Modern Doctrines of Maintenance and Champerty* (OUP 2023) 4.

⁷² Section 6.5.

⁷³ See amongst others, Deborah R. Hensler, ‘Foreword’ in Brian Fitzpatrick and Randall Thomas (Eds), *The Cambridge Handbook of Class Actions* (CUP 2021) xix; Steinitz (n 56) 1078; Deborah R. Hensler, ‘Third-party Financing of Class Action Litigation in the United States: Will the Sky Fall?’ (2014) 63 (2) *DePaul Law Review* 499; Peysner (n 15); W. Bradley Wendel, ‘Alternative Litigation Finance and Anti-commodification Norms’ (2014) 63 (2) *DePaul Law Review* 655.

⁷⁴ Karl Evers Hillstrom, ‘US Chamber mostly funded by small pool of big donors: study’ (The Hill, 26 April 2023) <<https://thehill.com/lobbying/3973039-us-chamber-mostly-funded-by-small-pool-of-big-donors-study/>> accessed 13 March 2024; See also Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Second Edition, HUP 1971), 143-147 and Peysner (n 15) 56.

⁷⁵ Statista, ‘Leading lobbying spenders in the United States in 2023’ (Statista Research Department, 26 February, 2024) <<https://www.statista.com/statistics/257344/top-lobbying-spenders-in-the-us/>> accessed 13 March 2024.

Trouble: Third-Party Litigation Funding in the US'.⁷⁶ As its title suggests, the paper concluded that TPF would lead to an increase in the volume of litigation and in the number of frivolous claims and advocated for its general prohibition or, at least, its restriction in class actions.⁷⁷ This position was reiterated in an updated report in 2020.⁷⁸ Additionally, in a 2012 paper, it proposed the establishment of a new federal agency to regulate TPF.⁷⁹ Concerns expressed in a 2019 report on Europe included the over-commodification of legal claims, control over the litigation process and risks of frivolous litigation and measures such as the imposition of caps and licensing requirements were recommended.⁸⁰ The Chamber and the European business community's efforts are also targeted at individual European jurisdictions. This was evident in the process leading up to the development of funding rules in the EU's RAD,⁸¹ and in England and Wales' collective redress system.⁸² It was also further demonstrated during the implementation of the 'WAMCA' regime in the Netherlands, which enabled collective actions for damages,⁸³ and through the establishment of a new campaign group called 'Fair Civil Justice' in the UK, which published its own report on TPF in the jurisdiction in 2024.⁸⁴ European-wide and national business groups are also active in publishing selective information on

⁷⁶ Peysner (n 15) 56.

⁷⁷ Ibid.

⁷⁸ US Chamber of Commerce Institute for Legal Reform, 'Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding: A Decade Later' (Institute for Legal Reform, 27 January 2020) <<https://instituteforlegalreform.com/research/selling-more-lawsuits-buying-more-trouble-third-party-litigation-funding-a-decade-later/>> accessed 29 August 2024.

⁷⁹ US Chamber of Commerce Institute for Legal Reform, 'Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation' (Institute for Legal Reform, 24 October 2012) <<https://instituteforlegalreform.com/research/stopping-the-sale-on-lawsuits-a-proposal-to-regulate-third-party-investments-in-litigation/>> accessed 13 March 2024.

⁸⁰ US Chamber of Commerce Institute for Legal Reform, 'Uncharted Waters: Analysis of TPLF in European Collective Redress' (Institute for Legal Reform, 15 October 2019) <<https://instituteforlegalreform.com/research/uncharted-waters-analysis-of-tplf-in-european-collective-redress/>> accessed 29 August 2024; See also Cordina(n 5).

⁸¹ Alexandre Biard and Xandra E. Kramer, 'The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity?' (2019) 27 Zeitschrift Für Europäisches Privatrecht Zeup 249.

⁸² Peysner (n 15); Owen Bowcott, 'US Chamber of Commerce Lobbies Against Class Actions in UK Courts' (The Guardian, 25 July 2015) <<https://www.theguardian.com/business/2015/jul/15/us-chamber-commerce-lobbies-against-class-actions-uk-courts>> accessed 9 September 2024.

⁸³ Alexandre Biard, Xandra Kramer and Ilja Tillema, 'Dutch collective redress dangerous? A call for a more nuanced approach' (Conflict of Laws, 3 October 2017) <<http://conflictoflaws.net/2017/dutch-collective-redress-dangerous-a-call-for-a-more-nuanced-approach/>> accessed 13 March 2024.

⁸⁴ Fair Civil Justice, 'Establishing Fairness In Litigation Funding' (Fair Civil Justice, 4 June 2024) <https://fairciviljustice.org/wp-content/uploads/2024/12/1452C_TPLF_4_RGB_Pages.pdf> accessed 7 June 2024. Fair Civil Justice has been particularly active in the UK's TPF debate since its establishment.

TPF.⁸⁵ Similar patterns have also been observed in Australia.⁸⁶ This lobbying has also attracted the attention of scholars.⁸⁷

These efforts, through lobbying and court action, can be framed as a continuation of the 1970s, 80s and 90s' 'profound reaction' against the significant expansion of access to justice and of remedies and protections in the previous decades in the US.⁸⁸ This reaction gave rise to the 'tort reform' movement which was generally 'based on the theory of a litigation explosion in the United States that negatively impacted corporations, the ability of businesses to compete in the international arena, and the economic welfare of the country generally.'⁸⁹

American and European businesses and multinational corporations were not the only group who opposed US style class actions and their funding in Europe; till the mid-1990s, continental traditionalist scholars and policymakers viewed class actions as unnecessary, given, amongst other reasons, the traditional regulatory European state with strong public enforcement regimes and the perceived excesses of class actions and litigation culture in the US.⁹⁰ This distaste persists in Europe in a diluted form to this day. Mass claims in Europe are labelled as 'collective redress' rather than as 'class actions' and, unlike the US, usually involve a strong role for representative entities with consumer protection as their main purpose.⁹¹ As discussed previously, similar antipathy has frequently been expressed in Europe towards contingency fee agreements.⁹²

⁸⁵ European Justice Forum, EJF Position Paper on Third Party Litigation Funding (European Justice Forum, January 2022) <<https://europeanjusticeforum.org/topics/third-party-litigation-funding/>> accessed 26 March 2024; Business Europe, 'Joint Statement on Responsible Private Funding of Litigation June 2022' (Business Europe, 22 June 2022) <<https://www.buinessurope.eu/publications/responsible-private-funding-litigation-joint-business-statement> > accessed 26 March 2024; British Chamber of Commerce, 'BCC Supporting 'Fair Civil Justice' Campaign' (British Chamber of Commerce, 11 December 2023) <<https://www.britishchambers.org.uk/news/2023/12/bcc-supporting-fair-civiljustice-campaign/>> accessed 26 March 2024; Reactie VNO-NCW en MKB-Nederland op de consultatie over het ontwerp Wetsvoorstel Afwikkeling massaschade in een collectieve actie (Overheid.nl, 24 October 2014) <<https://www.internetconsultatie.nl/motiedijksma/reacties> > accessed 26 March 2024; Deutsche Industrie- und Handelskammer (DIHK), 'German companies' demands for the trilogue negotiations on the "Directive on representative actions for the protection of the collective interests of consumers" (DIHK, January 2020) <<https://www.dihk.de/resource/blob/17370/0439cf89c9a01cc492a72972ccdcfe3c/verbaende-trilogverhandlungen-sammelklagen-englisch-data.pdf>> accessed 9 September 2024.

⁸⁶ US Chamber of Commerce Institute for Legal Reform, 'Third Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy' (Institute for Legal Reform, 2013) <<https://instituteforlegalreform.com/research/third-party-litigation-financing-in-australia-class-actions-conflicts-and-controversy/>> accessed 9 September 2024.

⁸⁷ See e.g. Deborah R. Hensler, 'So You Are Thinking About Adopting a Class Action Regime? Lessons from the US' (2023) 42 (1) Civil Justice Quarterly 3, 4; Wendel (n 73); Peysner (n 15).

⁸⁸ Marc Galanter, 'A World Without Trials?' (2006) Journal of Dispute Resolution 7, 19. See also, Hazel Genn, Judging Civil Justice (CUP, 2009) 30-31; Charles C. Silver and David A. Hyman, 'Third Party Litigation Funding: Panacea or More Problems?' (2023) SSRN Working Paper Series <<https://ssrn.com/abstract=4438503>> accessed 3 October 2024.

⁸⁹ Linda S. Mullenix, 'For the Defence: 28 Shadows of European Class Actions' in Alan Uzelac and Stefaan Voet (Eds) Class Actions in Europe: Holy Grail or a Wrong Trail? (Springer, 2021) 48; Sections 3.3.1.1 and 4.2.1.

⁹⁰ Mullenix (n 89) 44; Roger van den Bergh 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 20 (1) Maastricht Journal of European and Comparative Law 12,13; On these US and European perceptions see also Section 3.3.1.1 and 3.4.1.1.

⁹¹ On the RAD system see Section 3.4.1.1. See also 3.4.2 to 3.4.4.

⁹² Section 2.3.4.

There is also regular negative political and media activity in the US with respect to the consumer TPF industry. Although in Europe, individual consumer TPF is virtually inexistent, negative publicity about that industry may affect the public perception of the commercial TPF industry and could lead to overly stringent regulation of litigation funding in general. The US consumer TPF sector has raised concerns about predatory practices. It has been considered as comparable to payday lending; a form of high-cost, short-term credit and has led to a tarnished reputation of the consumer TPF industry.⁹³ This could have also contributed to the slower growth of the commercial TPF industry in the US, when compared to other jurisdictions.⁹⁴

With regard to US consumer TPF, an empirical study found that consumer TPF agreements are often unnecessarily ‘complex and opaque’, which may cause less sophisticated consumers to underestimate the future costs involved. However, the amount ultimately paid to funders at the conclusion of disputes was lower than both the contractual terms and the figures speculated in the media. The authors suggest that renegotiations occur because consumers are surprised at the unexpectedly high payments required.⁹⁵

It is important to note that this funding model takes the form of loans and the repayment is based on a monthly or annual interest charge. The ultimate payment owed to the funder is determined by the interest rate and the length of time for the resolution of the litigation,⁹⁶ rather than based on the contingency of success of the claim, as it would be in commercial TPF. There are indications of an emerging market for ‘litigation loans’ in the UK, which operate on a similar basis, but these are repayable whether or not the claim is successful.⁹⁷

Another relevant development, which is also distinct from TPF, emerged in the UK from the 1990s onwards in the form of ‘claims management companies’ (CMCs). These companies actively sought personal injury claims through advertising and through directly contacting victims and then referring these claims to solicitors for a fee. The fee could take the form of a lump sum or a percentage of the proceeds following litigation. CMCs generated considerable negative publicity and contributed to the perception of a compensation culture, despite the available data suggesting that there was no increase in frivolous claims or in the overall volume of litigation during those years.⁹⁸ By 2016, financial

⁹³ Paige Marta Skiba and Jean Xiao, ‘Consumer Litigation Funding: Just Another Form of Payday Lending? (Consumer Credit in America: Past, Present, and Future)’ (2017) 80 (3) *Law and Contemporary Problems* 117, at 117; See also, Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (2nd Edition, Wolter Kluwer 2017) 135; Avraham and Sebok (n 27) 1139; Burford Capital (n 39); Section 1.4.

⁹⁴ Nieuwveld and Sahani (n 93) 135.

⁹⁵ Avraham and Sebok (n 27) 1172-1176; Cordina (n 5) 277.

⁹⁶ Avraham and Sebok (n 27) 1135.

⁹⁷ Mulheron (n 71) 42-43.

⁹⁸ Richard Lewis and Annette Morris, ‘Tort Law Culture: Image and Reality’ (2012) 39 (4) *Journal of Law and Society* 562, 580-581.

services claims, rather than personal injury claims, became the main source of business for these companies. Today, they are regulated by the Financial Conduct Authority.⁹⁹

Many acknowledge that specific regulation to protect more vulnerable claimants may become necessary should TPF become more broadly and directly available to consumers in Europe.¹⁰⁰ The main focus of this research will remain on commercial TPF given the current lack of consumer TPF in Europe, and the lack of indications that TPF will expand into this sector.¹⁰¹

Chapter 5 contains a more thorough economic analysis of the interest group landscape in litigation funding. It includes more references to public information campaigns on TPF by other types of interest groups besides business groups. This includes advocacy in favour of TPF and for the liberalisation of the legal services market, as well as calls for more restrictive regulation from other sources. The next section offers a comparative overview of the different regulatory approaches adopted with respect to TPF in select jurisdictions.

3.3. Tracing the Origins and Global Evolution of TPF

TPF has become a global phenomenon in recent times, but its roots as a modern industry can be traced back to common law litigation in jurisdictions like Australia, England and Wales and the US, as well as in international arbitration. Eventually, litigation in civil law jurisdictions also started to make use of TPF. TPF as a funding method can be considered to be inspired by and to have evolved from earlier litigation funding models, particularly contingency fee arrangements.¹⁰² TPF in the US and Australia and in international commercial and investment arbitration will be examined in the following sections. This analysis will serve to provide a wider context and useful points of comparison with how it is regulated and perceived in domestic and cross-border litigation in Europe.

3.3.1. United States

Entrepreneurial litigation and result-based agreements originated in the US with the rise of contingency fees. Despite the widespread use of contingency fees, the US today is also home to the largest TPF market in the world, by a wide margin.¹⁰³ However, commercial TPF can be said to still be relatively new in the US when compared to the level of sophistication the industry has reached in

⁹⁹ Mulheron (n 71) 33-34.

¹⁰⁰ Willem H. van Boom, 'Litigation Costs and Third-party Funding', in Willem van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 26; Peysner (n 15); Cordina (n 5) 277.

¹⁰¹ Including in England and Wales; Peysner (n 15) 72.

¹⁰² Section 2.3.4.

¹⁰³ Deminor (n 6).

Australia and the UK.¹⁰⁴ Apart from the widespread use of contingency fees, this slower growth can also, to a lesser degree, be attributed to the prohibition of fee sharing by lawyers with non-lawyers. This prohibition is nowadays no longer de facto relevant, or its effect has been greatly diminished, at least as far as litigation funding goes.¹⁰⁵ As has been described in the previous section, the US market for individual consumer TPF, such as personal injury claims and other small claims, is much older and does not have an equivalent in Europe.¹⁰⁶

In terms of the American civil justice system as a whole, there is a largely misguided, or as Galanter called it, ‘jaundiced’,¹⁰⁷ popular perception around the world, which was already alluded to in Section 3.2.3. This view is fuelled by so-called ‘tort reform’ initiatives spearheaded by the business community and the media which sometimes sensationalises isolated cases.¹⁰⁸ The perception is that the US is replete with frivolous litigation and is very much a compensation culture with claimants being awarded enormous and undeserved amounts of damages, when compared to Europe.¹⁰⁹ This image can indeed be influenced by characteristics of the US legal system including the presence of contingency fees, punitive damages, class actions, civil juries, the American rule on each party paying its own litigation costs regardless of the outcome, a stronger culture of individualism rather than collectivism and a stronger reliance on private enforcement through adversarial legalism rather than on public enforcement and government intervention.¹¹⁰

While this may be correct, the reality also is that the degree of these differences is very limited and definitely not as excessive as is often believed, and the portrayal of the US as a cesspit of frivolous litigation is certainly untrue.¹¹¹ This is especially relevant as a major and oft-repeated concern for Europeans when it comes to introducing TPF and other result-based arrangements, as is seen throughout in this research, is exactly the fear of bringing this inexistent US style compensation culture home. TPF will presumably lead to countless unscrupulous plaintiffs (ab)using the legal system to make quick money by suing companies and professionals. The same argumentation has been used against punitive damages and class actions, or for that matter, anything which facilitates litigation against members of more strongly organised groups.¹¹² In fact, the opposite holds, ‘the available evidence overwhelmingly refutes these assertions’.¹¹³ TPF is another civil justice

¹⁰⁴ Nieuwveld and Sahani (n 93) 130.

¹⁰⁵ Model Rules of Professional Conduct, American Bar Association (2018). See also Steinitz (n 33) 943, 976.

¹⁰⁶ Nieuwveld and Sahani (n 93) at 120.

¹⁰⁷ Marc Galanter, ‘Oil Strike in Hell: Contemporary Legends about the Civil Justice System’ (1998) 40 *Arizona Law Review* 717, 717.

¹⁰⁸ A well-known example is the ‘McDonalds coffee case’, which generated significant controversy at the time.

¹⁰⁹ Renée Charlotte Meurkens, ‘Punitive Damages, The Civil Remedy in American Law, Lessons and Caveats for Continental Europe’ (Doctoral Thesis, Maastricht University 2014) 23-25.

¹¹⁰ *Ibid.*

¹¹¹ Galanter (n 88); Galanter (n 107), Genn (n 88); Meurkens (n 109); Hensler (n 87).

¹¹² Meurkens (n 109). Examples are corporations and medical professionals. On the interest group landscape see Chapter 5 and Section 3.2.3.

¹¹³ Marc Galanter, ‘The Hundred-Year Decline of Trials and the Thirty Years War’ (2005) 57 *Stanford Law Review* 1255, 1269-70.

development that is resisted by corporate sponsored think tanks on the basis of the creation of a compensation culture.¹¹⁴

Studies have shown that very small percentages of Americans pursue legitimate legal claims against tortfeasors, including in the area of medical malpractice.¹¹⁵ The overall volume of litigation has also been declining.¹¹⁶ While it may be argued that probably even fewer Europeans pursue legitimate claims, the current American situation appears to be far from a compensation culture.

Currently, the US regulatory framework relevant to TPF can vary widely depending on the state in question, and its statute, common law and professional codes. The legal framework includes laws and principles which were in place before the rapid growth of the current litigation funding industry in the US. These include the common law doctrines of maintenance, champerty and barratry which existed during colonial times and may have potential application to litigation funding arrangements. A patchwork of recently enacted laws and rules may be applicable depending on the jurisdiction. Additionally, while there has been interest in regulating issues surrounding TPF at the federal level, no such harmonisation has been successful to date.¹¹⁷

For the purposes of this research, it is particularly relevant that commercial TPF is treated very differently from consumer TPF in the US. Courts recognise that the bargaining power of corporate claimants is much greater than that of individual consumer claimants, who often face significant financial constraints and information asymmetries between them and the funder and the defendant.¹¹⁸ The regulations now protecting those individuals are very stringent, but exceptions or exemptions are usually put in place for large commercial disputes.¹¹⁹ A majority of states in the US now allow TPF at least to some degree, especially in commercial cases, and the practice continues to grow.¹²⁰

Other features of the American legal system which are of relevance are the limited roles that legal aid and LEI play, when compared to Europe, and that litigation is much more expensive.¹²¹

Many US funders are active in Europe as well. For instance, the largest TPF provider worldwide, Burford Capital, has a large presence in the UK and has also entered the Dutch and German collective

¹¹⁴ Silver and Hyman (n 88). See also Section 3.2.3.

¹¹⁵ Jef De Mot, Michael Faure and Louis Visscher, 'TPF and its Alternatives: An Economic Appraisal' in Willem H. van Boom (ed) *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 10.

¹¹⁶ Galanter (n 88).

¹¹⁷ Nieuwveld and Sahani (n 93). See also, Elizabeth Korchin, Patrick Dempsey and Eric Blinderman, 'United States' in Simon Latham (ed), *The Law Reviews - The Third Party Litigation Funding Law Review, Fifth Edition* (2022).

¹¹⁸ Nieuwveld and Sahani (n 93) 174; On information asymmetry see Sections 4.3.1 to 4.3.3.

¹¹⁹ *Ibid.* 174.

¹²⁰ *Ibid.*

¹²¹ Meurkens (n 109) 32-34.

action funding markets by creating subsidiaries in those legal systems.¹²² Furthermore, many US law firms operate in Europe and can receive a fee from the settlement arising out of European mass claims.¹²³

3.3.2. Australia

Australia is, arguably, the most TPF-friendly jurisdiction with one of the most sophisticated TPF markets in the world. While there have been instances of TPF elsewhere in the 1980s, TPF in its modern form seems to have developed the earliest at a significant scale in Australia.¹²⁴ It has existed since 1995, when insolvency practitioners started to contract for the funding of lawsuits.¹²⁵ The coexistence of the loser-pays rule and prohibition of contingency fees led to favourable conditions for the development of the industry.¹²⁶

Similarly to other common law jurisdictions, Australian courts had to expressly abolish the crime and tort of maintenance and champerty. Judicial recognition was given to TPF as a means to offer access to justice by the landmark *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd*.¹²⁷ Various Australian law reform Commissions have examined the benefits and risks of TPF, especially in class actions, and whether consumers are adequately protected. Consumer protection as the reason for restricting TPF can be said to have been ‘used as ‘cover’ to protect the interests of corporate defendants facing the prospect of litigation where previously they had not’.¹²⁸ In class actions, the funder’s fee has been subject to court alterations.¹²⁹ Whether litigation funders are required to hold an Australian Financial Services Licence and be regulated by the Australian Securities & Investments Commission and whether funding arrangements are considered ‘a management investment scheme’ under the Corporations Act 2001 has also been subject to changes, debate and controversy. A Bill intending to put these requirements in place did not become law following a change in government in 2022.¹³⁰ These proposals were also struck down by the Federal Court in *LCM Funding Pty Ltd v Stanwell* in

¹²² Anthony J. Sebok, ‘The Rules of Professional Responsibility and Legal Finance: A Status Update’ (2022) 57 *Wake Forest Law Review* 777, 784. See also GlobalNewswire, ‘Hausfeld and Burford Capital Announce 30 Million Euro German Venture’ <<https://www.globenewswire.com/news-release/2015/10/28/780627/0/en/Hausfeld-and-Burford-Cap-ital-Announce-30-Million-Euro-German-venture.html>> accessed 2 October 2024.

¹²³ Xandra Kramer and Ilja Tillema, ‘The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context’ (2021) 2 *Revista Ítalo-Española de Derecho Procesal* 165, 171.

¹²⁴ Litigation funding firm Omnibridgeway has been carrying out TPF related to emerging country sovereign debt recovery since 1986. See Omnibridgeway <<https://omnibridgeway.com/about/overview#History>> accessed 2 October 2024.

¹²⁵ Michael Legg, Edmond Park, Nicholas Turner and Louisa Travers, ‘The Rise and Regulation of Litigation Funding in Australia’ (2011) 38 *Northern Kentucky Law Review* 625, 628; Cordina (n 5) 272.

¹²⁶ Samuel Issacharoff, ‘Litigation Funding and the Problem of Agency Cost in Representative Actions’ (2014) 63(2) *DePaul Law Review* 561, 567-570; Cordina (n 5) 272.

¹²⁷ *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386.

¹²⁸ Michael Legg, ‘The Rise and Regulation of Litigation Funding in Australian Class Actions’ (2021) 14 *Erasmus Law Review* 221.

¹²⁹ *Ibid.* 225-226.

¹³⁰ Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 to amend the Corporations Act 2001 (Cth).

2022, which overturned an earlier decision it made in 2009.¹³¹ One judge considered these requirements as ‘placing a square peg into a round hole’, and the case outlined how the funding of class actions should not be incorporated into the same category as financial services.¹³² In this regard, the Corporations Amendment (Litigation Funding) Regulations 2022 were issued, to remove this requirement.¹³³ Furthermore, the lifting of the prohibition on contingency fees in Australia has been recommended many times as a means to introduce further competition in the Australian legal market.¹³⁴ The issue of TPF has also been highly politicised in Australia.

3.3.3. International Arbitration

The focus of this research is on TPF in litigation in Europe. However, in addition to the Australian and US situations just explored, how TPF is regulated in international arbitration proceedings is also of relevance. It provides a wider context and useful points of comparison with its regulation in court-based litigation in Europe. When contrasted with litigation, arbitration is essentially ‘a matter of contract: an arbitration occurs because the parties involved have agreed, as part of their original contract or after a dispute arises, that they will resolve their disputes by the arbitral procedures they have designated.’¹³⁵ The law on TPF in international arbitration can vary depending on the jurisdiction in which the arbitration is taking place, but TPF is generally permitted and governed by the principles of party autonomy and freedom of contract. The focus of this research remains on court litigation in Europe, therefore, the regulation of TPF in international arbitration will only be very summarily sketched. In general, TPF is well accepted in commercial arbitration. In investment arbitration, larger political issues involving states are involved and TPF’s role is subject to continued debate.

3.3.3.1. Commercial Arbitration

TPF has found acceptance more easily in international commercial arbitration than in the context of court litigation, and indications suggest that it is being used increasingly.¹³⁶ Funders are generally more interested in commercial arbitration because of, amongst others, the high-value claims involved,

¹³¹ *Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147; 180 FCR 11.

¹³² *LCM Funding Pty Ltd v. Stanwell Corporation Limited* [2022] FCAFC 103. See also Christopher Knaus, ‘Federal court strikes down key part of Coalition’s crackdown on class action funding’ (The Guardian, 17 June 2022) <<https://www.theguardian.com/law/2022/jun/17/federal-court-strikes-down-key-part-of-coalitions-crackdown-on-class-action-funding>> accessed 3 October 2024.

¹³³ Australian Government: Australian Taxation Office, ‘Corporations Amendment (Litigation Funding) Regulations 2022’ <<https://www.ato.gov.au/law/view/print?DocID=REG%2F20221614%2FSch1-C11&PiT=99991231235958>> accessed 3 October 2024.

¹³⁴ Legg (n 128).

¹³⁵ Donald Francis Donovan, ‘International Commercial Arbitration and Public Policy’ (1995) 27 (3) *New York University Journal of International Law and Politics* 645, 645.

¹³⁶ Sahana Ramesh, ‘Third-Party Funding in International Arbitration: Ownership of the Claim, Consequences for Costs Orders, and Regulation’ (2020) 36 *Arbitration International* 275, 276-7.

increased party autonomy, choice of law, perceived finality of awards, simplified and time-efficient procedures and the enforcement regime provided by the 1958 New York Convention.¹³⁷

When it comes to the regulation of TPF in arbitration, certain jurisdictions, notably Singapore and Hong Kong, have recently introduced legislation on TPF of international arbitration.¹³⁸ However, rules on TPF are not confined to national laws but have also found their way into institutional arbitral rules and codes of ethics, such as in the Hong Kong International Arbitration Centre Rules of 2018.¹³⁹ Arbitral institutions practice or guidance notes can also be a means to govern TPF in international arbitration, rather than official bodies of rules. Another version of soft law is found in the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. They provide, for instance, that where one of the parties to international arbitration proceedings has a direct economic interest in ‘the award to be rendered in the arbitration’, they ‘may be considered to bear the identity of such party’.¹⁴⁰ The party should also disclose ‘on its own initiative at the earliest opportunity’ any direct or indirect relationship existing, amongst others, between the arbitrator and the funder.¹⁴¹

3.3.3.2. Investment Arbitration

Historically a variant of commercial arbitration, international investment arbitration’s role is to resolve disputes which arise between investors and foreign countries, notably when the recipient state breaches or defaults on an investment contract.¹⁴² Whilst commercial arbitration is characterised by privacy and confidentiality, the same cannot be said for investment arbitration, which has been characterised by an increased shift towards transparency. Privacy and confidentiality in this sphere would raise obvious concerns, since states are involved and a wider range of policy issues within a larger political context are at play.¹⁴³

The claims are also usually of very high value and revolve around foreign private investors who claim that their interests have been harmed, for example through nationalisation or expropriation, which may leave the investors insolvent. TPF provides the resources for such investors to pursue arbitration. States can also on rare occasions be the recipients of TPF in investment arbitration.¹⁴⁴

¹³⁷ The New York Convention is the most authoritative source of regulatory authority for the uniform treatment and recognition arbitral awards. It laid the foundation for international commercial arbitration. Increased harmonisation of arbitration regulation has been taking place since then. See Yihua Chen, ‘Third-Party Funding in International Arbitration: A Transnational Study of Ethical Implications and Responses’ (Doctoral thesis at Erasmus University Rotterdam 2022) 47.

¹³⁸ Chen (n 137) 257-71.

¹³⁹ Hong Kong International Arbitration Centre (HKIAC) Code of Conduct for Arbitrators. See also Chen (n 416) 61, 100, 103.

¹⁴⁰ International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration Article 6(b).

¹⁴¹ *Ibid.* Article 7(a).

¹⁴² Willem H. van Boom, ‘Third-Party Financing in International Investment Arbitration’ (2011) <<https://ssrn.com/abstract=2027114>> accessed 4 October 2024.

¹⁴³ *Ibid.* 13; ICCA (n 32) 199.

¹⁴⁴ Agata Zwolankiewicz, ‘Third party funding in international investment arbitration: a dire need of disclosure’ (2019) 18 (2) Warsaw University Law Review 5, 7.

To pursue the claim in the national courts of the host country may be difficult. Such disputes are thus typically governed by an International Investment Agreement (IIA) between the parties and a treaty between the host state and the recipient investment state through a Bilateral Investment Treaty (BIT) or an International Investment Treaty (IIT). Such investment treaties usually provide that disputes are to be resolved through international arbitration as per the rules of the 1965 International Centre for Settlement of Investment Disputes (ICSID) Treaty, or the rules of the United Nations Commission on International Trade Law (UNCITRAL).

When it comes to TPF in this context, regular debate is had, particularly on whether to disclose information about TPF and on the provision of security for costs in arbitrations. Both the ICSID and the UNCITRAL rules do not require either.¹⁴⁵ However, TPF is addressed in various ways in more recently negotiated investment treaties, with one example being the EU–Canada Comprehensive Economic and Trade Agreement (CETA). Adopting rules related to TPF is indeed being considered by both UNCITRAL and ICSID, which have both engaged in discussions and consultations on the inclusion of TPF provisions.¹⁴⁶

3.4. Third-Party Funding Regulation in Europe

Despite TPF being to a large extent more widespread in the common law world and in international arbitration, the focus of this research now turns to developments in Europe, where major recent developments on the issue of regulation have taken place. This section begins by examining the build-up to and implementation of the EU’s RAD in Section 3.4.1.1, followed by an overview of the relevant soft law instruments in Section 3.4.1.2, and concluding with a discussion on the controversial Voss Report and its adoption by the EP in Section 3.4.1.3. Sections 3.4.2 to 3.4.4 analyse TPF regulation in the Netherlands, Germany and England and Wales respectively.

3.4.1. European Union

3.4.1.1. Representative Actions Directive

As things stand, TPF regulation at the EU level is still rather limited, however this may change significantly in the near future. Until very recently, the question of regulating funding had been confined to the consumer collective redress type of litigation. The regulation of consumer collective redress as a whole was spurred by the Dieseltgate emissions scandal, which revealed insufficient

¹⁴⁵ Winfield Shrimpton, ‘Treaty Arbitration: Types of litigation and arbitration that attract and are attractive to litigation finance’ in Steven Friel (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020) (n 146) 278.

¹⁴⁶ Zwolankiewicz (n 144); Shrimpton (n 145) 278.

consumer protection safeguards.¹⁴⁷ Collective redress refers to legal procedures designed to securing redress after instances of mass harm, and this often entails significant litigation costs.¹⁴⁸ In the US, class actions have been used since the 1960s.¹⁴⁹ The European legislator has been taking gradual steps to introduce a European version of the class action, labelled collective redress. At the same time, it has been distancing itself from any associations with the perceived abuses of the US system of class actions. In 2009, the Injunctions Directive¹⁵⁰ was approved, which required Member States to introduce adequate actions for the cessation or prohibition of any consumers' rights infringement.

An important milestone for consumer collective redress was the 2013 Commission Recommendation on collective redress in the EU.¹⁵¹ With regard to TPF, the Recommendation contained certain conditions regarding the provision of funding in collective redress mechanisms. These included prohibiting funders from charging excessive return rates and from influencing the proceedings. It also provided that the claimant is to disclose the origins of funding and for the courts to stay the proceedings in case of conflicts of interests or insufficient resources.¹⁵² On the other hand the 2014 Damages Directive,¹⁵³ did not address TPF and affected only mass harm arising from competition law infringements. It ensured the right to full compensation in these instances.

The 2009 Injunctions Directive was then repealed by the 2020's RAD, which introduces compensatory collective redress systems in the EU. As per the scope of the Directive, various areas of consumer law are covered. Notably, claims arising from competition law infringements and in the environmental sector suffered by consumers are not covered.¹⁵⁴

With the RAD, after a long deliberation process with the participation of stakeholders including the business lobby and consumer organisations, TPF is permitted in collective redress actions, subject to strict conditions.¹⁵⁵ In the lead-up to the RAD, reservations were expressed on various occasions on contingency fees; in general they should not be allowed in the EU, because of risks of abuse or because they are incompatible with the EU tradition,¹⁵⁶ and they are ultimately rejected by the RAD.¹⁵⁷ As to

¹⁴⁷ Alexandre Biard-Denieul, 'Thunder Road: The Implementation of the Representative Actions Directive in Europe' (2024) 28 (4) *Emory International Law Review* 751, 752.

¹⁴⁸ Section 2.2.

¹⁴⁹ Kramer and Tillema (n 123) 181.

¹⁵⁰ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

¹⁵¹ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

¹⁵² *Ibid.* para 14-16.

¹⁵³ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

¹⁵⁴ Annex 1 of the RAD. See also Inchausti (n 68).

¹⁵⁵ Biard and Kramer (n 81) 251-2.

¹⁵⁶ Kramer and Tillema (n 123) 149.

¹⁵⁷ Louis Visscher and Michael Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 (3) *Journal of Consumer Policy* 455, 478.

TPF, the Directive regulates it by requiring its disclosure and by enabling courts to assess whether funders have interests conflicting with the consumers' collective interests. It subjects TPF to judicial scrutiny to prevent 'abusive litigation'. The judiciary can assess whether funders unduly influence procedural decisions taken by the 'qualified entity' representing the consumers and if these entities have sufficient resources. In fact, only these qualified entities have standing to pursue consumer collective redress. With regard to public funding, as pointed out in Section 2.3.6, Member States are encouraged, but not obliged, to provide additional structural financial support if needed to facilitate the pursuit of collective actions.

As of the time of writing, Member States are in the implementation stage of the RAD, and differing levels of restrictions on TPF are expected. Prohibitions can also be put into effect, given that the Directive grants each Member State the discretion whether or not to permit TPF. The Directive only requires the above-mentioned minimum safeguards if TPF is allowed. As can be seen in Sections 3.3.4 and 3.3.5, different approaches were taken by the Netherlands and Germany with regard to the transposition of the Directive.

3.4.1.2. Model Rules, Guidelines and Self-regulatory Codes of Conduct

In addition to formal regulation, various European-wide soft law guidelines on TPF have also been issued. For instance, one part of the comprehensive model European Rules of Civil Procedure drafted by ELI and UNIDROIT in 2020, is dedicated to collective proceedings and also touch on TPF.¹⁵⁸ Specifically, they include provisions on qualified claimants disclosing to the court that they have sufficient funding, on revealing the source of their funding (excluding sensitive details) and on demonstrating that they act in the group's best interests. Beyond collective redress, another provision holds that individual parties in individual litigation are also to disclose the source of their funding and relevant details to the court.

Of particular significance are another set of guidelines, or proposals for 'light-touch regulation', which were issued by ELI in August 2024 in the form of the 'Principles Governing the Third Party Funding of Litigation'.¹⁵⁹ Among the Principles are that prior to entering into a TPF agreement, promotional material should be clear, comprehensive and not misleading and that any conflicts of interest should be disclosed. Funded parties should also be encouraged by funders to seek independent advice at this preliminary stage. In terms of the relationship between the parties, TPF agreements should, for instance, provide that, as a minimum, a litigation funding agreement should disclose the ultimate source of funds. TPF contracts should also contain clear provisions on the maintenance of adequate

¹⁵⁸ Rules 204 to 245.

¹⁵⁹ European Law Institute (ELI), 'Principles Governing the Third Party Funding of Litigation' (August, 2024). A 'light' regulatory approach is also favoured by many stakeholders in the EC's mapping study and by the CJC's Final Report on litigation funding. See Sections 3.4.1.3 and 3.4.4.3.

capital by the funder for the duration of the proceedings, on the manner through which conflicts of interest will be avoided, on the success fees charged and liability for adverse costs, on the degree of involvement by the funder, on termination rights and on dispute resolution.

These Principles constitute a markedly different approach to more restrictive calls for European regulation such as the earlier 2022 EP Resolution, which is to be examined in the following subsection. The ELI's proposed rules have an apparent focus on ensuring that claimants entering into TPF agreements are more fully informed about the nature and the consequences of the funding. While rather detailed, the Principles may remedy potential information asymmetries and provide a standard design for the contract for the parties. Very few mandatory rules are proposed for the contract design. They can therefore be regarded as a more moderate and supportive alternative to the rules proposed by the EP Resolution. The Principles are likely to remain influential in the near future as European jurisdictions consider the question of regulating TPF.

Self-regulatory codes of conduct have also been compiled by funders' associations. The most prominent of these is the ALF Code of Conduct in England and Wales, which will be discussed in Section 3.4.4.1. The industry group European Litigation Funders Association (ELFA) has also adopted a very concise code of conduct in 2022.¹⁶⁰ Notably, it stipulates that member funders shall set up a complaints procedure, where deviations from the code can be brought to the attention of the association. While not compiled by funders, the Dutch Claimcode is another soft law instrument which governs representative entities in collective proceedings and their funding in the jurisdiction of the Netherlands.¹⁶¹

3.4.1.3. EP Resolution on Responsible Private Funding of Litigation and EC Mapping Study

The growing importance of TPF and the interest in it by European institutions was amply shown by the comprehensive 2020 EPRS report on Responsible Private Funding of Litigation.¹⁶² This was followed by the 2021 'European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation'. Being authored by the conservative German Member of the EP, Axel Voss, it is also known as the 'Voss Report'. The report contains a proposed directive and constitutes a proposal to tackle the concerns surrounding TPF. It proposes comprehensive additional regulation of TPF in all types of litigation or arbitration, not just in collective redress. These include requirements on the establishment a licensing system for funders in each Member State; disclosure of TPF agreements (contrasted with the disclosure of only the 'source' of funding as

¹⁶⁰ ELFA, 'Code of Conduct' <<https://elfassociation.eu/about/code-of-conduct>> accessed 16 October 2024.

¹⁶¹ See Section 3.4.2.

¹⁶² Saulnier, Müller and Koronthalyova (n 2).

provided for in the RAD); the use of transparent language in TPF agreements; 40% caps on funders' returns; and, with limited exceptions, preventing litigation funders from withdrawing funding while proceedings are ongoing.¹⁶³

This report has been criticised on various occasions, in particular by funders. The Voss Report was seen as 'discriminatory, unnecessary and overburdensome' by the ILFA¹⁶⁴ and was described over the Channel as a 'clampdown' by the Law Society Gazette.¹⁶⁵ Stadler cautions that if implemented, the proposed system would lead to qualified entities not being able to bring many collective redress actions.¹⁶⁶ On the other hand, it was predictably supported by the business community¹⁶⁷ and welcomed with additional suggested restrictions by the CCBE.¹⁶⁸ The Voss Report was subsequently adopted by an EP resolution in September of 2022.¹⁶⁹

The proposed directive contains measures which go beyond the other regulatory systems examined in restricting TPF.¹⁷⁰ Overall, it shows that in the EU regulatory debate on contingency fees and TPF, there remain clear, obvious and prevailing signs of hesitance, reluctance and resistance. In some instances, there is direct and concerted opposition to any form of entrepreneurship and result-based fee arrangements in litigation which exceeds the resistance shown in other legal orders. If this resistance succeeds, not only consumers would bear the brunt when it comes to collective matters, but also other groups of claimants, or individual claimants such as cash-strapped SMEs. These claimants would ultimately lack access to justice in practical terms.

¹⁶³ European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation (2020/2130(INL)); Adrian Cordina, 'The Time is Ripe? Proposed Regulation of Third Party Litigation Funding in the European Union' (Conflict of Laws, 25 October 2021) <<https://conflictoflaws.net/2021/the-time-is-ripe-proposed-regulation-of-third-party-litigation-funding-in-the-european-union/>> accessed 9 September 2024. For a discussion on termination rights and caps as provided for in the EP Resolution, see Section 6.4.2 and 6.4.3.

¹⁶⁴ ILFA (n 52) 3.

¹⁶⁵ John Hyde, 'News focus: EU to clamp down on booming litigation funding sector' (Law Society Gazette, 20 September 2022) <https://www.lawgazette.co.uk/news-focus/news-focus-eu-to-clamp-down-on-booming-litigation-funding-sector/5113702.article?utm_source=gazette_newsletter&utm_medium=email&utm_campaign=Greene+SDT+hearing+opens+%7c+Few+couples+applying+for+joint+divorce+%7c+Rozenberg_09%2f20%2f2022> accessed 16 October 2024; Adrian Cordina and Eva Storskrubb, 'The Future Regulation of Third-party Funding in Europe: Conference Report, 22 June 2022, Erasmus University Rotterdam' (2022) 26 (2) *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 38.

¹⁶⁶ Stadler (n 40) 152.

¹⁶⁷ See e.g. Business Europe (n 85). See also Section 3.2.3 and Section 5.3.1.1.

¹⁶⁸ CCBE, 'CCBE first comments on the European Parliament's recommendations to the Commission on Responsible private funding of litigation' (CCBE, 13 May 2022) <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Postion_Papers/EN_DEON_20220513_CCBE-comments-on-the-European-Parliament-s-Recommendations-to-the-Commission-on-Responsible-private-funding-of-litigation.pdf> accessed 12 September. See also Section 5.3.2.1.

¹⁶⁹ European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)). See also Cordina (n 163); Cordina and Storskrubb (n 165).

¹⁷⁰ This view was echoed by Stadler; Astrid Stadler, 'German Collective Actions - Is Litigation Funding in a Dead End?' in Xandra Kramer, Jos Hoevenaars, Betül Kas and Erlis Themeli, *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022).

As discussed also in Section 1.1, the Voss Report clearly portrays TPF in a negative light. It also seems to reflect the American Chamber of Commerce's and other special interest groups' positions on TPF.¹⁷¹ It has raised questions on the extent to which it is an instance of political influence by the business community, or the 'anti-funding lobby'¹⁷² in general, despite the EU being known to be less influenced by business interests than the US.¹⁷³ The more stringent approach which is being called for in the EU, could however also be attributed to the usually more restrictive regulatory approach and standards adopted in the EU. In recent years, this stricter approach was adopted in different sectors such as data protection, environment and big tech, when compared to other jurisdictions, namely, the US.¹⁷⁴ It could also be that, in the name of consumer or claimant protection, TPF also ends up being regulated quite severely. As this research will show in subsequent chapters, this restrictive approach does not appear to be justified when taking into account the entire litigation funding landscape and the goals of ensuring access to justice and deterrence of wrongful conduct.

In response to the EP Resolution adopting the Voss Report, the Commission conducted a comprehensive mapping study on litigation funding in Europe, incorporating empirical research and consultations with a wide variety of stakeholders.¹⁷⁵ Published in 2025, the study comprises national reports as well as legal and practical analyses of TPF. 'A considerable number' of respondents in the consultation expressed support for either a 'light-touch' regulatory approach, or for no regulation at all, as opposed to the 'strong' regulatory model proposed in the EP Resolution.¹⁷⁶ Most of the stakeholders viewed TPF as having positive effects rather than negative effects.¹⁷⁷ The study underscores the EU's ongoing evaluation of the practice, and will serve as a basis for future regulatory initiatives. The stakeholder responses suggest that future regulatory efforts may favour a more moderate regulatory framework. Nevertheless, the future direction of EU regulation in this area remains uncertain.

¹⁷¹ Sections 3.2.3, 5.3.1.3 and 5.3.2.1.

¹⁷² Tets Ishikawa, 'An Unfair Tax on Accessing Justice, Law Society Gazette' (Law Society Gazette, 22 August 2022) <<https://www.lawgazette.co.uk/commentary-and-opinion/an-unfair-tax-on-accessing-justice/5113445.article>> accessed 29 August 2024; Tets Ishikawa, 'Voss report is unsatisfyingly hollow and narrow' (The Law Society Gazette, 7 October 2022) <<https://www.lawgazette.co.uk/commentary-and-opinion/voss-report-is-unsatisfyingly-hollow-and-narrow/5113894.article>> accessed 3 October 2024.

¹⁷³ There is also lobbying in support of TPF by the recently established ILFA for example. See generally, Andreas Dür, David Marshall and Patrick Bernhagen, *The Political Influence of Business in the European Union* (University of Michigan Press New Comparative Politics Series 2019), Anu Bradford, *The Brussels Effect* (OUP 2020) 251; Section 3.4.3 and Chapter 5.

¹⁷⁴ Bradford (n 173).

¹⁷⁵ European Commission DG Justice and Consumers (n 12).

¹⁷⁶ *Ibid.* 14-15.

¹⁷⁷ *Ibid.*; Charlotte de Meeûs, 'European Commission publishes long-awaited study mapping the use and regulation of third-party litigation funding in the EU' (10 April 2025) <<https://gavclaw.com/2025/04/10/european-commission-publishes-long-awaited-study-mapping-the-use-and-regulation-of-third-party-litigation-funding-in-the-eu-guest-post-by-charlotte-de-meeus/>> accessed 1 May 2025. See also Chapter 6 for further discussion on the results of the stakeholder consultation.

3.4.2. Netherlands

While the previous section examined the situation in the EU, this section proceeds with an analysis of selected national European jurisdictions, starting with the Netherlands. As discussed previously, in Europe, having a compensation or a claim culture can be considered to be more undesirable than it is in the US. This is also reflected in the debate in the Netherlands on collective actions.¹⁷⁸ Nevertheless, the available data from the Central Register for Collective Claims¹⁷⁹ has shown that following the introduction of entrepreneurial parties in Dutch collective redress, that there was no increase in unmeritorious collective actions. Collective actions' contribution to the system has 'remained modest', mitigating compensation culture concerns.¹⁸⁰

Generally speaking, despite its relatively small size, the Netherlands has been and continues to be a forerunner in entrepreneurial litigation and collective actions in Europe, and is supportive of TPF.¹⁸¹ As in the EU, the limited legal developments concerning TPF in the Netherlands have also mainly centred around the funding of collective redress actions. It seems that TPF is mainly present in this kind of litigation in the Netherlands rather than in individual commercial disputes.¹⁸² Apart from the prohibitions of the use of contingency fees by lawyers, the Netherlands has not had an equivalent to the common law doctrines of maintenance and champerty. A TPF contract is considered as a private contract 'sui generis' with the normal principles of party autonomy and public policy considerations being applicable.¹⁸³ Notable funders operating in the Netherlands include Deminor, Liesker Procesfinanciering, Redbreast, Omnibridgeway and Woodsford.

In terms of collective redress, the Dutch system is relevant at an international scale as it has wide territorial reach and can involve foreign claimants and defendants.¹⁸⁴ As mentioned in Section 2.3.4, it is characterised by the establishment of ad hoc representative organisations or foundations after instances of mass harm.¹⁸⁵ In January 2020, the amended collective action regulation, abbreviated as

¹⁷⁸ Tillema (n 28); Finch and Deminor, 'Three Years of WAMCA: A Second Quantitative Analysis' (2023) <<https://www.deminor.com/en/news-insights/three-years-of-wamca-a-quantitative-analysis/>> accessed 3 October 2024; Meurkens (n 109) 136.

¹⁷⁹ De Rechtspraak, 'Centraal register voor collectieve vorderingen' <<https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen>> accessed 3 October 2024.

¹⁸⁰ Ilja Tillema, 'Entrepreneurial motives in Dutch collective redress: Adding fuel to a 'compensation culture'?' in van Boom (ed) (n 18); Ilja Tillema, 'Dutch collective actions and the rise of entrepreneurial actors: Navigating between access to Justice and a claim culture' in Xandra Kramer, Stefaan Voet, Lorenz Kodderitsch, Magdalena Tulibacka and Burkhard Hess (Eds), *Delivering Justice: A Holistic and Multidisciplinary Approach* (Bloomsbury Publishing 2022) (n 20) 252. See also Finch and Deminor (n 178).

¹⁸¹ Xandra Kramer, 'The Quest for Funding Under the Dutch WAMCA: Third Party Funding and the Viability of a Procedural Fund' (2024) 38 (4) *Emory International Law Review* 767, 768.

¹⁸² Rein Philips, 'Netherlands', in Simon Latham (ed), *The Law Reviews - The Third Party Litigation Funding Law Review, Fifth Edition* (2022).

¹⁸³ Ianika N. Tzankova and Xandra E. Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands' in A Uzelac and S. Voet (Eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021) 115.

¹⁸⁴ *Ibid.*

¹⁸⁵ Kramer and Tillema (n 123) 178-9.

WAMCA,¹⁸⁶ came into effect, which expanded the Dutch collective action to include actions for damages or compensation on an opt-out basis. The admissibility requirements for foundations have become more stringent under the WAMCA, with stricter representativeness criteria, which may impede collective actions.¹⁸⁷ The WAMCA includes requirements on a supervisory body for foundations, a transparent decision-making process that involves members, adequate financial resources, an accessible website with governance details, and sufficient expertise in handling collective claims.¹⁸⁸ The RAD led to a few minor amendments to the WAMCA in 2023.¹⁸⁹

Since the implementation of the WAMCA, collective redress proceedings have taken place in a variety of categories - including consumer protection, public interest and human rights, intellectual property and labour law.¹⁹⁰ Over a third of WAMCA proceedings have made use of external litigation funding¹⁹¹ and the average success fee for litigation funders has been found to be around 25%.¹⁹² Importantly, all actions for damages made use of TPF, whereas non-damages actions mostly made use of personal contributions.¹⁹³

In addition, the Claimcode was established in 2011 and updated in 2019. It provides for some self-regulatory guidelines for the representative organisations or foundations.¹⁹⁴ When it comes to TPF, the foundation and its stakeholders are not to pursue profit but can recover the litigation costs they incur plus a reasonable uplift for future actions. They are also required to disclose the involvement a third-party funder and the main principles of the funding arrangement. The funder must have sufficient financial resources and control and influence over the litigation must be solely reserved to the representative entity for the benefit of its members. Furthermore, it prohibits the funder from withdrawing funding before a first instance judgment is issued. The Claimcode is a self-regulatory instrument and does not include sanctions for non-compliance, however it can be taken into consideration by courts when assessing the organisation's admissibility.¹⁹⁵

In addition, with the 2020 update to the 3:305a regulation of the Dutch Civil Code, which allows the bringing of a collective action by a representative organisation, the judiciary is now also able to assess

¹⁸⁶ Wet Afwikkeling Massaschade in Collectieve Acties (Act on Collective Damages Claims) 2020.

¹⁸⁷ Kramer (n 180) 771; Kramer and others (n 20) 117-119; Sections 5.3.3 and 6.3.

¹⁸⁸ Ibid; Section 5.3.2.2.

¹⁸⁹ Kramer (n 181).

¹⁹⁰ Finch and Deminor (n 178) 4.

¹⁹¹ Ibid. 11.

¹⁹² Ibid.

¹⁹³ Kramer and others (n 20).

¹⁹⁴ Commissie Claimcode 'Claim Code 2019'. See also Kramer and Tillema (n 123); Tzankova and Kramer (n 182); Tillema (n 396); Eduardo Silva de Freitas, Xandra Kramer and Jos Hoevenaars, 'Second Act in Dutch TikTok class action on privacy violation: court assesses Third Party Funding Agreements' <<https://conflictoflaws.net/2023/second-act-in-dutch-tiktok-class-action-on-privacy-violation-court-assesses-third-party-funding-agreements/>> accessed 7 February 2025.

¹⁹⁵ Ibid.

the representative parties' governance, funding, and representativeness.¹⁹⁶ With the landmark billion euro Fortis settlement, the Amsterdam Court of Appeal held that the reasonableness of the organisations' remuneration should always be assessed, regardless of whether the organisation is for-profit or non-profit. Showing transparency on their business models would also be required.¹⁹⁷

Funding agreements have also started to face more detailed judicial scrutiny in WAMCA collective actions when the foundations' admissibility is reviewed.¹⁹⁸ This was the case for instance in the first of two interim judgements by the Amsterdam District Court in the ongoing TikTok case, in particular with regard to the success fee and the level of control by the funder. A guideline was issued that the maximum amount recovered by the funder should be five times of the amount invested. The independence of the claimants to take procedural decisions should also be guaranteed. By the second interim judgement, the funding agreements had been amended to the satisfaction of the court.¹⁹⁹ In the Vattenfall case, however, 'the court accepted a fee of 25% of the damages awarded without further elaboration.'²⁰⁰

Moreover, in the Oracle and Salesforce case, the court considered the question of foundation board members being appointed by funders. It ruled that the fact that the foundation's board was initially appointed by the litigation funder at the time of filing did not constitute excessive influence, since the board was subsequently expanded and then operated independently.²⁰¹ In the Airbus case, the two claim organisations in the case were declared inadmissible. One was deemed unrepresentative due to a disproportionate number of private and institutional investors in the organisation. The other was rejected for lacking sufficient experience, failing to meet governance requirements, and being too dependent on the commercial funder, as there were close ties between the foundation's board and the funder.²⁰²

The Netherlands has emerged as the key EU jurisdiction for TPF, particularly in collective redress.²⁰³ While, relatively speaking, it is an advanced jurisdiction in the area, the WAMCA has resulted in

¹⁹⁶ Kramer and Tillema (n 123) at 179.

¹⁹⁷ Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422. On this judgment, see also Tzankova and Kramer (n 182).

¹⁹⁸ Kramer (n 181) 779-780; Silva de Freitas; Kramer and Hoevenaars (n 194).

¹⁹⁹ District Court Amsterdam 10 January 2024, ECLI:NL:RBAMS:2024:83 (TBYP/SMC/SOMI v TikTok) (Netherlands); Kramer (n 181) 779-780.

²⁰⁰ District Court Amsterdam 25 October 2023, ECLI:NL:RBAMS:2023:6683 (St. Nuon-CLAIM v Vattenfall) (Netherlands); Kramer (n 181) 779-780; Silva de Freitas; Kramer and Hoevenaars (n 193).

²⁰¹ Amsterdam Court of Appeal 18 June 2024 ECLI:NL:GHAMS:2024:1651 (St. The Privacy Collective v Oracle and Salesforce (Netherlands); Global Competition Review, 'Amsterdam Court of Appeal clarifies WAMCA standards in major data privacy collective action against Oracle and Salesforce' <<https://globalcompetitionreview.com/hub/class-actions-hub/2024/article/amsterdam-court-of-appeal-clarifies-wamca-standards-in-major-data-privacy-collective-action-against-oracle-and-salesforce>> accessed 7 February 2025.

²⁰² Kramer (n 181) 772; District Court The Hague, 20 September 2023, ECLI:NL:RBDHA:2023:14036, JOR 2024, 27 m.nt TMC Arons (Stichting Investor Loss Compensation/Airbus SE) (Netherlands).

