

# Worldthinks

— Insight & Strategy —

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## Consumer Attitudes to Third Party Litigation Funding and its Potential Regulation in the EU

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## Executive Summary

Third party litigation funding (TPLF) is a business practice by which hedge funds and other financiers invest in lawsuits in exchange for a percentage of any settlement or judgment. TPLF began in Australia, and in recent years has quickly expanded to the U.S., the UK, and more recently to the European Union (EU). TPLF is an estimated €40 billion to €80 billion market globally,<sup>1</sup> and there are strong indications that the practice will continue to grow at a rapid pace.

At the time of this publication, the member states of the EU are in the process of transposing the Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers (the Directive) into their respective national legal systems. The Directive creates the first EU-wide regime for collective actions (also referred to below as class actions), and will fundamentally reshape the EU's civil litigation environment. This change is likely to accelerate the growth of TPLF activity throughout the EU.

As TPLF continues to develop in Europe, it is important to understand how European consumers view the practice and various

safeguards that the Parliament and Commission might consider to ensure TPLF operates in consumers' best interests.

This research focuses on attitudes towards TPLF among consumers in five EU member states (France, Germany, Netherlands, Poland, and Spain) in which funders currently operate. These five markets were chosen to represent a spread of different member states across the EU in terms of size, location, and accession date.

Findings in each market are based on a two-stage methodology, beginning with qualitative focus groups to explore consumers' initial viewpoints on TPLF and the language they used to describe those viewpoints. Following the qualitative stage, the quantitative stage consisted of a nationally representative survey of 5,021 consumers across the five markets. The focus groups took place on 12<sup>th</sup> May and 17<sup>th</sup> May, and the survey was conducted between 24<sup>th</sup> June and 2<sup>nd</sup> July. Throughout this report, verbatim quotations relate to findings from the qualitative focus groups, while figures and percentages are derived from the quantitative survey.

<sup>1</sup> Slingshot Capital, *Commercial Litigation Finance: How Big is This Thing?*, Litigation Finance Journal (February 26, 2020), <https://litigationfinancejournal.com/commercial-litigation-finance-how-big-is-this-thing/>.

This research was designed and conducted by independent research organisation WorldThinks in accordance with the ICC/ESOMAR International Code on Market, Opinion and Social Research and Data Analytics. The research was commissioned by the U.S. Chamber Institute for Legal Reform. Further detail about the research methodology can be found in the Appendix to this report.

The quantitative survey indicated substantial majorities of consumers strongly supported the creation of safeguards for TPLF.

**83%** of consumers across the five markets support the introduction of safeguards to ensure cases funded by TPLF operate in consumers' best interests, whereas less than 10% of consumers oppose the introduction of safeguards.

**58%** of consumers across the five surveyed markets believe that TPLF should *only* be allowed to operate with safeguards in place. A further 25% of consumers believe the practice of TPLF should be banned entirely, and less than 10% of consumers believe TPLF should be allowed to operate without any safeguards in place at all.

**52%** of consumers oppose self-regulation as a safeguard to ensure TPLF operates in the best interests of consumers and the law, and only 31% support it.

When asked subsequently which of the proposed safeguards should definitely not be enacted, 32% of consumers identified self-regulation as an intervention that should be ruled out altogether. Qualitatively, this view reflects concern about a perceived lack of transparency in the practice of TPLF at present and low trust that the funding industry would develop codes of conduct in consumers' best interests and adhere to them.

**A majority of consumers support almost all safeguards tested in the research – except self-regulation.** Of the suggested safeguards, consumers are most likely to prioritise funders having a fiduciary duty to put the best interests of claimants over their own investment interests (79%), and funders being legally obliged to see a case through to the end without the ability to withdraw their funding before the case is concluded (78%).



# 2

## Context

### Starting views of civil litigation systems and TPLF

Consumers' starting views of the civil litigation system in each market are mixed. Overall, across the five markets, the proportion of consumers believing their civil litigation system is moving in the right direction is only marginally greater than those believing it is moving in the wrong direction.

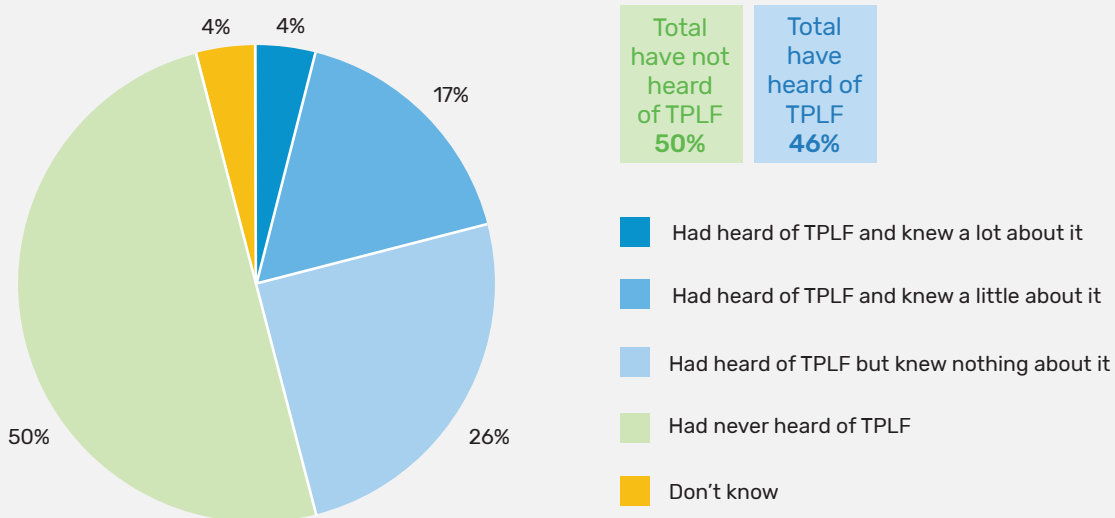
Class action lawsuits are a relatively front-of-mind association for consumers when discussing their market's civil litigation system. Whilst consumers overall tend to have positive views

