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*Special Issue — Harmonizing and Enhancing the Enforcement of Consumer Law: A
Comparative Analysis of Germany and Italy*

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Research Perspectives on Collective Litigation and Society

Third-Party Litigation Funding (TPLF) is an instrument that can contribute in resolving the problem of costs – and risks – of disputes, which in fact entail a barrier to access justice. It has emerged in common law jurisdictions (precisely, Australia, and the UK) and is now also gaining pace in the EU continental ones, within the civil law traditions.³ At this stage, the provisions contained in the Directive 2020/1828 address the main issues in regulating TPLF in the context of consumer collective or representative claims. It should be noted that, in implementing the mentioned Directive, the Member States have actually lost the opportunity to extend the safeguards provided for consumer collective redress to individual cases.

TPLF is a business entailing the provision of capital and other resources to parties to a dispute, by an entity that is neither a lawyer nor an insurer of that party. It is generally provided in exchange for a share of the recovery, only in case of success, sometimes even entailing the transfer of the claim to a controlled entity and prosecuting the dispute against the original defendant. In this respect, it is worth noting that the assignment of claims is often discussed alongside TPLF because both mechanisms serve a similar functional purpose: overcoming financial and organisational barriers to litigation by reallocating litigation risk. In both cases, the original right holder does not bear the full economic burden of pursuing the claim, thereby facilitating access to justice and enabling collective or mass claims that would otherwise remain unenforced. However, despite this functional proximity, assignment of claims is conceptually and legally distinct from TPLF. In an assignment model, the substantive claim itself is transferred, in whole or in part, from the original claimant to another entity, which then becomes the formal rights holder and litigates in its own name and at its own risk. The assignee's entitlement to the proceeds of litigation derives from ownership of the claim rather than from a contractual right to remuneration contingent on the outcome of the proceedings. As a result, the litigation is no longer conducted “on behalf of” the original claimant, but rather by a new claimant whose standing is grounded in private law rules on the transfer of rights. By contrast, TPLF does not involve any transfer of the claim. The claimant retains ownership and procedural standing, while a third-party funder merely finances the litigation in exchange for a share of the proceeds in the event of success. The funder's interest is contractual and derivative, not proprietary. This distinction is crucial, as it affects issues of procedural legitimacy, control over the litigation, disclosure obligations, and potential conflicts of interest. The difference also has important regulatory implications. Assignment of claims is typically governed by contract law and rules on assignability, which vary significantly across jurisdictions and may restrict the transfer of certain types of consumer claims. TPLF, by contrast, raises specific concerns related to litigation finance, such as funder influence, transparency, and alignment of incentives, which have prompted targeted regulatory responses domestically and by the EU. In the context of consumer collective redress, assignment models have sometimes been used as a *functional substitute* for underdeveloped collective action mechanisms. Nonetheless, treating assignment of claims as equivalent to TPLF risks obscuring their distinct legal nature and governance challenges. While both mechanisms may contribute to addressing under-enforcement, they do so through fundamentally different reallocations of rights, risks, and control.⁴

³ A. Cordina, E. Storskrubb, The Future Regulation of Third-Party Funding in Europe, Conference Report, in *Erasmus University Rotterdam*, 1-8 (2023).

⁴ L. Hornkohl, Turning Harm into Claims - How Recent ECJ Case Law Shapes the Interplay of Claim Assignment, Funding, and Victim Compensation in Mass B2B Competition Law Litigation on Digital Markets, Research Paper, 2-13 (2025), <http://dx.doi.org/10.2139/ssrn.5629632> (last visited March, 10, 2026).

II. THE STATE OF THE ART

In litigation funding agreements, the funders commit to covering civil litigation costs and, in most of the times, assume the risk of adverse cost awards. In exchange, they seek reimbursement of litigation expenses and compensation dependent on the dispute's financial outcome. The compensation for funders is contingent upon the results of the litigation and the settlement of debts by the opposing party, which adds complexity to these arrangements. More specifically, in the current understanding of TPLF, the size of the funder's remuneration depends in principle on the following three factors: likelihood of success; presumable length of the civil proceedings; value of the claim. Moreover, funders are generally more interested in funding high value claims, given that the remuneration clearly depends on the claimant's recovery by winning the litigation.⁵

According to this model, a funder is more likely to agree to fund condemnation claims, rather than claims for the ascertainment of a legal right or fact, which will ultimately end with the enactment of a purely declaratory judgement. In fact, if the funded party obtains a condemnatory judgement, the counterparty will pay the sum ordered by the court, and the funder will be able to retain the agreed percentage.⁶

The funder is more likely to agree to fund a claim against a financially solvent defendant offering good prospects of recovering any sum that is awarded in the final judgement. The solvency of the counterparty, however, is a dynamic factor and may vary from the moment of the funding decision to the end of the dispute when the funder is expected to recover. Hence the third-party funder's investment decision suffers from an external and apparently uncontrollable risk: the counterparty's solvency risk.

