Feasibility Study for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights

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Feasibility study on a Union fund for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights

Table of Contents

Executive Summary ..... **i**

I. Introduction **1**

II. Task 1: stakeholders' consultation analysis **3**
- **A. Survey population and representativeness** **3**
- **B. Funding sources and obstacles for CSOs** **3**
- **C. Sources of financial support for litigation** **6**
- **D. Final views and suggestions** **7**

III. Task 2: donor inquiry **9**
- **A. Preliminaries** **9**
- **B. Summary of the data** **10**
- **C. Interpretation of the data** **11**
- **D. Supporters of individual case litigation in Europe** **13**
- **E. Two further funding initiatives worthy of note** **15**
- **F. Reflections from donors on good practice in litigation support** **16**

IV. Task 3: Summary of field interviews **17**
- **A. Current litigation practice** **17**
- **B. Current sources of funding for fundamental rights litigation** **18**
- **C. Issues ripe for future litigation** **19**
- **D. Views regarding Commission funding** **20**
- **E. Suggestions for structuring funding** **20**

V. Discussion **23**
- **A. EU competences** **23**
- **B. Potential litigation funding structures** **25**
- **C. Ancillary support considerations** **30**
- **D. Potential issue areas for fundamental rights litigation support** **31**
- **E. Sound fund management** **31**

VI. Conclusions **35**

Appendix A: Interviews **37**

Appendix B: Stakeholder Survey Text **43**

Appendix C: Financial Obstacles to Litigation Against Corporations **65**

Appendix D: Table of Litigation Donors **67**

Appendix E: The Role of Pro Bono **74**

Appendix F: Suggestions from Selected Donors on Structuring a Litigation Fund **76**

Appendix G: Field Interviews **77**

Appendix H: Sound Fund Management **91**

Executive Summary

I. Introduction

This study[1] informs the European Commission's Directorate General for Justice and Consumers ("Commission" in short) as to the feasibility and potential added value of EU funding for litigating cases relating to violations of democracy, the rule of law and fundamental rights in Europe.[2]

The study is based on interviews and research organised in three tasks:

(1) analysing a stakeholder survey conducted by the Commission to assess *the state of fundamental rights litigation under EU law and the Charter of Fundamental Rights of the European Union* ("EU fundamental rights litigation") being carried out in Europe presently (Task 1);
(2) mapping and assessing the current *state of funding support* for EU fundamental rights litigation (Task 2); and
(3) building on Task 1 and Task 2, and assuming the need (if any) for new funding, (a) *determining how to ensure coherence with the competences of the EU under the Treaties and the subsidiarity principle*, (b) delineating some *possible funding structures* that would constitute an added value to existing support for such litigation and that would fit within the Commission funding architecture, (c) identifying *issue areas of possible litigation that could be supported*, and (d) setting out some *basic principles of sound funding management* as reflected in the practices of other donors that currently fund litigation (Task 3)

The study is based on extensive research and stakeholder interviews for each of these tasks. Over the course of three months, 12 interviews were conducted in relation to Task 1, 23 interviews in relation to Task 2, and 66 interviews in relation to Task 3, the majority of all these having been in person.

II. Interview and survey findings

As to *existing support for rights litigation in Europe*:

- Only a very small number of donors reliably support such litigation to any significant degree; these include five private foundations, and one public donor (EEA/Norway)
- The vast majority of support for litigation is through core or project grants, where individual cases are *not* identified as to be brought under the grants, and where litigation tends to be just one of the activities that the grants support

[1] The study is part of the implementation of the "Preparatory Action on a Union fund for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights," by the European Parliament.

[2] The potential support for litigation under consideration here will sometimes be referred to as a, or the, "fund," as specified in the Technical Specifications for this study. Such a fund (with a small "f") is not to be confused with a Fund within the EU Multiannual Financial Framework, such as the Justice, Rights and Values Fund proposed for 2021-2027. Rather, and in line with the wider understanding of "litigation funds" in the human rights donor sector, which this report reflects, it is simply a dedicated set of funding to be disbursed by the Commission for the support of EU fundamental rights litigation. This report explicitly does not make any recommendation as to the creation or not of a Fund (with a capital "F") in the EU budget.

- Assessment of grants that support litigation generally is *not* done at the level of actual cases being brought, but rather, and as proxies, the focus is on the quality and footprint of the grant recipients generally
- The previous points notwithstanding, there are two donors that do support individual rights cases in Europe, and their approach, coupled with the approach of a donor supporting rights litigation in Canada, provide useful models for other litigation funds, including the possible support for EU fundamental rights litigation under consideration here

The following points were made by *litigators* (that is, litigating CSOs, and individual lawyers, usually working in law firms) in both the survey and the Task 3 interviews:

- Echoing the first bullet point above, most litigators that receive litigation funding receive it from one or more of the private foundations that are providing the bulk of current litigation support
- The vast majority said that their litigation budgets are insufficient for them to carry out all the rights litigation that they think is desirable
- There is an increasing interest in conducting EU fundamental rights litigation:
    - There are CSOs and individual lawyers that are bringing cases already, and are experts in such litigation
    - In addition, there are many other CSOs and individual lawyers that recognise the potential value of EU fundamental rights litigation, but that need and desire training and support to bring such cases
- Providing support for EU fundamental rights litigation is within the scope of Commission funding (a point confirmed through desk research)
- Various areas are ripe for EU fundamental rights litigation, including, most prominently, asylum/migration issues, discrimination issues, and criminal procedure/fair trial issues
- EU funding for litigation would represent an added value, because, it was said,
    - It would be funding that would not be perceived to be biased
    - It would be a further concrete demonstration of the EU's commitment to fundamental rights
    - It would emphasise the legitimacy of litigation as a tool for the implementation of the EU Charter of Fundamental Rights, and the credibility of CSO litigation efforts
    - It could persuade other donors to contribute to support for litigation
- Decision-making for awarding litigation grants should *not* rest with Commission services and should, in that sense, be *independent* of the Commission
- Grants should support "litigation programs" (that is, block grants, either for EU fundamental rights litigation generally, or for litigation on specified fundamental rights themes), allowing grantees the *flexibility* to bring cases as they see fit, and as opportunities arise

III. Conclusions

Based on the survey and interview data, as well as on the considerable experience of the authors in creating and operating litigation funds, the following conclusions may be drawn:

As to the feasibility and appropriateness of the Commission supporting fundamental rights litigation:

- Such support would add substantial value because (1) there is a clear need for funding for such litigation, (2) there are opportunities to advance fundamental rights jurisprudence, and (3) such funding would be within the scope of Commission grants architecture
- If the sole aim of the financial support is to advance fundamental rights jurisprudence, grants could be limited to individual cases. If, however, the aim is also to build capacity in the field, i.e., to assist more CSOs and individual lawyers, through training and mentoring, to be able to bring cases, then funding for "litigation programs" would provide greater value

As to the potential structure of such funding:

- The structure that would deliver the greatest value would be for funding from the Commission (for instance, in the form of a single grant, initially for five years and renewable every three years) to go to a regranter or regranters (per rights issue area, if appropriate); such regranter(s) would provide grants for fundamental rights litigation in Europe
- Another potential structure would have the Commission services themselves making grants decisions and administering the grants. However, there are significant disadvantages to this approach, including an increased workload for the services, as well as the challenges of (1) services needing to have the contextual expertise to vet all potential applications, across 27 Member States and 27 legal contexts, and (2) the potential for political or other tangential considerations to influence, or to be perceived to influence, grants decisions
- If Commission services are to decide individual litigation grants, convening an advisory panel of persons with (1) reputations for integrity and neutrality, and (2) local and issue-specific expertise, would be a way of ensuring high quality and nuanced grant-making, and would mitigate against the risks of actual or perceived bias in that grant-making

As to substantive features of the grant structure:

- Providing for mentoring and training attached to fundamental rights cases actually being brought would be an effective means of building the field
- Flexibility and nimbleness are important features of grant-making in this context, to enable litigators to respond to opportunities that require prompt responses
- Simple grant-making procedures, low application thresholds and an absence of co-funding requirements would be the best means of ensuring that smaller but high quality CSO litigators will be able to apply for, and ultimately to receive, funding
- Sound financial management could be ensured through certain best practices, including:

- grant selection criteria being closely aligned with the basic goals of the grant-making, both as to substantive litigation areas, and as to individual case selection, or litigation program selection, as determined by the Commission
- risks, including as to adverse cost orders, reputation, and cases being brought that are not in line with the purpose and intent of the Charter as a whole, being assessed and managed
- grants being monitored and evaluated, and lessons learned from these efforts being applied going forward

I. Introduction

This study[3] informs the European Commission's Directorate General for Justice and Consumers ("Commission" in short) as to the feasibility and potential added value of EU funding for litigating cases relating to violations of democracy, the rule of law and fundamental rights in Europe.[4]

The study is based on interviews and research organised in three tasks:

(1) analysing a stakeholder survey conducted by the Commission to assess *the state of fundamental rights litigation under EU law and the Charter of Fundamental Rights of the European Union* ("fundamental rights litigation"[5]) being carried out in Europe presently (Task 1);
(2) mapping and assessing the current *state of funding support* for fundamental rights litigation (Task 2); and
(3) building on Task 1 and Task 2, and assuming the need (if any) for new funding, (a) *determining how to ensure coherence with the competences of the EU under the Treaties and the subsidiarity principle*, (b) delineating some *possible funding structures* that would constitute an added value to existing support for such litigation and that would fit within the Commission funding architecture, (c) identifying *issue areas of possible litigation that could be supported*, and (d) setting out some *basic principles of sound funding management* as reflected in the practices of other donors that currently fund litigation (Task 3)

Extensive research and stakeholder interviews were conducted for each of these tasks. Over the course of three months, 12 interviews were carried out in relation to Task 1, 23 interviews in relation to Task 2, and 66 interviews in relation to Task 3, the majority of all these having been in person.

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Section II, just below, contains the stakeholder survey analysis. Section III contains the data and analysis with respect to the donor interviews, while Section IV summarises the field interviews. Section V sets out potential structures and areas of concentration for a fund, based on analyses of needs and competence. Section VI summarises the principal conclusions arising from (1) the interviews, in combination

[3] The study is part of the implementation of the "Preparatory Action on a Union fund for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights," by the European Parliament.

[4] The potential support for litigation under consideration here will sometimes be referred to as a, or the, "fund," as specified in the Technical Specifications for this study. Such a fund (with a small "f") is not to be confused with a Fund within the EU Multiannual Financial Framework, such as the Justice, Rights and Values Fund proposed for 2021-2027. Rather, and in line with the wider understanding of "litigation funds" in the human rights donor sector, which this report reflects, it is simply a dedicated set of funding to be disbursed by the Commission for the support of EU fundamental rights litigation. This report explicitly does not make any recommendation as to the creation or not of a Fund (with a capital "F") in the EU budget.

[5] The term "fundamental rights litigation" will be used throughout to refer specifically to litigation under EU law in support of fundamental rights as defined in the Charter of Fundamental Rights of the European Union. This is an important distinction from, and subset of, "human rights litigation," which, as will be discussed in this report, is understood by most donors, CSOs and litigators as litigation being brought under the European Convention on Human Rights, national constitutions or other sources of rights in domestic law.

with (2) the expertise and experience of the authors in creating and running litigation funds.

Appendix A contains a list of all interviews conducted. Appendices B and C set out, respectively, the text of the stakeholder survey, and some comments on the challenges of rights litigation against large corporations and other wealthy entities. Appendix D contains a table detailing the existing litigation support of the donors surveyed, and Appendices E-H discuss in further detail the role of pro bono, recommendations from selected donors, findings of field interviews, and sound funding management

II. Task 1: stakeholders' consultation analysis

This section analyses the outcome of a questionnaire that was circulated by the Commission's DG Justice and Consumers between April and June 2018 and that aimed to assess gaps and needs in support for litigating fundamental rights cases. The text of the questionnaire is reproduced at Appendix B.

A. Survey population and representativeness

The survey drew 59[6] responses. Forty-five were from CSOs, with the others coming from national human rights institutions, law practices, international organisations and academic institutions. Thirty-nine indicated that their activities include litigation. Twenty-three operate across the EU or in several countries, and are mainly based in Belgium and a few other western or central European countries; the remainder are active only in the country where they are based and hail from across the EU.

While the survey response cohort is broadly geographically representative of stakeholders across the EU, it is not representative in other ways:

- Very few human rights donors, national human rights institutions, law firms or litigators not attached to CSOs responded
- A number of prominent CSOs whose activities include fundamental rights litigation did not respond, including international organisations such as the European Roma Rights Centre and Privacy International, as well as national organisations such as the Hungarian Helsinki Committee

The lack of responses from groups other than CSOs means that clustering responses according to the profile of respondents would not provide meaningful results.

B. Funding sources and obstacles for CSOs

1. Trends: diminishing funds

A lack of funding was a serious obstacle for all. 86% of respondents indicated that a lack of adequate funding represents "to a high extent" an obstacle to litigation, legal counselling and support on fundamental rights. Several elaborated that donors fail to appreciate how powerful a tool for change litigation can be, and how much it requires in terms of resources. One respondent, from a global human rights litigating CSO, indicated that donors overall are still wary of funding litigation:

> [A] significant issue is the misperception about the utility, potential and cost/benefit of human rights litigation among funders … the number of funders remains low meaning it is difficult to create a sustainable funding strategy.

Another noted how "difficult [it is to explain to a donor] how non-linear, slow and unpredictable litigation is."

[6] There were some duplicates and overlaps: there were two submissions each for the Danish Institute for Human Rights and the Association for Nature, Environment and Sustainable Development Sunce, and the same individual responded for both the Czech Association Justice and Environment and the Environmental Management and Law Association.

In addition to this lack of funding for fundamental rights litigation, 73% of respondents highlighted donor focus on short-term projects and a lack of general operating support as specific problems.

For 37.5% of the CSOs engaged in litigation, private foreign funding constitutes their largest source of income.[7] Crowdfunding and small donations represent 16.7%, while regranting, public funding and private national funding represent around 11%. EU and public international funding sources make up only 6.5% each.

Funding trends show a decrease almost across the board, but in particular as regards private foreign funding: during 2015-2018 this decreased or stopped for 43% of CSOs active in fundamental rights litigation. The same group of organisations also experienced a decrease in public funding, Commission funding, public international funding and regrant funding. There were slight increases in private funding from within countries, and in income from crowdfunding/small donations, but it is unclear from the survey responses whether this has made up for the loss of funding from other sources (anecdotal evidence suggests that it has not).[8]

2. Obstacles to obtaining funding

The biggest obstacle to accessing funding for fundamental rights litigation, indicated by 53% of respondents, is the complexity of application procedures. But other obstacles were also highlighted:

- The main "external factors" mentioned included
  - criteria for consortia and partnerships (indicated by 51% of respondents)
  - reporting procedures (49%)
  - financial capacity criteria (45%)[9]
- 39% of respondents stated that they lack technical/operational capacity to apply for funding

Additionally, in a small number of countries, there may be regulatory impediments to funding litigation or to CSOs engaging in litigation.[10]

27% of respondents voiced criticism of various aspects of recent Commission funding schemes. The critiques focused on perceived bureaucracy, funding thresholds, co-financing requirements, and a suspected preference for funding large organisations and coalitions. One respondent, for example, thought there is a

> bias towards funding large organisations ... where the Commission sees the risk that money disappears is the lowest. This ... risk-averse awarding of funds, paired with co-financing requirements, reimbursement ... and [complex

[7] The survey did not define "private foreign funding," "public funding," or others of the terms used, and it is not clear exactly how respondents understood these.
[8] Survey respondents did not elaborate on the total amount of funding lost.
[9] These criteria typically require the organisation that applies for a grant to demonstrate that they have the financial capacity to handle the grant, for example by submitting accounts showing that they are solvent, by showing that they have competently handled previous grants, or in other ways.
[10] For example, a Spanish respondent indicated that "it is forbidden to support legal expenses," while a Czech respondent stated that "legal counselling … can be run only by attorneys at law and not by NGOs."

> procedures] means that young, innovative and small organisations driven by volunteers … won't apply.

Another respondent said that the funding threshold makes it "difficult to smaller organisations to apply," and that the Commission's co-financing requirement is difficult "specifically for long-term projects and support." Others complained that the need to submit applications in English or French forces them to run up translation costs just to apply for funding; while the requirement to apply in consortia leads to "running and hunting all over Europe to find partners." One noted that, de facto, the requirements for Commission funding bids mean that "only big firms can submit offers"; while others observed that funding conditions rule out new, volunteer-driven and grassroots organisations, and make it harder for those in lower-cost countries to meet the grant threshold. Some respondents did not think that these conditions improved the quality of bids. As one put it:

> [The] yearly turnover of CSOs in Slovenia is much lower than yearly turnover of CSOs in bigger EU countries. Almost all calls require partnership which sometimes is actually not relevant or it just creates additional costs for the donor, but does not increase the quality of the project or show better impact.

3. Other obstacles

Other obstacles to litigation indicated by survey respondents boil down to a lack of awareness, confidence and financial capacity among potential individual litigants;[11] and a lack of resources – both financial and human – for CSOs.[12]

Specifically with regard to litigation against large corporations, one respondent noted that, "[r]etaliation in the form of SLAPP suits ["strategic litigation against public participation"] is increasingly common for journalists as well as legal NGOs." Another stated, in terms echoed almost verbatim by several others:

> Human rights cases against corporations are typically characterised by huge inequality of litigation resources … legal uncertainty and the high financial costs and risks constitute a strong deterrent effect.

Respondents indicated the reverse of nearly each of these as a potential incentive to fundamental rights litigation, with many focusing on funding and support. A Czech respondent, for instance, noted that

> [t]he primary factor is the existence of strong personal interest or values held by the affected individuals. Then, there must be a legal support available as well as mechanism[s] to overcome financial barriers.

[11] Respondents agreed that nearly all of the suggested obstacles to individuals exercising their rights are relevant or very relevant: lack of financial resources (ticked by 93% of respondents); lack of confidence in the litigation and the long-term nature of proceedings (85%); lack of enforcement by national authorities or lack of confidence in their capacity to address the problem (83%); lack of monitoring of enforcement (78%); lack of awareness of rights (76%) and remedies/redress mechanisms (82%); and high legal fees (73%).

[12] Obstacles listed by CSOs as "relevant" or "very relevant" included: lack of adequate/accessible financial resources to assist/support applicants (ticked by 93%); the costs of legal proceedings (78%); lack of capacity (including human resources) (78%); and lack of adequate in-house legal expertise (66%).

Several noted the importance of CSOs. "The presence of a funding/supporting organisation is often the key factor for victims," said one, and another said that "encouragement, support and empowerment of the victims of human rights violations by [CSOs] plays a big role."

Respondents overwhelmingly agreed with the suggestion in the survey that enhanced legal expertise in relation to EU law and fundamental rights litigation, and adequate support for individuals, were strong enabling factors. There was moderate support for the other suggested enabling factors (a well established partnership/coalition among stakeholders; adequate communication/awareness-raising strategies; regular monitoring and evaluation of litigation outcomes; and adequate risk mitigation strategies). No one thought that any of these was irrelevant.

The same respondents who indicated specific risks around litigation against corporations also suggested a number of changes in law and procedure that would incentivise such litigation.[13] While these topics are generally beyond the scope of the preparatory action, Appendix C sets out some relevant observations and comments, from survey respondents as well as interviewees.

More than 80% of respondents indicated that the main suggested factors to be taken into account when initiating cases should be the impact on the interpretation of EU law and the Charter of Fundamental Rights of the European Union ("Charter"), and the impact on the transposition/implementation at national level of EU law and the Charter. There was significantly less support for the suggested factors of the number of individuals affected by the violation of particular rights and concrete/reasonable possibilities of redress or compensation; and the existence of cross-border impact was thought least relevant.

C. Sources of financial support for litigation

Respondents indicated that financial support for litigation has come primarily from applicants' own resources and private litigation funds. A minority of cases were said to be funded from public legal aid, and small numbers of cases were funded through insurance, crowdfunding, no-win-no-fee arrangements or pro bono. A number of respondents pointed out that legal aid on its own is often insufficient, as it pays only for "run of the mill" and relatively low-resource cases rather than strategic litigation, which can take years, requires highly specialised lawyers and is highly resource-intensive.

Respondents emphasised that additional support would enable them "to target systematic social problems and human rights violations through strategic litigation" and bring cases that would not otherwise be brought. While respondents ticked litigation-related activities they would be able to undertake with more funding, all of them boiled down to their needing funding for their own in-house legal staff. As one put it: "Legal costs equals staff costs." The only other costs that need to be paid are court fees and other litigation-related costs; and, in some cases, specialised legal counsel.

[13] Suggested law reforms included collective redress in judicial proceedings; enhanced pre-trial disclosure; enhanced transparency around issues such as parent companies and controlling entities; extraterritorial jurisdiction; and a reversed burden of proof.

Some respondents seemed perplexed by the question of "added" value, as it seemed self-evident to them that current levels of financial support are far below that required. As one put it: "Any further financial support would add value." Another stated:

> Most of the strategic cases involving fundamental rights are initiated by independent human rights actors … [M]ost of the time lack of funding precludes them from supporting cases or continuing cases.