of class actions, none have seriously previously contemplated how these lawsuits are funded.

There is limited claimed awareness of TPLF, with 50% of consumers claiming to have never heard of TPLF at all and 26% of consumers stating that they have heard of TPLF but know nothing about it. Some participants in the qualitative focus groups expressed surprise that TPLF is allowed in their market at all.

FIGURE 1

Percent across all markets claiming any awareness of TPLF.



Q. Before today, how much, if anything, did you know about third party litigation funding? Base: all respondents in France [n=1016], Germany [n=1000], the Netherlands [n=1003], Poland [n=1000], Spain [n=1002].

\*Due to rounding, figures in this and other charts may not add up precisely.

# 3

## Perceptions of TPLF

### Key takeaways

- 58% of consumers across markets believe TPLF should be allowed to operate, but only with safeguards in place. 25% believe that TPLF should be banned entirely.
- Only 7% of consumers believe that TPLF should be allowed to operate without any safeguards in place, and 10% say they do not know what their position is.
- 83% of consumers across the five markets support the introduction of safeguards to ensure that cases funded by TPLF operate in consumers' best interests. Only 8% of consumers oppose the introduction of safeguards.
- 74% of consumers support government intervention in the practice of TPLF, for example by designing and implementing safeguards.

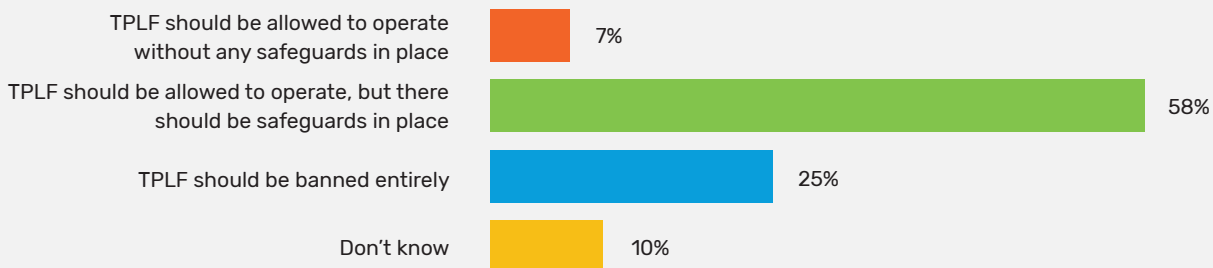
### Views on the practice of TPLF

Once consumers were shown information explaining the practice of TPLF, most were sceptical of TPLF being allowed to operate without safeguards, and a significant number

did not believe it should be allowed at all. The description of TPLF shown to survey respondents can be found in the Appendix.

FIGURE 2

Percent selecting whether TPLF should be allowed to operate with/without safeguards/ banned entirely.



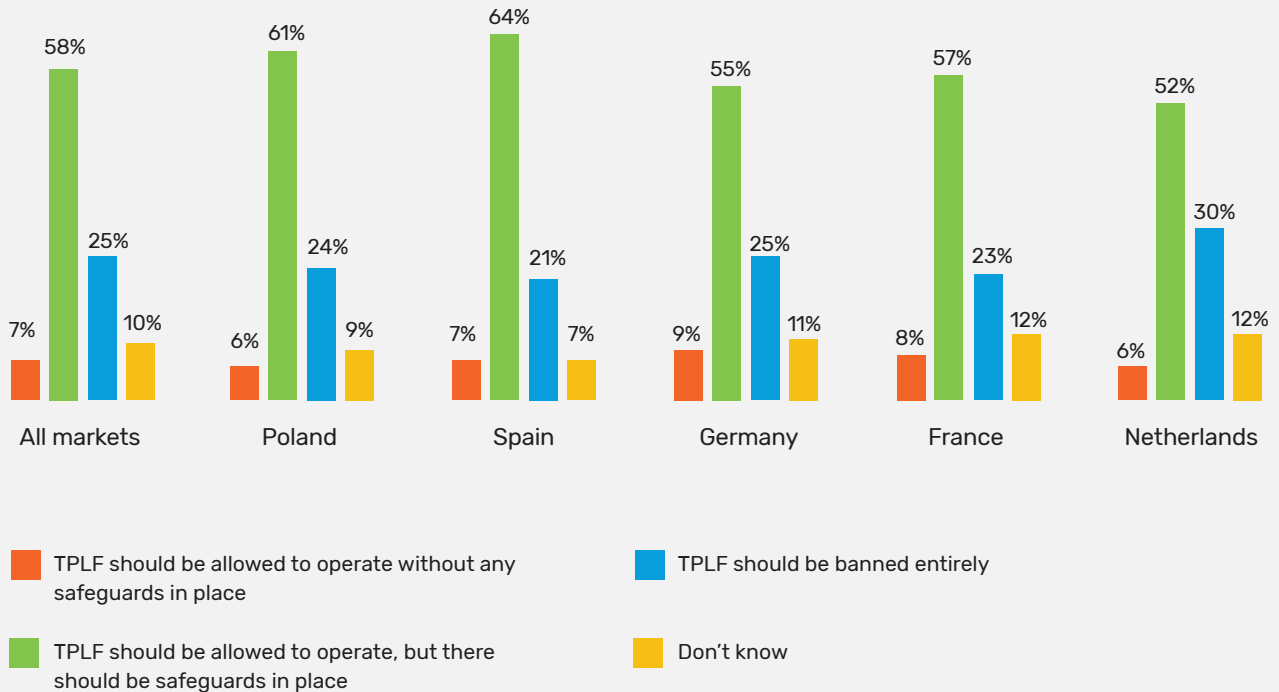
Q. Based on all the information you have now read, which of the following best describes your position on the issues of third party litigation funding? Base: all respondents [n=5021].