For the funded party, which is usually a claimant that does not meet the criteria to be granted legal aid, TPLF is an opportunity to improve its access to justice in high value disputes and to challenge defendants greatly superior to it in terms of economic power.⁷ For the party being funded, TPLF serves as a valuable device with which to shift the risk of any adverse judgment outcome, with the funder assuming full responsibility and effectively becoming the "primary risk holder".⁸

TPLF also differs from contingency and conditional fee agreements insofar as it is the funder, and not the claimant's lawyer, who is entitled to obtain a reimbursement and a remuneration fee.⁹ However, contingency/conditional fee agreements and TPLF agreements seem to share a common feature whereby the 'investor' providing resources - be it a lawyer or a litigation funder - agrees

⁵ E. D'Alessandro & C. Poncibò, *State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding*, Research Paper for the European Parliament Research Service (EPRS), Strasbourg, 2021, pp. 15 ss. The Research Paper has been published as Annex to J. Saulnier, K. Müller, I. Koronthalyova, *Responsible Private Funding of Litigation*, European Added Value Unit, PE 662.612, Strasbourg, 2021, pp. 45-118, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU\(2021\)662612_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf) (last visited March, 10, 2026).

⁶ D'Alessandro & Poncibò, 2021, p. 45 ss.

⁷ TPLF clearly differs from B.T.E. insurance, because there is no payment of a premium and maximum coverage for the funder, litigation crowdfunding, because funders are professional investors making an investment in the claim, whereas crowdfunders are usually individuals having no investment expertise and committing a small sum (often through a crowdfunding platform) to cover a small part of the costs and risks of a dispute; sale of claim, because the claimant's claim is not purchased by the funder. TPLF also differs from the assignment of claims for collection only, because the funder is not a claimant whose goal is that of collecting the claim.

⁸ For example, the German TPLF model contracts usually provide for the assignment of the claim to the funder ("assignee") as security. The assignment as security should be kept confidential and cannot be revealed in court. The claim is retransferred to the assignor once the funder has no further interest or reason to require a security.

⁹ D'Alessandro & Poncibò, 2021, p. 45 ss.

with a party to the case (generally the claimant) to be paid a percentage or fraction of the recovery if that party is successful.

In 2021, the European Parliament had concluded a Study and commissioned a Research Paper covering TPLF (also ‘EP Study’).¹⁰ It analysed the economic and legal issues of TPLF in the EU, and specifically focused on the risks posed by unregulated TPLF. The study investigated the origin of the TPLF industry in Europe, which can be traced back to 1967 in the UK, where it has been ruled by the courts. At present, the European market consists of several European funders and non-European funders able to operate in many EU Member States, as well as start-up companies that operate only at national level. The study also attempted to define TPLF in both litigation and arbitration where the funder agrees to fund litigation by bearing the costs of the civil proceedings, and to contractually assume the risk of adverse cost awards¹¹ in return for reimbursement of the litigation costs and for remuneration. The funder’s investment is not necessarily recouped or repaid and the funder’s remuneration depends on if (and when) the funded party wins the litigation.

Scholars have noted that funders usually seek a ratio of between 1 to 10 in terms of the amount of money needed to finance the dispute and the value of the financed claim.⁶¹² A funder is more likely to agree to fund condemnation claims, rather than claims for the mere ascertainment of a legal right which will ultimately end with the enactment of a purely declaratory judgment. In fact, if the funded party obtains a condemnatory judgment, the counterparty will pay the sum ordered by the court, and the funder will be able to retain the agreed percentage. A funder is more likely to agree to fund a claim against a solvent defendant offering good prospects of recovering any sum awarded in the final judgment. For the funded party – usually a claimant who does not meet the criteria to be granted legal aid – TPLF is an opportunity to improve its access to justice in high value disputes and to challenge defendants greatly superior to it in terms of economic power. For the funded party, TPLF is also useful for transferring the risk of any unfavourable outcome of the judgment, which is covered in full by the funder.

The EP Study also clarified that TPLF differs from contingency fee agreements because it is the funder, and not the claimant’s lawyer, who is entitled to obtain a reimbursement and a remuneration fee. Moreover, contingency fee agreements and TPLF agreements seem to share a common feature whereby the ‘investor’ providing funds, be it a lawyer or a litigation funder, agrees with a party of the case (generally the claimant) to be paid a fixed percentage of the recovery if that party is successful.

Since publication of the Study, the EP has passed a Resolution requesting the EU Commission to promulgate a new directive regulating third-party funding. In particular, the EU Parliament has added a draft directive to its resolution (the “Proposal for Directive”) which indicates the type of regulations that can be anticipated in EU Member States in the medium term.¹² As drafted, the Proposal for a Directive would apply a one-size-fits-all approach applicable to the TPLF of all litigation and arbitration proceedings in the EU.¹³ However, this proposal has been either

¹⁰ D’Alessandro & Poncibò, 2021, p. 50 ss.

¹¹ D’Alessandro & Poncibò, 2021, p. 555 ss.

¹² D’Alessandro & Poncibò, 2021, p. 60 ss.