When asked about potential adverse consequences to funding litigation, respondents generally said that there are not any that should stand in the way of providing such funding. As one respondent put it, "[c]urrently there are almost no resources and no legal representation available, so any form of assistance greatly outweighs risks."

A minority of respondents did think that there might be some adverse reputational consequences, either for the donor or for the recipient, because of potential conflicts of interest or a perception of financial dependence. But these could be mitigated, it was argued, through funding conditions as well as by strengthening the independence of grantees. Respondents in one country indicated a specific and very deliberate, on the part of the government, adverse consequence: retaliatory measures. "[I]n illiberal democracies, this may result in changed legislation against legal aid NGOs."

Respondents agreed that international organisations, CSOs (including as intermediaries), the EU and private entities would be best placed to provide financial support. A minority of respondents thought national independent human rights bodies are well placed, and most thought that national authorities are not appropriate, given that human rights violations are often perpetrated by state actors.

Most respondents agreed that the best criteria for financial support to litigation are the expected impact on the interpretation of EU law and the Charter generally, and implementation of EU fundamental rights at the national level. Some thought that pertinence to pre-defined priority areas and the number of individuals affected also are relevant.[14]

D. Final views and suggestions

Respondents overwhelmingly used the final open text box in the survey to indicate the urgent need, and their strong support, for financial support for fundamental rights litigation. Some, in addition, included suggestions as to the shape of an EU litigation grant program. Some examples:

- There should be greater flexibility as regards consortia and partnership requirements, as meeting these requirements is not always feasible or may not lead to the best results
- In view of the low current funding levels, and the low appetite of existing donors to fund litigation, the co-funding requirement should be lowered or abolished, and/or in-kind contributions should be considered as co-funding

[14] 80% of respondents declined to answer the question concerning funding criteria related to the beneficiary, as opposed to the legal action as such. Those who did answer this question constituted too small and unrepresentative a sample to draw any conclusions from; but they generally supported the suggested criteria related to the independence and not-for-profit nature of the beneficiary.

- Given the long-term and unpredictable nature of litigation, long-term funding should be made available, with grant requirements/outputs adapted to litigation
- Given the labour-intensive nature of litigation, a realistic level of funding for staff costs should be ensured
- Overall grant requirements should be simplified, and effective guidance should be provided regarding financial management and reporting
- Application procedures should be simplified, and consideration should be given to allowing at least initial, summary applications to be submitted in languages other than English or French

III. Task 2: donor inquiry

Task 2 involved conducting a survey of the "public and private 'litigation funds'" in "democracy, rule of law and fundamental rights." This Section summarises and discusses the findings from the 23 interviews conducted, with 19 different donors.

A. Preliminaries

1. Interviews

For the most part, Task 2 interviewees consisted of private foundations, and in four cases public bodies, which, in various ways, support rights litigation (with the interview focus almost exclusively on funding in/for Europe).

Based on the authors' experience, and also on feedback from the Task 3 interviews with CSO and individual litigators (summarised at Section IV), it is fair to conclude that the list of donors covers the principal supporters of European rights litigation. The bases for concluding this are the following:

- The donors listed in the table in Appendix D are, with only one or two exceptions, the *only ones* mentioned by any of the donors interviewed
- More significant, in the interviews with over 60 European litigators, typically only one or a very few of the donors listed in the Appendix D table were mentioned as supporting their litigation
- By far the donors most frequently listed were the Adessium Foundation, Luminate, the Oak Foundation, the Open Society Foundations (OSF), the Sigrid Rausing Trust and EEA/Norway[15]

2. Methodology, and a caveat

Over the course of the Task 2 interviews, the following questions were expected to be covered:

- how much funding the interviewees provide for litigation
- how many grantees they support for litigation
- the rights supported
- grant-making criteria and criteria for the success of grants
- rate of success of grants
- risk assessments undertaken
- monitoring, evaluation and learning (MEL) activities

As is more fully explained below, however, many of these questions turned out literally to be inapposite as to most donors. This is because, as is also explained below, the core assumption behind these questions was that donors that support litigation do so through grants to support *particular identified cases* involving one or

[15] That all said, given the availability of funds and time, this could not have been an *exhaustive* mapping of donors supporting litigation in Europe. This is because there are literally scores of private foundations supporting rights work in Europe, along with bilaterals of varying kinds. It may well be that some foundations or bilaterals that were not interviewed due to time constraints may have a case or two that they support, as part of general support or project grants. However, the fact that none was mentioned in this study's extensive interviewing is persuasive that there are no other *substantial* donors not represented here. For the purposes of this inquiry, there are no lessons to be drawn from the incidental funding of litigation by such groups.

another right, and thus their assessment of the propriety and ultimate success of relevant grants likely is measured against the prosecution of those cases. As emerged from the interviews though, this is simply not how litigation grant-making tends to work. See subsection C.

B. Summary of the data

1. Data on donors providing direct funding.

The table in Appendix D summarises the data with respect to donors that support litigation in Europe to some significant degree. The table was relegated to an Appendix for technical reasons (relating to formatting), but readers should consult it at this point, and should bear it in mind for the discussion in subsection C.

2. Pro bono support

Many lawyers in law firms across Europe assist CSOs in litigation either pro bono or at reduced fees. This, of course, must be counted as "litigation support," in addition to the funding provided by donors. This aspect is discussed in somewhat more detail in Appendix E. The main points are these:

- The willingness of law firm lawyers to work pro bono differs considerably from country to country, with more such support being provided in e.g., France, Hungary and Poland (and the UK), and much less in other Western European countries
- Pro bono support is more easily found for specifically defined tasks, such as legal research, rather than for long-running litigation
- Lawyers providing pro bono assistance typically specialise in certain areas (e.g., tax or employment), and have much less experience in fundamental rights litigation, though even they may carry out legal research in support of or preparatory to such litigation
- If a CSO requests legal assistance in litigation but the law firm or lawyer concerned already represents the party against which the litigation would take place, even if that representation is on a different matter, the lawyer or law firm will declare that they are "conflicted" and will decline to represent the CSO.
- There is often a symbiotic relationship between CSOs and law firms providing pro bono support, with CSOs usually directing the litigation, and providing communications with the clients; thus CSOs typically are required to play major roles in litigation even when they are supported by pro bono partners
- Pro bono lawyers only lead human rights litigation in exceptional cases where a senior partner at a law firm has subject matter expertise and strongly has supported her or his firm taking on the litigation

In sum, while pro bono presents opportunities, there are limitations; rarely is pro bono support a substitute for needed litigation and related work by CSO partners.

C. Interpretation of the data

As the reader will see clearly from the table at Appendix D, most litigation funding is not earmarked as such. This finding is detailed and then discussed next.

1. The challenge: no earmarking

The simple fact is that funding for fundamental rights litigation in Europe is not straightforwardly calculated; and perhaps is not really calculable at all. Specifically, and crucially, the largest private foundation supporters here, as well as EEA/Norway, are disposed generally to provide core grants or project grants that are not litigation-specific, and hence do not identify specific cases to be brought with their funds; and such grants are the ones principally at issue for this inquiry. Relevantly, grants from these donors go to CSOs that, almost without exception, do litigation *among other things* – for instance, capacity building, advocacy, and/or communications outreach. Accordingly, it is more or less impossible to determine, for any donor that does say that it, in some sense, supports litigation, *how much of its relevant funding* is devoted specifically to that work.

This was precisely the situation with the most prevalent donors interviewed. Program officers there confirmed that litigation is one of their interests, though none of them has dedicated streams or portfolios for fundamental (or human) rights litigation. Rather, litigation support crops up in grants in their various issue-focused streams, e.g., anti-discrimination work, or improvements in criminal procedure.

2. An explanation; and implications for assessing litigation applicants, measuring success, and assessing risk

There has been an increasing move amongst *private human rights/democracy foundations* (though this does not appear to be the case for public donors like EEA/Norway) to provide *core* grants instead of *project* grants. This move in part stems from a recognition that the "field" understands far better than foundation program officers do what is needed, in terms of activities and emphases, to move towards solutions to particular human rights problems. This has meant that foundations are tending to move away from designing their own sets of substantive objectives, e.g., to have particular laws repealed, and instead to focus on broad issue areas, e.g., the protection of LGBTI rights. Once those commitments are in place, efforts are made to find the most effective groups working in those areas, and to provide them with institutional funding that leaves them free to attack the relevant issues in ways they deem most appropriate.

This approach is very much reflected in the interviews. In particular, with the exception of the Digital Freedom Fund, and a partial exception of the Media Legal Defence Initiative (both described at subsection D below), donors that are inclined to support litigation are not ready to dictate what particular cases should be brought – or indeed, to say *when* litigation is indicated at all as a means of dealing with a particular human rights issue. Nor will they stipulate what mix of litigation to advocacy or messaging is appropriate: again, they leave it to the grantee.

Underlying this approach, too, is a theory for *what criteria should be employed for grant-making,* and *how to assess the success of grants*. As to the former, the core issue tends to be *the general quality of the applicant/grantee*: its track record,

standing in the relevant community, and similar factors; these serve as *proxies* for the *impact* that the applicant/grantee has had and is likely to have.

Similarly, *assessment of the quality of grants*, in this mode, typically focuses on activity summaries, assessing if the reported activities are consistent with the mission and goals that the organisations have themselves set, and on self-reporting of results achieved. Again, there is little focus on particular litigation strategies per se, let alone particular case outcomes.

Finally, any *risk assessment* as to litigation, in particular, generally must follow the same lines as above, since cases are usually not identified up front, or indeed litigation itself is not specifically broken out in grant applications: risk mitigation, in a word, is done through careful vetting of organisations *at organisational level*, in terms of prominence/reputation in their fields, and sometimes, as part of this, some accounting of litigation successes.

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To avoid possible misunderstanding: it is *not* the case that assessment of prior litigation is *not* part of assessments of the success of grants, or indeed of assessments of the suitability of grant applications, where litigation is part of what is on offer from applicants and grantees. If, for instance, an applicant or grantee is principally a litigator, most of the donors interviewed will consider their track record in litigation – wins and losses, naturally, but also the wisdom of their having taken certain cases, follow-up activities in relation to cases brought, and even the impact of cases that might have been lost (e.g., impact of allied communications and advocacy efforts). Indeed, a showing of past litigation imprudently undertaken, or a very poor win-loss record, might well counsel against funding a group that proposes to do a fair amount of litigation, and might too figure into an *ex ante* risk assessment. That all said, however, this sort of inquiry and assessment is quite different from grant-making, or assessing, based on consideration of specifically identified cases.

3. Summing up

The fact that litigation funding, not to mention support for individually identified cases, is not separated out by the principal donors interviewed, means that they typically do not have information as to some of the issues set out above. In particular, there are few, or no, answers to:

- how much funding goes to litigation support
- what criteria are employed for deciding to fund individual cases, or for assessing the efficacy of particular case work, because grants do not focus on either in relation to litigation that ends up being supported
- what risk management assessments are made as to any litigation that is supported (since the grants tend not to be made in contemplation of specifically identified cases)

That all acknowledged, two organisations interviewed do directly support fundamental (or human) rights litigation in Europe on a case-by-case basis. Their thinking and approaches are described next.

D. Supporters of individual case litigation in Europe

1. Digital Freedom Fund (DFF)

DFF, https://digitalfreedomfund.org/, is a recently-created free standing fund devoted to supporting *individual* "strategic" cases[16] on digital rights (privacy, human rights in tech, and protecting the free flow of information online), in any country in the Council of Europe area.[17]

Three types of support are available: support for cases *at a single instance* (e.g., a trial, or an appeal, including to an international tribunal); pre-litigation research; and emergency situations (e.g., costs for filing an appeal on short notice).

The basic criteria for case selection are these:

- proposed cases should fall, generally, in one of the above thematic areas
- the projected legal arguments to be made are salient
- an optimal forum is chosen for the litigation
- there is a satisfactory level of risk
- the litigation is embedded in a wider strategy for change, including an implementation strategy

While DFF generally prefers not to fund lawyers external to the applicant, they will sometimes do so if the lawyer's fee is at a reduced rate, or is capped.

There have been grants for 55 cases in the first (roughly) 18 months of DFF's operations; of these, about 10-15% are for fundamental rights (i.e., Charter-related) work. The grants have varied considerably in coverage, with some for more than one case, some including pre-litigation research, some for research only, and some for all this plus actual trial or appeal proceedings. Adverse costs (that is, costs awarded to the opposing lawyers for fees and court costs in the event that the grantee loses the case) are not covered: the interviewee said it was hard to see any donor providing for these, as they can be huge (hundreds of thousands of Euros in some jurisdictions).[18]

The interviewee declined to speak to the average cost of cases, as not all grants cover all litigation costs (for example, organisations with in-house lawyers ask for different grant amounts from organisations that have to use external counsel). As well, costs vary widely country to country.

DFF staff are responsible for vetting applications and sending write-ups to an expert panel, which in turn makes recommendations. The DFF Board makes the grant decisions. The process takes on average two to three months.

As to measuring success, or impact, or just progress in cases, this is done through assessment of milestones within cases, as well as numbers of cases brought. Very few

[16] "Strategic," here, according to DFF, means that the cases have implications beyond any for the parties, and are aimed at changing law or policy.
[17] The interviewee was not yet in a position to indicate the grants budget due to the youth of the organisation, but its first financial report indicated a grants budget of well below €1m.
[18] Though they can be very small in others – e.g., another interviewee said that they are capped at €34 in Austria.

supported cases have been concluded at this point, however, and so success measurement, and the process to be deployed for it, are still in their infancy.

2. Media Legal Defence Initiative (MLDI)

MLDI, https://www.mediadefence.org/, makes two kinds of litigation grants. First, there are "block grants," for bunches of cases (about €455,000 (£400,000) per year in total for such grants). Second, there is support for individual (usually "run of the mill") cases (that is, cases meant to provide relief only for the client); these latter are supported for a total of around €136,000 (£120,000) per year.

The *block grants*, the majority of which go to European CSOs, do *not* provide support for individual specified cases; rather, they simply provide support for cases that, over the grants periods, the grantees see fit to bring. This is because MLDI does not believe, generally, that it should be selecting cases to be brought; rather, in its view, grantees should be given the flexibility to make such decisions as situations arise in their jurisdictions.

These grants tend *not* to be exclusively for litigation. At least half have capacitation components.

Criteria employed for making these grants include:

- the need in the country for litigation interventions
- the relative independence of country courts
- the proven litigation competence of the applicant CSO

Criteria for success of the grants include:

- the number of cases delivered as against the number promised, where each *instance* (e.g., a trial, an appeal) counts as a "case"
- some indication of awareness raised, workshops conducted and the like. (The number of *wins* is typically *not* employed as a success criterion)

MLDI's funding for *individual cases or emergency support*, tends to be for "run of the mill" cases that are responses to emergencies that journalists are facing, rather than for strategic cases. Funding is for the "instance," with an expectation that the next instance will be funded as well.

Criteria for awarding these individual case grants include

- whether the victim is a journalist (or citizen journalist)/media outlet
- whether the person has been targeted because of their journalistic work, and
- whether an actual case is at hand

Criteria for success depend on what is reasonable to expect under the circumstances.

3. Comments on these "outliers"

DFF and MLDI are described as outliers just because the tendency in litigation support outside these two donors, as noted, is *not* for individually identified cases, and indeed not even *just* for litigation, even when cases are not identified. Indeed, even

MLDI, in the bulk of its support in financial terms (through block grants), does not support individual cases, and thus does not employ criteria for grant selection in terms of the merit of individual cases.

DFF is different in this regard, as to the majority of its grant-making, and thus it, along with the Canada Court Challenges Program described next, might serve as a model, or at least can suggest some directions, for litigation supported by the Commission, in the event that it chooses to support individually-identified cases.

E. Two further funding initiatives worthy of note

Two other programs of support for litigation are worth describing here. Neither, however, is focused on Europe.

1. The Canadian Court Challenges Program

The Canadian *Court Challenges Program*, https://pcjccp.ca/ (Program) has been in place (on and off) for many years. Currently, it supports litigation on fundamental rights as set out in the Canadian Charter of Rights and Freedoms.[19] The annual budget is €3.2m (CAD 5m), of which €2.4m (CAD 4m) is provided in grants.

Structurally, the Program sits in the University of Ottawa, which is its fiscal sponsor, and is administered pursuant to an MoU with the federal government. Program staff, three lawyers and two administrative persons, are formally University employees, but operationally are fully independent of the University.

Individual cases are supported. There are three types of support:

- for "trials"; legal time, research, court time, expert fees, and so forth, can be funded up to €130,000 (CAD 200,000); crucially, it is the trial itself that is funded, regardless of how long it goes for (thus, a trial grant is *not* for, e.g., a year or two years; it is simply for "doing the trial")
- for appeals, up to €32,000 (CAD 50,000) per instance
- for development of "test cases," up to €9,700 (CAD 15,000), for basic research and outreach to determine if a qualifying case might be brought

Staff receive applications and do the initial vetting. They send reports to an independent seven-person legal expert panel, which makes grant decisions.

Criteria for case selection, as set out broadly in the MoU, include that cases must be

- against the federal government (and not provincial governments)
- of "national importance"
- "test cases"
- such as to "advance rights"

Applications must come from the "client." Once a grant has been decided, the funds must go to a trust fund established by the client's lawyer; this can be an external lawyer, or can be for a lawyer from the client itself. It is worth noting that in Canada,

[19] https://laws-lois.justice.gc.ca/eng/const/page-15.html

CSOs have standing generally to bring fundamental rights cases, and so, often they will be the "client."

There have been 15-20 grants made in the last year, for trials, and about half a dozen grants for appeals.

2. UNESCO Global Media Defence Fund

The main details of this new Fund can be found in the table in Appendix D. Two relevant observations: First, the Fund will not support individual cases because Fund staff, sitting in Paris, do not feel they have the bandwidth or expertise to assess the potential merit of cases in regions and contexts with which they do not have deep familiarity.

Second, the Fund will consult external experts in the process of deciding which grants to support. But it will be Fund staff within UNESCO who will make final decisions. When asked if another option might have been to vest that authority in an independent expert panel, the interviewee said that this is not consistent with internal rules at UNESCO, and thus, that initiating such a system would require a series of decisions that would be time-consuming and cumbersome to achieve.

As will be detailed Section IV, however, there was a near-consensus from field interviewees that the litigation grant structure for the Commission's proposed fund, at least as regards funding *decisions*, should be *independent* of the Commission. It is probably fair to presume that the same point would be made by these interviewees as to this UNESCO Fund.

F. Reflections from donors on good practice in litigation support

Two comments *from donors* as to how Commission-supported rights litigation might best be managed are worth setting out. In a nutshell, a small number of donors each argued that (1) ideally, third parties, possibly regranters, would be best placed to make grant decisions, and (2) a rapid response facility embedded in the grant-making structure would be very useful, in light of how frequently litigation needs arise suddenly and unexpectedly, and require immediate attention. See Appendix F for some further details on these.

IV. Task 3: Summary of field interviews

This Section summarises the interviews conducted in person during site visits to four European Member States, and interviews conducted mainly by phone/ videoconference with CSOs or individual lawyers from 12 other countries – 10 Member States and two others (where conducted litigation was in or related to Member States or the EU). The full interview data can be found in Appendix G.

The core topics for the interviews were:

- current litigation practise: types of cases brought, in which jurisdictions
- sources of funding for interviewees' current litigation
- which issue areas are ripe for fundamental rights litigation in the near future (including which of these areas interviewees would be eager to conduct litigation in)
- the desirability of EU funding
- suggestions to the Commission for how the funding should be structured

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Two general points are worth noting before the details are set out. First, the political and legal contexts in which interviewees worked differed from country to country. Interviewees in Hungary and Poland described operating realities that were starkly different from those in, for example, France or the Netherlands. CSOs and lawyers in the former Member States that are engaged in fundamental rights litigation are smeared and vilified; it would not be an exaggeration to describe theirs as a "hostile environment."

Second, CSOs in some countries, e.g., Hungary, handle far more cases – hundreds more, even – than those in some other countries where we conducted interviews. We did not analyse in detail the reasons why CSOs in these countries handle so many more cases; what is clear is that there is a need for fundamental rights litigation in some countries that goes beyond the concept of "strategic" human rights litigation under which only a small handful of cases are taken. These differences, and the political and legal contexts within which CSOs and lawyers operate, interviewees agreed, need to be taken into consideration in grant-making decisions.

Bearing these differences in mind, common themes did emerge, particularly in relation to funding needs. The interview data is summarised next.

A. Current litigation practice

As to *litigation actually conducted*, the focus has been on constitutional or human rights litigation. Nearly all interviewees proceed in much of their litigation under local constitutional provisions, or under national law implementing the European Convention on Human Rights, with an eye to the European Court of Human Rights (ECtHR) as a venue of last resort. Litigation based on the Charter, with or without referrals to the Court of Justice of the European Union (CJEU), has emerged only relatively recently and is mostly the result of CSOs and lawyers seeking to fit their existing *human rights* litigation into a fundamental rights mould.