Of the five markets of interest, consumers in Spain (64%) and Poland (61%) are most likely to feel that TPLF should be allowed to operate, but only with safeguards in place, whereas

consumers in the Netherlands are most likely to feel that the practice of TPLF should be banned entirely (30%).

**FIGURE 3**

**Percent selecting whether TPLF should be allowed to operate with/without safeguards/banned entirely, by market.**



*Q. Based on all the information you have now read, which of the following best describes your position on the issues of third party litigation funding? Base: all respondents [n=5021].*

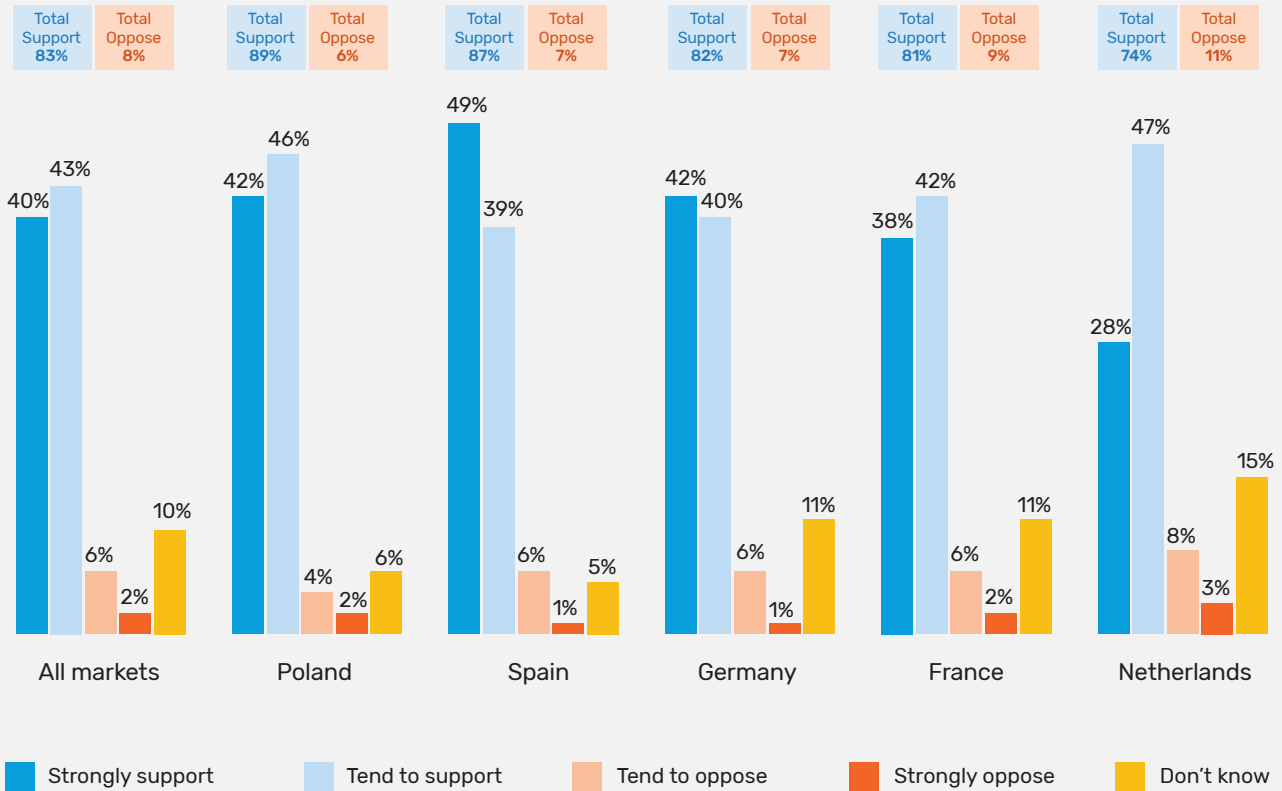
## Views on the introduction of safeguards

83% of consumers across the five markets support the introduction of safeguards to ensure that cases funded by TPLF operate in consumers' best interests. Just 6% of consumers somewhat oppose the introduction of safeguards, and a

mere 2% strongly oppose the introduction of safeguards. 10% say they do not know whether safeguards should be introduced.