²⁰³ Saulnier, Müller, Koronthalyova (n 2) 8; CMS (n 2).

additional regulation of the foundations' funding and the courts are increasingly scrutinising funding agreements, and can set limits on funders' influence and returns. This may suggest an effort to strike a balance between ensuring access to justice and mitigating the perceived risks of TPF in collective redress.

3.4.3. Germany

In Germany, commercial TPF developed relatively early and was pioneered by Foris AG.²⁰⁴ With respect to its regulatory status, TPF is neither forbidden nor explicitly regulated by law. Similarly to the Netherlands, the TPF agreement is generally qualified as a contract *sui generis*, or as a contract of undisclosed partnership,²⁰⁵ and is also regulated by the general principles of contract law. If, for instance, the success fee is too high, this may go against public policy.

As discussed in detail in Section 2.3.5, in Germany, third-party funders are also active in the assignment of claims model used by debt collecting companies after instances of price-fixing cartels or other mass harm events.²⁰⁶ In order to be able to provide legal advice, these claim vehicles, which include SPVs and legal technology companies, must be registered in accordance with the German Legal Services Act. They must also show basic legal knowledge and that they are covered by indemnity insurance.²⁰⁷ Article 4 of the Legal Services Act also protects claimants from conflicts of interest between the legal services provider and its funder.²⁰⁸

Of relevance to this research is that German case law has demonstrated resistance to TPF.²⁰⁹ In 2018, the German Federal Court ruled that a collective profit disgorgement claim against a major telecommunications company primarily served the financial interest of the funder. It held that the use of TPF contravened the legislature's intent and constituted an abuse of the consumer association's legal standing.²¹⁰ Despite acknowledging the financial challenges faced by consumer associations, particularly in collective actions, the court effectively prohibited the association from utilising TPF,

²⁰⁴ Astrid Stadler, 'Third Party Funding of Mass Litigation in Germany: Entrepreneurial Parties – Curse or Blessing?' in Loïc Cadiet, Burkhard Hess and Marta Requejo Isidro (Eds), *Privatizing Dispute Resolution* (Nomos 2019) 212. See also Chapter 6 for further discussion on the use of TPF in Germany.

²⁰⁵ Tillema (n 28) 103; Van Boom (n 32) 17.

²⁰⁶ Astrid Stadler, 'Third-Party Funding in Collective Redress' in Xandra Kramer, Stefaan Voet, Lorenz Kodderitsch, Magdalena Tulibacka and Burkhard Hess (Eds), *Delivering Justice: A Holistic and Multidisciplinary Approach* (Bloomsbury Publishing 2022) 259-60.

²⁰⁷ Stadler (n 206) 266.

²⁰⁸ English Translation of the German Legal Services Act - Act on Out-of-Court Legal Services <https://www.gesetze-im-internet.de/englisch_rdg/englisch_rdg.html> accessed 3 October 2024; European Commission DG Justice and Consumers (n 12) 222.

²⁰⁹ Stadler (n 206) 259. See also Section 2.3.5 for more case law and discussion on the use of the assignment model in Germany.

²¹⁰ German Federal Court of Justice (BGH), 13.9.2018, I ZR 26/17.

thereby making similar actions difficult to pursue in the future.²¹¹ This decision was highly criticised and has since been overturned by legislative action.²¹²

Similarly, funder capital inadequacy at the time of the assignment of claims could pose a legal obstacle for litigation funding by SPVs employing the assignment of claims model. In a cement cartel case,²¹³ CDC initiated legal action against cement cartel participants after purchasing the claims from direct purchasers. The case was dismissed ten years after the filing because, although CDC had sufficient funding at the time of the dismissal, it lacked adequate capital at the time of the assignments to cover a potential adverse cost order. The courts deemed this to be a violation of public policy as well as the principles of good faith and good dealing.

In addition to the German courts, some authors have also adopted a dismal view on TPF, considering TPF agreements to be void under German law as they are immoral and contrary to public policy.²¹⁴ The question of regulating TPF in Germany seems to still be in its initial stages,²¹⁵ with an important development being the implementation of the RAD in Germany with the 2023 Consumer Rights Enforcement Act ('Verbraucherrecht durchsetzungsgesetz' or 'VDuG'). It establishes an opt-in collective redress regime and limits funders' success fees to 10%. A collective action would also be inadmissible if a third-party funder influences the conduct of the litigation by the plaintiff, including decisions on settlements, to the detriment of consumers. Many deem this regime as too restrictive, particularly in relation to the 10% cap, as it makes TPF for such actions 'de facto impossible'.²¹⁶ It is likely, therefore, that the debt collection service provider assignment model will continue to play a crucial role as a workaround in the collective redress landscape of the jurisdiction of Germany.

The VDuG exemplifies the relatively more restrictive approach the jurisdiction adopts in relation to TPF, at least with respect to collective redress. Nevertheless, Germany remains a large litigation funding market, particularly in relation to commercial disputes.²¹⁷ Notable funders in Germany include Nivalion, Omnibridgeway and Deminor.

²¹¹ Stadler (n 206) 267-268; Cordina (n 5) 276.

²¹² European Commission DG Justice and Consumers (n 12) 224.

²¹³ OLG Dusseldorf, 18 February 2015, IVU Kart 3/14, Juristenzeitung (JZ) 2015; Stadler (n 205) 268-269; Cordina (n 5) 279.

²¹⁴ Solas (n 23) 97; Bruns (n 12).

²¹⁵ Stadler (n 170).

²¹⁶ Wolfgang Hau, 'Private Funding' in Burkhard Hess, Margaret Woo, Loïc Cadiet, Séverine Menétrey, and E Vallines García (Eds), *Comparative Procedural Law and Justice, Part III - Access to Justice and Costs of Litigation* (2024) 28-29. See also Susanne Augenhöfer and Adriani Dori, 'The Proposed Regulation of Third Party Litigation Funding – Much Ado about Nothing?' (2023) 20 (5) *Zeitschrift für das Privatrecht der Europäischen Union* 198. Many TPF contracts, and the ALF Code, for instance (Section 3.4.4.1), specifically allow for input on settlements.

²¹⁷ Saulnier, Müller, Koronthalyova (n 2) 8; Deminor (n 6).

3.4.4. England and Wales

At least as far as TPF is concerned, as noted earlier, the England and Wales is a major player globally, with an estimated value of the market which is larger than the rest of continental Europe.²¹⁸ As discussed in Section 3.2.3, the significance of maintenance and champerty's role in constraining alternative litigation funding has been decreasing. They were abolished as crimes and torts in 1967, but champerty survives as a rule of public policy.²¹⁹

The compensation culture debate has also taken place in England and Wales. However, here also, claims of an existence of a compensation culture are largely a myth. The volume of litigation, including that of frivolous claims, has not increased with the introduction of result-based agreements. On the contrary, in many cases, the number of claims has been in decline.²²⁰ Insofar as it is not based on data, this objection seems to revolve around the moral appropriateness of the propensity of a culture to pursue legal claims. Some have viewed this objection as a type of 'victim blaming', as it shifts the focus from wrongdoers to the parties seeking redress.²²¹

TPF in individual claims is regulated in England and Wales through case law, when objections are raised or judicial scrutiny is required, and through self-regulation. There are also specific rules on funding for competition law class actions.

3.4.4.1. *The ALF Code*

In terms of how TPF is regulated in England and Wales, the Association of Litigation Funders' 2018 Code of Conduct for Litigation Funders (ALF Code) provides a good starting point.²²² It is the self-regulatory instrument in use for third-party funded litigation in the jurisdiction. It was mandated by Jackson, and originally published by the CJC in 2011, as the way to regulate TPF up till the moment the use of TPF 'expands'.²²³ It, for instance, requires funders to ensure that funded parties receive independent legal advice prior to entering funding agreements, grants funders the possibility to provide input into settlement decisions and allows for termination of the agreement under specified conditions. The ALF Code also imposes minimum capital requirements of 5 million pounds and mandates continuous disclosure obligations for funders within the association.²²⁴ However, as a

²¹⁸ Deminor (n 6).

²¹⁹ Mulheron (n 71).

²²⁰ James Hand, 'The Compensation Culture: Cliché or Cause for Concern?' (2010) 37 (4) *Journal of Law and Society* 569, 572; Genn (n 88) 30-36.

²²¹ Lewis and Morris (n 98). For moral concerns over TPF, see Section 3.5.

²²² Association of Litigation Funders (ALF) Code of Conduct for Litigation Funders.

²²³ Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (TSO 2009) 119.

²²⁴ ALF Code Articles 9, 11.

voluntary self-regulatory regime, membership within the association is not compulsory, meaning that some funders operate in the market outside the auspices of the ALF Code.²²⁵ At the time of writing, there are 23 funders who are members of the association.²²⁶ Notable members include Harbour, Burford, Therium and Augusta Ventures. Separately from the Code of Conduct, a complaints procedure has also been set up by the ALF to address breaches of the Code.²²⁷ Beyond self-regulation, some funders may voluntarily elect to be authorised and registered with, and regulated by, the Financial Conduct Authority.²²⁸

3.4.4.2. Case Law

Case law in England and Wales is also essential. This section will briefly examine some of the most significant judgements regarding TPF. While ‘the modern endorsement of third party funding... can usefully be traced to *Giles v Thompson* in 1994’,²²⁹ the landmark 2005 *Arkin* case²³⁰ further solidified judicial approval to TPF. This case marked a significant shift from the archaic doctrines of maintenance and champerty. It established the well-known ‘*Arkin Cap*’²³¹ stipulating that a professional funder may be liable for the opposing party’s costs ‘to the extent of the funding provided’ if the case is lost.²³² The funder is entitled, as ‘the price of the funding’, to a portion of the proceeds if the claim succeeds, which reduces the damages recovered by a successful claimant.²³³ While the court described this reduction as ‘unfortunate’, it considered it a ‘cost that the impecunious claimant can reasonably be expected to bear’.²³⁴ Funders are held liable to adverse costs to prevent situations where defendants cannot recover their litigation costs from funders who may enable meritless claims to proceed to advanced stages.²³⁵ The cap was subsequently criticised by many.²³⁶

²²⁵ Rachael Mulheron, ‘England’s Unique Approach to the Self-regulation of Third Party Funding: A Critical Analysis of Recent Developments’ (2014) 73 *The Cambridge Law Journal* 570, 577.

²²⁶ ALF, ‘Membership Directory’ <<https://associationoflitigationfunders.com/membership/membership-directory/>> accessed 3 October 2024.

²²⁷ ALF, ‘A procedure to govern complaints made against Funder Members by funded litigants’ <<https://associationoflitigationfunders.com/wp-content/uploads/2018/03/ALF-Complaints-Procedure-October-2017.pdf>> accessed 25 October 2024. See also Section 6.4.3 on the complaints procedure.

²²⁸ Mulheron (n 71) 107. Eg. Harbour Litigation Funding <<https://www.harbourlitigationfunding.com/>> accessed 3 October 2024.

²²⁹ *Ibid.* 109.

²³⁰ *Arkin v. Borchard Lines Ltd & Ors* [2005] EWCA Civ 655 26 May 2005. <www.bailii.org/ew/cases/EWCA/Civ/2005/655.html>.

²³¹ The cap or limitation of a professional funder’s liability for the costs of the opposing party if the case loses, to the amount of the funding provided for the litigation. To illustrate, if the funder funds £1,000,000 and the case loses, the funder will also pay a maximum of £1,000,000 of adverse costs to the winning party.

²³² *Arkin*, para. 41.

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*; Cordina (n 5) 277.

²³⁶ Including by Sir Rupert Jackson in ‘In my view, it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat. This is unjust not only to the opposing party (who may be left with unrecovered costs) but also to the client (who may be exposed to costs liabilities which it cannot meet).’ Jackson (n 222) para. 4.6; Cordina (n 5) 277.

On the question of adverse costs, pursuant to another landmark case, *Excalibur*,²³⁷ funders who persist in funding ‘hopeless cases’²³⁸ are required to pay costs on an indemnity basis, that is, all the litigation costs incurred by the defendant, going beyond the Arkin Cap. This makes it important for funders to have adequate financial reserves. In a subsequent judgement, the court declined to apply the Arkin Cap and made a third-party costs order against a funder who exerted ‘massive’ control on the case in question.²³⁹ In *Chapelgate*²⁴⁰ also, the Court of Appeal dismissed an appeal by a commercial funder against an order holding it liable for all the defendants’ costs from the date of the funding agreement. The court confirmed that the Arkin cap does not automatically apply in cases involving professional funders. Instead, the court retains a broad discretion to make such an order on a case-by-case basis after consideration of all the circumstances.²⁴¹

On the other hand, *Essar v. Norscot*,²⁴² the English Commercial Court decided on the possibility for a funded claimant to recover not only the normal litigation costs, but also the TPF costs from the defendant in case of success. The Court here left the matter to the arbitral tribunal’s discretion, potentially allowing an arbitral tribunal to include other amounts within an award of costs, including success fees under TPF agreements, and possibly also DBAs, uplift fees in CFA arrangements, and ATE insurance premiums. While full recoverability increases the amount recovered by claimants, it could also leave defendants with significant adverse cost orders. Solas argues that disclosure of TPF in such cases may be useful for parties to know in advance what could be their exposure in case of loss.²⁴³ England and Wales’ TPF’s legal landscape continues to evolve with new case law, particularly in the competition class action regime. Of particular importance is the *Paccar* ruling, which will be discussed in the following section.

3.4.4.3. Competition Law Class Actions

In the group action sphere, until recently, the possibility of mass claims has been limited when compared to other common law jurisdictions such as the US and Australia. Since the Jackson Review, consumers and businesses now have the ability to pursue opt-out mass claims for damages caused by breaches of competition law, such as through price-fixing. The opt-in group action systems available in the jurisdiction, such as Group Litigation Orders (GLOs) and the representative action under the Civil Procedural Rules (CPR) 19.8, were found to encounter numerous difficulties and inadequacies

²³⁷ *Excalibur Ventures LLC v. Texas Keystone Inc & Ors* [2016] EWCA Civ 1144 18 November 2016. <www.bailii.org/ew/cases/EWCA/Civ/2016/1144.html>.

²³⁸ *Ibid.* para. 27.

²³⁹ *Laser Trust v. CFL Finance Ltd* [2021] EWHC 1404 (Ch) 21 May 2021. <www.bailii.org/ew/cases/EWHC/Ch/2021/1404.html>.

²⁴⁰ *Chapelgate Credit Opportunity Master Fund Ltd v Money and others* [2020] EWCA Civ 246.

²⁴¹ *Ibid.*, para. 44. See also *Barnes* (n 322) 23.

²⁴² *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm).

²⁴³ *Solas* (n 23) 54-55.

for cases to be pursued.²⁴⁴ Nevertheless, some of the collective actions making use of these procedures, such as the *Bates v Post Office* case,²⁴⁵ have relied on TPF. As in the EU, a ‘sectoral’, as opposed to a ‘generic’, class action system was adopted. It is applicable solely to matters relating to competition law.²⁴⁶

In this opt-out class action regime, there are rigorous rules on TPF. Authorised class representatives are appointed to bring collective actions on class members’ behalf in the Competition Appeal Tribunal (CAT).²⁴⁷ When it comes to the funding of the collective actions, in order to approve a person as a class representative, the CAT must decide on whether the person will be able to pay the defendants’ recoverable costs and how it plans to cover its own costs.²⁴⁸ Furthermore, the representative must ‘not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members’.²⁴⁹ In effect, TPF is regulated by being reviewed at an early stage, including through the certification process and summary judgements, and unsatisfactorily funded collective actions will not be allowed to continue.²⁵⁰

In *Mastercard v Merrick*,²⁵¹ one of the largest damages claim in the UK’s history, the Court of Appeal recognised TPF’s importance as if it did not need to be said, by noting that: ‘the power to bring collective proceedings introduced ... by the Consumer Rights Act 2015 was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding’.²⁵² Virtually all of the class actions to date filed under the UK Competition Law Class Action regime have been supported in some form or other by TPF.²⁵³ As of the time of writing, they number more than 50, and the first few, such as the above-mentioned *Mastercard* case, have reached settlement.²⁵⁴ Settlements are to be approved by the CAT.²⁵⁵

²⁴⁴ For instance, in one opt-in action related to football kits brought by the Consumers’ Association under the previous competition law regime, only 0.1% of affected by the breach signed up as claimants. See Sir Peter Roth, ‘Mass claims in competition law - a UK perspective’ (2022) (2) *Mass Claims Journal*; See also Rachael Mulheron, *Class Actions and Government* (CUP 2020) 30-49; Van den Bergh (n 90) 23.

²⁴⁵ *Alan Bates v Post Office Limited* [2019] EWHC 3408 (QB); Section 1.1.

²⁴⁶ Mulheron (n 244) 30-49.

²⁴⁷ Consumer Rights Act (2015) Schedule 8 and supporting Competition Appeal Tribunal (CAT) Rules 2015; See also, Rachael Mulheron, ‘The United Kingdom’s New Opt-Out Class Action’ (2017) 37 (4) *Oxford Journal of Legal Studies* 814.

²⁴⁸ CAT Rules 2015, r. 78(2)(d).

²⁴⁹ CAT Rules 2015, r. 78(2)(b).

²⁵⁰ Mulheron (n 244).

²⁵¹ *Merricks v Mastercard and others* EWCA [2019] Civ 674 (16 April 2019), para. 60; *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)* (11 December 2020) On appeal from: [2019] EWCA Civ 674.

²⁵² *Mastercard Incorporated* (n 251) para. 73. See also Rachael Mulheron, ‘Revisiting the Class Action Certification Matrix in *Merricks v Mastercard Inc*’ (2019) 30 *Kings Law Journal* 396, 408.

²⁵³ Mulheron (n 20).

²⁵⁴ Rachael Mulheron, ‘The Conundrum of Undistributed Residues under the United Kingdom’s Collective Proceedings Regime’ (2024) 23 (2) *Competition Law Journal* 79, 79-83; Vishala Sri-Pathma, ‘Millions of consumers could get £70 after Mastercard ruling’ (BBC 20 May, 2025) <<https://www.bbc.com/news/articles/c14kkjyrk20o>> accessed 30 May 2025.

²⁵⁵ *Ibid.*

Since DBAs are not allowed in opt-out class actions in the UK,²⁵⁶ a question which has recently received attention in the courts is whether the same can be said for TPF agreements, or ‘Litigation Funding Agreements’ (LFAs).²⁵⁷ This question was addressed by the 2023 Supreme Court Paccar judgement, in a decision related to a trucks cartel which had been found to be breaching competition rules by the EC. If TPF agreements constitute DBAs, the viability of the entire regime would be affected.²⁵⁸ In her analysis on how English law and the legislator’s intention should be interpreted in this regard, Mulheron was of the view that the two funding options were never intended to be considered the same.²⁵⁹

Nevertheless, the Supreme Court surprisingly ruled that LFAs, in which a percentage of the damages is recoverable by the funder, constitute DBAs.²⁶⁰ This has the potential to render many current LFAs unenforceable and in need of amendment. The decision hinged on LFAs being given a wide interpretation, allowing them to be classified as ‘claims management services’. This is a very important and recent successful challenge by corporate defendants on litigation funding. The full ramifications of this judgement are still unclear, especially for competition law class actions. It was certainly highly criticised as damaging to access to justice and to the reputation of the UK litigation market.²⁶¹ Subsequently, plans were initiated for new legislation to overturn the Paccar ruling and for the CJC to widely review the sector.²⁶² A bill was introduced in the House of Lords to ensure the enforceability of LFAs,²⁶³ but then abandoned when the new Labour government took office in 2024. A workaround is being used, in that the remuneration for funders is now being framed as multiples of the amounts invested in LFAs, instead of percentages of the damages.²⁶⁴

²⁵⁶ Section 2.3.4.

²⁵⁷ Mulheron (n 20).

²⁵⁸ Ibid.

²⁵⁹ Ibid; See also Sam Tobin, ‘Litigation funders warn of consequences in UK Supreme Court appeal’ (Reuters, 16 February 2023 <<https://www.reuters.com/world/uk/litigation-funders-warn-consequences-uk-supreme-court-appeal-2023-02-16/>> accessed 3 October 2024.

²⁶⁰ R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) Case ID: 2021/007.

²⁶¹ Andrew Higgins and Matthew Tweddell, ‘The Supreme Court Blows Up the Litigation Funding Market in PACCAR in the name of the Parliament—to the Surprise of Everyone Including the Parliament’ (2024) 43 (1) Civil Justice Quarterly 1; Rachael Mulheron, ‘Unpacking Paccar: Statutory Interpretation and Litigation Funding’ (2024) 83(1) Cambridge Law Journal 99.

²⁶² Ministry of Justice, HM Courts & Tribunals Service, and The Rt Hon Alex Chalk KC MP, Press release: New law to make justice more accessible for innocent people wronged by powerful companies (gov.uk, 4 March 2024) <<https://www.gov.uk/government/news/new-law-to-make-justice-more-accessible-for-innocent-people-wronged-by-powerful-companies>> accessed 12 March 2024.

²⁶³ UK Parliamentary Bills, ‘Litigation Funding Agreements (Enforceability) Bill’ Bills, Parliament (20 March 2024) <<https://bills.parliament.uk/bills/3702>> accessed 22 March 2024; Mulheron (n 43) 116-117.

²⁶⁴ Higgins and Tweddell (n 261) 14.

The CJC subsequently published an interim report and consultation to review litigation funding in October 2024,²⁶⁵ after which some of the consultation responses were made publicly available.²⁶⁶ The final report was published in June 2025, in which it recommended the reversal of the Paccar judgement, light statutory regulation of TPF and the wider permissibility and availability of various means of litigation funding.²⁶⁷ The Paccar judgement, in particular, shows that even in the largest TPF market and most liberalised legal services market in Europe, there are still notable instances where TPF faces new substantial limitations.

3.5. Commodification, Corrective Justice and Law-and Economics

The previous sections in this chapter addressed the question of how TPF is regulated across Europe, and how any resistance towards it is reflected in the different legal regimes examined. However, in order to gain a more comprehensive understanding on the factors that have hampered the development of TPF in Europe, it is necessary to consider the broader philosophical and cultural aspects which may be influencing these regulatory approaches and perceptions.

Closely tied with, but distinguishable from, the concept of a ‘compensation culture’, is the concept of the morality or desirability of commercialising a legal claim, or transforming it into a commodity, in and of itself. The opposition to this commodification also impedes the wider use of TPF.²⁶⁸ It entails that there is something inherently wrong with the trade over legal claims. As pointed out earlier, this is tied to the civil law tradition, which is more sceptical of markets and private enforcement than the American, and to a lesser degree, the British, counterparts. Broadly speaking, it is also related to the philosophical underpinnings of the German-speaking world, where Kantian ethics and deontological moral theory has a significant influence. By contrast, Bentham’s utilitarianism and consequentialism holds more sway in the English-speaking world.²⁶⁹

As a whole, these differences in traditions could be said to be contributing to the slower development of TPF and entrepreneurial litigation in continental Europe. The author of this research and others have highlighted how, especially in the civil law world, the civil justice system is traditionally seen

²⁶⁵ CJC, ‘Review of Litigation Funding: Interim Report and Consultation’ (2024) 54.

²⁶⁶ CJC, ‘CJC Review of Litigation Funding consultation responses’ <<https://www.judiciary.uk/cjc-review-of-litigation-funding-consultation-responses/>> accessed 30 May 2024.

²⁶⁷ CJC, ‘Review of Litigation Funding: Final Report’ (2025).

²⁶⁸ Solas (n 23) 246-249; ‘Commodification’ is to be distinguished from other concepts such as ‘commoditisation’ which Susskind employs. Here, Susskind is referring to the increased standardisation, systematisation and automation of legal work. Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future* (OUP 2017) 25-32.

²⁶⁹ Klaus Mathis, *Efficiency Instead of Justice - Searching for the Philosophical Underpinnings of the Economic Analysis of Law* (Springer 2009) 103-104.

more through a moral corrective justice lens, as a way for the victim of a wrong to be compensated. By contrast, common law jurisdictions may view civil justice systems as systems through which legal claims and services are commodified and bargained over privately, ‘within a market-inspired framework for the pursuit of social welfare and efficiency.’²⁷⁰ From a corrective justice perspective, a claim is seen to be personal or authentic,²⁷¹ to be controlled by the original party and to be brought against the wrongdoer. The involvement of litigation funders would remove the retributive aspect of a successful legal claim with respect to the wrongdoer.

Furthermore, in accordance with these cultural norms, a legal claim should not be reduced to the amount of money it sells for and sold to someone else. It may be argued that non-economic values are also at stake in the civil justice system, and opening legal claims to markets would be morally repugnant, comparable for example to markets for human organs.²⁷² These concepts go as far back as ancient Roman and Greek legal systems, and were reinforced by the strong influence of Christian norms.²⁷³ In England, the related doctrines of maintenance and champerty prohibiting third-party intervention in lawsuits were also strongly supported by Blackstone.²⁷⁴ On the other hand, Bentham was one of the earliest critics of the doctrines, mainly on the basis that otherwise many legal claims would not be effectively pursued at all.²⁷⁵

The arguments regarding this inviolable relationship between victim and wrongdoer and against loss of control over the claim by the original party, have been gradually and considerably weakened, as restrictions against assignment of claims were liberalised, and with the growing role of insurance in civil justice systems.²⁷⁶ Arguments against commodification are similarly unconvincing today.²⁷⁷

One can also identify an additional explanation which has been put forward as to why TPF has been held back in Europe. It is the difference in reception of the law-and-economics movement in the US compared to Europe. Law-and-economics as a discipline has not been as successful in continental Europe, and has even been resisted, unlike the US where it plays a much more dominant and

²⁷⁰ Marco de Morpurgo, ‘A Comparative Legal and Economic Approach to Third-party Litigation Funding’ (2011) 19 (2) *Cardozo Journal of International & Comparative Law* 343, 407. See also Wendel (n 73); Cordina (n 5).

²⁷¹ Anthony J. Sebok, ‘The Inauthentic Claim’ (2011) 64 (1) *Vanderbilt Law Review* 61; Stadler (n 169) 157.

²⁷² Sadil K. Mehra, ‘Justice Without Markets’ in Klaus Mathis and Avshalom Tor (Eds) *Law and Economics of Justice* (Springer 2024); Wendel (n 73); Cordina (n 5); Solas n (23) 246-249.

²⁷³ Section 2.3.

²⁷⁴ Keith N. Hylton, ‘The Economics of Third-Party Financed Litigation’ 8 (3) *Journal of Law, Economics and Policy* 701 705.

²⁷⁵ Anthony J. Sebok, ‘Should the Law Preserve Party Control - Litigation Investment, Insurance Law, and Double Standards’ (2015) 56 *William & Mary Law Review* 833; John Bentham, ‘Defence of Usury, Letter XII. Maintenance and Champerty’ (1818).

²⁷⁶ Legal insurance also involves interference by third parties in corrective justice relationships and a certain extent of commodification of legal claims. It is now well-established and accepted across Europe; see Sections 2.3.3.1 and 4.3.4; Sebok (n 274).

²⁷⁷ Wendel (n 73); Cordina (n 5).

persuasive role.²⁷⁸ Under the law-and-economics approach, the starting point in the question of litigation funding would be the allocation of property rights over legal claims which can be traded over by autonomous individuals, which then enhances social welfare.²⁷⁹

This difference is mainly due to cultural and philosophical traditions in Europe which were cemented post-World War II. Classical doctrinal legal reasoning in Europe is more often based on the view that the law as a whole can be coherently analysed with internal legal principles, such as human rights, equality and a general scepticism towards market solutions and private interests. The prevailing consensus is that European legal culture until very recently has been one of dogmatism and positivism.²⁸⁰ More broadly and across the societal spectrum, the widespread belief in postwar Europe with its dominant welfare state, was that the state was better placed at distributing goods and services and maintaining social, moral and cultural cohesion than free markets and self-interest.²⁸¹

Of course, this ‘antimarket bias’ is not unique to Europe or to the legal academy, but perhaps more widespread there. The tendency in modern societies is to underestimate the benefits of markets, and to associate profit-making with exploitation and anti-social behaviour. People tend to think of markets as wealth-redistributing rather than as wealth-creating, and to underestimate the role of competition in ensuring reasonable prices and quality.²⁸² TPF, being a new market-based litigation funding option, may also be susceptible to this kind of initial public reaction, before becoming more widely accepted later on.

Moreover, formal modelling within law-and-economics has proved to be an additional barrier for its accessibility ‘within the legal academy and to legal policy makers more generally’.²⁸³ It is evident why the mainstream European legal approach may not be easily reconciled with the economic perspective. However, the importance and accessibility of law-and-economics have been gradually growing in Europe, and the differences with the US have been narrowing.²⁸⁴ This is also reflected through academic collaborations and the inclusion of economic principles and reasoning in European legal scholarly work on TPF. More aspects of these differences in outlooks have been mentioned in Chapter 1 and will be discussed at the start of the next chapter.

²⁷⁸ De Morpurgo (n 269); See also Mathis (n 268); Ben Depoorter, ‘The Fall and Rise of Law & Economics in Europe in Michael Faure, Wicher Schreuders and Louis Visscher (Eds) *Don't Take it Seriously. Essays in Law and Economics in honour of Roger Van den Bergh* (Intersentia 2018).

²⁷⁹ See Section 4.2.2.

²⁸⁰ Anthony Sebok and Lars Trägårdh, ‘Adversarial Legalism and the Emergence of a New European Legality: A Comparative Perspective’, in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Eds), *Imagining New Legalities: Privacy and Its Possibilities in the 21st Century* (Stanford Scholarship Online, 2013), 164.

²⁸¹ Tony Judt, *Postwar Europe: A History of Europe since 1945* (Penguin Press, 2005).

²⁸² Gary M. Lucas Jr. and Slavisa Tasic, ‘Behavioral Public Choice and the Law’ (2015) 118 *West Virginia Law Review* 199, 220-222.

²⁸³ Anthony Ogus, ‘Law and Economics in the Legal Academy, or, what I should have said to Discipulus’ (2010) 60 (2) *Toronto Law Journal* 169.

²⁸⁴ Depoorter (n 278).

That being said, it is nowadays widely accepted that TPF should not be prohibited solely on the basis of commodification and corrective justice concerns. These concerns are in fact not raised as frequently as the claim culture concern, which is equally unconvincing. Overall, it remains in the view of the author, very difficult to justify the imposition of blanket prohibitions, or restrictions, on the trade over legal claims based solely on moral or deontological grounds. While relevant, the consequences which arise from the availability, or lack of, alternative litigation funding, or may yet arise, should also be considered. It is also difficult to justify restricting one specific means of funding legal claims without considering the regulatory and economic context of all the available or possible litigation funding methods. Finally, it is hard to understand the rationale for heavy restrictions, when TPF still plays a very peripheral role in the totality of the European litigation funding market, and is used almost exclusively between sophisticated parties with strong bargaining acumen.

3.6. Conclusion

This chapter has provided a comprehensive overview of the practice and law of TPF in Europe. It demonstrated how funders seek to exclusively fund high-value commercial and collective redress claims, with strong prospects of award recovery. This operational process helps mitigate concerns of a proliferation of frivolous litigation and ensures that the funded parties are for the most part sophisticated repeat-players. At the same time, it also provides claimants with additional strategic expertise. 'Portfolio funding' and the direct finance of law firms may be future developments to consider in Europe. The chapter then outlined some of the main sources of resistance to TPF, with the business community being the most notable.

With respect to TPF regulation and perceptions, a background was provided with regard to the jurisdictions of US, Australia and international arbitration. TPF is well-developed and utilised in these legal orders. Particular attention was also paid to the tort reform movement in the US, which has contributed to a perception of excess and of a compensation culture in the jurisdiction. Such perceptions are not borne out by evidence, but similar claims are brought with respect to TPF in Europe.

This chapter also examined the regulatory frameworks and perceptions surrounding TPF in the selected jurisdictions of the EU, the Netherlands, Germany and England and Wales. A gradual shift in recent decades from a more conservative stance towards TPF can be observed. This shift is evident with the cautious yet increasing recognition and acceptance of TPF in these jurisdictions. It is now specifically allowed in the collective redress sphere of these jurisdictions. Regulatory safeguards are in place to mitigate the risks associated with TPF in collective redress. Nevertheless, substantial resistance remains. The EP Resolution on Responsible Private Funding of Litigation, for instance,

seeks to strongly oppose and further restrict all forms of TPF across the EU. Germany also maintains a relatively restrictive approach, exemplified most notably by the imposition of a 10% cap on TPF success fees in its implementation of the RAD.

In England and Wales, while not completely abolished, there have been explicit renunciations of the ancient doctrines of maintenance and champerty, with TPF receiving repeated formal endorsement. However, this does not mean that TPF is completely accepted in the jurisdiction. The Paccar decision, in particular, highlights an instance where TPF has the potential of being severely restricted, even in jurisdictions traditionally considered as TPF-friendly. Both the EU and England and Wales are currently undergoing a process of deliberation on whether further regulation is needed.

The chapter therefore highlights the contentious nature of TPF as an issue that continues to divide stakeholders across Europe beyond regulatory frameworks and case law. In the academic literature and in the public discourse, proponents view TPF as a means to address access to justice gaps, especially in high-cost commercial and collective cases, whereas critics warn of the risks of commodifying litigation and of creating a compensation culture. Cultural norms in continental European legal systems, which emphasise corrective justice and associated moral norms in litigation, are also likely to play a role in shaping the levels of resistance or acceptance towards TPF. While the legitimacy of these concerns may be debated, regulatory frameworks surrounding TPF are in consequence likely to remain a dynamic area.

The research has so far therefore addressed the means through which, and to a certain extent, the reasons for which TPF is resisted. The next chapter will proceed with this exploration and also initiate the law-and-economics analysis of litigation funding, with a particular emphasis on TPF. It does so in view of starting to answer the research question of to what extent any resistance to TPF is warranted. It will assess whether there is an economic rationale behind such resistance, by assessing the justifiability of the resistance which is rooted in fears of conflicting interests. In this regard, it will examine whether these conflicts may lead to issues such as excessive prices and other outcomes that are not in the best interests of claimants or of the public. It achieves this by comparing the agency problems associated with TPF with those found in other comparable funding arrangements.

Chapter 4

Agency Risks and Third-Party Funding in Europe: Is Resistance Justified?

4.1. Introduction

In the previous chapters, the research has engaged in providing a comprehensive overview of the practice and law of litigation funding in Europe.¹ It then proceeded to show how TPF fits into this litigation funding landscape.² In doing so, the research took a comparative law approach and examined historical, practical and legal aspects related to TPF in different jurisdictions and legal orders. It focused on identifying the varying levels of acceptance or resistance with respect to TPF in Europe. The research now turns to a law-and-economics approach, in answering the research sub-question of the extent to which the resistance and scrutiny shown towards TPF and other result-based arrangements is warranted.

This chapter first gives a brief introduction on the application of law-and-economics to litigation funding, and on its place amid other methodological approaches in Section 4.2. The chapter's main focus is to review and apply agency theory, which is a core element in law-and-economics,³ to the different litigation funding options in Europe, with particular attention given to TPF.⁴

Examining the relationships in other funding models is essential as they provide relevant insights into the structure of TPF arrangements.⁵ These other funding models often exhibit certain similarities to TPF, and at times may be nearly identical. This will help identify any agency risks in TPF which are, or are not, found in other arrangements. It will also identify if there is different treatment with respect to TPF on elements in the arrangement which are also found in other arrangements. In the case of shared elements, the treatment, or levels of acceptance or resistance, should, in principle, be the same

¹ Chapter 2.

² Chapter 3.

³ 'The agency relationship is a pervasive fact of economic life'. Kenneth J. Arrow, 'The Economics of Agency' in John W. Pratt and Richard J. Zeckhauser (Eds), *Principals and Agents: The Structure of Business* (Harvard Business School Press, 1985) 37; 'It is worthwhile to point out the generality of the agency problem. The problem of inducing an "agent" to behave as if he were maximizing the "principal's" welfare is quite general. It exists in all organizations and in all cooperative efforts - at every level of management in firms, in universities, in mutual companies, in cooperatives, in governmental authorities and bureaus, in unions, and in relationships normally classified as agency relationships such as are common in the performing arts and the market for real estate.' Michael C. Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 (4) *Journal of Financial Economics* 305; See also Steven Shavell, 'Risk Sharing and Incentives in the Principal and Agent Relationship' (1979) 10 (1) *The Bell Journal of Economics* 55; Eric A. Posner, 'Agency Models in Law and Economics' (2000) University of Chicago Law School, John M. Olin Law and Economics Working Paper No. 92, Available at SSRN: <https://ssrn.com/abstract=204872>; Sections 4.2.3-4.3.2.

⁴ Section 4.3.

⁵ Comparisons of this sort have been made between the hourly fee, LEI and contingency fees in studies such as Michael Faure and Jef de Mot, 'Comparing Third-Party Financing of Litigation and Legal Expenses Insurance' (2012) 8 (3) *Journal of Law, Economics and Policy* 743; Jef De Mot, Michael Faure and Louis Visscher, 'TPF and its Alternatives: An Economic Appraisal' in Willem H. van Boom (ed) *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017); Charles Silver, 'Litigation Funding versus Liability Insurance: What's the difference' (2014) 63 (2) *DePaul Law Review* 617; and Michelle Boardman, 'Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation' (2012) *Journal of Law, Economics and Policy* 8(3) 673. This chapter builds on these analyses, in view of further examining the extent to which any resistance to TPF is justified. See also Section 2.3 for a discussion on the use of various means of funding in Europe.

as that applied to the similar arrangements. In other words, the question is whether TPF arrangements warrants the level of resistance and special treatment it currently receives, in view of agency risks.

A limitation of this approach is that different funding options fund different categories of claims within the European context. The utility of comparing different means of funding can therefore be questioned as the risks may differ depending on the type of claims involved. For instance, LEI funds large numbers of lower value litigations, whereas TPF funds a few high-value commercial claims where much larger economic issues are at stake.⁶ Nevertheless, BTE LEI, self-funding through hourly fees and result-based agreements can all be used by commercial claimants, underscoring the relevance of comparing the agency risks they give rise to.⁷

Collective actions for damages in Europe, by contrast, currently rely exclusively on TPF, as evidence in the UK and the Netherlands is showing.⁸ They are, in fact, where TPF is most resisted.⁹ Under the assumption that collective litigation is a desirable mechanism for enabling compensatory collective redress, it becomes even more critical to ensure that TPF is available and facilitated for such cases. This necessity persists despite the agency issues which may be associated with these funding arrangements. As this chapter will demonstrate, agency issues would, to varying degrees, also be present were collective actions to be funded through other means.

Agency theory is reviewed, applied and adapted to the European context with respect to hourly fees in Section 4.3.3, to LEI in Section 4.3.4, to contingency fee-like agreements in Section 4.3.5 and to TPF in individual litigation in Section 4.4.1, and in collective litigation in 4.4.2. Comparisons between them will be made throughout. Some concluding thoughts are provided in Section 5. This Chapter finds that there are also agency problems in the other funding models examined, which are similar to, if not more severe than, the problems found in TPF.

⁶ For overviews on the BTE LEI and TPF markets see Sections 2.3.3.1 and 3.2.1.

⁷ Gerhard Wagner, 'Tort law and liability insurance' in Michael Faure (ed), *Tort Law and Economics, Encyclopaedia of Law and Economics, Second Edition* (Edward Elgar 2009) 379; Jonathan H. Choi, 'In Defense of the Billable Hour: A Monitoring Theory of Law Firm Fees' (2018) 70 (2) *South Carolina Law Review* 297; Nuno Garoupa and Fernando Gomez-Pomar, 'Cashing by the Hour: Why Large Law Firms Prefer Hourly Fees over Contingent Fees' (2007) 24 (2) *The Journal of Law, Economics, & Organization* 458.

⁸ Xandra Kramer, Ianika Tzankova, Jos Hoevenaars and Karlijn van Doorn, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?* (Eleven 2024); Rachael Mulheron, 'The Funding of the United Kingdom's Class Action at a Cross-Roads' (2023) *King's Law Journal*, (1-27).

<<https://www.tandfonline.com/doi/full/10.1080/09615768.2022.2161350>> accessed 13 March 2024.

⁹ Section 3.2.3.

4.2. Law-and-economics and Litigation Funding

There are different bodies of literature analysing the different litigation funding arrangements, including legal ethics, equity and fairness perspectives.¹⁰ To justify the inclusion of the law-and-economics approach itself in this research, it is useful to outline its added value when contrasted with the other mainstream views on litigation funding. These other views usually revolve around non-consequentialist protection of the rights of the individual.¹¹ Law-and-economics offers a comprehensive framework for analysing the incentives found in TPF relationships, and on the associated effects (costs and benefits). It also sheds light on how the protection of the right of access to justice influences the behaviour of the actors involved and impacts society more broadly.¹² These issues are underemphasised by the moral rights-based approach.¹³ While access to justice is a fundamental human right, and it is almost self-evidently moral that effective access to justice to meritorious claims should at all times be provided,¹⁴ law-and-economics takes a different perspective. It focuses on adopting an evaluative and predictive approach to the effects of litigation funding, and its regulation, on the behaviour of litigants, of the lawyers and of the funders.¹⁵ For instance, increased access to justice due to the availability of litigation funding, may provide incentives to avoid legal disputes in the first place.¹⁶

Law-and-economics can therefore supplement the rights-based approach by providing a comprehensive theoretical framework of analysis on the relationships within TPF. As also briefly described in the introductory chapter, law-and-economics is concerned with the positive aspect of determining the positive and negative effects, or consequences, or costs and benefits, likely to be brought about by TPF to claimants and to society at large.¹⁷ The analysis is predicated on the assumption of rationality, or on 'rational choice theory', whereby actors seek to maximise their expected subjective utility.¹⁸ Related concepts extending from this assumption, such as Coasian

¹⁰ See for instance Deborah L. Rhode, 'Ethical Perspectives on Legal Practice' (1985) 37 *Stanford Law Review* 589; Virginia G. Maurer, Robert E. Thomas and Pamela A. DeBooth, 'Attorney Fee Arrangements: The U.S. and Western Perspectives' (1999) 19(2) *Northwestern Journal of International Law & Business* 272, 279; Suzanne Le Mire and Christine Parker, 'Keeping It In-House: Ethics in the Relationship between Large Law Firm Lawyers and Their Corporate Clients through the Eyes of in-House Counsel' (2008) 11 *Legal Ethics* 201.

¹¹ For brief discussions on this deontological approach, see Sections 1.5, 2.2 and 3.5.

¹² Robert G. Bone, 'Economics of Civil Procedure' in Francesco Parisi (Ed.) *The Oxford Handbook of Law and Economics Volume III: Public Law and Legal Institutions* (OUP 2017) 144.

¹³ *Ibid.*

¹⁴ For the importance, recognition and legal status of access to justice as a fundamental human right see Chapter 2. For a discussion on the morality and corrective justice concerns surrounding TPF see Sections 3.5 and 4.2.1.

¹⁵ Bone (n 12) 144.

¹⁶ See Section 4.2.1.

¹⁷ See also Section 1.5 for an introductory discussion on law-and-economics.

¹⁸ Alessio M. Paces and Louis T. Visscher, 'Methodology of Law and Economics' in Bart van Klink and Sanne Taekema (Eds), *Law and Method: Interdisciplinary research into Law* (Series Politika, nr 4 Tübingen: Mohr Siebeck, 2011), 85. Available at SSRN: <https://ssrn.com/abstract=2259058>.

bargaining, principal-agent problems and moral hazard are also integral in this research's examination of TPF. They will be further introduced, explained and incorporated later on in this chapter in its goal of addressing the question of the justifiability of TPF's resistance.

Critical insights, predictions and normative recommendations usually ensue following the positive law-and-economics analysis. The main normative criterion employed is Kaldor-Hicks efficiency, whereby changes to the status quo are favoured if they generate more social benefits than costs. The costs sustained by the 'losers' are, in principle, able to be compensated from the greater social welfare achieved by the change.¹⁹

Markets are assumed to advance social welfare through trade, exchange and freedom of contract.²⁰ This assumption is based on the principle that, under conditions of perfect competition and complete information, markets allocate resources efficiently and maximise overall welfare. Through this normative perspective, the law's goal is then to correct instances of market failures.²¹ Markets fail as perfectly competitive and efficient markets are inexistent. The four market failures often distinguished in the literature are information asymmetries, externalities, market power and under-provision of public goods.²²

As TPF is still at its infancy in Europe, whether the predictions provided by law-and-economics actually pan out in the future is an empirical question.²³ The following subsections provide brief overviews of some fundamental law-and-economics concepts related to TPF in anticipation of the theoretical analysis of the agency costs associated with litigation funding. The concepts examined in this section are deterrence, property rights, risk transfer, public goods and the problem of agency costs. The agency risks associated with TPF due to conflicting interests are a critical component of this research and will be addressed more thoroughly in Section 4.3.

¹⁹ See also Section 1.5.

²⁰ Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing 2004) 15-28; Section 4.2.2.

²¹ Ogus (n 20) 15-28; see also Section 5.2.1 for a discussion on the related public interest theory of regulation.

²² 'A market failure is a situation where scarce resources are not put to their highest valued uses'; Johan den Hertog, 'Review of Economic Theories of Regulation' (2010) Tjalling C. Koopmans Research Institute Discussion Paper Series 10-18, 5; Section 1.4; Paces and Visscher (n 18). These market failures, and how they relate to this research, will be introduced and examined throughout this chapter. See also Mathis (n 102); Michael Faure and Niels Philipsen, 'Standardisation from a Law and Economics Perspective' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-Disciplinary and Multilevel Analysis* (Edward Elgar 2020) 159.

²³ See Sections 1.4 and 3.2.2 for the existing empirical research on TPF. See Chapter 6 for this study's empirical research.

4.2.1. Compensation versus Deterrence

An example of a difference that arises through the different approaches is the relative importance of compensation versus that of deterrence. This difference is highly relevant to the question of TPF's resistance. From a law-and-economics social welfare perspective, unlike the mainstream rights-based approach, the main purpose of litigation funding is not to ensure that the claimant is compensated for the harm suffered. As with any other activity, through this perspective, litigation funding is assessed through its capacity of mitigating market failures.

Among the most important functions of TPF is therefore its role in addressing the market failure of 'negative externalities'. In engaging in activities, parties can impose negative effects on third parties. These effects represent the uncompensated and indirect impact on the well-being of individuals besides those directly involved in the harmful activity in question.²⁴ These costs are said to 'spill over' on bystanders without them being 'internalised' by those responsible, with the classic example being polluting activities.²⁵

By facilitating meritorious litigation against wrongdoers, litigation funding can generate deterrent effects, or equivalently, incentives for desirable behaviour, or compliance with the law, for potential wrongdoers.²⁶ Given the increased prospect of being held liable, the costs the potential wrongdoers would expect to bear due to their wrongful acts would also increase so as to include the wider social cost. They would therefore weigh in this additional cost in future behaviour. Potential wrongdoers would then invest more in precautions to avoid future harmful accidents, or else reduce their activity levels.²⁷ Litigation funding provides incentives for potential wrongdoers to ex ante 'internalise' the harmful effects on bystanders that would otherwise arise from their activity.²⁸

From a law-and-economics perspective, the primary objective is to ensure that wrongdoers are confronted with the negative consequences they cause, and pay, rather than victims being fully

²⁴ Louis T. Visscher, 'Tort Damages', in Michael Faure (ed), *Tort Law and Economics, Encyclopaedia of Law and Economics, Second Edition* (2009) 153, 153; Robert Cooter and Thomas Ulen, *Law and Economics, 6th edition* (Berkeley Law Books 2016) 39; Adrian Cordina, 'Is it all that Fishy? A Critical Review of the Concerns surrounding Third Party Litigation Funding in Europe' (2021) 14 (4) *Erasmus Law Review* 270, 272.

²⁵ See generally Ogus (n 20) 35-38.

²⁶ Marco de Morpurgo, 'A Comparative Legal and Economic Approach to Third-party Litigation Funding' (2011) 19 (2) *Cardozo Journal of International & Comparative Law* 343, 382-383; Gianmarco Solas, *Third Party Funding: Law, Economics and Policy* (CUP 2019) 245-246.

²⁷ Visscher (n 24) 153; Paccès and Visscher (n 18). The 'optimal' deterrence, or level of care, becomes the point up to which the expense of taking extra precaution is equal to the expected benefit of reduced accident-related costs. Beyond this point, further precaution by potential wrongdoers becomes inefficient because it costs more than the harm it prevents. David Rosenberg, 'Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss' (2002) 88 (8) *Virginia Law Review* 1871, 1875.

²⁸ See also Anthony Ogus, 'Shifts in Governance for Compensation to Damage: A Framework for Analysis' in Willem H. van Boom and Michael Faure (Eds), *Shifts in Compensation between Public and Private Systems* (SpringerWienNewYork 2007) 36-37.

compensated.²⁹ The amount that the wrongdoers pay is relevant, not to whom or what form it takes. This internalisation can be achieved not only through litigation, private enforcement and the payment of compensation, but also through the payment of public sanctions, such as administrative and criminal fines.³⁰ By enabling victims' pursuit of meritorious cases, litigation funding is one of many means through which the process of deterrence can be facilitated. From an economic perspective therefore, the ex ante perspective of deterring is more important than the ex post perspective of compensating which the legal perspective usually adopts.³¹

The issue of compensation versus deterrence in litigation funding arises most visibly in large opt-out class actions. Hereby, each individual class member often receives modest amounts of compensation. While the compensation may often constitute a substantial share of the total damage sustained, typically around 70%, for example,³² many class members often do not claim (or cash in) the amount they are entitled to for a variety reasons.³³ As a result, these individuals remain uncompensated. Furthermore, a significant share (e.g. 30%) of the total compensation for the whole group is allocated to the funders or to the lawyers, a reality that can be highly visible to the public and is frequently met with resistance.³⁴ While the financial burden imposed on the wrongdoer may serve a deterrent function, the actual compensation received by individual victims often falls short of fully redressing their harm.

However, the fact that due to a TPF agreement, the claimant receives less than 100% of the damages or proceeds, for instance a class member in a class action ultimately receiving 350 Euros instead of 500 Euros, is of less importance from a law-and-economics perspective than from an access to justice or fairness normative standpoint for the reasons described above.³⁵ In addition, from an empirical perspective, studies have shown that compensation is rarely perfect or full. Under-compensation is

²⁹ Law-and-economics commentators can also consider compensation as a goal of litigation, along with deterrence. See Geoffrey Miller, 'Group litigation in the enforcement of tort law' in Jennifer Arlen (Ed), *Research Handbook on the Economics of Torts* (Edward Elgar 2013) 268; Louis Visscher and Michael Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 (3) *Journal of Consumer Policy* 455; Michael Faure, Louis Visscher and Franziska Weber, 'The Impact of Speed and Accuracy in Personal Injury Cases: A Law and Economics Analysis' (2023) 24 (3-4) *European Journal of Law Reform* 317, 319; Michael Faure, Louis Visscher and Franziska Weber 'Liability for Unknown Risks – A Law and Economics Perspective' (2016) 7 (2) *Journal of European Tort Law* 198, 201. For a brief discussion on the moral corrective justice perspective which prioritises victim compensation, see Section 3.5; Ogus (n 28) 35.

³⁰ Franziska Weber, 'Towards an Optimal Mix of Public and Private Enforcement in Consumer Law' (EDLE Doctoral Thesis 2012) 43.

³¹ Faure, Visscher and Weber (2023, n 29) 325.

³² Section 3.2.2.

³³ For an overview of the question of unclaimed funds, and possible solutions, in England and Wales, see Rachael Mulheron, 'The Conundrum of Undistributed Residues under the United Kingdom's Collective Proceedings Regime' (2024) 23 (2) *Competition Law Journal* 79; Miller (n 29) 268.

³⁴ Fair Civil Justice, 'The Merricks-Mastercard settlement shows the real winners from class actions' (Fair Civil Justice, 25 February 2025) <<https://fairciviljustice.org/news/the-merricks-mastercard-settlement-shows-the-real-winners-from-class-actions/>> accessed 2 March, 2025.

³⁵ Furthermore, a general principle of tort law in European jurisdictions is *restitutio in integrum* - that victims are put in the position they would be in, had it not been for the wrongdoing. Ogus (n 643) 20. For more detailed discussion on the pricing of TPF and of comparable means of litigation funding, see Sections 2.3, 3.2.1, 3.2.2 and 4.3.3-4.4.2.

often the reality, including in class actions and individual tort litigation which is self-funded, or funded through insurance.³⁶ Similarly to other means of funding, there is an ‘inherent acceptance within the civil procedure regime that litigants will bear some costs of their litigation’, and these costs can take the form of percentages of the compensation.³⁷ All of the above raises questions on the feasibility for striving for full victim compensation in the civil justice system. The prospect of full compensatory justice for the victims with third-party funded litigation is therefore also very difficult to achieve, in spite of any fairness and moral concerns it may raise.

Law-and-economics addresses this problem from a different angle. From an economic standpoint, it would be a question of to what extent wrongdoers are confronted with the negative consequences they cause, or internalise the negative externalities they bring about. It would also be a question of determining to what extent defendants would be optimally deterred if they were to be liable also to funder’s success fees and/or ATE premiums in case of loss. Defendants’ interest groups often claim that the facilitation of litigation over-deters, and leads, amongst others, to higher prices for their goods and services due to increased risk of liability.³⁸ This question of recoverability was also fought over in the ‘cost wars’ in England and Wales, referred to in Chapter 2. Recoverability of success fees in this jurisdiction resulted in significant increases in litigation costs as claimants were not incentivised to control the recoverable costs, and was thereafter limited.³⁹

Potential wrongdoers considering actions which impose negative externalities on other individuals and on society, are influenced by the probability and by the severity of being sanctioned, and they will take this into consideration in their cost-benefit calculations. This model of deterrence originates from the economic analysis of criminal law. It has been extended to civil law, with the sanction being the compensation, or the damages, to be paid out.⁴⁰ Deterrence is however difficult to measure in the real world, and empirical studies on the deterrent effects of litigation have been limited.⁴¹ If a general situation of under-deterrence is deemed to exist in Europe, regulators might consider increasing

³⁶ See Miller (n 29) 268; Richard Lewis and Annette Morris, ‘Tort Law Culture: Image and Reality’ (2012) 39 (4) *Journal of Law and Society* 562, 574-8; Deborah L. Rhode, ‘F frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution’ (2004) 54 *Duke Law Journal* 447.

³⁷ CJC, ‘Review of Litigation Funding: Interim Report and Consultation’ (2024) 54.

³⁸ Miller (n 29) 266. See also Section 3.2.3.

³⁹ These concerned the question of recoverability of success fees for conditional fee arrangements and ATE premiums, not the recoverability of TPF success fees; See Section 2.3.4.

Furthermore, punitive damages, which could further deter wrongdoers, are not a feature in European legal systems. Their availability could help mitigate the problems arising from ‘the fact that the probability that a tortfeasor will actually be held liable is below 100 percent’. Visscher (n 24) 166-167. See also Visscher and Faure (n 29) 472-473; Section 2.2 on the obstacles with holding tortfeasors liable. Punitive damages’ absence may further underscore the importance of ensuring the availability of TPF in order to secure deterrence in Europe.

