

Between Protection and Access to Justice: On the Regulation of Returns in Third-Party Litigation Funding

Patrik Provazník

Faculty of Law, Masaryk University, Czech Republic

Abstract

The present paper deals with the issue of third-party litigation funding from the perspective of current regulatory considerations. These, under the guise of protecting the weaker party from exploitation by the funder, are directed towards setting limits on the funders' returns for their services. This measure is intended not only to ensure that the supported litigants do not lose a substantial part of the amount awarded, but also to limit other negative externalities associated with this funding mechanism. However, this paper seeks to show that the consequences of such a measure may be diametrically opposed and miss the mark.

Keywords

Access to Justice; Caps on Returns; Regulatory Considerations; Third-Party Litigation Funding; (Un)Intended Consequences.

1 Introduction

Access to justice represents one of the fundamental principles of the rule of law, which is not only a goal in itself, but also a process to achieve it.¹ However, in the pursuit of its implementation, certain obstacles may be encountered time and again, which are regularly accompanied by extensive discussions on how to counter them. One such a pressing issue in the current

¹ Handbook on European law relating to access to justice. *European Court of Human Rights* [online]. 22. 6. 2016, p. 16 [cit. 15. 5. 2022]. Available at: https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf

litigation environment, both nationally and internationally, is the economic accessibility of justice. Indeed, across the spectrum of global jurisdictions, it may be observed that an increasing amount of financial resources is required to enforce or defend one's rights before the courts. For many parties, however, these costs may present insurmountable obstacles that result in them either resigning to pursue their rights or losing the litigation brought against them. Thus, the lack of access to legal services and justice may be not only a result but also a cause of disadvantage and poverty.² In these circumstances, the scales are tipped in favor of the economically stronger litigant, as justice is largely relegated to the ability to bear the economic burden of the legal process. For many people, access to justice thus becomes more of a dreamlike ideal without realistic contours.

However, the outcome of a legal dispute should reflect the strength of the party's claim, not the size of its bank account.³ Therefore, the litigation environment and the market have responded to these negative externalities with a variety of tools to counter them. In addition to generally accepted tools, such as legal aid or legal expenses insurance, a new market for alternative funding, which is referred to in this paper as third-party litigation funding ("TPLF")⁴, has begun to emerge and develop. Although many jurisdictions have more than 20 years of experience with this phenomenon in its modern form, it is a largely unregulated or only partially regulated funding mechanism. And while the absence of formal regulation, which would be substituted by means of self-regulation among the entities operating in the market, may not cause difficulties for an industry in its infancy,⁵ the litigation investment

² Equal Access to Justice. *OECD* [online]. 7. 10. 2015, p. 3 [cit. 15. 5. 2022]. Available at: <https://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf>

³ BEDI, S., MARRA, W. C. The Shadows of Litigation Finance. *Vanderbilt Law Review*. 2021, Vol. 74, no. 3, p. 566.

⁴ This term also implies that the focus of this paper is on the use and regulation of this mechanism in state court proceedings, although a number of aspects typically associated with arbitration, such as the volume of claims, the speed of proceedings, or the expertise of arbitrators, make arbitration even more appealing to funders.

⁵ HODGES, C., PEYSNER, J., NURSE, A. Litigation funding: status and issues. *University of Oxford. Faculty of Law* [online]. January 2012, p. 144 [cit. 15. 5. 2022]. Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf

market is currently a rapidly expanding market whose global value for 2021 was estimated at approximately \$ 13 billion.⁶

This type of funding, whereby a third party provides one party to a dispute with funds in exchange for a financial reward, has attracted considerable attention and has been the subject of extensive scholarly and legislative debate over the last few years. This is due to the fact that there are several problematic aspects associated with TPLF, the most pressing of which is the question of the relationship between enabling access to justice and the price that litigants must pay for this opportunity. Indeed, critics of this mechanism often point to the paradox that the rising costs of access to justice are combated by an instrument that, while improving access to justice, often imposes disproportionately high costs. This is, of course, a source of controversy, and raises questions about the need for regulation. When considering the regulation of TPLF, most current discussions focus on measures to set limits on funders' returns. This approach is believed to tame predatory lenders, and counter the negative externalities of TPLF in all of its aspects. This paper's objective is thus to consider whether the proposed regulation of the contractual side of TPLF leads to the intended objectives or whether, instead, an unintended consequence is lurking behind the good intention.

To answer this question, the paper is divided into four parts. The first part briefly outlines how TPLF works, identifies its functions, and provides a classification of its problematic aspects. The second part of the paper outlines the developments in the debates and legislative measures adopted in selected jurisdictions with the focus on funders' returns limitation. The third part focuses specifically on the criticized consequences of TPLF, and the implications of the proposed regulations of funder returns on these aspects. Part four then concludes with a reflection on the question raised.

⁶ The Decade of Dispute & the impact of litigation funding. *FTI Consulting* [online]. 22. 7. 2021 [cit. 15. 5. 2022]. Available at: <https://fticommunications.com/wp-content/uploads/2021/07/FTI-Consulting-The-Decade-of-Disputes-The-Impact-of-Litigation-Funding.pdf>

2 Setting the Stage: TPLF

2.1 Grasping the Notion

TPLF falls under the broader category of so-called alternative litigation funding, an umbrella term for a range of instruments where a third party who is not a party to the proceedings contributes in a certain way to the costs of the litigation.

The TPLF mechanism may be characterized by the following defining features:⁷

- “1. a cash advance;
2. made by a non-party;
3. to a party to the proceedings (mostly plaintiff);
4. in exchange for an assigned share of the litigation proceeds, if any;
5. arising out of settlement or judgment; and
6. payable at the time of recovery”

Based on these features, TPLF may be broadly⁸ defined as the practice whereby a third party provides a litigant, under a litigation funding agreement, with funds to enable it to pursue (or defend)⁹ a claim in court, in exchange for a financial reward.¹⁰

It is apparent from this definition that the commitment of the supported party to provide the funder with a financial reward constitutes the

⁷ MCLAUGHLIN, J. H. Litigation Funding: Charting a Legal and Ethical Course. *Vermont Law Review*. 2007, Vol. 31, no. 3, p. 618. – Point 3 slightly modified as the source speaks of plaintiff only.

