Responsible private funding of litigation

2020/2130(INL) - 25/07/2022 - Committee report tabled for plenary, single reading

The Committee on Legal Affairs adopted a legislative initiative report by Axel VOS (EPP, DE) containing recommendations to the Commission on responsible private funding of litigation.

Commercial third-party litigation funding (TPLF) is a growing practice whereby private investors ('litigation funders') who are not a party to a dispute invest for profit in legal proceedings and pay legal and other expenses, in exchange for a share of any eventual award. Collective redress is only one type of litigation in which TPLF is currently used, with other examples being arbitration, insolvency proceedings, investment recovery, anti-trust claims and others.

Need for common EU-wide minimum standards

TPLF is a practice that is developing into a market for litigation services without a specific EU-wide legislative framework in place. According to the report, **TPLF could, if properly regulated, be used more often as a tool to support access to justice**, especially in countries where legal costs are very high or for women and marginalised groups with additional funding barriers.

Members are convinced that in order to ensure access to justice for all and that justice systems prioritise redress for injured parties, and not the interests of private investors who might only be seeking commercial opportunities from legal disputes, it is necessary to establish common minimum standards at Union level, which address the key aspects relevant to TPLF, including transparency, fairness, and proportionality. The aim of such a regulatory regime would be to regulate litigation funding activities by litigation funders.

Proposed European Directive

The report requested the Commission to:

- closely monitor and analyse the development of third party litigation funding in the Member States, both in terms of the legal framework and practice, with particular attention to be given to the implementation of Directive (EU) 2020/1828;

- submit, after the expiry of the deadline for the application of Directive (EU) 2020/1828, namely 25 June 2023, and taking into account the effects of that Directive, to submit a proposal for a Directive to establish **common minimum standards at Union level on commercial third-party litigation funding**.

The objectives of this Directive are to ensure the harmonisation of Member States' rules applicable to litigation funders and their activities, and thus to enable access to justice, while introducing common minimum standards for the protection of the rights of funded claimants and intended beneficiaries in proceedings financed wholly or in part by third-party funding agreements, which apply in all Member States in which litigation funding is permitted.

The report recommended the following:

- the establishment of a **system of authorisation** for litigation funders, thereby ensuring that effective opportunities are provided to claimants to make use of TPLF and that adequate safeguards are put in place, including through the introduction of corporate governance requirements and supervisory powers to protect claimants and to ensure that funding is only provided by entities that are committed to complying

with minimum standards in terms of transparency, independence, governance and capital adequacy, and to observing a fiduciary relationship vis-à-vis claimants and intended beneficiaries;

- third-party funding agreements should be required to observe a **fiduciary duty of care** to act in the best interests of a claimant;

- Member States should require litigation funders to demonstrate that they have **sufficient capital** to satisfy their financial obligations;

- safeguards be adopted to prevent potential **conflicts of interest**, to lay down claimants' rights and require disclosure of details of relationships between litigation funders and the other parties involved;

- just like claimants, litigation funders should be responsible for defendants' costs arising from unsuccessful litigation, such as due to an adverse cost award;

- litigation funders should in no case claim unfair, **disproportionate or unreasonable reward** at the expense of claimants. Save in exceptional circumstances, when the share of any reward claimed by a litigation funder would dilute the award, including all damages amounts, costs, fees and other expenses, available to claimants and intended beneficiaries to 60% or less, it should be presumed unfair and deemed invalid;

- in the interests of **transparency**, there should be an obligation to inform the relevant court or administrative authority of the existence of commercial funding and the identity of the funder, as well as to disclose third-party funding agreements in full to courts or administrative authorities, upon their request or at the request of the defendant to the court and subject to appropriate limitations to protect any necessary confidentiality;

- supervisory authorities, courts and administrative authorities should have the powers to facilitate the enforcement of legislation. Members recommended the **establishment of a complaints system** that does not give rise to excessive costs or an excessive administrative burden for Member States;

- lastly, supervisory authorities, courts and administrative authorities, where appropriate in accordance with national procedural law, should have the **powers to address abusive practices** by authorised litigation funders, while not hindering access to justice for claimants and intended beneficiaries.