

The Time is Ripe? Proposed Regulation of Third Party Litigation Funding in the European Union

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The question of how to fund litigation is an essential precondition for civil justice systems. While in some countries like Australia third party litigation funding (TPLF) has been developing for decades, in Europe too TPLF is now on the rise, particularly in international arbitration and collective actions. This has also caught the attention of the European legislator.

On the 17th of June 2021 the European Parliament Committee on Legal Affairs published a Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation (TPLF). This follows the February 2021 European Parliament Research Service Study on the same matter. TPLF is the funding of litigation by an external third party in return for a share of the proceeds in case of success and is a growing commercial practice. The Draft highlights that TPLF in the EU is however currently operating in a 'regulatory vacuum', as it is not only present in consumer collective redress cases, in which case specific funding rules have already been enacted through the Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers [Representative Actions Directive (RAD)].

While recognising the role TPLF plays in facilitating access to justice where otherwise not available due to the costs and risks of litigation, the Draft attempts to provide proposals on how to tackle the risks and concerns TPLF gives rise to. It focuses especially on the conflicts of interest between the litigation funders and the claimants, more specifically on the economic interest of the funder, which

could drive the funder to demand excessive shares of the proceeds and to control the litigation process.

Similarly to the RAD, the Draft contains recommendations that it should be ensured that decisions in the relevant legal proceedings, including decisions on settlement, are not influenced in any way by the litigation funders and that courts or administrative authorities be empowered to require disclosure of information on third-party litigation funding.

Amongst the main recommendations which go beyond the funding rules in the RAD is that of establishing a system of supervisory authorities in each Member State which permits TPLF. These would grant authorisations and require that litigation funders comply with minimum criteria of governance, transparency, capital adequacy and observance of a fiduciary duty to claimants. Article 5 also proposes that third-party funding agreements need to comply with the laws of the Member State of the litigation proceedings or of the claimant, which could create problems if claimants and/or intended beneficiaries are from different Member States, from outside the EU or if one Member State prohibits TPLF in cross-border litigation.

It also contains recommendations on funding agreements being worded transparently, clearly and in simple language, on capping the return rate to the litigation funder at 40%, and on, subject to exceptions, preventing litigation funders from withdrawing funding midway through proceedings.

The debate on TPLF in Europe has only in recent years started to take the limelight in civil justice academia (see e.g. Kramer & Tillema 2020; Tzankova & Kramer 2021). That this topic is garnering attention is also evidenced by the September 2021 survey commissioned by the U.S. Chamber Institute for Legal Reform on Consumer Attitudes on TPLF and its regulation in the EU. While the complex matter of TPLF is in need of further research and reflection, considering developments in legal practice perhaps now indeed the time is also ripe for regulatory discussions.