**FIGURE 4**

**Percent supporting/opposing the introduction of safeguards, by market.**



*Q. After everything you have just read, to what extent do you support or oppose the introduction of safeguards that would ensure cases funded by third party litigation funding operate in consumers' best interests? Base: all respondents [n=5021].*

Of the five markets of interest, consumers in Spain (49%) are most likely to say they *strongly* support the introduction of safeguards, while consumers in Poland (89%) and Spain (87%) are most likely to say they support the introduction of safeguards overall. Consumers in the Netherlands are most likely to say they do not know whether safeguards should be introduced (15%), and relatively speaking, they are the least supportive of safeguards, but still an overwhelming majority (74%) favours them. Consumers who have heard of TPLF or who have positive views of their national government or of the EU are also more likely to support the introduction of safeguards.

Qualitatively, a particularly strong reason for introducing safeguards was felt to be the

perceived lack of transparency in the way in which TPLF currently operates. Within this overall desire for more transparency, focus group participants spontaneously called for measures or safeguards that:

- **Ensure** that funders cannot be involved in a case without their involvement being made clear to the claimants and the courts;
- **Prevent** funders from being able to influence and make crucial decisions in case strategy;
- **Limit** the profit that funders are able to make from an investment in a case;
- **Ensure** claimants are able to take their portion of financial settlements ahead of funders.



**“I think it [TPLF] isn’t really fair... it’s bad that it’s not regulated. I mean, the fact there are no limits or boundaries, it doesn’t seem right.”**

*(Focus group participant, Poland)*

**“There has to be regulation. It should be more open, and we should be able to choose a company or the funder. There should be clear terms and conditions, rather than things happening behind our back.”**

*(Focus group participant, Poland)*

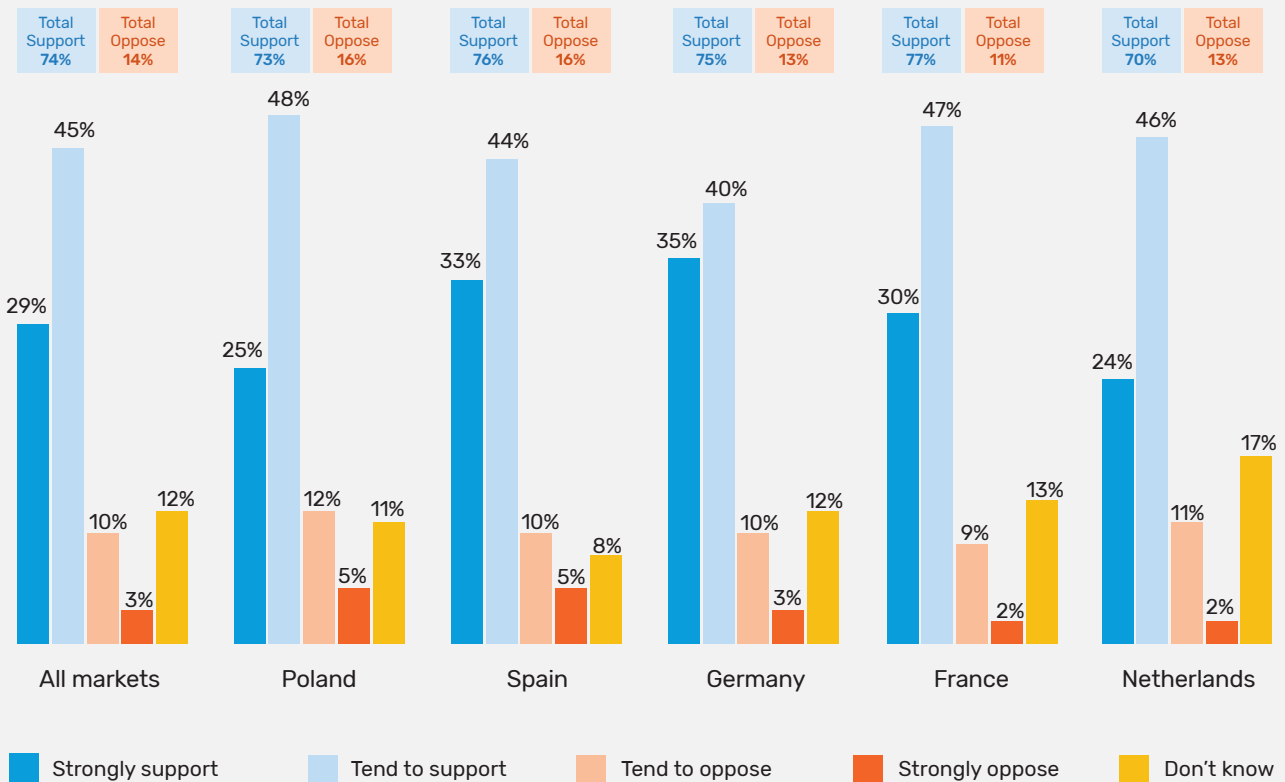
## Views on government intervention in TPLF

74% of consumers across the five markets strongly or somewhat support government intervention in the practice of TPLF. Only 3% of consumers strongly oppose government

intervention, and 10% of consumers somewhat oppose this. 12% of consumers say they do not know whether they support or oppose government intervention in the practice.

