Responsible private funding of litigation

2020/2130(INL) - 13/09/2022 - Text adopted by Parliament, single reading

The European Parliament adopted by 504 votes to 57, against and 65 abstentions, a resolution of the European Parliament with 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 parties to a dispute, invest for profit in legal proceedings and pay costs and other legal fees, in exchange for a share of any eventual award; whereas 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

The TPLF is a practice that is developing into a market for litigation services without a **specific legislative framework in place at EU level**. According to the Parliament, the 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 who face additional financial barriers.

Regulating TPLF should go hand in hand with policies enhancing access to justice for claimants, such as by lowering legal costs, by providing adequate public funding to civil society organisations, including consumer protection organisations, or by promoting other practices such as legal aid or crowdfunding.

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. Such a regime should regulate funding activities in relation to all types of claims, regardless of the claims' nature. It should be without prejudice to existing international, Union and national law allowing claims to be brought, in particular law on the protection of the collective interests of consumers, on environmental protection, and law governing insolvency proceedings or liability.

Proposal for a European directive

Parliament called on 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 on representative actions for the protection of the collective interests of consumers;

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

The Directive should ensure the **harmonisation of Member States' rules** applicable to third party funders and their activities, thus allowing access to justice, while introducing common minimum standards for the protection of the rights of funded claimants and intended beneficiaries in proceedings financed in whole or in part by third party funding arrangements, which apply in all Member States where litigation funding is permitted.

The resolution recommended the following:

- the introduction of an **authorisation system** for third party funders to ensure that applicants have an effective opportunity to use the TPLF and that adequate safeguards are in place, including the introduction of corporate governance requirements and supervisory powers to protect applicants and ensure that funding is only provided by entities committed to complying with minimum standards in terms of independence, transparency, governance and capital adequacy, as well as to maintaining trust and confidence in applicants and intended beneficiaries;

- third-party funders should be bound by a **fiduciary duty of care** requiring them to act in the best interests of a claimant; litigation funders cannot have undue control over the legal proceedings they fund; such control over the legal proceedings must be the responsibility of the claimant and their legal representatives;

- Member States should require third party funders to demonstrate that they have **sufficient own funds** to meet their financial obligations;

- safeguards should be adopted to **prevent potential conflicts of interest**, define the rights of applicants and require disclosure of details of the relationship between third party funders and other parties involved;

- third-party litigation funders should **not be permitted to abandon funded parties in litigation** at any stage in the litigation process, leaving claimants solely responsible for all costs of the litigation, which may have only been pursued due to the involvement of the funder; stresses, therefore, that contractual arrangements on the basis of conditional funding should be considered void;

- third-party litigation funders should in **no case claim unfair, disproportionate or unreasonable reward** at the expense of claimants. Only in exceptional circumstances should agreements between third party funders and claimants depart from the general rule that a minimum of 60% of the gross settlement or damages is paid to claimants;

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

- supervisory authorities, courts and administrative authorities should: (i) have the **necessary powers to facilitate the enforcement of the legislation**; (ii) have the necessary powers to address abusive practices by authorised litigation funders, while not hindering access to justice for claimants and intended beneficiaries. Members recommended that a system for **handling complaints** be put in place which does not create excessive costs or administrative burdens for Member States.