Some CSOs and litigators do have an explicit strategy of fundamental rights litigation, with or without seeking CJEU referrals. The issues litigated, relating specifically to EU law/fundamental rights, included (with numbers of interviewees mentioning each in parentheses):

- equality and non-discrimination (9)
- migration and asylum (7)
- privacy/data protection (5)
- criminal procedure/fair trial standards (5)
- freedom of information (4)
- environmental rights (4)
- rule of law or human rights generally (3)
- freedom of expression (2)
- children's rights (2)
- against corporations for human rights abuses (1)
- implementation of EU generally (1)

Many CSOs said that their *capacity for litigation* depended on in-house legal staff. For most, this consists of a modest number, ranging from two to six lawyers, although a few larger organisations interviewed employ up to twenty lawyers. Most interviewees said that they use outside lawyers to supplement their internal capacity. Where they have a budget to do so, CSOs pay external lawyers – though usually far below their market rates; others depend on contributions pro bono.

B. Current sources of funding for fundamental rights litigation

The main *funding sources* for virtually every group that engages in litigation are some combination of the Adessium Foundation, Luminate, Oak Foundation, OSF, and the Sigrid Rausing Trust. Funding from these donors has been almost universally *not* specifically for litigation, but rather for general operating or programmatic support that the CSOs have used for, among others, litigation activities.

Other donors mentioned as having funded some of the groups engaged in litigation, included the Bertha Foundation, the Bloomberg Foundation, the City of Geneva, EEA/Norway, the European Commission, and the Swedish Post Code Lottery. None of these, however, funded litigation at any scale; many gave no more than one or two grants that happened to include litigation activities. (Even the Bertha Foundation, which, among donors, has a reputation for funding human rights litigation, in fact funds primarily a fellowships program for emerging human rights lawyers, and hardly any litigation specifically.[20])

Non-donor sources of funding included membership fees, donations from members of the public (including through crowdfunding mechanisms and income tax contributions) and, for law firms/legal practitioners, funds from commercial income. One interviewee mentioned funding from commercial litigation funds, but this is available only when cases have a commercial aspect and there is a strong likelihood of a large pay-out (in practice, more than €1m) as part of an eventual judgment (because that would make it financially attractive for the funder).

[20] As described at https://berthafoundation.org/lawyers/

Only six CSOs received *specific funding for litigation*. This came from:

- UN Voluntary Fund for Victims of Torture
- United Nations High Commissioner for Refugees
- Media Legal Defence Initiative
- Digital Freedom Fund

Of these, only the Media Legal Defence Initiative and the Digital Freedom Fund support specifically identified cases; the others provide funding for litigation programs or blocks of unspecified cases (and indeed, as has been explained, the *bulk* of the funding from the Media Legal Defence Initiative goes for block grants as well).

When asked whom they might reach out to in the future for funding, the same main donors (Adessium et al, along with EEA/Norway) were mentioned far more frequently than any others.

In two of this study's focus countries, CSOs emphasised the importance of understanding that because of the scarcity of litigation-specific funding, in practice the litigation that they engage in is funded from general operating budgets – or it is essentially unfunded. Neither option is attractive: general operating budgets are already stretched, and unfunded litigation means that staff either work overtime, or they fit litigation in alongside funded work. This does not constitute an enabling financial environment for fundamental rights litigation; yet for many human rights CSOs, it is how they are forced to work.

C. Issues ripe for future litigation

There was a wide range of potential *types of fundamental rights cases* mentioned that *could/should be brought*, particularly if new funding were made available. There was an interest in CJEU-focused litigation, partly because of the increasing difficulty of successfully bringing cases to the ECtHR,[21] and partly because the CJEU was widely seen as being able to offer a speedy response at a relatively low cost, and without having to first litigate to the highest court in the country. Many interviewees observed that CJEU judgments are much more likely to be implemented than are ECtHR judgments, and thus are considerably more impactful. However, serious hurdles were noted: it can be very hard to convince national judges to refer a case to the CJEU, and there is less expertise on CJEU litigation among a human rights community that until relatively recently was focused on the ECtHR.

Predictably and understandably, the majority of the responses reflected the areas in which interviewees were already conducting litigation. For completeness, all responses are listed here, again with parentheses indicating the number of people mentioning the category:

- migration and asylum (13)
- criminal justice/fair trial standards (7)
- equality and non-discrimination (4)
- against corporations for human rights abuses (2)

[21] It is well documented that the ECtHR has a substantial backlog, and that cases before it can take many years to be concluded.

- environmental rights (2)
- human rights and counter-terrorism (2)
- freedom of information (2)
- arms exports (2)
- the right to an effective remedy (2)
- privacy and data protection (2)
- children's rights (1)
- closing of civic space (1)
- health care (1)
- education (1)
- consumer rights (1)

D. Views regarding Commission funding

The majority of interviewees expressed a view about *whether they would accept Commission funding*. All of them said they would, although two interviewees indicated that they would not take funds for individual cases; grants would need to be for programs of litigation. Six stated that they would need to look at any grant restrictions or conditions carefully, and that funding would need to be available for external lawyers as well as for in-house legal staff.

Some interviewees were wary of bureaucracy. As one said, the administrative burden can be "quite demanding," substantially more difficult than with their other donors. Another indicated that because litigation funding is so limited, they would endure the bureaucracy – but wished it would not need to be so complicated. One said that the 20% co-funding requirement would be a major hurdle.

Those who expressed opinions about *the added value of Commission funding for litigation* indicated that it:

- would show that the EU is committed to the rule of law and fundamental rights, and to their protection through litigation
- would emphasise the credibility of CSO litigation efforts
- would be seen as very independent, even compared to private foundation funding (and certainly compared to national government funding)
- could persuade other donors to contribute to support litigation.

E. Suggestions for structuring funding

Thirty interviewees had suggestions *as to what funding should look like*.

Independence of the decision-making process was emphasised by 18 respondents, whether by setting up an external decision making body, through regranting or in some other way.

Twenty-one interviewees made the point that instead of funding specific cases, the Commission should *fund litigation strategies or programs*. Reasons for this included:

- When a case is launched it is impossible to predict whether it will develop to the level hoped (for example, for various reasons a case may be dropped; or it may be settled or won at a lower court, and the other party doesn't appeal, so higher courts are not reached and no precedent is set)
- Case selection should be left to the field rather than to the donor
- Funding individual cases would cause competition between cases for which support is sought
- The Commission needs to avoid the perception that it is choosing between countries

Additionally, CSOs with in-house lawyers said that case-specific litigation would make it difficult for them to fund in-house staff (although four said that block-funding a number of specifically identified cases would be an option, as it would give them a predictable level of income and enable them to hire, or keep on, in-house legal staff).

Those that favoured, or did not object to, a model of funding individual cases made the following points:

- Case funding must be decided swiftly (15): if individual cases would be supported, opportunities (including appeals and third party interventions) need to be taken up very quickly. A small number of interviewees suggested that pre-approving organisations to apply for funds might be a way of speeding up the decision-making process
- Case funding must be flexible (15): if individual cases are to be supported, funding should be for a range of related costs, including court fees, expert fees, travel, printing and photocopying and other related expenses
- Case funding needs to be for multiple years (15): if individual cases are supported, it should be understood that they are usually unpredictable and can take many years to complete

Other common observations were that funding may in certain circumstances need to go to, or through, individual lawyers; that funding should include capacity building elements; that funding thresholds should be eliminated or substantially lowered (even a grant of €1,000 can be very meaningful to a cash-strapped CSO); and that either the 20% match requirement should be eliminated, or, in the alternative, that in-kind contributions should be counted towards the threshold (as per recommended accounting practices in many European countries).

A number of interviewees argued that not just strategic cases should be funded, because of the importance of CSOs serving their entire field of beneficiaries. These interviewees argued that, from the large number of cases they conduct, strategic ones emerge organically.

Four interviewees said that a regranting mechanism could be established for specific thematic areas, for example migration and asylum.

Finally, about half a dozen interviewees said that a major problem for them is *the potential of adverse cost orders* (the award of the opposing party's lawyers' fees and other costs when cases are lost). As noted in Section III, none of the donors interviewed provides specific support for these. As also indicated, such orders can be

very substantial, and are a significant concern for many litigators. Although in some countries insurance is available to cover these costs, this in itself is expensive.

V. Discussion

A. EU competences

1. Subsidiarity and added value

The principles of European added value and subsidiarity require that funding from the EU budget be focused on objectives that cannot be sufficiently achieved by the Member States alone, and where EU intervention can add value.

Funding for fundamental rights litigation would undoubtedly add value in terms of contributing to a better enforcement of EU law. Many interviewees indicated that, with increased (or even, with any) funding for litigation, they would litigate fundamental rights cases. This would contribute to a greater use of the Charter, and remedy its relative and well-documented lack of use.[22] Insofar as cases may be litigated to the CJEU, this would contribute to an improved pan-European understanding of the meaning of Charter rights in different contexts.

There is also clear added value in coordinating funding for fundamental rights litigation at the EU level. The decision-making entity (ideally, a regranter, as is argued at subsection B below) would have a pan-European view over the implementation of fundamental rights and would be able to make informed decisions on which cases are most likely to set a positive precedent and contribute to a better implementation of fundamental rights. In turn, this would ensure a consistent interpretation and coherent application of EU fundamental rights law throughout all Member States.

Furthermore, a recurring theme throughout the interviews was that funding for fundamental rights litigation is inadequate, and that the objective of protecting and promoting fundamental rights is not currently being achieved by Member States alone. Access to justice is hampered in every Member State in which interviews were carried out (in some more than in others). While a *legal aid* system of some form exists in every country of the EU, the feedback from interviews was that this had either been stripped back to cover nothing but the very bare essentials of litigation; that it was available only in limited areas of law; that public interest organisations are ineligible for support; or that accessing it was excessively bureaucratic (and in some countries, all of these problems combined). As a result, that system cannot cover strategic litigation, which is typically very resource intensive. Even "run of the mill" fundamental rights cases are not covered by legal aid in countries where such aid is only available for some areas of law. (In Ireland, for example, legal aid is available only in criminal maters, asylum applications, matters concerning family law, and certain contractual disputes.[23]) It is also worth bearing in mind that many CSOs will

[22] As most recently elaborated by the Director of the EU Fundamental Rights Agency in his speech on the 10th Anniversary of the Charter of Fundamental Rights (https://ec.europa.eu/info/sites/info/files/michael_oflaherty_director_of_the_european_union_agency_for_fundamental_rights.pdf) and the accompanying Consultation Report: The EU Charter of Fundamental Rights on its 10th anniversary: views of civil society and national human rights institutions, 30 October 2019: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-use-cso-nhri_en.pdf. See also Special Eurobarometer 487b, "Awareness of the Charter of Fundamental Rights of the European Union."

[23] As explained in interviews and elaborated on the website of the Citizens Information Board: https://www.citizensinformation.ie/en/justice/legal_aid_and_advice/legal_aid_board.html

not accept funding directly from Member State entities, believing that this would constitute a conflict of interest since the human rights violations they litigate are often perpetrated by state actors.

As has been explained, private philanthropy *on its own* is not able to provide sufficient funds. As described in Section III, only a small number of donors support human rights litigation in Europe; and the interviews conducted with CSOs, lawyers and other stakeholders confirmed that funding is scarce.

In sum, it is worth repeating the feedback of one respondent to the survey, commenting on the inadequate current level of funding for fundamental rights litigation: "Any further financial support would add value." A consistent theme across the survey and the Task 3 interviews, indeed, was that added funding would be of crucial value; it would allow cases of merit to be litigated that are now not being pursued solely for lack of funding.

2. Coherence with Commission funding architecture[24]

Future Commission funding for fundamental rights litigation would be best grounded within the to-be-established Justice, Rights and Values Fund and its two proposed funding programs, the Rights and Values Programme[25] and the Justice Programme.[26] The Fund is envisaged for 2021-2027 and will "help to sustain open, democratic, pluralist and inclusive societies. It will also help to empower people by protecting and promoting rights and values and by further developing an EU area of justice."[27]

A common understanding on the Fund was confirmed by the Committee of Permanent Representatives on 13 March 2019, and by the European Parliament during its April 2019 plenary. The budgetary aspects are subject to the overall agreement on the EU's 2021-2027 budget, which at the time of writing of this study remained under discussion.[28]

The Justice, Rights and Values Fund will contribute to several of the Commission's priorities and is included as a Priority in the Commission's 2020 Work Programme along with a Strategy for the Implementation of the Charter of Fundamental Rights.[29] The Rights and Values Programme will aim at

[24] If any of the recommendations made in this study are to be implemented, it would be within the Multiannual Financial Framework (MFF) for 2021-2027. Although the overall contours of that MFF have emerged, details have not yet been agreed. There is therefore an element of uncertainty and the reader is urged to read this Section with that in mind.
[25] COM(2018)383 final2018/0207 (COD)30.05.2018
[26] COM(2018)384 final2018/0208 (COD)30.05.2018
[27] As per the Explanatory Memoranda to the Justice and Rights and Values programs (respectively COM(2018) 384 final, 30 May 2018 and COM(2018) 383 final/2, 7 June 2018)
[28] As summarised in a 9 March 2020 Note from the Croatian Presidency: Overview of the current legislative proposals under the Croatian Presidency (6499/20 JAI 206 COMIX 82)
[29] A Union that strives for more, Commission Work Programme 2020, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 29 January 2020, COM(2020) 37 final (see in particular, p. 8 and Annex III: Priority pending proposals)

> protecting and promoting rights and values as enshrined in the EU Treaties and in the EU Charter of Fundamental Rights, including by supporting civil society organisations, in order to sustain open, democratic and inclusive societies,[30]

while the Justice Programme will

> support the further development of a European area of justice based on the Union's values, the rule of law, and mutual recognition and trust, in particular by facilitating access to justice and promoting judicial cooperation in civil and criminal matters, and the effectiveness of national justice systems.[31]

Both the European Parliament and the European Economic and Social Committee have recommended that litigation be explicitly mentioned as an activity to be funded.[32] Whether or not these proposals make their way into the final text, the broadly-worded activities proposed in Annex I to each of the Programmes as currently drafted do not preclude litigation support – indeed, it would fall under "supporting civil society organisations active in the areas covered." Importantly, we note that under the 2014-2020 Rights Equality and Citizenship Programme, which used similarly broadly worded activities and also did not explicitly mention litigation as a fundable activity, the Commission has funded CSO litigation.[33]

B. Potential litigation funding structures

There are two main possibilities for the Commission's support for litigation. First, it might run the fund *internally*. This means that it would not only administer the funding, but it would also select issues areas to be funded, would formulate and administer calls, and most important, *would make grants decisions*.

Alternatively, the funding might be run *externally*, meaning that *its grants would be decided and administered* by a body outside and independent of the Commission.

In either case, moreover, there would be the choice of supporting (1) individual cases, (2) "litigation programs," or (3) a combination of these. (A "litigation program," for these purposes, is a *series* of cases, none of which is identified in a grant application. Such a program might be, for instance, "to bring five cases on discrimination in employment over the next three years, in collaboration with CSO X, which does advocacy, and CSO Y, to do community outreach." Alternatively, the number of cases need not even be specified, though the issue area would be.)

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[30] Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing the Rights and Values Programme, COM(2018) 383 final/2, 7 June 2018

[31] Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing the Justice Programme, COM(2018) 384 final, 30 May 2018

[32] Amendments adopted by the European Parliament on the proposal for a regulation of the European Parliament and of the Council establishing the Rights and Values Programme, 17 January 2019: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0040_EN.html and Amendments adopted by the European Parliament on the proposal for a regulation of the European Parliament and of the Council establishing the Justice Programme, 13 February 2019: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0097_EN.html. EESC opinion: New Justice, Rights and Values Fund, 18 October 2018, SOC/599-EESC-2018-02950: https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/new-justice-rights-and-values-fund

[33] For example, under the 2018 "Call for proposals to support national or transnational projects on non-discrimination and Roma integration": https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/topic-details/rec-rdis-disc-ag-2018

These possibilities are considered in turn.

1. An internal funding stream supporting *individual cases*

On this scenario, the Commission retains full control over the litigation funding, from call design to grants awards, and following grants through reports and eventual monitoring, evaluation and learning. Grants are made for individual cases.

The field interviewees were virtually unanimous that this arrangement would be quite problematic. Potential problems include the following:

- Grant requests, potentially coming from 27 Member States, on various issues set out by the Commission, may be for local situations and contexts that it would be virtually impossible for Commission services [34] to be fully conversant with. As a result, grant decisions in many cases may well be under-informed – *unless* that is, the Commission makes a significant investment in internal capacity. The authors' experience with sector-specific litigation funds indicates that the challenge in this regard should not be underestimated
- Commission procedures, as experienced by virtually all interviewees, are complex and require long waiting times. This means they are not suited to making the quick funding decisions that are needed to respond to specific case opportunities that come and go within short deadlines, usually imposed by courts
- Small organisations that may have important cases to bring will not necessarily have the knowhow or bandwidth to navigate the Commission's complex application procedures – for this reason and the previous one, important cases will likely be missed
- While the Commission supports various human rights initiatives on a selective country basis, Member States that are defendants in litigation cases supported by the Commission may view this as an especially aggressive tactic being deployed, which in turn could be, or could be perceived to be, an inhibiting factor in the Commission's decision-making on grants
- The comments of many interviewees about the need to ensure the independence of grants decision-making clearly reflected a concern that, despite the best of intentions of Commission services, political or other tangential considerations that really should not play a role in grants decisions might in fact influence them

2. An internal funding stream supporting *litigation programs*

This scenario presents a somewhat different picture from that considered just above. Specifically, on the positive side,

- Litigation program requests are likely to be based on Member State situations more broadly than individual cases might, and Commission services may be more likely to be sufficiently familiar with them
- Related to the previous point: program support avoids the worry of many interviewees, that Commission services would be less qualified to make

[34] The Commission advises that "services" is the term that it employs to refer to Commission staff, and this terminology is adopted here.

decisions about which individual cases to bring than local litigators are; on this approach, it will be the field that decides which cases to bring, as opportunities arise within the grants periods
- Grantees will have the flexibility to take up litigation opportunities as they arise, rather than having to request new funding to do so
- Litigation programs will likely be larger than individual grants, and may only be suitable for relatively large litigation groups, ones that do in fact have the bandwidth to make applications and deal with Commission procedures[35]
- A predictable income stream for a period of time will allow CSOs to invest in their own in-house legal capacity, and thus civil society will be strengthened in this regard

These points acknowledged, the potential for politics and other irrelevant pressures making their way into grants decisions (as we have understood many interviewees to have been concerned about), or even just a perception that this is the case, as well as the remaining reputational risks, make this arrangement far from ideal, though perhaps somewhat less problematic than the individual case funding model.

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We have pointed out just above various challenges that would attend grants being made, in whole or in part, by Commission services. We note in this regard that many of these – amounting, in short, to the complexity of developing and responsibly deploying criteria for choosing grantees to run fundamental rights litigation – are challenges for *any* donor, public or private. We do provide some suggestions for dealing with these challenges at Section V.E. below; they are drawn from interviews with donors that currently make strategic litigation grants, as well as from our own experience as grant-makers.

3. External litigation fund(s): regranting

Under this scenario, Commission support for fundamental rights litigation would be fully outsourced to one or several third parties – e.g., a CSO, or a university, or a bar association, which would function as a regranter (or regranters[36]).

The interview data, and the authors' professional experience in creating and running litigation funds, suggest that the regranting model benefits from several advantages compared with funding directly from the Commission:

- Assuming the appointment of an experienced and credible organisation selected as the regranter, the fund would be fully independent of the Commission, obviating the concerns on this score set out above
- Similarly, the proper selection of regrant *staff* (possibly assisted by an advisory board) would ensure that grants are being provided based on specific and proven expert judgment

[35] However, the smaller groups referred to above, which might not have the bandwidth to put together "programs" of cases, will indeed be left out here – despite the fact that the individual cases within their purview and competence might well contribute positively to EU fundamental rights jurisprudence.

[36] Multiple regranters might be employed, most plausibly by issue area – e.g., one for making litigation grants for work on discrimination, another to make grants for litigation on asylum and migration issues. For simplicity below, however, we focus on a single regranter.

- Regranters, in the authors' experience (both within and outside the litigation context), are able to develop flexible grant-making streams, highly adaptable to changing circumstances (the Media Legal Defence Initiative is a notable example)
- Regranters are adept at developing processes and procedures that are appropriate, in terms of complexities and demands, for their stakeholders. (This presupposes that the Commission does not insist on a version of its own complex procedures being replicated in the regranter – a situation that various interviewees warned against)
- The regranters with which the authors are familiar all have excellent and professional accounting and related systems, and are fully and satisfactorily answerable to their donors[37]; there is thus no reason in principle why fund regranters could not ensure sound fund management, both downstream as to their grantees, and upstream to the Commission[38]

It is worth noting that that DG Justice has used regranting as a model, and it has also funded projects that have included sub-grants made to lawyers.[39] Although there probably are not DG Justice projects that involve regranting at the scale that would be required in this model, other Directorates General have supported some. For example, the Directorate-General for International Cooperation and Development granted a coalition of CSOs €15m over a five-year period to operate the EU Human Rights Defenders Mechanism, operationalised as ProtectDefenders.EU.[40] Regranting, or sub-granting, is a significant part of this project, including for human rights litigation. The 2017 Evaluation of the European Instrument for Human Rights and Democracy commented more broadly that the use of sub-grants for human rights projects contributed to the overall efficiency of the program and allowed it reach smaller civil society organisations at grassroots level.