**FIGURE 5**

Percent supporting/opposing government intervention in TPLF, by market.



Q. Lawmakers are considering whether or not to intervene in this practice, for example by designing and implementing safeguards. To what extent do you support government intervention in the practice of third party litigation funding?  
Base: all respondents [n=5021].

Of the five markets of interest, consumers in France, Germany and Spain are more likely than those in Poland and the Netherlands to say they *strongly* support government intervention in the practice of TPLF, whereas consumers in France, the Netherlands and Poland are more likely than those in Germany to say they *somewhat* support government intervention in the practice of TPLF. Once again, consumers in the Netherlands are significantly more likely

than all other markets to say they don't know whether they support government intervention in the practice of TPLF (17%).

Qualitatively, there is strong consensus among all participants that some form of authority should take action to bring more regulation to the practice of TPLF – with most consumers either seeing a role for the EU or their national government in this, or, in some cases, both.

**“I think if they are going to agree to its [TPLF] existence, then they should definitely regulate it, both the EU Commission and the [Spanish] government.”**

*(Focus group participant, Spain)*

**“It's very important that something is done, at least to avoid opening the door to abusive proceedings. It's clear to see that these funders are not seeking justice, they're just seeking the most profit.”**

*(Focus group participant, France)*

**“There must be regulation because at the moment, it's just chaos. There's no management of how such lawsuits should take place. If there was proper legislation, their [funders'] approach would be different.”**

*(Focus group participant, Poland)*

# 4

## Perceptions of Specific Safeguards

### Key takeaways

- There is strong support across the board for every safeguard tested, with the notable exception of funders being allowed to self-regulate.
- The most supported safeguards are those that speak to funders 'having a fiduciary duty to put the best interests of claimants over their own investment interests' and funders 'being legally required to see a case through until the end, without the ability to withdraw their funding before the case is concluded'.
- When it comes to the proposal that funders could be allowed to self-regulate, only 31% of consumers support this as a safeguard, and 52% oppose this as a safeguard.

### Support for and opposition to specific safeguards

Overall, between 66% and 79% of consumers across the five markets of interest support all tested safeguards,

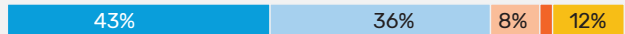
with the exception of self-regulation, which received well below a majority of support (31%).

**FIGURE 6**

**Percent support/oppose each tested safeguard.**

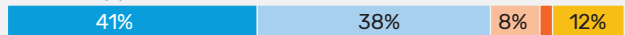
Funders should have a fiduciary duty to put the best interests of claimants over their own investment interests.

**Total: Support: 79%**



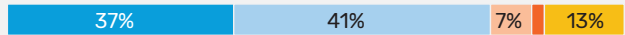
Funders should be legally required to see a case through until the end, without the ability to withdraw their funding before the case is concluded.

**Total: Support: 78%**



Funding agreements should be subject to an independent review to ensure they are not written unfairly in favour of the funders.

**Total: Support: 78%**



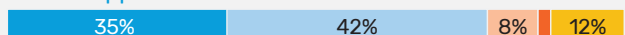
Funders should be accountable to pay costs which arise during a legal proceeding or lawsuit if their side loses.

**Total: Support: 77%**



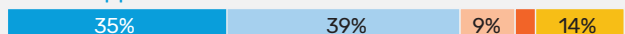
Funders should have limitations placed on them regarding the fees they are able to charge if the party they're funding wins or settles the case.

**Total: Support: 77%**



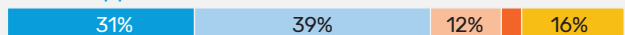
Funders should be licensed and authorized by an independent licensing agency, before they can invest in lawsuits.

**Total: Support: 75%**



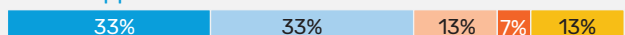
Funders should not be able to control strategic decisions of litigation normally left up to the lawyers or claimants themselves.

**Total: Support: 69%**



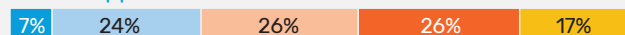
Funders should have to disclose their investments and their terms so that all parties involved in the lawsuit are aware.

**Total: Support: 66%**



Instead of government regulation, funders should be left to self-regulate by letting them adopt their own codes of conduct.

**Total: Support: 31%**



■ Strongly support   ■ Tend to support   ■ Tend to oppose   ■ Strongly oppose   ■ Don't know

*Q. Above are some specific safeguards that have been suggested in response to the current landscape of third party litigation funding. These safeguards do not intend to limit the extent to which funders are able to invest in cases, but instead aim to ensure that the practice of third party litigation funding operates within consumers' best interests. For each option, please state how much you support or oppose the introduction of this measure. Base: all respondents [n=5021].*

Of the five markets of interest, consumers in Spain and Poland are consistently most likely to support the specific safeguards. In line with their general views about the practice of TPLF and about the potential for government intervention, consumers in the Netherlands are consistently most likely to say they don't know whether they support or oppose the specific safeguards.