¹³ EU Parliament, Resolution of 13 September 2022 with Recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.pdf

abandoned or put on hold for the time being, prompting considerable debate and discussion within the EU institutions and legal scholars.¹⁴

It is also worth noting that, in March 2025, the European Commission ('EC') has published a new Study ('EC Study') to analyse the landscape of TPLF across the member states of the EU by grounding on an empirical and comparative methodologies.¹⁵ In the EU, TPLF is actually practiced in some EU member states, such as: Austria, Belgium, France, Germany, Italy, Spain and The Netherlands.¹⁶ The ongoing comparative research seems to confirm that this practice is taking place in the absence of a specific national legislative framework, with the exception of Ireland.¹⁷ TPLF is permitted and regulated in Slovenia by Article 59, in accordance with the principles set out in the Commission Recommendation of 11 June 2013 pursuant to the legislation on collective redress,¹⁸ "Law of Collective Actions".¹⁹

The comparative analysis also indicates a general lack of data and case-law about TPLF in the EU Member States.²⁰ In fact, the provisions of the litigation funding agreements are generally protected by confidentiality clauses and, thus, they are not disclosed to third parties, nor to domestic courts.²¹ Today, such practice remains a much-debated topic in EU Private Law.²² The reason why this instrument has attracted so much attention from - and stirred controversy among stakeholders - is that, on the one hand, it can facilitate access to justice and promote the enforcement of EU Law,²³ while on the other hand, it may raise risks of abuses and undermine the well-functioning of EU judicial systems. For this reason, the debate on whether it should be regulated, and eventually how, is animated.²⁴ In fact, to date, while TPLF has certainly facilitated the filing of some claims in the EU (primarily concerning commercial and financial law, or competition law), there is a very limited factual evidence that abuses happen on a large scale, although the fact that this business remains undisclosed (i.e. litigation agreement are often confidential) prevents the making of accurate assessments by academic and policy-makers.²⁵

¹⁴ The proposed limitation on TPLF recovery shares to a maximum of 40% of awarded damages (absent "exceptional circumstances") represented a significant regulatory intervention in litigation funding arrangements. This limitation has proven controversial primarily because it conflicts with the principle of party autonomy in contract law.

¹⁵ British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, in collaboration with Civic Consulting, the Asser Institute and Risk & Policy Analysts (RPA), 2025, <https://www.biicl.org/projects/mapping-third-party-litigation-funding-in-the-european-union> (last visited March, 10, 2026).

¹⁶ British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, 2025, p. 76 ss. About Country Reports.

¹⁷ In Ireland, TPLF is prohibited by the Supreme Court of Ireland in *Persona Digital Telephony Ltd vs. Minister for Public Enterprise*, Ireland, [2017] IESC 27 at 54 (iv).

¹⁸ J. Sladič, A New Model of Civil Litigation in Slovenia: Is the Slovenian Judiciary Prepared for the Challenges Presented by the New Law on Collective Actions? In A. Uzelac, C. Hendrik, R. van Rhee (eds.), *Transformation of Civil Justice. Unity and Diversity* Paesi Bassi, 2018, pp.213-277.

¹⁹ J. Sladič, 2018, pp. 213 ss. See the Art. 59 of Slovenian Law of Collective Action, 2019.

²⁰ Precisely, there are no statistics or case law available yet that report on the use of TPLF.

²¹ British Institute of International and Comparative Law, EC Study, 2025.

²² T. Trapp, Z. Hlady, H. Abildgaard, O. Mokko, Third-Party Legal Standing under European Union Law: A Comparative Review of Selected EU Law and National Implications', in *Amsterdam Law School Research Paper* 1-54 (2024).

²³ M. E. Méndez Pinedo, Access to justice as hope in the dark in search for a new concept in European Law, in *Int. J. of Humanities and Social Sciences*, 11 (2001).

²⁴ D'Alessandro & Poncibò, 2021, p. 81.

²⁵ A. Cordina, Is It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe, in *Erasmus Law Review*, 270-280 (2021). M. Dumitrunica, Third-party litigation funding between business opportunity and facilitating access to justice, in *European Journal of Law and Public Administration*, 104-111 (2022).

III. TPLF AND COLLECTIVE REDRESS

Among the key issues surrounding TPLF and consumer collective redress mechanisms are several interrelated considerations.

TPLF arrangements can create potential conflicts between the funder, the representative plaintiffs, and the legal counsel. For example, a funder's primary goal is often financial return, which may not always align perfectly with the optimal legal strategy for claimants. Ensuring transparency and proper governance mechanisms is therefore crucial to mitigate risks that the funder's interests might override the collective interests of the plaintiffs.

With regard to conflicts of interest, Directive 2020/1828, in line with the 2013 Recommendation on collective redress,²⁶ provides that the representative entities' (which manages the claim) decisions must not be unduly influenced by funders *in a manner that would be detrimental to the collective interests of the consumers concerned* (Article 10, paragraph 2.a). Moreover, the Directive excludes the possibility of bringing a representative action *against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent* (paragraph 2.b). Paragraph 3 of the same article 10 empowers Courts and administrative Authorities to overview the compliance with the previously described provisions. The Directive does not regulate the aspect regarding disclosure of the funding agreement (if to the Court only or also to the counterparty). In this sense may prove helpful rule 237 of the ELI/Unidroit Model European Rules of Civil Procedure, which requires that such details may be disclosed to the Court and *in so far as appropriate, to the parties*.²⁷ These provisions, since no specific rules are present in the Italian system, could be applied as interpretative and addressing principles.²⁸

Secondly, how a litigation funder is compensated is another central concern. Funders typically receive a percentage of any damages recovered or settlement achieved. The structure of this remuneration can influence litigation strategies, potentially creating incentives to settle prematurely or to pursue claims primarily with high financial upside rather than those with the strongest legal merit. Regulatory frameworks and contractual safeguards are necessary to balance the funder's economic interests with the fair representation of claimants.