⁴⁰ Weber (n 30) 41. See also Gary S. Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 (2) *Journal of Political Economy* 169.

⁴¹ Deborah Hensler, ‘The socio-economics of mass torts: What we know, don’t know and should know’ in Jennifer Arlen (Ed), *Research Handbook on the Economics of Torts* (Edward Elgar 2013).

deterrence by strengthening and facilitating private enforcement avenues such as collective actions and TPF, as an alternative to other forms of government intervention.⁴²

As discussed previously, it was suggested that the idea of a compensation culture appears to be a myth. Some consumer advocates and other practitioners and authors would argue for the benefits of more litigation and against the claim that wrongdoing is currently over-deterred.⁴³ They argue that there is a situation of systemic under-litigation, under-enforcement and under-deterrence.⁴⁴ Furthermore, the law-and-economics literature has generally found that due to the costs of litigation, there is under-deterrence from the threat of tort liability.⁴⁵ Nevertheless, as discussed in the previous chapter, compensation culture claims in general, or due to litigation funding, remain omnipresent in the regulatory and policy-making debate.⁴⁶

Concerns about lawyers or funders extracting disproportionate rates from the proceeds remain prominent in the context of result-based funding arrangements, often leading to calls for stricter regulatory oversight.⁴⁷ Full compensation in itself to the victims, or possible redistribution of wealth concerns through the civil justice system, or generally, may be important goals for the regulator, and feature heavily in the political discourse.⁴⁸ However, from a law-and-economics perspective, they are of secondary importance to deterrence. In line with this perspective, and considering the above-mentioned practical obstacles with securing full compensatory or corrective justice, this research assigns greater value to the deterrent function of litigation over its compensatory role. Policymaking often entails trade-offs between efficiency and other competing normative goals. Accordingly, the exploration of the pursuit of these secondary objectives falls outside the scope of this analysis.

⁴² Edward L. Glaeser and Andrei Schleifer, 'The Rise of the Regulatory State' (2003) 41 (2) *Journal of Economic Literature* 401, 404. A situation of over-deterrence could also potentially arise because the fear of sanctions could lead to less innovation, more expensive goods and services or to them not being provided to the market in the first place. Nevertheless, it could also be the case that a general increase in the prospect of liability, which could include liability for 'unknown risks', may induce producers to invest and innovate more in safety, resulting in an advance in social welfare. Faure, Visscher and Weber (2016, n 29) 211-212.

From an economic perspective, 'optimal' deterrence is the goal, and 'perfect' or complete deterrence is not advisable, given the costs of enforcement. Some wrongdoing may need to be tolerated if the social cost of avoiding wrongdoing 'are higher than the benefits of additional deterrence'. Weber (n 30) 41-42; Faure, Visscher and Weber (2023, n 29) 319. See also Jeremy Kidd, 'To Fund or not to Fund: The Need for Second Best Solutions' (2012) 8 (3) *Journal of Law, Economics and Policy* 613, 622-623.

⁴³ Sections 3.3-3.4.

⁴⁴ W. Bradley Wendel, 'Paying the Piper but not Calling the Tune: Litigation Financing and Professional Independence' (2018) 52 (1) *Akron Law Review* 1; David S. Abrams and Daniel L. Chen, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (2013) 15 (4) *University of Pennsylvania Journal of Business Law* 1075, 1076-1079. See also Section 2.2.

⁴⁵ Thomas J. Miceli and Michael P. Stone, 'Piggyback' lawsuits and deterrence: Can frivolous litigation improve welfare?' (2014) 39 *International Review of Law and Economics* 49; Steven Shavell, 'The social versus private incentive to bring suit in a costly legal system' (1982) 11 (2) *Journal of Legal Studies*, 333.

⁴⁶ Sections 3.2.3 - 3.4.

⁴⁷ Jérôme Saulnier, Klaus Müller and Ivan Koronthalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', European Parliament Research Service (March 2021); See also Cordina (n 24).

⁴⁸ Roger van den Bergh 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 20 (1) *Maastricht Journal of European and Comparative Law* 12, 14.

4.2.2. Property Rights, Risk Transfer and Public Goods

In the economic literature, TPF is often conceptualised as private actors bargaining over property rights in legal claims with potential successful outcomes.⁴⁹ Property rights, in this context, refer to the legally enforceable rights to possess, use, and transfer legal claims as assets. Since Coase's seminal work on externalities, bargaining and transaction costs, it is assumed that in a frictionless world, that is, a world without transaction costs, economic efficiency will be achieved, and market failures corrected, on the condition that property rights are well defined.⁵⁰ In accordance with Coase, externalities are controlled or internalised by bargaining and by contract law, with the rest of the externalities dealt with by tort litigation, implying a suspicion towards regulation.⁵¹ By extension, property rights and free enterprise over legal claims will generate efficient outcomes, as legal claims will end up being transferred to those who value them most.⁵² The condition is that this happens in a world where bargaining can be done for free, that is, without incurring transaction costs. Such a world does not exist. Transaction costs include the costs of search, information, negotiation, bargaining, contracting, coordinating, monitoring, and enforcing.⁵³ Regulation's task in this context is then to facilitate private bargaining, by for example, making it easier to ascertain property or ownership rights. 'Default rules' in contracts, or 'implied terms' which can be contracted around, as opposed to 'mandatory' rules, can also achieve this as they reduce the cost of making transactions for the contracting parties.⁵⁴

As discussed previously, the concept of property rights over legal claims which can be bargained over is relatively novel and is often met with scepticism, particularly in European legal traditions,⁵⁵ The litigation funding market has however been gradually liberalising over the last century, as shown by the introduction and increasing use of alternative private means of funding.⁵⁶ Different legal cultures have different preferences and moral values with regard to the transferability of ownership over legal claims.⁵⁷ Legal insurance, result-based agreements and assignments of claims are all different

⁴⁹ Anthony J. Sebok, 'The Inauthentic Claim' (2011) 64 (1) *Vanderbilt Law Review* 61; Solas (n 26) 126-130; de Morpurgo (n 26).

⁵⁰ Ronald H. Coase, 'The Problem of Social Cost' (1960) 56 (4) *Journal of Law & Economics* 837; see also Paces and Visscher (n 18); Alessio Paces and Roger Van den Bergh, 'An Introduction to the Law and Economics of Regulation' in Roger Van den Bergh and Alessio Paces (eds), *Regulation and Economics, Encyclopedia of Law and Economics* (2nd edn, Edward Elgar 2012) vol 9, 2; den Hertog (n 22) 16.

⁵¹ Daniel P. Kessler, 'Introduction' in Daniel P. Kessler (ed), *Regulation vs. Litigation: Perspective from Economics and Law* (The University of Chicago Press, 2011) 2.

⁵² De Morpurgo (n 26) 349-350.

⁵³ See e.g. Cooter and Ulen (n 24) 81-91.

⁵⁴ Paces and Visscher (n 18); Ogus (n 20) 17.

⁵⁵ Section 3.5.

⁵⁶ Chapter 2.

⁵⁷ See Chapter 3; Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 (2) *The American Economic Review* 347, 350. See also Eirik G. Furubotn and Svetozar Pejovich, 'Property Rights and Economic Theory: A Survey of Recent Literature' (1972) 10 (4) *Journal of Economic Literature* 1137; Van Boom (n 59).

contractual arrangements through which all or some of the property rights over legal claims are bargained and exchanged, and ultimately allocated to their highest valued uses. Hereby, the property right of avoiding the risk of incurring the litigation costs is exchanged for a price.⁵⁸ Otherwise, the only option for the original claimholders would be to pursue the claim themselves, and they might not be the best party to do so. In other words, alternative litigation funding involves a ‘risk transfer’.

Litigation has also been framed as a public good. As a by-product of public dispute resolution, legal rules and deterrence are generated for similar disputes in the future. Judgements, opinions, case law, precedent and deterrence are characterised by their non-excludable and non-rivalrous nature, in that everyone can benefit without preventing anyone else from also benefitting from them. Public goods tend to be undersupplied, as there is little incentive for private actors to supply them. They would bear the entire cost of supplying them, while the benefits are shared broadly with others who do not contribute to the cost. When litigation is facilitated, for example through appropriate procedures and funding, rational apathy, ‘free rider’ and ‘collective action problems’ are mitigated and public goods are supplied, in most part by private actors.⁵⁹ This results in the mitigation of the market failure of the under-provision of public goods.⁶⁰

4.2.3. Agency Theory in Law-and-Economics

At this point, the principal concern surrounding TPF and other result-based arrangements remains the profit-motive of the funding provider, whose self-interest could conflict with claimants’ interests. This provides the fuel for concerns such as excessive return rates, control over litigation decisions, increases in frivolous litigation and the overall volume of litigation and inadequate capital reserves.⁶¹ This research is primarily concerned with the concern of conflicting interests, and the extent to which resistance based on this concern is justified.

Generally speaking, and as discussed earlier, law-and-economics is concerned with aligning incentives and interests such as to maximise social welfare and the correction of market failures.⁶² In this respect,

⁵⁸ de Morpurgo (n 26) 349-350.

⁵⁹ For further discussion on free rider and collective action problems and how they feature in litigation funding, see Sections 4.3.4, 4.4.2 and 5.2.2; European Commission DG Justice and Consumers, ‘Mapping Third Party Litigation Funding in the European Union’ (2025) 13, 666-671.

⁶⁰ William M. Landes and Richard A. Posner, ‘Adjudication as a Private Good’ (1979) 8 (2) *The Journal of Legal Studies* 235, 248; William B. Rubenstein, ‘Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action’ (2006) 74 (3) *UMKC Law Review* 709; Jürgen G. Backhaus, Alberto Cassone and Giovanni B. Ramello, ‘The law and economics of class action litigation: setting the research agenda’ in Jürgen G. Backhaus, Alberto Cassone and Giovanni B. Ramello (eds.) *The Law and Economics of Class Actions in Europe* (Edward Elgar, 2012).

⁶¹ Cordina (n 24); European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation (2020/2130(INL)) 7-9, 26.

⁶² Section 4.2.1.

the law-and-economics literature generally views TPF positively.⁶³ This research builds on the existing literature by applying agency theory to examine hourly fees, LEI, contingency fee-like agreements and TPF. It makes comparisons between these funding options in order to address the difficult question of to what extent the resistance to TPF is warranted in Europe.

Agency theory and the problem of agency costs is a core concern of law-and-economics.⁶⁴ It can provide a comprehensive framework for analysing the different litigation funding sources outlined in Chapter 2 and for responding to the above-mentioned concern associated with TPF. It achieves this by deconstructing the relationships between principals and agents, highlighting how conflicts arise when self-interested agents perform tasks assigned to them by self-interested principals. The objective is assumed to be the maximisation of the principal's welfare, which, in the case of this research on litigation funding, is often the claimant, or the group of claimants. It also advances possible relationship designs which reduce conflicts of interests. Agency theory will be introduced in Sections 4.3.1. and 4.3.2, before it is applied to different means of litigation funding.

Limitations to agency theory in economics have been outlined. It has been described as 'parsimonious', as it can ignore wider relationships of multiple societal actors outside the contract, in order to keep its models tractable.⁶⁵ The wide use of the variety of agency theory found in economics has also been described as a type of 'economic imperialism'.⁶⁶ Arrow also highlighted other limitations, observing that real world practice can differ from the complex implications of the models, as fee arrangements for most professionals can tend to be simple and straightforward because of the vast costs of contracting itself, understanding the contract, its implications and applications.⁶⁷ If contracts are complex, they may involve a large discretionary component. Monitoring and verifying the behaviour of the agent will also tend to be an imprecise and vague activity. Finally, agency theory may not take in the full picture of social or personal rewards and incentives available to agents, including ethics and reputation.⁶⁸

Nevertheless, despite the above, agency theory achieves the goal of integrating the various elements of what can be very complex relations through the tools provided by economic analysis.⁶⁹ As explained

⁶³ Visscher and Faure (n 29).

⁶⁴ See note 8.

⁶⁵ Edgar Kiser, 'Comparing Varieties of Agency Theory in Economics, Political Science, and Sociology: An Illustration from State Policy Implementation' (1999) 17 (2) *Sociological Theory* 146, 150.

⁶⁶ *Ibid.* As has been the application of economic analysis of law in criminal and family law by Becker, see Mathis (n 102).

⁶⁷ Arrow (n 3) 19-22.

⁶⁸ *Ibid.* The effects of reputation are being increasingly incorporated into more recent models in the law-and-economics literature. See for instance; Camille Chaserant and Sophie Harnay, 'Self-regulation of the legal profession and quality in the market for legal services: an economic analysis of lawyers' reputation' (2015) 39 (2) *European Journal of Law and Economics* 431; Roy Shapira, *Law and Reputation: How the Legal System Shapes Behaviour by Producing Information* (CUP 2020).

⁶⁹ Arrow (n 3) 19-22.

earlier, this approach provides a valuable framework in analysing the behaviour, incentives and motivations of the actors in litigation funding, and contains elements which are missed by other methodological approaches.

4.3. (Multi) Principal-Agent Relationships in Litigation Funding

4.3.1. The Principal-Agent Relationship

A framework for analysing principal-agent relationships was provided in the classic paper by Jensen and Meckling in 1976.⁷⁰ The agency relationship arises in interactions or contracts where one or more persons (the principal/s) engage one or more persons (the agent/s) to perform services on their behalf. Such relationships entail the delegation of some decision-making to the agent and are present in essentially any cooperative effort involving two or more people. Examples of these relationships can include employer-employees, shareholder-directors, client-lawyer, patient-doctor, landlord-tenant relationships and broader relationships such as between society and corporations.⁷¹ Self-interested and utility-maximising agents will not always act in the best interests of the principal. The principal can reduce the misalignment from their interest through the use of incentives, bonding and monitoring, which would entail pecuniary and non-pecuniary costs. These agency costs are necessary to ascertain that the agent will make good decisions from the principal's viewpoint. The agent would otherwise not act in the principal's best interests for free. In most agency relationships, there will still be some divergence of interests in addition to the aforementioned costs and this divergence was referred to as the 'residual loss' by Jensen and Meckling.

Arrow underscored that the problems in agency relationships arise only when the information available to the two participants is unequal or asymmetrical, giving rise to a market failure.⁷² The two problems which arise are 'hidden-action' (moral hazard) and 'hidden-information' (adverse selection). There would be no problems when a principal has full information and observational abilities, as then the agent would be told what to do in a given amount of time, through a perfect contract. As emphasised by Akerlof, the information asymmetry problem could also lead to a general degradation of the quality of the services provided in the market, and lead to a 'market for lemons'.⁷³ Low-quality services could also lead to negative externalities on third parties.⁷⁴ If the only way consumers can learn about the quality is through the price, then there is no incentive for suppliers to

⁷⁰ Jensen and Meckling (n 3).

⁷¹ See e.g. Shavell (n 3).

⁷² Arrow (n 3).

⁷³ George A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 (3) *The Quarterly Journal of Economics* 488.

⁷⁴ Niels Philipsen 'European Regulation of the Liberal Professions? Or, How I Learned to Stop Worrying and Trust in National Authorities' in Michael Faure, Wicher Schreuders and Louis Visscher (Eds) *Don't Take it Seriously. Essays in Law and Economics in honour of Roger Van den Bergh* (Intersentia 2018).

provide high-quality services. They would be able to charge higher prices for lower quality services as consumers cannot distinguish quality due to the information asymmetry. Some form of quality regulation will be needed to remedy these market failures.⁷⁵

After a review of the principal-agent literature, Eisenhardt outlined the propositions which have emerged from the research.⁷⁶ The first proposition was that when the contract between the principal and agent is outcome (result) based, such as that in a contingency fee agreement between the claimant and the lawyer, the rewards for both depend on the same actions, and the lawyer is more likely to behave in the interests of the principal. Secondly, the more the principal is informed and able to verify agent behaviour, the more the agent is likely to behave in the interests of the principal. The principal has two options in case of unobservable behaviour. One is the implementation of information systems, such as budgeting, reporting, layers of management and task programmability which would better accommodate contracts based on behaviour than outcome-based contracts. The other option is to use outcome-based contracts which align interests without the need for information systems. However, outcome-based contracts become more costly for principals as outcome uncertainty increases, as the risk still has to be borne by the agent, despite the motivational benefits of such contracts. In other words, when many variables reduce the certainty of the desired outcome, this uncertainty would lead the agent to bear more risk, and can lead to a 'behaviour-based' contract to become preferable over an outcome-based contract. Risk aversion of the principal therefore favours outcome-based contracts, as the risk is instead shifted to the agent, whereas risk aversion of the agent favours behaviour-based contracts. Furthermore, as goal conflict decreases, for example through the agent's selfless behaviour or other-regarding preferences, behaviour-based contracting is favoured.⁷⁷ Another proposition was that the ease of outcome measurability and verifiability favours outcome-based contracts. Finally, increased length of the agency relationship favours behaviour-based contracts, as the principal has the time to learn more about the agent and therefore will have established more bonding and observational capabilities.⁷⁸

As discussed, the principal-agent framework laid out above offers a valuable foundation for analysing the delegation of decision-making in contexts where interests may diverge and information is asymmetrical. These conditions are clearly present in the various forms of litigation funding arrangements to be examined. Through this framework, litigation funding contracts can be systematically evaluated and compared, with the aim of assessing the justifiability of the resistance towards TPF on the basis of conflicts of interests between the actors.

⁷⁵ Ibid. See also Niels J. Philipsen, 'The Law and Economics of Professional Regulation: What does the theory teach China?' In Thomas Eger, Michael Faure and Zhang Naigen (Eds), *Economics of Law in China* (Edward Elgar, 2007) 114.

⁷⁶ For a fuller discussion on these propositions, see Kathleen M. Eisenhardt, 'Agency Theory: An Assessment and Review' (1989) 14 (1) *Academy of Management Review* 57, 60-63.

⁷⁷ Altruistic behaviour is often considered to be the exception, not the rule.

⁷⁸ Eisenhardt (n 76).

4.3.2. Agency Theory in Legal Services

Agency theory and law-and-economics have been applied extensively to lawyer remuneration in litigation, particularly with respect to hourly fees and contingency fees.⁷⁹ Lawyers take on cases based on the expected costs and benefits, and only if the expected benefits outweigh, or at least equal, the benefits of their next best alternative activity.⁸⁰ The claimants, on the other hand, are interested in having the lawyer investing substantial time and effort in representing them at little cost, and in recovering high amounts from the defendants.⁸¹ In the simplest scenario, there is one claimant and one lawyer; one principal and one agent. Although lawyers have duties to the court as well, and in this sense are agents of the court, agency models often narrow their focus to the agency relationship between the client and the lawyer.⁸² The focus of this research is on the relationship between claimants, rather than defendants, and the lawyer, since it is claimants who are most often the recipients of outcome-based litigation funding such as TPF.

Legal services are a type of 'expert service' or 'credence good', in that the claimants (principal) are often assumed to be less informed about the legal nature of their case than their lawyer (the expert/agent).⁸³ They are typically less familiar with the legal technicalities involved, giving rise to an informational asymmetry. They would need to acquire costly additional information to rectify the problem and verify whether the lawyer acts in their best interest and provides them with good-quality services at reasonable fees.⁸⁴ This is also the case ex post, after the services have been delivered. The benefits of acquiring this additional information are rarely greater than the monitoring costs. Therefore, it is often impossible for claimants to verify, if for instance, some of the complex legal work done on their behalf was really needed, or if necessary work was not performed.

In addition to the information asymmetry problem and agency costs, transaction cost economics suggests another problem; the problem of 'bilateral monopoly'.⁸⁵ For the duration of the contractual relationship with the lawyer, both the claimant and the lawyer incur various relationship-specific

⁷⁹ Amongst others in Louis T. Visscher, 'The Duty of Lawyers to Serve Their Clients' Interests: An Economic and Psychological Account' (2014) RILE Working Paper Series 2014/03, <<https://ssrn.com/abstract=2418952>> accessed 3 October 2024; Winand Emons, 'Legal Fees and Lawyers' Compensation' in Francesco Parisi (Ed) *The Oxford Handbook of Law and Economics, Volume 3: Public Law and Legal Institutions* (OUP, 2017); Choi (n 7); Garoupa and Gomez-Pomar (n 7).

⁸⁰ This condition is referred to in agency theory as the 'participation constraint'. Arrow (n 3) 12. The next best alternative activity foregone is also the lawyer's 'opportunity cost'.

⁸¹ Maurer and others (n 10) 281.

⁸² Michael Duffy, 'Two's Company, 'Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory' (2016) 39 (1) University of New South Wales Law Journal 165, 185.

⁸³ This is especially the case with one-shotter claimants.

⁸⁴ Winand Emons, 'Credence Goods and Fraudulent Experts' (1997) 28 (1) The RAND Journal of Economics 107. Other examples of expert services include medical services and automobile repairs. See also Michael R. Darby and Edi Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 (1) The Journal of Law & Economics 67.

⁸⁵ Duffy (n 82) 197; Oliver E. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (Free Press; Collier Macmillan Publishers, 1985) 574.

costs, and sunk costs and switching costs make exit opportunities more limited once the claimants have chosen their lawyer. It becomes increasingly costly to terminate the engagement and switch to another lawyer, as the claimant would have to search for, build a relationship with a new lawyer and explain their case again. Switching to another lawyer would also lead to delays to the litigation in question. These switching costs therefore reduce competition and could lead the lawyer to act less in the claimant's best interests during the litigation.

The economic literature has also at times assumed that the claimant may have better information about the facts or merits of the case than their lawyers, whereas lawyers have better information about their own ability.⁸⁶ Nonetheless, with practically all of the litigation funding arrangements, claimants are, to varying degrees, unable to fully monitor lawyers as to whether they are acting in their best interest, even though it is the lawyers who choose actions affecting their welfare. In sum, claimants often lack the ability to distinguish the quality of their legal representatives (hidden information/adverse selection)⁸⁷ and cannot ascertain if the actions of their representatives are as diligent as they can be (hidden action/moral hazard). The following sections will apply agency theory to hourly fees, LEI, contingency fees and TPF and examine the extent to which agency costs feature with each funding option.

4.3.3. The Hourly Fee Model

Hourly fees are frequently criticised because the client bears all the legal risk, the attorney has no incentive to put in unobservable effort, yet has an incentive to “overlawyer” cases, i.e., to run the meter for observable yet unnecessary tasks.⁸⁸

With hourly fees, the claimants pay the lawyer in accordance with the time spent on the case. They also bear the risk of losing the case along with the entirety of the litigation costs, including adverse costs. There may be reputational and financial incentives for high-quality representation by the lawyer. However, the incentive is to spend more time on the case, to leave ‘no stone unturned’⁸⁹ and to not ‘shirk’. The incentive is to over-prepare, overspend, ‘over-lawyer’ and ‘charge by the stone’⁹⁰ at

⁸⁶ Emons (n 79) 249; Daniel L. Rubinfeld and Suzanne Scotchmer, ‘Contingent Fees for Attorneys: An Economic Analysis’ (1993) 24 (3) *The RAND Journal of Economics* 343.

⁸⁷ Law schools ensure minimum quality standards and other indications of quality can be graduating from elite institutions, serving corporate clients and charging high fees. See Elisabetta Iossa and Bruno Jullien, ‘The market for lawyers and quality layers in legal services’ (2012) 43 (4) *RAND Journal of Economics* 677, 677-678.

However, it might also be in the interests of the legal profession in cases where it is self-regulated, which in many jurisdictions it is, to set too high minimum standards to restrict competition. See Hayne E. Leland, ‘Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards’ (1979) 87 (6) *Journal of Political Economy* 1328; Frank H. Stephen, James H. Love and Neil Rickman, ‘Regulation of the Legal Profession’ in Roger Van den Bergh and Alessio Paccas (eds), *Regulation and Economics, Encyclopedia of Law and Economics*, 2nd edn (Edward Elgar 2012); Section 5.3.2.1.

⁸⁸ Emons (n 79) 248.

⁸⁹ Rhode (n 10) 635.

⁹⁰ *Ibid.*

the expense of the claimant, in order to bill more hours.⁹¹ This depends also on the extent to which lawyers have internalised professional ethics and have other-regarding preferences. Nevertheless, despite any associations with nobility, virtue and ethics over self-interest, under rational choice theory, lawyers are 'no different from other individuals in that they respond to the incentives found in the structure of the market in which they operate.'⁹² Reputation and professional ethics provide strong incentives, but financial incentives are for the most part stronger motivations, as lawyers would rather earn more than less. The opportunities for lawyers therefore to change their behaviour and engage in opportunism in hourly fee arrangements without risks of detection are rife, irrespective of the existence of professional codes of ethics. A staple of many lawyer codes of ethics is the stipulation that lawyers must act in the client's best interests.⁹³ The lawyers' change in behaviour to prioritise their private interests, due to a reduced risk of detection, is known as the 'moral hazard' phenomenon.⁹⁴

If opportunistic behaviour, misconduct and fraud are detected, reputational sanctions or concerns could also potentially act as a constraint on the lawyer in the form of loss of future business opportunities. However, reputational risks are more effective in the case of repeat-players than with one-shotters.⁹⁵ Firstly, the longer the agency relationship between the claimant and the lawyer, the better an hourly fee contract would align incentives, to the benefit of repeat-players. Hereby, the repeat-claimant has more time to learn more about the lawyer and acquires better observational and monitoring abilities.⁹⁶ Repeat-claimants also tend to be in a better position because of being better-informed through experience in litigation. Those claimants who are more experienced and better resourced are also more likely to push back against bills that they find to be excessive. They can, through the use of in-house counsel, monitor the lawyer more effectively, by for example perusing the hourly bill itself, which would contain the different tasks worked on.⁹⁷

⁹¹ Maurer and others (n 10).

⁹² Francisco Cabrillo and Sean Fitzpatrick, *The Economics of Courts and Litigation* (Edward Elgar, 2008) 163, 157-158. Popular perceptions of lawyers have always not been very favourable - 'many people do not believe lawyers are above fraudulent behaviour'; Gillian K. Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System' 98 (4) *Michigan Law Review* 953, 969. See also; Marc Galanter, 'Predators and Parasites: Lawyer-Bashing and Civil Justice' (1994) 28 (3) *Georgia Law Review* 633.

⁹³ See for example; CCBE Model Code of Conduct for European Lawyers Art. 2.7. See De Mot, Faure and Visscher (n 5) 45; Miller (n 29) 273; Cordina (n 24).

⁹⁴ Section 4.3.5. The moral hazard effect in hourly fees could be reduced if the lawyers have a diversity of clients, as in this case, they are less dependent on single cases. They will more likely act more in the claimant's best interests and spend less unnecessary amounts of hours on each; Winand Emons, 'Expertise, contingent fees, and insufficient attorney effort' (2000) 20 *International Review of Law and Economics* 21.

However, this may be dampened by the switching costs referred to earlier. Lawyers might prefer to stick to the same clients because of the costs involved in establishing new relationships and learning about new cases.

⁹⁵ See also Michael G. Faure and Franziska Weber, 'Dispersed Losses in Tort Law – An Economic Analysis' (2015) 6 (2) *Journal of European Tort Law* 163, 179; Cordina (n 24); Shapira (n 68). In reality, there is a spectrum of different levels of claimant sophistication and financial constraints, but for simplifying purposes these two opposite extremes are presented.

⁹⁶ Eisenhardt (n 76) 63.

⁹⁷ Choi (n 7) 299. See also Cabrillo and Fitzpatrick (n 92) 159-60.

Claimants, if and when they become aware of opportunistic behaviour, can impose (imperfect) reputational or non-legal sanctions themselves on the lawyers. Hereby, as market actors and stakeholders, claimants cost them future business opportunities. This kind of 'informal' enforcement has the benefit of being cheaper and more immediate than formal enforcement.⁹⁸

When it comes to formal disciplinary sanctions or potential exclusion from the profession, lawyers may in effect be rarely sanctioned, because malpractice is often impossible to detect not only by the claimant, but also by experts due to the complexity, ambiguity and unpredictability of the law. If detected, there may be few incentives for other peers, lawyers or judges, to report misconduct.⁹⁹

Studies in the US show that the hourly fee model still dominates among sophisticated law firms and corporations, where both hourly fees and contingency fees are widely available.¹⁰⁰ This is in spite of the assumption that large and sophisticated modern law firms as agents can bear risk better, a characteristic typically associated with outcome-based contracts. Possible explanations are that corporate clients as principals are also well able to bear the risk of loss of the litigation costs and thus prefer hourly fees.¹⁰¹ They also operate across different countries and tend to be involved in very complex cases which require services which go beyond only resolving the disputes in question. This could make the contingency fee unfeasible. Finally, both large law firms, and corporate clients with in-house counsel, as repeat-players, establish long-term relationships with bonding mechanisms and have the resources and personnel to monitor individual lawyers' behaviour.¹⁰² Well-informed claimants in general tend to prefer the hourly fee.

In the one-shotter arena, however, which involves individual claimants and SMEs who do not litigate often, the higher information asymmetry involved could much more easily lead some lawyers to spend more time on the case than necessary in order to bill more hours. Opportunistic behaviour and the moral hazard effect here is much more difficult to detect and the demand for the lawyer's services and future business opportunities would not decrease in the long run. Consumer demand is not very responsive in this segment of the market.¹⁰³

When contrasting fixed fees with hourly fees, the reverse problem could arise, in that instead of the lawyer working unnecessarily longer, the incentive for the lawyer is to make less effort and shirk as they receive the same outcome anyways.¹⁰⁴

⁹⁸ Shapira (n 68) 1-37.

⁹⁹ Cabrillo and Fitzpatrick (n 92) 160. See also Hadfield (n 92) 970.

¹⁰⁰ Choi (n 7) 309-310; Garoupa and Gomez-Pomar (n 7) 458-460.

¹⁰¹ *Ibid.*

¹⁰² Garoupa and Gomez-Pomar (n 7) 469-73; Stephen, Love and Rickman (n 87).

¹⁰³ See generally Akerlof (n 73) and Section 4.3.1 for a discussion on the information asymmetry problem; Shapira (n 68).

¹⁰⁴ Maurer and others (n 10).

Moreover, with hourly fees there are risks of frivolous litigation. Hourly fee lawyers may accept to take on cases where the expected losses of bringing a claim outweigh the expected gains for the claimants, as they will get remunerated anyway.¹⁰⁵ When claimants exaggerate or overestimate their claims, lawyers have few incentives to act as gatekeepers and not bring the (frivolous) claims forward.

Despite the fact that obligations exist upon lawyers in most countries not to file frivolous claims or defences, it is notoriously costly to screen out such actions, primarily because of the [...] complexity of the law and the fact that it is difficult – even for experts – ex post to establish the value of lawyers' actions.¹⁰⁶

Similarly, under the hourly fee, rather than settle earlier when this is in the claimant's best interest, lawyers could be incentivised to go to trial more often and 'drag cases out' to extend their engagement by the claimant.¹⁰⁷ Empirical research supports the predictions that, under the hourly fee, lower quality cases are more likely to be brought forward, and that lawyers have incentives to delay settlement.¹⁰⁸

The above suggests that even the payment of hourly fees to lawyers through claimants' personal resources - one of the most, if not the most, common funding methods in Europe¹⁰⁹ - is not immune abuses. It is also realistic to claim, that the ubiquity and near monopoly of the hourly fee model is a major source of unnecessary costs in European civil justice systems.¹¹⁰ Opening the market to alternative fee models and to non-lawyer service providers could significantly reduce the misalignment of interests between legal representatives, claimants and society, through the provision of more affordable and higher quality legal services.¹¹¹

The hourly-fee model is however universally accepted as standard practice,¹¹² does not lead to any furore and is primarily regulated through self-regulatory frameworks and fiduciary obligations requiring lawyers to act in their clients' best interests. As mentioned in the preceding chapters, the same cannot be said for result-based funding arrangements, which will be analysed hereafter in

¹⁰⁵ De Mot, Faure and Visscher (n 5) 45. See also, Steven Shavell, *Foundations of Economic Analysis of Law* (The Belknap Press of Harvard University Press 2004) 435; Eric Helland and Alexander Tabarrok, 'Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets' (2003) 19 (2) *The Journal of Law, Economics and Organisation* 517; Cordina (n 24).

¹⁰⁶ Cabrillo and Fitzpatrick (n 92) 167.

¹⁰⁷ *Ibid*, 168; Shavell (n 105).

¹⁰⁸ When compared with lawyers operating under contingency fees. Helland and Tabarrok (n 105).

¹⁰⁹ Section 2.3.1.

¹¹⁰ The incentives the hourly fee model provides to the legal profession is one of main causes of 'poor service to the community'. Adrian Zuckerman, 'Justice in Crisis: Comparative Perspectives in Civil Procedure' in Adrian Zuckerman (Ed) *Civil Justice in Crisis* (OUP 1999) 45.

¹¹¹ Cabrillo and Fitzpatrick (n 92) 171.

¹¹² See Chapter 2; Maurer and others (n 10) 289; Suzi Ring and Emma Jacobs, 'Why the billable hour is still king in the legal world' *Financial Times* (London, 27 January 2025) <<https://www.ft.com/content/7750aff2-0677-4ba9-b571-4e02cf83950d>> accessed 2 May 2025.

Sections 4.3.5 to 4.4.2. As discussed in Chapters 2 and 3, result-based funding encounters scrutiny, resistance and prohibitions, especially in Europe. This remains the case despite the fact that, as with hourly billing, lawyers operating under result-based funding are still bound by ethical and legal duties to act in the claimant's best interests. One conventional explanation could be that;

excess costs are not visible to the public, highly compensated hourly fee attorneys do not appear to receive windfalls that highly compensated contingency fee attorneys receive.¹¹³

This section has applied agency theory to the use of hourly fees, demonstrating that this billing method involves significant agency costs. In accordance with agency theory, the contract between the claimant and the lawyer may be better structured, as a contingency fee agreement amongst others, to better align the interests of both parties in the outcome.¹¹⁴ Furthermore, with the other funding methods to be discussed in the following sections, the better-informed lawyers, insurers and funders would bear the risk of loss of the entire litigation costs themselves, instead of the claimant. They have an interest therefore to only bring forward cases of strong merit, unlike lawyers billing by the hour, who have less at stake in the case's success. The risk of frivolous claims is further attenuated by the European loser pays rule. Evidence so far has shown that the use of result-based arrangements does not cause increases in frivolous litigation and in the overall volume of litigation.¹¹⁵ Nevertheless, the popular image that through result-based arrangements frivolous claims will proliferate and a compensation culture would arise still persists in the litigation funding debate.¹¹⁶

This analysis of hourly fees highlights the importance of applying a consistent framework when evaluating different litigation funding models, in order to ensure a comprehensive understanding of the incentives at play. In principle, the same standard or criteria used to assess, or resist, TPF should also be applied here. The next litigation funding method to be analysed in this manner is BTE LEI.

4.3.4. Legal Insurance

The use of BTE LEI in Europe was discussed in Chapter 2.¹¹⁷ Of particular relevance is that there is a 'curious' absence of 'active' LEI policies in Europe.¹¹⁸ The costs of bringing suits are rarely covered

¹¹³ Maurer and others (n 10) 292.

¹¹⁴ Section 4.3.5.

¹¹⁵ See Chapter 3; Helland and Tabarrok (n 105).

¹¹⁶ Sections 3.3 - 3.4.

¹¹⁷ See Section 2.3.3.1.

¹¹⁸ Jef de Mot, Ben Depoorter and Michael Faure, 'The Multiplication Effect of Legal Insurance' (2016) 13 (1) NYU Journal of Law & Business 1. Active legal insurance policies represent only one percent of total premiums in Europe.

when compared to the costs of defending against suits, in contrast to TPF, which predominantly funds claimants. Wider availability of LEI for claimants could potentially provide significant access to justice and deterrence benefits.¹¹⁹ However, in spite of this unavailability, and as was also explained in Section 2.3.3.1, insurers still play a fundamental role in civil justice systems. This is the case even in England and Wales, where there is a lower prevalence of BTE LEI insurance coverage rates than in the Netherlands and Germany, but covering almost 3 in 5 adults as of 2014.¹²⁰ For instance, 9 out of 10 of tort claims brought concern motor vehicle and workplace incidents in which the parties are (compulsorily) insured, with the rest being large self-insured organisations or public bodies such as local authorities. Insurers are the ‘paymasters of the tort system’ accounting for 94% of tort compensation for personal injury.¹²¹ Nevertheless, the critical role insurance plays is rarely acknowledged, understood or criticised.¹²² An important reason is due to the doctrine of subrogation, where the insurer often defends or brings claims standing in its clients’ shoes to recover the money it is liable to pay under the policy. The insurer does this in anonymity by using the name of its client.¹²³ Many times, litigation in reality takes place between two insurance companies, not between the parties actually named in the litigation.¹²⁴ In the EU, the freedom of the choice of lawyer is guaranteed, but insurers can nudge towards the selection of panel lawyers.¹²⁵ This can raise questions on why the issue of control by funders in third-party funded litigation is so contentious in comparison to control by insurers in insurer-funded litigation.¹²⁶

This section continues the analysis of legal insurance from a law-and-economics perspective. Since most individuals are risk-averse, LEI can be very attractive.¹²⁷ Unlike the situation of hourly fees, which are paid directly by the claimants, LEI involves a risk transfer, allowing claimants initially bearing small risks of significant litigation costs and damage liabilities, to shift them to the insurer. The insurer is ‘risk-neutral’; that is, more willing and able to bear the risk of loss.¹²⁸ The small risk of ‘possibly devastating’ litigation costs and liability, is exchanged with the regular payment of small annual premiums.¹²⁹ With the deep pockets and the expertise of the insurers, LEI would also level the

¹¹⁹ Ibid.

¹²⁰ Richard Lewis, ‘Compensation Culture Reviewed: Incentives to Claim and Damages Levels’ (2014) *Journal of Personal Injury Law*, 209 <<https://ssrn.com/abstract=2467110>> accessed 3 October 2024; see also Richard Lewis, ‘Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice?’ (2011) 74 (2) *The Modern Law Review* 272.

¹²¹ Lewis (2014, n 120).

¹²² Section 2.3.3.1.

¹²³ Lewis (2014, n 120) 67.

¹²⁴ Ibid. See also; Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) 97-98; Reuben Hasson, ‘Subrogation in Insurance Law - A Critical Evaluation’ (1985) 5 (3) *Oxford Journal of Legal Studies* 416.

¹²⁵ Section 2.3.3.1; Wolfgang Hau, ‘Private Funding’ in Burkhard Hess, Margaret Woo, Loïc Cadiet, Séverine Menétrey, and E Vallines García (Eds), *Comparative Procedural Law and Justice, Part III - Access to Justice and Costs of Litigation* (2024) 15.

¹²⁶ Silver (n 5); Section 2.3.3.1.

¹²⁷ De Mot, Depoorter and Faure (n 118).

¹²⁸ Wagner (n 7).

¹²⁹ Donatella Porrini, ‘Insurance Regulation’ in Roger Van den Bergh and Alessio Paces (eds), *Regulation and Economics, Encyclopedia of Law and Economics, 2nd edn* (Edward Elgar 2012) 529.

playing field and significantly improve the bargaining position of the insured claimant vis-à-vis the defendant, and vice-versa.

Similarly to the funding of litigation through hourly fees by the claimants themselves, and to virtually any agency relationship, in LEI, claimants also suffer from agency problems and substantial information asymmetries. Policyholders in insurance in general, including in LEI, have much more limited expertise and interest in the character and quality of the insurance they purchase than their insurers.¹³⁰ This asymmetry entails that LEI is also a credence good or expert service - it is costly or impossible for policyholders to evaluate its true value even after purchase.

Firstly, the LEI contract itself can be complex, ambiguous and have unclear implications, even to experts.¹³¹ Secondly, as pointed out in Section 2.3.3.1, most of the insured almost never, or never, end up making use of the coverage they paid for, given the small chances for these high-cost events, so they are not informed through experience on how the package works in practice. The reputation of the insurer may also be misleading because of the reliance on word of mouth and the insured's past experiences. Finally, the opportunities to switch to other insurers are limited, because of the costs of the switch itself.¹³² Policyholders generally have little to no voice in their carrier's operations, and limited exit opportunities in order to switch to other insurers.¹³³

Due to the complexity of the LEI contract, the differing contexts of individual situations and the information asymmetries, insurers may also have an incentive to deny legitimate claims or delay claims payouts. Prospective claimants may not be able to distinguish between insurers that adopt excessively aggressive practices in claims handling and those that do not. They may become wary of these practices, and resultantly request less claims to be funded through their insurer. The market may therefore fail to deter these detrimental practices.¹³⁴ In fact, insurers in the US have been found to adopt strategies to minimise claim payments.¹³⁵ However, especially when the claims are of low value, which most are, as evidence in England has shown, insurers do not splurge on legal costs contesting liability and readily hand out compensation, possibly encouraging more claims and a 'compensation culture'.¹³⁶

¹³⁰ Daniel Schwarcz and Peter Siegelman, 'Law and Economics of Insurance' in Francesco Parisi (ed), *Oxford Handbook of Law and Economics, Volume II: Private and Commercial Law* (OUP 2017).

¹³¹ Ibid. 487. See also Daniel Schwarcz, 'A Products Liability Theory for the Judicial Regulations of Insurance Policies' (2007) 48 (4) *William and Mary Law Review* 1389; Civil Justice Council (CJC), 'The Law and Practicalities of Before-The-Event (BTE) Insurance: An Information Study' (Civil Litigation Review Working Group BTE Insurance, 2017) 7-8.

¹³² Schwarcz and Siegelman (n 130) 487; See also Schwarcz (n 131).

¹³³ Schwarcz and Siegelman (n 130) 483.

¹³⁴ Ibid. 496-497.

¹³⁵ Ibid; Schwarcz (n 131).

¹³⁶ Lewis and Morris (n 36) 572; Lewis (n 2014, n 120).

Another aspect of the principal-agent problem in LEI, as in the insurance industry in general, is moral hazard and adverse selection on the part of the insured. Both at the initial contracting stage of LEI and for the duration of the insurance, the insurer cannot fully calculate the value of the risk posed by the particular individual, as this would entail having full access to personal and hidden characteristics that may lead to liability in the future.¹³⁷ Insurers may expect some high-risk insureds to understate their exposure to losses, take less caution in avoiding accidents which lead to litigation or to pursue weak claims, whilst paying the same premiums as everyone else. Insurers address this risk of moral hazard through deductibles, the opinions of third parties and through the provision of legal services and caps on coverage.¹³⁸ The moral hazard problem can also lead to more high-risk individuals purchasing insurance. This in turn leads to higher pay-outs by insurance companies, resulting in more expensive insurance premiums. Low-risk customers would ultimately subsidise high-risk insureds or not purchase insurance.¹³⁹ However, empirical research has shown that the effect of moral hazard in this context is relatively small.¹⁴⁰

Shavell draws attention to another agency issue which may feature with insurance, due to caps on liability.¹⁴¹ Caps on coverage are common in Europe, as seen in Section 2.3.3.1. A claimant who sustains a loss may recover the upper limit of coverage immediately from the insurer, but still has an interest in recovering the rest of the damage through a judgement or settlement. This interest is not as strong as it would be if the claimant were recovering the total damages. The insurer would also only have an interest to recover the amount it immediately paid out to the insured from the subsequent litigation. Both the claimant and the insurer have reduced incentives when compared to a single uninsured claimant. However, it is the insurer who bears the litigation costs, so the insurer's incentives to recover the extra amount are further reduced. Under the assumption that insurers control litigation, they would be less likely to pursue the claim and this would create a conflict of interest. Differences in bargaining power might further exacerbate the conflict. In general, in these cases, insurers have reduced incentives to spend at trial and be more likely to settle as they have less at stake than the full amount of the loss sustained, yet bear the entire litigation costs. On the other hand, the claimants would want their insurer to spend more as they have some stake in the outcome.¹⁴²

¹³⁷ Joseph A. Fields and Dogan Tirtiroglu, 'Agency-Theory Implications for the Insurance Industry: A Review of the Theoretical and Empirical Research' (1991) 30 (1) *Quarterly Journal of Business and Economics* 40, 48.

¹³⁸ *Ibid*; Faure and de Mot (n 5) 760.

¹³⁹ Porrini (n 129) 534; Faure and de Mot (n 5) 760.

¹⁴⁰ De Mot, Faure and Visscher (n 5); Velthoven and Klein Haarhuis (n 185); Faure and de Mot (n 5) 760. The literature on insurance has also distinguished between first-party insurance and third-party insurance. First-party insurance covers the risk of harm to the insured themselves. Third-party insurance covers also the potential harm suffered by others other than the insured. Examples of third-party insurance are the insurances for motor vehicles, medical malpractice, lawyers and employers. With first party insurance, the insured can better signal all the information on whether they are high or low-risk individuals directly to the insurer. The insurer can therefore differentiate risk better. Wagner (n 7) 377; Michael Faure, 'The View from Law and Economics' in Wagner (Ed) *Tort Law and Liability Insurance* (Springer Wien New York, 2005).

¹⁴¹ Shavell (n 105) 438-440.

¹⁴² *Ibid*. The CJC finds that caps on cover are rarely exceeded. CJC (n 131) 23, 49; Section 2.3.3.

With regard to involvement in the litigation, which insurers often have in practice,¹⁴³ LEI presumably leads to better decisions about litigation strategy to the benefit of the claimant. This is due to the specialised legal expertise concentrated by insurers through the use of panel lawyers¹⁴⁴ and to the reduction of the costs of negotiation and coordination during litigation.¹⁴⁵ Unlike the hourly fee arrangement examined in Section 4.3.3, LEI involves a tripartite relationship, so conflicts could arise if hourly fee lawyers prefer to keep working and advise the insurer to reject reasonable settlement proposals. However, this misalignment is reduced by the repeated relationships with the panel lawyers and the high level of influence or monitoring capability insurers usually have in the litigation process. In effect, another agency relationship may arise - being paid, and often selected by the insurer, the lawyer can become the agent of the insurer.¹⁴⁶

When it comes to insurer effects on litigation decisions and litigation volume, potential defendants could be sent a signal on the merits of the claim and be more likely to settle earlier if they know the claimants can commit vast sums of their insurer's money fighting the lawsuit.¹⁴⁷ Similarly, as to the converse situation; when potential claimants face defendants with LEI, they will also be less likely to sue.¹⁴⁸ Many families and firms in fact make use of LEI.¹⁴⁹ However, the opposite effect could also hold true. Defendants having LEI which also covers liability for adverse judgements (liability insurance) could encourage increases in litigation, which includes the meritless type;

[Liability insurance] makes defendants an attractive target and is a spur to suit, for otherwise many defendants would be unable to pay judgments and thus not be sued—plaintiffs and their insurers will not bring suit if they know that defendants do not have the assets or [...] insurance to pay the judgments that they seek.¹⁵⁰

As mentioned in Chapter 2, LEI is by now very well accepted and regarded in Europe. Suggestions have even been made for compulsory LEI with universal coverage to be introduced in European jurisdictions.¹⁵¹ In giving a law-and-economics perspective, Faure gave the following advantages and disadvantages with respect to compulsory insurance. Not-so-informed individuals might in general underestimate the risk of being involved in legal disputes and not get insurance, making compulsory insurance useful. Another argument for compulsory liability insurance is the potential insolvency (or

¹⁴³ Through the doctrine of subrogation amongst others; Section 2.3.3.1.

¹⁴⁴ Schwarcz and Siegelman (n 130) 499.

¹⁴⁵ Shavell (n 105) 442.

¹⁴⁶ It can be surmised that today BTE insurers have much higher control over the litigation they fund than third-party funders do over third-party funded litigation. See also Section 4.4.1.

¹⁴⁷ Schwarcz and Siegelman (n 130) 499.

¹⁴⁸ *Ibid.*

¹⁴⁹ Wagner (n 7) 379.

¹⁵⁰ Shavell (n 105) 439.

¹⁵¹ John Sorabji, 'Legal Expenses Insurance and the Future of Effective Litigation Funding' (2021) 14 (4) *Erasmus Law Review* 189.

‘judgement proof’ problem) of the wrongdoer. By only being liable up to the amount of the assets the wrongdoer owns, there will be an under-deterrence problem and externalisation of costs onto victims or society at large.¹⁵² With compulsory insurance which exposes insurers to full liability, this problem is solved. The insurer will also be incentivised to control moral hazard through deductibles, higher premiums and the threat of shutting the insured out of insurance, as happens in motor vehicle insurance. These arguments depend on the existence of a competitive insurance market, and on the willingness of the insurers to insure.¹⁵³

Furthermore, the higher the LEI coverage rates, the more access to justice is provided and the more potential wrongdoing is deterred. However, as people do not consider this public good and the external deterrence benefits of getting legal insurance, less people may ultimately get insured. Since everyone shares from these deterrence benefits, there is a collective action problem or an incentive to free-ride, and not get insured, safe in the knowledge that many others are insured. Similarly, as all insurers share the deterrence benefits (in the form of less accidents to insure) generated by one or more insurer, fewer insurers are incentivised to offer LEI as well. This also increases the price of LEI.¹⁵⁴ Compulsory insurance may solve this problem.

An argument against compulsory LEI however is that some individuals are higher risk whereas others are more low-risk, demanding different amounts of coverage or no insurance at all. A generalised duty to purchase;

then forces the good risk to subsidise bad risks. This form of cross subsidisation can be avoided if a first party insurance like accident insurances are largely offered but not imposed compulsorily.¹⁵⁵

In conclusion, at least in comparison to result-based arrangements, which are examined in the following sections, contemporary legal debate in Europe tends to take LEI, a widely used litigation funding method, for granted as a reality in civil litigation. It is seen as highly useful and essential for access to justice, and is rarely subject to criticism.¹⁵⁶ This is despite the close similarities it has with TPF, its potential of numerous agency issues, the significant influence insurers can exert over the litigation process on and the possible contribution to increases in frivolous litigation. An important distinction is that LEI in Europe often involves a significantly unequal bargaining position between the insurer and the claimant, making the contrasting perceptions even more surprising. Some

¹⁵² This problem could also arise in cases where there are caps to the potential liability of the insurer. See Faure (n 140) 252-3.

¹⁵³ Faure (n 140) 242-4.

¹⁵⁴ De Mot, Depoorter and Faure (n 118) 6.

¹⁵⁵ Faure (n 140) 246.

¹⁵⁶ This has not always been the case, however contemporary European scholarship seems to have made peace with LEI. See also Section 2.3.3.1.

American authors have encouraged critics of TPF to reconsider their approach and thoroughly examine LEI before condemning TPF.¹⁵⁷

The near absence of critical discourse surrounding LEI in Europe remains difficult to explain.¹⁵⁸ This is especially the case when considering the level of debate taking place with regard to TPF, which arises almost exclusively in litigation between two commercially sophisticated parties. Conventional explanations for this difference in outlooks include the fact that LEI predominantly funds defendants rather than claimants and that it forms part of a larger, long-established insurance industry that has existed for over a century. Moreover, it is a heavily regulated industry and plays an essential role in modern economies.¹⁵⁹

This section has applied economic analysis and agency theory to the relationships in LEI. The next section will turn to contingency fee-like agreements.

4.3.5. Contingency Fee-Like Agreements

As with LEI, contingency fees involve a transfer of the risk of bearing all or some of the litigation costs away from the claimants. This time, they are transferred to the lawyer or law firm representing them. Apart from financing the claim, the lawyers also, for the most part, manage the litigation, making contingency fees an active funding model.¹⁶⁰ From a claimant's perspective, contingency fees, similarly to TPF arrangements, are outcome-based or result-based arrangements, meaning that the funders or lawyers will only receive a fee in case of success. Outcome-based arrangements in litigation have also been collectively referred to as 'entrepreneurial litigation'.¹⁶¹ When compared with hourly fees, contingency fees are much more difficult to structure at the outset. Lawyers need to take into account the uncertainty and unpredictability of the outcome and their risk tolerance, and include this in the fee.¹⁶² However, once structured, they are also easy to understand for claimants as they revolve around an easily measurable share of the outcome.

The conventional client-lawyer agency relationship has been viewed as the client being the principal and the lawyer being the agent. With contingency fee agreements, the claimants can also become the

¹⁵⁷ W. Bradley Wendel, 'Alternative Litigation Finance and Anti-commodification Norms' (2014) 63 (2) *DePaul Law Review* 655; Silver (n 5); See Chapter 3.

¹⁵⁸ Section 2.3.3.1; Hau (n 125) 7. European law-and-economics scholarship has addressed legal insurance on various occasions in more recent years. See for instance; De Mot, Faure and Visscher (n 5); De Mot, Depoorter and Faure (n 118).

¹⁵⁹ See also European Law Institute (ELI), 'Principles Governing the Third Party Funding of Litigation' (August, 2024) 87.

¹⁶⁰ See Section 3.2.2; Hau (n 125) 5.

¹⁶¹ Ilja Tillema, 'Entrepreneurial Mass Litigation: Balancing the Building Blocks' (Doctoral thesis at Erasmus University Rotterdam 2019).

¹⁶² Hadfield (n 92) 979. On risk aversion see Section 2.2.

agent of the lawyers.¹⁶³ Since lawyers have a stronger stake in the outcome of the case, they have an interest in having the claimants participating effectively in the litigation. Claimants participate in the process by for instance providing witness statements and relevant evidence. By transferring the risk in these fee structures, the claimant has less incentive to participate and to monitor in the process. This gives rise to a dual-agency relationship, where the claimants and lawyers simultaneously assume roles as principal and agent in relation to one another.¹⁶⁴

The first important aspect of contingency fee-like agreements, and other result-based arrangements, is the access to justice they enable (albeit only to claims perceived by the lawyer to be of high-enough monetary value and chances of success), in situations where claimants do not have enough financial resources to bring claims. They also overcome the rational apathy of claimants in mass harm when the costs of individually pursuing the claim outweigh the benefits.¹⁶⁵ Contingency fees could therefore be highly beneficial to access to justice, given the increasing constraints claimants encounter in pursuing their claims.

However, this feature has often been interpreted as both an advantage and a disadvantage. The other side of the coin of increasing access to justice and deterrence benefits is the interpretation that a compensation culture may arise in the form of too much meritless litigation.¹⁶⁶ This fear in Europe, alongside the aversion to commodifying or commercialising legal claims, which were examined earlier in Chapter 3, involves an external societal or public policy concern.¹⁶⁷ While agency theory mainly focuses on internal costs and conflicts that arise in the contingency fee relationship, it also offers insights into whether such arrangements might incentivise frivolous litigation.

As described in Section 4.2.2, under an hourly fee arrangement, lawyers can have the incentive to take on cases in which the expected gains for the claimant are less than the litigation costs,¹⁶⁸ as lawyers will be paid regardless of the outcome. Under contingency fees, if a case is of ‘negative expected value’, the lawyer will not accept to take it on. The lawyer might also be unwilling to take some ‘positive expected value’ cases, i.e., cases for which the expected gain exceeds the legal costs. This can occur when the net gain is not so high, and the lawyer would only obtain a small share of the gains, e.g. 30%, but bears the full costs.¹⁶⁹ The European loser pays rule, which increases the cost-risk of taking a case, further reduces the incentives for lawyers to take on cases. In effect, if

¹⁶³ Geoffrey P. Miller, ‘Some Agency Problems in Settlement’ (1987) 16 (1) *Journal of Legal Studies* 189.