When asked to select the two safeguards which they felt should be implemented with the

highest priority, consumers are most likely to prioritise requirements for funders to:

- **Have a fiduciary duty** to put the best interests of claimants over their own investment interests (79%); and
- **Be legally required** to see a case through until the end, without the ability to withdraw their funding before the case is concluded (78%).

**“I agree with that [fiduciary duty], and I think when you’re talking about a court case, where you’re talking about justice, and complying with the law, that has to be paramount over any investment opportunity.”**

*(Focus group participant, France)*

**“This definitely [should be implemented], because they could be tempted, if things don’t go their way, to withdraw [from the case].”**

*(Focus group participant, Poland)*

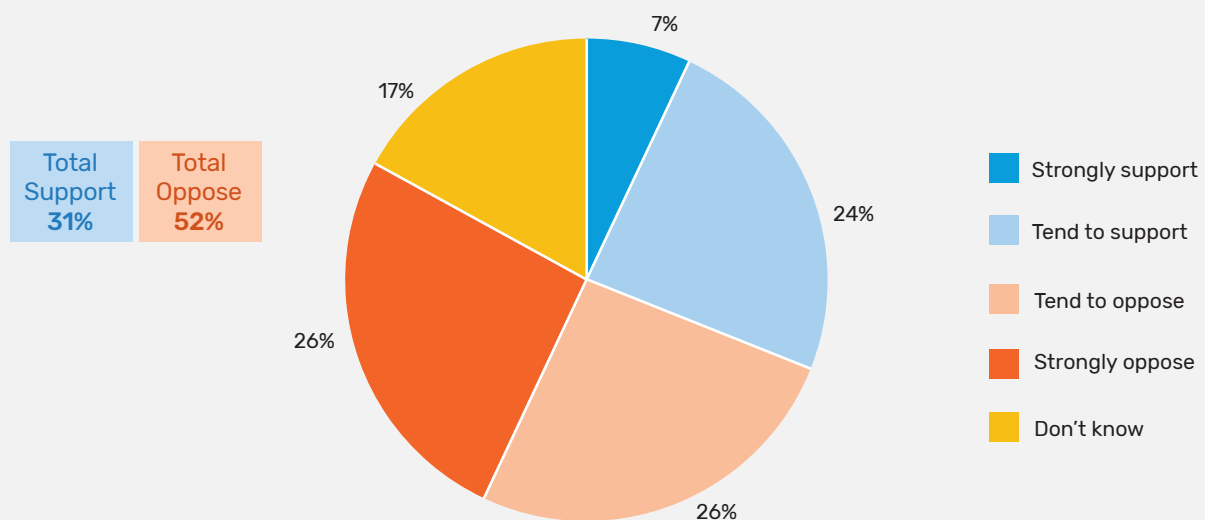
## Views on self-regulation

Across all markets, consumers were the least supportive of the safeguard suggesting funders would be allowed to self-regulate. 52% of consumers strongly or somewhat oppose self-regulation as a safeguard. Only 7% of

consumers strongly support this safeguard and 24% say they tend to support it. A further 17% of consumers say they don’t know whether they support or oppose this measure.

**FIGURE 7**

Percent support/oppose self-regulation.



Q. Above are some specific safeguards that have been suggested in response to the current landscape of third party litigation funding. These safeguards do not intend to limit the extent to which funders are able to invest in cases, but instead aim to ensure that the practice of third party litigation funding operates within consumers’ best interests. For each option, please state how much you support or oppose the introduction of this measure.

Instead of government regulation, funders should be left to self-regulate by letting them adopt their own codes of conduct.  
Base: all respondents [n=5021].

Overall, of the five markets of interest, consumers in France and Germany are most likely to both strongly and somewhat oppose self-regulation of TPLF as a safeguard, with consumers in the Netherlands most likely to say they don't know whether they support or oppose this safeguard.

Consumers were asked separately which, if any, of the tested safeguards should definitely not be implemented. 32% of consumers say self-regulation should not be implemented overall,

with consumers in France, the Netherlands and Germany most likely of the five markets of interest to say they believe self-regulation should definitely not be implemented.

Qualitatively, participants across markets rejected self-regulation as a suitable safeguard because this is felt to offer little guarantee that codes of conduct are being developed in the best interests of consumers and the law, and that they are being adhered to in practice.

**“No, no way. I don't agree with that [self-regulation]. It has to be regulated by someone external, otherwise if they regulate themselves, they'll do whatever they see best. There has to be independent oversight.”**

*(Focus group participant, Spain)*

**“No! That means they wouldn't have any regulation at all, they can do what they want.”**

*(Focus group participant, France)*



# 5

## Summary of Key Findings

The majority of consumers (58%) across the five markets surveyed believe that TPLF should *only* be allowed to operate with safeguards in place. 25% of consumers believe that TPLF should be banned entirely, and fewer than 10% of consumers believe that TPLF should be allowed to operate without any safeguards in place.

Most consumers (83%) across the five markets support the introduction of safeguards to ensure cases funded by TPLF operate in consumers' best interests, while less than 10% of consumers oppose the introduction of safeguards. 74% of consumers also support government intervention in the practice of TPLF, for example by designing and implementing safeguards.