Having regard to contingency fees, the European hostility vis-à-vis this tool seems rooted. Indeed, point 30 of the 2013 Recommendation explicitly prohibited contingency fees, except in case they are properly regulated by a national legislation which considers the right to full compensation of the claimants. Similarly, the European Parliament's Legislative resolution of 26 March 2019, a preparatory work in the path to Directive 2020/1828, at the proposed article 15a, explicitly prohibited the introduction of a contingency fee mechanism.²⁹ However, the final version of the Directive, which is silent on this point, seems to have implicitly expunged such a prohibition, thus allowing member States to introduce contingency remuneration. A national example of

²⁶ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26 July 2013, 60-65.

²⁷ ELI/Unidroit Model European Rules of Civil Procedure, 2020, <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules> (last visited March, 10, 2026).

²⁸ European Parliament, Legislative resolution of 26 March 2019 on the proposal for a directive on representative actions for the protection of the collective interests of consumers, 2018/0089 (COD), https://www.europarl.europa.eu/doceo/document/TA-8-2019-0222_EN.html?redirect (last visited March, 10, 2026).

²⁹ European Parliament, Legislative resolution of 26 March 2019.

contingency fees' regulation is represented by the Slovenian *ZKollT*, which provides that the plaintiff's lawyer can arrange a contingency fee agreement not exceeding 15% of the sum recovered by means of the action. However, this percentage can be increased up to 30%, should the lawyer accept to bear all the expenses in case of defeat (article 61).³⁰ Such an innovative mechanism can be defined as a *sui generis attorney third party litigation funding*.³¹ However, an alternative and viable method for regulating the issue – given the still cold European approach towards contingency fees – may be represented by the mentioned 2019 Italian reform, which, despite not introducing a proper contingency fee system, has adopted a sort of rewarding remuneration for lawyers (article 840-*novies* of the Code of Civil Procedure).³²

Furthermore, in collective redress, the design of the participation mechanism can significantly affect both the efficiency of the process and the fairness of outcomes. Opt-in mechanisms require claimants to actively join the action, which can limit exposure to funder-driven litigation but may reduce overall participation. Opt-out mechanisms automatically include all eligible claimants unless they expressly decline, potentially increasing recoveries and efficiency but also raising ethical concerns regarding consent and the extent of the funder's influence. Deciding which mechanism is more appropriate depends on legal traditions, the nature of the claims, and the balance between access to justice and protection of individual rights.

The central issue while dealing with TPLF and collective redress is represented by which adhesion mechanism is more tailor-made for TPLF. First of all, it is worth mentioning that after years of European hostility against the opt-out adhesion mechanism, Directive 2020/1828 does not impose an adhesion mechanism, thus leaving the door open for opt-out. However, in order to better understand how to find the better solution in the TPLF context, a comparative approach is needed. As a starting point, an opt-in mechanism has the positive aspect of granting a better management of the case by the funder (people who opt-in also signs the funding agreement). However, it might reduce access to justice, which is one of the main aims of both collective redress and TPLF. This issue can be better addressed by the opt-out scheme, which, however, may incentivize the so-called free-riding, *i.e.*, the action is joined also by people who have not signed the TPLF agreement, but who takes the benefits stemming from the action sustained by the funder. Having reference to Italy, it must be evaluated in practice the solution introduced by the 2019 reform of a postponed opt-in, similar to what was previously introduced in France with the creation of the *action de groupe*.³³ This model can mix the advantage of granting a decision which can potentially reach all the affected parties, thus by keeping control by the funder during the subsequent adhesion phase. Anyhow, it does not reduce the possibility of *free-riding*.

³⁰ A. Piletta Massaro, The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding on opportunity for consumers, Research Paper, 97-115, 2021, 10.5937/RKSP2101095P (last visited March, 10, 2026).

³¹ U.S. Chamber Institute for Legal Reform, *Uncharted Waters, An Analysis of Third Party Litigation Funding in European Collective Redress*, October 2019, 73, available at <https://instituteforlegalreform.com/research/uncharted-waters-analysis-of-tplf-in-european-collective-redress/> (last visited March, 10, 2026).

³² A. Piletta Massaro, The Italian class action reform: a redesigned tool beyond consumer law, in *ERPL* 841-864 (2020). C. Poncibò, A. Piletta Massaro, The Italian Government adopts a collective action reform which aims at redesigning proceedings beyond consumer law, in *Concurrences*, 95748 (2020).

³³ Dalloz, L'action de groupe entre dans une nouvelle ère : la réforme tant attendue est promulguée, 1 2026, <https://www.dalloz-actualite.fr/flash/l-action-de-groupe-entre-dans-une-nouvelle-ere-reforme-tant-attendue-est-promulguee-partie-1> (last visited March, 10, 2026).