⁸ TPLF is not a uniform concept, but its structure is determined and adapted to the environment in which it is applied, both in terms of societal considerations, and the need to comply with existing legal regulations and principles governing judicial proceedings. – HODGES, C., PEYSNER, J., NURSE, A. Litigation funding: status and issues. *University of Oxford. Faculty of Law* [online]. January 2012, pp. 2, 84 [cit. 15. 5. 2022]. Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf – A broad definition is, therefore, preferable here, as it allows to build on it in the latter parts of this paper, and to modify it when differentiating between the approaches adopted in different jurisdictions.

⁹ Although TPLF may be used to support both sides of the dispute, typically the funds are provided to plaintiffs, which corresponds to one of the traditional ways of calculating funder’s return.

¹⁰ HODGES, C., PEYSNER, J., NURSE, A. Litigation funding: status and issues. *University of Oxford. Faculty of Law* [online]. January 2012, p. 10 [cit. 15. 5. 2022]. Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf

cornerstone of this type of funding. The way the funder's return is calculated varies depending on the different approaches to the mechanism itself, for example, as a multiple of the amount originally granted or as an obligation to repay the amount granted with agreed interests. In most cases, however, the funder's return is calculated as a percentage of the amount awarded or agreed in settlement.¹¹ Nevertheless, the structure of TPLF contracts is not boilerplate, but reflects the specific circumstances of each case.¹² Accordingly, the provision is often complex and includes multiple calculation methods, with the understanding that the method that yields the highest return to the funder will apply.

The second characteristic feature of TPLF is its non-recourse nature, i.e., the conditionality of the funder's remuneration on the success of the litigant it supports. Thus, if the plaintiff is supported, they will only pay the funder's remuneration if they are successful in pursuing their claim. If, on the other hand, the plaintiff loses the case, they will owe the funder nothing.¹³ This is an appealing feature to litigants that distinguishes TPLF from other traditional third-party litigation funding methods.

2.2 Functions

From this brief outline, two elementary functions of TPLF – financial and risk transfer – may be clearly inferred.¹⁴

¹¹ ELIAS, R. Mythbusting: Why the Critics of Litigation Finance Are Wrong. *Florida A&M University Law Review*. 2017, Vol. 13, no. 1, p. 111; LEWIS, J. Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice. *Georgetown Journal of Legal Ethics*. 2020, Vol. 33, no. 3, p. 687; GLENN, R. The Efficacy of Choice-of-Law and Forum Selection Provisions in Third-Party Litigation Funding Contracts. *Cardozo Law Review*. 2020, Vol. 41, no. 5, p. 2248.

¹² GLENN, R. The Efficacy of Choice-of-Law and Forum Selection Provisions in Third-Party Litigation Funding Contracts. *Cardozo Law Review*. 2020, Vol. 41, no. 5, p. 2248.

¹³ LEWIS, J. Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice. *Georgetown Journal of Legal Ethics*. 2020, Vol. 33, no. 3, p. 687; ELIAS, R. Mythbusting: Why the Critics of Litigation Finance Are Wrong. *Florida A&M University Law Review*. 2017, Vol. 13, no. 1, p. 113; VELJANOVSKI, C. Third Party Litigation Funding in Europe. *Journal of Law, Economics & Policy*. 2012, Vol. 8, no. 3, p. 405.

¹⁴ HEATON, J. B. Litigation Funding: An Economic Analysis. *American Journal of Trial Advocacy*. 2019, Vol. 42, no. 2, p. 309.

The financial function reflects the fact that TPLF is a form of funding for one of the litigants. Thus, the funder provides the supported party with funds which, depending on the contractual arrangement, are used either to cover the costs of litigation or to finance everyday life. Both cases are indeed viable, as in the majority of cases, funding is provided to parties who do not have the means to litigate and are unable to obtain them from other sources. TPLF thus becomes their last resort to proceed with the claim.

On the other hand, it should be noted that this does not exhaust the range of persons who can use the services of funders. Funding may also be provided to parties who have sufficient funds to finance litigation, but do not want to spend them because of the risk associated with litigation.¹⁵ This is typical of commercial entities that prefer to invest the funds in their business and its development. Third-party funding thus allows them to turn their legal claims into investments.¹⁶ Another category may be those who perceive their claims as negative expected values cases and would therefore refrain from litigation themselves. However, in terms of economic analysis, when using TPLF, the risk-averse claimant may become risk-neutral thanks to the funding.¹⁷ In this respect, it is rather the second elementary function of TPLF that is the decisive factor for them.

This function consists of transferring the risk to the funder. It reflects the non-recourse nature of funding, where, if the litigation is lost, all the risk falls on the funder who loses its original investment, gains nothing, and typically will still be liable to pay the counterparty's legal expenses. In such cases, it becomes advantageous for the funded party to trade this risk of losing the case for a portion of the amount awarded or otherwise obtained in the event of successful litigation.

¹⁵ APOSTOLIDIS, M. Third-Party Funding in Dispute Resolution: Financial Aspects and Litigation Funding Agreements. *Academia.edu* [online]. P. 6 [cit. 15. 5. 2022]. Available at: https://www.academia.edu/34709414/Third-Party_Funding_in_Dispute_Resolution_Financial_Aspects_and_Litigation_Funding_Agreements_by_Miltiadis_G._Apostolidis_International_Hellenic_University_SCHOOL_OF_ECONOMICS_BUSINESS_ADMINISTRATION_and_LEGAL_STUDIES

¹⁶ LEWIS, J. Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice. *Georgetown Journal of Legal Ethics*. 2020, Vol. 33, no. 3, p. 700.

¹⁷ HEATON, J.B. Litigation Funding: An Economic Analysis. *American Journal of Trial Advocacy*. 2019, Vol. 42, no. 2, pp. 311–312.

2.3 Commercial vs. Consumer

One more important point should be made, which already follows in part from the above, and which should be born in mind when considering the regulation of TPLF. This is the distinction to be made between funding commercial and consumer litigation.

It is generally considered that the former category does not pose such a risk of exploitation by the funder, since there are sophisticated entities on both sides, who are presumed to be aware of the associated risks. This conviction may stem from the assumption that commercial litigation funding will most often not be used because of the lack of resources, but rather to convert the claim into an investment, with the contractual terms striking a balance that is beneficial to both the funder and the litigant.¹⁸

Against this conclusion, it could be argued that the position of a small and medium-sized enterprise *vis-à-vis* a billion-dollar company does not, in fact, show significant differences from that of a consumer. One can certainly agree with this in relation to the ability to compete economically in spending money on litigation. However, from an informational and legal point of view, that is to say, in terms of the ability to perceive and properly understand all the implications that entering into a TPLF contract entails, their position is nevertheless different from that of consumers. The two categories of financing are very different, raise different concerns in relation to different aspects of TPLF, and regulatory considerations reflect this accordingly.