All specific safeguards tested in the research, with the exception of self-regulation, are supported by the majority of consumers, with support ranging from 79% to 66% of consumers surveyed saying they support each safeguard. Of the suggested safeguards, consumers are most likely to prioritise funders having a fiduciary duty to put the best interests of claimants over their own investment interests, and funders being legally obliged to see a case through to the end without the ability to withdraw their funding before the case is concluded.

However, more than half of consumers (52%) oppose self-regulation as a safeguard to ensure TPLF operates in the best interests of consumers and the law.

# Appendix

## Research methodology

### Stage 1: Qualitative phase

**Qualitative focus groups** were conducted in **three of the five** EU markets of interest:

- 1 focus group with 6 participants in **Poland** on Wednesday 12<sup>th</sup> May;
- 1 focus group with 7 participants in **Spain** on Wednesday 12<sup>th</sup> May; and
- 1 focus group with 6 participants in **France** on Monday 17<sup>th</sup> May.

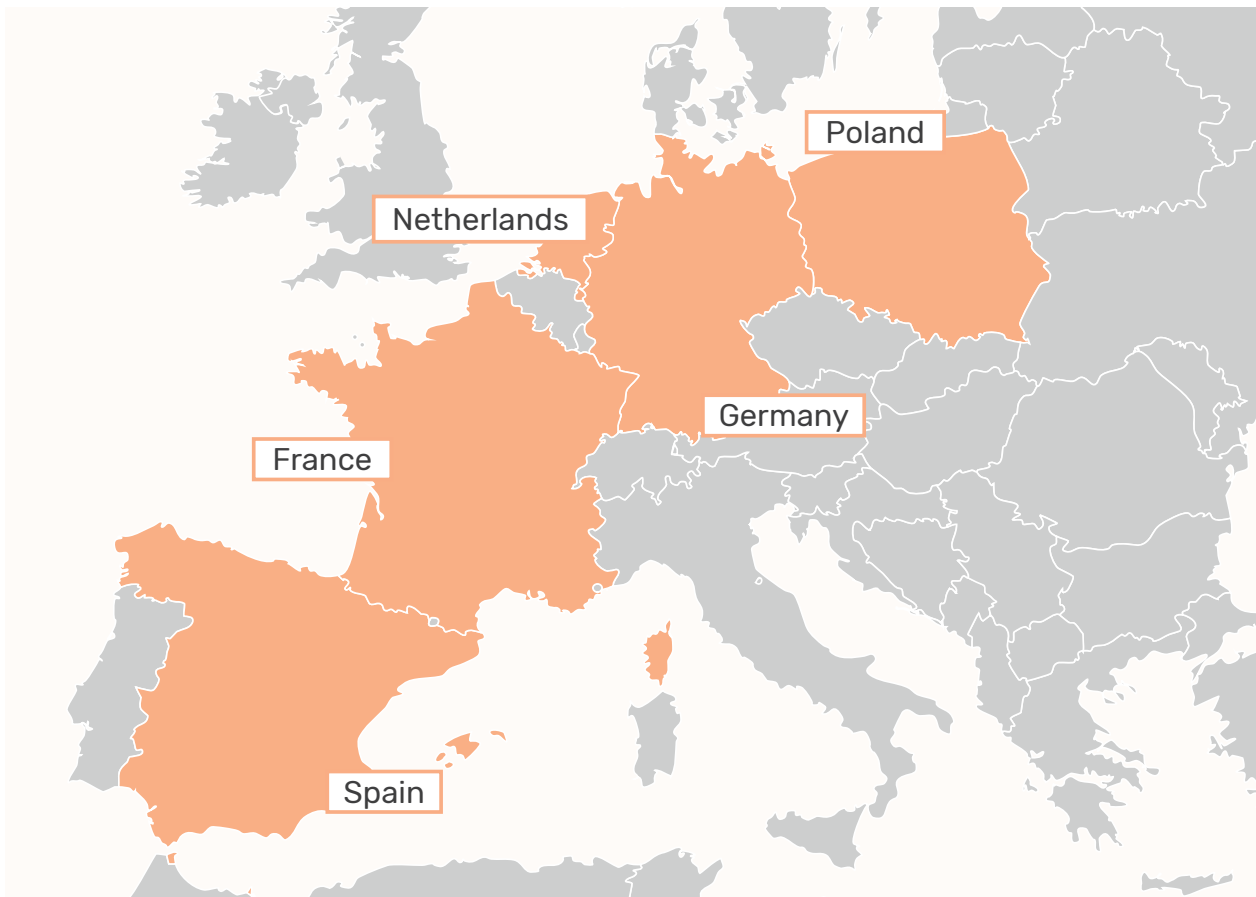
Focus groups comprised members of the general public who were recruited to fit within a 30-60-year-old age range as well as within average socioeconomic grade ranges (ranging from those in intermediate managerial, administrative or professional roles to skilled manual workers). Participants all kept up with the news regularly, had neutral views towards the EU, and no participants worked in either the legal or financial services sector.