IV. RE-THINKING TPLF IN CONSUMER COLLECTIVE REDRESS

In this context, it becomes imperative to develop a more coherent and principled regulatory framework for TPLF in consumer collective redress, one that recognises the transformative potential of litigation-tech synergies but also addresses their inherent tensions.³⁴ Such a framework should aim to preserve accessibility and innovation while embedding safeguards for transparency, fairness, and consumer autonomy. It should also foster accountability across the value chain, from the design of legal algorithms to the governance of funding arrangements. Only by doing so can the EU ensure that the promise of legal tech and litigation funding does not come at the expense of the rule of law or the legitimacy of its justice systems.

The article argues that a critical distinction must be drawn between funding arrangements involving sophisticated commercial entities and those involving individual consumers, groups of consumers and their associations.³⁵

The fundamental premise for differential treatment rests on the inherent vulnerability gap between consumers and commercial entities.³⁶ Professional economic operators typically possess legal expertise, negotiating experience, and the resources to assess complex funding agreements. They enter such arrangements as informed participants capable of evaluating risks and negotiating favorable terms. Consumers, by contrast, often lack specialized knowledge of litigation finance, face significant information asymmetries, and may be experiencing financial distress that compromises their bargaining position.

This vulnerability creates conditions where funders may exploit their superior position to secure disproportionate shares of litigation proceeds. The consumer or the group of consumers, facing the choice between abandoning a legitimate claim or accepting potentially onerous funding terms, may acquiesce to arrangements that ultimately leave them with minimal recovery despite bearing the emotional and temporal burdens of litigation.

Additionally, we argue that the Unfair Terms Directive may offer a suitable legal basis for consumers, as its core principles can be readily applied to evaluate the fairness of the contractual terms of litigation funding arrangements between funders, consumers and their groups.³⁷ Terms reserving exceptionally large portions of litigation proceeds for funders could be scrutinised by public agencies and courts in the EU under the significant imbalance test, especially when they substantially diminish the effective remedy available to consumers.³⁸

³⁴ These are Arkansas, Indiana, Nevada, Tennessee and West Virginia, Illinois, which have passed laws capping the percentages that funders may charge if the party being financed is a consumer. In this regard, see R. Avraham, L.A. Baker, A. J. Sebok, *The MDL Revolution and Consumer Legal Funding*, U of Texas Law, Law and Econ Research Paper No. 601, (2021), pp. 152-153, <https://ssrn.com/abstract=3858826>. The authors point out that in Tennessee, the introduction of the price cap induced one of the largest funders in the country to leave the market in that state. The authors take a contrarian approach to 'excessive' regulatory initiatives, illustrating how many of them are based more on 'fears' than on solid scientific evidence.

³⁵ C. de Meeûs, Investing in Responsible Litigation: Third-Party Funding for Public Interest Litigation, in *Neth Int Law Rev* 1 (2024), <https://doi.org/10.1007/s40802-024-00268-2>

³⁶ N. Helberger, H-W. Micklitz, H-W. & P. Rott, *The regulatory gap: Consumer protection in the digital economy*, BEUC (The European Consumer Organisation), 2024, https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-116_the_regulatory_gap-consumer_protection_in_the_digital_economy.pdf (last visited March, 10, 2026).

³⁷ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29-34, ELI: <http://data.europa.eu/eli/dir/1993/13/oj>

³⁸ F. Esposito & M. Grochowski, The consumer benchmark, vulnerability, and contract terms transparency: A plea for reconsideration, in *ERCL* 1-31 (2022).

In practice, we argue that the courts and/or consumer protection agencies in the Member States should exercise heightened scrutiny when approving funding percentages in consumer cases, while the standard for approval should incorporate both procedural and substantive fairness considerations. Procedurally, courts would examine whether the consumer received adequate disclosures about the funding arrangement, including clear explanations of how the funder's share would be calculated under various recovery scenarios. Substantively, courts would assess whether the funder's potential recovery remains proportionate to the risk assumed and services provided. This would not categorically prohibit higher-percentage arrangements in all consumer cases, but would subject them to meaningful fairness assessment. Courts would consider factors such as the risk assumed by the funder, the complexity of the case, the anticipated duration of proceedings, and comparable market rates when determining whether a particular arrangement unfairly disadvantages the consumer.

V. COMPARATIVE PERSPECTIVES

In order to strengthen the analysis, the argument should also be developed through a comparative perspective on consumer collective redress and third-party litigation funding.

V.1 US Approaches to TPLF

While TPLF is generally permissible in the US, its regulation varies by state. Courts have consistently treated litigation funding as legally acceptable, provided it does not constitute champerty or maintenance.

The recognition of this vulnerability gap is not without precedent. Even in jurisdictions that traditionally favor contractual freedom, such as the United States, several state legislatures have implemented targeted consumer protections for litigation funding.³⁹ Several U.S. states, including Arkansas, Indiana, Nevada, Tennessee, West Virginia, and Illinois, have adopted legislative measures capping the percentage that third-party funders may charge when the funded party is a consumer. These interventions are typically justified on consumer protection grounds, reflecting concerns about exploitative pricing and the risk of funders extracting disproportionate returns from vulnerable claimants.