It is central to the following parts of this paper to note that many of the existing and prospective regulations considering capping funders' returns, as well as the discussions outlined *infra*, predominantly relate to the consumer litigation funding market.¹⁹

2.4 Dissecting Complexity: To the Core of This Paper

There is no doubt that TPLF yields several positive effects. Among the most significant of these are, of course, the improved access to justice and levelling

¹⁸ ELIAS, R. Mythbusting: Why the Critics of Litigation Finance Are Wrong. *Florida A&M University Law Review*. 2017, Vol. 13, no. 1, p. 116.

¹⁹ BEDI, S., MARRA, W.C. The Shadows of Litigation Finance. *Vanderbilt Law Review*. 2021, Vol. 74, no. 3, p. 576.

the playing field between the litigants or, as has been aptly noted, assisting David in his battle with Goliath.²⁰ Hand in hand with these also comes the deterrence effect, which leads to greater compliance with the law, since one can no longer rely on not being sued in many cases because the victims of their actions cannot afford to pursue their claim due to the lack of funds.²¹ On the other hand, however, the fulfilment of these functions also raises several concerns that fall under three sets of issues. These issues can be broadly classified as:²²

1. Procedural – focusing on the impact of the financial support provided on the conduct of the supported litigants during court proceedings.
2. Ethical – touching on issues of potential conflict of interest, issues of disruption of the lawyer-client relationship, and the funder's influence on their procedural actions.
3. Contractual – relating to the conduct of the parties in negotiating the terms and the structure of the TPLF contract.

This paper is specifically focused, within the contractual level, on the issue of limiting the freedom of funders in determining their remuneration, which is a cornerstone of any TPLF contract and at, the same time, is probably one of the most controversial aspects of all the above-mentioned.

Its essence, and concurrently the bone of contention, lies in the provision that the funder, in the event of a winning decision, receives a portion of the damages awarded at the expense of the supported party. The amount of the funder's return is typically in the range of 20–40% of the amount raised, but due to the individual nature of each contract this range can vary in either direction. Although the commercial considerations determining the amount of the fee charged may vary,²³ the traditional model is based on a direct proportionality

²⁰ BEDI, S., MARRA, W.C. The Shadows of Litigation Finance. *Vanderbilt Law Review*. 2021, Vol. 74, no. 3, p. 580.

²¹ PURI, P. Financing of Litigation by Third-Party Investors: A Share of Justice. *Osgoode Hall Law Journal*. 1998, Vol. 36, no. 3, p. 556; DE MORPURGO, M. A Comparative Legal and Economic Approach to Third-Party Litigation Funding. *Cardozo Journal of International and Comparative Law*. 2011, Vol. 19, no. 2, pp. 382–383.

²² SHANNON, V.A. Harmonizing Third-Party Litigation Funding Regulation. *Cardozo Law Review*. 2015, Vol. 36, no. 3, p. 881.

²³ VELJANOVSKI, C. Third Party Litigation Funding in Europe. *Journal of Law, Economics & Policy*. 2012, Vol. 8, no. 3, pp. 423–424.

whereby the greater the risk taken by the funder, the greater the fee charged in the event of success. Overall, funders' returns significantly exceed the limits of returns that a funder could expect for other types of investment.

It is sometimes argued that the objectives and interests of both parties should be aligned.²⁴ In practice, however, it should be noted that funders do not act as guardian angels for their customers but operate for the purpose of generating profit. They do this precisely by charging fees for their services. In this respect, although the funder and its customer share the same objective, they differ in their reasons for achieving that objective.²⁵ Despite this realization, charging excessive fees is viewed as a secondary (additional)²⁶ victimization of the victim.²⁷ Therefore, there are tendencies to fight this state of affairs.

One of the proposed ways of countering these high returns is to positively influence new entrants and rely on market forces where competition not only across alternative funding methods but also within TPLF funders will lead to lower rates charged.²⁸ However, the massive development and overall size of the TPLF market no longer allows for reliance on these forms of (self-)regulation and, on the contrary, gives rise to a belief in the need for legislative intervention.²⁹ This fact triggers a regulatory tendency

²⁴ APOSTOLIDIS, M. Third-Party Funding in Dispute Resolution: Financial Aspects and Litigation Funding Agreements. *Academia.edu* [online]. P. 16 [cit. 15. 5. 2022]. Available at: https://www.academia.edu/34709414/Third-Party_Funding_in_Dispute_Resolution_Financial_Aspects_and_Litigation_Funding_Agreements_by_Miltiadis_G._Apostolidis_International_Hellenic_University_SCHOOL_OF_ECONOMICS_BUSINESS_ADMINISTRATION_and_LEGAL_STUDIES

²⁵ ELIAS, R. Mythbusting: Why the Critics of Litigation Finance Are Wrong. *Florida A&M University Law Review*. 2017, Vol. 13, no. 1, p. 115.

²⁶ RODAK, M. It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement. *University of Pennsylvania Law Review*. 2006, Vol. 155, no. 2, p. 518.

²⁷ BEYDLER, N. Risky Business: Examining Approaches to Regulating Consumer Litigation Funding. *UMKC Law Review*. 2012, Vol. 80, no. 4, p. 1160.

²⁸ MOLOT, J. T. Litigation Finance: A Market Solution to a Procedural Problem. *Georgetown Law Journal*. 2010, Vol. 99, no. 1, p. 108; MARTIN, S.L. The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed. *Fordham Journal of Corporate & Financial Law*. 2004, Vol. 10, no. 1, p. 57.

²⁹ BARKSDALE, C. R. All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance. *Review of Litigation*. 2007, Vol. 26, no. 3, p. 736; ESTEVAO, M.J. The Litigation Financing Industry: Regulation to Protect and Inform Consumers. *University of Colorado Law Review*. 2013, Vol. 84, no. 2, p. 483.

to limit these revenues by setting limits on what a funder could demand. The fundamental idea behind this approach is primarily to protect the recipient of the financial support from the funder and to ensure that they receive a greater return on the amount paid out, so that they do not fall victim to secondary victimization, this time by the funder. In this context, however, the question arises as to whether this objective will be achieved by setting a limit on the returns of funders.