¹⁶⁴ *Ibid.*

¹⁶⁵ Contingency fees are however not permitted in collective actions in Europe. Sections 3.4.1.2 and 4.4.2; De Mot, Faure and Visscher (n 5); Cordina (n 24). On ‘rational apathy’ see Sections 1.4 and 2.2.

¹⁶⁶ Michael Faure, Fokke Fernhout and Niels Philipsen, ‘No Cure, No Pay and Contingency Fees’ in Tuil and Visscher (n 188) 39-41. Evidence suggests that this concern is unfounded. Sections 3.4.2 and 3.4.3.

¹⁶⁷ Section 3.5.

¹⁶⁸ Cases of ‘negative expected value’.

¹⁶⁹ Shavell (n 105) 435.

contingency fees were to be allowed, lawyers in Europe may ‘cherry pick’ cases of high enough value and chances of success, and it could be the case that the access to justice benefits would not be significant.

An oft-mentioned concern with contingency fees (and TPF and class actions) is the fear of ‘blackmail settlements’. These occur when frivolous claims are used to extract unwarranted settlements, driven by defendants’ concerns of disrepute and the significant litigation costs associated with identifying its lack of merit until resolution.¹⁷⁰ The idea that unmeritorious claims will be pursued for this purpose is controversial and very much related to claim culture concerns, and as mentioned, the available data does not support these assertions.¹⁷¹ Furthermore, the European loser pays rule acts as a further disincentive, and it is not clear why this argument is brought with regard to result-based fees, and not to the hourly fee, where there are stronger incentives to bring frivolous litigation.¹⁷²

A possible agency problem with contingency fees arises in relation to the timing and the size of settlements. If lawyers take on a case on a contingent fee, they are more likely to make more effort, both to ensure success of the case and to acquire more damages to share from with the claimant. This serves to align the interests of the lawyer with those of the claimant, as the claimant also has an interest in a successful and large award. However, as cases progress, the longer the lawyers spend on the case, the lower the benefit they will start accruing from each hour worked. They would hereby be better off working on other cases. Lawyers might then prefer to settle early, instead of holding out for a better offer or wait till trial, even if a delayed resolution could yield a higher payout. In other words, the lawyer’s return per hour invested in the case would be higher the sooner the case is settled. As the claimant does not bear any of the litigation costs, contingency fees may lead to a tension between the lawyers’ interests and the claimant’s interest in maximisation of the outcome.¹⁷³

Nonetheless, some economic models have suggested that this effect of earlier settlement due to contingency fees may not inherently arise. It would depend on the specifics of the case whether the hourly fee or the contingency fee would better align incentives of the lawyer with those of the claimant.¹⁷⁴ Empirical research suggests that when compared with hourly fees, contingency fee lawyers do take less time to settle cases.¹⁷⁵ Other research has demonstrated that while contingency fee lawyers may spend less time on lower-value cases, they spend more on higher-value cases.¹⁷⁶

¹⁷⁰ Visscher and Faure (n 29) 462; Sebok (n 274) 846; Miller (n 29) 266.

¹⁷¹ Sections 3.3 - 3.4.

¹⁷² This depends also on the financial constraints of the claimant. Lawyers of better resourced claimants face less financial constraints in bringing frivolous claims under the hourly fee. Maurer and others (n 10) 291-292; Section 4.3.3.

¹⁷³ Choi (n 7) 303; Kidd (n 42) 634.

¹⁷⁴ Faure, Fernhout and Philippsen (n 781) 37-9. See also Neil Rickman, ‘Contingent fees and litigation settlement’ (1999) 19 (3) *International Review of Law and Economics* 295.

¹⁷⁵ Helland and Tabarrok (n 105).

¹⁷⁶ Herbert M. Kritzer, William L. F. Felstiner, Austin Sarat and David M. Trubek, ‘The Impact of Fee Arrangement on Lawyer Effort’ (1985) 19 (2) *Law and Society Review* 251.

In summary, the hourly fee model gives lawyers strong incentives to accept cases, including unmeritorious ones, and to prolong proceedings unnecessarily. At the same time, high legal fees may act as a significant barrier to accessing justice. In contrast, under the contingency fee, while claimants with limited financial means may gain access to justice, the incentive for lawyers is to exclusively support high-value cases.¹⁷⁷ While the incentive to settle early may also be excessive, the opposite problem arises under the hourly model.¹⁷⁸ Earlier settlement can be desirable in European jurisdictions plagued by court delays. However, this may come at the expense of one-shotter claimants who suffer from inequalities in bargaining power.

In Europe, as discussed earlier, contingency fees are mostly prohibited, whereas conditional fees were recently introduced or experimented with in some jurisdictions, including in England and Wales and the Netherlands.¹⁷⁹ Conditional fees involve a fixed uplift unrelated to the adjudicated amount (not a percentage of the proceeds, also sometimes referred to as ‘no-win, no-fee’).

A theoretical study was conducted under the assumptions that both contingency and conditional were to be available and that claimants are informed about the merits of the case.¹⁸⁰ It found that conditional fees could be preferred over contingency fees with strong cases as claimants would not have to give away a share of the proceeds. Contingency fees can therefore create a moral hazard problem on the part of the claimant and lead them to put forward weaker cases to lawyers, whereas conditional and hourly fees can attract stronger cases.¹⁸¹ Nevertheless, as discussed earlier, lawyers have an incentive to screen and reject unmeritorious claims due to their own financial stake in the outcome.

Furthermore, with contingency fees, the higher the judgement, the larger the lawyers’ final share and thus the more effort lawyers put into the case.¹⁸² They may also adopt risky strategies with higher expected judgements but lower probability of winning. Therefore, when claimants are risk-averse, they could wish for the lawyer to adopt a safer strategy with a higher chance of success, but with lower expected judgements. In such cases, they should opt for conditional fees with fixed uplifts.¹⁸³

The example of the hybrid DBAs in England and Wales, which were briefly explored in Chapter 2,¹⁸⁴ is a type of mixed contract which combines elements of the payment of fixed, but discounted, hourly fee throughout the litigation, along with a percentage of the outcome in case of success. This mixture

¹⁷⁷ Shavell (n 105) 435-436; Helland and Tabarrok (n 105).

¹⁷⁸ Ibid.

¹⁷⁹ Sections 3.4.2 - 3.4.4.

¹⁸⁰ Emons (n 79).

¹⁸¹ Ibid. 250.

¹⁸² Contingency fee lawyers spend more time in high stakes cases. Kritzer and others (n 176).

¹⁸³ Emons (n 79).

¹⁸⁴ Ibid; Section 2.3.4.

of incentives from both models could potentially lead to a better alignment of interests between the lawyers and the claimants in certain cases.

The law-and-economics literature has identified the socially efficient contract which maximises utilities of both parties as one in which the lawyer purchases the claim and becomes the ‘residual claimant’. The assignment structure would effectively eliminate most of the agency costs. However, such arrangements are often impermissible under champerty doctrines and forbidden *pactum quota litis*, as discussed in Chapter 2.¹⁸⁵ A problem with assignment is that the buyer of the claim may still need the original claimholder to keep cooperating and to provide information on the claim, in order for it to succeed. The original claimholder, having already cashed in, would lack the incentives to do so.¹⁸⁶

As discussed, legal claims can involve a wide variety of specific circumstances. This variety can lead to different fee arrangements being preferable from an economic perspective. It might then be best left to the contracting parties to align their respective incentives, provided that information asymmetry is not so severe. Blanket bans on contingency fees, conditional fees and assignment of claims do not serve the claimants’ interests when these arrangements would be the most efficient option for their cases. This section addressed contingency fee-like agreements and demonstrated how they may help ameliorate access to justice gaps and agency issues to a considerable extent. It is regrettable that they remain highly restricted or outright forbidden in many European jurisdictions. The next two sections shift focus to the funding model which constitutes the core of this research; TPF in individual litigation and in collective redress procedures.

4.4. Agency Risks and Third-Party Funding in Europe

4.4.1. TPF in Individual Litigation

This section examines the principal-agent problem in TPF in individual litigation, in the context of addressing the research question on the extent to which resistance on the grounds of conflicting interests is justified. In this section, individual litigation refers to individual cases involving a single claimant that are supported by TPF. Hereby, a claimant’s litigation is funded by a third party in exchange for a share of the proceeds, only if the case is successful. Similarly to insurance, this funding model involves a tripartite relationship, with every party potentially having conflicting interests. However, an important distinction between these two models is that BTE LEI in Europe appears to be much more common in funding the defence against lower value claims, rather than the bringing of

¹⁸⁵ Section 2.3.5.

¹⁸⁶ Faure and Weber (n 95) 171. For a discussion on the use of the assignment of claims model in Europe, see Section 2.3.5.

high value claims.¹⁸⁷ The agency issues in this type of insurance were discussed in detail in Section 4.3.4.

ATE insurance, on the other hand, can be similar to TPF as it may also involve a result-based arrangement for higher-value claims. The primary difference is that ATE is used to cover the risk of loss, whereas TPF provides day-to-day funding. However, this distinction can become blurry as both can be used in conjunction by the claimant. They can provide the claimant with essentially the same services.¹⁸⁸

This section will take into account the core definition of TPF; where a funder funds a case for a claimant in return for a share of any awards. The lawyers in these arrangements, especially in Europe, usually work under the hourly fee model and therefore retain similar incentives to those outlined in Section 4.3.3. They may be inclined to prolong their engagement, regardless of what is in the best interests of the claimant or the funder. Funders, on the other hand, acquiring a share of the proceeds from any awards in case of success, share similar incentives to contingency fee lawyers. They are primarily motivated to fund high value cases with stronger merits and prefer earlier resolutions.¹⁸⁹ In this tripartite agency relationship, claimants remain the ultimate principals. They do not bear the normal litigation costs and have an interest in obtaining high amounts of damages for low shares of the awards. As a result, they might be more willing to hold out for better settlement offers than the funder or to pursue the litigation through trial more often. On the other hand, however, they may also be less inclined to protract the litigation than the hourly fee lawyer.¹⁹⁰

Being paid and monitored by the funder, the lawyer might also become an agent of the funder. This depends, as pointed out in Chapter 3, on the extent to which funders take a passive or active role in the litigation process, and on regulatory constraints.¹⁹¹ Passive funding in TPF appears to be standard practice in Europe, unlike LEI, where insurers typically have higher levels of control.¹⁹² This agency analysis does not take into account the lawyer's ethical obligations towards the client interests. There is a risk, as happens with the other means of litigation funding explored, that these ethical obligations may be overshadowed by the influence of the funder's interests. As discussed in the analysis of insurance, repeated relationships between funders and lawyers, and the high levels of expertise and monitoring capabilities funders possess, may cause lawyers to prioritise the funders' interests rather than those of the claimants.¹⁹³ Alternatively, lawyers may strive to prioritise their own private

¹⁸⁷ Sections 2.3.3.1 and 4.3.4; De Mot, Depoorter and Faure (n 118); Lewis and Morris (n 36) 572; Lewis (2014, n 120).

¹⁸⁸ For a discussion on the use of ATE see Section 2.3.3.2.

¹⁸⁹ Section 4.3.5; Visscher and Faure (n 29) 463; Duffy (n 82) 189.

¹⁹⁰ Duffy (n 82). Sections 4.3.3 and 4.3.5. It is important to note that, empirical research has suggested that contingency fee lawyers take longer to resolve higher-stakes cases. The same may hold for litigation funders. Kritzer and others (n 176).

¹⁹¹ Section 3.2.2.

¹⁹² On the respective levels of control by insurers and funders see Section 3.2.2; Section 4.3.4; Section 2.3.3.1; Chapter 6.

¹⁹³ Section 4.3.4; Duffy (n 82) 192.

financial interest in the course of action they take during the dispute resolution process.¹⁹⁴ All of this is highly dependent on the level of information asymmetry between the claimants on the one hand, and the funders and the lawyers, on the other.

The information asymmetry problem also features in TPF, as it does with the other funding models examined. Thus far, however, TPF for individual claimants in Europe takes place almost exclusively between funders and sophisticated commercial entities or individuals with in-house counsel and/or the law firms they engage.¹⁹⁵ Funders tend to be lawyers by background, have experience in litigation, are well-resourced and acquire deep expertise and understanding of the merits and the risks of the case in question.¹⁹⁶ The claimants are also repeat-players who are in a relatively good bargaining position and have the resources and expertise to understand and negotiate the funding agreement and the remuneration to the funder, with the assistance of their legal representatives. The information asymmetry problem is therefore not as severe as it is in some of the situations involving one-shotters in the other funding models examined previously.

The asymmetry can become wider in cases such as those involving sophisticated but impecunious claimants, wealthy one-shotter individual claimants, or individual or smaller groups of SME claimants with a high-value claim. Nevertheless, in the European context, this asymmetry is far lower than that between insurers and lawyers and the individual one-shotters with lower value claims in LEI and hourly fee arrangements. It is also important to note that these other arrangements fund the vast majority of litigation in Europe.¹⁹⁷

The TPF market in Europe benefits from a large number of funders and could be said to be relatively competitive.¹⁹⁸ This reduces agency issues through the ability to choose and switch between funders for the most competitive funding arrangement, in case the claimant has an attractive case. Nevertheless, once the funder and lawyer are chosen, there are high transaction and switching costs which may make switching to other funders and lawyers too costly.¹⁹⁹ There may therefore be instances of moral hazard on the part of the litigation funder or lawyer, to the detriment of claimants, especially with respect to those in relatively weaker bargaining positions. The funder may for instance charge more or settle for less or earlier than would be ideal from the claimants' point of view. Alternatively, the lawyer working under the hourly fee might seek to prolong the litigation unnecessarily. Reputational sanctions, which are effective for repeat-players, may control this

¹⁹⁴ Section 4.3.3.

¹⁹⁵ Section 3.2.

¹⁹⁶ *Ibid.*

¹⁹⁷ Sections 2.3.1 and 2.3.3.

¹⁹⁸ Saulnier, Müller, Koronthalyova (n 47).

¹⁹⁹ Section 4.3.2.

problem.²⁰⁰ All things considered, severely restricting TPF in individual litigation on the basis of inequalities in bargaining power does not seem to be justified, given its lack of presence in the one-shot consumer sector.²⁰¹

As with other funding models involving a risk transfer, claimants may in theory also seek funding on weak or frivolous claims, or choose to ‘withhold adverse information prior to the funding commitment’.²⁰² The higher the estimated value of the claim and the more certain the outcome relative to the costs, the stronger the incentive to dispense with the resources needed, or acquire funding to initiate litigation. In other words, if the outcome is 100% certain of a win and of very high value, it is more likely that claimants will strive to fund the case through their own resources. Hereby, the proceeds are not shared with any litigation funder and claimants benefit from an absence of the risk of losing the entire litigation costs. There can therefore be ‘adverse selection’ problems, in that claimants who are well-informed about the merits will self-fund ‘certain victories’, but make use of TPF for weaker cases, in order to shift the risk onto funders. This adverse selection problem is however mitigated by the incentive for funders, who are known to possess the expertise, to act as gatekeepers and only select to fund cases with better prospects of success.²⁰³ A profit-motivated funder, as a rational actor, would not provide the funding unless the expected benefits outweigh, or at least equal, the costs. As was shown previously, the concern that TPF will bring about a substantial increase in frivolous claims is also not borne out by evidence. The available data and the empirical research conducted by the author also demonstrate that, following thorough due diligence procedures, very small percentages of the funding requests are accepted by funders.²⁰⁴

Moral hazard may also arise as claimants transfer their risk to a funder and thereby have less than a 100% stake in the outcome. They may become inclined to change their behaviour and participate, monitor and cooperate less effectively during the litigation.²⁰⁵ Given the reported success fees or percentages of the award due to the funder, claimants usually retain the vast majority of the compensation. This ensures a significant stake in the outcome and incentives for effective participation in the litigation on the part of the claimants, in spite of the risk transfer.²⁰⁶

²⁰⁰ Section 4.3.3.

²⁰¹ This view is shared by Willem H. van Boom, ‘Litigation Costs and Third-party Funding’, in Willem van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 26; John Peysner, ‘Playing the Man not the Ball’, in Willem H. van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017).

²⁰² Samuel Issacharoff, ‘Litigation Funding and the Problem of Agency Cost in Representative Actions’ (2014) 63(2) *DePaul Law Review* 561 573-574.

²⁰³ De Mot, Faure and Visscher (n 5) 34-36.

²⁰⁴ Section 3.2.2; Section 6.4.2.

²⁰⁵ De Mot, Faure and Visscher (n 5) 34-36.

²⁰⁶ Section 3.2.2, Tom Baker, ‘What Litigation Funders Can Learn About Settlement Rights from the Law of Liability Insurance’ (2023). *Theoretical Inquiries of Law*, Forthcoming, University of Pennsylvania, Institute for Law and Economics Research Paper No. 23-41, Available at SSRN: <https://ssrn.com/abstract=4638617>; Section 6.4.3; European Commission DG Justice and Consumers (n 59) 12, 650-651.

Another significant agency issue which can arise is when lawyers working under the hourly fee reject reasonable settlements to prolong the process in third-party funded litigation. Relatively uninformed claimants may follow their lawyers' advice in this regard, and may opt to not instruct for a change in course. Depending on the degree of funders' involvement in, and monitoring of, the litigation, funders as principals may then have an interest in intervening to their own benefit and that of the claimant.²⁰⁷ This is due to the funder's and the claimant's shared interest in a timely resolution of the dispute.

It appears from the above that the inclusion of third-party funders in individual litigation, like that of insurers, does not lead to a perfect alignment of interests. It is also evident however that the extent to which agency issues feature in single-claimant TPF is not vastly more significant than any of the other means of funding available. If anything, the interests of all the parties may in reality become more aligned than they would be under the hourly fee or the contingency fee. The funder's interest in an earlier resolution may offset the incentives the lawyers have for prolonging the litigation under hourly fees.²⁰⁸ Furthermore, their incentive to not fund unmeritorious cases is stronger than that of hourly fee lawyers. The hourly fee lawyers' incentives may in turn offset the funders' interest in earlier settlements, when this is not in the claimants' best interests, mitigating one of the drawbacks often associated with outcome-based agreements.²⁰⁹

This section examined TPF in individual claimant cases in Europe, which encounters less resistance than TPF in multi-claimant cases. However, it still faces instances of significant resistance. The EP Resolution on Responsible Private Funding of Litigation, for example, does not distinguish between individual and collective litigation in its far-reaching regulatory proposal.²¹⁰ It is argued in this section that higher levels of resistance to TPF in individual litigation, compared to other funding models, are not warranted. The next section will address whether resistance to TPF in multi-claimant litigation is justified on grounds of agency issues.

4.4.2. TPF in European Collective Redress Procedures

The previous section discussed agency costs in TPF between individual claimants, which in Europe is mainly used by businesses.²¹¹ It finds that, relatively speaking, TPF aligns interests between the parties involved well, albeit not perfectly. This section discusses collective redress involving multiple claimants in single cases after instances of mass harm. As seen already, collective actions are a

²⁰⁷ Issacharoff (n 202) 582.

²⁰⁸ Kidd (n 42) 634-635.

²⁰⁹ Empirical research demonstrates however that for high-stakes cases, contingency fee lawyers may take longer to settle cases. TPF in Europe is also associated with high-stakes cases. This issue of earlier settlements may therefore not feature with TPF. Kritzer and others (n 176).

²¹⁰ Section 3.4.1.3.

²¹¹ Section 3.2.

significant area where TPF is also being used in certain European jurisdictions.²¹² In fact, at present, it appears that TPF is consistently utilised for the funding of compensatory collective redress in Europe. This is shown by evidence both in England and the Netherlands.²¹³ Collective actions are also the type of litigation in which TPF is most resisted.²¹⁴ As discussed in Chapter 3, the forms collective redress procedures take in Europe vary by jurisdiction.

From a law-and-economics perspective, collective redress procedures address the problem of rational apathy, and enable access to justice, where the costs of pursuing a claim individually, rather than collectively, would exceed the benefits.²¹⁵ Pursuing a claim collectively increases the value of the claim and also benefits from economies of scale due to reductions in the cost per claim. For instance, a single lawyer or law firm can handle the case, and the facts of the case only need to be investigated once, avoiding repeated efforts.²¹⁶ When multiple individual claims on the same issue are bundled into a collective action led by a representative in adequate collective redress procedures, free rider problems are overcome. The group members would otherwise have an incentive to wait for others to make the effort in pursuing the claim, and thereby benefit without bearing any of the cost.²¹⁷

As far as the principal-agent problems associated with European collective redress are concerned, the situation becomes more complex than it is with the situation of individual litigation examined in the preceding section. Many of the agency related findings outlined earlier, such as the degree of alignment of incentives between claimants, funders and lawyers, remain relevant and continue to apply in collective proceedings.

In collective redress in Europe, there are additional agency relationships with the inclusion of a group representative for the group members.²¹⁸ Additional agency relationships entail additional agency costs.²¹⁹ The group members are the claimants and act as the principals in the relationship. The group representatives as their agents may also be inclined pursue their private interest in their role of monitoring the lawyers and the funders. This private interest may not necessarily be in full alignment with the interest of the claimants. As will be explained later in this section, this applies regardless of

²¹² Section 3.4.

²¹³ Kramer and others (n 8); Rachael Mulheron, 'The Funding of the United Kingdom's Class Action at a Cross-Roads' (2023) *King's Law Journal*, (1-27) <<https://www.tandfonline.com/doi/full/10.1080/09615768.2022.2161350>> accessed 13 March 2024, 23; Rachael Mulheron, *The Modern Doctrines of Maintenance and Champerty* (OUP 2023) 103-104.

²¹⁴ Sections 3.2.3 and 5.3.1.1.

²¹⁵ For a description of rational apathy see Section 1.4.

²¹⁶ Louis Visscher and Michael Faure, 'Mass Harm from a Law and Economics Perspective – The Case for Collective Action' in Tomas Arons and Rianka Rijnhout (Eds), *Mass Harm in Europe: Compensation and Civil Procedures* (Intersentia, 2023).

²¹⁷ Ibid. 4; Roger van den Bergh 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 20 (1) *Maastricht Journal of European and Comparative Law* 12, 24-26; On the free rider problem see also Section 5.2.2.

²¹⁸ This is the case in collective actions in Europe. In the US, 'group actions' rather than 'representative actions' are used, where the lawyer directly represents the claimants in collective actions. Visscher and Faure (n 29) 468.

²¹⁹ Visscher and Faure (n 29) 468; Issacharoff (n 62) 581.

whether they are a general consumer organisation, an ad hoc non-profit, an activist or a specialist person. It is important to note that these agency issues do not arise because of TPF, but due to the inclusion of the representative in the relationship.

Secondly, and importantly, collective redress involves numerous claimants. The claimants as principals can potentially have diverse and heterogeneous goals.²²⁰ They may have different thresholds for acceptable settlements or case strategies, or may prioritise justice or accountability rather than compensation. The group of claimants can become very large and range into the millions of claimants in a single opt-out collective action. Agency problems are therefore significantly aggravated, because the larger the group and the more heterogeneous their interests, the more complex and costly it becomes for the claimants to organise, coordinate and keep tabs on their representative, their lawyer and their litigation funder.²²¹

Furthermore, the claimants in collective actions may also possess limited information on the law and on the merits of the case. They also usually have a limited financial stake in the outcome. This further hinders their incentives to monitor and participate in the litigation. Since collective action and free rider problems inhibit mass claims, claimants therefore have to rely on other incentives for their agents to further their best interests. These can include a combination of reputation, idealism, altruism and monetary incentives. The agents in Europe can for instance take the form of non-profit representative organisations, as required by the RAD, or of class representatives who can be natural persons, as is common in England and Wales' competition law class action regime.²²²

Employees and directors of not-for-profit entities, and class representatives who bring collective actions, might be assumed to be altruistically committed agents of the principals; the group of claimants. Since they do not pursue profit, any income they receive is generally used in furtherance of the stated objectives of the organisation or for future collective actions.²²³ They might then be more motivated by intrinsic incentives such as job satisfaction, affiliation with colleagues, ethical values and pro-social behaviour than agents from the private sector.²²⁴ Utility-maximising individuals often pursue a diverse set of goals that extend beyond financial self-interest, reflecting a broader range of

²²⁰ Van den Bergh (n 217) 26-27.

²²¹ On 'collective action problems' see Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Second Edition, HUP 1971); Section 5.2.2.

²²² Sections 3.4.1.1 and 3.4.4.3.

²²³ Van den Bergh (n 217) 29.

²²⁴ Jan C. Heckelman, 'Collective Action' in Robert D. Congleton, Bernard Grofman and Stefan Voigt (eds), *The Oxford Handbook of Public Choice, vol 1* (OUP 2019) 473-474; Ayman Fouda, 'Multi-Principal Agency and the Compliance with Professional Guidelines in Health Systems: Economic and Regulatory Perspectives' (EDLE Doctoral Thesis 2022) 62; Adrian Cordina, 'The Regulation of Litigation Funding in Europe: An Application of Principal-Agent Theory' in Xandra Kramer, Masood Ahmed, Adriani Dori and María Carlota Ucin (Eds) *Sustaining Access to Justice in Europe: New Avenues for Costs and Funding* (Hart 2025).

preferences and motivations.²²⁵ The representatives' goals can therefore become more aligned with those the claimants.²²⁶ They may be trusted more by the principals, and the group members will have a reduced need to engage in costly monitoring and verification.

Representative organisations are often longstanding repeat-players, unless they have been established ad hoc for a specific collective action.²²⁷ In cases of ad hoc organisations, it may be argued that when funders and lawyers are involved in their establishment and management, these organisations exert lower levels of control over these agents.²²⁸ These organisations may be perceived as lacking sufficient independence from the influence of the funders and the lawyers, and the latter may collude to prioritise their interests over those of the group. Where class representatives are natural persons, as can be the case in the England and Wales' class action regime, they are also likely to possess relevant expertise and experience, even if they are participating in their first collective action.²²⁹ They tend to be specialists in the subject matter of the class action. Both forms of representatives tend to have experience and expertise in the collective action's subject matter, which further mitigates information asymmetries in their agency relationships with lawyers and funders.²³⁰

The right of exit as a means of controlling agency issues in opt-out collective actions is however largely meaningless. Exiting the collective action to individually litigate the claim is often not worthwhile from a cost-benefit perspective, unless there are competing collective actions on the same matter, which is often not the case.²³¹ Opt-in collective actions, on the other hand, provide this right prior to the collective action, but this usually comes at the expense of participation rates, especially when the damage suffered per victim is relatively low.²³²

Where representative organisations are required, problems may arise where they are monopolies in the jurisdictions they operate in. Competition between them would make them more likely to better serve claimants' interests, as they would make more effort to retain their members.²³³ Section 5.3.3 provides a more detailed discussion on how the private interests of the organisation may not align

²²⁵ See e.g. Louis Kaplow and Steven Shavell, 'Fairness versus Welfare: Notes on the Pareto Principle, Preferences and Distributive Justice' (2003) (Ser. Nber Working Paper Series, no. 9622) National Bureau of Economic Research; Richard A. Posner, *Economic Analysis of Law* (Third Edition, Wolter Kluwers 1986) 4; Furubotn and Pejovich (n 57).

²²⁶ Eisenhardt (n 76) 62; Roland Bénabou and Jean Tirole, 'Incentives and Prosocial Behaviour' (2005) National Bureau of Economic Research Working Paper 11535 <<http://www.nber.org/papers/w11535>>; Tore Ellingsen and Magnus Johannesson, 'Pride and Prejudice: The Human Side of Incentive Theory' (2008) 98(3) *American Economic Review* 990.

²²⁷ Kramer and others (n 8) 84.

²²⁸ Van den Bergh (n 217) 30; Cordina (n 224); Section 3.4.2; Chapter 6.

²²⁹ Rachael Mulheron, 'A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study. A Report for Submission to the Legal Services Board' (Legal Services Board 2024)155-163; Section 3.4.4.3.

²³⁰ Visscher and Faure (n 29) 459.

²³¹ See for instance De Rechtspraak, 'Centraal register voor collectieve vorderingen' <<https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen>> accessed 3 October 2025; Mulheron (n 229) 155-163.

²³² Miller (n 29) 274-275; Van den Bergh (n 217) 21, 30; Visscher and Faure (n 29).

²³³ Visscher and Faure (n 29) 470.

with the claimants' interests, leading to agency costs. While these insights pertain to the organisations' role in TPF policy-making, they also extend to their involvement in bringing collective actions.

This section highlighted that although agency issues become significant in collective actions involving large numbers of claimants, various market-based mechanisms like financial and reputational incentives exist which mitigate these challenges. The agency issues are for the most part caused by the collective nature of this type of litigation, and would arise regardless of how they are funded. Moreover, the inclusion of sophisticated group representatives in the process may further reduce agency risks and, in turn, the legitimacy of the resistance faced by TPF in collective actions. By the same token, Visscher and Faure also stressed the importance of not throwing the baby out with the bathwater due to the limited agency risks that TPF presents in collective redress systems. Access to justice and deterrence of wrongdoing should remain central considerations in any critique or regulation of this issue, as TPF remains the only practical means through which collective actions can be brought in Europe. In essence, it is critical that TPF is accessible and not over-regulated in collective redress, despite the heavy resistance it faces in this area.

What is important to realise is that without TPF, the collective action might not be brought to start with, because of the costs and risks involved. The situation with TPF and the limited agency problems are clearly preferable to the situation without TPF, where collective actions would not be initiated.²³⁴

4.4. Conclusion

This chapter has laid the foundation for gaining insights into the sub-research question of the extent to which the high levels of resistance shown towards TPF are warranted. It described the added value which law-and-economics brings in analysing litigation funding. It introduced concepts of significant relevance to the research on TPF, such as deterrence, property rights in litigation and agency theory. It then proceeded to explore the agency risks within the context of different means of litigation funding. Agency problems feature in all of the different litigation funding options examined; they do in hourly fees, in LEI, in contingency fees and in TPF, both in individual and in collective litigation. They can cause lower quality legal services to claimants in the form of unnecessary expenditure on litigation, or else, in the form of lower compensation received at the end of the dispute resolution process. With all of the funding models examined, agency costs become more significant when one-shotter claimants are involved, due to information asymmetry problems. With respect TPF in Europe, agency issues become more acute in third-party funded collective litigation. This is especially the case when the group of claimants is larger and collective action problems are aggravated. Result-based

²³⁴ Visscher and Faure (n 29) 474.

agreements, like contingency fees and TPF, are however generally found to align interests between the actors involved more effectively than hourly fees. This alignment arises because both the claimants and their funder have a shared financial interest in a successful, substantial and timely outcome. While there are still agency risks with TPF, it is particularly important to reiterate, that there is often no realistic alternative to TPF for collective actions in Europe. Without TPF, there would be no access to justice for many claimants to begin with.

It can therefore be seen that the resistance and traditional objections to TPF - often grounded in conflicts of interest or agency issues - may lack sufficient justification. Agency theory suggests that the inherent agency problems within TPF are not fundamentally different from - and may indeed be less problematic than those in - other widely accepted funding models, such as insurance and hourly fees. TPF should therefore not be subjected to more resistance or to more restrictive regulation than these other widely accepted funding models on the basis of conflicting interests.

Nevertheless, the hesitance toward TPF remains significant. It may stem more from entrenched biases or misconceptions, or else, from a desire not to be litigated against, rather than from clear, evidence-based concerns over agency risks. The next chapter will build on this discussion by extending the principal-agent framework to TPF in regulation-making. In this context, stakeholders act as principals, while the regulator serves as the agent. It will address more thoroughly the sub-research question of why TPF is resisted, by making reference to the different interest groups involved and their campaigns in opposition to, or in support of TPF. It also examines the influence this could have on the TPF discourse, perception and regulatory outcomes.

Chapter 5

**Multi-Agency Relationships in
European TPF Regulation: Unpacking
the Resistance**

5.1. Introduction

It is often taken for granted, at least where economic objectives are involved, that groups of individuals with common interests usually attempt to further those economic interests.¹

The preceding chapter initiated the exploration into the question of the extent to which the significant resistance shown towards TPF in Europe is warranted. From the perspective of agency theory in litigation funding, this resistance appears puzzling, as the agency risks associated with the relationships within TPF agreements are similar to, if not less severe than those found in other well-accepted funding models examined. The question, then, is why TPF as a funding model encounters more resistance, even though its agency problems are found to be less severe than those associated with more traditional models like hourly fee funding. The current chapter addresses this question. When agency theory is extended from within TPF agreements to TPF regulation in Europe, additional principal-agent relationships emerge. Hereby, politicians and regulators function as agents, whereas interest groups serve as principals. These relationships can shed further light on two of the central research questions of this research: how and why TPF is resisted.

Under the private interest theories of regulation, there is competition among rent-seeking well-organised and single-issue oriented industry representatives and lobbyists, who act as political principals.² This competition can culminate in regulatory capture, wherein the political agent becomes influenced or controlled, either by the dominant business interest groups and/or by other influential entities. The various interest groups present in the TPF context - lawyers, funders, insurers, consumer organisations and the business community - all compete through the generation of information and other means in the attempt to shift the decision-making process in their favour. This consequently redistributes the wealth of society towards private interests, often at the expense of the public interest.³ This dynamic can provide a more in-depth explanation for the resistance to TPF, and for the rationales for its restrictive regulation. It also raises the question of whether such resistance only serves certain interest groups' private interests or genuinely serves the common good. By doing so, it provides further insight into the justifiability of the resistance.

¹ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Second Edition, HUP 1971) 1.

² For a discussion on the private interest theories of regulation and rent-seeking see Section 5.2.2. See also George J. Stigler, 'The Theory of Economic Regulation' (1971) 2 (1) *The Bell Journal of Economics and Management Science* 3, Richard A. Posner, 'Theories of Economic Regulation' (1974) 5 (2) *The Bell Journal of Economics and Management Science* 335; Gary Becker, 'A Theory of Competition Among Pressure Groups for Political Influence' (1983) 98 (3) *The Quarterly Journal of Economics* 371; Paul H. Rubin, 'Public Choice and Tort Reform' (2005) *Public Choice* 124 (1-2) 223; Section 5.2.

³ *Ibid.*

This chapter therefore first provides an introductory analysis of the economic interest theories of regulation and of agency theory in politics in Section 5.2. It then provides an overview of the available evidence on interest group activity in the European litigation funding context in Section 5.3. It refers to the public information campaigns different interest groups have embarked on, and their positions on TPF are examined from an agency theory perspective. Some groups support TPF, whereas others advocate for more restrictive regulation. The chapter therefore links these theoretical insights with the current TPF developments and seeks to further unpack the resistance towards TPF. Section 5.4 provides an analysis of public and self-regulation approaches, followed by concluding thoughts in Section 5.5.

5.2. Economic Theories of Regulation

Before examining the economic theories of regulation in detail, it is essential to establish their relevance in the context of TPF resistance. The considerable activity by interest groups in the sphere, and the influence this may have, suggests that resistance to TPF in regulation may not be purely based on public interest concerns such as justice or fairness. The resistance could instead be largely driven by the strategic efforts of well-organised actors seeking to protect or advance their own market positions. Understanding these broader economic and political forces at play provides a foundation for analysing how regulatory frameworks and perceptions emerge and evolve in response to competing interests. With this in mind, the following section explores the economic theories of regulation, which offer valuable insights into the motivations behind the narratives and regulatory decisions affecting TPF.

The economic theories of regulation are typically divided into public interest theories and private interest theories. Private interest theories of regulation and agency theory in politics are closely interrelated, as both consider the self-interest of the politician, regulator and interest groups. These theories are reviewed in this section, setting the stage for the subsequent discussion on the interest group landscape and activity in litigation funding in Europe.

5.2.1. Public Interest Theories

The public interest theory of regulation posits that regulators, equipped with perfect information and enforcement capabilities, act benevolently to promote the public interest.⁴ By making use of their

⁴ For a more comprehensive overview on the economic theories of regulation see Johan den Hertog, 'Review of Economic Theories of Regulation' (2010) Tjalling C. Koopmans Research Institute Discussion Paper Series 10-18; Adrian Cordina, 'The Regulation of Litigation Funding in Europe: An Application of Principal-Agent Theory' in Xandra Kramer, Masood Ahmed, Adriani Dori and María Carlota Ucin (Eds) *Sustaining Access to Justice in Europe: New Avenues for Costs and Funding* (Hart 2025). See also Section 4.2 for further background on law-and-economics.

coercive powers, omniscient and benevolent regulators aim to correct market failures and ensure efficient government intervention.⁵ Such intervention can take various forms, and can include public regulation, liability rules, taxation and nudging.⁶ For instance, in the litigation funding space, this can take the form of licensing requirements for third-party funders, or of restrictions over the influence on the litigation they fund.⁷ More broadly, it could also include the provision of legal aid by the welfare state as a public service.⁸ The public interest theory is normative, as it is concerned with how society should be regulated.⁹

In contrast, private interest theories of regulation, which will be discussed further in the next section, emphasise the regulator's costs of monitoring and enforcement. More importantly, they highlight the self-interest of politicians, regulators and interest groups, which may diverge from the public interest.¹⁰ Under the private interest theories, regulation is explained primarily from interest groups.¹¹ Public interest theories of regulation are, by contrast, sometimes criticised as being 'naive' with respect to explaining regulation.¹² They serve to rationalise regulation, whereas private interest ones are considered as capable at accounting for complex regulatory realities.¹³

Government interventions incur significant costs, and the extent of these costs increases with the level of intervention.¹⁴ These costs include direct expenses related to drafting new legislation, establishing regulatory agencies, and monitoring compliance, as well as indirect costs such as reduced innovation and heightened risks of corruption and regulatory capture.¹⁵ The goal of a benevolent and omniscient regulator is to address market failures while carefully considering the costs of intervention. A top-down regulatory intervention is justified from a public interest perspective if the benefits outweigh the costs the intervention generates, and is to be considered in combination with other instruments like self-regulation or standards.¹⁶

⁵ Ibid.

⁶ Michael Faure and Niels Philipsen, 'Standardisation from a Law and Economics Perspective' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-Disciplinary and Multilevel Analysis* (Edward Elgar 2020) 159.

⁷ For an overview of the regulatory status of TPF, see Chapter 3.

⁸ Régis Lanneau, 'Public Services as a Strategy of Regulation' in Klaus Mathis and Avishalom Tor, *Law and Economics of Regulation* (Springer 2021) 7-8; Section 2.3.2.

⁹ Section 4.2.

¹⁰ Alessio Paces and Roger Van den Bergh, 'An Introduction to the Law and Economics of Regulation' in Roger Van den Bergh and Alessio Paces (eds), *Regulation and Economics, Encyclopedia of Law and Economics* (2nd edn, Edward Elgar 2012) vol 9, 2.

¹¹ Ibid.

¹² den Hertog (n 106) 4.

¹³ Ibid. 2; Paces and Van den Bergh (n 10) 6.

¹⁴ den Hertog (n 4).

¹⁵ Ibid.

¹⁶ Standards give more discretion to the regulated parties and 'leave more freedom... as to how to achieve a particular result'; Faure and Philipsen (n 6) 157-8; See also Niels Philipsen 'European Regulation of the Liberal Professions? Or, How I Learned to Stop Worrying and Trust in National Authorities' in Michael Faure, Wicher Schreuders and Louis Visscher (Eds) *Don't Take it Seriously. Essays in Law and Economics in honour of Roger Van den Bergh* (Intersentia 2018).

The Pigouvian perspective, which was prevalent until 1960, held that government intervention was the only solution to a market failure.¹⁷ Since Coase's 'Problem of Social Cost', the automatic resort to regulation in cases of market failure has been increasingly questioned.¹⁸ Under the economic approach, normative recommendations are made following a comparative institutional analysis, assessing whether regulation may improve on market outcomes or not.

Furthermore, when insights from behavioural economics are extended to regulatory decision-making, a further element of government fallibility is taken into consideration.¹⁹ Policymakers also suffer from cognitive biases such as 'availability heuristics'. This refers to the tendency to overestimate the likelihood or importance of events that are more readily recalled, often because they are recent, dramatic, or widely publicised. Interest groups, including those in litigation funding, may make use of these. They may, for instance, consistently overemphasise certain risks associated with TPF in the public discourse.²⁰ This can cause deviations from the public interest, in spite of the policymakers' best intentions.²¹

In the context of TPF therefore, caution must be exercised to mitigate the potential adverse effects of legal interventions. Overly stringent regulatory frameworks may inadvertently constrain the availability of funding, particularly due to the creation of barriers to entry into the funding market. Burdensome compliance requirements may suppress innovation within the funding market and impose transaction costs. They would thereby ultimately reduce the capacity of financially constrained claimants to pursue meritorious claims through TPF. Even when motivated by the public good, regulatory action must account for limitations such as imperfect information and susceptibility to cognitive biases.

This chapter now proceeds by introducing the private interest theory of regulation as the means of analysis of interest group activity in TPF in the following sections. Central to this theory is the role of interest groups and the significant influence they can exert on TPF policy. By focusing on how these groups shape narratives and regulatory outcomes, the ways through which, and the reasons for which TPF is resisted, are highlighted. Further light is therefore shed on the potential for divergence from the public interest in TPF regulation, and by extension, on the justifiability of the resistance to TPF.

¹⁷ Arthur Cecil Pigou, *The Economics of Welfare* (Routledge Classics in Economic Series, 1938); See also Andrei Schleifer, 'Efficient Regulation' in Daniel P. Kessler (ed), *Regulation vs. Litigation: Perspective from Economics and Law* (The University of Chicago Press, 2011) 28.

¹⁸ Harold Demsetz, 'Information and Efficiency: Another Viewpoint' (1969) 12 (1) *The Journal of Law & Economics* 1. On the Coase Theorem, see Section 4.2.2.

¹⁹ Jeffrey J. Rachlinski and Cynthia R. Farina, 'Cognitive Psychology and Optimal Government Design' (2002) Cornell Law Faculty Publications Paper 755; Gary M. Lucas Jr. and Slavisa Tasic, 'Behavioral Public Choice and the Law' (2015) 118 *West Virginia Law Review* 199.

²⁰ See for instance Section 3.2.3 for a discussion on the considerable lobbying by the business community.

²¹ Lucas and Tasic (n 19) 223-24; Cordina (n 4).

5.2.2. Private Interest Theories

The pervasive presence of regulation in the Western world, even in contract law, reflects a widespread scepticism regarding the capacity of unregulated contracts to address market failures.²² Politics and interest groups' influence can offer a more compelling explanation for regulation than the benevolence of the regulator. Under these theories, interest groups engage in rent seeking aimed at achieving favourable regulation, through public information campaigns, the provision of regulatory recommendations and strategic litigation, among other means.²³ Favourable regulation usually increases the costs of contracting and restricts competition, benefitting incumbent interest groups, turning many industries into oligopolies.²⁴ Regulation is conceptualised as being governed by supply and demand, supplied by the legislature and demanded by those who value it most.²⁵

Smaller and specialised interest groups are more effective at obtaining favourable regulation, due to lower collective action and free rider problems, and superior coordination, than larger groups such as consumer groups.²⁶ In the larger groups, rational group members recognise that their individual efforts, no matter how substantial, yield benefits which are shared by the whole group but are negligible to them individually. These group members would therefore tend to seek to free-ride on the efforts of others in the group which benefit them personally, without contributing to the costs of receiving the said benefits. Collective action is thereby stopped, or made more difficult.²⁷ In other words, the smaller the group, the less the collective action costs and the easier it is to coordinate efforts in order to obtain favourable legislation. Contributions for the group are public goods within the group, and they tend to be undersupplied, unless the group is so small that the coordination costs are lower than the benefits. Therefore, in the policy-making competition and in principal-agent theory terms, special industry interest groups are generally perceived as more effective principals than other groups. They are better positioned to make use of incentives, monitoring and bonding to ascertain that political and regulatory actors make good decisions on their behalf and produce favourable legislation.

²² Schleifer (n 17) 28.

²³ 'Rents' and 'economic profits' have the same meaning and are the extent to which the rewards or returns are above those of one's next best alternative, and are sought after by interest groups through policies which are beneficial to them. Robert D. Congleton, 'The Political Economy of Rent Creation and Rent Extraction' in Robert D. Congleton, Bernard Grofman and Stefan Voigt (eds), *The Oxford Handbook of Public Choice, Volume 1* (OUP 2019) 534.

²⁴ Stigler (n 2) 5; Robert B. Ekelund and Robert D. Tollison, *Microeconomics: Private Markets and Public Choice*, 7th edn (Pearson 2005) 443.

²⁵ Stigler (n 2); Posner (n 2) 346.

²⁶ See generally, Olson (n 1). Faure and Philipson (n 6).

²⁷ Olson (n 1).

It is also acknowledged that a mix of self-interest and altruism may motivate the different groups.²⁸ For instance, consumer groups, and other groups such as public health and environmental groups, are often perceived as having more altruistic motivations in advancing the diffuse interests of consumers and citizens. However, this can be the case also for the individuals who lobby for business and professional groups, who justify their claims that by furthering business interests, the specific industry's, or the profession's interests, they are also furthering the public interest. In the TPF context, intrinsic objectives such as access to justice or, conversely, the avoidance of a compensation culture, can motivate both types of groups.²⁹

The prevailing 'capture theory' however suggests that it is business groups, particularly special interest groups representing specific industries, that are the most effective at organising and influencing policymaking to secure rents at the expense of society. This has led to support to calls for deregulation as a means of avoiding capture.³⁰ More recent literature has shifted to the phenomenon of 'information capture', where policymakers are inundated with information by special interest groups, which also favours those special interests over less well-funded consumer groups.³¹ Industry groups can manipulate regulatory policy to their advantage through various other mechanisms, including member voting, promises of future employment opportunities (the 'revolving door' phenomenon), political campaign contributions, and even outright bribery or threats of public criticism.³²

In the context of TPF, these regulatory dynamics are particularly relevant given the high level of interest group activity in the area. The resistance to TPF may stem not from a genuine concern for the public interest but from the influence of well-organised interest groups that seek to shape regulation in their favour. Incumbent players, such as the business community, insurers and established law firms may perceive TPF as a disruptive force that threatens their market position.³³ By leveraging their superior access to policymakers and their ability to shape regulatory narratives, these groups may advocate for restrictive regulations that increase the cost of entry for litigation funders, thereby protecting their own interests. Conversely, funders, collective redress lawyers and consumer organisations may push for regulatory frameworks that facilitate TPF, arguing that it enhances access to justice for claimants they could potentially be involved with.

²⁸ Steven Croley, 'Interest Groups and Public Choice' in Daniel A. Farber and Anne Joseph O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar Research Handbook in Law and Economics Series 2010) 50-4, Cordina (n 44); Section 4.4.2.

²⁹ Ibid.

³⁰ Croley (n 28) 57.

³¹ Daniel Schwarcz, 'Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation' in Daniel Carpenter and David A. Moss (eds), *Preventing Regulatory Capture, Special Interest Influence and How to Limit It* (CUP 2014) 365.

³² Stigler (n 2); Ernesto Dal Bó, 'Regulatory Capture: A Review' (2006) 22 (2) *Oxford Review of Economic Policy* 203, 207-210.

³³ For these groups' positions on TPF, see Section 5.3.

The next section applies the lens of agency theory to regulation, which offers further insights into the challenges of aligning the actions of policymakers and administrators with the interests of the broader public.

5.2.3. Agency Theory in Regulation

Private interest theories of regulation and the principal-agent framework in politics are closely interrelated as both take into account the private interests of the actors and the role of incentives and information asymmetries. When principal-agent theory is applied in the political arena, different incentives are at play than those discussed in the previous chapter. Voters, and citizens, are the ultimate principals in policymaking, but have poor incentives to vote, to monitor, to be informed and to participate in politics.³⁴ They delegate their decision-making authority to politicians and bureaucrats as their agents. Politicians are primarily interested in securing and maintaining political positions. Bureaucrats and administrators, in turn, are driven by career advancement and maximising their budget.³⁵ Politicians and bureaucrats put in high levels of effort when they act in the interests of the voters and citizens, and ‘shirk’ when they do not.³⁶

Interest groups, due to being better informed and to their ability to monitor and influence policy-making more effectively than the general public, often emerge as the most effective political principals. Policy-making agents, motivated by access to information on the industry they regulate, votes and political campaign contributions are influenced by said interest groups.

Under agency theory, as with the private interest theories of regulation, consumers are at a distinct disadvantage. They suffer from significant information asymmetries in their agency relationships, both with the interest group purporting to represent them, and with the regulators, due to the collective action problems examined in the previous section.³⁷ In contrast, other stakeholders in litigation funding such as funders, insurers, lawyers, and members of the business community, are typically more concentrated, better resourced, and possess specialised knowledge, enabling them to monitor and incentivise regulators more effectively.³⁸ As a result, regulatory outcomes may disproportionately reflect the interests of these well-organised actors, rather than those of the broader consumer base.

³⁴ Robert D. Tollison, ‘The Interest-Group Theory of Government: Problems and Prospects’ (2008) 54(2–3) *Kyklos* 465, 467; den Hertog (n 106) 32-33; Cordina (n 4).

³⁵ Franziska Weber, ‘Towards an Optimal Mix of Public and Private Enforcement in Consumer Law’ (EDLE Doctoral Thesis 2012) 48.

³⁶ Den Hertog (n 4) 32-33.

³⁷ See also Section 4.4.2 and 5.3.3 on these asymmetries.

³⁸ Section 5.3.

Although political influence is inherently difficult to quantify and policymaking is complex, it is nonetheless widely recognised that interest groups can induce policy deviations from the public interest. The research now turns to the interests group landscape in litigation funding in Europe, in particular with regard to their campaigning around the question of regulating TPF. It links these developments with the insights provided by economic theory and the principal-agent framework.

5.3. The Interest Group Landscape in TPF across Europe

5.3.1. Business Groups

As TPF in Europe has emerged and developed in recent years, so too has the interest group activity around it grown. The active interest groups which are affected by, and campaign on TPF policy, can be categorised into three types; business groups, legal associations and consumer representatives. Business groups include the large corporate community, funders and insurers. Within legal associations, one can identify associations which represent the profession as a whole, alongside the more specialised groups of plaintiff bar associations. This section examines the positions these different stakeholders adopt with regard to TPF. In doing so, it makes reference to the public information campaigns they embark on and to the influence they may have on TPF discourse and regulatory outcomes. The next sections then turn to identifying key lessons economic theory provides for the design of TPF regulation and to providing some remarks which consolidate the insights gained on the sources, nature and justifiability of the resistance towards TPF.

5.3.1.1. Large Corporates

As discussed in Section 5.2.2, business interest groups may employ a variety of strategies to influence the regulation of TPF, one of which involves framing moral concerns and consumer protection as a rationale for restrictive regulation of TPF in regular public information campaigns. This approach may be motivated by a desire to genuinely further the public interest. From a private interest perspective, it is more likely that this approach is motivated by a shared desire to avoid or mitigate liability payments that could arise if litigation funding were readily accessible.³⁹ As more comprehensively discussed in Chapter 3 (Section 3.2.3), business groups are one of the main sources of resistance to TPF, particularly in collective actions, whereby the defendants are most often corporations. This was also reflected in the interviews conducted for the purposes of this research.⁴⁰ The main actor is the

³⁹ Anthony Ogus, 'Shifts in Governance for Compensation to Damage: A Framework for Analysis' in Willem H. van Boom and Michael Faure (Eds), *Shifts in Compensation between Public and Private Systems* (SpringerWienNewYork 2007) 38; Cordina (n 4); Bruce Yandle, 'Bootleggers and Baptists: The Education of a Regulatory Economist' (1983) Regulation.

⁴⁰ Section 6.5.

US Chamber of Commerce, which is known for its frequent lobbying on TPF around the world.⁴¹ The Chamber, which ostensibly represents the broader American business community, derives its support from a small cohort of large corporations.⁴² Having in effect a small number of group members may make these groups more effective at overcoming free rider and collective action problems, and consequently, at influencing TPF policy in their favour. Since this interest group and its activities were already discussed extensively, this Chapter will turn to the next special interest group in the arena; funders.

5.3.1.2. Funders

In Europe, third-party funders as an interest group are represented by organisations such as the Association of Litigations Funders of England and Wales (ALF), which introduced the 2018 ALF Code.⁴³ More recently established bodies, such as the ILFA and ELFA, have also compiled codes of conducts or best practices, which are publicly accessible on their websites.⁴⁴ Prior to these, the American Legal Finance Association (ALFA) was established in 2004 by American consumer TPF providers and represents funders from the older consumer TPF industry in the US.⁴⁵

In terms of their lobbying activities, since TPF primarily supports claimants, funder groups' efforts tend to align with claimants' regulatory interests. Their objective is to ensure that TPF remains accessible without being hindered by new, time-consuming and costly regulatory barriers or procedural obstacles. In particular, ILFA has emerged as an active voice in lobbying efforts to safeguard access to TPF in Europe, as confirmed also by the empirical research of this study. For instance, in its July 2022 response to the Voss report and a 2023 report, it strongly argued against additional regulation beyond what is set out in the RAD.⁴⁶ On the Paccar decision and the CJC review of litigation funding in the UK, ILFA stated that it 'will work to reestablish full access to the justice

⁴¹ Section 3.2.3 contains a discussion on the Chamber's and other European business groups' public campaigns around the area; See also Cordina (n 4).

⁴² Ibid.

⁴³ On the ALF, see section 3.3.6.1.

⁴⁴ On these associations see Section 3.4.1.2 and 3.4.4.1; ILFA's Best Practices <<https://www.ilfa.com/>>.

⁴⁵ Gianmarco Solas, *Third Party Funding: Law, Economics and Policy* (CUP 2019) 64; Marco de Morpurgo, 'A Comparative Legal and Economic Approach to Third-party Litigation Funding' (2011) 19 (2) *Cardozo Journal of International & Comparative Law* 343, 358. On the consumer TPF industry see Sections 1.4 and 3.2.3.