However, empirical and economic analyses cast doubt on the effectiveness of such price-cap regimes. As highlighted by Avraham, Baker, and Sebok, the introduction of a statutory cap in Tennessee led one of the largest consumer litigation funders to exit the state market altogether. Rather than correcting market failures, the cap appears to have reduced the availability of funding, thereby potentially exacerbating under-enforcement by limiting consumers' practical ability to pursue claims. This outcome illustrates a classic regulatory trade-off: measures designed to protect consumers ex-ante may, in practice, deprive them of meaningful access to justice ex post.⁴⁰

More broadly, the authors adopt a deliberately contrarian stance towards what they describe as "excessive" regulatory initiatives in the litigation funding space.⁴¹ They argue that many such

³⁹ R. Avraham, L.A. Baker, A. J. Sebok, *The MDL Revolution and Consumer Legal Funding*, U of Texas Law, Law and Econ Research Paper No. 601, 152-153 (2021), <https://ssrn.com/abstract=3858826>. They points out that in Tennessee, the introduction of the price cap induced one of the largest funders in the country to leave the market in that state. The authors take a contrarian approach to 'excessive' regulatory initiatives, illustrating how many of them are based more on 'fears' than on solid scientific evidence.

⁴⁰ R. Avraham, L.A. Baker, A. J. Sebok, 2021, p. 151 ss.

⁴¹ R. Avraham, L.A. Baker, A. J. Sebok, 2021, p. 151 ss.

interventions are driven less by robust empirical evidence than by normative anxieties surrounding the commodification of litigation, moral hazard, or perceived threats to judicial integrity.⁴² In doing so, the article challenges the assumption that price regulation is a necessary or proportionate response to litigation funding, suggesting instead that disclosure obligations, judicial oversight, and competition may offer more calibrated means of addressing potential abuses.

V.2 Australia

The Australian market for litigation funding is highly developed, and TPLF is widely recognised as a legitimate and essential component of access to justice.⁴³

In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, the High Court of Australia delivered a landmark judgment on the legality and governance of third-party litigation funding (TPLF)⁴⁴, firmly establishing its permissibility within the Australian legal system. The case concerned funding arrangements supporting representative proceedings brought by tobacco retailers against wholesalers, with the litigation funder playing an active role in organising and financing the claims. Rejecting the argument that the funding arrangements were inherently *champertous* or contrary to public policy, the High Court held that the provision of litigation funding, even where the funder stands to receive a share of the proceeds, does not in itself constitute an abuse of process. The Court emphasised that traditional doctrines of maintenance and champerty should not operate as categorical barriers to funding arrangements in modern litigation, particularly in the absence of demonstrable prejudice to the administration of justice.

At the same time, the Court adopted a measured and pragmatic approach. While affirming the legality of TPLF in principle, it declined to endorse a blanket acceptance of all funding arrangements. Instead, the judgment left open the possibility for judicial intervention where the funder's involvement might compromise procedural fairness or where the terms of the funding agreement, particularly the funder's share of any recovery, could be considered unreasonable. This preserved a supervisory role for courts without imposing ex-ante prohibitions on funding.

The significance of *Fostif* extends beyond its immediate facts. The decision laid the foundation for Australia's development into one of the most mature and sophisticated litigation funding markets globally. Subsequent case law has built on *Fostif* by refining standards for disclosure, managing conflicts of interest, and scrutinising funding commissions. Indeed, *Fostif* is particularly instructive because it demonstrates a judicial willingness to normalise TPLF as a legitimate feature of civil justice, while simultaneously recognising the need for case-specific oversight. The case is also notable for its applicability to claims brought by business entities, illustrating that concerns about access to justice and litigation asymmetries are not confined to individual consumers. In this respect, the decision has informed later debates on the role of litigation funding in collective redress mechanisms that extend beyond traditional consumer protection paradigms.

Following the 2006 *Fostif* decision by the High Court of Australia, the Australian judiciary faced a new set of challenges, particularly regarding how to organize and manage the participation of group

⁴² British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, 2025, p. 598.

⁴³ D'Alessandro & Poncibò, 2021, p. 25.

⁴⁴ *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386. This landmark High Court case confirmed the legality of third-party funding in Australia. It underscored that funding arrangements should not necessarily be viewed as *champertous* (unlawfully speculative) but left the door open for courts to assess the reasonableness of the funder's share. This ruling has been influential in later cases that have examined the specifics of funding agreements, especially when the funded party is a business entity rather than individual consumers.

members in such actions. One key concern was ensuring fairness and efficiency in adhesion mechanisms, that is, how claimants become part of a class action.

To address these issues, the courts explored the use of a “closed class system”, which was first introduced in the 2007 *Multiplex* decision by the Full Federal Court of Australia.⁴⁵ Under this system, the class of claimants is fixed at an early stage of the proceedings, meaning that only those who are identified and opt in at that point can participate in the action. This approach contrasts with an open or opt-out system, where potential claimants can be added later or are automatically included unless they expressly opt out.

The closed class system was designed to balance efficiency, fairness, and procedural manageability. By clearly defining the group of claimants early on, the court aimed to reduce uncertainties about funding arrangements, legal costs, and the allocation of any recovery. It also helped to mitigate potential conflicts of interest between funders, lawyers, and plaintiffs, since the composition of the class, and therefore the funder’s potential return, was known from the outset.