3 Overview of Regulatory Considerations in Selected Jurisdictions

Before proceeding to assess the impact of capping on the perceived negative externalities of TPLF, the author considers it appropriate to present the developments on this issue across selected jurisdictions. In each jurisdiction, funders respond to the particularities of the local litigation environment and any existing regulations and developments in relation to this mechanism. This is no different when considering the question of the regulation of funder returns. The aim of this section is to demonstrate the differences and similarities in approaches and opinions, as well as the way these are reflected in current regulatory considerations.

For the purposes of this paper, due to the limited scope, three jurisdictions have been selected to present the ways in which this issue is or is considered to be regulated. The implications of the proposed regulatory instruments will be addressed in more detail in the next section of the paper.

3.1 United States of America

The present regulatory considerations and approaches to funder returns are determined by historical approaches that rested on an absolute rejection of third-party involvement in litigation between the parties, relying on the common-law doctrines of maintenance and champerty. Although these doctrines are most strongly associated with the milieu and influence of English feudal lords,³⁰ in some US states adherence to these doctrines persists to this day.³¹

³⁰ GLENN, R. The Efficacy of Choice-of-Law and Forum Selection Provisions in Third-Party Litigation Funding Contracts. *Cardozo Law Review*. 2020, Vol. 41, no. 5, p. 2251.

³¹ Such as Minnesota, Delaware, or Kentucky.

At the opposite end of the scale of openness to TPLF stand jurisdictions that consider the doctrines of champerty and maintenance as outdated and inapt for the needs of the current litigation environment. This shift in policy is often presented on the case of Ohio, where the courts first found TPLF inadmissible because of its conflict with these doctrines, only to be followed by the legislature's response, which struck down these limitations, effectively legalizing TPLF.³² Nevertheless, the doctrine of champerty has left its mark in these jurisdictions as well, as many funders under its influence insist on deriving their returns not from the amount recovered, but from the amount originally advanced, which is returned with agreed interests. This, in turn, leads to the fact that the solution to the issue of funder returns relies on an approach to the classification of TPLF contracts. These can be divided into two streams.

On the one hand, there are jurisdictions that classify TPLF contracts as investments. For this approach, most of the jurisdictions so represented do not regulate in any way the question of funders' returns. Thus, these jurisdictions have moved from a regime of absolute prohibition to a regime of funder freedom.

On the other hand, there are jurisdictions that perceive the risks associated with the absolute freedom of funders and seek to tame this discretion. They achieve this through a different classification, whereby a TPLF contract is not seen as an investment but as a loan subject to usury laws.³³ Typically, the following characteristics must be present for the concept of usury to be met within the meaning of these laws:³⁴

1. *“an agreement to lend money;*

³² MOLOT, J. T. Litigation Finance: A Market Solution to a Procedural Problem. *Georgetown Law Journal*. 2010, Vol. 99, no. 1, p. 95.

³³ *E.g.*, Decision of the Supreme Court of Colorado, United States of America, of 16 November 2015, Case No. 13SC497 [online]. *FindLaw* [cit. 15. 5. 2022]. Available at: <https://caselaw.findlaw.com/co-supreme-court/1718513.html>

³⁴ MARTIN, S. L. The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed. *Fordham Journal of Corporate & Financial Law*, 2004, Vol. 10, no. 1, p. 58; XIAO, J. Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table. *Vanderbilt Law Review*. 2015, Vol. 68, no. 1, p. 272. The fourth defining feature of intent to obtain more than the statutory maximum is (ir)relevant depending on the jurisdiction. – RICHMOND, D. R. Other People's Money: The Ethics of Litigation Funding. *Mercer Law Review*. 2005, Vol. 56, no. 2, p. 665.

2. *the borrower's absolute obligation to repay with repayment not contingent on any other event or circumstance;*
3. *a greater compensation for making the loan than is allowed under a usury statute or the State Constitution; and*
4. *an intention to take more for the loan of the money than the law allows."*

As can be seen, this approach gets in the way of funders who, striving to avoid regulation by these statutes, word their contracts to make the return of the funds provided and their return contingent on the outcome of the proceedings. Thus, when using TPLF, the supported party is not under an absolute obligation to return the funds provided, which is a mandatory element for the fulfilment of the concept of usury as defined above. Nevertheless, there have been some court decisions which have found, in relation to this element, that, in the circumstances of the case, the risk taken by the funder was so low as to amount in practice to an absolute obligation on the litigant to repay the funds provided together with the agreed return to the funder. This has been held, for example, in cases where the defendant's liability was determined based on strict liability for the damage caused.³⁵

3.2 Australia

Australia is considered the cradle of modern TPLF. The origins of this method of litigation funding date back to 1995, when it was enshrined in a statutory exemption for insolvency practitioners.³⁶ However, in other areas, uncertainty persisted as to the legality of this method of funding, considering the existing doctrines of champerty and maintenance. Consequently, funder activity in these other areas was limited and the

³⁵ E.g., Decision of the Nassau County Supreme Court, the State of New York, of 2. 3. 2005, Case *Echeverria vs. Estate of Lindner*, 2005 NY Slip Op 50675(U). In: *JUSTIA US Law* [online]. [cit. 15. 5. 2022]. Available at: <https://law.justia.com/cases/new-york/other-courts/2005/2005-50675.html>. However, regarding the classification of funded cases into commercial and consumer, it should be noted that the classification of TPLF as loans and their subsumption under the restrictions of usury laws applies to consumer cases, but does not apply to commercial cases, which are thereby left largely unregulated. – XIAO, J. Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table. *Vanderbilt Law Review*. 2015, Vol. 68, no. 1, p. 272.

³⁶ LEGG, M. et al. The Rise and Regulation of Litigation Funding in Australia. *Northern Kentucky Law Review*. 2011, Vol. 38, no. 4, p. 628.

development rather slow. These doubts were finally removed in 2006 when the High Court of Australia handed down its first decision in the *Fostif* case.³⁷ Since then, the issue of TPLF regulation has been the subject of a plethora of scholarly articles, as well as studies and debates at the legislative level.