⁴⁶ ILFA, 'Resourcing the Rule of Law in Europe' (ILFA, 26 June 2023) <<https://www.ilfa.com/news>> accessed 29 March 2024; ILFA (n 55); Section 6.5.

system after the PACCAR decision severely limited third-party funding agreements'.⁴⁷ It also countered the European business community's 2024 call for additional regulation of TPF.⁴⁸

With respect to their agency relationship with policymakers, like the large corporate lobby, litigation funding firms also benefit from being a small group with homogeneous interests. This group consists only of the litigation funding firms providing TPF in Europe, so it has a relatively small number of members, along with a single political issue with large stakes. This should make it more effective at influencing policy. On the regulation question, funders may find it in their interest to oppose restrictive regulation before it is enacted, as compliance would become costly. However, once such regulation is enacted, the larger funders may in turn start protecting the status quo, as this would impose barriers to entry for smaller potential competitors. This may increase the price of TPF, as the lack of competition in the funding market would enable these larger funders to earn rents by charging above the competitive price.⁴⁹

5.3.1.3. Legal Insurers

The next business group involved in TPF campaigning is comprised of legal insurers. As discussed in Chapter 2, BTE legal protection insurance is predominantly offered to households, firms and defendants.⁵⁰ Insurers are also active in public information campaigns related to TPF. For instance, Swiss Re, a major reinsurer, concluded in a 2024 report that TPF is gaining more traction in the insurance sector and that it is contributing to social inflation, including in Europe. It called for its regulation, including through capping the share of the awards to funders.⁵¹ In 2022, Insurance Europe, an organisation which represents several insurance and reinsurance companies in Europe, was one of various business organisations which called for new EU TPF regulation.⁵² It subsequently

⁴⁷ ILFA, 'International Legal Finance Association Welcomes UK Civil Justice Council Review' (ILFA, 23 April 2024) <https://cdn.prod.website-files.com/5ef44d9ad0e366e4767c9f0c/6668a1d14a6e0431efaebe3_ILFA%20PACCAR%20statement.pdf> accessed 15 September 2024; International Legal Finance Association (ILFA) submits letter to the European Commission on Voss Report's proposal to impose overburdensome regulation (ILFA, 7 March 2022) <<https://www.ilfa.com/news>> accessed 13 March 2024

⁴⁸ AmCham EU, 'Position paper - Call for regulation of private Third-Party Litigation Funding (TPLF) at EU level' (AmCham EU, 15 November 2024) <<https://www.amchameu.eu/position-papers/call-regulation-private-third-party-litigation-funding-tplf-eu-level>> accessed 28 December 2024; ILFA, 'Mythbusting the call for new regulation of TPLF' (ILFA, 18 November 2024) <<https://members.ilfa.com/mythbusting-the-call-for-new-regulation-of-tplf/>> accessed 28 November 2024.

⁴⁹ Cordina (n 4); Faure and Philipson (n 6) 165.

⁵⁰ Sections 2.3.3.1 and 4.3.4.

⁵¹ Swiss Re Institute, 'Litigation costs drive claims inflation: indexing liability loss trends' (Swiss Re Institute, 7 September 2024) <<https://www.swissre.com/institute/research/sigma-research/sigma-2024-04-social-inflation.html>> accessed 15 September 2024.

⁵² Insurance Europe, 'EU should develop rules on third party litigation funding' (Insurance Europe, 22 June 2022) <<https://www.insuranceeurope.eu/news/2650/eu-should-develop-rules-on-third-party-litigation-funding>> accessed 15 September 2024.

welcomed the Voss Report.⁵³ Earlier, in 2017, it called for particular caution to be exercised with regard to TPF in collective redress, as it might promote the commodification of collective redress claims and frivolous litigation.⁵⁴ Burford Capital also reports on years of extensive lobbying against TPF by the insurance industry in its 2023 Annual Report.⁵⁵

Insurance companies, as financial entities offering protection against potential risks, have a vested interest in monitoring and controlling their litigation outlays.⁵⁶ TPF may be perceived as leading to increased litigation and liability risk exposure. Rubin argues that insurers have mixed motives as an interest group in such a case. ‘In the short run, they lose from expansive tort liability, but in the long run greater liability exposure leads to greater sales of insurance’.⁵⁷ Negative campaigning on TPF may therefore be motivated by a short-term concern regarding the increased litigation costs and liability they may need to cover for insured defendants.⁵⁸ They may therefore tend to express the public interest argument that these costs may be passed on to the policyholders in the form of higher premiums and, more broadly, to inflationary pressures. Under the assumption that TPF increases the volume of litigation,⁵⁹ insurers may however ultimately benefit in the long run from higher take up of LEI, as more individuals would seek to protect themselves from the risks associated with litigation.

Meanwhile, given the close similarities between ATE legal insurance and TPF, ATE providers may perceive TPF as directly competing with their services, rather than as only complementing it.⁶⁰ To the extent to which TPF is viewed as competing with ATE insurance, insurers’ interest groups may also seek restrictive regulation with regard to TPF to protect their market position and limit its growth.

5.3.2. Legal Professional Associations

5.3.2.1. Profession-wide Associations

In addition to the large business community, funders, insurers and consumer organisations, other interest groups which could be influential in the arena include legal associations. These can take the

⁵³ Insurance Europe, ‘EU supervision of third-party litigation funding sector could benefit both claimants and defendants’ (Insurance Europe, 13 September 2022) <<https://www.insuranceeurope.eu/news/2703/eu-supervision-of-third-party-litigation-funding-sector-could-benefit-both-claimants-and-defendants/>> accessed 15 September 2024.

⁵⁴ Insurance Europe, ‘Insurance Europe joint position on collective redress’ (Insurance Europe, 19 December 2017) <<https://www.insuranceeurope.eu/publications/1841/joint-position-paper-on-collective-redress/>> accessed 15 September 2024.

⁵⁵ Burford Capital Annual Report 2023, vii.

⁵⁶ On the incentives in litigation for insurers see Section 4.3.4.

⁵⁷ Rubin (n 2) 236.

⁵⁸ Charles Silver, ‘Litigation Funding versus Liability Insurance: What’s the difference’ (2014) 63 (2) DePaul Law Review 617, 652.

⁵⁹ It is worthwhile to note that the introduction of result-based funding in Europe has not resulted in increases in litigation volume. See Chapters 2 and 3.

⁶⁰ International Council for Commercial Arbitration (ICCA), ‘Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration, (ICCA reports series, no. 4, 2018) 35. See also, Section 2.3.3.2.

form of not only profession-wide associations in different jurisdictions, but also of plaintiff-bar or defence-bar associations. This section will discuss these against the background of their agency relationships with policymakers in the TPF context.

As is currently the case with funders, lawyers in Europe are also to a large extent self-regulated.⁶¹ In order to overcome free rider problems as an interest group and strengthen their position in TPF policymaking, legal associations benefit from homogeneity and can often require compulsory membership in order to provide legal services.⁶² They usually set their own 'expedient' ethical standards and are self-disciplining, giving rise to incentives for individual legal professionals to maintain good standing with the association.⁶³ From an economic perspective, these groups then have incentives to restrict competition with their members' services and often hold monopolies in the provision of legal services.⁶⁴ One means through which competition could be reduced is through restricting specific fee structures and other means of litigation funding, such as contingency and conditional fees and TPF. These are resisted as they may contribute to the introduction of new players in the legal services market and threaten the position of established law firms.

Legal associations are in fact historically known to lobby for the protection of their monopoly over legal services. For instance, resistance to other means of funding by legal associations was shown towards LEI.⁶⁵ Furthermore, the legal profession in the traditionally more conservative European legal culture in particular, has not looked at contingency fee agreements favourably and these agreements are largely prohibited in the self-regulatory codes of conduct.⁶⁶ Fears of abuses in the civil justice system are cited.⁶⁷ Such concerns may reflect the profession's private interest in restricting market access, framed under the guise of protecting the public and upholding the integrity of the justice system.

Other fee models such as contingency fees and TPF being widely available could increase the supply, availability and competition between funding models, and lower the price of legal services for consumers.⁶⁸ TPF providers could be viewed as competitors in the provision of legal services, to the

⁶¹ Frank H. Stephen, James H. Love and Neil Rickman, 'Regulation of the Legal Profession' in Roger Van den Bergh and Alessio Paces (eds), *Regulation and Economics, Encyclopedia of Law and Economics*, 2nd edn (Edward Elgar 2012).

⁶² Olson (n 1) 137-8.

⁶³ Ibid.

⁶⁴ Stephen, Love and Rickman (n 61); Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing 2004) 70-71. In England and Wales for instance, in addition to self-regulatory bodies, legal services are overseen by a public regulatory body - the Legal Services Board.

⁶⁵ Willem H. van Boom, 'Insuring vs. Investing in Litigation: A Comparative History of Litigation Insurance and Claim Investment' (2020) 8 (1) *Comparative Legal History* 2, 17.

⁶⁶ See for instance, The Council of Bars and Law Societies of Europe (CCBE) Model Code of Conduct for European Lawyers Art. 2.7.

⁶⁷ See Sections 2.3.4 and 3.3.1.1.

⁶⁸ Section 4.3.3; Francisco Cabrillo and Sean Fitzpatrick, *The Economics of Courts and Litigation* (Edward Elgar, 2008) 163, 171-183.

extent they go beyond solely providing funding services to claimants. It may then be in the interest of the self-regulating legal profession to curb TPF.

Other means through which lawyers have an incentive to limit competition is through restricting entry into the profession, non-lawyer legal services and the advertising of legal services. Yet, each of these have the potential of improving the affordability and quality of legal services.⁶⁹ It is important to note however that the highly regulated, fixed and predictable litigation costs have been found to be of great value in Germany in facilitating the provision of BTE LEI, as was outlined in Chapter 2. Regulated legal fees may also inform claimants on average prices and protect against excessive charges.⁷⁰ Being self-regulated, the profession as a whole also has an interest in maintaining a good reputation and a high level of demand by ensuring high quality legal services.⁷¹

In addition, lawyers, as an interest group, may have an incentive to over-complexify and over-formalise the law, which is already difficult to navigate for claimants.⁷² They might be inclined to do so in their lobbying on the law related to TPF as well. More complexity increases the need and demand for their services. Whilst complexity and formality may result in error-reduction and improve the accuracy of decisions in civil justice, transaction costs increase and the benefits would predominantly accrue to the legal profession. Benefits may also accrue indirectly to defendants who have opportunities to engage in strategic delaying tactics and satellite litigation. All of this may come at the expense of claimants and society in the form of a general increase in litigation costs and delays.⁷³

With regard to legal association activity on TPF specifically, the American Bar Association (ABA), in its best practices for TPF in 2020, implied that TPF should be curtailed.⁷⁴ In Europe, the CCBE, the European-wide legal professional association, published a letter in 2022 on the draft directive based on the Voss Report, in which it not only welcomed the proposed regulation but proposed even more restrictive regulation. For instance, it considered the capping of funders' success fees at 40% as too high, and suggests instead a cap of 25 to 30%.⁷⁵ This would reduce the returns funders can acquire

⁶⁹ Ibid. 171-183. See also Stephen, Love and Rickman (n 61); Roger van den Bergh, 'Towards Better Regulation of the Legal Professions in the European Union' (2007) RILE Working Paper Series No. 2008/07 <<https://ssrn.com/abstract=1113310>> accessed 3 October 2024, 16.

⁷⁰ Van den Bergh (n 69) 16.

⁷¹ Camille Chaserant and Sophie Harnay, 'Self-regulation of the legal profession and quality in the market for legal services: an economic analysis of lawyers' reputation' (2015) 39 (2) European Journal of Law and Economics 431. On self-regulation see also Section 5.4.1.

⁷² Cabrillo and Fitzpatrick (n 68) 157-158.

⁷³ Ibid.

⁷⁴ ABA, Best Practices for Third-Party Litigation Funding (ABA, 2020).

<<https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf>> accessed 3 October 2024; Charles C. Silver and David A. Hyman, 'Third Party Litigation Funding: Panacea or More Problems?' (2023) SSRN Working Paper Series <<https://ssrn.com/abstract=4438503>> accessed 3 October 2024.

⁷⁵ CCBE, 'CCBE first comments on the European Parliament's recommendations to the Commission on Responsible private funding of litigation' (CCBE, 13 May 2022)

from the litigation they fund, and in turn reduce the number of claims which are economically feasible to fund.⁷⁶ The German Federal Bar Association also welcomed the draft directive and proposed the same maximum success fee. It also proposed to ensure that debt collection service providers, which fund claims through the assignment model and employ TPF as a secondary service, or only occasionally, are also covered by TPF regulation.⁷⁷ It is important to reiterate that the Voss Report is already widely considered as highly restrictive of TPF.⁷⁸ However, profession-wide legal associations in Europe are proposing even tighter measures.

In Germany, debt collection service providers have also met resistance from the legal profession, who feared losing parts of their business.⁷⁹ The traditional legal community in Germany also opposed contingency fees when this was proposed by policymakers to level the playing field between lawyers on the one hand and legal technology and debt collection companies on the other;

These groups fear the commercialization of the profession and instead prefer an almost complete ban on the debt collecting activities of legal technology firms and special purpose vehicles. Their fear that the commercial interest of lawyers might prevail over professional ethics and result in a 'litigation industry' is in accordance with the traditional resistance against US-style contingency fees in Europe, particularly in Germany.⁸⁰

Legal associations play a significant role in shaping the regulatory landscape for litigation funding in Europe. Their dual role as both gatekeepers of professional standards and advocates for their members' interests often creates incentives to restrict competition and protect their monopoly over legal services. TPF may threaten this traditional dominance. Legal associations however often frame their resistance towards TPF in terms of ethical concerns and fears of over-commercialisation. This is evident in their advocacy for stringent regulations like the Voss Report, as well as in their broader opposition to market-oriented reforms.

<https://www.cbbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Postion_Papers/EN_DEON_20220513_CCBE-comments-on-the-European-Parliament-s-Recommendations-to-the-Commission-on-Responsible-private-funding-of-litigation.pdf> accessed 12 September 16.

⁷⁶ Section 6.4.3.

⁷⁷ Bundesrechtsanwaltskammer, 'Entschließungsentwurf des EP zur verantwortungsbewussten privaten' (2021) <https://www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-europa/2021/august/stellungnahme-der-brak-2021-51.pdf> accessed 3 October 2024.

⁷⁸ Section 3.4.1.3.

⁷⁹ David Markworth, 'Coding a Collective Consumer Redress Vehicle in Germany: How Debt Collection Services Became Consumer Allies and what that Means for Directive 2020/1828' (2023), 12 (2) *Journal of European Consumer and Market Law* 89, 93; For more on debt collection service providers see Chapter 2, Section 2.3.5.

⁸⁰ Astrid Stadler, 'Third-Party Funding in Collective Redress' in Xandra Kramer, Stefaan Voet, Lorenz Kodderitsch, Magdalena Tulibacka and Burkhard Hess (Eds), *Delivering Justice: A Holistic and Multidisciplinary Approach* (Bloomsbury Publishing 2022) 260.

5.3.2.2. *Collective Redress Lawyers Associations*

A notable development in recent years has been the establishment of plaintiff-side collective redress lawyers associations in Europe. This has happened both in the Netherlands and the UK. Respectively named Vereniging Voor Massaschade Advocaten (VVMA) in the Netherlands and the Collective Redress Lawyers Association (CORLA) in England and Wales, these entities have entered the scene and started participating in the public discourse around collective actions and their funding.⁸¹ It is in these entities' members' interest that litigation funding is available, as this funds and supports their lawyers' practice areas. They will therefore tend to campaign it its favour. For instance, CORLA welcomed the plans to reverse the Paccar ruling, which restricted TPF.⁸² In anticipation of the CJC review of litigation funding in the jurisdiction,⁸³ it stated the following;

[we] will be making the case for third party funding to be embedded into the civil litigation landscape. We will encourage the review to carefully consider the pitfalls of 'over regulating' the sector and the inherent dangers of artificially limiting the remuneration available to funders. At CORLA we believe expanding access to justice through the availability of funding is in the interests of everyone, save for the corporate behemoths. Collective actions are a proven tool for achieving just that.⁸⁴

The VVMA in the Netherlands also provides information on collective redress which counters the corporate campaigning, and for instance, believes that the WAMCA has resulted in onerous new requirements which hinder the ability to pursue collective actions effectively.⁸⁵

Meanwhile, in Germany, where debt collection services providers using legal technology as a means of collective redress are very common, a notable stakeholder is the Legal Tech Association. While not a legal association as such, the Legal Tech Association counts law firms, legal tech firms such as Flightright and Rightmart,⁸⁶ and litigation funders such as Deminor, amongst its members. It advocates broadly for investment in legal technology inside and outside law firms and for further

⁸¹ Collective Redress Lawyers Association (CORLA), <<https://corla.org.uk/>> accessed 9 September 2024; Vereniging Voor Massaschade Advocaten (VVMA), <<https://www.massaschadeadvocaten.nl/wat-we-doen/>> accessed 9 September 2024.

⁸² CORLA, 'Co-President Martyn Day comments on the Ministry of Justice's plans to introduce a new law reversing PACCAR litigation funding ruling' (CORLA, 4 March 2024 <<https://corla.org.uk/co-president-martyn-day-comments-on-the-ministry-of-justices-plans-to-introduce-a-new-law-reversing-paccar-litigation-funding-ruling/>> accessed 9 September 2024. The plan for reversal was later abandoned following a change in government; see Section 3.4.4.3.

⁸³ Section 3.4.4.

⁸⁴ CORLA, 'Co-President Martyn Day comments on the Civil Justice Council review of litigation funding' (CORLA, April 24, 2024) <<https://corla.org.uk/co-president-martyn-day-comments-on-the-civil-justice-council-review-of-litigation-funding/>> accessed 9 September 2024.

⁸⁵ Marco de Vries, 'Afwikkeling massaschadeclaims kan sneller en goedkoper' (Advocatenblad, 2023) <<https://magazine.advocatenblad.nl/2023-10/afwikkeling-massaschadeclaims-kan-sneller-en-goedkoper/>> accessed 9 September 2024.

⁸⁶ On legal tech firms in Germany, see also Section 2.3.5.

liberalisation of the German and the European legal services markets. It, for instance, rejected the Voss Report as too restrictive.⁸⁷

As mentioned, plaintiff-side collective redress lawyers associations are a relatively new phenomenon. Their establishment coincides with a rise in third-party funded collective actions in the selected European jurisdictions.⁸⁸ This may also indicate either a polarisation in the debate, or else a convergence with the US, where the legal culture is more adversarial.⁸⁹ As observed also by a respondent in the empirical research outlined in the next chapter, their campaigning in favour of TPF in Europe, along with that of funder organisations, comes at a later stage than that of the other incumbent interest groups discussed.⁹⁰ All of the other interest groups discussed have engaged in lobbying against TPF. These plaintiff-side and funder organisations may therefore be interpreted as a balancing force in response to the considerable opposition.

There are presently no defence-side lawyer associations in the selected jurisdictions that the author is aware of. Nevertheless, some prominent defence law firms are known to campaign around restricting TPF, reflecting their corporate clients' position on TPF.⁹¹

5.3.3. Consumer Organisations and Class Representatives

In comparison to the other interest groups discussed, consumers form a much larger group. Some have argued that they may, under the right conditions, hold more power than other interest groups.⁹² Consumers, especially when acting individually, rather than when represented by an interest group or a representative, are generally seen as the weaker party in contracts with firms. It is increasingly recognised that there is a need for regulatory protection for consumers and interventions in the freedom of contract. This is the case especially when the inefficiencies of high transaction costs and information asymmetry are present, and therefore reputational sanctions cannot be effectively used against firms.⁹³ However, both in third-party funded collective actions and as an interest group, consumers are collectively represented by various non-profit organisations or representatives in Europe, which mitigates, but does not eliminate, information asymmetry problems.⁹⁴

⁸⁷ Legal Tech Deutschland, 'Legal Tech Verband lehnt Initiative zur strengeren Regulierung von Prozessfinanzierung ab' (Legal Tech Deutschland, 4 November 2021) <<https://www.legaltechverband.de/aktivitaeten/legal-tech-verband-lehnt-initiative-zur-strengerer-regulierung-von-prozessfinanzierung-ab/>> accessed 3 October 2024.

⁸⁸ Chapter 3.

⁸⁹ Section 6.5.

⁹⁰ Section 6.5.

⁹¹ Ibid.

⁹² den Hertog (n 4) 24-25, 32; Becker (n 2).

⁹³ Katalin J. Cseres, 'Consumer Protection in the European Union' in Roger Van den Bergh and Alessio Paces (eds), *Regulation and Economics, Encyclopedia of Law and Economics, 2nd edn* (Edward Elgar 2012) vol 9, 165. Information asymmetry and reputational sanctions are examined in the discussion on hourly fees in Section 4.3.3.

⁹⁴ On consumer representatives in collective litigation see Section 4.4.2.

As an interest group in policy matters, a consumer organisation represents a large number of individuals with heterogeneous interests. It therefore needs to overcome significant collective action and free rider problems.⁹⁵ Consumer organisations can be seen however as being driven by other-regarding preferences, and generally organise with the stated goal of furthering consumer interests and even the public interest. This should align the interests between the organisations and the consumers to a considerable extent.⁹⁶ However, these organisations may also be concerned with the private interests of the organisation, which may not necessarily fully align with those of the consumers they represent. They may be more concerned with the growth of the organisation by maximising membership, volunteers and donations, for instance. Their advocacy may represent the interests of only a portion of the whole group of consumers. There might be a lack of sufficient competition between consumer organisations in certain jurisdictions or markets.⁹⁷ They may exaggerate political problems which favour government intervention rather than market solutions, in order to advance the organisations' interests.⁹⁸ Hereby, consumers suffer from agency costs and collective action problems and cannot exert effective oversight on whether the organisation is truly furthering their best interests.⁹⁹

Similarly to other interest groups, consumer organisations bring relevant information, experience, expertise and sophistication to policymaking and have preferred policy outcomes as well. They can be interested, amongst others, in securing a more prominent and visible role in collective actions by ensuring the availability of litigation funding, maintaining reasonable TPF pricing and avoiding conflicts of interests with funders. They will therefore be interested in ensuring that funding regulation is not too burdensome so as to make collective actions difficult or impossible to bring.¹⁰⁰

A notable active consumer group in Europe is the 'European Consumer Organisation' (BEUC). It published a report on funding in September 2022 in which it welcomed the existing European regulatory framework on TPF while suggesting its complementation with public funding models.¹⁰¹ In 2024, it published a position paper on TPF in which it did not see the need for additional regulation, but advocated for the agreement of best practices among stakeholders.¹⁰² In the UK, 'Consumer Voice'

⁹⁵ Sections 4.4.2 and 5.2.2.

⁹⁶ Section 4.4.2.

⁹⁷ Louis Visscher and Michael Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 (3) *Journal of Consumer Policy* 455; Section 4.4.2.

⁹⁸ Lucas and Tasic (n 19) 248-249; Roy Shapira, *Law and Reputation: How the Legal System Shapes Behaviour by Producing Information* (CUP 2020) 27.

⁹⁹ Cordina (n 4); Visscher and Faure (n 97).

¹⁰⁰ Cordina (n 4).

¹⁰¹ BEUC The European Consumer Organisation and NOYB, 'Funding of collective redress: Financing options in the EU and beyond' (BEUC, 9 November 2022) <<https://www.beuc.eu/reports/funding-collective-redress-financing-options-eu-and-beyond>> accessed 13 March 2024, 14-15.

¹⁰² BEUC The European Consumer Organisation, 'Justice unchained: BEUC's view on third party litigation funding for collective redress' (BEUC, 21 November 2024) <<https://www.beuc.eu/position-papers/justice-unchained-beucs-view-third-party-litigation-funding-collective->

5.4. Insights for Designing TPF Regulation

As described in Section 5.2, economic theory identifies numerous potential pitfalls associated with regulation. Even with the best intentions, it remains a complex task to design regulation which reflects the public interest. This is particularly relevant when considering the question of regulating TPF, where a significant amount of ‘noise’ is made by different interest groups. Current TPF regulation consists of a mix of different legal instruments in different jurisdictions. Further regulation is being considered, as seen in Chapter 3. Outside of collective redress, litigation funders in Europe remain largely self-regulated and subject to case law and jurisprudence. As European legislators ponder the question of regulating TPF, this section identifies and consolidates the key lessons economic theory and agency theory offer for two of the main avenues for regulation; self-regulation and public regulation.

5.4.1. Self-Regulation

Self-regulation occurs when an industry takes on the responsibility of creating and enforcing its own standards, as opposed to relying on government oversight. In the TPF context, funders’ associations have enacted self-regulatory standards, with the most prominent example being the ALF Code in the UK.¹⁰⁸

There are several benefits to self-regulation. Firstly, it reduces the principal-agent problem between society and a public regulator. With traditional public regulation, society delegates regulatory authority to a regulatory body, as its agent, and agency costs arise when the objectives of society and the regulator are not aligned. Self-regulation is also less costly than public regulation, because the industry itself bears the information, monitoring and enforcement costs to regulate the industry, a burden which would otherwise fall on the regulator. Additionally, as the industry possesses greater expertise, technical knowledge and direct experience, it may be better equipped for the appropriate regulatory design.¹⁰⁹ Finally, the industry also has strong reputational incentives to maintain high standards, particularly in markets such as TPF in Europe where the information asymmetries between the contracting parties are relatively minimal. Misconduct or low-quality services can harm a funder’s reputation and cause a reduction in demand for its services.¹¹⁰ There are therefore market-based incentives for compliance with litigation funding codes of conduct. Self-regulation is particularly beneficial in cases of communities with homogeneous preferences like that of funders, as it provides

¹⁰⁸ Section 3.4.4.1. Other examples of self-regulatory standards can be found in the Dutch Claimcode and in the codes compiled by ELFA and ILFA.

¹⁰⁹ Anthony Ogus, ‘Rethinking Self-Regulation’ (1995) 15 (1) *Oxford Journal of Legal Studies* 97.

¹¹⁰ Chapter 4.

benefits of lower information, monitoring and enforcement costs, flexibility and provides added value for belonging.¹¹¹

However, these benefits need to be balanced against the potential drawbacks. In fact, self-regulation is also highly criticised by economists as being cartel-like and has been described as the ‘ultimate form of regulatory capture’, where the industry regulates itself to serve the interests and protect the market positions of the large players.¹¹² A significant drawback of self-regulatory instruments is therefore the risk of creating barriers to entry for smaller competitors. The ALF Code, for instance, prescribes minimum capital requirements with regular disclosure obligations for its members. These rules may be intended to ensure the financial stability of funders, transparency in the market and that claimants are not unexpectedly left without a funding source while proceedings are ongoing. However, they could also disproportionately impact smaller funders who also have to meet these requirements. This has the potential to drive up the cost of TPF, and set its price above the competitive price, enabling the larger funders to earn rents and profits beyond what would be expected in a more competitive market.

Self-regulatory entities enforcing codes of conducts are also typically much more limited in their sanctioning powers.¹¹³ Moreover, as the threat of regulatory action grows, funders may take the steps to adopt more stringent self-regulatory standards, in order to pre-empt, avoid or delay mandatory regulation.¹¹⁴ While it benefits from lower costs, the privatisation of regulation in the litigation funding sphere in the context of justice as a public good may create risks of a disregard by funders of public interest concerns such as monopolistic behaviour and other negative externalities.

5.4.2. Public Regulation

As described earlier, economic theory takes public interest and private interest perspectives on regulation.¹¹⁵ Public regulation involves government-led intervention and oversight, where regulatory authorities are responsible for creating, implementing, and enforcing rules to regulate the industry. As discussed, from a public interest perspective, the costs of regulation increase the more the regulator intervenes, and such costs may exceed the benefits regulation brings about. Once implemented, public regulation introduces direct costs such as information, monitoring and enforcement, which are borne

¹¹¹ On the preconditions for efficient self-regulation, see also Lisa Bernstein, ‘Opting out of the legal system: extralegal contractual relations in the diamond industry’ (1992) 21 (1) *The Journal of Legal Studies* 115.

¹¹² Stephen, Love and Rickman (n 61) 648; Ogus (n 109).

¹¹³ Michael Faure, Louis Visscher and Franziska Weber ‘Liability for Unknown Risks – A Law and Economics Perspective’ (2016) 7 (2) *Journal of European Tort Law* 198, 221; See Section 3.4.4.1 and Chapter 6 for the ALF’s complaints procedure.

¹¹⁴ John W. Maxwell, Thomas P. Lyon & Steven C. Hackett, ‘Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism’ (2000) 43 (2) *Journal of Law and Economics* 583.

¹¹⁵ Section 5.2.

by the regulator. It also introduces compliance costs for the industry, which constitute barriers to entry and may restrict competition in the funding market.¹¹⁶ Moreover, in accordance with the private interest theory, various interest groups are active in the attempt to influence regulatory decision-making and may cause deviations from the public interest. There is also a risk that any future regulatory or administrative agency overseeing funders could be influenced or captured by the industry it is meant to regulate. This potential for capture arises because the regulator will depend on the funders for information and monitoring,¹¹⁷ compounded by phenomena like the ‘revolving door’, whereby employees transition from industry to the regulator and vice-versa. Individuals transitioning from the funding industry to regulatory roles may bring valuable expertise but may also be influenced by pro-industry views. Similarly, employment at the regulator with prospects or promises of future lucrative industry employment might also incentivise more lenient regulatory positions. Moreover, former regulators-turned-industry employees possess the network, skills and insider-knowledge necessary for effective lobbying.¹¹⁸ This increases the likelihood that regulation is shaped to serve the interests of the funding industry, rather than those of the broader public.

From a public interest perspective, it is therefore crucial to strike a delicate balance between the benefits and drawbacks of different forms of regulation. The law’s goal is to reduce market failures, and the main market failure associated with TPF is information asymmetry.¹¹⁹ Information asymmetry in TPF was analysed in detail in Chapter 3 and was found to be of a relatively limited nature when compared to other litigation funding models. TPF can also give rise to risks of market power, especially due to the high entry costs associated with the industry. However, a sizeable number of funders are currently operating within Europe, which mitigates concerns of limited competition between funders.¹²⁰ It has also been argued that TPF may also impose externalities on the civil justice system in the form of a rise in frivolous litigation, the risk for which is found to be negligible in this research.¹²¹ The market failures which may arise due TPF appear therefore to be very limited.

Particularly stringent regulation may not be in the public interest, given the significant social costs it may give rise to, and the limited benefits it would bring about.¹²² There appears to be a broad

¹¹⁶ Ibid.

¹¹⁷ Cordina (n 4); Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (MIT Press 1993) 475.

¹¹⁸ Dal Bó (n 32) 214.

¹¹⁹ Section 4.2 and Section 5.2.1.

¹²⁰ Jérôme Saulnier, Klaus Müller and Ivan Koronthalyova, ‘Responsible Private Funding of Litigation. European Added Value Assessment’, European Parliament Research Service (March 2021); European Commission DG Justice and Consumers, ‘Mapping Third Party Litigation Funding in the European Union’ (2025) 639-641.

¹²¹ Sections 3.3 - 3.4

¹²² Section 5.2.1.

consensus among the majority of stakeholders in favour of introducing of a form of ‘light’ regulation in Europe, albeit primarily among categories of stakeholders who have an existing interest in, or have historically endorsed TPF.¹²³ This is confirmed by the existing empirical research and by the interview research conducted by the author. Such light touch regulation may be better suited at preserving the benefits of TPF, in particular those of enhanced access to justice and deterrence of wrongdoing, while ensuring that claimants are better protected from undesirable outcomes in their litigation due to information asymmetries with their funders.

5.5. Conclusion

Chapters 2 and 3 have provided a comprehensive background against which TPF emerged in Europe and identified some of the main sources of, and reasons for, its resistance. The regulatory frameworks in select European jurisdictions and other relevant cultural factors contributing to the said opposition were outlined. By adopting a law-and-economics framework in Chapters 4 and 5, this research further addressed the central question of the extent to which this resistance is justifiable. This analysis was built upon in this chapter by further exploring the underlying reasons for interest group resistance towards TPF, and how this may contribute to current perceptions and regulation. The ways through which interest groups could keep playing a role in influencing future perceptions and regulation were also examined. This analysis emphasises that it may be private interests which are playing a greater role in shaping the modern resistance towards TPF, rather than genuine public interest concerns such as concerns over the commodification of justice or over conflicts of interest. The resistance appears to derive more from certain interest groups’ desire not to be litigated against or to protect monopoly privileges in the legal services market. These groups include the big business community, legal associations and insurers. Consumer organisations, funders and collective redress plaintiff lawyers’ associations on the other hand, find it to be in their interest to advocate for a more lenient regulatory regime on TPF, in order to support the funding of claims they seek to be involved in.

This chapter has further unpacked the resistance towards TPF by reviewing the multi-agency relationships in TPF policymaking. It analysed the relationships between society, the business community, the interest groups representing different segments of the legal services market, consumers and the politicians and regulators. The risk of influence, or at worst, capture, by special interests at the expense of consumers and the broader public interest was highlighted.

¹²³ European Commission DG Justice and Consumers (n 120) 14-15; Section 6.5; On the light-touch regulation as proposed by European Law Institute (ELI), see ‘Principles Governing the Third Party Funding of Litigation’ (August, 2024); Section 3.4.1.2.

It has also previously been argued that there are at present insufficiencies in access to justice and in deterrence of wrongdoing. A normative viewpoint is therefore adopted whereby it should be ensured that regulations are not made in such a way that the funding of claims through TPF is hindered, but rather facilitated. This viewpoint is further reinforced by the observation that much of the modern resistance to TPF stems from self-serving interest group narratives.

The next chapter builds on this theoretical analysis by incorporating empirical insights from stakeholder interviews to provide a more comprehensive, practice-oriented understanding of the resistance to TPF across Europe. These interviews corroborate this chapter's findings by confirming the presence of substantial interest group activity. There is a concern among stakeholders that certain groups opposing TPF may have a disproportionate influence on regulatory approaches and public discourse surrounding TPF. The findings of the next chapter also reinforce the conclusion that much of the contemporary resistance is shaped by private interests rather than genuine public concerns.

Chapter 6

An Empirical Investigation into Third-Party Funding in Europe

6.1. Introduction

The preceding chapter concluded the theoretical component of this research. The research has so far identified the sources and underlying reasons for the resistance shown towards TPF. These insights have emerged following a comparative legal and economic analysis. The economic analysis in Chapter 4 finds that, while there are some agency risks associated with TPF, these are not considerably larger than the risks associated with other well-accepted means of litigation funding, such as hourly fees and LEI. The agency risks in TPF may even be lower. In collective redress claims with large numbers of group members, agency issues become higher. This lends some credence to resistance and calls for restrictive regulatory safeguards to be put into place. However, the agency problems largely arise due to the collective nature of the litigation not due to TPF's role in the process. Furthermore, TPF is at present virtually the only available funding option for compensatory collective redress in Europe. Calls for more hardline approaches which would severely hinder TPF's availability and effectiveness would thus not be appropriate in view of enabling access to justice after instances of mass harm. As discussed in Chapter 5, these approaches may be more rooted in protecting certain lobby group's private interests rather than in public interest concerns. Ensuring access to justice and deterrence of wrongdoing by the civil justice system requires that the law is enforceable and that meritorious litigation can be funded in some way or another.

This chapter builds upon the theoretical framework by integrating empirical research to present a more comprehensive view of TPF's resistance and its implications across Europe. It does so by providing a detailed report on the insights gained from the author's interview-based research. As outlined in the Methodology section (Section 1.5), sixteen semi-structured interviews were carried out between 2022 and 2024 among a diversity of stakeholders to deepen the understanding of the issues surrounding the research questions. These stakeholders included representatives of professional litigation funders, lawyers involved in funded litigation, class representatives, academics and business representatives. The interviews covered participants operating in the three selected jurisdictions: the Netherlands, Germany and England and Wales, thereby also offering a comparative perspective on the subject matter. Informed consent was granted by the respondents where specific references are made, and quotations used from the transcripts of the interviews.

This chapter therefore draws upon the responses and data collected during these interviews to provide additional context, nuance and critical analysis to the findings derived from the theoretical study. The interview findings are also contextualised and substantiated through reference to other existing empirical studies of significance in the field, thereby strengthening the overall analysis.¹

¹ These other studies include: Xandra Kramer, Ianika Tzankova, Jos Hoevenaars and Karlijn van Doorn, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?* (Eleven 2024); Rachael Mulheron, 'A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study. A Report for Submission to the Legal Services Board' (Legal

An indicative list of the questions asked to participants can be found in Appendix A for reference. While the actual interviews' structures tended to deviate from the guide, each interview addressed some or most of the key themes indicated in the guide. The core topics addressed in the interviews will be listed further on.

All the respondents are prominent stakeholders in the TPF industry in Europe, as evidenced by their leading roles in litigation funding firms, law firms, third-party funded litigation and academia. Some also hold prominent positions in industry or legal professional associations. Although their responses do not fully represent every stakeholder, the industry has a relatively small pool of stakeholders. While this enhances the validity of the findings from the sample, they cannot be generalised to the whole population of stakeholders.

A total of sixteen interviews were conducted, five of them in-person, eleven of them via video-call. All the interviews were carried out with respondents operating in this study's selected jurisdictions. Six of the interviews were with respondents in England, and the rest in continental Europe; six in the Netherlands and four in Germany. In terms of professional capacities, six of the interviewees were senior representatives of litigation funders, eight were lawyers involved in funded litigation, one was a class representative, and one was a representative of the business community. The senior representatives worked for litigation funding firms that varied in size, ranging from large firms to smaller ones. Five of the respondents also hold academic positions. Five of the respondents who practise as lawyers act mostly on the plaintiff side, with one representing the defence side more often.

The respondents were approached following liaison with the author's supervisors and colleagues, and following recommendations by the respondents themselves. They were for the most part approached and invited to participate via email, with one of them contacted via the LinkedIn platform.

The interviews were conducted between 2022 and 2024. The interviews with Dutch respondents took place online. Twelve of the sixteen interviews were audio-recorded, and for nine of them, informed consent was granted for references and quotations to be used in publications.

Assurances of anonymity and confidentiality were provided in the interview invites. As to the response rate, approximately two-thirds of the invitations sent by the author were accepted and led to interviews. The audio-recorded responses were then transcribed verbatim, anonymised and stored securely. The transcripts were then sent to the respondents, who were asked if they wished to revise their answers. Two of the respondents opted to revise the transcript. In case direct anonymous quotations or references are used, respondents were contacted and shown the quotes to be used and

Services Board 2024); European Commission DG Justice and Consumers, 'Mapping Third Party Litigation Funding in the European Union' (2025).

the relevant context for the quotes was provided. The results of the whole interview research were also shared with the respondents. The transcripts, audio recordings and informed consent forms were stored in an online drive. Access was given to the researcher's supervisors, in accordance with the data management plan which was compiled, in order for them to check that the research is done properly. The transcripts, which do not include personal data that could directly or indirectly identify the respondents, will be uploaded to the Erasmus University Rotterdam Data Repository for access by other researchers.

Respondents' confidentiality concerns and social desirability bias may be limitations of this research method. Most of the interviews were with participants who are engaged in funding claimants, or acting for claimants, not for defendants. This focus offers a more detailed understanding on the internal workings and experiences associated with TPF. However, more favourable perceptions on TPF were to be expected from this category of respondents, due to its role in facilitating financial support for the cases these stakeholders are, or seek to be, involved in. In total, 2 of the 16 interviewees could be considered as stakeholders representing the perspectives of defendants. They offered more critical perspectives on TPF. This imbalance in representation was taken into account when interpreting the data.

The bulk of the qualitative empirical research was carried out in 2023 and 2024, prior to the publication of other significant empirical studies on TPF, such as the research on the revolving litigation fund in the Netherlands² and the Legal Services Board's report on litigation funding in England and Wales.³ The EC's extensive mapping study of TPF in Europe, which makes use of surveys and interviews, was also published in 2025, shortly before finalising the reporting of the present research.⁴ While this chapter focuses on the discussion of the research findings from the interviews, it also takes the findings of these studies into account in its analysis.

The chapter is structured around the key themes that emerged during the interviews, aligning with the overarching topic and research questions. Specifically, the interviews addressed aspects such as the types and value of funded claims, the funders' case selection process, conflicts of interest in TPF agreements, pricing issues, the broader impacts of TPF, and the participants' perceptions and experiences with TPF. The questions asked were designed to establish whether TPF is becoming available in the individual consumer sector, where higher information asymmetries would feature.⁵ They also seek to establish whether there are significant risks of meritless litigation being brought. They examine whether the risks of conflicts of interests in TPF are larger than those found in

² Kramer and others (n 1).

³ Mulheron (n 1).

⁴ European Commission DG Justice and Consumers (n 1).

⁵ For a detailed examination of information asymmetries in litigation funding, see Chapter 4.

alternative funding arrangements, and whether such risks would, in the view of the interviewees, be a legitimate cause for resistance and restrictive regulation. They gain insights as to whether the price of TPF can be considered excessive, and finally on the stakeholders' general perceptions on TPF. In short, they add further insights on the resistance shown towards TPF, and on the central question of whether and how far this resistance is warranted.

Along these lines, the next section, Section 6.2 provides an overview of the existing empirical research on TPF. Section 6.3 focuses on the composition and size of the TPF market and on exploring the types of claims and their value. It offers insights into the market's characteristics, growth patterns and business practices such as the case selection process. Section 6.4 then addresses the respondents' perspectives on potential conflicts of interest within TPF arrangements and focuses specifically on the issues of the degree of conflict, influence on the litigation and pricing. Section 6.5 then outlines the participants' views on interest group activity surrounding TPF and its implications. It also outlines their perspectives on which aspects of TPF should be regulated, if any, and evaluates their general perceptions towards TPF. Section 6.6 provides some concluding remarks.

6.2. Review of Existing Empirical Research

In recent years, as TPF has gained prominence in the European legal sector, it has become the subject of more empirical research.⁶ The earliest such study was conducted by Veljanovski. This 2012 study was conducted on the basis of interviews, at a time where the TPF industry was 'still in its formative stages'.⁷ The number of active litigation funders in the UK was found to be much lower than 15. The size of the market was estimated to be valued between 157 and 500 million pounds, a figure which is reported to have since grown tenfold.⁸ By 2010, it was estimated that no more than 100 cases were supported by TPF in the UK.⁹ TPF was almost exclusively dedicated to commercial litigation, usually valued at more than 1 million pounds. Return rates in Europe usually ranged between 20 and 40%.¹⁰ Respondents reported that a case should have at least a 70% chance of success to be funded.¹¹

The next significant empirical study on TPF in Europe was conducted by EPRS in 2020. Also based on a series of interviews, it valued the TPF market in the EU at 1 billion Euros and projected its value

⁶ See also the general literature review in Section 1.4.

⁷ Cento Veljanovski, 'Third-Party Litigation Funding in Europe' (2012) 8 (3) *Journal of Law, Economics and Policy* 405, 410.

⁸ *Ibid*; CJC, 'Review of Litigation Funding: Final Report' (2025) 60; Deminor, 'Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends', (Deminor 2022).

<<https://drs.deminor.com/en/litigation-funding-from-a-european-perspective>> accessed 29 August 2024.

⁹ Veljanovski (n 7) 415.

¹⁰ *Ibid*. 424.

¹¹ *Ibid*. 425.

to double in the next 5 years.¹² It reported that 44 litigation funders were active in the UK, with most also operating across the EU. 24 were active in the Netherlands, and 13 in Germany.¹³ It also outlined the areas of law of third-party funded cases and that the return rates range from 20 to 50%.¹⁴

As part of the 2023 research on the desirability of a litigation fund for collective actions in the Netherlands, a qualitative analysis on the financing of collective actions was also conducted.¹⁵ Regarding TPF, this study found that litigation funders can be involved in the identification, initial investigations and bookbuilding process of the action.¹⁶ It finds that ‘claimants are (almost) entirely reliant on the current private market of commercial litigation funders’ for compensatory collective actions.¹⁷ The study also highlights the evaluation criteria employed by funders to accept to fund cases in their due diligence process. These criteria include the value and the merits of the claim, and the ‘rule of ten’.¹⁸ The regulatory burden imposed by the WAMCA and the associated uncertainties may also lead to more caution amongst funders and to less availability of funding for certain compensatory collective claims.¹⁹

In 2024, the review of litigation funding commissioned by the Legal Services Board in England and Wales was published.²⁰ It highlighted empirical feedback gathered from questionnaires and follow-up meetings on a variety of subjects, including funders’ acceptance rates, the role of the ALF, adverse costs, success rates, independent advice, termination and on control or influence over the proceedings.

Finally, in 2025, the EC published its mapping study on TPF which includes a stakeholder consultation, providing a valuable source of empirical data.²¹ Around 300 entities were identified as providing TPF across the EU.²² Information was also provided on the number of cases funded in different jurisdictions, the usual value of the funded claims, the ratio between the investment and expected claim value, typical shares of compensation awarded, control over the proceedings, termination, disclosure and views on the effects and the need for regulation of TPF.²³ As discussed,

¹² Jérôme Saulnier, Klaus Müller and Ivan Koronthalyova, ‘Responsible Private Funding of Litigation. European Added Value Assessment’, European Parliament Research Service (March 2021) 5-6.

¹³ Ibid. 8.

¹⁴ Ibid. 51-54.

¹⁵ Kramer and others (n 1).

¹⁶ Ibid. 101-103.

¹⁷ Ibid. 108.

¹⁸ Ibid. 109-110; Sections 3.2.2 and 6.3. An industry practice in which the expected award recovery of the claim needs to be at least 10 times the amount invested to fund the litigation.

¹⁹ Ibid. 117-119. Sections 3.4.2 and 5.3.3.

²⁰ Mulheron (n 1).

²¹ European Commission DG Justice and Consumers.

²² Ibid.

²³ Ibid. 641-695.

the findings of these studies were compared with the findings from the author's interview research and integrated in the following sections.

6.3. The TPF Market and Business Model

One of the primary goals of this study's empirical research is to provide additional understanding of the TPF industry, and its role in the overall legal services market. This establishes whether TPF is still playing a marginal and niche role among sophisticated parties, or if it is becoming more widely available, including in the individual consumer sector, shedding more light on the justifiability for resistance and restrictive regulation.²⁴ As discussed in the theoretical analysis of litigation funding, higher information asymmetries would feature were TPF to be provided to non-sophisticated one-shotter claimants in the consumer sector of the legal market. TPF in the individual consumer sector would give rise to significant agency costs, due to consumers' inability to effectively monitor their lawyer and funder and ensure their interests are advanced. The asymmetry also diminishes the effectiveness of the potential use of reputational sanctions against their agents.²⁵

As is clear from the literature and from various reports, the TPF industry has been expanding globally in recent years and is projected to keep doing so.²⁶ This was confirmed during the interviews. However, precise figures on the size of the market, on its share in the legal services market and on the composition of the TPF market remain elusive.²⁷ One needs to instead rely on varying estimates which use different approaches to measure the market size and structure in order to gain a clearer picture of the situation. Furthermore, the legal services market varies across jurisdictions, as was also evident in this interview research.²⁸

It is well understood today that TPF in the selected European jurisdictions pertains to two main categories of litigation, them being commercial disputes between companies and collective actions, in various areas of law.²⁹ Collective actions mainly involve consumers as group members, but can also involve SMEs and other types of groups.³⁰ With regard to the composition of the UK TPF market, one funder emphasised that consumer collective redress only forms a portion of the litigation funding market, despite the significant focus it attracts 'both from a political and academic background'.³¹

²⁴ Section 3.2.1.

²⁵ Sections 4.3.3 and 3.2.3.

²⁶ Section 3.2.1; Saulnier, Müller and Koronthalyova (n 12) 3-7; Deminor (n 8).

²⁷ Ibid.

²⁸ See also Chapter 2 and Section 3.4.

²⁹ European Commission DG Justice and Consumers (n 1) 11. TPF has, on occasion, also been utilised in other areas of law, including family law, see Section 3.2.1.

³⁰ Section 3.4.

³¹ UK Funder 1 Interview.

Indeed, as was clearly shown previously in this research, consumer class actions have been on the rise and are at the forefront of the debate on TPF in Europe, whereas TPF in commercial disputes receives less attention.³² This may however be attributed to the implementation of new collective redress systems in England and Wales and in the EU and the surrounding discourse they have generated.³³ This funder expressed that consumer collective actions should be viewed and treated very differently in regulation from commercial disputes between businesses. Some regulatory proposals such as the Voss Report and the subsequent EP Resolution on Responsible Private Funding of Litigation seek to adopt a ‘one-size-fits-all’ approach to TPF regulation. The Resolution, for instance, does not distinguish between different approaches for different types of litigation or arbitration proceedings.³⁴ Among the key reasons for different treatment for the two types of litigation, is the usually lower information asymmetry and agency problems associated with the commercially sophisticated individual parties involved in third-party funded individual litigation.³⁵

Regarding the overall share of litigation that is third-party funded, the respondent confirmed that, in line with the available estimates, only a very small minority of cases receive TPF.³⁶ Most law firms and claims, and the legal industry itself, are predominantly funded by ‘deep paying clients’.³⁷ Hourly-fee funding, directly paid by litigants, still dominates the European legal services market.³⁸ One of the many contributing factors could be a general lack of awareness on TPF, as ‘most lawyers are still very unfamiliar with litigation funding’.³⁹ Some estimates suggest that TPF does not account for more than 0.8% of the European legal services market.⁴⁰ For instance, in the Netherlands, respondents in the EC’s mapping study estimated that only around 80 cases receive TPF per year.⁴¹ While there is potential for increased growth and exposure, TPF continues to operate at the fringes of the legal services market.

As examined in Chapters 2 and 3, TPF emerged in a context of a broader shift from public means to private alternative means of litigation funding. It was observed there that some may view this shift

³² Sections 3.2.3 and 5.3; CMS, ‘European Class Action Report’ (CMS, 2024) <https://cms.law/en/int/publication/cms-european-class-action-report-2024?utm_source=lawnwandutm_medium=referralandutm_campaign=Class%Action%Report2024>; Sections 3.4.2 - 3.4.3.

³³ Section 3.4.4 and 3.4.1.1.

³⁴ Section 3.4.1.3; European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation (2020/2130(INL)); European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL) Article 3.

³⁵ Sections 4.4.1 and 4.4.2.

³⁶ UK Funder 1 Interview.

³⁷ Ibid.

³⁸ On hourly fee arrangements, see Section 2.3.1 and 4.4.3; Maurer and others (n 10) 289; Suzi Ring and Emma Jacobs, ‘Why the billable hour is still king in the legal world’ Financial Times (London, 27 January 2025) <<https://www.ft.com/content/7750aff2-0677-4ba9-b571-4e02cf83950d>> accessed 2 May 2025.

³⁹ UK Funder 1 Interview; Section 3.2.1.

⁴⁰ Saulnier, Müller and Koronthalyova (n 12) 5; Deminor (n 8); Section 3.2.1.

⁴¹ European Commission DG Justice and Consumers (n 1) 11.

towards market-based funding and private enforcement as undesirable, driven by moral objections, amongst other concerns.⁴² European civil justice systems have had a tradition of public legal aid and public enforcement by regulatory bodies.⁴³ A funder involved in collective actions responded to this concern by stating that their business model is simply a response to a growing lack of government assistance for claims and of public enforcement mechanisms.⁴⁴ TPF emerged in the context of a decline in public legal aid systems and limitations in the availability of alternative private means of funding such as contingency fees and LEI.

With regard to the actual size of the industry, some estimates have arrived at a figure of a few billion Euros globally.⁴⁵ According to the same participant, there are methodological difficulties in ascertaining the true value;

One way with which you can describe the size of the market is by the amount of money being invested into litigations, and I have no idea, it is entirely opaque. Another way you could describe the size of the market is the amount of returns being generated by litigation funders for the claimants or for themselves [...] Do you include American law firms handling contingency fee agreements, do you include hedge funds, do you include people who back contingent insolvency proceedings?⁴⁶

Despite these difficulties, a general understanding on the scale and significance of the industry can be acquired by examining its key trends, participants and the various estimates. For example, the European TPF market was valued at approximately 1 billion Euro in 2019, grew to an estimated 1.6 billion Euro by 2022, and was projected to reach 2.9 billion in 2025.⁴⁷ TPF is well-developed in certain key markets like the jurisdictions analysed in this research; the UK, Germany and the Netherlands. However, it remains less prominent across much of the rest of Europe.⁴⁸

Another topic which was discussed in the interviews relates to the value of the claims which are third-party funded in Europe. Consistent with what is portrayed in the existing literature, including the EC mapping study, the focus remains firmly on very high-value claims, typically amounting to several millions of Euros.⁴⁹ This was also confirmed by one respondent from the UK. It was explained how lower-value claims can only be funded through their bundling into a collective action, by benefitting from economies of scale.

⁴² Sections 2.3.2 and 3.5.

⁴³ Sections 2.3.2, 3.2.3 and 3.5.

⁴⁴ UK Funder 2 Interview.

⁴⁵ Saulnier, Müller and Koronthalyova (n 12); Deminor (n 8); European Commission DG Justice and Consumers (n 1); Section 2.3.1.

⁴⁶ UK Funder 2 Interview.

⁴⁷ Section 3.2.1; Saulnier, Müller and Koronthalyova (n 12) 3-7; Deminor (n 8).

⁴⁸ Ibid; European Commission DG Justice and Consumers (n 1) 641.

⁴⁹ Section 3.2; European Commission DG Justice and Consumers (n 1) 12.

It's very difficult to make claims work at lower value, because there's a minimum cost involved in all claims, so unless you can aggregate those claims and reduce the average amount of costs, they are not viable.⁵⁰

Lower valued individual claims in Europe therefore continue to rely on non-TPF means of funding. TPF remains predominantly concentrated within the domain of sophisticated and repeat-litigants, where concerns over significant information asymmetries, such as those faced by one-shotter claimants, are less pronounced. However, this also showcases its limitations, as it does little to address broader access to justice gaps for many potential meritorious claims which are of lower value, or for those which lack sufficient prospects of success to attract funders.⁵¹

There has also been a rise in third-party funded class actions in England and Wales, which are also of high value, due to the introduction of the Consumer Rights Act.⁵² A prominent lawyer in the jurisdiction confirmed that while the practice of TPF is still 'relatively new', it is now 'established'. It is practically the only option available for opt-out class actions and for cases like *Bates vs Post Office*.⁵³ To obtain funding for claims, law firms either use brokers or go directly to funders. This remains the case for English firms, who do not have the amount of capital law firms with an American background have.⁵⁴

The respondents practicing in the Netherlands informed that the European TPF market is developing on the plaintiff, or claimant side of the equation. One of the first Dutch litigation funding firms was Liesker Procesfinanciering, and other small Netherlands-based funders like Redbreast also operate in the market. American law firms and London-based funders are also active in funding collective actions in the jurisdiction, including securities, competition and WAMCA cases. There is now in general an increasing awareness among litigants and lawyers about litigation funding. This is the case both in collective claims and in large individual commercial disputes, even though in the latter, the litigants often have the resources to litigate themselves.⁵⁵ TPF can also be used for the enforcement of specific awards. In general, however, litigation funders in the Netherlands are more often involved with collective or bundled claims, rather than with 'B2B' (business-to-business) disputes. Like elsewhere, TPF in B2B disputes gives rise to less political debate in the Netherlands than TPF in collective

⁵⁰ UK Funder 3 Interview; see also Section 4.4.2.

⁵¹ See Chapter 2 for the use of alternative means of funding besides TPF.

⁵² UK Funder 3 Interview; Section 3.4.4.3.