In essence, after endorsing TPLF, the Australian judiciary was working to create a structured framework for collective actions that could accommodate the new role of litigation funders while protecting the rights and interests of the claimants. The closed class system represented an early judicial attempt to regulate participation in funded collective litigation, setting a precedent for the careful integration of TPLF in class action law.

According to this approach, only adherents who signed the relevant TPLF agreement might have the right to join the action. Anyhow, it appears evident as this mechanism eminently transformed the opt-out Australian class action system into an opt-in one. As a consequence, an alternative solution was introduced with the so-called common fund orders. In brief, this system allows the Court to issue an order which authorizes the funder’s payment from the total sum awarded by the Court, irrespectively of the fact that class members entered into the relevant funding agreement.⁴⁶

V.3 Canada

Canada has emerged as one of the most advanced jurisdictions for TPLF in the context of class actions. The combination of judicial oversight and growing market sophistication has enabled Canadian courts to actively engage with litigation funding while safeguarding the interests of class members.

In *Lileyman v Bumble Bee Foods LLC*, the Ontario Superior Court of Justice addressed the legitimacy and public policy value of third-party litigation funding (TPLF) in the context of class proceedings.⁴⁷ The case concerned a proposed class action against a well-resourced corporate defendant, where the plaintiffs relied on external funding to pursue complex and costly litigation. Applying the litigation funding provisions of the Ontario Class Proceedings Act, the Court approved a funding arrangement under which a third-party funder agreed to cover disbursements

⁴⁵ Federal Court of Australia, Full Court, 21 December 2007, *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*, (2007) 164 FCR 275.

⁴⁶ D’Alessandro & Poncibò, 2021, p. 30 ss.

⁴⁷ *Lileyman v Bumble Bee Foods LLC*, 2021 ONSC 4968. The Ontario Superior Court of Justice applied the litigation funding provisions of the Class Proceedings Act and confirmed the public policy benefit of litigation funding in situations where individual plaintiffs may have difficulty obtaining damages from a deep-pocketed corporate defendant. The litigation funder provided funding to the class for expenses and provided an indemnity for any adverse cost award. The Court recognised that funding by a third party can play a large role in ensuring that defendants are held accountable for their alleged wrongful actions. Justice Perrel observed that: “Third-party litigation funding is acceptable as promoting the important objectives of class proceedings, including promoting access to justice and behaviour modification and may be justified in class proceedings as a matter of necessity.”

and provide an indemnity against any adverse costs award. This aspect was particularly significant given the Canadian “loser pays” cost regime, which can otherwise deter collective actions by exposing representative plaintiffs to substantial financial risk.⁴⁸

In this case, it has been expressly recognised the public policy benefits of litigation funding in class actions, emphasising its role in overcoming structural barriers to access to justice. The Court held that third-party funding can be instrumental in enabling plaintiffs—who might otherwise lack the resources or risk tolerance—to seek redress against deep-pocketed corporate defendants. In this sense, TPLF was framed not merely as a private financing arrangement, but as a mechanism that supports the broader objectives of class proceedings. In other words, TPLF is acceptable as promoting the important objectives of class proceedings, including promoting access to justice and behaviour modification and may be justified in class proceedings *as a matter of necessity*.⁴⁹

This passage situates TPLF squarely within the normative foundations of collective redress, linking it to both access to justice and behaviour modification, the latter reflecting the deterrent and regulatory function of private enforcement. The Court’s reasoning thus aligns litigation funding with the public interest dimension of class actions, rather than treating it as an exceptional or suspect practice.

The decision in *Lileyman* is also significant in comparative perspective. It exemplifies a judicial approach that acknowledges litigation funding as a structural response to enforcement asymmetries, particularly where collective claims target powerful corporate actors and entail high litigation costs. At the same time, by subjecting funding arrangements to judicial scrutiny and approval, the Court reaffirmed the need for safeguards to protect class members’ interests and maintain procedural integrity.

Both courts in these jurisdictions often evaluate the specifics of each case, including the nature of the litigation and the characteristics of the funded party, to ensure that the funder’s share is appropriate. Generally, a larger share of the proceeds is more acceptable in cases where the funded party is a professional entity or a corporate actor, particularly in complex, high-risk litigation, for example, bankruptcy cases.

VI. THE ELI PRINCIPLES

Rather than importing price-cap models inspired by consumer credit regulation, a more proportionate EU approach could prioritise transparency and fairness⁵⁰ of funding agreements and judicial oversight.

In the realm of TPLF, where external financiers support litigation in exchange for a share of the proceeds, transparency and fairness are paramount. This is particularly relevant in consumer collective redress. The European Law Institute (‘ELI’) has recognised this imperative and has embarked in 2022-2024 on a comprehensive project aimed at elucidating key considerations surrounding TPLF arrangements.⁵¹ The multifaceted aspects of the ELI’s endeavour include: the

⁴⁸ British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, 2025, p. 572.

⁴⁹ British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, 2025, p. 572.

⁵⁰ E. Mišćenić, & P. Tereszkiewicz, Towards a new Digital Fairness Act, in *Journal of European Consumer and Market Law*, 229-233 (2024).