At an early stage in the development of these debates, a report by the Productivity Commission came out quite clearly in favor of freedom of funders in relation to their returns and, conversely, concluded that there was no need to limit funders' returns.³⁸

A similar approach to legislative intervention can be seen in the Consultation Paper and follow-up Report produced by the Victorian Law Reform Commission ("VLRC") in 2017 and 2018, respectively. This Consultation Paper was based on the recognized power of the courts to assess the reasonableness and fairness of returns to funders in class actions. However, an issue identified within the terms of reference was whether criteria for setting a cap or sliding scale should be introduced at a statutory level or within court guidelines to ensure that returns to funders are not disproportionate in relation to the risk undertaken.³⁹ However, it was already noted within the follow-up Report that there was a divergence of views on the statutory regulation and therefore a recommendation was made that the Supreme Court should address this issue through developing its expertise rather than being guided by artificial legislative guidance.⁴⁰

³⁷ Order of the High Court of Australia of 30. 8. 2006, Case *Campbells Cash and Carry Pty Limited vs. Fostif Pty Ltd.*, [2006] HCA 41. In: *Jade* [online]. [cit. 15. 5. 2022]. Available at: <https://jade.io/article/1499>

³⁸ PRODUCTIVITY COMMISSION. Access to Justice Arrangements. Inquiry Report. *Australian Government Productivity Commission* [online]. September 2014, p. 635 [cit. 15. 5. 2022]. Available at: <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf>

³⁹ VICTORIAN LAW REFORM COMMISSION. Access to Justice – Litigation Funding and Group Proceedings. Consultation Paper. *Victorian Law Reform Commission* [online]. July 2017, p. 100 [cit. 15. 5. 2022]. Available at: https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRC_Litigation_Funding_and_Group_Proceedings_Consultation_Paper_for_web.pdf

⁴⁰ VICTORIAN LAW REFORM COMMISSION. Access to Justice – Litigation Funding and Group Proceedings. Report. *Victorian Law Reform Commission* [online]. March 2018, p. 127 [cit. 15. 5. 2022]. Available at: https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRC_Litigation_Funding_and_Group_Proceedings_Report_for_web.pdf

Two months after the publication of the Report prepared by the VLRC, another discussion was initiated by the Australian Law Reform Commission. Having identified the arguments put forward for or against capping funder returns, which were consistent with the previous discussions and findings, two issues were again raised for discussion, namely whether statutory limits on returns should be introduced in the form of a sliding scale on the amount settled or adjudicated, or whether a provision should be introduced providing for a rebuttable presumption that would ensure that members of a class action would recover at least 50.1% of the proceeds, unless the court decides otherwise in the particular circumstances of the case.⁴¹ A total of 78 submissions were made to this discussion. Following these submissions, a final report entitled “Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders” was published in December 2018.⁴² Based on the submissions and after evaluating the arguments presented, it was recommended that statutory caps limiting funders’ returns be introduced only if other proposals, including enshrining the power of courts to modify, set or reject percentage arrangements in TPLF agreements, were not adopted.⁴³

The next stage of finding an approach to TPLF regulation took place in 2020 in the Parliamentary Joint Committee on Corporations and Financial Services (“PJC”). It issued a report in December 2020 where the PJC recommended consultation by the Australian Government on how best to provide a minimum return on litigation proceeds for class members, as well as whether a minimum return of 70% is the most appropriate limit

⁴¹ AUSTRALIAN LAW REFORM COMMISSION. Inquiry into Class Action Proceedings and Third-Party Litigation Funders. Discussion Paper. *Australian Government Australian Law Reform Commission* [online]. June 2018, p. 94 [cit. 15. 5. 2022]. Available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/dp85_1_june_2018_.pdf

⁴² AUSTRALIAN LAW REFORM COMMISSION. Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders. *Australian Government Australian Law Reform Commission* [online]. December 2018 [cit. 15. 5. 2022]. Available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess_2.pdf

⁴³ *Ibid.*, p. 216.

or whether a graduated approach would be more appropriate.⁴⁴ Following this recommendation, a consultation process was launched in June 2021. A total of 23 submissions were made, including one confidential, out of which only four submissions were in favor of setting limits, but even these did not adopt clear-cut positions.

Despite the overwhelmingly negative view from TPLF companies, a bill was introduced in 2021 providing for a rebuttable presumption in favor of a 30% cap on funder returns, along with other conditions.⁴⁵ The first reading of this bill took place on 27 October 2021, but its fate is uncertain and will depend on the upcoming federal elections. At the time of writing this paper, neither the results of the elections nor the fate of the proposal were known.

3.3 European Union

The stance towards TPLF and its possible regulation at EU level has long been outside the attention of the EU legislator and thus left to the discretion of Member States.⁴⁶ A moderate shift in this passive stance occurred in 2013, when the European Commission adopted a recommendation following the ongoing discussions on collective redress mechanisms. This recommendation also addressed the issue of funding, where the principles identified were to ensure that TPLF would not lead to abuse of the system or cause conflicts of interest.⁴⁷ Therefore, it was recommended to prohibit the funder from charging unreasonable interest on the funds provided.⁴⁸

⁴⁴ PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES. Litigation funding and the regulation of the class action industry. *Parliament of Australia* [online]. 21.12.2020, p. 206 [cit. 15. 5. 2022]. Available at: https://www.aph.gov.au/-/media/Committees/corporations_ctte/Litigation_Funding/Litigation_funding_and_the_regulation_of_the_class_action_industry_report.pdf?la=en&hash=688F6CEDD016BE31B03A75101A6C6AA3BAE29AB7

⁴⁵ Australia. Corporations Amendment (Improving Outcome for Litigation Funding Participants) Bill 2021.

⁴⁶ MASSARO, A.P. The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers? *Scindeks-clanci.ceon.rs* [online]. P. 97 [cit. 15. 5. 2022]. Available at: <https://scindeks-clanci.ceon.rs/data/pdf/2683-443X/2021/2683-443X2101095P.pdf>

⁴⁷ Point 19 Preamble of the 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.

⁴⁸ *Ibid.*, point 16 letter c).

A principle was also identified that the funder's remuneration should be prohibited from being derived from the amount reached in a settlement or from the damages awarded in a judgment, unless such arrangements were regulated by a public authority to safeguard the interests of the parties.⁴⁹ However, the only Member State that introduced national legislation in line with this recommendation was Slovenia in its Collective Actions Act.⁵⁰

A further development on this issue came in 2018, when the first draft Directive on representative actions⁵¹ was adopted under the “New Deal for Consumers” initiative. This draft addressed the issue of funding of representative actions in Article 7, however, unlike the prohibitions identified in point 16 of the 2013 Recommendation, there is no prohibition on funders charging excessive interest on the funds provided. Thus, only the procedural and ethical aspects were addressed, i.e., the duty of disclosure and the prohibition of abuse of process to the detriment of the funder's competitors. Similar holds true for Article 10 of the adopted text of the Directive which also emphasizes that TPLF is a matter for individual Member States to decide whether or not to allow it.⁵²

However, this has not stopped developments at EU level. In March 2021, a European Added Value Assessment entitled “Responsible private funding of litigation” was published, which focused specifically on TPLF and responded to the fragmentation of regulatory approaches to representative actions across Member States, and in turn highlighted the need to provide equivalent protection across the EU.⁵³ In this context, two regulatory models with different levels of regulation – medium and strong – were presented.