⁵³ UK Practitioner 1 Interview; UK Practitioner 2 Interview; Alan Bates, 'Alan Bates: Why I wouldn't beat the Post Office today' *Financial Times* (London, 12 January 2024) <https://www.ft.com/content/1b11f96d-b96d-4ced-9dee-98c40008b172?trk=feed_main-feed-card_comment-text> accessed 7 June 2024; *Alan Bates v Post Office Limited* [2019] EWHC 3408 (QB); Section 1.1.

⁵⁴ UK Practitioner 1 Interview.

⁵⁵ NL Funder 1 Interview; Section 3.2.1.

actions.⁵⁶ A Dutch lawyer mentioned that their law firm works with all of the large funders.⁵⁷ As was also reported in the research on the desirability of a collective litigation fund in the Netherlands, interviewees informed that collective actions can be identified and initiated by any of the parties involved; a foundation may approach a law firm with respect to a claim, or a funder may contact the law firm, or any other combination.⁵⁸

In Germany, there are some traditional funders like Foris AG who have funded smaller-value individual claims.⁵⁹ Funding is there for impecunious claimants, but it is more often used by companies who are not ‘cash-strapped at all’ to ‘de-risk’ litigation.⁶⁰ It has notably been used in German litigation in cartel damages cases and Dieseltgate cases.⁶¹ Funders maintain rigorous due diligence in the case selection process. They not only consider the value and chances of claims’ success before funding them; other very important factors are the expected duration of a claim and the prospects of enforceability, given the chance of the litigants becoming insolvent. The longer the duration of the litigation, the more costly the litigation is and the less the value of the amount recouped at the end of the process. Having a higher claim value relative to the costs is also beneficial. The ‘rule of ten’ is sometimes used in the funding industry, meaning that the estimated claim value needs to be at least 10 times the amount invested on the costs of the case.⁶² This ensures that ‘the lion’s share of the proceeds in the end of the day ends up with the client’, which is in the interests of all parties and also shields the funding industry from accusations of predatory practices.⁶³ One funder stated that only 2% of the cases which request funding are taken on by the funding firm, highlighting the incentive funders possess to provide funding exclusively for good-quality cases. This ‘extraordinarily low’ rate aligns with the rates reported in the England and Wales jurisdiction. Moreover, the success rate for funded cases cited by some respondents in the Legal Services Board’s 2024 report ranged from 55 to 76%, further reaffirming the exclusive selection of meritorious cases by funders.⁶⁴ These findings reinforce this research’s conclusion that the risk of a considerable increase in frivolous litigation and the emergence of a compensation culture as a result of TPF remains negligible.

The interview findings with regard to the TPF market and the case selection process are in line with the general picture provided by the available literature and reporting on TPF in Europe.⁶⁵ The

⁵⁶ Chapter 3.

⁵⁷ NL Practitioner 1 Interview.

⁵⁸ NL Practitioner 1 Interview; Kramer and others (n 1) 101-103; Section 3.2.2.

⁵⁹ Section 3.4.3.

⁶⁰ DE Funder 1 Interview.

⁶¹ Section 3.4.3 and 2.3.5.

⁶² This was also confirmed in Kramer and others (n 3) 110; Sections 3.2.2 and 4.4.1. See also European Commission DG Justice and Consumers (n 1) 647.

⁶³ DE Funder 1 Interview.

⁶⁴ Ibid. Mulheron (n 1) 33, 36, 96; Sections 3.2.2, 4.3.5 and 4.4.

⁶⁵ Section 3.2.

situation is one where TPF funds a very small number of very high value commercial and collective claims, and is not available for the one-shotter litigation sector. The funded claims are carefully selected on the basis of their potential of successful returns, mitigating fears of frivolous litigation or of TPF's potential role in fostering a compensation culture. The next section delves deeper into how TPF operates in practice for the duration of the contract, with particular attention given to examining the contentious topic of the potential of conflicting interests within TPF agreements.

6.4. Conflicts of Interest

As pointed out throughout this research, the concern of conflicting interests within TPF agreements is a major reason cited for resistance against TPF.⁶⁶ The interviewees were therefore asked about the possibilities and risks of conflicts of interest, not only in TPF, but also in other means of litigation funding. Their responses are scrutinised against the findings from the economic theoretical analysis of this research. Methodologically, the analysis of Chapters 4 operates on the assumption that all actors seek to advance their self-interest and are utility-maximising.⁶⁷ It was found that the risks from conflicts of interests in TPF, especially in individual litigation between businesses, are in general, limited, and not more severe than those in other means of litigation funding. TPF could even align interests more effectively than other funding options. The risks, however, become greater in collective litigation involving larger numbers of group members, as greater agency costs and collective action problems hinder the ability of claimants to effectively safeguard their own interests in these cases. The interview responses help assess whether these risks materialise in practice and how they are perceived by those directly involved in litigation funding.

6.4.1. Degree of Conflict

Along these lines, the interviews first gathered the stakeholders' perspectives on the issue of the degree to which interests may conflict within TPF agreements. A fundamental approach for evaluating this issue involves the comparison of TPF with other funding agreements,⁶⁸ or other commercial agreements. One funder highlighted how TPF agreements, similarly to any other commercial agreement, entail conflicts of interest between parties who have differing objectives.⁶⁹ As analysed under the principal-agent framework, this arises out of the inherent nature of agency relationships, whereby the self-interested claimants depend on the self-interested funders and lawyers to advance their objectives. Since the agents may also seek to pursue their own goals, conflicts and

⁶⁶ Adrian Cordina, 'Is it all that Fishy? A Critical Review of the Concerns surrounding Third Party Litigation Funding in Europe' (2021) 14 (4) *Erasmus Law Review* 270; Chapter 4.

⁶⁷ See Section 4.2.

⁶⁸ Chapter 4.

⁶⁹ UK Funder 2 Interview.

misalignments of interests emerge. The claimants may then have to bear the costs of incentivising, monitoring and bonding to align the interests within the relationship. Furthermore, different contractual designs may be better suited at tackling agency problems and conflicts.⁷⁰

This funder highlighted how, relative to other agreements, TPF agreements tend to be subjected to more intense scrutiny, as in many cases, especially in class actions, they are also disclosed to the court for judicial review.⁷¹ This has been demonstrated in recent case law in England and Wales and the Netherlands.⁷² In such cases, the defendant is also granted the opportunity to examine the funding agreement and make submissions to the court regarding its provisions. That each party is legally represented was also emphasised by some of the funders interviewed. All of this additional scrutiny should result in a mitigation of the risks of conflicts of interest. This funder commented that;

The defendant, who is a stranger to the contract, not a party to the contract, and has interests contrary to the contract, also gets to review the contract, also gets to make submissions to court on the contract [...] And that is the scene in litigation funding, my interest is not always the same as the party that I'm funding but I'm hyper scrutinised in a way that all those contracts aren't and so the fear of conflicts of interest are mitigated in my contract much more than they are in any other contract.⁷³

The respondents were also asked on whether conflicting interests in TPF could be compared with other types of funding, such as hourly fee funding. Under hourly fees, economic theory predicts that lawyers have incentives to prolong the litigation, as the more time spent on the case, the more remuneration they receive. Furthermore, since they do not acquire a share from the outcome in case of success, they do not have strong incentives to maximise the outcome and to only bring good-quality cases forward.⁷⁴ Both of these sets of incentives can lead to actions which are unfavourable to the claimant.⁷⁵ On this comparison, the same respondent expressed that when funders pursue their economic interests, positive outcomes usually arise.⁷⁶ This was attributed to funders' gatekeeping role of selecting meritorious cases with higher likelihoods of successful returns, their commitment to ensure that cases are run cost-effectively within set budgets, and their ability to bring additional sophistication, experience and strategic expertise for the benefit of the claimant. Such outcomes may not arise with hourly fee funding, as was emphasised by this funder;

⁷⁰ Section 4.2.3.

⁷¹ Ibid.

⁷² Sections 3.4.2 - 3.4.3; UK Funder 2 Interview; NL Funder 1 Interview; NL Lawyer 1 Interview.

⁷³ UK Funder 2 Interview.

⁷⁴ Section 4.3.3.

⁷⁵ Ibid.

⁷⁶ UK Funder 2 Interview.

a litigation funder is a hyper rational litigant, we are hyper rational, we make only rational economically sensible decisions, and that has positive effects throughout the lifetime of the litigation [...] we only pursue meritorious claims, and in that respect, we are gatekeepers for litigations. Here litigation lawyers definitely have a conflict of interest, they get paid whether the case is good or bad, and they therefore do not have a rational economic reason to stop a bad case being pursued. We do. [...] Often, we will be asked for funding from a claimant who we will decline.⁷⁷

This aligns with the economic analysis, which demonstrated that the TPF incentive structure is likely to lead to the pursuit of cases with high likelihoods of success and to cost-efficiency during the litigation process. The inclusion of a sophisticated entity in relationship may also benefit the claimant, particularly by enhancing oversight of the hourly fee lawyer's actions.⁷⁸

Another respondent highlighted that since most funders do not attempt to influence the conduct of the litigation, the risk of conflicting interests is further reduced.⁷⁹ The lawyers are also professionally obliged to ensure that the claimants' interests are safeguarded.⁸⁰ However, under the principal-agent framework, ethical obligations are often subordinated to financial interests.⁸¹ This funder compared TPF with contingency fees. With both TPF and contingency fees, cases are funded for a share of any awards. Contingency fee lawyers however actively run the claim they are funding themselves, and it is often only the claimants who can monitor the lawyers' actions to ensure that their interests are advanced. As this funder observes;

This is where I am always a bit bemused. Lawyers have worked with the contingency fees [...] on conditional fees and other related agreements, all of which are funding, because what they are doing is that they are forgoing their fees in order that a claimant can pursue their claim and may take a share of the proceeds at the end of it. It is funding because it is enabling the claim to go forward, funding by the very person who is running the case and makes all the decisions [...] the clear conflict of interest that that presents, that the person who stands to benefit from the claim, is also the person who is running the claim. And that's something which I think is not often or enough talked about. Funders are not running the claim, not controlling the claim and are simply paying the bills, yet people get very excited about our role in all of this.⁸²

⁷⁷ Ibid.

⁷⁸ Section 4.4.1

⁷⁹ UK Funder 3 Interview.

⁸⁰ See e.g.; CCBE Model Code of Conduct for European Lawyers Art. 2.7.

⁸¹ Sections 4.2.3, 4.3 and 4.4.

⁸² UK Funder 3 Interview. On contingency fees see also Sections 2.3.4 and 4.3.5.

As was emphasised in Chapter 4 on the economics on hourly fees, the assumption is that lawyers may pursue their own financial interests at the expense of the claimants, both in hourly fee and in contingency fee agreements. With contingency fees, lawyers may be disposed to prefer earlier settlements, as the less time they spend on the litigation, the higher the return they acquire relative to the time spent.⁸³ TPF, being also a result-based agreement, may also bring about this effect. Empirical research however also suggests that under outcome-based funding, high-stakes cases take longer to settle than lower-stakes ones.⁸⁴ A lawyer who was interviewed cast doubt on this assumption by observing that it may not capture real-world practice and ethical obligations;

most lawyers want to settle the case and move on, and of course they've got professional duties to their client [...] if you're on a DBA, you and the funder of course are married because you like an early answer. And, but, life doesn't work that way, you've got DBAs that go to trial and you've got CFAs that settle on day one.⁸⁵

The concepts of trust between all the parties involved in the litigation and of investing in long-term relationships were also highlighted.⁸⁶ These concepts could be related to the economic reputational incentives discussed in Chapter 4, which are more effective at aligning interests amongst repeat-players than amongst one-shotters. Having more resources and experience, repeat-players are more likely than one-shotters to detect misconduct and cost the wrongdoing funder or lawyer future business opportunities.⁸⁷ Since TPF in Europe takes place almost exclusively between sophisticated repeat-players, market-based reputational incentives may serve to further align the interests of all the parties involved.

6.4.2. Influence on the Litigation

All of the above does not mean however that funders may not take any actions during the litigation to protect their own interests. Influencing the conduct of the litigation is a sensitive issue and one of the major concerns surrounding TPF.⁸⁸ The RAD, for instance, prohibits any kind of influence by commercial funders on representative organisations in consumer collective claims in the EU.⁸⁹ It was also pointed out by one respondent that the ALF Code in England and Wales provides that the funder is not to influence any type of funded litigation, and that the control and conduct of the litigation is

⁸³ Section 4.3.5.

⁸⁴ Herbert M. Kritzer, William L. F. Felstiner, Austin Sarat and David M. Trubek, 'The Impact of Fee Arrangement on Lawyer Effort' (1985) 19 (2) *Law and Society Review* 251; Section 4.4.1.

⁸⁵ UK Practitioner 1 Interview.

⁸⁶ UK Class Representative 1 Interview; UK Practitioner 1 Interview; NL Funder 1 Interview.

⁸⁷ Section 4.3.3.

⁸⁸ Cordina (n 66); Chapter 4.

⁸⁹ RAD Article 4(3)(e).

to always rest with the funded party's lawyer.⁹⁰ That funders generally take a passive role, which is restricted to providing the funding for the litigation, was repeatedly confirmed by most of the respondents, although this is still occasionally disputed.⁹¹

It was also explained by funders how, in any event, all parties are usually interested in pulling in the same direction. They all seek to maximise the efficient balance between the amount recovered and the time taken for the litigation to conclude. Hourly fee lawyers' potential interest in prolonging the third-party funded litigation were the one area which was highlighted as possibly being problematic in this regard, more so than conflicting interests between funders and claimants.⁹²

A form of influence funders could have on the litigation is through signalling to the defendant the quality of the case. A case being third-party funded entails that a funder has evaluated the claim's merit and is prepared to provide significant financial support. This signal of credibility and financial backing may induce the defendant to reevaluate its expectations regarding the risks and the cost of continued litigation, potentially facilitating earlier settlements.⁹³

A possibly problematic issue was raised by an interviewee with respect to collective actions in the Netherlands which are initiated through the setting up of ad hoc foundations.⁹⁴ There may be instances where there are close ties between the funders, the lawyers and the foundation bringing the case. Both the funders and the lawyers may be involved in the establishment and the running of the foundation. It may be considered that such foundations would advance the group members' interests less effectively than other pre-existing ones. This is based on the assumption that these ad hoc foundations would be under greater influence from the lawyers and the funders, rather than being beholden to the group members. The lawyers' and funders' interests would then be prioritised by the representative, rather than the claimants', creating significant agency costs.⁹⁵ However, while these foundations are established ad hoc for a collective action, they later tend to become multi-purpose organisations, by bringing other cases and by engaging in other activities in their field.⁹⁶ Moreover, there are often no alternative means through which these initial cases can be brought and funded, as the existing organisations may not be able or willing to bring these cases.

⁹⁰ UK Funder 3 Interview; ALF Code of Conduct for Litigation Funders Article 9.3; The 2024 ELI principles also provide that 'the Funded Party shall – save in exceptional cases – be the ultimate decision-maker in relation to the funded proceedings'. ELI (n 1) Principle 10.

⁹¹ US Chamber of Commerce Institute for Legal Reform, 'Uncharted Waters: Analysis of TPLF in European Collective Redress' (Institute for Legal Reform, 15 October 2019) <<https://instituteforlegalreform.com/research/uncharted-waters-analysis-of-tplf-in-european-collective-redress/>> accessed 29 August 2024, 11.

⁹² DE Funder 1 Interview; UK Funder 1 Interview.

⁹³ UK Funder 3 Interview.

⁹⁴ On the Dutch collective redress system see Section 3.4.2.

⁹⁵ See also Section 4.4.2.

⁹⁶ Ibid.

Longstanding and idealistic consumer organisations, and other non-profit foundations are, by contrast, definitely perceived as repeat-players, or at least in the process of becoming repeat-players. They are also viewed as ‘clearly independent’ from their funders and legal representatives.⁹⁷ They may also be more motivated by an intrinsic desire to stop malpractice and compensate the victims they represent, rather than driven by commercial incentives.⁹⁸ A class representative in England and Wales noted that the motivation for bringing the collective action was driven by the opportunity to directly apply their expertise and make a positive impact, in addition to focussing on securing compensation for the affected consumers.⁹⁹ Prosocial and reputational incentives on the part of the representatives may therefore play a significant role. However, it is important to note, that from an economic perspective, particularly in collective actions with large numbers of members, consumers will suffer from collective action problems and agency costs, as they are unable to coordinate in order to monitor or incentivise representatives.¹⁰⁰ Representatives also pursue private interests and, due to a lack of effective oversight, may not protect the claimants’ interests to the fullest extent in their relationship with funders and lawyers.

The ideal scenario, as suggested by one interviewee, would be where the foundation, or even the claimant in B2B disputes, has the opportunity to actively negotiate the terms of the funding agreement. It should show that it has at least attempted to negotiate with more than one funder, in order to obtain the most competitive funding arrangement for the litigation. This would alleviate concerns of foundations and funders not being sufficiently independent from the representative. Another respondent was of the opinion that in collective actions in the Netherlands, the courts are already well equipped to establish the independence of the foundation from the funders and the lawyers.¹⁰¹

The funders’ role in the litigation is never completely passive. One funder explained how they may propose settlements or some other litigation strategy, which happens more often with individual commercial disputes, or B2B disputes.¹⁰² The ALF Code of Conduct for instance specifically allows such input in Article 11.1. In B2B cases, funders are in more direct contact with the individual claimant whom they have contracted with. The degree of involvement by funders also varies across litigation funding firms. The claimant has the opportunity to then check with their law firm, who

⁹⁷ NL Funder 1 Interview; NL Practitioner Interview.

⁹⁸ NL Practitioner 1 Interview; Section 5.3.3; Adrian Cordina, ‘The Regulation of Litigation Funding in Europe: An Application of Principal-Agent Theory’ in Xandra Kramer, Masood Ahmed, Adriani Dori and Maria Carlota Ucin (Eds) *Sustaining Access to Justice in Europe: New Avenues for Costs and Funding* (Hart 2025).

⁹⁹ UK Class Representative 1 Interview.

¹⁰⁰ Section 4.4.2.

¹⁰¹ NL Funder 1 Interview. The 2019 Claimcode also requires foundations to be independent; Commissie Claimcode ‘Claim Code 2019’; Section. 3.4.2.

¹⁰² NL Funder 1 Interview. On the question of control over the legal proceedings see also European Commission DG Justice and Consumers (n 1) 654-656. The majority of non-funder stakeholder respondents, and a minority of funders, reported that funders do exercise some form of control over the proceedings, including on consent for settlement and for appeal.

always maintains independence, if it would agree with the strategies proposed by the funder. The funders are also the ones paying for legal advice of this kind. The vast majority of times, these recommendations are accepted, as interests are for the most part in alignment.¹⁰³ Furthermore, as discussed throughout this study, both claimants in third-party funded individual litigation and representatives in collective redress tend to be commercially sophisticated, with the ability to discern the quality of the advice given and to align their agents' interest with theirs.¹⁰⁴

Funders may also have an interest in terminating or withdrawing funding under certain circumstances, which could significantly influence the course of the litigation. The right to terminate funding was advocated for by funders in those situations where the claimants and lawyers are not in agreement with the funder regarding termination. There is a risk that if the case continues, the entire investment by the funder would be lost.¹⁰⁵ The claimant does not bear any of the costs in those cases where the litigation does not succeed. A moral hazard problem arises. The claimant might have an interest in maintaining cases, whose prospects of success have turned to the worse, to a later stage, without bearing the negative consequences of such action. Instead, those consequences are borne by the funders.¹⁰⁶ Funders highlighted however that conflicts of this kind are quite rare and tend to be avoided at the outset, including by the drafting of detailed funding agreements, particularly in relation to staged funding.¹⁰⁷ However, a lawyer criticised termination rights, especially when termination is done purely on the basis of the 'commerciality' of a case.¹⁰⁸ This may, in some instances, lead to a less than favourable resolution for impecunious claimants, who may possess strong claims, but are left with no choice other than accepting to settle the litigation prematurely for lower amounts.¹⁰⁹ The variation in responses suggests that there may be differences in stakeholder perceptions towards termination rights.¹¹⁰ The ALF Code of Conduct, for instance, requires TPF agreements to contain the conditions that have to be met for termination, which concern the merits, viability and material breaches of the case, whereas the EP Resolution on Responsible Private Funding of Litigation proposes restricting the withdrawal of funding without the claimants' consent only to those situations where it is sanctioned by a court or administrative authority and does not disadvantage claimants.¹¹¹ A funder criticised a provision in the Dutch Claimcode which prohibits the funder from withdrawing funding before a first instance judgment is issued.¹¹²

¹⁰³ Ibid.

¹⁰⁴ Section 4.4.

¹⁰⁵ Ibid.

¹⁰⁶ UK Funder 2 Interview; Section 4.4.1.

¹⁰⁷ DE Funder 1 Interview; see also Mulheron (n 1) 133-135; Section 3.2.2.

¹⁰⁸ UK Practitioner 1 Interview.

¹⁰⁹ UK Practitioner 2 Interview. The Post Office case in England and Wales may be an example of this situation, see Section 1.1.

¹¹⁰ See also Mulheron (n 1) 130-135.

¹¹¹ ALF Code of Conduct Article 11; Mulheron (n 1) 130-135; European Parliament (2022, n 34) Articles 14 and 15.

¹¹² UK Funder 2 Interview; Section 3.4.2.

From the class representative side of the equation, it was stated how representatives also take a proactive role in the litigation in safeguarding the interests of the class in their relationship with funders, aided by the court;

my responsibility is for the class members to get compensation or damages in a timely, at the most efficient and timely way possible. So, my job is also to oversee that process and to ensure that things aren't being so delayed unnecessarily. Inevitably, it takes, some things take longer, some things take less time because we're, you know, that's the nature of litigation with such a huge company. I think the key thing is that the CAT is there overseeing everything, so they're not going to be enabling anybody to be motivated, kind of, in that strategic, commercially strategic way. [...] the funding agreement was all overseen by the courts and the CAT reviewed that when we filed the claim, and the claim was certified.¹¹³

Notably, funding agreements are increasingly being disclosed to the court, especially in the certification or admissibility stages of collective actions in England and Wales and the Netherlands.¹¹⁴ Sensitive parts of the agreement are usually redacted. On the question of disclosure, it was agreed by the respondents that disclosing that a case is third-party funded would send a signal that the case is meritorious. Disclosure's function is also to enable scrutiny by the courts over the funder's role and to increase transparency generally. Nevertheless, it could lead to satellite litigation on matters related to funding and not on the substance of the dispute. A funder observed that certain sensitive information such as the budgets, or information on staged funding, could also be taken advantage of by defendants and should not be disclosed.¹¹⁵

6.4.3. TPF Pricing

Pricing of TPF, which usually takes the form of percentages of the compensation awarded at the resolution of the dispute, is another important and heavily debated issue.¹¹⁶ Litigation funders in Europe typically receive 20 to 30 percent of the amount awarded in the case.¹¹⁷ A major concern is that the return rates for funders may be excessive and various suggestions have been made for caps to be introduced in Europe.¹¹⁸ On the pricing issue, two funders deliberated on the question of

¹¹³ UK Class Representative 1 Interview.

¹¹⁴ Sections 3.4.2 and 3.4.4.

¹¹⁵ UK Funder 2 Interview.

¹¹⁶ Chapter 4; Cordina (n 66).

¹¹⁷ European Commission DG Justice and Consumers (n 1) 12, 650-651; Saulnier, Müller and Koronthalyova (n 12) 22; Mulheron (n 1) 107; Veljanovski (n 7) 424.

¹¹⁸ Caps on return rates were proposed in the Voss Report and in various position papers by interest groups, see Sections 3.2.3, 3.4.1.3, 5.3.1.3 and 5.3.2.1. A Dutch case also limited the return to five times the invested amount. District Court Amsterdam 10 January 2024, ECLI:NL:RBAMS:2024:83 (TBYP/SMC/SOMI v TikTok) (Netherlands); Xandra Kramer, 'The Quest for Funding Under the Dutch WAMCA: Third Party Funding and the Viability of a Procedural Fund' (2024) 38 (4) Emory International Law Review 767779-780; Section 3.4.2.

recoverability of success fees, which would ensure that the success fee would more often be paid by the defendant instead of from the claimants' damages.¹¹⁹ Recoverability would further enhance not only compensatory justice, but also deterrence of wrongdoing, as potential wrongdoers would start to account for the additional liabilities they might face. Nevertheless, incentives to control the litigation costs would be diminished, and defendants could face significantly increased adverse costs.¹²⁰

Funders contend that competitive funding markets also control prices.¹²¹ The data shows that a significant number of funders are currently active in the market.¹²² That said, if the only available option is TPF, being able to access justice and acquire some share of the proceeds is a better option for claimants, than the alternative of no access to justice whatsoever. Imperfect justice is in other words better than no justice. Caps on success fees would only serve to reduce the amount of cases funded.¹²³ They would therefore restrict the supply of funding, and may create regulatory barriers to entry for potential new entrants and reduce competition in the market.¹²⁴

Furthermore, in many cases, claimants expressly agree the success fee through contractual agreement. In opt-out class actions, this is however usually not the case. TPF in opt-out cases is instead contracted directly with representatives on behalf of the class members.¹²⁵ Any representative who is found to have agreed to an excessive reward for the funder, would likely not acquire the support of the group members, who may also opt out of the action. Reputational concerns may also deter excessive pricing.¹²⁶ In addition, the court has the opportunity to scrutinise the funding agreement and the success fee in these opt-out class actions.¹²⁷

While TPF is rather expensive, the significant risk undertaken and the number of years funded disputes take to resolve were also highlighted as important factors. Finally, a perhaps neglected, but essential point, is that claimants are always represented by law firms or lawyers who are legally or ethically bound to maintain independence from the funder, and protect the claimants' interests when it comes to the price of TPF.¹²⁸ Nevertheless, it was acknowledged on various occasions that it remains

¹¹⁹ UK Funder 1 Interview. On recoverability, see Sections 2.2; 2.3.4 and 4.2.1.

¹²⁰ Section 4.2.1; Section 2.3.4; UK Practitioner 1 Interview.

¹²¹ NL Funder 1 Interview.

¹²² Saulnier, Müller, Koronthalyova (n 12); European Commission DG Justice and Consumers (n 1) 639-641.

¹²³ UK Funder 2 Interview.

¹²⁴ Section 5.2.

¹²⁵ On collective actions see Sections 3.4 and 4.4.2.

¹²⁶ Section 4.3.3.

¹²⁷ NL Funder 1 Interview; UK Funder 1 Interview.

¹²⁸ NL Funder 1, UK Funder 3 Interview.

undesirable in certain situations for claimants to give away significant shares of the proceeds to funders, rather than receive full compensation for the damage suffered.¹²⁹

The interviewed class representative also noted the aspect of court scrutiny, which further mitigates the risk of excessive TPF pricing;

And then when it comes to damages, when we win, the CAT will oversee the proportion of damage. [...] So, I think this is also another thing to flag up with, when any kind of scepticism or ambulance chasing arguments come to the fore is that the CAT, the court is there, the special court is there to oversee and ensure that there aren't kind of ridiculous sums being compensated to different stakeholders.¹³⁰

It was also reminded by a funder that the ALF has a complaints procedure, through which complaints on breaches of the ALF Code can be raised to the organisation and resolved. This procedure has been utilised a few times.¹³¹ Most of the major litigation funding firms in the jurisdiction of England and Wales are members of the organisation, however there are a few which operate outside its ambit.¹³² That said, self-regulatory entities' sanctioning power tends to be significantly more limited than that of formal regulatory bodies.¹³³

Most of the respondents were of the general view that TPF does not present any serious cause for concern in terms of conflicts of interest. Funders, in particular, highlighted that they predominantly pursue the same objectives as the claimants in the litigation, but acknowledged that there may still be instances of conflict. The responses generally reinforce the general findings of this research, and convey that TPF is today largely perceived in a positive light among the majority of stakeholders.¹³⁴ This suggests that much of the ongoing stringent opposition from certain quarters, on the basis of conflicts of interests, is perceived to be unwarranted.

6.5. Interest Group Activity and Regulation

Another important dimension of TPF involves the positions and lobbying efforts of various interest groups. This political activity sheds further light into the sources and nature of the resistance towards TPF, as well as into the justifiability of such resistance. As pointed out earlier in this research,¹³⁵ many

¹²⁹ See also European Commission DG Justice and Consumers (n 1) 13.

¹³⁰ UK Class Representative 1 Interview.

¹³¹ UK Funder 3 Interview; Mulheron (n 1) 63; Section 3.4.4.1. ELFA also has a complaints procedure. Section 3.4.1.2.

¹³² UK Funder 3 Interview; UK Practitioner 1 Interview.

¹³³ Section 5.4.1.

¹³⁴ See also European Commission DG Justice and Consumers (n 1); Chapter 3-5.

¹³⁵ Section 3.2.3 and Chapter 5.

respondents confirmed that there is significant corporate lobbying against TPF in Europe, particularly with regard to collective actions. Most of the resistance comes from well-resourced defendants that have an interest in opposing litigation funding, as they are ‘the party who is the defendant to the claim brought by litigation funding’.¹³⁶ That there is significant lobbying was the case in all of the jurisdictions studied. The main actor is the US Chamber of Commerce, which brings American ‘style’ lobbying to the arena, but European and national business groups in Europe like ‘Business Europe’, ‘Fair Civil Justice’ and ‘big German industry’ are also involved.¹³⁷ It was emphasised by many respondents that legislators should emphasise and facilitate access to justice, rather than be swayed by the views of defendants’ interest groups. According to one participant, these groups tend to publish ‘controversial statements which are not backed by evidence’.¹³⁸ The role of defence law firms as an interest group was also emphasised as a significant source of resistance against TPF in the Netherlands.

More recently, other types of interest groups, such as funder groups and claimant law firm organisations, have started to become more active in the political debate. With regard to the Netherlands, a funder remarked;

What you saw in the beginning was that these defendant law firms were rather well organised and equipped to be part of consultations, while litigation funders were maybe less present in the market. There were less of them, and they were less active. Now you see that litigation funders have become more abundant in amount. They've become better organised, and also the plaintiff's side of law firms want to say things about litigation funding.¹³⁹

Funders and claimant law firms have a commercial interest in the accessibility of TPF and have now started to become more proactive in lobbying in its favour, and to counter the corporate lobbying. Recently established organisations like ILFA and CORLA are active in this regard.¹⁴⁰ More generally, some organisations, such as the Legal Tech Association in Germany, advocate for the wider liberalisation of the litigation funding market, including through the introduction of contingency fees and direct third-party investment in law firms.¹⁴¹ Some of the respondents in the Netherlands were concerned with the increasing polarisation of the debate on this issue. With regard to the ALF in England and Wales, one of the funders interviewed stressed that it ‘is different and distinct [...] from ILFA which is a trade association, i.e. [ILFA] is a more proactive association for any issues around

¹³⁶ UK Funder 2 Interview.

¹³⁷ DE Funder 1 Interview; UK Practitioner 1 Interview.

¹³⁸ UK Funder 2 Interview.

¹³⁹ NL Funder 1 Interview.

¹⁴⁰ Sections 5.3.1.2 and 5.3.2.2.

¹⁴¹ NL Funder 1; DE Funder 1; Section 5.3.2.2.

funding and does not have a regulatory function'.¹⁴² The ALF therefore does not engage in public campaigns to the same extent as the ILFA.

As per the analysis in the preceding chapter (Chapter 5), special interests may exert a disproportionate influence on shaping TPF regulatory outcomes. Being more effective at organising and having large stakes in the political issue enhances their ability to influence the political agent, possibly at the expense of the public interest. The campaigning against TPF by the large corporate lobby and certain defence law firms, amongst other groups, has been particularly prominent. However, stakeholders reflect that advocacy in favour of TPF by funders and plaintiff lawyer associations has also begun to gather momentum in more recent years. This may represent a counterbalancing force that promotes the public interest, or the interest of the broader base of legal service consumers. Nevertheless, consumers, as a dispersed and less organised interest group, continue to face significant collective action problems that limit their influence.

As discussed earlier in this study, while TPF remains largely unregulated outside the realm of collective redress, there have been various calls for more stringent regulation, and both the EU and England and Wales are engaged in developing an appropriate regulatory response.¹⁴³ On the question of regulation, a few of the interview respondents were of the opinion that TPF should be treated as a financial product and regulated as such, for example through licensing by supervisory authorities. This was one of proposals of the Voss Report and the EP Resolution on Responsible Private Funding of Litigation.¹⁴⁴ All of the respondents, however, agreed that the Voss Report required revisions, particularly in relation to the provisions relating to caps on return rates. Most perceived it as overly restrictive and even questioned the necessity of regulation at this point in time.¹⁴⁵ Some of the respondents expressed the view that courts may be better positioned to oversee and scrutinise TPF agreements, given their proximity to the proceedings and ability to assess fairness on a case-by-case basis.¹⁴⁶ These views tend to align with the economic analysis of regulation conducted previously in this study. Nevertheless, while self-regulation of TPF holds some considerable advantages over formal public regulation, the risks of monopolistic practices by the funding industry also need to be accounted for.¹⁴⁷

Beyond the question of regulatory design, the risks of promoting frivolous litigation and a more litigious society often dominate negative narratives around TPF.¹⁴⁸ While jurisdictions like England

¹⁴² UK Funder 3 Interview.

¹⁴³ Sections 3.4.1.3 and 3.4.4.3.

¹⁴⁴ Section 3.4.1.3.

¹⁴⁵ UK Funder 1 Interview; UK Funder 3 Interview; NL Funder 1 Interview; DE Funder 1 Interview; UK Practitioner 2 Interview.

¹⁴⁶ NL Funder 1 Interview; UK Class Representative 1 Interview; UK Practitioner 2 Interview.

¹⁴⁷ Section 5.4.

¹⁴⁸ Section 3.2.3.

and Wales and the Netherlands are considered as relatively TPF and collective actions friendly, these issues were downplayed as issues which are not borne out by evidence or practice. The general attitude towards TPF was that it contributes to improving access to justice, by enabling it where it would otherwise not be available, albeit in an imperfect way. A perception of legal realism could therefore be said to be emerging amongst the majority of stakeholders involved in TPF. Similarly, many of the (non-business) stakeholders in the EC stakeholder study saw TPF as having positive effects and were in favour of 'light-touch' regulation or no regulation.¹⁴⁹ An emphasis is placed on the real-world benefits, and while TPF's imperfections are acknowledged, the practical benefits outweigh its risks.

6.6. Conclusion

The first goal of the empirical research conducted for the purposes of this study was to provide further insight into the practical operations of TPF in Europe. TPF supports only a limited number of high value commercial and collective claims and is not accessible within the one-shotter litigation sector. Funded cases are meticulously chosen based on their likelihood of successful returns, which helps alleviate concerns about a proliferation of frivolous litigation and of a compensation culture.

With regard to the justifiability of the resistance, it was established from the previous economic theoretical account and from the available empirical literature that there appear to be limited justifications for the instances of severe resistance towards TPF. This was also the impression gathered from the empirical research carried out by the author, as laid out in this chapter. The real-world experiences and perceptions collected, however, reaffirm the divisive nature of TPF. While it is viewed rather favourably by the majority of the respondents, some strongly emphasise the risks associated with the practice. Overall, however, the TPF model does not give rise to concerns that claimants will systematically be taken advantage of to a significantly greater degree than they would be under other funding models. Moreover, it does not raise the public policy concern of a surge in frivolous litigation.

This chapter also reinforces the notion that the resistance seems to be largely stemming from defendants' interest groups. As was also noted in Chapter 5, the arguments these groups make in the guise of promoting the public interest gain traction primarily due to their capacity for effective organisation in their pursuit of their regulatory objectives. Other factors, such as the traditional and cultural reluctance within the legal community or the general public to accept the commercialisation of the civil justice system, were also mentioned to be of importance in the interviews, but appear to

¹⁴⁹ European Commission DG Justice and Consumers (n 1) 14-15, 662, 678-679. Among all stakeholder categories, 34% of stakeholders viewed TPF as having only positive effects, 24% considered TPLF to give rise to both positive and negative effects and 17% only perceived negative effects. 58% of respondents considered that TPF should be regulated and 29% saw no need for regulation.

play a much more limited role. Finally, 'counter-lobbying' in support of TPF by claimants' interest groups was emphasised by the respondents as beginning to gain greater prominence in Europe.

Ultimately, there is a broader tension between innovation in legal systems and entrenched interests that resist such change. While the evidence suggests that the benefits of TPF are significant, these advantages are often overshadowed by the narratives promoted by well-organised opposition groups. Addressing this resistance requires a balanced approach that evaluates the merits and drawbacks of TPF in the light of an informed analysis.

Chapter 7

Conclusions

7.1. Resistance to TPF in Europe and its Implications

This research has examined the development of TPF in Europe, the resistance it encounters and its justifications. As discussed in the literature review in Section 1.4, the existing literature has established that there is significant resistance to the adoption and acceptance of TPF. However, studies targeting and combining the specific questions of identifying the reasons behind this resistance, and of whether this resistance is justified, with a specific focus on Europe, have largely been lacking.¹ This research has sought to address this gap. It places a special emphasis on applying an economic theoretical analysis of the resistance facing TPF in Chapters 4 and 5. Prior to the economic analysis, it employs a doctrinal-comparative approach in Chapters 2 and 3 to establish a robust legal and practical foundation on the development of TPF. The study is complemented by empirical research, presented in Chapter 6. Semi-structured interviews were conducted, providing insights into real-world perspectives and experiences on the research questions, and scrutinising the insights gained from the theoretical analysis.

In the preceding chapters, this study has addressed the overarching research question posed in the introductory chapter, along with its sub-questions. In essence, the central question sought to examine the development of TPF, the factors and barriers hindering the wider adoption of TPF in Europe, and the extent to which resistance to its use can be justified. By addressing these main questions, the various research sub-questions posed in Chapter 1 were also addressed. The legal and practical frameworks governing litigation funding, and TPF specifically, across Europe were investigated. A special focus was applied to the EU, the Netherlands, Germany, and England and Wales, analysing how resistance is reflected in these jurisdictions' legal cultures, regulations and practices. The benefits and drawbacks of TPF were then evaluated from a law-and-economics perspective, mainly by comparing the principal-agent problem in TPF with other private funding arrangements. The study then delved into the perspectives of stakeholders and interest groups, exploring the motivations behind certain actors' support or opposition towards TPF and how their positions and narratives could influence its development and regulation. Furthermore, through the study's empirical research, the practical operation of TPF was further examined, including the types of claims funders typically support, the areas of law involved, case value, likelihood of success, and the extent of funders' influence over case decisions and strategies. The study also considers the impact of TPF on settlements and resolutions, along with the experiences and perceptions of claimants and other stakeholders. TPF is compared with alternative funding options throughout. Finally, the study assesses the normative question as to whether TPF should be approached with caution

¹ Section 1.4.

or actively encouraged within European civil justice systems. It also explores potential litigation funding strategies, wherein drawbacks are mitigated and benefits enhanced.

The following sub-sections consolidate and elaborate on the findings of this research. The research findings can be grouped into five categories. These concern the findings related to the relationship between litigation funding and access to justice; the regulatory frameworks, the status quo of the resistance to TPF; the underlying reasons for the resistance; and, finally, the justifiability of the resistance. The final section of this chapter provides further reflections and explores what the future could hold for TPF in Europe. It also provides some strategies which could be beneficial for litigation funding on the continent and comments on what future research into the field should focus on.

7.2. Access to Justice, Litigation Costs and Funding

Chapter 2 focused on the issue of access to justice amid rising litigation costs and limited availability of alternative means of funding. Access to justice is internationally recognised as a fundamental human right and as an essential component of the rule of law.² However, securing this right has become increasingly difficult for many due to the substantial increase in the cost of legal services and austerity measures in recent decades. Traditionally generous public legal aid systems are facing increased pressure, thereby giving rise to a need for alternative means of funding, particularly for individuals with limited resources.³ In outlining this background, the decline and present use of legal aid in the selected jurisdictions was first discussed. LEI, a cornerstone of many European civil justice systems, was then examined in this context. It is nowadays an essential means of litigation and is widely accepted within the legal culture. It forms a substantial portion of the legal services market as a private form of litigation funding. Nevertheless, it initially encountered resistance to its use. Furthermore, it is predominantly used by defendants, excludes many categories of claims, is subject to financial caps, may give rise to conflicts of interest, and, of particular importance for the purposes of this study, does not provide coverage for collective actions.⁴

Outcome-based agreements can therefore address this funding gap to a certain extent. Under these arrangements, the cost of litigation is paid for by the claimants out of the proceeds only

² Masood Ahmed and Xandra Kramer, 'Global Developments and Challenges in Costs and Funding of Civil Justice' (2021) 14 (4) *Erasmus Law Review* 181; Section 2.3.1.

³ Xandra Kramer, Carlota Ucin and Adriani Dori, 'Challenges to Access to Civil Justice in Europe' in Margaret Y.K. Woo and Cornelis Hendrik van Rhee (Eds), *Comparative Civil Procedure* (Edward Elgar 2025); Section 2.2.

⁴ Section 2.3.3.1.

in the event of success. Contingency fee-like agreements, that is, funding of the litigation by the lawyer representing the claimant, have in recent years started to be introduced, or experimented with, in a few European jurisdictions. Nonetheless, they only provide access to claims with sufficiently high value and prospects of success. Moreover, they remain heavily restricted or outright prohibited in many continental European jurisdictions. Notably, these agreements are, to a large extent, impermissible in the collective redress procedures of all of the selected jurisdictions.⁵ While often not an outcome-based agreement per se, the assignment of claims model also does not involve the risk of bearing the litigation costs in the event of an unsuccessful outcome for the original claimholder. It is nonetheless also subject to various legal constraints.⁶ These regulatory limitations, coupled with an enduring negative perception, contribute to a broader resistance toward outcome-based arrangements. As TPF is also an outcome-based model, it faces similar scepticism.

In addition, other alternative mechanisms such as self-financing public or non-profit litigation funds have yet to be implemented.⁷ The few examples of such funds operating outside Europe and their potential access to justice benefits were discussed. Crowdfunding has also begun to play a role to finance certain claims but is still in its infancy.⁸ These limitations affecting alternative means of funding highlight a substantial gap in litigation funding and access to justice. This gap has increasingly been addressed by TPF. TPF has emerged as an indispensable mechanism in supporting high-value claims in Europe, especially in the context of compensatory collective actions.⁹ Nevertheless, it is highly likely that many potential claimants with meritorious claims that do not attract TPF continue to encounter insurmountable barriers to accessing justice in European civil justice systems.

7.3. TPF Regulatory Frameworks and Practice in Europe

In answering the aforementioned questions, the research progressed in Chapter 3 with the provision of a comprehensive picture of the status quo with regard to the practice and law of TPF in Europe. The chapter engaged in a legal-doctrinal and comparative analysis, focussing both on the regulatory frameworks and relevant case law. In addition, the structural and

⁵ Section 2.3.4.

⁶ Section 2.3.5.

⁷ Xandra Kramer, Ianika Tzankova, Jos Hoevenaars and Karlijn van Doorn, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?* (Eleven 2024; Section 2.3.6).

⁸ *Ibid.* 47-48.

⁹ Section 3.2.1.

operational characteristics of TPF agreements were examined, shedding light on the funder-lawyer-claimant relationships for the duration of the litigation.

TPF remains a dynamic and evolving area within the context of civil justice in Europe. The increasing relevance of TPF is demonstrated by significant developments such as the EP Resolution on Responsible Private Funding of Litigation, the ELI Principles, the EC mapping study and the CJC's final report reviewing litigation funding. All of these developments took place after the commencement of this research and epitomise the growing policy attention this field is receiving.

Nevertheless, across the EU, TPF remains largely unregulated outside of collective redress. The primary source of regulation in this area is the RAD, which contains requirements concerning the disclosure of the identity of the funder to the court, ensuring sufficient capital on the part of the funder and of the consumer representative entities, and that both the funder and the representative entity act in the best interest of the claimants.¹⁰ In the Netherlands, the WAMCA and the Claimcode (a soft law instrument) provide some concrete rules for the use of TPF by foundations and representative organisations in collective redress. Judicial decisions are increasingly clarifying and shaping the permissible forms TPF can take.¹¹ In Germany, the implementation of the RAD regulates TPF robustly, most notably by imposing a 10% cap on the return rates for funders. Case law has also been instrumental, particularly in relation to acknowledging the legality of entities cooperating with third-party funders to bring mass claims via the assignment of claims model.¹²

In England and Wales, the ALF Code of Conduct provides a form of self-regulation for funders and establishes standards for capital adequacy and ethical conduct, amongst others.¹³ The collective proceedings regime under the CAT also incorporates provisions impacting the use and scrutiny of TPF.¹⁴ The surviving doctrine of champerty continues to be of significance, and case law, such as the *Paccar* decision, can have far-reaching implications on LFAs' enforceability.¹⁵

¹⁰ Directive 2020/1828/EU of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1 (RAD); Section 3.4.1.1.

¹¹ Xandra Kramer, 'The Quest for Funding Under the Dutch WAMCA: Third Party Funding and the Viability of a Procedural Fund' (2024) 38 (4) *Emory International Law Review* 767; Section 3.4.2.

¹² David Markworth, 'Coding a Collective Consumer Redress Vehicle in Germany: How Debt Collection Services Became Consumer Allies and what that Means for Directive 2020/1828' (2023), 12 (2) *Journal of European Consumer and Market Law* 89; Sections 2.3.5 and 3.4.3.

¹³ Section 3.4.4.1.

¹⁴ Consumer Rights Act Schedule 8 and supporting CAT Rules 2015; Section 3.4.4.3.

¹⁵ Section 3.4.4.

Regarding the development of TPF as an industry and segment of the legal services market, evidence suggests that it is undergoing steady expansion in Europe, with continuing growth anticipated. The TPF industry in Europe was estimated to be valued at around 1 billion Euro in 2019 by one estimate,¹⁶ and at 1.6 billion Euro in 2022 by another.¹⁷ By 2025, it was expected to account for 2.9 billion.¹⁸ However, TPF in Europe remains underdeveloped outside certain key markets like the UK, Germany and the Netherlands.¹⁹ Its share in the overall legal services market also remains marginal - it does not represent more than 0.8%.²⁰ Other forms of funding, particularly hourly-fee funding directly by clients, dominate the market.

Regarding operational characteristics, it is particularly notable that third-party funders conduct thorough due diligence on the claims they fund, accepting to fund only a very small minority of the cases put forward to them. Their incentive is to exclusively fund commercial and collective redress claims of very high value with strong prospects of award recovery. While this operational process mitigates concerns about TPF's contribution to a compensation culture, many meritorious claims are likely to practically lack access to justice. Moreover, funded parties are almost invariably commercially sophisticated entities with the ability to evaluate and effectively negotiate funding agreements. Concerns that one-shotter claimants with lower valued claims will be systematically taken advantage of are also effectively dispelled since they do not receive TPF. Furthermore, funders tend to take a passive role in the litigation process, leaving the control and conduct of the litigation to the claimant and their legal representatives. Funders keep themselves informed on the process, may propose strategies on settlement and may withdraw funding if certain conditions are met.²¹

7.4. Status Quo of the Resistance to TPF

Particular attention was paid in this study to identifying instances of resistance to TPF in the regulatory frameworks indicated above. The findings indicate that this means of funding continues to encounter significant resistance, particularly in the context of collective redress.

¹⁶ Jérôme Saulnier, Klaus Müller and Ivan Koronthalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', European Parliament Research Service (March 2021) 3-7.

¹⁷ Deminor, 'Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends', (Deminor 2022) <<https://drs.deminor.com/en/litigation-funding-from-a-european-perspective>> accessed 29 August 2024.

¹⁸ Ibid.

¹⁹ European Commission DG Justice and Consumers, 'Mapping Third Party Litigation Funding in the European Union' (2025) 641.

²⁰ Saulnier, Müller and Koronthalyova (n 16) 5; Deminor (n 16); Section 3.2.1.

²¹ See generally, Section 3.2.2.

This is evident first and foremost from the various regulatory safeguards and restrictions imposed on the funding of these types of procedures, demonstrating an ongoing reluctance to liberalise TPF practices. Three of the most noteworthy examples of this resistance can be found in the EU, England and Wales and in Germany. In the EU, the EP Resolution proposing a directive regulating TPF across all types of litigation or arbitration proceedings is widely regarded as highly restrictive, with its proposals for caps on success fees and for the establishment of supervisory authorities in each Member State, amongst other recommendations.²² In England and Wales, the Paccar decision effectively prohibits success fees in LFAs for competition class actions to be structured as percentages of the damages.²³ In Germany, pursuant to the implementation of the RAD, success fees cannot exceed 10% of the damages, making this type of collective action *de facto* impossible to bring.²⁴ All of these developments illustrate the continuing hesitance to fully accept TPF in European civil justice systems.

Resistance to TPF manifests itself in various ways and through various sources. Among the most visible forms of resistance are the aforementioned legal prohibitions or restrictions. Some other jurisdictions like Ireland and Greece go as far as to explicitly ban TPF.²⁵ Judicial decisions can also play a significant role, as exemplified by the Paccar decision which limited TPF considerably, and by other decisions across the selected jurisdictions, as shown in Chapter 3. Courts at times express scepticism or set precedents that curb the influence of third-party funders.

Furthermore, public information campaigns and lobbying efforts by certain interest groups also actively seek to limit the spread of TPF.²⁶ A particularly active interest group has been the large corporate lobby, most notably through the US Chamber of Commerce's Institute of Legal Reform. The risks of commodifying the civil justice system, of conflicts of interest to the detriment of claimants and consumers and of frivolous litigation and a compensation culture

²² European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)); European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation (2020/2130(INL)); Section 3.4.1.3.

²³ R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) Case ID: 2021/007.

²⁴ Section 3.4.3; Wolfgang Hau, 'Private Funding' in Burkhard Hess, Margaret Woo, Loic Cadiet, Séverine Menétrey, and E Vallines García (Eds) *Comparative Procedural Law and Justice, Part III - Access to Justice and Costs of Litigation* (2024) 28-29; Susanne Augenhöfer and Adriani Dori, 'The Proposed Regulation of Third Party Litigation Funding – Much Ado about Nothing?' (2023) 20 (5) *Zeitschrift für das Privatrecht der Europäischen Union* 198, 204.

²⁵ David Capper, 'Litigation Funding in Ireland' 14(4) *Erasmus Law Review* 211; Saulnier, Müller, Koronthalyova (n 16).

²⁶ Sections 3.2.3 and 5.3.

are emphasised.²⁷ It is demonstrated in the research that resistance to TPF in Europe is diverse, spanning legal, judicial, and cultural dimensions. While TPF is often recognised as facilitating access to justice for many claims, European jurisdictions remain wary of its potential risks. That it remains the subject of ongoing debate is highly likely following the EC's extensive study on the matter, along with the publication by the CJC of a review of litigation funding in England and Wales.²⁸ Both of these reports were published in 2025, close to the finalisation of the writing of this research.

7.5. The Reasons for the Resistance

Another central focus of this research was identifying the reasons commonly cited for resisting TPF, in order to proceed with examining their justifiability. Amongst the underlying rationales identified for the resistance are the continuing influence of the traditional common law doctrines regarding champerty and maintenance, and the civil law prohibitions of contingency fees and assignments.²⁹ While these are increasingly being relaxed or circumvented, their legacy persists, as evidenced by the various surviving prohibitions and restrictions placed around result-based litigation funding agreements.

Another aspect which may be influencing perceptions on TPF is the role of culture. Specifically, a legal culture which emphasises the intrinsic importance of not commercialising legal claims and of non-interference by third parties in litigation hampers the development of TPF.³⁰ The concept of liberalising the legal services market may be inherently resisted, due to the moral undesirability of further embedding profit-making into the civil justice system. There should instead be greater reliance on ethical conduct and corrective justice norms in litigation. TPF challenges these traditional notions, by prioritising financial incentives and economic interests in dispute resolution, which may lead to resistance on these same grounds. Nevertheless, this research suggests that the influence of these cultural and moral norms has been steadily diminishing. While still brought up on certain occasions, they rarely feature to a considerable extent in the present discourse surrounding TPF.³¹

²⁷ US Chamber of Commerce Institute for Legal Reform, 'Uncharted Waters: Analysis of TPLF in European Collective Redress' (Institute for Legal Reform, 15 October 2019) <<https://instituteforlegalreform.com/research/uncharted-waters-analysis-of-tplf-in-european-collective-redress/>> accessed 29 August 2024.

²⁸ European Commission DG Justice and Consumers (n 19); Section 3.4.

²⁹ Sections 2.3.4 and 2.3.5.

³⁰ Section 3.5.

³¹ *Ibid.*

By contrast, genuine concerns over conflicting interests within TPF arrangements are considered to play a much more significant role in contributing to the modern resistance towards TPF. These conflicts may be to the detriment of both the claimant and society at large. Funders may be perceived to, for instance, extract excessive shares out of the proceeds from the cases they fund, exert undue control over the litigation, or fund non-meritorious litigation at the expense of claimants and society.³² All of these raise public policy concerns and could lead to more restrictive regulation. The principal-agent analysis presented in Chapter 4 demonstrates that funders, as agents, may indeed have incentives for speedier resolutions which may not be ideal from the claimants' perspectives.³³ With collective actions involving large number of claimants, these problems are exacerbated due to wider information asymmetry and collective action problems. In this type of litigation, the claimants can exert less effective oversight over their representatives, funders and lawyers in order to protect their interests.³⁴ Nonetheless, these issues alone do not necessarily entail that the broader resistance to TPF is found to be justified, as the next section will demonstrate.

Furthermore, from a political perspective, certain interest groups - particularly those whose interests are aligned with defendants' interests - may view TPF as a threat to their members' business models, given the potential of increased litigation and associated liability. Similarly, legal professionals may also perceive TPF as undermining their traditional dominance in the legal services market. These groups therefore constitute a significant source of resistance and regularly campaign for regulatory constraints on the use of TPF.³⁵

Nevertheless, it needs to be reiterated that, in spite of all the possible reasons for, and sources of resistance outlined above, TPF also enjoys considerable support, primarily due to its ability to promote the public interest by facilitating access to justice and the consequent deterrence of future unlawful conduct.³⁶ By providing financial support and additional strategic expertise, TPF also achieves the important goal of levelling the playing field when litigation is against a more well-resourced defendant.³⁷ In fact, the TPF industry continues to expand in Europe, but

³² Adrian Cordina, 'Is it all that Fishy? A Critical Review of the Concerns surrounding Third Party Litigation Funding in Europe' (2021) 14 (4) *Erasmus Law Review* 270; Saulnier, Müller, Koronthalyova (n 16).

³³ Sections 4.3.5 and 4.4.1.

³⁴ Section 4.4.2.

³⁵ Sections 3.2.3, 5.3.1.1 and 5.3.2.1.

³⁶ Xandra Kramer and Ilja Tillema, 'The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context' (2021) 2 *Revista Ítalo-Española de Derecho Procesal* 165; Louis Visscher and Michael Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 (3) *Journal of Consumer Policy* 455; European Law Institute (ELI), 'Principles Governing the Third Party Funding of Litigation' (August, 2024); ILFA, 'Resourcing the Rule of Law in Europe' (ILFA, 26 June 2023) <<https://www.ilfa.com/news>> accessed 29 March 2024; Sections 2.2, 4.2.1, 5.3.1.2, 5.3.2.2 and 5.3.3.