A regranting model similar to the EU Human Rights Defenders Mechanism, or other human rights litigation projects funded by the Directorate-General for International

[37] The Canada Court Challenges Program, the Digital Freedom Fund, and the Media Legal Defence Initiative are all good examples.

[38] Another "external" approach that the authors have seen elsewhere would have the Commission appointing an *independent expert board* that meets several times during the year – or that might be available "on call" virtually. It would be presented with reports from Commission services describing and analysing grant applications, and *would make final decisions* about which ones to award, while the Commission would be responsible for all grant administration.

However, conversations with relevant Commission services suggest that the Commission has not employed external boards of this sort for grant-making, and that indeed there may be legal obstacles to its doing so. If this is in fact the case, of course this possibility will be off the table. It is worth hesitating over it in any case, simply to illustrate a second form of independence in grant decision-making, given the strong preference expressed by the field for such independence.

Two further points about this approach should be made: First, an appropriately constituted external board would have detailed knowledge of relevant rights issues and local contexts, so that grants decisions would be appropriately informed, and would be (again, if appropriately constituted) immune from potential political interference and pushback. Second, in principle, such boards would be as well placed to make decisions as to individual cases as they would be to decide on litigation programs.

[39] For example, in the Project "Advancing Roma Rights in Europe" by Europai Roma Jogok Kozpontja Alapitvany: https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/how-to-participate/org-details/999999999/project/848540/program/31076817/details

[40] See the Financial Transparency System: https://ec.europa.eu/budget/fts/index_en.htm (budget reference SCR.CTR.367873.01.1 (*BGUE*))

Cooperation and Development under the European Instrument for Human Rights and Democracy could be used in the context envisaged here.

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It remains to be considered whether such a regranting approach would be more effective if the regranter were charged with supporting only individual cases, or whether it would be preferable for it to fund litigation programs, in whole or in part. The answer depends on some basic decisions that the Commission would need to take about its core aims for the litigation fund. To explain:

A basic concern that many field interviewees had about *an individual case approach* was that the Commission might not be sufficiently well placed to "choose" the best cases. That concern, however, would be obviated in the event that *the regranter* is appropriately staffed and assisted by qualified advisory panels. Assuming that individual case applications come with the promise of highly qualified senior litigators being involved, there would be good reason to expect potentially highly impactful cases being brought, with the prospect of powerful jurisprudence being established. (That said, it should be acknowledged that the individual case approach would likely end up supporting only "big" cases, and would not provide for the opportunity of jurisprudence being built iteratively over the course of a strategically selected series of smaller test cases.)

If, however, the Commission has a further aim for litigation funding of *building the field of European fundamental rights litigators* – as is suggested by grants it has made to date as part of this preparatory action – the individual case support approach would not be ideal. This is because that approach would likely end up supporting only a narrow and repeating set of litigation CSOs. Nor would there be, on that approach, any obvious need for mentoring, or for growing litigation CSOs that might, *on the litigation program approach*, bring in junior lawyers and have them trained by senior lawyers, as part of litigation projects. (On this point about training, see subsection C immediately below.)

As noted, which approach will provide better value will simply depend on the degree to which field building is part of the Commission's aim in creating the fund.

Regardless, however, of which approach the Commission ends up adopting, the Canadian *Court Challenges Program* (CCP) is an instructive model, as it is applicable to either approach.[41] There are two particularly salient advantages of this model. First, it possesses *two sorts of independence*: (1) in its *administration*, it is independent of the donor (the Canadian government); and (2) *the board that decides its grants* is independent of the administration. Second, it has an explicit mechanism for downstream sound management, through the requirement of funds being placed in trust accounts. (Additionally, the CCP has an advantage that many interviewees would welcome *as to individual case support*: cases are supported for their duration, with single grants that are not themselves time-bound.)

[41] In addition to the CCP, EEA/Norway operates in Europe (among others) through a regranting system, with "fund operators" functioning in selected individual Member States. Functionally, this approach is similar to that taken by the CCP. It is worth noting that some EEA/Norway fund operators have encouraged the Commission to adopt its approach for certain of the Commission's grant-making.

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Finally, it is to be observed that if the Commission were to use a regranting model, there would be the need to determine which "home(s)" to select; possibilities include universities (as with the CCP); a CSO with pan-European reach that serves litigation CSOs generally; or various CSOs that serve as umbrella organisations for groups working across Europe on particular issues, e.g., migrants and refugee rights, or racial discrimination. The choice would need to be informed by a separate investigation, which was outside the remit of this project.

C. Ancillary support considerations

Support for actual litigation should lie at the core of the fund's remit. This may still mean, however, that support for some other closely related activities might be appropriate, provided the activities are explicitly and demonstrably tied to actual litigation work.

One example: the interviews show that there are some CSOs and related outside lawyers that are fully able to engage in, and in fact are engaged at present, in fundamental rights litigation, in the site visit countries and elsewhere. At the same time, that same data shows that, while fundamental rights litigation, including with a focus on CJEU referrals and on implementation, is increasingly "on the radar screens" of litigators, knowledge of relevant EU law practice and procedures is limited outside of the few practitioners just referenced. The fund could play a significant role in responding to this situation by assisting in the *upgrading of capacity*, with the expectable result that fundamental rights litigation will increase in Europe, and that Charter rights are promoted and protected more systematically. In particular, it could be helpful to the field if the *fund itself* were to support such upgrading, bearing in mind the essential need to connect the upgrading with actual litigation.[42]

Some examples: calls for litigation proposals could include as one criterion, that the litigation team include junior as well as senior lawyers, where mentoring of the former by the latter is part of the proposal. Equally, given the acknowledged desirability of information-sharing across jurisdictions, and potential collaborations as well, the deployment of some of the fund's resources to the development of a *hub* facility to further assist in field building would be of significant value. The idea would be that an organisation might be tasked with serving as an information clearing house, a convenor of litigators around specific themes and issues, and a "connector" between groups and individual litigators. One possibility here is that this hub function could be served by an existing CSO that already serves a wide range of CSOs – for instance the European Centre for Not-for-Profit Law (though this CSO is mentioned only as an illustrative example, as this possibility was not discussed with them). Another possibility would be for the Fundamental Rights Agency to be supported to perform this task.

Again, fundamental rights litigation was said frequently not ever to be sufficient, *on its own*, to secure the rights even of the victims who are the parties to cases. Instead, a

[42] The examples in this paragraph presuppose that one of the aims of the fund will be field-building, to increase the number of qualified fundamental rights litigators. See subsection B.3 just above for a comment on this.

proper litigation strategy should include not only the legal strategy itself, but also strategic communications, outreach to affected communities, and advocacy (particularly where cases have been won and judgments need to be implemented). Taking this point into account, calls for proposals could favour applications that include communications and advocacy plans and activities (perhaps performed by a group of specialised CSOs contributing their specific expertises), with the fund being ready to support such "surrounding" work, in addition to the actual legal work at the heart of the proposed efforts.

D. Potential issue areas for fundamental rights litigation support

The identification of areas of support is, to a large extent, a political question. Within the umbrella of fundamental rights and EU law, the range of rights and related issues that could be litigated is very broad, and decisions regarding support for particular themes – or, a decision for a broad fund that would support litigation for the implementation of fundamental rights generally – is one that the Commission presumably will make in the context of its own objectives and other programs.

That said, if the Commission chooses to focus on one or more specific themes, the following were mentioned prominently (that is, using admittedly arbitrary measures, by a majority of survey respondents and at least half a dozen interviewees):

- asylum and migration (72% of survey respondents; already litigated or mentioned as an area for future litigation by at least 13 interviewees)
- discrimination, racism and intolerance (72% of survey respondents; already litigated or mentioned by at least nine interviewees)
- criminal justice/fair trials (34% of survey respondents; already litigated or mentioned by at least seven interviewees)

Two further observations: First, many of the interviewees and survey respondents advocated, understandably, for funding for the area that they happened to work on. The interview and survey data should be understood with that in mind; they are not a scientific survey as to the objective desirability of specific areas as focus areas. The notable exception was migration and asylum, which was mentioned as a potential focus even by interviewees who did not work on the issue. Second, there already are pan-European funds for digital rights and media freedom (the Digital Freedom Fund for the former, and the Media Legal Defence Initiative, among others, for the latter) – while the other areas mentioned in the above bullet points seem to be far less represented in terms of funding support.

E. Sound fund management

Sound management of a litigation fund is of importance to both litigant and donor. This means that due attention needs to be given to grant selection criteria; risk assessment and mitigation; and monitoring, evaluation and learning strategy. The findings in this respect are summarised here; they are based on interviews with various donors who themselves have experience with litigation funds, and on the authors' experience in creating and running such funds; see Appendix H for further details.

1. Grant selection criteria

a. Choosing high impact cases, or cases more focused in implementation?

Grant selection criteria employed for every litigation fund with which the authors are familiar are driven very explicitly by the objectives of the fund. If, then, in the case of the fund under consideration here, the core objective is to achieve a small number of standard-setting judgments in Europe, then the optimal focus would be on finding those few cases (whether specifically identified, or promised as part of a litigation program) that might have that impact, and supporting their litigation up to the highest, precedent-setting courts. If, on the other hand, the objective is to contribute to the better implementation of EU fundamental rights norms throughout Member States, then support for a larger number of cases would be more appropriate, including at lower courts and tribunals.[43]

b. Grant criteria for litigation programs

As was observed above, and as was suggested in various donor interviews, criteria here should look first and foremost *at the litigation applicant*, precisely because cases to be litigated will not, on the litigation program approach, be specifically identified. Such criteria typically employed include:

- the reputation and footprint[44] of the applicant, as a litigator
- the litigation experience of those in, or affiliated with, the applicant
- the applicant's litigation history, in terms of wins and losses, which courts have been accessed, what impacts likely have been achieved
- the coherence and promise of the litigation program being proposed by the applicant

c. Grant criteria for individual cases

Suggested criteria for funding individual cases, again as indicated in interviews, as well as in the stakeholder survey, include the following, among others:

- the potential impact of the case on the implementation at national level of EU law and the Charter
- whether the case is part of a wider campaign – important to ensure efforts to obtain implementation of judgments
- the litigation experience, and the independence and not-for-profit nature of the applicant (though some interviewees thought that lawyers operating out of "regular" law firms should also be eligible)
- the reputation and footprint of the applicant, as a litigator

[43] In addition, as already noted, if field building is another basic aim of the fund, criteria applied in at least some applications would presumably focus, in addition to the potential merit of the expected litigation, on what opportunities would be offered for bringing young lawyers into the litigation mix and providing knowledge and experience for them as actual cases proceed.

[44] By a litigator's "footprint" (whether a CSO or an individual), we mean the areas of its work, thematic and otherwise, the number of cases it has litigated, other rights-related work it has undertaken, and others of its relevant activities.

2. Risk assessment and management

The main risk identified by interviewees was that of adverse cost orders, which in some countries can, as has been noted, be substantial. Other risks noted included:

- reputational ones (for both donor and litigant): these can be mitigated through (1) clear funding criteria, (2) deployed through a mechanism that operates independently, and (3) funding litigation programs rather than single cases
- cases brought that go against the purpose and intent of the Charter as a whole, even if formally in support of a fundamental right,[45] to be mitigated by expertise in vetting grant applications
- cases lost, or cases imprudently or frivolously brought, both of which can be mitigated by good case selection criteria, coupled with expertise in vetting grant applications
- applicants dropping out, for example by accepting a financial settlement, to be mitigated, though not eliminated, through careful discussion with applicants
- length of proceedings: cannot be mitigated, but just needs realistic assessment

3. Monitoring, evaluation and learning

Existing litigation funds, including both the Digital Freedom Fund and the Media Legal Defence Initiative (MLDI), employ strict monitoring, evaluation and learning systems for their grant-making, to maintain a high standard of funding and to periodically assess and adapt grant-making practices in light of lessons learned.[46] Clear objectives and indicators are set at the outset of litigation, as agreed between the donors and the grantees,[47] against which activities can then be monitored and evaluated – and from the results of which, learnings can be taken.[48]

MLDI, for instance, thinks of monitoring in terms of "ongoing tracking and surveillance of a project's key activities," measured against set goals and targets, as captured periodically over project periods. Again, its *evaluations* of projects look at their "relevance, fulfilment of objectives, efficiency, effectiveness, impact [and] sustainability."

In an important sense, monitoring and evaluation of litigation is similar to monitoring and evaluating any other project – with, however, a couple of important differences:

[45] Consider, for instance, a case brought by a white supremacist group nominally to protect its freedom of expression, but which is meant in fact to enable the group to disseminate content entirely inconsistent with the spirit of the Charter.

[46] "Avoiding irregularities," included in the tender as one of the stated aims of monitoring and evaluation, is an equally important aim, but this will be achieved as an automatic by-product.

[47] Such indicators might include: the number of cases instigated, key documents (e.g., legal pleadings) submitted, hearings held, and case outcomes. Donors may well be interested in impact beyond litigation as well. MLDI, for instance, tracks not only if journalists have won cases that were brought against them, but also if they were able to continue their work (if the cases were brought with the aim of silencing them).

[48] MLDI's strategy for example, can be downloaded here: https://www.mediadefence.org/resources/monitoring-and-evaluation-guidance-applicants; DFF's strategy here: https://digitalfreedomfund.org/support/resources-page/ (under "impact measurement framework for litigation").

- The donor needs to understand that crucial factors in litigation are outside the control of the litigant, because they are controlled to an important degree by judges, or even clients who, e.g., may accept settlement offers instead of seeing their litigation through
- Cases can take years to complete; and the exact timing is unpredictable, and largely outside the control of the litigant; thus “milestones” cannot be timed as they might be with other projects, and some cases may outlast the time period set for their respective grants

VI. Conclusions

Based on the survey and interview data, as well as on the experience of the authors in creating and operating litigation funds, the following conclusions may be drawn:

As to the feasibility and appropriateness of the Commission supporting fundamental rights litigation:

- Such support would add substantial value because (1) there is a clear need for funding for such litigation, (2) there are opportunities to advance fundamental rights jurisprudence, and (3) such funding would be within the scope of Commission grants architecture
- If the sole aim of the financial support is to advance fundamental rights jurisprudence, grants could be limited to individual cases. If, however, the aim is also to build capacity in the field, i.e., to assist more CSOs and individual lawyers, through training and mentoring, to be able to bring cases, then funding for "litigation programs" would provide greater value

As to the potential structure of such funding:

- The structure that would deliver the greatest value would be for funding from the Commission (for instance, in the form of a single grant, initially for five years and renewable every three years) to go to a regranter or regranters (per rights issue area, if appropriate); such regranter(s) would provide grants for fundamental rights litigation in Europe
- Another potential structure would have the Commission services themselves making grants decisions and administering the grants. However, there are significant disadvantages to this approach, including an increased workload for the services, as well as the challenges of (1) services needing to have the contextual expertise to vet all potential applications, across 27 Member States and 27 legal contexts, and (2) the potential for political or other tangential considerations to influence, or be perceived to influence, grants decisions
- If Commission services are to decide individual litigation grants, convening an advisory panel of persons with (1) reputations for integrity and neutrality, and (2) local and issue-specific expertise, would be a way of ensuring high quality and nuanced grant-making, and would mitigate against the risks of actual or perceived bias in that grant-making

As to substantive features of the grant structure:

- Providing for mentoring and training attached to fundamental rights cases actually being brought would be an effective means of building the field
- Flexibility and nimbleness are important features of grant-making in this context, to enable litigators to respond to opportunities that require prompt responses
- Simple grant-making procedures, low application thresholds and an absence of co-funding requirements would be the best means of ensuring that smaller but high quality CSO litigators will be able to apply for, and ultimately to receive, funding
- Sound financial management could be ensured through certain best practices, including

- grant selection criteria being closely aligned with the basic goals of the grant-making, both as to substantive litigation areas, and as to individual case selection, or litigation program selection, as determined by the Commission
- risks, including as to adverse cost orders, reputation, and cases being brought that are not in line with the purpose and intent of the Charter as a whole, being assessed and managed
- grants being monitored and evaluated, and lessons learned from these efforts being applied going forward

Appendix A: Interviews[49]

I. Tasks 1 and 3

A. General

Person	Position	Organisation
1. Kersty McCourt†	Senior Advocacy Advisor	Open Society Justice Initiative (Europe and global)
Natacha Kazatchkine	Senior Policy Analyst	Open Society European Policy Institute
2. Balázs Dénes*	Executive Director	Civil Liberties Union for Europe (Europe)
3. Chris Patz*†	Policy Officer	European Coalition for Corporate Justice (Europe)
4. Paul de Clerck†	Head of the Economic Justice Team	Friends of the Earth Europe (Europe)
5. Francesca Fanucci	Senior Legal Advisor	European Centre for Not-for-Profit Law (Europe)
6. Jago Russell	Chief Executive	Fair Trials (UK and Europe)
7. Rupert Skilbeck	Director	Redress (global)
8. Simon Cox	Migration Lawyer	(former) Open Society Justice Initiative (Europe and global)
9. Róisín Pillay*	Director, European Regional Program	International Commission of Jurists (Europe and global)
10. Christophe Marchand†	Independent litigator (Belgium)	
11. Jelle Klaas*	Litigation Director	Public Interest Litigation Project (Netherlands)
12. Romanita Jordache*	Volunteer lawyer; Board member	Access (Romania)
13. John Stauffer*	Legal Director	Civil Rights Defenders (Sweden)
14. Lydia Vicente*	Executive Director	Rights International Spain
15. Giulia Crescini*	Lawyer (volunteer)	Association for Juridical Studies on Immigration (Italy)
16. Krassimir Kanev	Chairperson	Bulgarian Helsinki Committee (Bulgaria)

[49] Asterisks indicate interviews by phone. All other interviews were conducted in person. A cross (†) indicates that interviews ranged across Tasks 1 and 3 (with some survey respondents, interviews were conducted that went beyond their survey responses).