### Stage 2: Quantitative phase

Quantitative findings are based on an online **quantitative survey of 5,021 consumers** conducted in all five member states of interest, designed and weighted to be nationally representative of the adult population aged 18+ in

that market according to gender, age, income and region. The survey was conducted between 24<sup>th</sup> June and 2<sup>nd</sup> July. All consumers were surveyed in the official language of their market. Numbers of responses for each market are as follows:

Market	Sample size (n=)
France (FR)	1,016
Germany (DE)	1,000
Netherlands (NL)	1,003
Poland (PL)	1,000
Spain (ES)	1,002
<b>Total:</b>	<b>5,021</b>



This report is based on the combined findings from both phases of research.

Given limited consumer knowledge about TPLF, to ensure that all survey respondents had sufficient understanding of the practice of TPLF to engage with the survey, all respondents were shown a short explanatory passage outlining the principles of the TPLF practice. Consumers were then shown more information about TPLF, including an example of TPLF, as well as arguments for and against the regulation or oversight of the practice. This information is detailed in full below.

Nine different safeguards relating to the regulation of TPLF were shown to and tested with consumers. Safeguards included the idea of funders being licensed and authorised by an independent licensing agency, funders being subject to independent reviews, and funders having a fiduciary duty to put the best interests of claimants over their own investment interests. Full details of the tested safeguards can be found below.

## Explanation of TPLF provided to consumers (shown in the official language of each market)

Third party litigation funding is a new and growing industry in RESPONDENT COUNTRY and across Europe, including in France, Germany, Spain, the Netherlands, Poland, and Italy, which turns lawsuits into investment opportunities. It allows outside funders to invest in lawsuits in exchange for a cut of any settlement or award.

Litigation funders seek out cases where there is likely to be a large award (such as collective actions) and arrange with the law firm to pay the costs of the legal proceedings in exchange for a share of the outcome. In most cases, these funding agreements take place in secret since there is currently no legal requirement for the funder or the lawyer to disclose whether a funder is involved or not. This means that judges, defendants and even claimants often do not know whether a funder is funding a lawsuit.

Funders structure their agreements so that they are able to influence strategic elements of litigation decisions, like accepting or rejecting a settlement agreement and even ensuring they have the ability to withdraw from a case. Funding agreements can also lay out how the funder will be paid. For example, when the claimant wins a funded case, the funder will often take their cut of the winnings before the claimant - often 20-40% of the proceeds of the case, or even more - leaving claimants with a significantly reduced payment.

Currently, there is no government oversight of litigation funding, meaning that litigation funders are largely unregulated in RESPONDENT COUNTRY and can operate without supervision or the risk of penalties for misconduct.

One highly publicised example of third party litigation funding is the litigation against Volkswagen in Germany, following the diesel emissions scandal.

In one lawsuit, a German consumer association reached a settlement with Volkswagen for €830 million, including one-off payments to consumers of between €1,350 and €6,257. Car owners had a choice to either accept that settlement or bring their own lawsuit against the company.

Meanwhile, a third party litigation funder teamed up with a private law firm to get Volkswagen customers to file a lawsuit instead of taking the settlement, promising payments of "up to €5,000" per car owner. However, in reality those payments were not guaranteed; the lawsuit could take months or years to resolve; and the fee that the funder would take from the lawsuit was not disclosed to the customers.

Funders argue that their large fees are justified given the amount of risk they take on by funding litigation, and that any financial recovery for claimants is better than none. Funders also argue that many claims could not be brought without their services. And some funders insist that they are able to adequately regulate themselves through voluntary codes of conduct, without any need for government oversight.

On the other hand, critics of third party litigation funding say that funders prioritise their financial interests over the interests of claimants in the case, and state that funders should have to disclose their investments and their terms so that all parties are aware of these. Critics also say that funders should not be able to control strategic decisions of litigation, and that funders should be obliged to see a case through until the end, without having the ability to withdraw their funding before the case is concluded.

## Specific safeguards tested (shown in the official language of each market)

Nine potential safeguards were tested with both survey respondents and qualitative research participants, with the order rotated to ensure that they were not always shown to respondents in the same order:

1. Third party litigation funders should be licensed and authorised by an independent licensing agency, before they can invest in lawsuits in RESPONDENT COUNTRY.
2. Third party litigation funders currently have no obligation to share the details of investments and agreements, meaning lawsuits can often proceed without all parties knowing that a funder is involved in a case. Funders should have to disclose their investments and their terms so that all parties involved in the lawsuit are aware.
3. Third party litigation funders should have limitations placed on them regarding the fees they are able to charge if the party they're funding wins or settles the case.
4. Third party litigation funders should not be able to control strategic decisions of litigation normally left up to the lawyers or claimants themselves, such as appointing lawyers, determining case strategy, or agreeing to a settlement with the defending party.
5. Funding agreements should be subject to an independent review, taking account of all relevant circumstances, to ensure they are not written unfairly in favour of the funders. If the agreement does not meet minimum fairness standards, it should be possible to require it to be modified, or even thrown out.
6. Third party litigation funders should be accountable to pay costs which arise during a legal proceeding or lawsuit if their side loses. This way, claimants in the case would not be left to bear all of the costs.
7. Third party litigation funders should have a fiduciary duty – i.e. they should be bound both legally and ethically – to put the best interests of claimants over their own investment interests.
8. Third party litigation funders should be legally required to see a case through until the end, without the ability to withdraw their funding before the case is concluded.
9. Instead of government regulation, third party litigation funders should be left to self-regulate by letting them adopt their own codes of conduct.



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