³⁷ Sections 4.4.1 and 4.4.2.

much depends on the future regulatory frameworks that are ultimately adopted. As mentioned, at the time of writing, both the EU and England and Wales are actively engaged in deliberating appropriate regulatory approaches for the sector.

7.6. Justifiability of the Resistance

In addressing the question of whether the resistance to TPF is justifiable, this research employed law-and-economics and agency theory in Chapters 4 and 5, complemented by a qualitative empirical analysis in Chapter 6. It examined the extent to which TPF results in outcomes which are detrimental to claimants or are otherwise contrary to the public interest.

7.6.1. Principal-Agent Analysis

Under the theoretical framework of Chapter 4, agents in different litigation funding arrangements are utility-maximising and pursue their self-interest, which may not necessarily align with the interest of principals in the contractual relationship. For instance, under the hourly fee model, the lawyer, being paid on an hourly basis, has an interest to prolong his engagement to earn more fees, regardless of whether it is beneficial or not to the claimant. Since lawyers do not have a financial stake in the outcome, they would also lack incentives to reject low-quality cases.³⁸ In such cases, hourly fees increase the risks of claimants bearing the entirety of the litigation costs, along with adverse costs. By contrast, under the contingency fee, the lawyer, receiving a share of the award in case of success, has financial incentives to take on good-quality cases to ensure a return at the end of the process. Contingency fee lawyers may however also be inclined to settle earlier for less than would be ideal for the claimant, to lower the time and costs they incur relative to the award.³⁹ Under LEI, insurers also have incentives to minimise costs and may deny coverage for legitimate claims, and in case of caps on coverage, not to recover amounts beyond the capped amount for the claimant.⁴⁰ The degree of conflict and agency costs in all of these arrangements depends on the level of information asymmetry in the relationship - the more the claimant is informed and able to monitor, the less likely the agent will take sub-optimal action for the claimant.

³⁸ Section 4.3.3.

³⁹ It is important to note that empirical research from the US suggests that contingency fee lawyers take longer to settle high-stakes cases than lower-stakes cases. Herbert M. Kritzer, William L. F. Felstiner, Austin Sarat and David M. Trubek, 'The Impact of Fee Arrangement on Lawyer Effort' (1985) 19 (2) *Law and Society Review* 251; Section 4.3.5.

⁴⁰ Section 4.4.1.

While conflicts of interests between funders and claimants and agency costs associated with TPF are indeed present, their prevalence is of a similar nature to - if not less severe than - those associated with the other means of funding litigation just discussed. These other means include hourly fees and LEI, which are universally accepted, and contingency fees, which continue to encounter resistance. Regarding TPF, funders have incentives in the tripartite relationship to exclusively select to fund high-value meritorious cases and may prefer speedier settlements.⁴¹ These sets of incentives may offset the incentives of lawyers who are working under the hourly fee in the third-party funded litigation to take on non-meritorious cases and to prolong the litigation. It is found therefore that, particularly in individual litigation, the agency problems associated with TPF are of a relatively limited nature. The broader question is then raised on why hourly billing and LEI, which can pose significant agency risks and conflicts of interest, and often involve one-shotters, are widely accepted and permitted in Europe, in contrast to result-based agreements.⁴²

The agency costs associated with TPF widen with collective redress, but this is primarily due to collective action problems associated with large groups with heterogeneous interests. Large groups suffer from significant coordination costs which hinders their ability to ensure their interests are advanced by their agents.⁴³ Similar issues would also arise were collective redress to be funded through other funding options. Moreover, the parties in TPF agreements, both in individual and in collective litigation, tend to be commercially sophisticated and well-informed. Finally, of particular importance is that there is often no viable alternative means of funding collective redress in Europe, in the absence of contingency fees and increased public funding.⁴⁴ Given these findings, the justifiability of the resistance is further put into question. Nevertheless, it needs to be reiterated that TPF does not address access to justice gaps in society more broadly. The establishment of self-funding public funds is therefore also promoted in this research as a promising solution to alleviate this limitation, but they remain largely unimplemented across Europe.⁴⁵

Given the above considerations, the resistance would appear to be puzzling, as the underlying justifications are largely unsubstantiated. Of particular relevance, however, is the observation that much of the contemporary resistance to TPF appears to originate from special interest

⁴¹ Ibid.

⁴² Sections 4.3.3 to 4.4.1.

⁴³ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Second Edition, HUP 1971); Section 4.4.2.

⁴⁴ Note 3.

⁴⁵ Section 2.3.6.

groups, most notably the large corporate lobbies.⁴⁶ These lobbies have incentives to reduce the amount of litigation their members are involved in as defendants. Legal insurers and legal professional associations may also have incentives to seek restrictive regulation, to reduce their liability outlays and to protect monopolies over the legal services market, respectively.⁴⁷ This raises critical questions on the justifiability of such resistance and on whether it is truly motivated by the public interest. In Chapter 5, it was highlighted how under the private interest theory of regulation, special interests are comparatively more capable and effective at organising, campaigning and influencing policy to advance their regulatory objectives than large groups, such as consumer groups. These incumbent special interests include the large corporate lobby, legal insurers, and legal professional associations, who, as mentioned, may all find restrictive regulation of TPF to be in their private interests. As a result, these political principals may play a disproportionate role in influencing the policy-making agent and in shaping legislative decisions, regulatory frameworks and the public discourse.

By contrast, funders and collective redress lawyer organisations and representatives' organisations have an interest in campaigning in favour of more lenient and supportive regulatory regimes on TPF, to facilitate the litigation they fund and pursue.⁴⁸ Furthermore, general consumer organisations in Europe such as BEUC may be seen as more closely representing the public interest.⁴⁹ Their public statements suggest a generally favourable view of TPF, indicating that groups who advocate for the interests of society's consumers are at odds with the resistance movement.⁵⁰ This further supports the findings of this research, which concludes that much of the more stringent opposition shown towards TPF lacks a justifiable basis. This is not intended, however, to imply the absence of any risks associated with the practice. Rather, this research calls for a more balanced and evidence-based approach for the critical analysis and regulation of TPF.

7.6.2. Empirical Analysis

This overall perspective is also supported by the author's empirical research contained in Chapter 6. The findings in this chapter are to a large extent corroborated by other research, including the EC's mapping study and the Legal Services Board's review, in demonstrating that

⁴⁶ Sections 3.2.3 and 5.3.

⁴⁷ Sections 5.3.1.3 and 5.3.2.1.

⁴⁸ Sections 5.3.1.2 and 5.3.2.2.

⁴⁹ Section 5.3.3.

⁵⁰ See e.g. BEUC The European Consumer Organisation and NOYB, 'Funding of collective redress: Financing options in the EU and beyond' (BEUC, 9 November 2022) <<https://www.beuc.eu/reports/funding-collective-redress-financing-options-eu-and-beyond>> accessed 13 March 2024, 14-15.

TPF is a growing industry that facilitates the pursuit of high-value, meritorious claims by sophisticated parties.⁵¹ The scrutiny that TPF attracts and the alignment of interests funders share with claimants in achieving a large and successful outcome were highlighted by the respondents. While instances of potential for conflicts of interest were acknowledged, the research conducted suggests that such concerns are of a relatively limited nature. Funders take a passive role in the process, largely restricted to providing financial support for the proceedings. They invest in long-term relationships with the other parties involved. In collective actions, the lawyers and funders pursuing the claim may be involved in the establishment of the ad hoc representative entities. These situations were seen to carry a certain degree of risk that claimants' interests may not be sufficiently protected. Court scrutiny of the TPF arrangement and of the independence of the parties is however significant, and representatives are generally seen as advancing the interests of claimants effectively in their relationship with funders and lawyers.⁵² The respondents also noted the significant lobbying activity around TPF by various interest groups, with initial negative campaigning now increasingly met by more supportive advocacy. The vast majority of stakeholders express a generally favourable view of TPF, suggesting widespread acceptance of its legitimacy and value within the legal system, in contrast to the more critical perspectives held by a vocal minority. With regard to regulation, many would opt for 'light-touch' or no further regulatory intervention, rather than highly restrictive regulation.⁵³

7.7. Future Outlook

This final section considers the future outlook of TPF. While the future trajectory remains uncertain, the industry is expected to continue expanding, particularly in the context of for commercial disputes between businesses, both in litigation and arbitration procedures.⁵⁴ In Europe, the main source of uncertainty lies in the realm of collective redress. As previously discussed, corporate interest groups are likely to remain vocal and influential in shaping the regulatory landscape for the funding of collective actions. From a normative perspective, it is particularly essential that the more extreme forms of resistance do not prevail, as this would significantly undermine efforts to ensure access to justice for many claims. On the contrary, meritorious litigation should be able to be funded through a variety of funding options without undue hindrance. Given the legal and cultural context, it remains highly unlikely that

⁵¹ Section 6.3.

⁵² Section 6.4.

⁵³ Section 6.5; European Commission DG Justice and Consumers (n 19) 14-15, 678-679.

⁵⁴ Section 3.2.1.

contingency fees will suddenly become widely available across continental Europe. Contingency fees also remain, to a large extent, impermissible in collective redress in all of the jurisdictions studied, including in England and Wales. One of the recommendations of the recently published CJC's review and consultation exercise on litigation funding in the jurisdiction, for instance, was for DBAs to be allowed in competition law class actions.⁵⁵

It is also uncertain what the approach of the EC will be following the EP's resolution adopting the Voss Report initiative and its subsequent TPF mapping study. However, there are indications that a more moderate approach towards TPF may be forthcoming. These indications align with the aforementioned conclusion that much of today's resistance to TPF lacks a justifiable basis. If the formal regulatory route is opted for, more moderate regulation would be better suited at preserving the benefits of TPF, in particular those of enhanced access to justice and deterrence of wrongdoing, while also ensuring greater protection from undesirable outcomes arising from information asymmetries between claimants and their agents.

In fact, the vast majority of non-business stakeholder respondents in the consultation of the EC's mapping study were in favour of either a 'light-touch' regulatory approach or of no regulation at all, as opposed to the 'strong' regulatory model proposed in the EP Resolution.⁵⁶ The ELI principles, published a year before the EC study, also propose this type of light regulation.⁵⁷ While any EU regulation will not be binding in England and Wales, in this jurisdiction also, following widespread criticism of the Paccar decision, future legislative action or judicial decisions may eventually reverse the ruling.⁵⁸ This reversal was in fact also recommended by the CJC's Final Report.⁵⁹ As a whole, the CJC proposes various (light) formal regulatory measures placing safeguards around the use of TPF. More broadly, it rightly promotes the wider availability of the various different means of litigation funding examined in this research, including the establishment of a litigation fund for collective and lower value individual matters.⁶⁰ In the Netherlands, the WAMCA has resulted in increased procedural and cost barriers for representative organisations in collective actions which may prevent some potential claims to effectively secure funding. In its current form, the regime's uncertainty may render certain cases less attractive for funders to invest in. Organisations such as the ANCB and the VVMA advocate for the simplification of the regime ahead of the review of the regime by

⁵⁵ CJC, 'Review of Litigation Funding: Final Report' (2025) Recommendation 54; See also Section 3.4.4.3.

⁵⁶ European Commission DG Justice and Consumers (n 19) 14-15, 662, 678-679; Section 6.5

⁵⁷ ELI (n 36).

⁵⁸ Section 3.4.

⁵⁹ CJC (n 55).

⁶⁰ Ibid.

the Dutch Ministry of Justice.⁶¹ The 10% cap on success fees in Germany's implementation of the RAD is highly discouraging, but alternative means of bringing mass claims remain effective in the jurisdiction. The regulatory approaches adopted in all of the jurisdictions could have a significant impact not only on access to justice for many claims, but also on the overall TPF and legal services market, and on these markets' contribution to European economies.

Looking ahead, the establishment of the public or non-profit self-funding litigation funds discussed in Chapter 2, should be thoroughly explored for all types of litigation across Europe. Given the pressures on legal aid systems, well-structured funds, similar to the Fonds d'aide aux actions collectives in Quebec, offer considerable potential in addressing access to justice gaps without requiring significant ongoing public investment or spending.⁶² Another sustainable funding model is the use of unclaimed funds from resolved opt-out collective actions. Such alternatives would not only complement the existing TPF market but also help ensure that some of the meritorious cases which may not attract commercial result-based funding can still be pursued. Furthermore, the potential introduction of contingency fee structures in collective redress systems and in continental European jurisdictions warrants further consideration. Finally, the question of recoverability of the litigation costs and success fees from defendants should be reconsidered, particularly in cases of mass harm where significant personal harm was incurred by the victims. This would help address a crucial concern associated with TPF, namely the reduction of claimants' compensation.⁶³

With respect to other future research directions, the field of TPF in Europe is likely to remain a prominent topic in the next few years as the debate over its regulation continues. As pointed out, there is a notable dearth of academic research on the current state of LEI, both on a comparative level between European jurisdictions, and on how its agency problems compare with TPF. Research could focus on how LEI's role in facilitating access to justice for claimants can be further improved.⁶⁴ The area of litigation funding also presents a particularly compelling opportunity for public choice scholars, given the high stakes involved and the various strategies employed by different interest groups to influence policy outcomes.⁶⁵ Another promising

⁶¹ Sections 5.3.2.2 and 5.3.3. See also Kramer (n 11) 771; Section 3.4.2.

⁶² Section 2.3.6.

⁶³ Cordina (n 32); Saulnier, Müller and Koronthalyova (n 16); European Commission DG Justice and Consumers (n 18); European Commission DG Justice and Consumers (n 19) 13, 666-668.

⁶⁴ Sections 2.3.2 and 4.3.4. See e.g. John Sorabji, 'Legal Expenses Insurance and the Future of Effective Litigation Funding' (2021) 14 (4) *Erasmus Law Review* 189; Jef De Mot, Michael Faure and Louis Visscher, 'TPF and its Alternatives: An Economic Appraisal' in Willem H. van Boom (ed) *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017); De Mot J, Depoorter M and Faure M, 'The Multiplication Effect of Legal Insurance' (2016) 13 (1) *NYU Journal of Law & Business* 1.

⁶⁵ See e.g. Paul H. Rubin, 'Public Choice and Tort Reform' (2005) *Public Choice* 124 (1-2) 223; Charles C. Silver and David A. Hyman, 'Third Party Litigation Funding: Panacea or More Problems?' (2023) SSRN Working Paper

avenue lies in examining the role of competition among funders and its impact on pricing structures and the quality of the services provided. Furthermore, mass claims supported by TPF are a relatively new phenomenon in jurisdictions such as England and Wales, the Netherlands and Germany. Future research should investigate TPF's contribution to these early cases' resolution, whether through settlement or trial. For instance, research could focus on the funding challenges encountered during the proceedings and assessing the share of the compensation ultimately received by the group members. More quantitative research is also needed on the share of litigation funded by different funding means in order to better understand TPF's role in civil justice. 'Portfolio funding' and the direct finance of law firms may also be future developments to consider in Europe.⁶⁶

Further research is particularly needed on the perspectives of claimants as end-users of TPF. Gaining a deeper understanding of how claimants experience and perceive TPF, including through the use of surveys, is essential for evaluating its real-world impact.⁶⁷ The empirical research carried out in this research primarily focused on stakeholders other than claimants or claimant representatives. However, it also provides valuable representative insights. Future academic work, particularly claimant-centred empirical research, either in select prominent case studies, or generally, would be vital in building a more comprehensive understanding of TPF's implications.

Series <<https://ssrn.com/abstract=4438503>> accessed 3 October 2024; Adrian Cordina, 'The Regulation of Litigation Funding in Europe: An Application of Principal-Agent Theory' in Xandra Kramer, Masood Ahmed, Adriani Dori and María Carlota Ucin (Eds) *Sustaining Access to Justice in Europe: New Avenues for Costs and Funding* (Hart 2025; Chapter 5.

⁶⁶ Section 3.2.2.

⁶⁷ The European Commission's 2025 mapping study and a CRN study include insights from representatives which have benefitted, or could potentially benefit from TPF. European Commission DG Justice and Consumers (n 19); Class Representatives Network (CRN), 'Selecting Funders and Negotiating Litigation Funding Agreements' (CRN, September 20, 2024) <<https://classrepresentativesnetwork.org/research-and-reports/>> accessed 30 September 2024.

Bibliography

Books, Articles, Book Chapters and Reports

Abrams D S and Chen D L, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (2013) 15 (4) *University of Pennsylvania Journal of Business Law* 1075

Ahmed M, 'Revisiting Hybrid Damages-Based Agreements' (2022) 1 *Journal of Personal Injury Law* 33

— and Kramer X, 'Global Developments and Challenges in Costs and Funding of Civil Justice' (2021) 14 (4) *Erasmus Law Review* 181

Akerlof G A, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 (3) *The Quarterly Journal of Economics* 488

Andrews N, 'English Systems of Multiparty Litigation' in Fitzpatrick B and Thomas R (Eds), *The Cambridge Handbook of Class Actions* (CUP 2021)

Associatie van Nederlandse Collectieve Belangenbehartigers (ANCB) 'Evaluatie WAMCA 2025 – Position paper ANCB Samen werken aan een gezond ecosysteem voor collectieve acties' (ANCB, May 2025) <<https://ancb.nl/#over-ancb#over-ancb>> accessed 25 May 2025

Arrow K J, 'The Economics of Agency' in John W. Pratt and Richard J. Zeckhauser (Eds), *Principals and Agents: The Structure of Business* (Harvard Business School Press, 1985)

Augenhofer S and Dori A, 'The Proposed Regulation of Third Party Litigation Funding – Much Ado about Nothing?' (2023) 20 (5) *Zeitschrift für das Privatrecht der Europäischen Union* 198

Avraham R and Sebok A, 'An Empirical investigation of Third Party Consumer Litigant Funding' (2018) 104 (5) *Cornell Law Review* 1133

Baker T, 'What Litigation Funders Can Learn About Settlement Rights From the Law of Liability Insurance' (2023). *Theoretical Inquiries of Law*, Forthcoming, University of Pennsylvania, Institute for Law and Economics Research Paper No. 23-41, Available at SSRN: <https://ssrn.com/abstract=4638617>

— and Siegelman P, ‘The law and economics of liability insurance: A theoretical and empirical review’ in Jennifer Arlen (ed) *Research Handbook on the Economics of Torts* (Edward Elgar Publishing 2013)

Barnes J, ‘England’ in Friel S (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020)

Batman F and Aaltonen M V (Eds), *Histories of Legal Aid: A Comparative and International Perspective* (1st ed, Palgrave Macmillan, 2022)

Becker G, ‘Crime and Punishment: An Economic Approach’ (1968) 76 (2) *Journal of Political Economy* 169

Becker G, ‘A Theory of Competition Among Pressure Groups for Political Influence’ (1983) 98 (3) *The Quarterly Journal of Economics* 371

Bench Nieuwveld B and Shannon Sahani V, *Third-Party Funding in International Arbitration* (2nd Edition, Wolter Kluwer 2017)

Bénabou and Jean Tirole, ‘Incentives and Prosocial Behaviour’ (2005) National Bureau of Economic Research Working Paper 11535 <<http://www.nber.org/papers/w11535>>

Bentham J, ‘Defence of Usury, Letter XII. Maintenance and Champerty’ (1818)

Bernstein L, ‘Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21 (1) *The Journal of Legal Studies* 115

BEUC The European Consumer Organisation and NOYB ‘Funding of collective redress: Financing options in the EU and beyond’ (BEUC, 9 November 2022) <<https://www.beuc.eu/reports/funding-collective-redress-financing-options-eu-and-beyond>> accessed 13 March 2024

— ‘Justice unchained: BEUC’s view on third party litigation funding for collective redress’ (BEUC, 21 November 2024) <<https://www.beuc.eu/position-papers/justice-unchained-beucs-view-third-party-litigation-funding-collective-redress#:~:text=BEUC's%20view%20on%20TPLF%20for,substantial%20benefits%20to%20claimant%20organisations>> accessed 28 December 2024

- Biard A and Kramer X, ‘The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity?’ (2019) 27 *Zeitschrift Für Europäisches Privatrecht Zeup* 249
- ‘Je t’aime moi non plus’: Why Europe Needs Strong Collective Redress’ in Kramer X, Voet S, Kodderitsch L, Tulibacka M and Hess B, *Delivering Justice: A Holistic and Multidisciplinary Approach* (Bloomsbury Publishing 2022)
 - ‘The Age of Consumer Law Enforcement in the European Union: High Hopes or Wishful Thinking?’ (2023) *European Journal of Risk Regulation* 1-12 4 <<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/age-of-consumer-law-enforcement-in-the-european-union-high-hopes-or-wishful-thinking/E51DA630C0D24F8987A0660B9B9C8EC7>> accessed 12 March 2024
 - ‘Thunder Road: The Implementation of the Representative Actions Directive in Europe’ (2024) 28 (4) *Emory International Law Review* 751

Boardman M, ‘Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation’ (2012) *Journal of Law, Economics and Policy* 8(3) 673.

Bone R G, ‘Economics of Civil Procedure’ in Francesco Parisi (Ed.) *The Oxford Handbook of Law and Economics Volume III: Public Law and Legal Institutions* (OUP 2017)

Bradford A, *The Brussels Effect* (OUP 2020)

Burford Capital Annual Report 2021

- Annual Report 2023

Erhard Blankenburg, ‘Civil Justice: Access, Cost, and Expedition. The Netherlands’ in Zuckerman A (Ed.), *Civil Justice in Crisis* (OUP 1999)

Bruns A, ‘Third-party financing in the perspective of German law: useful instrument for improvement of the civil justice system or speculative immoral investment?’ (2012) 8 (3) *Journal of Law, Economics and Policy* 525

Bukspan E, ‘The Israeli Public Class Action Fund: New Approach for Integrating Business and Social Responsibility’ in Fitzpatrick B and Thomas R(Eds), *The Cambridge Handbook of Class Actions* (CUP 2021)

Cabrillo F and Fitzpatrick S, *The Economics of Courts and Litigation* (Edward Elgar, 2008)

Capper D, 'Litigation Funding in Ireland' 14(4) *Erasmus Law Review* 211

- and Sebok A, 'A Brief history of Third-party Litigation Funding in the UK, US and Elsewhere in the Common Law' in Friel S (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020)

Coase R, 'The Problem of Social Cost' (1960) 56 (4) *Journal of Law & Economics* 837

Civil Justice Council (CJC), 'The Law and Practicalities of Before-The-Event (BTE) Insurance: An Information Study' (Civil Litigation Review Working Group BTE Insurance, 2017)

- 'Review of Litigation Funding: Interim Report and Consultation' (2024)
- 'Review of Litigation Funding: Final Report' (2025)

Chaserant C and Harnay S, 'Self-regulation of the legal profession and quality in the market for legal services: an economic analysis of lawyers' reputation' (2015) 39 (2) *European Journal of Law and Economics* 431

Chen D L, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (2013) 15 (4) *University of Pennsylvania Journal of Business Law* 1075

Chen Y, 'Third-Party Funding in International Arbitration: A Transnational Study of Ethical Implications and Responses' (Doctoral thesis at Erasmus University Rotterdam 2022)

Choi J H, 'In Defense of the Billable Hour: A Monitoring Theory of Law Firm Fees' (2018) 70 (2) *South Carolina Law Review* 297

Class Representatives Network (CRN), 'Selecting Funders and Negotiating Litigation Funding Agreements' (CRN, September 20, 2024) <<https://classrepresentativesnetwork.org/research-and-reports/>> accessed 30 September 2024.

CMS, 'European Class Action Report' (CMS, 2024) <https://cms.law/en/int/publication/cms-european-class-action-report-2024?utm_source=lawnowandutm_medium=referralandutm_campaign=Class%Action%Report2024>

Cooter R D and Ulen T S, *Law and Economics*, 6th edition (Berkeley Law Books 2016)

Cordina A, 'Is it all that Fishy? A Critical Review of the Concerns surrounding Third Party Litigation Funding in Europe' (2021) 14 (4) *Erasmus Law Review* 270

— and Storskrubb E, 'The Future Regulation of Third-party Funding in Europe: Conference Report, 22 June 2022, Erasmus University Rotterdam' (2022) 26 (2) *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement* 38

— 'The Regulation of Litigation Funding in Europe: An Application of Principal-Agent Theory' in Xandra Kramer, Masood Ahmed, Adriani Dori and María Carlota Ucín (Eds), *Sustaining Access to Justice in Europe: New Avenues for Costs and Funding* (Hart 2025)

Croley S, 'Interest Groups and Public Choice' in Farber D A and O'Connell A J (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar Research Handbook in Law and Economics Series 2010)

Cseres K J, 'Consumer Protection in the European Union' in Van den Bergh R and Paces A (eds), *Regulation and Economics, Encyclopedia of Law and Economics*, 2nd edn (Edward Elgar 2012) vol 9

Deffains B and Desrieux C, 'To Litigate or Not to Litigate? The Impacts of Third-party Financing on Litigation' (2014) 43 *International Review of Law & Economics* 178

Degeling S and Legg M, 'Undue Influence, Litigation Funding and Book Building in Group Proceedings' (2023) 42 (3) *Civil Justice Quarterly* 247

Deminor, 'Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends', (Deminor 2022) <<https://drs.deminor.com/en/litigation-funding-from-a-european-perspective>> accessed 29 August 2024

Demougin D and Maultzsch F, 'Third-Party Financing of Litigation: Legal Approaches and a Formal Model' (2013) 60 (3) *CESifo Economic Studies* 525

Dal Bó E, 'Regulatory Capture: A Review' (2006) 22 (2) *Oxford Review of Economic Policy* 203

Darby M R and Karni E, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 (1) *The Journal of Law & Economics* 67

Den Hertog J, 'Review of economic theories of regulation' (2010) Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10-18

De Morpurgo M, 'A Comparative Legal and Economic Approach to Third-party Litigation Funding' (2011) 19 (2) *Cardozo Journal of International & Comparative Law* 343

De Mot J, Depoorter M and Faure M, 'The Multiplication Effect of Legal Insurance' (2016) 13 (1) *NYU Journal of Law & Business* 1

— and Faure M and Visscher L, 'TPF and its Alternatives: An Economic Appraisal' in Willem H. van Boom (ed) *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017)

Demsetz H, 'Toward a Theory of Property Rights' (1967) 57 (2) *The American Economic Review* 347

— 'Information and Efficiency: Another Viewpoint' (1969) 12 (1) *The Journal of Law & Economics* 1

Depoorter B, 'The Fall and Rise of Law & Economics' in Europe in Faure M, Schreuders W and Visscher L (Eds) *Don't Take it Seriously. Essays in Law and Economics in honour of Roger Van den Bergh* (Intersentia 2018)

Donovan D F, 'International Commercial Arbitration and Public Policy' (1995) 27 (3) *New York University Journal of International Law and Politics* 645

Dori A and Richard V 'Litigation Costs and Procedural Cultures – New Avenues for Research in Procedural Law' in Kramer X E and Hess B (Eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos 2016)

Duffy M, 'Two's Company, 'Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory' (2016) 39 (1) *University of New South Wales Law Journal* 165

Dür A, Marshall D and Bernhagen P, *The Political Influence of Business in the European Union* (University of Michigan Press New Comparative Politics Series 2019)

Eisenhardt K M, 'Agency Theory: An Assessment and Review' (1989) 14 (1) *Academy of Management Review* 57

Ekelund R B and Tollison R D, *Microeconomics: Private Markets and Public Choice*, 7th edn (Pearson 2005)

Ellingsen T and Johannesson M, 'Pride and Prejudice: The Human Side of Incentive Theory' (2008) 98(3) *American Economic Review* 990

Emons W, 'Credence Goods and Fraudulent Experts' (1997) 28 (1) *The RAND Journal of Economics* 107

- 'Expertise, contingent fees, and insufficient attorney effort' (2000) 20 *International Review of Law and Economics* 21
- 'Legal Fees and Lawyers' Compensation' in Francesco Parisi (Ed.) *The Oxford Handbook of Law and Economics, Volume 3: Public Law and Legal Institutions* (OUP, 2017)

European Agency for Fundamental Rights, *Handbook on European Law Relating to Access to Justice* (Publications Office of the European Union 2016)

European Commission DG Justice and Consumers, 'Mapping Third Party Litigation Funding in the European Union' (2025)

Faure M G, 'The View from Law and Economics' in Wagner (Ed) *Tort Law and Liability Insurance* (Springer Wien New York, 2005)

- and Fernhout F and Philipsen N, 'No Cure, No Pay and Contingency Fees' in Tuil M and Visscher L T (Eds), *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical and Economic Analysis* (Cheltenham: Edward Elgar 2010)
- and de Mot J, 'Comparing Third-Party Financing of Litigation and Legal Expenses Insurance' (2012) 8 (3) *Journal of Law, Economics and Policy* 743
- and Weber F, 'Dispersed Losses in Tort Law – An Economic Analysis' (2015) 6 (2) *Journal of European Tort Law* 163
- and Visscher L and Weber F 'Liability for Unknown Risks – A Law and Economics Perspective' (2016) 7 (2) *Journal of European Tort Law* 19
- and Philipsen N, 'Standardisation from a Law and Economics Perspective' in Eliantonio M and Cauffman C (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-Disciplinary and Multilevel Analysis* (Edward Elgar 2020)
- and Visscher L and Weber F, 'The Impact of Speed and Accuracy in Personal Injury Cases: A Law and Economics Analysis' (2023) 24 (3-4) *European Journal of Law Reform* 317

Fair Civil Justice, 'Establishing Fairness In Litigation Funding' (Fair Civil Justice, June 4 2024) <https://fairciviljustice.org/wp-content/uploads/2024/12/1452C_TPLF_4_RGB_Pages.pdf> accessed 7 June 2024

Fenn P, Grembi V and Rickman N, 'No Win, No Fee', Cost-shifting and the Costs of Civil Litigation: A Natural Experiment' (2017) *The Economic Journal* 142

Fields J A and Tirtiroglu D, 'Agency-Theory Implications for the Insurance Industry: A Review of the Theoretical and Empirical Research' (1991) 30 (1) *Quarterly Journal of Business and Economics* 40

Finch and Deminor, 'Three Years of WAMCA: A Second Quantitative Analysis' (2023) <<https://www.deminor.com/en/news-insights/three-years-of-wamca-a-quantitative-analysis/>> accessed 3 October 2024

Fouda A, 'Multi-Principal Agency and the Compliance with Professional Guidelines in Health Systems: Economic and Regulatory Perspectives' (EDLE Doctoral Thesis 2022)

Furubotn E G and Pejovich S, 'Property Rights and Economic Theory: A Survey of Recent Literature' (1972) 10 (4) *Journal of Economic Literature* 1137

Gabuthy Y and Lambert E A, 'English Rule and Frivolous Suits: Conditional Versus Hourly Fees' (2011) 7 (1) *Review of Law & Economics* 72

Galanter M, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 (1) *Law & Society Review* 95

- 'Predators and Parasites: Lawyer-Bashing and Civil Justice' (1994) 28 (3) *Georgia Law Review* 633
- 'Oil Strike in Hell: Contemporary Legends about the Civil Justice System' (1998) 40 *Arizona Law Review* 717
- 'The Hundred-Year Decline of Trials and the Thirty Years War' (2005) 57 *Stanford Law Review* 1255
- 'A World Without Trials?' (2006) *Journal of Dispute Resolution* 7

Garoupa N and Gomez-Pomar F, 'Cashing by the Hour: Why Large Law Firms Prefer Hourly Fees over Contingent Fees' (2007) 24 (2) *The Journal of Law, Economics, & Organization* 458

Genn H, *Judging Civil Justice* (CUP 2009)

Genn H, 'When Law is Good for Your Health: Mitigating the Social Determinants of Health through Access to Justice' (2019) 72 (1) *Current Legal Problems* 159

Glaeser E L and Schleifer A, 'The Rise of the Regulatory State' (2003) 41 (2) *Journal of Economic Literature* 401

Gottwald P, *Litigation in England and Germany: Legal Professional Services, Key Features and Funding* (Giesecking-Verlag, 2010)

Haarhuis C K and van Velthoven B C J, 'Legal Aid and Legal Expenses Insurance, Complements or Substitutes? The Case of the Netherlands' (Scholarly Publications Leiden University, 2010)

Hadfield G, 'The Price of Law: How the Market for Lawyers Distorts the Justice System' 98 (4) *Michigan Law Review* 953

Hand J, 'The Compensation Culture: Cliché or Cause for Concern?' (2010) 37 (4) *Journal of Law and Society* 569, 572

Hasson R, 'Subrogation in Insurance Law - A Critical Evaluation' (1985) 5 (3) *Oxford Journal of Legal Studies* 416

Hau W, 'Private Funding' in Hess B, Woo M, Cadet L, Menétrey S, and Vallines García E (Eds), *Comparative Procedural Law and Justice, Part III - Access to Justice and Costs of Litigation (2024)*

Heckelman J C, 'Collective Action' in Robert D. Congleton, Bernard Grofman and Stefan Voigt (eds), *The Oxford Handbook of Public Choice*, vol 1 (OUP 2019)

Helland E and Tabarrok A, 'Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets' (2003) 19 (2) *The Journal of Law, Economics and Organisation*

Hensler D R 'The socio-economics of mass torts: What we know, don't know and should know' in Arlen J (Ed), *Research Handbook on the Economics of Torts* (Edward Elgar 2013)

- 'Third-party Financing of Class Action Litigation in the United States: Will the Sky Fall?' (2014) 63 (2) *DePaul Law Review* 499
- 'Foreword' in Fitzpatrick B and Thomas R(Eds), *The Cambridge Handbook of Class Actions* (CUP 2021)
- 'So You Are Thinking About Adopting a Class Action Regime? Lessons from the US' (2023) 42 (1) *Civil Justice Quarterly* 3

Hess B and Hübner R, 'Germany' in Hodges, Vogenauer and Tulibacka in Hodges C, Vogenauer S and Tulibacka M (Eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing 2010)

Higgins A, 'The costs of civil justice and who pays?' (2017) 37 *Oxford Journal of Legal Studies* 687

— and Matthew Tweddell, 'The Supreme Court Blows Up the Litigation Funding Market in PACCAR in the name of the Parliament—to the Surprise of Everyone Including the Parliament' (2024) 43 (1) *Civil Justice Quarterly* 1

Hodges C, Vogenauer S and Tulibacka M (Eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing 2010)

— and Peysner J and Nurse A, 'Litigation Funding: Status and Issues' (2012) 55 *Oxford Legal Studies Research Paper*, 151

Hylton K N, 'The Economics of Third-Party Financed Litigation' 8 (3) *Journal of Law, Economics and Policy* 701

Inchausti F G, 'A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November' (2021) 2 *Zeitschrift für das Privatrecht der Europäischen Union* 61

International Council for Commercial Arbitration (ICCA), 'Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration, (ICCA reports series, no. 4, 2018)

International Legal Finance Association (ILFA), ILFA submits letter to the European Commission on Voss Report's proposal to impose overburdensome regulation (ILFA, 7 March 2022)

— 'Resourcing the Rule of Law in Europe' (ILFA, 26 June 2023)
<<https://www.ilfa.com/news>> accessed 29 March 2024

Iossa E and Jullien B, 'The market for lawyers and quality layers in legal services' (2012) 43 (4) *RAND Journal of Economics* 677

Issacharoff S, 'Litigation Funding and the Problem of Agency Cost in Representative Actions' (2014) 63(2) *DePaul Law Review* 561

Jensen M C and Meckling W H, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 (4) *Journal of Financial Economics* 305

Judt T, *Postwar Europe: A History of Europe since 1945* (Penguin Press, 2005)

Kaplow L and Shavell S, 'Fairness versus Welfare: Notes on the Pareto Principle, Preferences and Distributive Justice' (2003) (Ser. Nber Working Paper Series, no. 9622) National Bureau of Economic Research

Keet M, Heavin H and Sparrow S, 'Anticipating and Managing the Psychological Cost of Civil Litigation' (2017) 34 (2) *Windsor Yearbook of Access to Justice* 73

Kelemen R D, *Eurolegalism – The Transformation of Law and Regulation in the European Union* (HUP 2011)

Kessler D P, 'Introduction' in Kessler D P (ed), *Regulation vs. Litigation: Perspective from Economics and Law* (The University of Chicago Press, 2011)

Kidd J, 'To Fund or not to Fund: The Need for Second Best Solutions' (2012) 8 (3) *Journal of Law, Economics and Policy* 613

Kilian M, 'Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience' (2003) 30(1) *Journal of Law and Society* 31

— and Regan F, 'Legal expenses insurance and legal aid—two sides of the same coin? The experience from Germany and Sweden' (2004) 11 (3) *International Journal of the Legal Profession* 233

Kiser E, 'Comparing Varieties of Agency Theory in Economics, Political Science, and Sociology: An Illustration from State Policy Implementation' (1999) 17 (2) *Sociological Theory* 146

Korchin E, Dempsey P and Blinderman E, 'United States' in Latham (ed) *The Law Reviews - The Third Party Litigation Funding Law Review*, Fifth Edition (2022)

Kramer X E, 'Legal Aid', in Basedow Jürgen and others (Eds.), *Encyclopedia of Private International Law* (Edward Elgar Publishing Limited 2017)

— and Kakiuchi S, 'Austerity in civil procedure and the role of simplified procedures' (2015) 8 (4) *Erasmus Law Review* 139

- and Tillema I, ‘The Funding of Collective Redress by Entrepreneurial Parties: The EU and Dutch Context’ (2021) 2 *Revista Ítalo-Española de Derecho Procesal* 165
- and Tzankova I N, Hoevenaars J and van Doorn C J M ‘Nut, noodzaak, vormgeving en kosten van een (revolverend) processenfonds voor collectieve acties’ (Rapport tbv het Wetenschappelijk Onderzoeks- en Documentatiecentrum, WODC, 2023)
- and Tzankova I N, Hoevenaars J and van Doorn C J M, *Financing Collective Actions in the Netherlands: Towards a Litigation Fund?* (Eleven 2024)
- ‘The Quest for Funding Under the Dutch WAMCA: Third Party Funding and the Viability of a Procedural Fund’ (2024) 38 (4) *Emory International Law Review* 767
- and Carlota Ucín and Adriani Dori, ‘Challenges to Access to Civil Justice in Europe’ in Margaret Y.K. Woo and Cornelis Hendrik van Rhee (Eds), *Comparative Civil Procedure* (Edward Elgar 2025)

Kritzer H M, Felstiner W L F, Sarat A and Trubek D M, ‘The Impact of Fee Arrangement on Lawyer Effort’ (1985) 19 (2) *Law and Society Review* 251

Laffont J J and Tirole J, *A Theory of Incentives in Procurement and Regulation* (MIT Press 1993)

Landsman S, ‘The History of Contingency and the Contingency of History’ (1998) 47(2) *DePaul Law Review* 261

Lanneau R, ‘Public Services as a Strategy of Regulation’ in Klaus Mathis and Avishalom Tor, *Law and Economics of Regulation* (Springer 2021)

Legg M, and Park E, Turner N and Travers L, ‘The Rise and Regulation of Litigation Funding in Australia’ (2011) 38 *Northern Kentucky Law Review* 625

- ‘The Rise and Regulation of Litigation Funding in Australian Class Actions’ (2021) 14 *Erasmus Law Review* 221

Leland H E, ‘Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards’ (1979) 87 (6) *Journal of Political Economy*

Le Mire S and Parker C, ‘Keeping It in-House: Ethics in the Relationship between Large Law Firm Lawyers and Their Corporate Clients through the Eyes of in-House Counsel’ (2008) 11 *Legal Ethics* 201

Lewis R, 'The Relationship Between Tort Law and Insurance in England and Wales' in Gerhard Wagner (Ed.) *Tort Law and Liability Insurance* (Springer Wien New York, 2005)

- 'Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice?' (2011) 74 (2) *The Modern Law Review* 272
- and Morris A, 'Tort Law Culture: Image and Reality' (2012) 39 (4) *Journal of Law and Society* 562
- 'Compensation Culture Reviewed: Incentives to Claim and Damages Levels' (2014) *Journal of Personal Injury Law*, 209 <<https://ssrn.com/abstract=2467110>> accessed 3 October 2024

Lucas G M and Tasic S, 'Behavioral Public Choice and the Law' (2015) 118 *West Virginia Law Review* 199

Markworth D, 'Coding a Collective Consumer Redress Vehicle in Germany: How Debt Collection Services Became Consumer Allies and what that Means for Directive 2020/1828' (2023), 12 (2) *Journal of European Consumer and Market Law* 89

Mathis K, *Efficiency Instead of Justice - Searching for the Philosophical Underpinnings of the Economic Analysis of Law* (Springer 2009)

- and Tor A (Eds) *Law and Economics of Justice* (Springer 2024)

Maurer V G, Thomas R E and DeBooth P A, 'Attorney Fee Arrangements: The U.S. and Western Perspectives' (1999) 19(2) *Northwestern Journal of International Law & Business* 27

Maxwell J W, Lyon T P and Hackett S C, 'Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism' (2000) 43 (2) *Journal of Law and Economics* 583

Mehra S K, 'Justice Without Markets' in Klaus Mathis and Avishalom Tor (Eds) *Law and Economics of Justice* (Springer 2024)

Merkin R and Steele J, *Insurance and the Law of Obligations* (OUP 2013)

Meurkens R M, 'Punitive Damages, The Civil Remedy in American Law, Lessons and Caveats for Continental Europe' (Doctoral Thesis, Maastricht University 2014) 38

Miceli T J and Stone M P, "'Piggyback" lawsuits and deterrence: Can frivolous litigation improve welfare?' (2014) 39 *International Review of Law and Economics* 49

- Miller G P, 'Some Agency Problems in Settlement' (1987) 16 (1) *Journal of Legal Studies* 189
- 'Group litigation in the enforcement of tort law' in Arlen J (Ed), *Research Handbook on the Economics of Torts* (Edward Elgar 2013)
- Mulcahy L, 'The Collective Interest in Private Dispute Resolution' (2012) 33 (1) *Oxford Journal of Legal Studies* 59
- Mulheron R, 'The Damages-Based Agreements Regulations 2013: Some Conundrums in the "Brave New World" of Funding' (2013) 32(2) *Civil Justice Quarterly* 241
- 'England's Unique Approach to the Self-regulation of Third Party Funding: A Critical Analysis of Recent Developments' (2014) 73 *The Cambridge Law Journal* 570
 - 'The United Kingdom's New Opt-Out Class Action' (2017) 37 (4) *Oxford Journal of Legal Studies* 814
 - 'Revisiting the Class Action Certification Matrix in *Merricks V Mastercard Inc*' (2019) 30 *Kings Law Journal* 396
 - and Bacon N, 'The 2019 DBA Reform Project Explanatory Memorandum' (October 2019) <[https://www.qmul.ac.uk/law/media/law/docs/research/Doc-3---Explanatory-Memorandum-\(13-Oct-2019\).pdf](https://www.qmul.ac.uk/law/media/law/docs/research/Doc-3---Explanatory-Memorandum-(13-Oct-2019).pdf)> accessed 29 September 2024
 - *Class Actions and Government* (CUP 2020)
 - *The Modern Doctrines of Maintenance and Champerty* (OUP 2023)
 - 'The Funding of the United Kingdom's Class Action at a Cross-Roads' (2023) *King's Law Journal*, (1-27) <<https://www.tandfonline.com/doi/full/10.1080/09615768.2022.2161350>> accessed 13 March 2024
 - 'A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study. A Report for submission to the Legal Services Board' (Legal Services Board 2024)
 - 'Unpacking Paccar: Statutory Interpretation and Litigation Funding' (2024) 83(1) *Cambridge Law Journal* 99
 - 'The Conundrum of Undistributed Residues under the United Kingdom's Collective Proceedings Regime' (2024) 23 (2) *Competition Law Journal* 79
- Mullenix L S, 'For the Defence: 28 Shadows of European Class Actions' in Alan Uzelac and Stefaan Voet (Eds) *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021)
- Nagy C I, *Collective Actions in Europe. A Comparative, Economic and Transsystemic Analysis* (Springer Open 2019)

Nayer R and Ahmed R, 'Pro bono, philanthropic, charitable and 'revenge' funding' in Friel S (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020)

Ogus A, 'Rethinking Self-Regulation' (1995) 15 (1) *Oxford Journal of Legal Studies* 97

- Ogus A, *Regulation: Legal Form and Economic Theory* (Hart Publishing 2004)
- 'Shifts in Governance for Compensation to Damage: A Framework for Analysis' in W H. van Boom and M Faure (Eds) *Shifts in Compensation between Public and Private Systems* (SpringerWienNewYork 2007)
- 'Law and economics in the legal academy, or, what I should have said to Discipulus' (2010) 60 (2) *Toronto Law Journal* 169

Olson M, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Second Edition, HUP 1971)

Paccas A M and Visscher L T, 'Methodology of Law and Economics' in Bart van Klink and Sanne Taekema (Eds.), *Law and Method: Interdisciplinary Research into Law* (Series Politika, nr 4), Tübingen: Mohr Siebeck 2011, 85, Available at SSRN: <https://ssrn.com/abstract=2259058>

- and Van den Bergh R, 'An Introduction to the Law and Economics of Regulation' in Van den Bergh R and Paccas A (eds), *Regulation and Economics, Encyclopedia of Law and Economics* (2nd edn, Edward Elgar 2012) vol 9

Pert L and Sebok A, 'Third-party Litigation Financing and Lawyers' Ethical Obligations' in Friel S (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020)

Peysner J, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding* (Palgrave Macmillan, 2014)

- 'Playing the Man not the Ball', in Willem H. van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 56

Philips R, 'Netherlands', in Latham S (ed) *The Law Reviews - The Third Party Litigation Funding Law Review*, Fifth Edition (2022)

Philipsen N, 'The Law and Economics of Professional Regulation: What does the theory teach China?' in Eger T, Faure M and Naigen Z (Eds), *Economics of Law in China* (Edward Elgar, 2007)

- 'European Regulation of the Liberal Professions? Or, How I Learned to Stop Worrying and Trust in National Authorities' in Faure M, Schreuders W and Visscher L (Eds) *Don't*

Take it Seriously. Essays in Law and Economics in honour of Roger Van den Bergh
(Intersentia 2018)

Piché C, 'Transparency and Oversight of Class Actions Funding in Canada', in Kramer X, Hoevenaars J, Kas B and Themeli E, *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 259

Pigou A C, *The Economics of Welfare* (Routledge Classics in Economic Series, 1938)

Piketty T, *Capital and Ideology* (HUP 2019)

Pinna A, 'Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims', in Mark Tuil and Louis Visscher (Eds), *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical and Economic Analysis* (Edward Elgar Publishing, 2010)

Porrini D, 'Insurance Regulation' in Van den Bergh R and Paces A (eds), *Regulation and Economics, Encyclopedia of Law and Economics*, 2nd edn (Edward Elgar 2012)

Posner R A, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2(2) *The Journal of Legal Studies* 399

— 'Theories of Economic Regulation' (1974) 5 (2) *The Bell Journal of Economics and Management Science* 335

— *Economic Analysis of Law* (Third Edition, Wolter Kluwers 1986) 4

Posner E A 'Agency Models in Law and Economics' (2000) University of Chicago Law School, John M. Olin Law and Economics Working Paper No. 92. Available at SSRN: <https://ssrn.com/abstract=204872>

Rachlinski J J and Farina C R, 'Cognitive Psychology and Optimal Government Design' (2002) Cornell Law Faculty Publications. Paper 755

Radin M, 'Maintenance by Champerty' (1935) 24 *California Law Review* 48

Ramesh S, 'Third-Party Funding in International Arbitration: Ownership of the Claim, Consequences for Costs Orders, and Regulation' (2020) 36 *Arbitration International* 275

Rhode D L, 'Ethical Perspectives on Legal Practice' (1985) 37 *Stanford Law Review* 589

- ‘Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution’ (2004) 54 *Duke Law Journal* 447
- Rickman, ‘Contingent Fees and Litigation Settlement’ (1999) 19 (3) *International Review of Law and Economics*
- and Fenn P and Gray A, ‘Reform of Legal Aid in England and Wales’ (1999) 20 (3) *Fiscal Studies* 261
- Robbenolt J K, ‘Litigation and Settlement’ in Eyal Zamir and Doron Teichmann (Eds) *The Oxford Handbook of Behavioral Economics and the Law* (OUP 2018)
- Raad voor Rechtsbijstand/Legal Aid Board, ‘Legal Aid in the Netherlands a broad outline - Edition: May 2021’ (2021) <<https://www.rvr.org/english/>> accessed 5 November 2024
- Rogers C, *Ethics in International Arbitration*, 1st edn (OUP 2014)
- Rouas V, *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (University of London Press 2022)
- Roth P, ‘Mass claims in competition law - a UK perspective’ (2022) (2) *Mass Claims Journal*
- Rozema B, ‘Financiering van collectieve acties: wie draait op voor de succesvergoeding van de financier?’ (NTBR, 21 July 2023)
<https://new.navigators.nl/document/id7c8e2510c88b4c7b961b6afbf698542a?ctx=WKNL_CSL_87&tab=tekst>
- Rubenstein W B, ‘Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action’ (2006) 74 *UMKC Law Review* 709
- Rubin P H, ‘Public Choice and Tort Reform’ (2005) *Public Choice* 124 (1-2) 223
- Rubinfeld and Scotchmer S, ‘Contingent Fees for Attorneys: An Economic Analysis’ (1993) 24 (3) *The RAND Journal of Economics* 343
- Saulnier J, Müller K and Koronthalyova I, ‘Responsible Private Funding of Litigation: European Added Value Assessment’, European Parliament Research Service (March 2021)

Schleifer A, 'Efficient Regulation' in Daniel P. Kessler (ed), *Regulation vs. Litigation: Perspective from Economics and Law* (The University of Chicago Press, 2011)

Schwarcz D, 'A Products Liability Theory for the Judicial Regulations of Insurance Policies' (2007) 48 (4) *William and Mary Law Review* 1389

— 'Preventing Capture Through Consumer Empowerment Programs: Some Evidence From Insurance Regulation' in Carpenter D and Moss D A (eds), *Preventing Regulatory Capture, Special Interest Influence and How to Limit It* (CUP 2014)

— and Siegelman P, 'Law and Economics of Insurance' in Parisi F (Ed), *Oxford Handbook of Law and Economics, Volume II: Private and Commercial Law* (OUP 2017)

Sebok A J, 'The Inauthentic Claim' (2011) 64 (1) *Vanderbilt Law Review* 61

— and Trägårdh L, 'Adversarial Legalism and the Emergence of a New European Legality: A Comparative Perspective', in Sarat A, Douglas L, and Umphrey M M (eds), *Imagining New Legalities: Privacy and Its Possibilities in the 21st Century* (Stanford Scholarship Online, 2013)

— and Wendel W B, 'Duty in the Litigation-Investment Agreement: The Choice between Tort and Contract Norms When the Deal Breaks down' (2013) 66 *Vanderbilt Law Review* 1831

— 'Should the Law Preserve Party Control - Litigation Investment, Insurance Law, and Double Standards' (2015) 56 *William & Mary Law Review* 833

— 'The Rules of Professional Responsibility and Legal Finance: A Status Update' (2022) 57 *Wake Forest Law Rev* 777

Shannon Sahani V, 'Harmonizing Third-Party Litigation Funding Regulation' (2015) 36(3) *Cardozo Law Review* 861

— 'Rethinking the Impact of Third-party Funding on Access to Civil Justice' (2020) 69(2) *DePaul Law Review* 611

Shapira R, *Law and Reputation: How the Legal System shapes Behaviour by producing Information* (CUP 2020)

Shavell S, 'Risk Sharing and Incentives in the Principal and Agent Relationship' (1979) 10 (1) *The Bell Journal of Economics* 55

— 'The social versus private incentive to bring suit in a costly legal system' (1982) 11 (2) *Journal of Legal Studies* 333

- and National Bureau of Economic Research. (2003). Economic analysis of litigation and the legal process (Ser. Nber working paper series, no. 9697). National Bureau of Economic Research
- *Foundations of Economic Analysis of Law* (The Belknap Press of Harvard University Press 2004)

Shrimpton W, 'Treaty Arbitration: Types of litigation and arbitration that attract and are attractive to litigation finance' in Friel S (Ed), *The Law and Business of Litigation Finance* (Bloomsbury Publishing 2020)

Silver C, 'Litigation Funding versus Liability Insurance: What's the difference' (2014) 63 (2) DePaul Law Review 617

- and Hyman D A, 'Third Party Litigation Funding: Panacea or More Problems?' (2023) SSRN Working Paper Series <<https://ssrn.com/abstract=4438503>> accessed 3 October 2024

Sir Rupert Jackson, 'Review of Civil Litigation Costs: Final Report' (TSO 2009)

Skiba P M and Xiao J, 'Consumer Litigation Funding: Just Another Form of Payday Lending? (Consumer Credit in America: Past, Present, and Future)' (2017) 80 (3) Law and Contemporary Problems 117

Solas G, *Third Party Funding: Law, Economics and Policy* (CUP 2019)

Sorabji J, 'Legal Expenses Insurance and the Future of Effective Litigation Funding' (2021) 14 (4) Erasmus Law Review 189

Stadler A, 'Third Party Funding of Mass Litigation in Germany: Entrepreneurial Parties – Curse or Blessing?' in L. Cadiet, B. Hess and M.R. Isidro (Eds), *Privatizing Dispute Resolution* (2019) 209

- 'German Collective Actions - Is Litigation Funding in a Dead End?' in Kramer X, Hoevenaars J, Kas B and Themeli E, *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022)
- 'Third-Party Funding in Collective Redress' in Kramer X, Voet S, Kodderitsch L, Tulibacka M and Hess B, *Delivering Justice: A Holistic and Multidisciplinary Approach* (Bloomsbury Publishing 2022)

Starr M A, Starr, 'Qualitative and Mixed-methods Research in Economics: Surprising Growth, Promising Future: Qualitative Research in Economics' (2014) 28 (2) *Journal of Economic Surveys* 238

Steinitz M, 'Whose claim is This Anyway? Third-Party Litigation Funding' (2011) 95 (4) *Minnesota Law Review*, 1268

- 'The Litigation Finance Contract' (2012) 54(2) *William & Mary Law Review* 455
- and Field A C, 'A Model Litigation Finance Contract' (2014) 99(2) *Iowa Law Review* 711
- 'Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements' (2019) 53 (2) *UC Davis Law Review* 1073
- 'Third-Party Funding: Investment Arbitration' (2021) *University of Iowa College of Law Legal Studies Research Paper Series*
- 'The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm' (2022) 63(3) *William & Mary Law Review* 939

Steinman H, 'Are tradeoffs between justice and welfare possible? Calabresi and Dworkin on the normative foundations of law and economics' (2005) 64 (1-2) *Maryland Law Review* 250

Stephen F H, Love J H and Rickman N, 'Regulation of the Legal Profession' in Van den Bergh R and Paces A (eds), *Regulation and Economics, Encyclopedia of Law and Economics*, 2nd edn (Edward Elgar 2012)