The following foundations declined to be interviewed: the Bertha Foundation, the Esmée Fairbairn Foundation, and the Joseph Rowntree Charitable Trust

17. Alain Werner*	Director	Civitas Maxima (Switzerland)
18. Philip Grant* Magali Deppen*	Director Head of External Relations	Trial (Switzerland) Trial
19. Nuala Mole	Founder	Aire Centre (UK and Europe)
20. Max Schrems*	Honorary Chairman	European Centre for Digital Rights (Austria, and pan-European)
21. Vedrana Perišin*† Dijana Kesonja*†	Strategic Litigation Advisor Strategic Litigation Advisor	Office of Ombudswoman, Croatia (Croatia Ombudswoman) Croatia Ombudswoman
22. Lamin Khadar*	Pro Bono Manager	Dentons Amsterdam
23. Leire Larracoechea*	Director	Pro Bono Espana
24. Liam Herrick*	Executive Director	Irish Council for Civil Liberties
25. Özgür Kahale*	Pro Bono Manager, Europe	DLA Piper
26. Deirdre Malone*	Legal Manager	Public Interest Law Alliance/Free Legal Advice Centres
27. Helen Duffy*	International human rights lawyer and Professor	Rights in Practice
28. Helen Darbishire*	Executive Director	Access Info Europe
29. Katrine Thomasen*	Senior Legal Advisor for Europe	Centre for Reproductive Rights
30. Caroline Wilson Palow*	Legal Director and General Counsel	Privacy International
31. Malte Spitz*†	General Secretary	Gesellschaft für Freiheitsrechte e.V.
32. Waikwa Wanyoike	Director, Litigation	Open Society Justice Initiative
33. Tamás Kádár*†	Deputy Director, Head of Legal and Policy	Equinet

B. Site visits

1. France

Person	Position	Organisation
1. Lanna Hollo	Senior Legal Officer	Open Society Justice Initiative (France)
2. Slim Ben Achour	Lawyer	
3. Louis Cofflard	Member of Board	Friends of the Earth, France
4. Clémence Bectarte	Coordinator, Litigation Action Group	International Federation for Human Rights (FIDH)
5. Sihem Zine	President	Action Droits des Musulmans (ADM)
6. Arié Alimi	Lawyer, member of the Board of La Ligue des droits de l'Homme	Arié Alimi Avocats
7. Cécile Marcel	Director	Observatoire International des Prisons (France)
8. Omer Mas Capitolin	President	Maison Communautaire Pour un Développement Solidaire

2. Hungary

Person	Position	Organisation
1. Csaba Kiss†	Director	Environmental Management Law Association
2. Máté Szabó†	Director of Programs	Hungarian Civil Liberties Union
3. Tamás Bodoky	Editor and publisher	Atlatszo.hu
4. Peter Nizak	Chair	Civil Review Foundation
5. András Kádár	Co-chair	Hungarian Helsinki Committee (HHC)
Márta Pardavi	Co-chair	HHC
6. Miklós Ligeti	Head of legal	Transparency International Hungary
7. Lilla Farkas	Attorney	Chance for Children Foundation
8. Renáta Uitz	Associate Professor	Central European University
9. Atanas Politov	Pro Bono Manager, Europe	Dentons Budapest
10. Tamás Dombos†	Director	Háttér Society

3. Poland

Person	Position	Organisation
1. Maria Ejchart-Dubois	Founder	Free Courts (FC)
Sylwia Gregorczyk-Abram	Founder	FC
Michał Wawrykiewicz	Founder	FC
2. Katarzyna Slubik	President of Board; staff lawyer	Stowarzyszenie Interwencji Prawnej (SIP)
Witold Klaus	Board member	SIP
3. Karolina Gierdal	Staff lawyer	Campaign Against Homophobia
4. Katarzyna Wiśniewska	Coordinator, Strategic Litigation Program	Helsinki Foundation, Poland (HFP)
Jacek Białas	Lawyer, Strategic Litigation Program	HFP
5. Zuzanna Rudzińska-Bluszcz	Chief Coordinator, Strategic Litigation	Office of the Ombudsman
6. Eliza Rutynowska	Advocacy Officer and staff lawyer	Polish Society of Antidiscrimination Law
7. Agnieszka Warso-Buchanan	Lawyer, Strategic Litigation on Clean Air	Client Earth Poland
8. Wojciech Klicki	Staff Lawyer	Panoptykon
9. Katarzyna Batko-Tołuć		Fundacja Wolnosci

4. Brussels

Person	Position	Organisation
1. Arpi Avetisyan†	Senior Litigation Officer	ILGA-Europe
2. Simone Cuomo	Senior Legal Advisor	Council of Bars and Law Societies of Europe (CCBE)
3. Adam Weiss	Managing Director (until March 2020); Board member	European Roma Rights Centre
4. Amy Rose†	Director of Litigation	Client Earth
5. Alex Mik	Campaigns and Communications Officer	Fair Trials
Laure Baudrihaye	Senior Layer, Law & Policy	Fair Trials

C. EU staff or experts

Person	Position	Organisation
1. Waltraud Heller*	Fundamental Rights Platform (inter alia)	Fundamental Rights Agency
2. Vera Egenberger*	Consultant (inter alia)	Fundamental Rights Agency (consultancy)
3. Sophie In't Veld*	MEP (Netherlands)	
4. Fabian Lutz*	Senior Legal Expert	European Commission, Directorate General for Migration and Home Affairs
5. Francesco Zoia Bolzonello Muriel Bissières	Program and Financial Manager Program and Financial Manager	European Commission, Directorate General for Justice and Consumers (DG Justice) DG Justice
6. Christine Astrig Mardirossian*	Program Manager	European Commission, Directorate-General for International Cooperation and Development

II. Task 2

Person	Position	Organisation
1. Adrian Arena	Director, International Human Rights Program	Oak Foundation
2. Nina Spataru*	Program Officer	Oak Foundation
3. Borislav Petranov*	Director, Global Rights and Accountability, Human Rights Initiative	Open Society Foundations
5. Tamara van Strijp	Program Manager	Adessium Foundation
5. Martin Tisné Salmana Ahmed	Managing Director Associate	Luminate Luminate
6. David Sampson	Deputy Director	Baring Foundation
7. Alinda Vermeer	Acting Chief Executive Officer	Media Legal Defence Initiative
8. Päivi Anttila et al*	Senior Sector Officer, Financial Mechanism Office	EEA/Norway grants
9. Andrei Pop et al*	Program Director	Fundaţia pentru Dezvoltarea Societăţii Civile, EEA/Norway fund operator for Romania
10. Vera Morà	Director	Ökotárs Foundation, former EEA/Norway fund operator for Hungary
11. Simone Bakker*	Policy Officer	Dutch Ministry of Foreign Affairs

12. Bella Kosmala Nicole Francis	Project Manager Chief Executive	Strategic Litigation Fund Immigration Law Practitioners' Association[50]
13. Tim Verbist*	Program Manager	Porticus Foundation hub, Belgium
14. Angela van der Meer*	Program Officer	Digital Defenders Partnership
15. Pippa Johnson*	Development Officer	Liberty (UK)
16. Anna Ramskogler-Witt*	Partnerships and Fundraising	European Centre for Constitutional and Human Rights
17. Peggy Sailler	Executive Director	Network of European Foundations
18. Stefan Schaefers	Director	King Baudouin Foundation
19. Eric Cormier*	Legal Counsel	Court Challenges Program (Canada)
20. Andrea Cairola*	Program Specialist, Section of Freedom of Expression and Safety of Journalists	UNESCO
21. Nadja Groot*	Program Manager	Democracy and Media Foundation
22. Tim Cahill*	Senior Program Officer	Sigrid Rausing Trust
23. Nani Jansen Reventlow*	Director	Digital Freedom Fund

[50] This Association is the fiscal sponsor for the Fund.

Appendix B: Stakeholder Survey Text[51]

Exploratory stakeholder consultation - litigating cases related to violations of democracy, rule of law, and fundamental rights

Fields marked with * are mandatory.

1 Introduction

The exploratory consultation is carried out in the context of the implementation of the Preparatory Action[1] "*EU fund for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights*", adopted upon initiative of the European Parliament under the EU general budget 2018.[2]

The European Commission (DG Justice and Consumers) is responsible for the implementation of the Preparatory Action. According to the budgetary remarks which accompanied its adoption, acknowledging that "*empowering civil society organisations, movements and individuals is key to a truly democratic EU and its values as enshrined in the EU Treaties and the EU Charter of Fundamental Rights*", this Preparatory Action aims at creating an "*EU fund for awareness raising and legal assistance to individuals and civil society organisations litigating democracy, rule of law and fundamental rights violations based on the outcome of a requested feasibility study*". The feasibility study should include an "*overview of the current obstacles facing individuals and civil society organisations wishing to exercise their rights regarding democracy, the rule of law and fundamental rights, in particular through litigation*".

This exploratory consultation is intended to inform the implementation of the Preparatory Action, having regard to its objectives and taking into account the EU legal framework as laid down in the Treaties, as well as the overall objective of ensuring that, in the fields covered by EU law, fundamental rights and freedoms as enshrined in the Charter of Fundamental Rights of the EU are respected[3] and that individuals are granted effective legal protection to that effect[4].

The consultation aims, in particular, to gather views on gaps and needs in terms of support for litigating cases relating to violations of fundamental rights and freedoms based on EU law and the Charter of Fundamental Rights of the EU in national contexts.

Focus is put, in this context, on the role and experience of independent human rights actors, which play a key role in supporting the exercise and enforcement of fundamental rights and principles including within the EU legal framework, through direct engagement in strategic litigation but also other activities which support and accompany litigation, and in particular applicants' legal counselling and support, education and awareness raising (in particular raising individuals' awareness of their rights and of existing remedies and redress mechanisms, and litigation related training) as well as advocacy and watchdog activities. The notion of 'independent human rights actors', within the meaning of this exploratory consultation, refers to

[51] Included with permission from the Commission, and converted from PDF and not true to the original font clarity. Page numbers omitted.

civil society organisations engaged in the promotion and protection of fundamental rights[5], independent national human rights bodies, and namely accredited national human rights institutions and equality bodies, as well as legal practitioners working in the field of human rights law.

Any reference to funding or support for litigation is to be understood, for the purpose of this consultation, as referring to forms of financial support for litigation and litigation related activities by entities other than the parties themselves (or their insurers) and beyond legal aid services available under existing national rules. In particular, any assessment of legal aid schemes available under national rules is outside the scope of this consultation.

The request for contributions has been sent by DG Justice and Consumers to a list of targeted stakeholders, including independent human rights actors and donors. The invitation to contribute may reach you either directly from the European Commission or through organisations you are members of or partner to. The Commission reserves the right to discard contributions from respondents which have not been directly identified as part of its targeted range of stakeholders.

The exploratory consultation **is open until 18 June 2018**. In case of questions please contact JUST-C2-CHARTE@ec.europa.eu clearly indicating the title of the consultation in the object of your email.

[1] See Article 54(2) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

[2] http://eur-lex.europa.eu/budget/data/General/2018/en/SEC03.pdf, item 33 03 77 06.

[3] According to Article 51(1) of the Charter, its provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

[4] Article 19(1) second subparagraph TEU and Article 47 Charter of Fundamental Rights.

[5] Civil society organisations are here intended, irrespective of their legal status at national level, as non-profit, voluntary organisations established as legal entities, having a non-commercial purpose and independent of local, regional and central government, public entities, political parties and commercial organisations. Religious institutions and political parties are not considered as falling under the scope of this definition for the purpose of this consultation.

☐ *1.1 I have read the privacy statement attached

2 Identification

2.1 Name and surname

*2.2 Name of the organisation

2.3 Country where the organisation is based

- ○ Austria
- ○ Belgium

- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain
- Sweden
- United Kingdom
- Norway
- Iceland
- Switzerland
- Liechstenstein
- Other

2.4 Please specify

2.5 Please indicate the countries where the organisation operates (if different than previous)

*2.6 Your organisation is:

- National authority
- Civil society organisation (Note: irrespective of the legal status, including foundations, associations, NGOs. Please refer to the definition provided at footnote [5] in the introduction)
- Law practice entity
- EU institution / agency

- ◯ International organisation
- ◯ Other

2.7 Please specify

2.8 Please specify if the authority is:

- ◯ Governmental body (Ministries, executive agencies / bodies)
- ◯ Judiciary (e.g. associations or networks of judges or courts)
- ◯ National Human Rights Institution / body
- ◯ Equality body
- ◯ Other

2.9 Does your mandate cover any of the following areas of activity?

- ☐ Advocacy (including watchdog)
- ☐ Education and awareness raising
- ☐ Litigation
- ☐ Legal counselling and support

2.10 Does your mandate cover any of the following areas of activity?

- ☐ Advocacy (including watchdog)
- ☐ Education and awareness raising
- ☐ Litigation
- ☐ Legal counselling and support

2.11 Please specify

2.12 Does your institution provide funds to civil society organisations engaged in the promotion and protection of fundamental rights?

- ◯ Yes
- ◯ No

2.13 Please specify if your organisation is:

- ◯ Grassroots organisation at local/national level
- ◯ Umbrella/Member based organisation at national/supra national level
- ◯ International civil society organisation

2.14 Areas of activity of your organisation

- ☐ Advocacy (including watchdog)
- ☐ Education and awareness raising
- ☐ Litigation
- ☐ Legal counselling and support

- [ ] Other

2.15 Please specify

2.16 Areas of activity of your organisation's members

- [ ] Advocacy (including watchdog)
- [ ] Education and awareness raising
- [ ] Litigation
- [ ] Legal counselling and support
- [ ] Other

2.17 Please specify

2.18 If applicable, please specify whether your organisation:

- [ ] finances its member/other civil society organisations engaged in the promotion and protection of fundamental rights (including through regranting)
- [ ] collects fees from its members
- [ ] does not finance its members/other civil society organisations engaged in the promotion and protection of fundamental rights

2.19 Approximately, what does this funding represent with respect to the overall resources of the members?

- ○ Less than 25%
- ○ Between 25% and 50%
- ○ Between 50 and 75%
- ○ Between 75% and 100%

2.20 Please specify if the entity is:

- ○ Law firm
- ○ Bar of law society
- ○ Lawyers' association
- ○ Pro bono organisations / association
- ○ Other

2.21 Please specify

2.22 Does your entity receive financial support for litigation and litigation related activities by entities other than the parties themselves (or their insurers))?

- ○ Yes
- ○ No

3 Sources of funding for activities related to the promotion and protection fundamental rights

(The response options in this section become visible only after the completion of the identification section)

3.1 Please indicate what is your main source of funding:

ADVOCACY (INCLUDING WATCHDOG)

	To no extent	To a low extent	To a large extent	To a full extent	Not applicable
Public local/regional funds	○	○	○	○	○
Public national funds	○	○	○	○	○
Public EU funds	○	○	○	○	○
Public international funds	○	○	○	○	○
Private national funds	○	○	○	○	○
Private foreign funds	○	○	○	○	○
Private micro-donations and crowd funding	○	○	○	○	○
Funds from civil society organisations (including via regranting)	○	○	○	○	○

3.2 Please indicate any additional source of funding if not previously listed

3.3 **EDUCATION AND AWARENESS RAISING**

	To no extent	To a low extent	To a large extent	To a full extent	Not applicable
Public local/regional funds	○	○	○	○	○
Public national funds	○	○	○	○	○
Public EU funds	○	○	○	○	○
Public international funds	○	○	○	○	○
Private national funds	○	○	○	○	○
Private foreign funds	○	○	○	○	○

Private micro-donations and crowd funding					
Funds from civil society organisations (including via regranting)					

3.4 Please indicate any additional source of funding if not previously listed

3.5 **LITIGATION**

	To no extent	To a low extent	To a large extent	To a full extent	Not applicable
Public local/regional funds					
Public national funds					
Public EU funds					
Public international funds					
Private national funds					
Private foreign funds					
Private micro-donations and crowd funding					
Funds from civil society organisations (including via regranting)					

3.6 Please indicate any additional source of funding if not previously listed

3.7 **LEGAL COUNSELLING AND SUPPORT**

	To no extent	To a low extent	To a large extent	To a full extent	Not applicable
Public local/regional funds					
Public national funds					
Public EU funds					
Public international funds					
Private national funds					
Private foreign funds					

Private micro-donations and crowd funding	○	○	○	○	○
Funds from civil society organisations (including via regranting)	○	○	○	○	○

3.8 Please indicate any additional source of funding if not previously listed

3.9 If applicable, please indicate if you have any policy in place that restrains from receiving public funding specifically on litigation

- ○ Yes
- ○ No

3.10 Please indicate how, compared to 3 years ago, the amount of funding from each applicable source has changed:

ADVOCACY (INCLUDING WATCHDOG)

	Increased	Remained stable	Decreased	Stopped	Not applicable
Public local/regional funds	○	○	○	○	○
Public national funds	○	○	○	○	○
Public EU funds	○	○	○	○	○
Public international funds	○	○	○	○	○
Private national funds	○	○	○	○	○
Private foreign funds	○	○	○	○	○
Private micro-donations and crowd funding	○	○	○	○	○
Funds from civil society organisations (including via regranting)	○	○	○	○	○

3.11 **EDUCATION AND AWARENESS RAISING**

	Increased	Remained stable	Decreased	Stopped	Not applicable
Public local/regional funds	○	○	○	○	○
Public national funds	○	○	○	○	○
Public EU funds	○	○	○	○	○

Public international funds					
Private national funds					
Private foreign funds					
Private micro-donations and crowd funding					
Funds from civil society organisations (including via regranting)					

3.12 **LITIGATION**

	Increased	Remained stable	Decreased	Stopped	Not applicable
Public local/regional funds					
Public national funds					
Public EU funds					
Public international funds					
Private national funds					
Private foreign funds					
Private micro-donations and crowd funding					
Funds from civil society organisations (including via regranting)					

3.13 **LEGAL COUNSELLING AND SUPPORT**

	Increased	Remained stable	Decreased	Stopped	Not applicable
Public local/regional funds					
Public national funds					
Public EU funds					
Public international funds					
Private national funds					
Private foreign funds					

Private micro-donations and crowd funding	○	○	○	○	○
Funds from civil society organisations (including via regranting)	○	○	○	○	○

3.14 Please use the field below to provide more information on the funding trends, not captured by answer above

3.15 Please indicate for what activities your funding / grants have been prioritised in the last 3 years

	To no extent	To a low extent	To a large extent	To a full extent	Not applicable
Advocacy (including watchdog)	○	○	○	○	○
Education and awareness raising	○	○	○	○	○
Litigation	○	○	○	○	○
Legal counselling and support	○	○	○	○	○

3.16 Please indicate any additional activities funded if not previously listed:

3.17 If you ticked the box on "Not applicable" on any of the lines above, please explain why:

3.18 In your experience, to what extent does lack of adequate funding represent an obstacle to independent human rights actors undertaking activities of advocacy, awareness raising, litigation, legal counselling and support on fundamental rights?

	To no extent	To a limited extent	To a fair extent	To a high extent	No opinion
Advocacy (including watchdog)	○	○	○	○	○
Education and awareness raising	○	○	○	○	○
Litigation	○	○	○	○	○
Legal counselling and support	○	○	○	○	○

3.19 In your experience what are the causes of the funding difficulties?

ADVOCACY (INCLUDING WATCHDOG)

Rate relevance from 1: Not at all relevant to 4: Very relevant

NOTE: If you reply on behalf of a national independent human rights body or a CSO/NGO please reflect the challenges you are experiencing, otherwise please provide your views on the challenges facing independent human rights actors from your perspective

	1	2	3	4	No opinion
Limited availability of funds in this area	○	○	○	○	○
Limited sustainability of available funds in this area (e.g. short-term project funding, lack of core support)	○	○	○	○	○
Difficult access to funds due to the conditions of the calls	○	○	○	○	○
Lack of capacity in the organisation(s) to prepare and participate to calls	○	○	○	○	○
Lack of awareness about the existence of funding opportunities	○	○	○	○	○
Funding schemes favour a limited number of organisations with certain characteristics	○	○	○	○	○
Lack of equal treatment, discretion or arbitrariness in the granting of funding	○	○	○	○	○

3.20 Please include any additional relevant cause not previously listed

3.21 **EDUCATION AND AWARENESS RAISING**

Rate relevance from 1: Not at all relevant to 4: Very relevant

NOTE: If you reply on behalf of a national independent human rights body or a CSO/NGO please reflect the challenges you are experiencing, otherwise please provide your views on the challenges facing independent human rights actors from your perspective

	1	2	3	4	No opinion
Limited availability of funds in this area	○	○	○	○	○
Limited sustainability of available funds in this area (e.g. short-term project funding, lack of core support)	○	○	○	○	○
Difficult access to funds due to the conditions of the calls	○	○	○	○	○
Lack of capacity in the organisation(s) to prepare and participate to calls	○	○	○	○	○
Lack of awareness about the existence of funding opportunities	○	○	○	○	○
Funding schemes favour a limited number of organisations with certain characteristics	○	○	○	○	○

3.22 Please include any additional relevant cause not previously listed

3.23 **LITIGATION**

Rate relevance from 1: Not at all relevant to 4: Very relevant

NOTE: If you reply on behalf of a national independent human rights body or a CSO/NGO please reflect the challenges you are experiencing, otherwise please provide your views on the challenges facing independent human rights actors from your perspective

	1	2	3	4	No opinion
Limited availability of funds in this area	○	○	○	○	○
Limited sustainability of available funds in this area (e.g. short-term project funding, lack of core support)	○	○	○	○	○
Difficult access to funds due to the conditions of the calls	○	○	○	○	○
Lack of capacity in the organisation(s) to prepare and participate to calls	○	○	○	○	○
Lack of awareness about the existence of funding opportunities	○	○	○	○	○
Funding schemes favour a limited number of organisations with certain characteristics	○	○	○	○	○

3.24 Please include any additional relevant cause not previously listed

3.25 **LEGAL COUNSELLING AND SUPPORT**

Rate relevance from 1: Not at all relevant to 4: Very relevant

NOTE: If you reply on behalf of a national independent human rights body or a CSO/NGO please reflect the challenges you are experiencing, otherwise please provide your views on the challenges facing independent human rights actors from your perspective

	1	2	3	4	No opinion
Limited availability of funds in this area	○	○	○	○	○
Limited sustainability of available funds in this area (e.g. short-term project funding, lack of core support)	○	○	○	○	○
Difficult access to funds due to the conditions of the calls	○	○	○	○	○
Lack of capacity in the organisation(s) to prepare and participate to calls	○	○	○	○	○
Lack of awareness about the existence of funding opportunities	○	○	○	○	○
Funding schemes favour a limited number of organisations with certain characteristics	○	○	○	○	○

3.26 Please include any additional relevant cause not previously listed

3.27 If you have indicated that difficulties in funding are related to the conditions of the calls, please specify what specific obstacles are the most relevant

Rate relevance from 1: Not at all relevant to 4: Very relevant

	1	2	3	4	No opinion
Value thresholds (e.g. minimum funding required to apply)	○	○	○	○	○
Financial capacity criteria	○	○	○	○	○
Technical / operational capacity	○	○	○	○	○
Criteria on establishing consortia and partnerships	○	○	○	○	○
Complexity of application procedures	○	○	○	○	○
Complexity of reporting procedures	○	○	○	○	○

3.28 Please indicate any additional difficulties not previously listed

3.29 For those obstacles which you consider as relevant or very relevant, please provide examples

4 Litigating cases relating to violations of fundamental rights and freedoms based on EU law and the Charter of Fundamental Rights of the EU in national contexts

4.1 In your experience what are typically the main factors affecting the exercise by individuals of their right to effective legal protection of fundamental rights and freedoms based on EU law and the Charter of Fundamental Rights of the EU in national contexts, in particular through litigation?