⁴⁹ Point 32 Preamble of the 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.

⁵⁰ Slovenia. Art. 60 Act No 55/2017, zakon o kolektivnih tožbah (ZKoIT).

⁵¹ Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM/2018/0184 final).

⁵² Art. 10 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

⁵³ SAULNIER, J., MÜLLER, K., KORONTHALYOVA, I. Responsible private funding on litigation. European added value assessment. *European Parliament* [online]. March 2021, p. 1 [cit. 15. 5. 2022]. Available at: [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)

In relation to the regulation of funder returns, their common feature is the introduction of a cap on such returns, but only the strong regulatory model explicitly includes a cap of 30%.⁵⁴ However, it is stressed that the added value is similar in both cases, which creates an obstacle to reaching a clear conclusion on which model to opt for.⁵⁵ It is thus already apparent at this point that the issue is not entirely clear-cut and deserves due examination and consideration.

The last proposal to be mentioned is the Draft Report of 17 June 2021 with recommendations to the Commission on Responsible private funding of litigation, which is referred to as the Voss Report. This is a draft directive which expresses the belief that, when third-party funding is used, the litigants should not be left with less than 60% of the proceeds, unless the specific circumstances of the case justify a contrary approach.⁵⁶

4 Partial Conclusion and Transition to the (Un) Intended Consequences of Capping

While no satisfactory answers emerge from the brief overview of the developments outlined, two partial conclusions can be drawn. On the one hand, there is a consensus on the need to regulate TPLF market players. On the other hand, it is the fact that in all jurisdictions, limiting funders' returns is generally considered to be the most effective and straightforward tool to address the various issues of TPLF. It is intended not only to protect the parties supported, but also to remedy other negative externalities that are linked to its procedural and ethical aspects.

However, despite these tendencies, it should also be clear how controversial the issue is, and that it is not easy to reach a consensus on the setting of limits or their potential level. Why is this so? And is something else being overlooked? To answer these questions, in the following paragraphs the

⁵⁴ Ibid., pp. 18–19.

⁵⁵ Ibid., p. 28.

⁵⁶ EUROPEAN PARLIAMENT. COMMITTEE ON LEGAL AFFAIRS. Draft Report with recommendations to the Commission on Responsible private funding of litigation. *European Parliament* [online]. 17.6.2021, p. 6, point 9 and Art. 13 para. 4 [cit. 15.5.2022]. Available at: https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf

focus will be on the most frequently cited arguments in favor of capping funder returns, and the author will try to present conclusions as to why it may be rather undesirable or why it misses the pursued primary objective of protecting litigants.

4.1 Overall Increase in Caseload

One of the fundamental purposes of TPLF is to mitigate the economic barriers of access to justice and, in turn, to strengthen this principle. Therefore, a logical consequence of the availability of TPLF is an overall increase in the number of cases brought before the courts. While this increase may reflect both of the functions of TPLF identified above, the author believes that the majority of this increase will fall into the category of cases that would not otherwise see the day in court due to lack of resources. The author thus does not consider this to be a negative consequence of TPLF itself, as on the contrary it achieves its core positive effect of providing access to justice and equality of arms of the parties to the dispute.⁵⁷ The outcome of litigation is thus no longer dependent on the amount of available funds, but on the legal strength of a particular claim.

The negative side of this consequence is sometimes associated with the fact that too much litigation may discourage riskier activities, the implementation and development of which could subsequently be beneficial for the market concerned or for the society as a whole.⁵⁸ In this respect, however, it should be noted that the regulation of liability for risky activities is a matter of substantive law, which by its approach itself regulates the question of whether and to what extent a particular claim can be successfully asserted. The availability of litigation funding in this case has no bearing on the merits of the case and the number of meritorious cases.

⁵⁷ DE MORPURGO, M. A Comparative Legal and Economic Approach to Third-Party Litigation Funding. *Cardozo Journal of International and Comparative Law*. 2011, Vol. 19, no. 2, p. 385; LYON, J. Revolution in Progress: Third-Party Funding of American Litigation. *UCLA Law Review*. 2010, Vol. 58, no. 2, p. 591.

⁵⁸ RODAK, M. It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement. *University of Pennsylvania Law Review*. 2006, Vol. 155, no. 2, p. 519.

4.2 Increase in Frivolous Cases

However, the basic argument of TPLF critics and proponents of capping funder returns is the fear of an overall increase in frivolous litigation. This view is based on the belief that funders will seek out high-volume cases where, although the likelihood of success is low, the likelihood of large profits is high. It is asserted that specialist funders will be able to resort to this practice when they can spread the risk across their portfolio of funded cases.⁵⁹

Although such situations cannot be ruled out in rare cases, the author does not consider this argument to be valid either. This conclusion is based on the premise of defining a frivolous case as “[a case] *that lacks merit and is commenced for the purpose of harassing, intimidating or irritating the defendant*”⁶⁰. Thus, if one disregards cases of judicial excess, the successful outcome of litigation cannot be described as frivolous because such litigation has a meritorious basis. If it were frivolous and had no basis, the action would have to be dismissed.

Nevertheless, similar conclusion holds true even if a case is considered frivolous when there is a low probability of success. Certainly, one can accept the proposition that the supported litigant, who risks no loss if the litigation is lost, may have an incentive in pursuing any claim when using TPLF. In this case, however, it is important to remember the objective and interests of the funders as they are far from providing their resources to fund any litigation. Very detailed due diligence is carried out before the decision to fund a particular dispute is made, which includes an assessment of the risk-return ratio and an assessment of the evidence supporting the merits of the dispute.⁶¹ For example, based on interviews with established funders,

⁵⁹ XIAO, J. Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table. *Vanderbilt Law Review*. 2015, Vol. 68, no. 1, p. 269.

⁶⁰ PURI, P. Financing of Litigation by Third-Party Investors: A Share of Justice. *Osgoode Hall Law Journal*. 1998, Vol. 36, no. 3, p. 558.