Stigler G J, 'The Theory of Economic Regulation' (1971) 2 (1) *The Bell Journal of Economics and Management Science* 3

Susskind R, *Tomorrow's Lawyers: An Introduction to Your Future* (OUP 2017)

The Council of Bars and Law Societies of Europe (CCBE), 'CCBE first comments on the European Parliament's recommendations to the Commission on Responsible private funding of litigation' (CCBE, 13 May 2022)

<https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Postion_Papers/EN_DEON_20220513_CCBE-comments-on-the-European-Parliament-s-Recommendations-to-the-Commission-on-Responsible-private-funding-of-litigation.pdf>
accessed 12 September

The Law Society, 'The Pro Bono Work of Solicitors: PC Holder Survey 2015' (2015)

Tillema I, 'Entrepreneurial motives in Dutch collective redress: Adding fuel to a 'compensation culture'?' in van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017) 56

- 'Entrepreneurial Mass Litigation: Balancing the Building Blocks' (Doctoral thesis at Erasmus University Rotterdam 2019)
- 'Dutch collective actions and the rise of entrepreneurial actors: Navigating between access to Justice and a claim culture' in Kramer X, Hoevenaars J, Kas B and Themeli E (Eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 259

Tollison, 'The Interest-Group Theory of Government: Problems and Prospects' (2008) 54(2-3) *Kyklos* 465

Tuil M L, 'The Netherlands' in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (Eds), *The Costs and Funding of Civil Litigation: a Comparative Perspective* (Hart Publishing 2010)

Tzankova I N and Kramer X E, 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands' in Uzelac A and Voet S (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer 2021)

US Chamber of Commerce Institute for Legal Reform, 'Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation' (Institute for Legal Reform, 24 October 2012) <<https://instituteforlegalreform.com/research/stopping-the-sale-on-lawsuits-a-proposal-to-regulate-third-party-investments-in-litigation/>> accessed 13 March 2024

- 'Third Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy' (Institute for Legal Reform, 2013)
<<https://instituteforlegalreform.com/research/third-party-litigation-financing-in-australia-class-actions-conflicts-and-controversy/>> accessed 9 September 2024.
- 'Uncharted Waters: Analysis of TPLF in European Collective Redress' (Institute for Legal Reform, 15 October 2019)
<<https://instituteforlegalreform.com/research/uncharted-waters-analysis-of-tplf-in-european-collective-redress/>> accessed 29 August 2024
- 'Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later' (Institute for Legal Reform, 27 January 2020) 31
<<https://instituteforlegalreform.com/research/selling-more-lawsuits-buying-more-trouble-third-party-litigation-funding-a-decade-later/>> accessed 29 August 2024

Veljanovski C, 'Third-Party Litigation Funding in Europe' (2012) 8 (3) *Journal of Law, Economics and Policy* 405

van Boom W H, 'Financing civil litigation by the European insurance industry', in Tuil M and Visscher L T (Eds), *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical and Economic Analysis* (Cheltenham: Edward Elgar 2010)

- *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017)
- 'Litigation Costs and Third-party Funding', in Willem van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2017)
- 'Insuring vs. Investing in Litigation: A Comparative History of Litigation Insurance and Claim Investment' (2020) 8 (1) *Comparative Legal History* 2

Van den Bergh R, 'Towards Better Regulation of the Legal Professions in the European Union' (2007) RILE Working Paper Series No. 2008/07, <<https://ssrn.com/abstract=1113310>> accessed 3 October 2024, 16

- 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 20 (1) *Maastricht Journal of European and Comparative Law* 12

Visscher L T, 'Tort Damages', in M. Faure (ed.), *Tort Law and Economics, Encyclopaedia of Law and Economics*, Second Edition (2009) 153

- 'The Duty of Lawyers to Serve Their Clients' Interests: An Economic and Psychological Account' (2014) RILE Working Paper Series 2014/03 <<https://ssrn.com/abstract=2418952>> accessed 3 October 2024
- and Faure M, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 (3) *Journal of Consumer Policy* 455
- and Faure M, 'Mass Harm from a Law and Economics Perspective – The Case for Collective Action' in Arons T and Rijnhout R (Eds) *Mass Harm in Europe: Compensation and Civil Procedures* (Intersentia, 2023)

Voet S, 'Costs and Funding of Collective Redress Proceedings' in Astrid Stadler, Emmanuel Jeuland and Vincent Smith, *Collective and Mass Litigation in Europe: Model Rules for Effective Dispute Resolution* (Edward Elgar Publishing Limited, 2020)

Wagner G, 'Tort law and liability insurance' in Michael Faure (ed.), *Tort Law and Economics, Encyclopaedia of Law and Economics*, Second Edition (Edward Elgar 2009) 377

Weber F, 'Towards an Optimal Mix of Public and Private Enforcement in Consumer Law' (EDLE Doctoral Thesis 2012)

Webley L, 'Qualitative Approaches to Empirical Legal Research' in Cane P and Kritzer H M (Eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010)

Wendel W B, 'Alternative litigation finance and anti-commodification norms' (2014) 63 (2) *DePaul Law Review*, 655

— 'Paying the Piper but not Calling the Tune: Litigation Financing and Professional Independence' (2018) 52 (1) *Akron Law Review* 1

Williamson O E, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (Collier Macmillan Publishers, 1985)

Yandle B, 'Bootleggers and Baptists: The Education of a Regulatory Economist' (1983) *Regulation*

Yeazell S C, 'Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial' (2004) 1(3) *Journal of Empirical Legal Studies* 943

Zhang B, 'Third Party Funding for Dispute Resolution: a Comparative Study of England, Hong Kong, Singapore, the Netherlands and Mainland China' (DPhil thesis, University of Groningen 2019)

Zuckerman A, *Civil Justice in Crisis* (OUP 1999)

Zwolankiewicz A, 'Third party funding in international investment arbitration: a dire need of disclosure' (2019) 18 (2) *Warsaw University Law Review* 5

Websites / Blogs

AmCham EU, 'Position paper - Call for regulation of private Third-Party Litigation Funding (TPLF) at EU level' (AmCham EU, 15 November 2024) <<https://www.amchameu.eu/position-papers/call-regulation-private-third-party-litigation-funding-tplf-eu-level>> accessed 28 December 2024

Bates A, 'Alan Bates: Why I wouldn't beat the Post Office today' Financial Times (London, 12 January 2024)
<https://www.ft.com/content/1b11f96d-b96d-4ced-9dee-98c40008b172?trk=feed_main-feed-card_comment-text> accessed 7 June 2024

Biard A, Kramer X and Tillema I, 'Dutch collective redress dangerous? A call for a more nuanced approach' (Conflict of Laws, 3 October 2017) <<http://conflictoflaws.net/2017/dutch-collective-redress-dangerous-a-call-for-a-more-nuanced-approach/>> accessed 13 March 2024

Bowcott O, 'US Chamber of Commerce Lobbies Against Class Actions in UK Courts' (The Guardian, 25 July 2015) <<https://www.theguardian.com/business/2015/jul/15/us-chamber-commerce-lobbies-against-class-actions-uk-courts>> accessed 9 September 2024

Bundesrechtsanwaltskammer, 'Entschließungsentwurf des EP zur verantwortungsbewussten privaten' (2021) <https://www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-europa/2021/august/stellungnahme-der-brak-2021-51.pdf> accessed 3 October 2024

Business Europe, 'Joint Statement on Responsible Private Funding of Litigation June 2022' (Business Europe, 22 June 2022) <<https://www.buinesseurope.eu/publications/responsible-private-funding-litigation-joint-business-statement>> accessed 26 March 2024

British Chamber of Commerce, 'BCC Supporting 'Fair Civil Justice' Campaign' (British Chamber of Commerce, 11 December 2023)
<<https://www.britishchambers.org.uk/news/2023/12/bcc-supporting-fair-civiljustice-campaign/>> accessed 26 March 2024

Consumer Voice, 'Law makes it easier for people to take on powerful rule-breaking companies' (Consumer Voice, March 5, 2024) <<https://consumervoic.uk/legal/law-makes-it-easier-for-people-to-get-litigation-funding/>> accessed 30 September 2024

Cordina A, 'The Time is Ripe? Proposed Regulation of Third Party Litigation Funding in the European Union' (Conflict of Laws, 25 October 2021) <<https://conflictoflaws.net/2021/the-time-is-ripe-proposed-regulation-of-third-party-litigation-funding-in-the-european-union>> accessed 9 September 2024

CORLA, 'Co-President Martyn Day comments on the Ministry of Justice's plans to introduce a new law reversing PACCAR litigation funding ruling' (CORLA, 4 March 2024 <<https://corla.org.uk/co-president-martyn-day-comments-on-the-ministry-of-justices-plans-to-introduce-a-new-law-reversing-paccar-litigation-funding-ruling/>> accessed 9 September 2024

— 'Co-President Martyn Day comments on the Civil Justice Council review of litigation funding' (CORLA, April 24, 2024) <<https://corla.org.uk/co-president-martyn-day-comments-on-the-civil-justice-council-review-of-litigation-funding/>> accessed 9 September 2024

Croft J, 'Therium sets up pro bono scheme to tackle legal aid gaps' (Financial Times, 11 March 2019) <<https://www.ft.com/content/72a099a2-41b1-11e9-9bee-efab61506f44>> accessed 16 October 2024

De Meeûs C, 'European Commission publishes long-awaited study mapping the use and regulation of third-party litigation funding in the EU' (10 April 2025) <<https://gavclaw.com/2025/04/10/european-commission-publishes-long-awaited-study-mapping-the-use-and-regulation-of-third-party-litigation-funding-in-the-eu-guest-post-by-charlotte-de-meeus/>> accessed 1 May 2025

De Vries M, 'Afwikkeling massaschadeclaims kan sneller en goedkoper' (Advocatenblad, 2023) <<https://magazine.advocatenblad.nl/2023-10/afwikkeling-massaschadeclaims-kan-sneller-en-goedkoper/>> accessed 9 September 2024

Deutsche Industrie- und Handelskammer (DIHK), 'German companies' demands for the trilogue negotiations on the "Directive on representative actions for the protection of the collective interests of consumers' (DIHK, January 2020) <<https://www.dihk.de/resource/blob/17370/0439cf89c9a01cc492a72972ccdcfe3c/verbaen-de-trilogverhandlungen-sammelklagen-englisch-data.pdf>> accessed 9 September 2024

European Justice Forum, EJP Position Paper on Third Party Litigation Funding (European Justice Forum, January 2022) <<https://europeanjusticeforum.org/topics/third-party-litigation-funding/>> accessed 26 March 2024

Fair Civil Justice, 'The Merricks-Mastercard settlement shows the real winners from class actions' (Fair Civil Justice, 25 February 2025) <<https://fairciviljustice.org/news/the-merricks-mastercard-settlement-shows-the-real-winners-from-class-actions/>> accessed 2 March, 2025

GlobalNewswire, 'Hausfeld and Burford Capital Announce 30 Million Euro German venture' <<https://www.globenewswire.com/news-release/2015/10/28/780627/0/en/Hausfeld-and-Burford-Cap-ital-Announce-30-Million-Euro-German-venture.html>> accessed 2 October 2024

Global Competition Review, 'Amsterdam Court of Appeal clarifies WAMCA standards in major data privacy collective action against Oracle and Salesforce' <<https://globalcompetitionreview.com/hub/class-actions-hub/2024/article/amsterdam-court-of-appeal-clarifies-wamca-standards-in-major-data-privacy-collective-action-against-oracle-and-salesforce>> accessed 7 February 2025

Hillstrom K E, 'US Chamber mostly funded by small pool of big donors: study' (The Hill, 26 April 2023) <<https://thehill.com/lobbying/3973039-us-chamber-mostly-funded-by-small-pool-of-big-donors-study/>> accessed 13 March 2024

Hyde J, 'News focus: EU to clamp down on booming litigation funding sector' (Law Society Gazette, 20 September 2022) <https://www.lawgazette.co.uk/news-focus/news-focus-eu-to-clamp-down-on-booming-litigation-funding-sector/5113702.article?utm_source=gazette_newsletter&utm_medium=email&utm_campaign=Greene+SDT+hearing+opens+%7c+Few+couples+applying+for+joint+divorce+%7c+Rozenberg_09%2f20%2f2022> accessed 16 October 2024

— 'Government rules out hybrid DBAs' (Law Society Gazette, 10 November 2014) <<https://www.lawgazette.co.uk/law/government-rules-out-hybrid-dbas/5044959.article>> accessed 29 August 2024

Insurance Europe, 'EU should develop rules on third party litigation funding' (Insurance Europe, 22 June 2022) <<https://www.insuranceeurope.eu/news/2650/eu-should-develop-rules-on-third-party-litigation-funding>> accessed 15 September 2024

— 'Insurance Europe joint position on collective redress' (Insurance Europe, 19 December 2017)

<<https://www.insuranceeurope.eu/publications/1841/joint-position-paper-on-collective-redress/>> accessed 15 September 2024

Ishikawa T, 'An Unfair Tax on Accessing Justice, Law Society Gazette' (Law Society Gazette, 22 August 2022) <<https://www.lawgazette.co.uk/commentary-and-opinion/an-unfair-tax-on-accessing-justice/5113445.article>> accessed 29 August 2024

— 'Voss report is unsatisfyingly hollow and narrow' (The Law Society Gazette, 7 October 2022)

<<https://www.lawgazette.co.uk/commentary-and-opinion/voss-report-is-unsatisfyingly-hollow-and-narrow/5113894.article>> accessed 3 October 2024

ILFA, 'International Legal Finance Association Welcomes UK Civil Justice Council Review' (ILFA, 23 April 2024)

<https://cdn.prod.websitefiles.com/5ef44d9ad0e366e4767c9f0c/6668a1d14a6e0431efaebe3_ILFA%20PACCAR%20statement.pdf> accessed 15 September 2024

— 'Mythbusting the call for new regulation of TPLF' (ILFA, 18 November 2024)

<<https://members.ilfa.com/mythbusting-the-call-for-new-regulation-of-tplf/>> accessed 28 November 2024

Kennedy S, 'Consumer clicks and class actions' (The Law Society Gazette, 20 January 2023) <<https://www.lawgazette.co.uk/practice-points/consumer-clicks-and-class-actions-/5114856.article>> accessed 13 March 2024

King M S and Mallesons W, 'Third Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy' (Institute for Legal Reform, 2013)

<<https://instituteforlegalreform.com/research/third-party-litigation-financing-in-australia-class-actions-conflicts-and-controversy/>> accessed 9 September 2024

Knaus C, 'Federal court strikes down key part of Coalition's crackdown on class action funding' (The Guardian, 17 June 2022) <<https://www.theguardian.com/law/2022/jun/17/federal-court-strikes-down-key-part-of-coalitions-crackdown-on-class-action-funding>> accessed 3 October 2024

Ladbury A, 'German Legal Protection Insurers' Dieselgate Payouts Top €1.5bn' (Commercial Risk, June 28, 2023) <<https://www.commercialriskonline.com/german-legal-protection-insurers-dieselgate-payouts-top-e1-5bn/>> accessed 29 August 2024

Lansky T and Kohlmeier T, 'ATE Insurance and Litigation Funding' (Deutscher Anwaltspiegel Dispute Resolution, 22 October 2019)

<<https://www.deutscheranwaltspiegel.de/disputeresolution/dispute-resolution/ate-insurance-and-litigation-funding/>> accessed 9 September 2024

Legal Tech Deutschland, Legal Tech Verband lehnt Initiative zur strengeren Regulierung von Prozessfinanzierung ab' (Legal Tech Deutschland, 4 November 2021)

<<https://www.legaltechverband.de/aktivitaeten/legal-tech-verband-lehnt-initiative-zur-strengeren-regulierung-von-prozessfinanzierung-ab/>> accessed 3 October 2024

Ministry of Justice, HM Courts & Tribunals Service, and The Rt Hon Alex Chalk KC MP, Press release: New law to make justice more accessible for innocent people wronged by powerful companies (gov.uk, 4 March 2024) <<https://www.gov.uk/government/news/new-law-to-make-justice-more-accessible-for-innocent-people-wronged-by-powerful-companies>> accessed 12 March 2024

Ring S and Jacobs E, 'Why the billable hour is still king in the legal world' Financial Times (London, 27 January 2025) <<https://www.ft.com/content/7750aff2-0677-4ba9-b571-4e02cf83950d>> accessed 2 May 2025

Rothwell R, 'Jackson Warns against 'Vested Interests' on DBAs' (Law Society Gazette, 21 October 2014) <<https://www.lawgazette.co.uk/law/jackson-warns-against-vested-interests-on-dbas/5044478.article>> accessed 29 August 2024

Silva de Freitas E, Kramer X and Hoevenaars J, 'Second Act in Dutch TikTok class action on privacy violation: court assesses Third Party Funding Agreements' <<https://conflictoflaws.net/2023/second-act-in-dutch-tiktok-class-action-on-privacy-violation-court-assesses-third-party-funding-agreements/>> accessed 7 February 2025

Sri-Pathma V, 'Millions of consumers could get £70 after Mastercard ruling' (BBC 20 May, 2025) <<https://www.bbc.com/news/articles/c14kkjyrk20o>> accessed 30 May 2025

Statista, 'Vertragsbestand der Rechtsschutzversicherung in Deutschland von 1990 bis 2022' (Statista, 2023)

<<https://de.statista.com/statistik/daten/studie/6599/umfrage/vertragsbestand-der-rechtsschutzversicherung-seit-1990/>> accessed 29 August 2024.

— ‘Leading lobbying spenders in the United States in 2023’ (Statista Research Department, 26 February, 2024)
<<https://www.statista.com/statistics/257344/top-lobbying-spenders-in-the-us/>>
accessed 13 March 2024

Swiss Re Institute, ‘Litigation costs drive claims inflation: indexing liability loss trends’ (Swiss Re Institute, 7 September 2024) <<https://www.swissre.com/institute/research/sigma-research/sigma-2024-04-social-inflation.html>> accessed 15 September 2024

Tobin S, ‘Litigation funders warn of consequences in UK Supreme Court appeal’ (Reuters, 16 February 2023 <<https://www.reuters.com/world/uk/litigation-funders-warn-consequences-uk-supreme-court-appeal-2023-02-16/>> Accessed 3 October 2024

UK Parliamentary Bills, ‘Litigation Funding Agreements (Enforceability) Bill’ Bills, Parliament (20 March 2024) <<https://bills.parliament.uk/bills/3702>> accessed 22 March 2024

Verbond van Verzekeraars, ‘Dutch Insurance Industry in Figures’ (Verbond van Verzekeraars, 2016) <<https://www.verzekeraars.nl/media/1751/verzekerd-van-cijfers-2016-eng.pdf>> accessed 29 August 2024

Voss A, ‘The EU Must Regulate Third Party Litigation Funding’ (The Parliament, 9 December 2021) <<https://www.theparliamentmagazine.eu/news/article/protecting-eu-consumers>> accessed 9 September 2024

Wielinga W, ‘Enforcement Funding and Management of cross-border Claims: Litigation funding on the rise’ (Business Law Magazine, 11 November 2021)
<<https://www.deutscheranwaltspiegel.de/businesslaw/enforcement-funding-and-management-of-cross-border-claims-26632/>>

List of Regulations and Soft Law Instruments

Australia

- Corporations Amendment (Litigation Funding) Regulations (2022)

England and Wales

- Access to Justice Act (1999)
- Association of Litigation Funders (ALF), Code of Conduct for Litigation Funders
- Association of Litigation Funders (ALF) A procedure to govern complaints made against Funder Members by funded litigants
- Competition Act (1998)
- Consumer Rights Act (2015)
- Competition Appeal Tribunal (CAT) Rules (2015)
- Solicitors Regulation Authority (SRA) Code of Conduct (2011)
- Solicitors Regulation Authority (SRA) Code of Conduct for Solicitors, RELs and RFLs (2018)
- The Damages-Based Agreements Regulations (2013)
- The Legal Aid, Sentencing and Punishment of Offenders Act (2012)

Germany

- Consumer Rights Enforcement Act ('Verbraucherrecht durchsetzungsgesetz') 2023
- English Translation of the German Legal Services Act - Act on Out-of-Court Legal Services
- German Federal Code for Lawyers
- The Act to Promote Consumer-oriented Offers in the Legal Services Market (Gesetz zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt) of 10 August 2021

Hong Kong

- Hong Kong International Arbitration Centre (HKIAC) Code of Conduct for Arbitrators

International and EU Law

- Charter of Fundamental Rights of the European Union

- Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests
- Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
- Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance
- Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings
- Directive 2020/1828/EU of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1
- European Litigation Funders Association (ELFA), 'Code of Conduct' <<https://elfassociation.eu/about/code-of-conduct>> accessed 16 October 2024
- European Commission 'Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law' (2013)
- European Convention of Human Rights
- European Parliament Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation (2020/2130(INL))
- European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))
- The Council of Bars and Law Societies of Europe (CCBE) Model Code of Conduct for European Lawyers
- International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration
- New York Convention (1958)

Netherlands

- Commissie Claimcode 'Claim Code 2019'
- English Version of the Code of Conduct of the Netherlands Bar Association: The Rules of Conduct of Advocates 1992
- Legal Aid Act (Wet op de rechtsbijstand)
- Wet Afwikkeling Massaschade in Collectieve Acties (Act on Collective Damages Claims) 2020

United States

- American Bar Association (ABA), Best Practices for Third-Party Litigation Funding (2020)
- Model Rules of Professional Conduct, American Bar Association (2018)

List of Cases

Australia

- Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd [2009] FCAFC 147; 180 FCR 11
- Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd (2006) 229 CLR 386
- LCM Funding Pty Ltd v. Stanwell Corporation Limited [2022] FCAFC 103

England and Wales

- Ahkmedova v Ahkmedov [2020] EWHC 1526 (Fam) [68]
- Alan Bates v Post Office Limited [2019] EWHC 3408 (QB)
- Arkin v. Borchard Lines Ltd & Ors [2005] EWCA Civ 655 26 May 2005. www.bailii.org/ew/cases/EWCA/Civ/2005/655.html
- Chapelgate Credit Opportunity Master Fund Ltd v Money and others [2020] EWCA Civ 246.
- Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)
- Excalibur Ventures LLC v. Texas Keystone Inc & Ors [2016] EWCA Civ 1144 18 November 2016. www.bailii.org/ew/cases/EWCA/Civ/2016/1144.html
- Laser Trust v. CFL Finance Ltd [2021] EWHC 1404 (Ch) 21 May 2021. www.bailii.org/ew/cases/EWHC/Ch/2021/1404.html
- Merricks v Mastercard and others EWCA [2019] Civ 674 (16 April 2019)
- Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent) On appeal from: [2019] EWCA Civ 674.
- R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) Case ID: 2021/007

Germany

- Federal Court of Justice (BGH), 13.9.2018, I ZR 26/17
- Federal Court of Justice (BGH), 13.6.2022, VIa ZR 418/21
- OLG Dusseldorf, 18 February 2015, IVU Kart 3/14, Juristenzeitung (JZ) 2015

Ireland

- Greenclean Waste Management Ltd v Leahy p/a Maurice Leahy and Co solicitors (No 2) [2014] IEHC 314

Netherlands

- Amsterdam Court of Appeal 13 July 2018, ECLI:NL:GHAMS:2018:2422
- Amsterdam Court of Appeal 18 June 2024 ECLI:NL:GHAMS:2024:1651 (St. The Privacy Collective v Oracle and Salesforce)
- District Court Amsterdam 10 January 2024, ECLI:NL:RBAMS:2024:83 (TBYP/SMC/SOMI v TikTok) (Netherlands)
- District Court Amsterdam 25 October 2023, ECLI:NL:RBAMS:2023:6683 (St. Nuon-CLAIM v Vattenfall) (Netherlands)
- District Court The Hague, 20 September 2023, ECLI:NL:RBDHA:2023:14036, JOR 2024, 27 m.nt TMC Arons (Stichting Investor Loss Compensation/Airbus SE)

European Court of Human Rights

- Airey v. Ireland, European Court of Human Rights, Application no. 6289/73, 1979
- Steel and Morris v. the United Kingdom, European Court of Human Rights, Application no. 68416/01, 2005

Appendices

Appendix A

Semi-structured Interview Questionnaire Description

As of 2020, there were around 45 active litigation funders in the UK, Netherlands and Germany.¹ Interviews were conducted with senior representatives of some of these, acting in their professional capacity. Interviews were also conducted with other stakeholders such as lawyers, class representatives and representatives from the business community. These interviews collected data on litigation funding operations in Europe.

After initial contact, explanations on the research and guarantees on confidentiality and anonymity were made. Introductory and screening questions regarding the jurisdictions in which the stakeholders are based, etc, were asked. Some of the information asked for can be obtained online, for instance from the respondents' websites. With the interviews, the information gathered will be more up to date and nuanced. This will therefore fill a gap in the literature and complement existing research. The following questions will be asked. The whole interviews took 30-60 minutes each. Questions could be skipped by the respondents, as some questions might be sensitive. A problem which could arise is that funders might answer in accordance with what they perceive to be socially desirable, which may not align with their true perspectives or practices.

The research goals are descriptive and attempt to shed light on the reality of TPF. The questions were adapted if the respondents were not funders but lawyers, class representatives or other types of respondents.

¹ Jérôme Saulnier, Klaus Müller and Ivan Koronthalyova, 'Responsible Private Funding of Litigation. European Added Value Assessment', European Parliament Research Service (March 2021) Annex 1.

Appendix B

Indicative Interview Guide

Type, Area of Law and Value of Claims

1. How has TPF developed in your jurisdiction? In which jurisdictions are the funded cases taking place and what type are they? E.g. Arbitration vs Court, Commercial disputes between businesses, collective redress, Area of law - competition law, privacy law, etc. Approximately, what is the value of funded claims?

Case Selection

2. The idea is that high value claims with high chances of success are funded. What are the factors which are taken into consideration for a claim to be accepted for funding? Are there instances of cases being funded on a pro bono basis or portfolio basis? Is there a minimum claim value for it to be funded? Could you indicate what share of funding requests are turned down?

Conflicts of Interest

3. Does the funder have some influence on the funded cases' litigation strategy and decisions? If so, to what extent? Does the funder choose the lawyer for the claimants? Does the funder maintain contact with the lawyers and the claimant? Does the funder sometimes terminate funding at a later point of the proceedings if circumstances change? Any experiences with conflicts of interest and how they are dealt with? To what extent are funding agreements disclosed? What are the differences between TPF and other means of funding, and between funding in collective redress and other types of case?

Pricing

4. What is the average share returned from the proceeds in successful cases? Or is the funder's fee calculated as a multiple of the amount invested? Can success fees be excessive? Should they be recoverable from the defendant in case of success?

Impacts of TPF

5. How long do cases take to resolve? What is the effect of funding on settlement? Does it encourage commercialisation of the civil justice system, unmeritorious litigation or a compensation culture?
6. What would you say is the effect of TPF for claims and, more broadly, for the civil justice system as a whole?

Perception and Experiences

7. What has been your experience with stakeholder activity in relation to TPF, particularly around regulatory recommendations? Which of the concerns would you say are justified and need addressing from a regulatory point of view? How do you see the future of litigation funding?

Summary

Third-party funding (TPF) of litigation refers to the funding of legal claims by an entity which is not connected to the claimant in return for a share of the award in the event of a successful outcome. TPF has gained increased prominence in the European civil justice discourse in recent years. TPF in Europe emerged in a context whereby civil justice systems face constraints such as austerity, mounting litigation costs and pressure on legal aid systems. This poses a significant challenge both to access to justice from a legal point of view and social welfare from an economic point of view. While the third-party funding (TPF) of litigation provides or facilitates access to justice for many claims, it also encounters significant resistance.

This research explores the TPF's development, the sources and nature of the resistance it encounters and whether this resistance is warranted. The situation in the EU, the Netherlands, Germany and England and Wales is focused on. Access to justice issues in Europe and the shift from public to private means of funding are first investigated in Chapter 2. Funding from claimants' personal means is becoming increasingly difficult and legal aid systems are in decline. Legal Expenses Insurance (LEI) is an important form of market-based litigation funding, but wide gaps in coverage remain, and it may raise concerns of conflicts of interest. Contingency fees, that is, funding by the same lawyer who represents the claimant in return for a share of the proceeds in the event of success, remain impermissible in many continental jurisdictions. The assignment of claims, which is successfully used in certain situations, also faces various restrictions in Europe. Against this background, TPF has emerged as an often indispensable funding option for high-value commercial and collective redress claims. Nevertheless, access to justice gaps remain for those situations which are not of sufficiently high value or prospects of success to attract TPF.

The TPF industry in Europe, now estimated to be valued at approximately 3 billion Euros, has grown rapidly and is expected to keep doing so, but does not exceed an estimated 0.8 percent of the overall legal services market. Funders conduct meticulous due diligence in selecting claims to fund, leading to the funding of a relatively small number of claims usually valued in the millions of Euros. The claimants they fund are therefore usually sophisticated entities. Their return rates usually range between 20 and 30 percent of the compensation. Funders keep themselves informed during the litigation, may propose strategies or withdraw the funding in certain situations. However, their role is usually relegated to a passive nature, largely restricted to providing the funding.

TPF is often essential for many claims, particularly for collective actions seeking compensation for the group members after instances of mass harm. Nevertheless, TPF in collective redress encounters significant resistance. Resistance is particularly notable from the business community, which argues that TPF may bring about the over-commodification of the civil justice system, an overall increase in frivolous litigation and in the volume of litigation and conflicts of interests with claimants. To address the sources and nature of this resistance, TPF is thoroughly examined from a legal-comparative, economic and empirical perspective.

The relevant rules which apply to TPF on a European-wide level, and in the Netherlands, England and Wales and Germany are outlined in Chapter 3. They are complemented with historical and cultural elements. TPF in the EU remains largely unregulated outside the realm of consumer collective redress. The 2020 Representative Actions Directive (RAD) contains provisions on the disclosure of funding, limitations on the influence of the funder and, generally, on the protection of the interests of the represented consumers. The Voss Report, published in 2021, proposed a more comprehensive regulatory regime, including rules on capping the return rates, establishing supervisory authorities in each Member and full disclosure of funding agreements. The Voss report is widely considered as overly stringent but was supported by the European Parliament in a 2022 resolution. Following an extensive mapping study by the European Commission (EC), the vast majority of non-business stakeholders in the consultation had a generally favourable view of TPF. Most of the respondents were in favour of either a 'light-touch' form of regulation such as that proposed by the European Law Institute (ELI) principles in 2024, or of no regulatory intervention.

In the Netherlands, TPF is permitted and relatively well-accepted and developed, and is indirectly regulated in collective redress by the WAMCA and the Claimcode (a soft law instrument). TPF is also scrutinised to a considerable extent by the judiciary in WAMCA cases. Case law is shaping and clarifying the permissible forms TPF can take, for instance, regarding the independence of the representative entity from the funder and the acceptable return rates. The WAMCA is considered to have increased the procedural barriers foundations bear in bringing collective actions forward, and some have argued that this may hinder funding. The simplification of the regime is advocated for. There is also an ongoing debate on whether TPF may contribute to an undesirable compensation culture.

In Germany, the overall TPF market remains highly developed and the largest in the EU. Significant instances of resistance can however be noted, particularly in collective redress, both in regulation and case law. The German implementation of the RAD provided for a 10 percent cap on success fees, well below the cap recommended in the EP's resolution, making this type

of collective redress practically impossible. By contrast, collective redress through the assignment of claims model is common. These actions are brought by debt collection services providers who cooperate with third-party funders, and their model has been fundamentally acknowledged by the German Federal Court of Justice.

The UK litigation funding market is the largest in Europe by a considerable margin. Regarding regulation, the surviving public policy doctrine of champerty may still constrain TPF. TPF in the jurisdiction is to a large extent self-regulated by the Association of Litigation Funders' (ALF) Code of Conduct, which establishes standards related to matters such as capital adequacy and ethical conduct. Most of the major funders are members of the ALF. In the competition law class action regime, funding is also regulated at a statutory level. Case law is also relevant and has established precedents on adverse costs such as the 'Arkin Cap'. The 2023 Paccar judgement is of particular importance, as it effectively ruled that the return rates for funders in competition class actions cannot be framed as percentages of the damages. This ruling was considered as a significant setback affecting the enforceability of many TPF agreements at the time, and more broadly, as damaging to the reputation of the UK's litigation market. A bill was introduced for its reversal but later abandoned. The 2025 Civil Justice Review's (CJC) landmark report reviewing litigation funding also recommends its reversal.

Regarding other sources of resistance, enduring elements of a European legal tradition that emphasises corrective justice and resists the commercialisation the civil justice system may also act as barriers to the further development of TPF. In accordance with this tradition, litigation is to be conducted between the parties affected without the interference of third parties, and legal claims should not be reduced to the amount of money they can sell for. This research suggests, however, that the influence of these cultural norms is not substantial and has been gradually diminished over time, although such concerns are occasionally raised.

The law-and-economics methodological framework is then applied in Chapter 4 to analyse the behaviour of the actors involved in order to address the research questions concerning the justifiability of the resistance. Particular emphasis is placed on principal-agent theory, where claimants as principals delegate decision-making to lawyers and funders as their agents. Given the pursuit of private interests by all the actors, misalignments of interests arise, giving rise to agency costs for the claimants, such as monitoring and incentives. Agency costs feature in all the different forms of funding, and the level of information asymmetry on the part of the claimant plays a significant role. It is found that when compared with other means of funding, agency costs in TPF in Europe are of a relatively limited nature. In brief, this is due to the claimants often being relatively well-informed and commercially sophisticated, and because

the funder shares the claimant's interest in a successful, large and timely outcome. While agency issues are more pronounced in collective actions with large numbers of group members, this is mainly due to collective action problems rather than the role of TPF. Furthermore, collective actions currently rely, to a significant degree, on TPF to be brought, highlighting the negative impact on access to justice and deterrence of wrongdoing were such funding to be restricted. Under this analysis therefore, much of the resistance to TPF on the basis of conflicting interests appears to lack a justifiable basis.

Furthermore, in Chapter 5 it was demonstrated that much of the ongoing resistance to TPF, particularly in the realm of collective redress, emanates from certain special interest groups. These groups include the large corporate lobby, legal insurers and legal professional associations. Their public information campaigns and lobbying efforts may lead to an overly negative perception and restrictive regulation of TPF. In accordance with the private interest theories of regulation, these political principals may have an interest in constraining TPF and are effective in overcoming free rider and collective action problems in their political activity. These groups include the large corporate lobbies, legal professional associations and insurers. Special interests in favour of TPF in Europe, such as funders and collective redress lawyer associations, have also become more active in the public discourse. Consumers, by contrast, suffer from significant collective action problems in ensuring that consumer organisations advance their policy interests. Nevertheless, consumer organisations have advocated for the facilitation of litigation funding. These groups which represent the broader consumer base are therefore at odds with the resistance movement, which raises further questions on the justifiability of the resistance.

Finally in Chapter 6, an empirical analysis was conducted, including through the use semi-structured interviews. These interviews collected insights to explore and describe the TPF industry, and stakeholder perspectives and experiences. The interview findings are largely corroborated by other empirical research of the field in demonstrating that TPF continues to expand and operate in the relatively niche area of high-value, meritorious claims belonging to sophisticated claimants. The scrutiny that TPF attracts and the alignment of interests funders share with claimants in the outcome were highlighted. The research conducted suggests that concerns of conflicts of interest are perceived to be of a relatively limited nature. Funders take a passive role in the process, which is largely restricted to providing funding for the proceedings. In collective actions, courts subject TPF agreements and the independence of the parties to significant scrutiny, in order to protect the claimants' interests. The initial lobbying activity against TPF is now increasingly met by more supportive advocacy. The vast majority of non-business stakeholders express a generally favourable view of TPF, suggesting widespread

acceptance of its legitimacy and value within the legal system, in contrast to the more critical perspectives held by a vocal minority. With regard to regulation, many would opt for 'light-touch' or no further regulatory intervention, rather than highly restrictive regulation.

In addressing the research questions, this study has argued that there are at present access to justice gaps and possible insufficiencies in deterrence of wrongdoing in Europe. From a normative perspective therefore, it is essential that the more substantial forms of resistance towards TPF do not prevail. On the contrary, meritorious litigation should be able to be funded through a variety of funding options without undue hindrance. There are welcome indications that a form of 'light-touch' regulation is forthcoming in many European jurisdictions following the ELI principles, the results of the EC mapping study and the CJC's review of litigation funding. This would largely preserve TPF's benefits, while mitigating concerns over its potential risks.

Samenvatting

Financiering door derden (TPF) van rechtszaken verwijst naar de financiering van juridische claims door een entiteit die niet verbonden is met de eiser in ruil voor een deel van de toekenning in het geval van een succesvolle uitkomst. TPF heeft de afgelopen jaren aan belang gewonnen in het Europese discours over civiele rechtspraak. TPF is in Europa ontstaan in een context waarin civiele rechtssystemen worden geconfronteerd met beperkingen zoals bezuinigingen, stijgende proceskosten en druk op de stelsels van rechtsbijstand. Dit vormt een aanzienlijke uitdaging, zowel voor de toegang tot de rechter vanuit juridisch oogpunt als voor het sociale welzijn vanuit economisch oogpunt. Hoewel de financiering door derden (TPF) van rechtszaken voor veel claims toegang tot de rechter biedt of vergemakkelijkt, stuit het ook op aanzienlijke weerstand.

Dit onderzoek onderzoekt de ontwikkeling van TPF, de bronnen en de aard van de weerstand die het tegenkomt en of deze weerstand gerechtvaardigd is. De situatie in de EU, Nederland, Duitsland en Engeland en Wales staat centraal. Toegang tot justitie in Europa en de verschuiving van publieke naar particuliere financieringsmiddelen worden eerst onderzocht in hoofdstuk 2. Financiering uit de persoonlijke middelen van de eisers wordt steeds moeilijker en de rechtsbijstandssystemen zijn aan het afnemen. Rechtsbijstandsverzekering (LEI) is een belangrijke vorm van marktgebaseerde procesfinanciering, maar er blijven aanzienlijke lacunes in de dekking bestaan, en er kunnen zorgen ontstaan over belangenconflicten. Resultaatafhankelijke vergoedingen, dat wil zeggen financiering door dezelfde advocaat die de eiser vertegenwoordigt in ruil voor een aandeel in de opbrengst bij succes, blijven in veel continentale rechtssystemen niet toegestaan. De cessie van vorderingen, die in bepaalde situaties met succes wordt toegepast, kent in Europa eveneens diverse beperkingen. Tegen deze achtergrond is TPF naar voren gekomen als een vaak onmisbare financieringsoptie voor commerciële en collectieve schadevergoedingsclaims met een hoge waarde. Desondanks blijven er hiaten in de toegang tot het recht bestaan voor situaties die niet van voldoende waarde zijn of onvoldoende kans op succes bieden om TPF aan te trekken.

De TPF-industrie in Europa, die nu wordt geschat op ongeveer 3 miljard euro, is snel gegroeid en zal naar verwachting blijven groeien, maar bedraagt naar schatting niet meer dan 0,8 procent van de totale markt voor juridische diensten. Financiers voeren een grondig due diligence-onderzoek uit bij de selectie van vorderingen om te financieren, wat resulteert in de financiering van een relatief klein aantal vorderingen, doorgaans ter waarde van enkele miljoenen euro's. De eisers die zij financieren zijn daarom meestal geavanceerde entiteiten.

Hun rendement ligt meestal tussen de 20 en 30 procent van de vergoeding. Financiers houden zichzelf op de hoogte tijdens de rechtszaak, kunnen strategieën voorstellen of de financiering in bepaalde situaties intrekken. Hun rol is echter meestal van passieve aard, grotendeels beperkt tot het verstrekken van de financiering.

TPF is vaak essentieel voor veel claims, met name voor collectieve acties waarbij schadevergoeding wordt gezocht voor de groepsleden na gevallen van massaschade. Desondanks stuit TPF bij collectieve rechtsvorderingen op aanzienlijke weerstand. De weerstand is vooral merkbaar in het bedrijfsleven, dat stelt dat TPF kan leiden tot een overmatige commercialisering van het civiele rechtssysteem, een algemene toename van frivole rechtszaken en van het aantal rechtszaken en belangenconflicten met eisders. Om de bronnen en de aard van deze weerstand aan te pakken, wordt TPF grondig onderzocht vanuit een juridisch-vergelijkend, economisch en empirisch perspectief.

De relevante regels die van toepassing zijn op TPF op Europees niveau en in Nederland, Engeland en Wales en Duitsland worden uiteengezet in hoofdstuk 3. Ze worden aangevuld met historische en culturele elementen. TPF in de EU blijft grotendeels ongeregeerd buiten het domein van collectieve rechtsvorderingen voor consumenten. De Richtlijn inzake representatieve acties (RAD) van 2020 bevat bepalingen over de openbaarmaking van financiering, beperkingen op de invloed van de financier en, in het algemeen, over de bescherming van de belangen van de vertegenwoordigde consumenten. Het Voss-rapport, gepubliceerd in 2021, stelde een uitgebreider regelgevingskader voor, met inbegrip van regels voor het beperken van rendementstarieven, de oprichting van toezichthoudende autoriteiten in elke lidstaat en volledige openbaarmaking van financieringsovereenkomsten. Het Voss-rapport wordt algemeen als te streng beschouwd, maar werd door het Europees Parlement gesteund in een resolutie van 2022. Na een uitgebreide inventarisatiestudie door de Europese Commissie (EC) had de overgrote meerderheid van de niet-commerciële belanghebbenden die aan de raadpleging deelnamen, over het algemeen een positieve houding ten opzichte van TPF. De meeste respondenten waren voorstander van een 'lichte' vorm van regelgeving, zoals voorgesteld door de principes van het European Law Institute (ELI) in 2024, of van geen regelgevende interventie.

In Nederland is TPF toegestaan en relatief goed geaccepteerd en ontwikkeld, en wordt het indirect gereguleerd in collectieve rechtsvorderingen door de WAMCA en de Claimcode (een soft law-instrument). TPF wordt ook in aanzienlijke mate onderzocht door de rechterlijke macht in WAMCA-zaken. De jurisprudentie bepaalt en verduidelijkt de toelaatbare vormen die TPF kan aannemen, bijvoorbeeld met betrekking tot de onafhankelijkheid van de

representatieve entiteit ten opzichte van de financier en de aanvaardbare rendementstarieven. Er wordt aangenomen dat de WAMCA de procedurele belemmeringen voor stichtingen bij het instellen van collectieve acties heeft vergroot, en sommigen hebben aangevoerd dat dit de financiering kan belemmeren. De vereenvoudiging van het regime wordt bepleit. Er is ook een voortdurend debat over de vraag of TPF kan bijdragen aan een ongewenste compensatiecultuur.

In Duitsland blijft de totale TPF-markt sterk ontwikkeld en de grootste in de EU. Er kunnen echter aanzienlijke gevallen van weerstand worden geconstateerd, met name bij collectieve rechtsvorderingen, zowel in de regelgeving als in de jurisprudentie. De Duitse implementatie van de RAD stelde een plafond van 10 procent in voor succesvergoedingen, aanzienlijk lager dan het in de resolutie van het Europees Parlement aanbevolen maximum, waardoor door derden gefinancierde collectieve rechtsvorderingen vrijwel onmogelijk worden gemaakt. Daarentegen is collectieve rechtsvordering via het model van cessie van vorderingen gebruikelijk. Deze acties worden ingesteld door incassobureaus die samenwerken met externe financiers, en hun model is fundamenteel erkend door het Duitse federale hof van justitie.

De Britse markt voor procesfinanciering is met een aanzienlijke marge de grootste in Europa. Wat de regelgeving betreft, kan de overgebleven openbare beleidsdoctrine van champerty TPF nog steeds beperken. TPF in de jurisdictie wordt in grote mate zelfgereguleerd door de gedragscode van de Association of Litigation Funders (ALF), die normen vaststelt met betrekking tot zaken als kapitaaltoereikendheid en ethisch gedrag. De meeste grote financiers zijn lid van de ALF. In het collectieve actieregime voor mededingingsrecht wordt de financiering ook op wettelijk niveau geregeld. De jurisprudentie is ook relevant en heeft precedentes vastgesteld voor nadelige kosten, zoals de 'Arkin Cap'. Het Paccar-arrest van 2023 is van bijzonder belang, aangezien daarin feitelijk werd bepaald dat de rendementstarieven voor financiers in collectieve mededingingszaken niet als percentages van de schadevergoeding mogen worden vastgesteld. Deze uitspraak werd beschouwd als een aanzienlijke tegenslag die de afdwingbaarheid van veel TPF-overeenkomsten op dat moment beïnvloedde, en meer in het algemeen als schadelijk voor de reputatie van de Britse procesmarkt. Er werd een wetsvoorstel ingediend voor de terugdraaiing ervan, maar dit werd later opgegeven. Het baanbrekende rapport van de Civil Justice Review (CJC) van 2025 over de herziening van de financiering van rechtszaken beveelt ook de terugdraaiing ervan aan.

Wat andere bronnen van weerstand betreft, kunnen blijvende elementen van een Europese rechtstraditie die de nadruk legt op corrigerende rechtvaardigheid en weerstand biedt aan de commercialisering van het civiele rechtssysteem, ook als belemmering fungeren voor de verdere ontwikkeling van TPF. In overeenstemming met deze traditie moeten geschillen tussen

de betrokken partijen worden gevoerd zonder tussenkomst van derden en mogen juridische claims niet worden teruggebracht tot het bedrag waarvoor ze kunnen worden verkocht. Dit onderzoek suggereert echter dat de invloed van deze culturele normen niet substantieel is en in de loop van de tijd geleidelijk is afgenomen, hoewel dergelijke zorgen af en toe worden geuit.

Het methodologische law-and-economics-kader wordt vervolgens in hoofdstuk 4 toegepast om het gedrag van de betrokken actoren te analyseren, teneinde de onderzoeksvragen met betrekking tot de rechtvaardiging van de weerstand te beantwoorden. Bijzondere nadruk wordt gelegd op de principal-agent theorie, waarbij eisers als principals de besluitvorming delegeren aan advocaten en financiers als hun agenten. Aangezien alle actoren hun eigen belangen nastreven, ontstaan er belangentegenstellingen die voor de eisers leiden tot agentschapskosten, zoals toezicht- en prikkelmechanismen. Agentschapskosten komen voor in alle verschillende vormen van financiering, en het niveau van informatieasymmetrie van de eiser speelt een belangrijke rol. Er is vastgesteld dat in vergelijking met andere financieringsmiddelen de agentschapskosten in TPF in Europa relatief beperkt zijn. Kortom, dit komt doordat de eisers vaak relatief goed geïnformeerd en commercieel verfijnd zijn en omdat de financier het belang van de eiser deelt in een succesvolle, grote en tijdige uitkomst. Hoewel agentschapskwesties meer uitgesproken zijn in collectieve acties met een groot aantal groepsleden, is dit voornamelijk te wijten aan problemen met collectieve acties in plaats van de rol van TPF. Bovendien zijn collectieve acties momenteel in aanzienlijke mate afhankelijk van TPF, wat de negatieve impact op de toegang tot de rechter en het afschrikken van wangedrag benadrukt wanneer dergelijke financiering zou worden beperkt. Volgens deze analyse lijkt een groot deel van de weerstand tegen TPF op basis van tegenstrijdige belangen dan ook geen gerechtvaardigde basis te hebben.

Bovendien werd in hoofdstuk 5 aangetoond dat een groot deel van de voortdurende weerstand tegen TPF, met name op het gebied van collectieve rechtsovereenkomsten, afkomstig is van bepaalde speciale belangengroepen. Deze groepen omvatten de grote bedrijfslobby, juridische verzekeraars en juridische beroepsverenigingen. Hun openbare informatiecampagnes en lobbyactiviteiten kunnen leiden tot een te negatieve perceptie en beperkende regulering van TPF. In overeenstemming met de theorieën over regulering op basis van particuliere belangen kunnen deze politieke principals er belang bij hebben om TPF te beperken en zijn zij effectief in het overwinnen van free-rider- en collectieve-actieproblemen binnen hun politieke activiteiten. Deze groepen omvatten de grote bedrijfslobby's, juridische beroepsverenigingen en verzekeraars. Bijzondere belangen die TPF in Europa steunen, zoals financiers en verenigingen van advocaten die actief zijn op het gebied van collectieve rechtsovereenkomsten, zijn

eveneens actiever geworden in het publieke debat. Consumenten hebben daarentegen te kampen met aanzienlijke collectieve-actieproblemen bij het waarborgen dat consumentenorganisaties hun beleidsbelangen behartigen. Desalniettemin hebben consumentenorganisaties gepleit voor het vergemakkelijken van procesfinanciering. Deze groepen die de bredere consumentenbasis vertegenwoordigen, zijn daarom in strijd met de weerstandsbeweging, wat verdere vragen oproept over de rechtvaardiging van de weerstand.

Ten slotte werd in hoofdstuk 6 een empirische analyse uitgevoerd, onder meer door het gebruik van semigestructureerde interviews. Deze interviews verzamelden inzichten om de TPF-industrie, perspectieven en ervaringen te verkennen en te beschrijven. De bevindingen van het interview worden grotendeels bevestigd door ander empirisch onderzoek op dit gebied, waaruit blijkt dat TPF blijft uitbreiden en actief is in het relatief nichegebied van hoogwaardige, verdienstelijke claims van geavanceerde eisers. De kritische blik die TPF aantrekt en de afstemming van belangen die financiers delen met eisers in de uitkomst werden benadrukt. Het uitgevoerde onderzoek suggereert dat zorgen over belangenconflicten als relatief beperkt worden ervaren. Financiers spelen een passieve rol in het proces, dat grotendeels beperkt is tot het verstrekken van financiering voor de procedure. Bij collectieve acties onderwerpen rechtbanken TPF-overeenkomsten en de onafhankelijkheid van de partijen aan een grondig onderzoek om de belangen van de eisers te beschermen. De aanvankelijke lobbyactiviteit tegen TPF wordt nu in toenemende mate geëvenaard door meer ondersteunende belangenbehartiging. De overgrote meerderheid van de niet-commerciële belanghebbenden geeft een over het algemeen positieve kijk op TPF, wat wijst op een brede acceptatie van de legitimiteit en waarde ervan binnen het rechtssysteem, in tegenstelling tot de meer kritische perspectieven van een luidruchtige minderheid. Met betrekking tot regelgeving zouden velen kiezen voor 'light-touch' of geen verdere regelgevende interventie, in plaats van zeer restrictieve regelgeving.

Bij het beantwoorden van de onderzoeksvragen heeft deze studie aangevoerd dat er momenteel hiaten in de toegang tot de rechter zijn en mogelijke tekortkomingen in het afschrikken van wangedrag in Europa. Vanuit een normatief perspectief is het daarom essentieel dat de meer substantiële vormen van weerstand tegen TPF niet de overhand krijgen. Integendeel, verdienstelijke rechtszaken moeten zonder onnodige belemmeringen kunnen worden gefinancierd via een verscheidenheid aan financieringsopties. Er zijn welkomme aanwijzingen dat er in veel Europese jurisdicties een vorm van 'light-touch' regelgeving op komst is volgens de ELI-principes, de resultaten van de inventarisatiestudie van de Europese Commissie en de beoordeling van de procesfinanciering door de CJC. Dit zou de voordelen van TPF grotendeels behouden, terwijl de zorgen over de potentiële risico's worden weggenomen.

Curriculum Vitae

Adrian Cordina was born on the 5th of February, 1994 in Gozo, Malta. In 2018, he obtained his joint LLM in European Law and Economics (EMLE) at the University of Bologna, Erasmus University Rotterdam and the University of Hamburg. In December 2020, he started his PhD research at Erasmus School of Law. His research is part of a broader project led by Professor Xandra Kramer and funded by the Dutch Research Council (NWO), titled 'Affordable Access to Justice: towards sustainable cost and funding mechanisms for civil litigation in Europe'. In 2023, he was a visiting researcher at UCL Faculty of Laws as part of his doctoral studies. Since 2019, he has been admitted to the Bar of Malta and has practised as an advocate in Malta.

Portfolio

Cordina A, 'Is it all that Fishy? A Critical Review of the Concerns surrounding Third Party Litigation Funding in Europe' (2021) 14 (4) Erasmus Law Review 270

Cordina A, 'The Time is Ripe? Proposed Regulation of Third Party Litigation Funding in the European Union' (Conflict of Laws, 25 October 2021) <<https://conflictoflaws.net/2021/the-time-is-ripe-proposed-regulation-of-third-party-litigation-funding-in-the-european-union>>

Cordina A, 'Developments in Third-Party Litigation Funding in Europe and Beyond' (Conflict of Laws, 23 August 2022) <<https://conflictoflaws.net/2022/developments-in-third-party-litigation-funding-in-europe-and-beyond/>>

Cordina A and Storskrubb E, 'The Future Regulation of Third-party Funding in Europe: Conference Report, 22 June 2022, Erasmus University Rotterdam' (2022) 26 (2) Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement 38

Cordina A and Burri Philipp A, 'CAT Certifies Gormsen v Meta Class Action on the Second Attempt' (Perfect Law, April 2024) <<https://perfectlaw.co.uk/cat-certifies-gormsen-v-meta-class-action-on-the-second-attempt/>>

Bättig L and Cordina A, 'Satisfying the Same Interest Criterion in English Representative Actions: Commission Recovery Ltd v Marks Clerp LLP' (Perfect Law, April 2024) <<https://perfectlaw.co.uk/satisfying-the-same-interest-criterion-in-english-representative-actions-commission-recovery-ltd-v-marks-clerk-llp-anor/>>

Silva de Freitas E, Cordina A and Bättig L, 'Global Class Actions and Mass Torts Conference by Perfect Law Ltd: Conference Report Day 1 (Perfect Law, April 2024) <<https://perfectlaw.co.uk/global-class-actions-mass-torts-conference-by-perfect-law-ltd-conference-report-day-1-23-may-2024/>>

Silva de Freitas E, Cordina A and Bättig L, 'Global Class Actions and Mass Torts Conference by Perfect Law Ltd: Conference Report Day 2 Room 1 (Perfect Law, April 2024) <<https://perfectlaw.co.uk/global-class-actions-mass-torts-conference-by-perfect-law-ltd-conference-report-day-2-24-may-2024-room-1/>>

Silva de Freitas E, Cordina A and Bättig L, 'Global Class Actions and Mass Torts Conference by Perfect Law Ltd: Conference Report Day 2 Room 2 (Perfect Law, April 2024)

<<https://perfectlaw.co.uk/global-class-actions-mass-torts-conference-by-perfect-law-ltd-conference-report-day-1-23-may-2024/>>

Cordina A, 'The Regulation of Litigation Funding in Europe: An Application of Principal-Agent Theory' in Xandra Kramer, Masood Ahmed, Adriani Dori and María Carlota Ucín (Eds), *Sustaining Access to Justice in Europe: New Avenues for Costs and Funding* (Hart 2025)