Rate the extent to which you agree on the importance of the factors below (1 not agree – 4 strongly agree)

	1	2	3	4	No opinion
Lack of individuals' awareness of their rights	○	○	○	○	○
Lack of individuals' awareness of existing remedies and redress mechanisms	○	○	○	○	○

Lack of financial resources for individuals to litigate cases (including legal aid)	○	○	○	○	○
Reluctance of individuals to engage in litigation (e.g. due to lack of confidence, long-term nature of the engagement, etc)	○	○	○	○	○
Limited availability of competent legal representatives	○	○	○	○	○
Limited availability of adequate legal assistance and support	○	○	○	○	○
High fees of competent legal representatives	○	○	○	○	○
High costs of adequate legal assistance and support	○	○	○	○	○
Lack of enforcement by national authorities or lack of confidence in their capacity to address effectively the problem	○	○	○	○	○
Lack of engagement by relevant institutions and bodies to monitor enforcement	○	○	○	○	○

4.2 Please indicate any additional factor not previously listed

4.3 In your experience, what are typically the main factors prompting individuals to exercise their right to effective legal protection of fundamental rights and freedoms based on EU law and the Charter of Fundamental Rights of the EU in national contexts, in particular through litigation?

Rate pertinence (1 not at all pertinent – 4 Very pertinent)

	1	2	3	4	No opinion
Enhanced awareness of rights holders on given issues (e.g. deriving from advocacy initiatives, social actions, etc)	○	○	○	○	○
Enhanced awareness of legal professionals on given issues	○	○	○	○	○
Enhanced awareness of the judiciary on given issues	○	○	○	○	○
Existence of issues of general relevance related to the implementation at national level of EU law and the Charter	○	○	○	○	○
Existence of issues of general relevance related to the interpretation of EU law and the Charter	○	○	○	○	○

4.4 Please indicate any additional factor not previously listed

4.5 In your experience, looking at the role of independent human rights actors, what are the main factors affecting their capacity to adequately support victims wishing to litigate cases relating to violations of fundamental rights and freedoms based on EU law and the Charter of Fundamental Rights of the EU in national contexts?

Rate relevance from 1: not at all relevant to 4: very relevant

	1	2	3	4	No opinion
Lack of adequate in-house legal expertise to assist/support applicants	○	○	○	○	○
Lack of adequate/accessible financial resources to assist/support applicants	○	○	○	○	○
Lack of capacity (including lack of human resources) to assist /support applicants	○	○	○	○	○
Lack of a strategic approach to litigation	○	○	○	○	○
Lack of knowledge of the potentials of litigation based on EU law and the Charter of Fundamental Rights of the EU	○	○	○	○	○
Applicable rules on legal standing	○	○	○	○	○
Risks relating to costs of legal proceedings	○	○	○	○	○
Reluctance of long-term engagement	○	○	○	○	○
Risks relating to applicants' drop out	○	○	○	○	○
Fear of retaliation	○	○	○	○	○

4.6 Please indicate any additional factor not previously listed

4.7 In your experience, what are the main avenues through which independent human rights actors can support the exercise by individuals of their right to effective legal protection of fundamental rights and freedoms based on EU law and the Charter of Fundamental Rights of the EU in national contexts?

Rate the relevance (1 not at all relevant – 4 Very relevant)

	1	2	3	4	No opinion
Legal representation before the competent court	○	○	○	○	○
Legal counselling and support before proceedings	○	○	○	○	○
Legal counselling and support during proceedings	○	○	○	○	○
Legal counselling and support after proceedings and during the implementation phase	○	○	○	○	○
Social support actions (communication, advocacy, awareness raising)	○	○	○	○	○
Third party interventions before the competent court	○	○	○	○	○
Raising awareness of/involving other individuals who may be victims of the same alleged violation	○	○	○	○	○

4.8 Please indicate any additional avenue not previously listed

4.9 In your experience, what are the key enabling factors for effective litigation as a means to ensure that, in the fields covered by EU law, fundamental rights and freedoms as enshrined in the Charter of Fundamental Rights of the EU are respected and that individuals are granted effective legal protection?

Rate the extent to which you agree on the importance of the factors below (1 not agree – 4 strongly agree)

	1	2	3	4	No opinion
Adequate communication / awareness raising strategies	○	○	○	○	○
Targeted and well-designed advocacy strategy	○	○	○	○	○
Adequate support (including counselling, legal advice, legal representation) to individuals litigating	○	○	○	○	○
Adequate risk mitigation strategy (risks such as applicant drop out, long legal proceedings)	○	○	○	○	○
Regular monitoring and evaluation of litigation outcomes	○	○	○	○	○
Strong legal expertise on EU law and the Charter of Fundamental Rights of the EU and related avenues for litigation	○	○	○	○	○
Well established partnership/coalition among stakeholders	○	○	○	○	○

4.10 Please indicate any additional enabling factor not previously listed

4.11 In your experience, which are the main factors to be considered when initiating litigation of cases relating to violations of fundamental rights and freedoms based on EU law and the Charter of fundamental rights of the EU in national contexts?

Rate pertinence from 1: not at all pertinent to 4: very pertinent

	1	2	3	4	No opinion
Impact on the transposition/implementation at national level of EU law and the Charter	○	○	○	○	○
Impact on the interpretation of EU law and the Charter	○	○	○	○	○
Number of individuals affected by the violation	○	○	○	○	○
Existence of a cross-border impact/relevance	○	○	○	○	○
Concrete/reasonable possibilities of redress/compensation	○	○	○	○	○

4.12 Please indicate any other relevant factor not previously listed

4.13 What are in your experience the main thematic areas on which litigation of cases relating to violations of fundamental rights and freedoms based on EU law and the Charter of fundamental rights of the EU in national contexts currently focuses?

Rate pertinence from 1: not at all pertinent to 4: very pertinent

	1	2	3	4	No opinion
Asylum law	○	○	○	○	○
Migration law	○	○	○	○	○
Rights of the child	○	○	○	○	○
Rights of persons with disabilities	○	○	○	○	○
Discrimination, racism, intolerance	○	○	○	○	○
Business and human rights	○	○	○	○	○
Data protection	○	○	○	○	○
Economic and social rights	○	○	○	○	○
Access to justice, right to a court	○	○	○	○	○
Rights of suspects and accused in criminal proceedings	○	○	○	○	○
EU citizenship and free movement	○	○	○	○	○
Consumer protection	○	○	○	○	○
Environmental protection	○	○	○	○	○

4.14 Please indicate any other relevant thematic area not previously listed

4.15 Please provide details on the specific issues raised which you may be aware of, in relation to the priorities you listed above "Pertinent" or "Very pertinent"

5 Support for litigating cases relating to violations of fundamental rights and freedoms based on EU Law and the Charter of Fundamental Rights of the EU in national contexts

5.1 In your experience, what are the main financial sources supporting individuals litigating cases relating to violations of fundamental rights and freedoms?

Rate pertinence: 1 not pertinent to 4 very pertinent

	1	2	3	4	No opinion
Own resources	○	○	○	○	○
Legal aid schemes available under national rules	○	○	○	○	○
Legal insurance schemes	○	○	○	○	○
Private litigation funds	○	○	○	○	○

5.2 Please indicate any other relevant source not previously listed

5.3 In your experience, what is the added value of financial support for litigation and litigation related activities as regards cases relating to violations of fundamental rights and freedoms?

Rate pertinence in terms of added value: 1 not pertinent to 4 very pertinent

	1	2	3	4	No opinion
Access for the applicant(s) to a complementary source of aid beyond legal aid schemes available under national rules (e.g. in cases where individuals are not eligible, or to cover other legal costs)	○	○	○	○	○
Access for the applicant(s) to a complementary/alternative source of legal coverage beyond available legal insurance schemes (e.g. in cases applicants cannot afford legal insurance, or to cover other legal costs)	○	○	○	○	○
Possibility for the applicant to be granted quality services accompanying litigation (such as legal counselling and support)	○	○	○	○	○
Opportunity for independent human rights actors to build capacity to be able to identify, support and/or litigate on behalf of /accompany applicants	○	○	○	○	○

5.4 Please indicate other added value if not previously listed

5.5 For those factors that you rated as being pertinent or very pertinent in terms of added value, please provide more details as to why

5.6 In your view, what should financial support for litigation (and litigation related activities) as regards cases relating to violations of fundamental rights and freedoms focus on?

Rate relevance from 1: not at all relevant to 4: very relevant

	1	2	3	4	No opinion
Direct and concrete support for applicants to litigate cases (e.g. lawyers' fees, court fees, other litigation associated costs)	○	○	○	○	○
Expert legal advice to inform litigation	○	○	○	○	○
Training and capacity building of independent human rights actors to identify, support and/or litigate on behalf of/accompany applicants	○	○	○	○	○
Coalition building	○	○	○	○	○
Advocacy	○	○	○	○	○
Counselling and support services	○	○	○	○	○
Communication and awareness raising	○	○	○	○	○
Research to prepare/document cases	○	○	○	○	○
Ability to file amicus briefs/third party interventions	○	○	○	○	○
Monitoring / activities around implementation of decisions	○	○	○	○	○

5.7 Please indicate other area not previously listed

5.8 Do you see any adverse consequences of financial support for litigation (and litigation related activities) as regards cases relating to violations of fundamental rights and freedoms?

Rate relevance of the risk from 1: not at all relevant to 4: very relevant

	1	2	3	4	No opinion
Reputational risk for the donor (including conflict of interest)	○	○	○	○	○
Reputational risk for the recipient (including perceptions on independence)	○	○	○	○	○
Reputational risk for the victim(s)	○	○	○	○	○
Reputational risk for the victim(s)' legal representatives (including perceptions on independence)	○	○	○	○	○
Interference with legal aid schemes available under national rules	○	○	○	○	○
Interference with available legal insurance schemes	○	○	○	○	○
Risks of abusive or frivolous litigation	○	○	○	○	○
Impact on equality of arms	○	○	○	○	○

5.9 Please use the field below to provide more information on possible adverse consequences if not captured by answer above

5.10 For those risks that you rated as relevant or very relevant, please use the field below to provide information on strategies that might be put in place to mitigate against the risks in question

5.11 In your view, having regard to potential conflicts of competences or conflicts of interest, what are the most appropriate actors to provide financial support for litigation (and litigation related activities) as regards cases relating to violations of fundamental rights and freedoms based on EU law and the Charter of Fundamental Rights of the EU in national contexts?

Rate the appropriateness (1 Not at all appropriate, 4 very much appropriate)

	1	2	3	4	No opinion
National authorities	○	○	○	○	○
National independent human rights bodies (e.g. accredited national human rights institutions, equality bodies)	○	○	○	○	○
International organisations	○	○	○	○	○
EU institutions	○	○	○	○	○
Private individuals/entities	○	○	○	○	○
Civil society organisations (including as "intermediaries")	○	○	○	○	○

5.12 Please indicate other funding actors if not previously listed

5.13 For those actors that you consider as not at all appropriate or not appropriate, please briefly explain why

5.14 In your view, what are the main criteria on the basis of which financial support for litigation and litigation related activities should be granted, in particular in relation to cases relating to violations of fundamental rights and freedoms based on EU law and the Charter of Fundamental Rights of the EU in national contexts?

Rate the appropriateness (1 Not at all appropriate, 4 very much appropriate)

	1	2	3	4	No opinion

Pertinence of the identified issue to certain pre-defined priority areas/issues					
Potentially significant impact on the implementation at national level of EU law and the Charter					
Potentially significant impact on the interpretation of EU law and the Charter					
Cross-border nature of the identified issue					
Estimate costs of the action					
Estimate duration of the action					
Co-funding/co-financing criteria					
Advanced stage of maturity of the action (i.e., existence of a claim ready to be submitted to the competent court)					
Evidence of several individuals affected (complaints, etc)					
Assessment of potential risks (e.g. harms to the applicants, abusive litigation, etc) and of mitigation strategies					

5.15 Please indicate other criteria if not previously listed

5.16 In your view, what are the main criteria on the basis of which beneficiaries of financial support for litigation and litigation related activities should be selected?

Rate the relevance (1 Not at all relevant, 4 very much relevant)

	1	2	3	4	No opinion
Independence of the beneficiary (-ies)					
Non-profit making nature of the beneficiary (-ies)					
Experience of the beneficiary (-ies) on litigation and litigation related activities					
Experience of the beneficiary (-ies) in grant managing					
Financial viability of the beneficiary (-ies) (stable and sufficient sources of finance)					
Existence of a balanced multi-stakeholder partnership (e.g. consortium of civil society organisations and law practice entities)					

5.17 Please indicate other criteria if not previously listed

5.18 If you considered the independence of beneficiaries as "relevant" or very "relevant", could you please indicate what could help to monitor and assess independence (e.g. establishing independent evaluation committee, strict reporting rules, etc.)?

5.19 Please share with us any additional view you may have which is not captured by the survey

500 character(s) maximum

Please avoid repeating any of the answers already given

Appendix C: Financial Obstacles to Litigation Against Corporations

Several interviewees as well as some respondents to the survey commented that some of the, in their opinion, most egregious human rights abuses are carried out by corporations. These include serious pollution and environmental abuses within the EU, as well as human rights abuses committed by transnational corporations outside the EU, or within the supply chains of corporations that sell goods or otherwise trade in the EU.

Building a legal case to challenge such alleged abuses requires an innovative use of the law, including of Charter rights. Interviewees and survey respondents spoke of numerous legal obstacles. They suggested law reform at the national level that would facilitate such litigation, including providing for collective redress in judicial proceedings; enhanced pre-trial disclosure; enhanced transparency around issues such as parent companies and controlling entities; extraterritorial jurisdiction; and a reversed burden of proof.

But interviewees and survey respondents highlighted the potential financial cost and financial risks of litigating against corporations as an even bigger hurdle than legal and procedural obstacles. The main obstacle, it was said, was the potential liability for the costs of the corporation, should the CSO lose the case.

As interviewees explained, and as elaborated in this report, CSOs typically have small legal teams to litigate their cases, sometimes bolstered with pro bono lawyers. CSO in-house lawyers get paid relatively low salaries and so the cost of a CSO's legal team, while still significant to the CSO (hence the need for funding outlined in this study), is comparatively low. In contrast, large corporations have legal teams that are several times larger, and consist of lawyers who are paid a hundredfold what a CSO lawyer charges (around €1,000 an hour is not uncommon). For a CSO to be faced with the cost of paying the legal bill of a corporation that is likely to run into the hundreds of thousands if they lose a case is simply unthinkable: it would mean bankruptcy. The net result is that this kind of litigation is rarely if ever undertaken. As one respondent, a CSO that litigates for improved environmental protections across the EU, stated: "We cannot go up against oil or gas majors."

Interviewees noted that this was a problem particularly in France, Germany, Ireland, Poland and the United Kingdom.

Additionally problematic, interviewees reported, are "SLAPP" suits: Strategic Lawsuits Against Public Participation. These are legal cases, usually brought by large corporations or other wealthy entities, against CSOs or journalists, to stop them investigating or publishing about their (i.e., the complainant's) activities. Often they are defamation cases, alleging that what a journalist or CSO has published is untrue, but other laws can be abused to this end as well. In a few states in the United States, such suits can be summarily dismissed by a judge, but in many European countries they cannot and are a growing phenomenon that fuels "lawfare" against CSOs by wealthy entities. As one respondent to the survey, a coalition of European CSOs, observed: "Retaliation in the form of SLAPP suits is increasingly common for journalists as well as legal CSOs."

The aim behind such cases is not to win them: it is purely to force a CSO or journalist to run up legal costs and expenses to defend the claim. For the claimant who is wealthy, paying their lawyers is a tax-deductible business expense; for the CSO or journalist, the cost of defending the litigation can threaten their survival or ability to carry on with their publishing or campaigning. One large environmental CSO, for instance, described how its in-house lawyers spend half their time defending legal cases brought against it, instead of working proactively on legal campaigns for environmental protection.

As one survey respondent wrote, echoing the words of some others:

> The general and systemic issue typically facing plaintiffs in business and human rights cases ... is the inequality of arms. Despite the merits of any potential claim, the financial costs associated with such litigation can be prohibitively expensive for what are often poor or otherwise disadvantaged plaintiffs. [C]orporate defendants will typically utilise every possible procedural hurdle in the litigation process, adding to litigation fees. The "loser pays" principle, standard to EU legal systems, also adds to the financial risk of the proceedings, as corporate defendant legal fees are typically extremely high.

Some interviewees explained that the risk of adverse costs is a major factor even in cases against public agencies. One interviewee referenced a well-publicised recent case in which the EU Border Agency, Frontex, sent two pro-transparency campaigners a €23,700 bill after winning a court case against them last November.[52] Even this sum, low compared to the costs faced by CSOs that go up against large corporations, was beyond the means of the campaigners in question, and thus had a major inhibiting effect on future litigation.

[52] https://euobserver.com/migration/147562

Appendix D: Table of Litigation Donors[53]

	Public / private	Nat'l / Int'l	Grant type	Number of litigation grantees	Thematic focus	Activities supported other than litigation	Grant-making criteria	Success criteria	MEL	Risk measurement	Desirability of more funding for field?	Knowledge of other litigation donors
Sigrid Rausing Trust	Private	Int'l (not restricted to Europe)	Typically core	10 grants in Europe listed in interview; interviewee suggested there may be more	Broad human rights reach, including: discrimination; rule of law; accountability	Training; advocacy	See Section III.C.1-3	See Section III.C.1-3, but including degree of follow-up, how grantee works with clients	See Section III.C.1-3	Quality and general track record of applicant as a proxy risk assessor		
Oak Foundation	Private	Int'l (not restricted to Europe)	Typically core	10-12 (about 50% of supported litigation is at the ECtHR)	Discrimination (LGBTI); war crimes accountability; human rights defenders	Training; advocacy; communica-tions	See Section III.C.1-3	See Section III.C.1-3	See Section III.C.1-3	Quality and general track record of applicant as a proxy risk assessor	Interested in expanding to CJEU support if persuaded that this is a promising venue	No suggestions other than OSF and Adessium

[53] Part of the task here was to research litigation budgets, but it emerged that the interviewees, other than DFF and MLDI, do not have separate litigation budget lines. The relevant column, for budgets, has therefore been omitted from this table. (DFF does have a specific budget for supporting individual cases, but, as it is a relatively young organisation, it has not published this information yet. MLDI's litigation support budget is set out in the body of this report).

Two further notes: First, the Canadian Court Challenges Program data has not been included in this table because that funding does not support fundamental rights litigation in Europe (though details about this Program can be found in the main text at Section III.E). Second, while the King Baudouin Foundation was interviewed, it does not support any litigation at all and so is not represented in this table.