⁶¹ APOSTOLIDIS, M. Third-Party Funding in Dispute Resolution: Financial Aspects and Litigation Funding Agreements. *Academia.edu* [online]. P. 28 [cit. 15. 5. 2022]. Available at: https://www.academia.edu/34709414/Third-Party_Funding_in_Dispute_Resolution_Financial_Aspects_and_Litigation_Funding_Agreements_by_Miltiadis_G._Apostolidis_International_Hellenic_University_SCHOOL_OF_ECONOMICS_BUSINESS_ADMINISTRATION_and_LEGAL_STUDIES

it has been reported that one of the companies requires a probability of success of up to 95%, while another requires a probability of success of at least 50%.⁶² If this assessment does not achieve the required ratio, such litigation will not be funded unless there is some error of judgment in the assessment process itself.⁶³ To the contrary, such a process may serve as a sieve, filtering out frivolous disputes and showing the funding applicant that such a dispute is not worth pursuing in court proceedings.⁶⁴ This stems from the fact that funders are repeat players in the market and thus have experience in estimating the likelihood of winning a dispute.⁶⁵

Moreover, reliable and established funders with a reputation will not risk funding such cases because they would lose their reputation and money. Many funding companies are publicly traded and have obligations to their shareholders, so they cannot afford to throw money away on frivolous litigation. The only exception might perhaps be in cases of market competitors. In these cases, the funder's motivation is certainly not to obtain a return on its investment, but these cases should be addressed by providing for a prohibition on this type of competition. Limiting funder returns will thus have zero effect on these cases.

It is thus more likely that with the availability of TPLF the ratio of meritorious to frivolous cases will increasingly shift in favor of the meritorious ones, which is also a desirable and general objective of this method of litigation funding.

4.3 Decreased Incentives for Settlement

Another issue that is being discussed when considering the regulation of funder returns is the impact on settlements. Indeed, there is a perception

⁶² ABRAMS, D.S., CHEN, D.L. A Market for Justice: A First Empirical Look at Third Party Litigation Funding. *University of Pennsylvania Journal of Business Law*. 2013, Vol. 15, no. 4, p. 1088.

⁶³ MOLOT, J. T. Litigation Finance: A Market Solution to a Procedural Problem. *Georgetown Law Journal*. 2010, Vol. 99, no. 1, p. 107.

⁶⁴ PURI, P. Financing of Litigation by Third-Party Investors: A Share of Justice. *Osgoode Hall Law Journal*. 1998, Vol. 36, no. 3, p. 558; BEDI, S., MARRA, W.C. The Shadows of Litigation Finance. *Vanderbilt Law Review*. 2021, Vol. 74, no. 3, p. 607.

⁶⁵ ROBERTSON, C. B. The Impact of Third-Party Financing on Transnational Litigation. *Case Western Reserve Journal of International Law*. 2011, Vol. 44, no. 1, p. 170.

among critics of TPLF that the availability of funding will reduce the incentive of the funded party to accept a settlement and, in turn, lead to prolonged litigation in an attempt to extract the most favorable judgment. This view may arguably stem from the risk-transfer function of TPLF, which transfers the risk of losing from the litigant to the funder. Therefore, the litigant does not have to fear loss and its actions might be assessed as riskier. In taking this view, however, it must be noted that settlements must first and foremost be fair and just. Nevertheless, this has often not been the case in situations where settlements have been proposed in the knowledge that the party concerned cannot, for financial reasons, afford to take the dispute to court.⁶⁶

Moreover, some sources assert that this statement is not accurate, and on the contrary, TPLF tends to encourage settlement.⁶⁷ Indeed, funders are also interested in a fair settlement, as they can obtain an interesting return for themselves at a relatively small cost. Such a solution is relatively swift, and the proportion of the return may be more favorable to them, given the small costs.

On the other hand, one cannot ignore cases where TPLF will be used opportunistically in an attempt to force the defendant to settle a case that would otherwise have little likelihood of success.⁶⁸ Here again, this is due to the desire to avoid the potential increased costs of litigation. However, it should be noted that such motives are more likely to be ruled out in the case of established funders with a good reputation. The argument is thus directed more towards those predatory funders who cast a long shadow on the whole practice of TPLF.

4.4 Limiting Funder Returns or Access to Justice?

The primary purpose for setting caps on funder returns should be to ensure that funders' customers are not deprived of a disproportionately large portion

⁶⁶ RICHMOND, D. R. Other People's Money: The Ethics of Litigation Funding. *Mercer Law Review*. 2005, Vol. 56, no. 2, p. 661.

⁶⁷ LYON, J. Revolution in Progress: Third-Party Funding of American Litigation. *UCLA Law Review*. 2010, Vol. 58, no. 2, p. 597.

⁶⁸ ABRAMOWICZ, M. Litigation Finance and the Problem of Frivolous Litigation. *DePaul Law Review*. 2014, Vol. 63, no. 2, p. 197.

of the proceeds for the benefit of the funder. However, this paper proposes that the capping of funder returns under the guise of protecting supported parties will likely lead to negating TPLF's core purpose of providing greater access to justice.

One must recall time and again that funders operate in the market for profit. Therefore, it is beyond doubt that this method of litigation funding is not available for every conceivable claim, but only to claims that evince a sufficient degree of profitability. This profitability is determined in particular by the costs that have to be incurred in order to conduct the proceedings (including the potential obligation to reimburse the opposing party for the costs of the proceedings in the event of losing the case), together with the assurance of a sufficient level of return in the event of winning the case. However, if the returns to funders are capped, then funding will likely not be provided to low value claims, as they will not be economically viable for funders.⁶⁹

With the capping of funder returns, the return on low value claims will be significantly reduced, to the extent that the risk on the funder's side cannot be covered and the claim will therefore not be funded at all. As a consequence, while funders will be prevented from profiting from the proceeds of litigation, it will be to the extent that such litigation will not reach the courts at all.