⁵¹ ELI Third Party Funding of Litigation Project & Working Group (2022-2024): <https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-third-party-funding-of-litigation/>

spanning disclosure requirements, capital adequacy assessment, case control and conflict of interest, and fee regulation, with a focus on their implications for promoting fairness and bolstering confidence in the European legal landscape.⁵²

Central to the ELI's initiative is the exploration of *disclosure requirements* concerning TPLF agreements and assuring the transparency of this practice.⁵³ The Institute grapples with the delicate balance between safeguarding the confidentiality of funding arrangements and the imperative of transparency, particularly for courts and administrative bodies. By delving into when and to whom information regarding TPLF should be disclosed, the ELI seeks to foster an environment in which stakeholders are adequately informed while respecting the commercial sensitivities inherent in such agreements.

Furthermore, the ELI's project scrutinizes the critical issue of capital adequacy assessment. By examining the responsibility and practice for evaluating the financial robustness of TPLF funders and the disclosure of this information to prospective litigants, ELI aims at ensuring the stability of the litigation landscape. This diligence in assessing funders' financial standing serves to safeguard the interests of all parties involved, mitigating risks and bolstering confidence in the integrity of TPLF arrangements.⁵⁴

Addressing concerns surrounding case control and conflict of interest is another pivotal purpose of the ELI's Principles: clarity on these matters is indispensable for upholding the rights of litigants and maintaining trust in the judicial system.⁵⁵

Moreover, the ELI's Principles analyses the issue of fee regulation within the TPLF framework. By considering mechanisms such as caps or other regulatory measures, the ELI attempts to curb excessive fees that could compromise the fairness of the litigation process. Such oversight is instrumental in fostering equitable outcomes and bolstering confidence in the efficacy of TPLF as a financing tool.⁵⁶

Tellingly, also rule 238, paragraph 2, of the ELI/Unidroit Model European Rules of Civil Procedure states that in case of successful proceeding, *the total amount of compensation received by the qualified claimant shall form a common fund*. Moreover, paragraph 3 of the same rule 238 specifies that the representative entity's costs and expenses *must be paid from the common fund before any distribution of compensation to group members*. At this purpose, considering the relevant funder's fee included into the *costs and expenses* referred to in rule 238, paragraph 3, seems reasonable.⁵⁷

VII. CONCLUSIONS

Consumer collective redress and TPLF occupy an increasingly central position in contemporary systems of private enforcement of consumer rights in the EU. In regulatory environments characterised by diffuse harm, complex factual patterns, and asymmetric resources, particularly in digital and data-driven markets, collective litigation has become indispensable to the effective protection of consumer rights. Yet, as this article has argued, the mere availability of collective

⁵² X. Kramer, The ELI-Unidroit Model European Rules of Civil Procedure: Key Features and Prospects of Costs and Funding of Collective Redress, in S. Amrani-Mekki & T. Clay (eds), *Mélanges en l'honneur du Professeur Loïc Cadiet*, Lexis Nexis (2023), pp. 823-835, <http://dx.doi.org/10.2139/ssrn.4710983>

⁵³ European Law Institute (ELI), *Principles Governing the Third-Party Funding of Litigation*, 2024, <http://dx.doi.org/10.2139/ssrn.5058246> (last visited March, 10, 2026).

⁵⁴ European Law Institute (ELI), *Principles Governing the Third-Party Funding of Litigation*, 2024, p.10 ss.

⁵⁵ X. Kramer, 2023, p. 825 ss.

⁵⁶ X. Kramer, 2023, p. 830 ss.

⁵⁷ D'Alessandro & Poncibò, 2021, p. 84.

redress mechanisms does not guarantee their practical effectiveness. Persistent barriers relating to cost, risk, and organisational capacity continue to produce structural under-enforcement.

In this context, TPLF emerges as a powerful enabling mechanism. By redistributing financial risk and providing access to capital, funding arrangements can render collective actions economically viable and allow qualified entities or consumer organisations to pursue claims that would otherwise remain dormant. Properly designed, TPLF can therefore enhance access to justice, strengthen compliance incentives, and contribute to the broader enforcement architecture of EU consumer law.⁵⁸

At the same time, the growing role of litigation funding raises legitimate concerns. Issues of funder influence, conflicts of interest, transparency, and alignment between private profit and public enforcement objectives cannot be ignored, particularly in cases where claimants act in the collective interest of consumers rather than for individual gain. These concerns underscore the need for a nuanced regulatory approach that neither demonises TPLF nor treats it as a neutral technical solution.

The relationship between TPLF and collective redress thus reflects a broader tension within EU enforcement policy: the attempt to reconcile market-based instruments with public interest objectives. Rather than viewing litigation funding as an anomaly or a threat, EU lawmakers and courts should recognise it as a structural response to enforcement gaps, while ensuring robust safeguards to assure disclosure, transparency, and fairness especially in consumer collective redress. Ultimately, the effectiveness and legitimacy of consumer collective redress will depend not only on procedural design, but also on the governance of the economic infrastructures that sustain litigation. Addressing under-enforcement in consumer law therefore requires moving beyond formal rights and remedies to confront the financial realities of enforcement.

⁵⁸ M. Namysłowska, The Silent Death of EU Consumer Law and Its Resilient Revival: Reinventing Consumer Protection Against Unfair Digital Commercial Practices, in *J Consum Policy* 317-336 (2025).