Adessium Foundation	Private	Int'l (not restricted to Europe)	Typically core	Around four with strong litigation focus (two focused on Netherlands, two international, including Europe); around four more that receive core support, with litigation components	Journalism; transparency and accountability; protection of civic space	For core grants: training; research; advocacy	See Section III.C.1-3	See Section III.C.1-3	See Section III.C.1-3	Not so much concerned about risk, though do take some efforts to manage communica-tions around support for controversial cases	Does not expect more explicit litigation support, though may incidentally support more litigation through core grants	Other than the usual actors, "Media and Democracy" in the Netherlands
Baring Foundation	Private	National (UK)	Project		Building litigation capacity in the CSO sector	Training, provision of legal advice (litigation is just a "tool in the toolbox")	See Section III.C.1-3	See Section III.C.1-3	See Section III.C.1-3	Quality and general track record of applicant as a proxy risk assessor	Would like to see more private donors enter the field	No suggestions
Open Society Foundations	Private	Int'l (not restricted to Europe)	Increasingly core	Probably dozens; relevant grants include to the Digital Freedom Fund, and to organisations doing human rights litigation in at the ECtHR; these tend to be core	A wide range of rights, including: digital rights and privacy; account-ability; discrimination	Training; Research; advocacy; communica-tions	See Section III.C.1-3	See Section III.C.1-3	See Section III.C.1-3	Quality and general track record of applicant as a proxy risk assessor	Depending on judgments of the field: if more requests come in for litigation, the amount of litigation support may increase, but not otherwise	No suggestions, though interviewee knows Oak, Adessium, and Luminate well

Luminate	Private	Europe (with respect to digital rights, their main rights focus)	Typically core (including for some NGOs that do only, or principally, litigation)	Six currently, that have litigation-relevant activity	Digital rights	As part of core grants, in most cases: advocacy; capacitation; communica-tions	See Section III.C.1-3	See Section III.C.1-3	See Section III.C.1-3	Quality and general track record of applicant as a proxy risk assessor		
Democracy and Media Foundation	Private	National (NL), with a few grants going as well to Council of Europe countries	Typically project or core; no dedicated litigation funding	Three current grantees conduct some litigation, as part of general support for them	Media freedom; support for victims of war crimes; law and democracy	Principally litigation (for the grants that have any litigation component)	See Section III.C.1-3	See Section III.C.1-3	See Section III.C.1-3	Quality and general track record of applicant as a proxy risk assessor		
EEA/Norway	Public	Int'l; Grants in Croatia, Czech Republic, Lithuania, Romania, and Slovenia have litigation as an "eligible activity," consistent with the "results framework" for these countries	Project, with "nothing to stop" litigation being supported, as part of a wider set of activities	Information not available across all countries; grants that have a litigation component may number in the dozens	Focus on supporting vulnerable groups, thus typically anti-discrimination	Training; research; advocacy; communica-tions; vital that projects involving litigation include a range of these other activities as well	See Section III.C.1-3; no criteria employed for choosing individual cases	See Section III.C.1-3	See Section III.C.1-3	Quality and general track record of applicant as a proxy risk assessor		Aware of the usual actors

UNESCO Global Media Defence Fund	Public	Int'l, with an emphasis on the Global South	Project	To be determined; initial call for funding published April 2020. Total fund available $500,000; grant size ranges from $15,000 to $60,000	Freedom of expression; defence of media and journalists	Strengthening legal networks; enhancing collaboration for legal advocacy; sharing jurisprudence	See Section III.C.1-3	See Section III.C.1-3	See Section III.C.1-3	Quality and general track record of applicant as a proxy risk indicator		
UN Voluntary Fund for Victims of Torture[54]	Public	Int'l	Project	184 "projects" averaging $30,000 - $40,000 each	Exclusive focus on torture victims	Medical, psychology-cal, social and legal assistance (including litigation) for torture victims	See Section III.C. 1-3	See Section III.C. 1-3	See Section III.C. 1-3			
Porticus (Belgium)	Private	Int'l, but as relevant here, Europe	Project	Two at present	Protection of refugee rights; support for Roma youth	Research; capacitation; advocacy	See Section III.C.1-3	Number of cases brought; number of wins, political changes				

[54] We were unable to interview anyone from this fund; the information in the table has been gathered from the fund's website, https://www.ohchr.org/EN/Issues/Torture/UNVFT/Pages/QAndA.aspx

Strategic Litigation Fund (UK)	Private	National (UK)	Project, for pre-litigation planning, or amicus curiae interventions; actual case support would exhaust the fund for less than a single case	34 in last two years	Support for youth in immigration system	Pre-litigation research only	Have a chance of leading to litigation; have a pro bono aspect; benefit youth under 25 years old	Cases go forward; advocacy efforts expended; government adjusts policies				
Ministry of Foreign Affairs, Human Rights Fund (Netherlands)	Public	Int'l (not restricted to Europe)	Project	Unspecified but probably a handful in Hungary and Poland	Various human rights, including: LGBTI; women and girls; human rights defenders	Various, including: advocacy; capacity building	Not applicable; interviewee doubted that litigation was included in any European grants but said it could be; would not be disaggregable and grants would not have litigation criteria					

Digital Freedom Fund	Private	Int'l (Europe)	Litigation; pre-litigation research; emergency support	55 (in first 18 months of existence)	Digital rights		Fit with thematic focus areas; salience of legal arguments; optimal litigation forum; risk management strategy; link with wider strategy for change	Assessment of milestones within cases, as well as numbers of cases brought	Measured against grant objectives	Part of case selection criteria	Would like to see more donors enter, including EU	Aware of the usual actors

Media Legal Defence Initiative	Private	Int'l (not restricted to Europe)	Litigation; litigation block grants	265 individual cases, 15 block grants (in 2018)	Media freedom	Capacity building	For block grants: need in the country for litigation interventions; relative independence of country courts; litigation competence For individual cases: whether in mandate; whether the person has been targeted because of their being a journalist; whether an actual case is at hand	For block grants: number of cases delivered; some indication of awareness raised, workshops conducted. For individual cases: dependent on specific case, including impact of litigation on journalist's ability to keep working	Measured against grant objectives	Part of case selection criteria		

Appendix E: The Role of Pro Bono

Many of the CSOs interviewed talked about using pro bono lawyers in their litigation, often with productive results. Pro bono lawyering provides a significant contribution to the work of CSOs, and the practice of pro bono is growing around Europe. However, the ability of lawyers to work pro bono differs from country to country. In some countries, there is a strong pro bono culture, and in other countries there is hardly any pro bono legal work being done at all. Even in those countries where such work is relatively established, it may be that lawyers are able to do legal contractual work on a pro bono basis (for example, drawing up employment contracts for CSOs) but they don't engage in litigation.

The executive director of a national pro bono network, and the pro bono managers of two of the law firms with the largest pro bono practices in Europe who, combined, supervise a network of several thousand lawyers, were interviewed. From these interviews, along with comments made by CSO interviewees, the following points emerge:

- The willingness of lawyers to work pro bono differs from country to country. Historically, pro bono is most established in US law firms with a presence in the EU, and among UK-based barristers. From there, the practice of pro bono has spread to other European countries. CSOs such as PILnet – the Global Network for Public Interest Law – focused on developing a pro bono culture in Central and Eastern European countries in the 1990s and 2000s, with the result that there is a more established pro bono culture in countries such as Hungary and Poland than elsewhere. The pro bono culture is weakest in Germany and other western European countries, as well as in southern Europe.
- Historically, lawyers have been more willing to provide their services pro bono on clearly defined and time-limited tasks such as drawing up employment contracts for CSOs, and less willing to commit to potentially long-running litigation that may require them to commit significant resources. While this is changing – one of the pro bono managers we interviewed spoke of having a "great appetite" to take on human rights litigation – this is a process that is happening more quickly in some countries and law firms than in others
- Lawyers typically specialise in certain areas, such as tax law, or employment law. They should not be expected nor called upon to work pro bono in areas outside their expertise; even if they would be willing to "try their hand at" fundamental rights litigation, the result would probably not be optimal
- Even when lawyers cannot provide legal representation in fundamental rights litigation, they may still be able to carry out legal research in support of or preparatory to litigation
- Particularly in large law firms, a partner – a senior lawyer in the firm – needs to support the project. They then usually assign more junior lawyers to work on the litigation alongside them, while supervising the overall process. Without the support of the partner, junior lawyers are unlikely to have the freedom to be able to commit to pro bono litigation and may not be able to give it their full time and attention

- Lawyers can sometimes have conflicts of interest. If a CSO requests legal assistance in litigation but the law firm or lawyer concerned already represents the party against which the litigation would take place, even if that representation is on a different matter, the lawyer or law firm will declare that they are "conflicted" and will decline to represent the CSO. This is a significant hurdle in particular for large firms, particularly when the litigation concerned is against a large corporation (which often retain the services of several law firms). Similarly, the pro bono manager for one law firm remarked that in their experience, lawyers in Central and Eastern European countries are hesitant to commit to litigation "against the government"
- Pro bono managers in law firms described a symbiotic relationship with CSOs. They rely on CSOs to "bring them cases," and remarked that pro bono projects with CSOs work best when the CSO has a dedicated team member with knowledge of the law, legal procedure and a clear vision as to how the litigation fits within the organisation's overall strategy. In litigation, pro bono lawyers often also rely on the CSO to communicate with the client. Ideally, the CSO would employ its own lawyers so that they can work seamlessly with pro bono lawyers

In short, it is clear that while "pro bono" presents opportunities, there are limitations. Pro bono lawyers can be a significant boost to CSO legal capacity, but they cannot replace it. For example, the large CSOs in Hungary handle several thousand cases annually, all of them controversial and in niche areas of law (prisoners rights, migration law). It is impossible for these cases to be taken on by pro bono lawyers. Pro bono works best when a number of factors combine: there needs to be a partner in the firm to support and push the litigation; she or he should have litigation experience on the issue concerned; the firm should not be conflicted or be willing to put in place internal divisions to manage the conflict (which is possible in some cases); and the CSO concerned should have its own capacity to work on the litigation, handle client communications and ensure that the litigation is firmly embedded in its own strategies.

A donor asked to make a funding decision on a case or a litigation project should not expect that pro bono lawyers will be part of the litigation team. However, particularly when donors are asked to fund legal fees for external counsel, the question "could this be handled on a pro bono basis?" will be relevant (and the answer will need to be judged on its merits).

Appendix F: Suggestions from Selected Donors on Structuring a Litigation Fund

There were various suggestions from donors on how Commission-supported fundamental rights litigation should be managed:

- Three interviewees emphasised generally that grants decisions should be made by independent third parties, rather than by Commission services
- Two of these three specified their preference for deploying a *regranter* to administer the grants, with decisions to be made entirely outside the Commission
- These same two persons indicated a couple of advantages of employing a regranter: (1) it might attract other donors to the same effort, and (2) it could give the Commission some cover by distancing it from the actual grants
- There should be some rapid response mechanism (otherwise put: significant flexibility in the grant-making), so that when a litigation opportunity appears, funding can be provided for it within the typically short window that is open
- One person recommended that the existing substantial thresholds should either be lowered, or applicants should be allowed to bundle cases into projects
- One person argued that the Commission will need to be realistic about what can be accomplished in, e.g., a two-year grant period; this person added that a case *instance* approach should be adopted, with proxy indicators: for instance, has there been press coverage? how has public debate been influenced?
- One person urged that national implementation cases should be considered alongside cases headed for the CJEU

Because the question about suggestions for structuring such support was open-ended, there was no separate identification of the issue of whether grants should be for specific cases or, rather, for programs of litigation with cases to be identified over the grant periods by grantees at their discretion. Given the broad tendency to favouring the latter, as noted, it is highly likely that most interviewees would have recommended against the individual case approach.

Appendix G: Field Interviews

Site visits were conducted in four jurisdictions – Brussels (for pan-European work, five interviews), France (eight interviews), Hungary (10 interviews), and Poland (nine interviews). In addition, 34 interviews were conducted, most by phone or videoconference, with CSOs and individual lawyers from: Austria, Belgium, Bulgaria, Croatia, Germany, Italy, the Netherlands, Romania, Spain, Sweden, Switzerland and the UK (the latter two conducting litigation in EU Member States). The interview input from these is set out in this Appendix.

I. France site visit

A. Relevant context

The French litigation context, particularly as to CSO litigation, is quite particular. Accordingly, two important points need to be flagged up front.

First, unlike in some other parts of Europe, the CSO sector in France – with some exceptions – tends to consist of quite small groups. They are often volunteer-led, and may well consist exclusively of volunteers. They tend to be poorly funded, and many indeed are suspicious of funding, especially of government funding, as such funding is perceived as threatening their independence. In many cases, even in the litigation context, the groups likely would not qualify for EU funding as things presently stand, unless the conditions for it (and in particular, the potential funding for fundamental rights litigation) are relaxed in various ways.

Second, it appears that lawyers within French CSOs are prohibited from taking cases on behalf of clients or victims with which their CSOs deal. The rule, rather, is that for such situations, CSOs must rely on the assistance of outside lawyers. (The situation seems to be different in the rare case in which the CSO itself is the client.) For that reason, when well-placed experts were asked about who should be interviewed in France, they provided a mix of CSOs and independent lawyers. It is why, as well, any grant-making for fundamental rights litigation in France, even if it goes directly to a French CSO, will have to contemplate some of the funds, perhaps the majority, going to outside lawyers.

B. Interview data

Eight interviews in all were conducted, four with persons in CSOs, and four with outside lawyers. The interview findings are as follows:

As to *types of cases currently being litigated*, three interviewees work on police violence, and two of these also work on racial profiling; three work mainly on discrimination cases (one of them works mainly on behalf of Roma and another works mainly on behalf of Muslims); one focuses on migration and refugee issues; and one works on environmental and climate change matters.

On *capacity*, the outside counsel all work in law firms, and as far as could be told, work "solo," vis à vis other lawyers in the firms, on their cases. Two of these work quite regularly with CSOs, while the other two work mainly directly for clients/victims who find them (the lawyers) on their own. Only two of the CSOs had their own lawyers. In all cases, the main litigation they do involves the use of outside

lawyers, all of whom work pro bono. In one of these latter, the CSO had a network of over 50 lawyers whom they work with; in another, there were about 30 volunteer lawyers; and in a third, the CSO relies principally on one outside lawyer.

As to *sources of funding*, three of the outside lawyers do their human rights cases pro bono, or almost entirely pro bono (one of these said that he receives, on some occasions, very modest payments from some clients, but far from what would be needed to cover his fee and costs). All three work in firms, and each said that the commercial side of the firm work covers their costs and salary, to some extent. One of these described himself as "independent," by which he appeared to mean that the commercial side completely covers the human rights work. The other two were very clear that the number of cases they bring is far less than they would wish to bring, but that the finances of the firms sets a ceiling on their pro bono work. The fourth also gets some support from the commercial side of his firm, but he, who is exceptionally active particularly on discrimination issues, said that the cases he has been bringing lately, especially ones trying to do "collective actions," have nearly caused the firm to go into bankruptcy – still though, he is persisting with them.

The four CSOs all receive *funding* from OSF, and one has a grant from the Sigrid Rausing Trust, all for general support (in very modest amounts). In one case the interviewee said that clients occasionally contribute a little bit, and another reported some financial support from the communities where the clients come from.

On whether they can and would *bring cases under EU law*, and in particular whether they would aim for something at the CJEU, the following points were made:

- One person does some EU law work in relation to discrimination; he knows this law well and considers the EU his "ally." A second said he adverts to CJEU decisions in his French work; while a third one who seemed to have a good sense of the potential of EU law arguments for his work, said that she is always looking for a "hook" to EU law for her cases but has not found a solid one yet. A fourth said that in his area, EU law is the most relevant law; he has tried to get referrals to the CJEU but has not succeeded to date
- One person said that, to date, he only employs arguments directed to the ECtHR when he thinks of international tribunals, but is intrigued by EU law argumentation, and would like to learn how to do it
- Three people said that they did not have the skills or knowledge to argue EU law or to consider trying to get referrals to the CJEU. According to one of these, "French lawyers don't have a Luxembourg culture"

There was little that came back when interviewees were asked which *cases involving fundamental rights could/should be brought* under EU law. The little mentioned as to types of cases, was this:

- discrimination in employment (1[55])
- sex discrimination (1)
- migration (1)

[55] Here, and for the remainder of this Appendix, numbers in parentheses indicate number of interviewees making the reported point.

- corporate responsibility for gross human rights abuses (1)
- police violence (1, though this person was not sure if there would be applicable EU law for this)
- climate change (1)

Regarding the proposed EU funding support: Five people who responded to the question said they would *take EU funding* for litigation. One person added that any grant would need to be quite substantial, because EU grants are a "nightmare," particularly in relation to what is required for their reporting; while another person said that EU funding is so "heavy" that they would need to bring on a full time person to deal with it – an impossibility for his organisation.

There were *recommendations* from two people *to the Commission* on what funding should look like, and they very much echoed each other. Both said that while grants could go to CSOs, the Commission would need to be open to much of the funding passing through to outside lawyers, given the system in France, to which we adverted at the outset of this Section. Both, indeed, thought that it would make more sense to fund lawyers directly, though one specified that the Commission might well condition any such grant on the grantee having a collaboration planned with a CSO, for the latter to do advocacy in relation to the litigation. (Our sense is that this person did not consider the possibility here of a joint application, from lawyer and CSO.) Both of these also argued that grants would need to be "program" ones, for a number of cases to be brought, at the discretion of the grantees.

Finally, as to recommendations, one person worried that having the grants administered by either the Commission, or by a regranter with a pan-European remit, would end up with grants going to only large CSOs, and indeed, the usual suspects. The implication was that there should be a regranting mechanism established *within France* for litigation support there.

One last comment of note: one person observed that French CSOs have little expertise in or experience with making applications in response to EU calls. The implication here is that, unless calls for a litigation fund are simplified in fundamental ways, compared to the typical Commission call, it would be unlikely that a French CSO (other than the few large international ones), or indeed a French outside lawyer, will ever be in a position to run a successful application for EU funding.

II. Hungary site visit

A. Relevant context

Interviewees unanimously described the political background in Hungary as very challenging. The government has created a hostile climate for human rights lawyers and their organisations, particularly those working on Roma rights, migration and criminal justice issues. Smear campaigns are being waged against the human rights community, vilifying them in various ways: as being aligned with and funded by George Soros (who is portrayed by the government as public enemy number 1); as being after money (some of the prisoners rights litigation is costing the government significant sums in compensation claims); as being responsible for the "influx" of refugees; as being against the people in general. This poses challenges in various ways, including in terms of funding: potential domestic donors (including businesses)

do not want to be seen to be supporting groups that are portrayed as being anti-government.

At the same time, some organisations have been able to connect with members of the public and have grown their income from donations from individuals.

B. Interview data

Ten interviews were conducted in the country: four with CSOs that engage in human rights litigation; one with a recently disbanded (for lack of funding) litigating CSO; a leading independent media outlet; a law firm specialised in public interest and environmental litigation; an academic; a pro bono manager at a law firm; and the former director of a large human rights donor organisation who had been forced to leave the country. The key findings are these:

The types of cases currently being litigated include:

- freedom of information (3)
- equality and non discrimination (3)
- human rights generally (2)
- freedom of expression (2)
- criminal justice (1)
- migration/refugee rights (1)
- children's rights (1)
- environmental rights (1)
- privacy (1)

The *number of cases litigated* is very substantial. Two organisations reported providing up to 2,500 legal consultations annually, with several hundred cases being litigated in court. Even the smaller organisations deal with several dozen cases annually. This illustrates, in part, the non-functioning of Hungary's legal aid system, which some of the interviewees emphasised.

On *capacity*:

- All the CSOs have in-house lawyers (ranging from two to 14). The CSOs all use pro bono lawyers, but stress that because of the high degree of specialisation required, the majority of the legal work is carried out in-house; the pro bono lawyers are relied on for the more menial, straightforward legal work
- For politically non-controversial work (such as children's rights – except when the children are Roma or from other minorities), pro bono is growing. However, for politically controversial human rights work, of the kind that is seen to go against the government, only a small number of lawyers are willing to work pro bono, and their number is *not* growing
- A few lawyers are willing to take on cases "low bono" – i.e., at a reduced rate. These lawyers tend to have long-standing relationships with the organisations for which they work. Their number is not growing though. Paid external lawyers are sometimes used when expertise is required on issues that the

CSOs do not have (for example, tax law), or, when the organisation has a budget

The few individual lawyers, or law firms, that engage in fundamental rights litigation do so *pro bono* or at a reduced rate. Effectively, they subsidise their fundamental rights litigation through their paid work (as was noted also in the French case). The CSOs interviewed indicated, however, that because of the vilification of human rights work, it is getting harder to get these lawyers to work with human rights CSOs: being seen to align themselves with an anti-government cause might cost them business. Only those who are most committed, or who have the support of large law firms, get involved. Thus, the group of lawyers who engage in pro bono human rights litigation remains relatively small. (An exception was one law firm, the Environmental Management Law Association, which engages in environmental litigation (a significant part of which could be classified as fundamental rights litigation) for paying clients.)

The international donors that *fund* Hungarian civil society are similar to those that fund civil society in other Central and Eastern European countries: OSF (although its funding has shrunk since it was forced to close its Hungary office); the European Commission; the Sigrid Rausing Trust; Oak Foundation; Civitates[56]; and a number of northern and western European governments. As international funding has, in the main, shrunk, Hungarian CSOs have been forced to redouble their efforts to raise funding from the Hungarian public, including through a mechanism whereby taxpayers can specify an organisation that they wish to receive 1% of their income tax. This has been very successful for a number of the CSOs interviewed.

Only two CSOs have received *specific funding for litigation*, from:

- UN Voluntary Fund for Victims of Torture
- United Nations High Commissioner for Refugees
- Media Legal Defence Initiative
- Digital Freedom Fund

Two other CSOs finance litigation through crowdfunding and paying clients.

All CSOs interviewed emphasised that, as important as it may be to understand what their sources of funding are, it is also important to understand how they finance litigation, and how their current funding is structured. Most of the funding required by CSOs to engage in fundamental rights litigation is to cover the cost of their in-house legal staff, with small amounts needed to cover court costs or, depending on the type of litigation, expert fees. As indicated, only two of the CSOs interviewed received grants specifically for human rights litigation (e.g., the grant from the Digital Freedom Fund); others funded the litigation (i.e., their staff) either through general operating costs, which they emphasised is scarce and already spread very thin, or not at all. In practice, unfunded litigation means that staff either work overtime, or that they fit the litigation in alongside work that is funded (usually, projects funded by international donors). Neither option constitutes an enabling financial environment for

[56] This pooled fund is mentioned here, but it does not support litigation, at least not at this early stage of its operations.

fundamental rights litigation; yet for the majority of human rights CSOs, this is their everyday reality.

Five interviewees indicated a strong interest in *bringing cases under EU law*, with the explicit aim of seeking referrals to the CJEU. The reasons for this were partly because of the increasing difficulty of successfully bringing cases to the ECtHR,[57] and partly because the CJEU was seen as offering a speedy response at a relatively low cost. However, there were serious hurdles: it is hard to convince Hungarian judges to refer cases to the CJEU, and there is less expertise on this among a human rights community that until recently was more focused on the ECtHR.

At the same time, only two of the interviewees had an explicit strategy of litigating *fundamental rights cases*. The areas concerned were:

- equality and non-discrimination
- criminal justice
- migration/refugee rights
- environmental rights
- privacy/data protection

All interviewees said they *would accept EU funding*, although they expressed concern about levels of bureaucracy required to administer it. Two commented that the *added value* of EU funding is in its perceived independence, which is very important in the current climate of vilification of human rights work.