It should also be noted that low-profitability disputes give little room for funders to make a mistake in their estimation. Thus, setting caps on their returns might make it even worse to the extent that they will rather give

⁶⁹ SLATER AND GORDON LAWYERS. Submission to the Treasury Consultation: Guaranteeing a minimum return of class action proceeds to class members. *Australian Government. The Treasury* [online]. June 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-slater_and_gordon.pdf; PIPER ALDERMAN. Public Submission – Consultation on Recommendation 20 of the Parliamentary Joint Committee report on litigation funding and class actions. *Australian Government. The Treasury* [online]. 28. 6. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-piper_alderman.pdf; CASHMAN, P. Guaranteeing a minimum return of class action proceeds to class members. Submission to the Treasury in respect of Recommendation 20 of the Parliamentary Joint Committee report on litigation funding and class actions. *Australian Government. The Treasury* [online]. 28. 6. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-dr_peter_cashman.pdf

up altogether.⁷⁰ Although the U.S. Chamber Institute for Legal Reform (ILR) points out that a potential loss on the funder's part is part and parcel of their business risk that they must take into account,⁷¹ it is important to recognize that funders will not take that risk and will pass it on to their clients, either through an increase in the price of their services or the more radical way of not funding the litigation at all. As funders are commercial companies that operate in the funding market to generate profit, their primary purpose is not to be the guardian angel of vulnerable litigants, and to provide them with greater access to justice. While this can be a very positive side effect, the primary motivation is to value the funds provided and make a profit.⁷²

Another consequence of introducing caps will likely be that the TPLF market will be closed to potential funders who simply will not enter such a market environment. Thus, competition will not be increased, and prices will not be lowered through competition. On the contrary, such a "closed" market will create privileged funders who will be few in number and will thus be able to charge higher prices. With this, the cap on the return to funders could very easily become a baseline for their return.⁷³

⁷⁰ KIDD, J. Modeling the Likely Effects of Litigation Financing. *Loyola University Chicago Law Journal*. 2016, Vol. 47, no. 4, p. 1288; SHINE LAWYERS. Submission to Treasury and Attorney-General's Department. Guaranteeing a minimum return of class action proceeds to class members. *Australian Government. The Treasury* [online]. 5.7.2021 [cit. 15.5.2022]. Available at: <https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-shine.pdf>

⁷¹ U.S. CHAMBER INSTITUTE FOR LEGAL REFORM. Guaranteeing a minimum return of class action proceeds to class members. Submission of the US Chamber of Commerce – Institute for Legal Reform. *Australian Government. The Treasury* [online]. 28.6.2021 [cit. 15.5.2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-us_chamber_and_professor_stuart_clark.pdf

⁷² SHEPHERD, J.M. Ideal Versus Reality in Third-Party Litigation Financing. *Journal of Law, Economics & Policy*. 2012, Vol. 8, no. 3, pp. 595, 600.

⁷³ ALLENS. "Guaranteeing a Minimum Return of Class Action Proceeds to Class Members". Submission to Treasury and Attorney-General's Department Joint Consultation. *Australian Government. The Treasury* [online]. 28.6.2021 [cit. 15.5.2022]. Available at: <https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-allens.pdf>; PHI FINNEY MCDONALD. Guaranteeing a minimum return of class action proceeds to members. *Australian Government. The Treasury* [online]. 5.7.2021 [cit. 15.5.2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-phi_finney_mcdonald.pdf; LAW COUNCIL OF AUSTRALIA. Guaranteeing a minimum return of class action proceeds to class members. *Australian Government. The Treasury* [online]. 6.7.2021 [cit. 15.5.2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-law_council_of_australia.pdf

It could perhaps be argued that this would not be an impermeable cap, as the proposed caps are mostly designed as rebuttable presumptions, whereby exceeding them will be possible if the exceptional circumstances of the case warrant it. It would thus be up to the court to assess the circumstances in question. However, this is an additional risk for funders, which would either deter them from funding such litigation altogether or would be reflected time and again in the cost of the services they provide. Moreover, from the position of the court, the author argues that there will be little incentive to rebut the presumption, as the purpose of these limits is to provide protection to the weaker party who might otherwise be secondarily victimized.

Thus, the introduction of limits on funder returns will ultimately miss the intended objective, where instead of increasing the returns to the litigants, they will end up with nothing at all because they will not have the means to resolve their dispute.⁷⁴ Such a solution, where the interest in protecting their guaranteed return outweighs their interest in access to justice is a wholly inappropriate solution. As has been aptly noted, the comparison is not whether the litigant receives 85% or 51% of the amount awarded, but whether they receive at least 51% of the amount awarded or 100% of nothing.⁷⁵

5 Conclusion

Based on the above, it is clear that TPLF is not a linear problem, but that there are different aspects and a number of externalities that need to be addressed. The regulation of only one of these aspects is not able to achieve the desired effects in the other aspects. On the other hand, however, such regulation cannot be seen in isolation, as the different issues

⁷⁴ WOODSFORD LITIGATION FUNDING. Public Submission to the Treasury and Attorney General in respect of the Joint Consultation Paper entitled Guaranteeing a minimum return of class action proceeds to class members (the “Consultation Paper”). *Australian Government. The Treasury* [online]. 25. 6. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-woodsford_litigation_funding.pdf

⁷⁵ LITIGATION CAPITAL MANAGEMENT LIMITED. The Treasury and Attorney-General’s Department Consultation Paper “Guaranteeing a Minimum Return of Class Action Proceeds to Class Members”. Submission of Litigation Capital Management Limited. *Australian Government. The Treasury* [online]. 5. 7. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-litigation_capital_management.pdf

are interrelated. Therefore, the need to regulate all aspects of TPLF in their interconnectedness is emphasized.⁷⁶ Only then will it be possible to present a comprehensive regulation that is balanced, responds to externalities of TPLF, and does not lead to undesirable consequences.

While it might seem that the author himself has departed from this exhortation by addressing only the issue of funder returns and its capping, this is precisely because it seems to be seen in many jurisdictions as a way to deal not only with the contractual dimension of TPLF, but also with other aspects and externalities. However, as the last chapter shows, capping funder returns is not an all-encompassing tool to combat these other consequences. The author is of the opinion that the impact of capping is rather negligible in these cases, as the determinants of these issues lie outside the contractual aspect of TPLF. Furthermore, too strict and ill-considered limitation of funder returns may lead to negation of the very primary purpose of protecting vulnerable customers of funders. Indeed, the interest in protecting them will at some point override the interest in ensuring access to justice, which certainly misses the intended purpose of the legislator. Regulation of funder returns is therefore a double-edged sword that, if handled carelessly, can do more harm than good.

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⁷⁶ MASSARO, A. P. The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers? *Scindeks-clanci.ceon.rs* [online]. P. 107 [cit. 15. 5. 2022]. Available at: <https://scindeks-clanci.ceon.rs/data/pdf/2683-443X/2021/2683-443X2101095P.pdf>

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Contact – e-mail

445932@mail.muni.cz

ORCID

0000-0002-7839-3188