There were various *suggestions* to the Commission *about what how to structure the support*:

- All CSOs argued for flexibility of funding in terms of duration (because cases can take a very long time), and of the application and reporting procedures
- All CSOs argued that decisions on supporting specific cases need to be taken quickly, given the short timelines sometimes involved (for example, to decide whether or not to lodge an appeal)
- All but one interviewee argued that the decision-making structure should involve a panel with advisory, or even decision-making[58], powers, so as to ensure the quality of decision-making. They argued that such a panel should be geographically representative
- CSOs with in-house lawyers all argued that their lawyers needed to be funded for their work
- Four interviewees argued for a mechanism whereby CSOs could receive funding for a set number of cases annually, or for a specific litigation strategy under which an unspecified (for reasons of unpredictability) number of cases would be launched

[57] There are various reasons why the ECtHR is getting less attractive, including these two: (1) the Hungarian Constitutional Court sits on cases, and so it takes a very long time to exhaust that remedy, and (2) the ECtHR has recently been pushing hard for friendly settlements during the initial stages of cases before it.

[58] As noted in the main text, this appears not to be a possible option for a Commission-supported litigation fund.

- Two interviewees argued that not just strategic cases should be funded, because of the importance of CSOs serving their entire field of beneficiaries. These interviewees argued that from the large number of cases they conduct, strategic ones emerge organically
- Two interviewees argued for a pool of funding for specific cases that could be applied for by pre-approved organisations, allowing for a relatively quick procedure

III. Poland site visit

A. Relevant context

The human rights situation in Poland is fraught, with CSOs in the crosshairs of smears, attempts (some successful) to limit or even cripple the work and even existence of CSOs working on human rights issues; and very prominently, the independence of the judiciary under substantial attack – although two recent CJEU judgments in which three interviewees were involved[59] have slowed this.

Despite this environment, CSOs in Poland can be very robust, with experienced and knowledgeable staff, including lawyers, and with decent levels of funding – though funding, particularly from private foundation sources, has dropped off in recent years.

Polish courts and the government have notably been disinclined to implement judgments of the ECtHR. The evidence is, though, that, while they will do so grudgingly, they *will* implement CJEU judgments, and the courts are to some degree (though also grudgingly) aware of their EU law obligations in the context of implementation cases. That said, as will be detailed below, there is a general disinclination amongst judges, particularly at trial level, to grant referrals to the CJEU.

B. Interview data

Nine interviews were conducted in the country, seven with established CSOs, one with a group of lawyers who are in the process of creating a CSO, and one with the strategic litigation lead at the Polish Office of the Ombudsman. The key findings are these:

The *types of cases currently being litigated include*:

- marriage equality and/or LGBTI issues more broadly (2)
- unlawful detention, migration/refugee/asylum (2)
- surveillance and data protection (1)
- environment from a human rights perspective (1)

[59] *A. K. and Others v Sąd Najwyższy*, Judgment of 19 November 2019 (C-585/18, C-624/18 and C-625/18) ECLI:EU:C:2019:982: http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-585/18&jur=C; *European Commission v Republic of Poland*, Judgment of 5 November 2019, (C-192/18) ECLI:EU:C:2019:924: http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=C-192/18&jur=C

- human rights generally, all strategic (1)
- defence of the judicial system (1 – the above-noted win at the CJEU)

On *capacity*:

- Seven of the CSOs have in-house lawyers (ranging from two to six); all of these use pro bono lawyers regularly (for most of these, there are networks (in one case, of 70 lawyers) available to help)
- One group, as already mentioned, is an informal association of senior lawyers that is starting its own CSO in the coming months
- The Ombudsman office has a small strategic litigation team, supplemented by lawyers from other departments as needed

Sources of funding (with the exception of the Ombudsman, which is fully funded by government) include

- OSF and its local Poland office (6)
- Sigrid Rausing Trust (2)
- Oak Foundation (1)
- Media Legal Defence Initiative (1)
- Bloomberg (1, for environmental litigation)
- Digital Freedom Fund (1 – support for a single case)

None of these grants, other than the Digital Freedom Fund one, has been dedicated to litigation.

The only other donor mentioned (by two interviewees) as a *possible* source of funding, was EEA/Norway.

Five interviewees expressed strong interest in *bringing cases under EU law*, with the prospect of getting to the CJEU, because the CJEU judgments, it was said, and as already noted, are powerful in Poland – i.e., are followed. Two others, while not expressing a view about their own litigation in this regard, also favoured the CJEU in terms of the power of its judgments – as one said, it is "obvious" that CJEU judgments are implemented while ECtHR judgments are not. (Two interviewees pointed to the above-mentioned cases on the judiciary as examples showing the power of CJEU judgments.)

Four of the above five interviewees, however, said that it is very difficult to get referrals from Polish judges – two had tried but had not succeeded yet. One of these thought that the situation in this regard may be changing, though change will be slow.

Finally, four people said that fundamental rights litigation under EU law is a new area, a "new territory" as one said, and that lawyers are just beginning to think, and learn, about how to undertake it. Three of these said they thought lawyers in Poland generally are not up to bringing such cases yet. (That said, three groups, as noted, are already involved in trying to get, and are sometimes succeeding in getting, referrals to the CJEU.)

Areas in which it was thought that *fundamental rights cases might be brought* include:

- migration (3, one person emphasising implementation work))
- discrimination (2, marriage equality, sex discrimination in employment)
- fair trials issues (2)
- GDPR implementation (1)
- implementation cases in respect of the surveillance practices of private companies (1)
- hate speech (1)

As to *whether they would accept EU funding*, the six people who answered this all said they would. Two of these said they would only accept such funding if the funds came with no strings attached. And two others worried about the complexity of such funding; one said it was so complicated to get Commission funding that it might not be worth taking it; and another said they didn't have any idea how to write proposals.

Three people commented on the *added value* of EU funding. They all argued that such funding would show that the Commission is supportive of fundamental rights litigation; that, in particular, it would empower CSOs, and would show the Polish government that the EU is supportive of the former's litigation work.

There were various *suggestions* to the Commission *about what the funding should look like*:

- Three people argued that individual case support should be off the table; one of these felt strongly that case selection should be left to the field
- Three people suggested that grants should be made to umbrella organisations that would then make litigation grants (that is, they would function as regranters). Two of these suggested that such organisations should be focused on specific issue areas (e.g., migration and asylum). One person mentioned the value of the EEU/Norway fund operator model in this regard
- One person argued that the grants mechanism must be independent; it is probable that the two people mentioned just above, arguing for regranting, might also have had in mind considerations of independence
- Two people emphasised the need for the grant-making to be flexible, given how case contexts are unpredictable, and timing considerations so frequently change
- One person, echoing concerns that many Polish lawyers are not up to speed on bringing cases under EU law, said that grants should include training components – the idea here seemed to be that grants should go for cases or for programs of cases, but with mentoring components for junior lawyers built in

IV. Other interviews

The data presentation below from these 34 interviews is broken into the same categories employed in the sections on site visits – though not every interviewee spoke to questions from every issue category.

As to *litigation actually conducted*, the focus tended to be on litigation that had been, or could have been, brought under EU law, with or without referrals to the CJEU. The numbers here are modest. This is because, as will be seen more fully below, fundamental rights litigation was said by many to be an emerging field. The fact is that almost all the interviewees, all engaged in human rights case work, proceed in much of their litigation under local constitutional provisions, or under national law implementing the European Convention of Human Rights, with an eye (often) to going to the ECtHR.

The input, such as it was, relating specifically to EU law/fundamental rights litigation, included:

- migration, asylum (4, some on theories of privacy, others on free movement)
- data protection (3, all in respect of implementing the GDPR)
- fair trial standards/procedure (3)
- various cases in discrimination (3):
    - LGBTI cases (1, on free movement)
    - in employment (2)
- environment (2)
- freedom of information (1, against EU institutions)
- children's rights (1)
- use of evidence obtained by torture (1)
- against corporates for human rights abuses (1)
- various implementation of EU law cases (1)
- marriage equality (1, on free movement)
- equality, across many areas, but dependent on country contexts (1)

While the question of *capacity for litigation* was not systematically canvassed, a few CSO interviewees did comment that their paid legal staffs are quite modest, consisting of anywhere from two up to six lawyers – with a very few exceptions (e.g., the European Centre for Constitutional and Human Rights). Five interviewees said that they use outside lawyers; two of these said that the lawyers are paid, though at less than market rates; in the other three, the contributions were said to be pro bono.

In virtually every case of groups receiving litigation funding, we were told that *funding sources* were some combination of Adessium, Luminate, Oak, OSF, and the Sigrid Rausing Trust. In every case, the funding was not specifically for litigation.

In addition, the following *sources* were mentioned:

- public funding (3, two Ombudsmen, and a network of European Equality Bodies)
- solo practitioner, with funds from the commercial side of the practice (2)
- UN Victims of Torture (1)
- City of Geneva (1)
- Digital Freedom Fund (1)
- Swedish Post Code Lottery (1)
- membership fees (1)
- EEA/Norway (1)

- crowdfunding (1)
- Bertha Foundation (1)

When interviewees were asked not only what their sources actually are, but also whom they might reach out to in the future for funding, the same names kept coming up (i.e., the Oak Foundation, OSF, the Sigrid Rausing Trust, as well as EEA/Norway).

There was a wide range of potential *types of fundamental rights cases* mentioned that *could/should be brought*, particularly if new funding were made available. Predictably and understandably, the majority of the responses reflected the areas in which interviewees were already conducting litigation. For completeness, all responses are listed here:

- discrimination (9), as to
    - disabilities (1)
    - LGBTI persons (1)
    - race (1)
    - labour (1)
    - housing (1)
    - "everything" (4, and one of these emphasised that which such cases might be brought depends wholly on local context)
- migration/asylum issues (6)
- criminal procedure (3, including access to justice, disclosure of information held on detainees, and the definition of remedies for criminal procedure violations)
- against corporations for human rights abuses (2)
- human rights and counter-terrorism (2)
- freedom of information (2)
- arms exports (2)
- effective remedies under Article 47 (1)
- "everything relating to children" (1)
- privacy (1)
- closing of civic space (1)
- discrimination bias in algorithms (1)
- health care (1)
- data protection (1)
- privacy (1)
- education (1)
- damages for failure to implement EU law (1)
- issues in consumer law (1)

Fourteen interviewees expressed a view about *whether they would accept EU funding*. All of them said they would.

- Five people said they were wary of Commission bureaucracy; as one said, the administrative burden can be "quite demanding," substantially more difficult than with their other donors; and one person said that his organisation would have to "suck it up" to accept such funding, but they would do so because of how limited litigation funding is

- Two interviewees said they would not take funds for individual cases; grants would need to be for programs of litigation
- Two said that they would need to look at any grant restrictions or conditions carefully; as one said, they would apply for a grant only if the "call was decent"
- One person said that the 80% requirement would be a major hurdle
- One person stipulated that any grant would need to be for external lawyers as well as for the organisation's in-house counsel
- On the other hand, two people said they saw no obstacle at all to accepting such funding

Ten people who expressed opinions about *the added value of EU funding for litigation* indicated the following:

- Four people argued that such funding would show that the EU is committed to fundamental rights and to their protection through litigation; one of these said that such funding would provide credibility for CSO litigation efforts; another observed that the funding would give CSOs a sense of protection; and a third said that it would be "symbolic" for the EU to invest in the "rule of law"
- Four people said that EU funding would be independent, even compared to private foundation funding (and certainly compared to national government funding), in that it would not have an agenda
- Three interviewees thought that EU funding would persuade other donors to contribute support for litigation
- Three people said simply that they would welcome more funding coming into this space
- One person suggested that such funding could be long-term, in contrast to private foundation funding

The matter of *suggestions as to what funding should look like* received more interest than any of the other interview questions, with 21 interviewees expressing views. Among the most common suggestions were these:

- Funding must *not* be at individual case level (8): for instance, this would cause competition between cases for which support is being sought; the Commission needs to avoid the perception that it is choosing between countries; it is important to fund *strategies* rather than cases; funding cases is a "non-starter"
- Case support needs to be for multiple years (6): This comment was likely based on the assumption that grants would be for individual cases; and the point was that cases are unpredictable, and can take many years to complete. One person said that cases must be funded instance by instance
- Funding must be flexible (5): Here too, it is likely that comments were based on the assumption that it would be cases that would be supported, and the idea was that case opportunities, including appeals and opportunities for third party interventions, come up very quickly and need to be taken up also quickly – thus funding needs to be made available on very short notice, in many situations
- There needs to be an independent body (i.e., independent of the Commission) to decide grants (5)

- Funding, even if it goes to CSOs, will sometimes need to pass through to individual lawyers (4): one other person urged that direct funding to lawyers outside individual CSOs should be considered
- Grants should explicitly cover a range of costs, including staff, outside counsel, expert fees, court costs, as required (3)
- Regranting is a good option, but only if the EU bureaucracy is avoided at the level of the actual grant-making (2)
- Grants might provide for some narrow capacity building, particularly mentoring in the context of cases (matching senior to junior lawyers) (2): as one person said, support should be comprehensive, to include mentoring as well as collaboration between CSOs with different expertise – e.g., litigation, communications
- The match requirement should be eliminated (2): One person said that, in the alternative, in-kind contributions should be counted. Another person argued for reducing the existing substantial thresholds – otherwise, s/he said, the fund would risk supporting only the "usual suspects"
- Grants should not be premised on referrals to the CJEU; national implementation cases are critical as well (2)
- Support for cases bound for the ECtHR should not be ruled out, particularly in situations in which the litigated issues are relevant to EU law, and where it is likely that the CJEU would note what the ECtHR says (2): As one person said, "it would be a shame if this were a promotional project" for the CJEU

There was a range of comments about *the relative value of litigation under EU law, including at the CJEU,* versus other types of human rights litigation in Europe:

- It was said that not enough lawyers know about the CJEU or how to litigate there or on EU law (6): "only a handful of organisations can do fundamental rights litigation"; lawyers in the interviewee's country don't know how to litigate EU discrimination cases; there is a general lack of expertise in this area; many lawyers don't realise that the CJEU does hear fundamental rights (i.e., human rights) cases
- The CJEU is especially impactful (5) and worth targeting (5): its "impact is massive"; it is difficult to access but it is very valuable, especially for freedom of information cases; it is "more interesting" than the ECtHR for criminal procedure cases; the ECtHR is "full," while CJEU jurisprudence is increasingly interesting; the CJEU is "increasingly important," especially on rule of law issues, partly because of how hard it is now to access the ECtHR
- Referrals to the CJEU are very difficult to obtain (4): courts at lower levels make referrals difficult; courts are hostile to EU law
- So far, it is mainly private lawyers who are litigating at the CJEU (2)
- The CJEU is "under-used" (1)

Finally, half a dozen of these interviewees, echoing other interviewees, said that a major problem for them is *the potential of adverse cost orders* – awards of opposing costs and lawyers' fees when cases are lost. None of the donors interviewed specifically supports these fees, though, as noted in the main text, insurance to hedge against this can be bought, but is itself expensive. As also noted in the text, adverse

cost orders can be very substantial in some Member States, e.g., Ireland (though modest in others, e.g., Austria)

Appendix H: Sound Fund Management

Sound management of a litigation fund is of importance to both litigant and donor. This means that due attention needs to be given to case selection criteria; risk assessment and mitigation; and monitoring, evaluation and learning strategy.

A. Grant selection criteria

1. Choosing high impact cases or cases more focused in implementation?

Grant selection criteria should be driven by the objectives of the fund. If the core objective is to achieve a small number of standard-setting judgments (at the CJEU, or for that matter, the ECtHR, or even national constitutional or supreme courts) in Europe, then grant selection should focus on finding those few cases (whether specifically identified, or promised as part of a litigation program) that might have that impact, and supporting their litigation up to those highest, precedent-setting courts. If, on the other hand, the objective is to contribute to the better implementation of EU fundamental rights norms throughout Member States, then support for a larger number of cases would be more appropriate, including at lower courts and tribunals.

2. Grant criteria for litigation programs

Criteria here, as suggested in the survey, interviews, and the authors' experience, need to look first and foremost *at the litigation applicant*, precisely because cases to be litigated will not be specifically identified. Such criteria should include:

- the reputation and footprint of the applicant, as a litigator
- the litigation experience of those in, or affiliated with, the applicant
- the applicant's litigation history, in terms of wins and losses, which courts have been accessed, what impacts likely have been achieved, what follow-ups they have carried out (both for wins and losses)
- the coherence and promise of the litigation program being proposed by the applicant

3. Grant criteria for individual cases

Suggested criteria, again based on the survey, the interviews, and the authors' judgment, include the following:

- the potential impact of the case on the implementation at European or at national level of EU law and the Charter
- whether the case is part of a wider campaign – important to ensure efforts to obtain implementation of judgments
- the litigation experience, and the independence and not-for-profit nature of the applicant (though some interviewees thought that lawyers operating out of "regular" law firms should also be eligible)
- the reputation and footprint of the applicant, as a litigator

B. Risk assessment and management

The main risk identified by interviewees was that of adverse cost orders. As noted in various places above, these can run into the hundreds of thousands of Euros, and have an obvious inhibiting factor on litigation.

Interviewees as well as survey respondents listed a range of other risks, and indicated how these could be mitigated. These included:

- reputational (for the donor and the litigant): can be mitigated in various ways, including by having clear funding criteria; through a funding mechanism that operates independently (for example, by involving an independent panel of experts to advise or even make grant decisions); by funding litigation programs or strategies rather than single cases; and by having public advocacy strategies alongside litigation
- cases lost: can be mitigated by good case selection criteria, including as applied to the legal team
- applicants dropping out, for example by accepting a financial settlement: can be mitigated by discussing this with the applicant in advance (though it should be understood that a lawyer is ethically bound to act in the client's best interest, and if a client is offered a particularly advantageous financial settlement then it would be improper for the lawyer to try to talk the client out of it, even if it means that no precedent-setting judgment is achieved)
- length of proceedings: this cannot in itself be mitigated; lawyers simply should engage in a realistic assessment of how long a case is likely to go on for

Given the many obstacles to human rights litigation, funding and otherwise, it is unlikely that frivolous cases would be pursued. Only a quarter of survey respondents thought that this was a likely risk; in the words of one respondent, it would be "readily and easily mitigated through the proper design, management and implementation of any [litigation] fund."[60]

C. Monitoring, evaluation and learning

Existing litigation funds employ strict monitoring, evaluation and learning (MEL) systems for their grant-making. The aims of these systems are to maintain a high standard of funding and to periodically assess and adapt grant-making practices in the light of lessons learned.[61] To this end, it is crucial that clear objectives are set at the outset, against which activities can then be monitored and evaluated – and from the results of which, learnings can be taken.

Two of the litigation donors interviewed – the Media Legal Defence Initiative (MLDI) and the Digital Freedom Fund – each have similar MEL systems.[62] Key in

[60] In discussion with Commission services, the risk of cases being brought, nominally under a Charter right but in fact incompatible with general Charter values, was mentioned. While this is a real risk in principle, it can be mitigated through careful vetting of grant applications.

[61] "Avoiding irregularities," included in the tender as one of the stated aims of monitoring and evaluation, is an equally important aim, but this will be achieved as an automatic by-product.

[62] MLDI's strategy can be downloaded here: https://www.mediadefence.org/resources/monitoring-and-evaluation-guidance-applicants; the Digital Freedom Fund's strategy here: https://digitalfreedomfund.org/support/resources-page/ (under "impact measurement framework for litigation").

both is a shared understanding between the donor and the litigant of what the objectives of the litigation are, as well as a shared agreement as to the expected activities to be monitored. The MLDI strategy, for example, defines this as follows:

> **Monitoring** is the ongoing tracking and surveillance of a project's key activities, enabling organisations to track their progress against a set of goals and targets as the project progresses. Monitoring should make use of data captured during the project's implementation and be carried out periodically in order to highlight where things are going to plan and where they are behind schedule, allowing staff to respond to the amount of progress made and improve the delivery of the project. …
>
> **Evaluation** is the systematic and objective assessment of an ongoing or completed project, program, or policy, and its design, implementation and results. The aim is to determine:
>
> • relevance
> • fulfilment of objectives
> • efficiency
> • effectiveness
> • impact
> • sustainability

In this sense, monitoring and evaluation of litigation is similar to monitoring and evaluating any other project. There are, however, some key differences. First, it is important for the donor to understand that crucial factors in litigation are outside the control of the litigant. A judge, or a panel of judges, is in ultimate control of the litigation activity, and there is a range of other actors who can "interfere" with a litigation project (primarily, but not limited to, lawyers for the party against whom the litigation takes place). This can even include the client, who, as already noted, may decide to accept a financial settlement rather than await a judgment that may not be delivered for some time, and the outcome of which is inherently uncertain.

A second crucial difference is timing: cases can take years to complete. This is unpredictable, and to a large extent outside the control of the litigant. It means that "milestones" cannot be timed as they might be with other projects; it even means that a case may outlast the time period set for the grant.

Third, donors and litigants must agree on appropriate indicators. These can include the number of cases instigated; key documents (such as legal pleadings) submitted; hearings held; and, case outcomes. Donors such as MLDI are interested in impact beyond litigation as well; they track, for example, not only if journalists have won cases that were brought against them, but also if they were able to continue their work (if the case was brought with the aim of silencing them).

No doubt the Canada Court Challenges Program also has an MEL strategy; there was not enough time in in the CCP interview to explore this, however.

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