

Authorisation procedure for litigation funders?

EU Parliament wants to regulate third-party litigation funding

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In June 2021, the EU Parliament's Committee of Legal Affairs drafted a report on litigation funding by third parties not involved in the proceedings. It builds on a study by the EU Parliament's Scientific Service from February 2021. In its annexe, the draft report contains, pursuant to Art. 225 TFEU, a request to the EU Commission to submit an already pre-formulated proposal for a directive in order to initiate the legislative procedure between the EU Parliament and the Council.

The aim of the project is, on the one hand, to harmonise the regulations of the member states on litigation funding and, on the other hand, to establish protective mechanisms for the financed plaintiff party. According to the study by the Scientific Service, only three member states explicitly regulate litigation funding by third parties. While Greece and Ireland prohibit third-party funding, Slovenia allows it under certain conditions. In the other member states, however, there are no specific regulations on litigation funding. Accordingly, it is generally permitted without there being separate requirements for litigation funders.

According to the proposal for a directive, it should be up to the member states whether they allow litigation financing by third parties. However, if they do allow it in principle, the litigation funders must be subject to an authorisation procedure supervised by an independent supervisory authority. Approval requirements include, in particular, compliance with minimum capital requirements and fiduciary duties, as well as ensuring that they are not subject to conflicts of interest. In addition, litigation funders must enter into explicit funding agreements with the parties and comply with transparency requirements. According to Art. 3 of the proposed Directive, a litigation funder shall be any entity that undertakes, in connection with proceedings, to bear all or part of the costs of proceedings in return for a contingency fee or a share in the amount of money awarded to the claimant. According to recital 5 of the proposal for a Directive, the project should not include the financing of proceedings by legal representatives themselves. The background to this is that general ethical and professional requirements for lawyers already apply in the member states and are

typically closely related to the agreement of contingency fees for lawyers. Their admissibility and conditions are regulated much more extensively in the member states than litigation funding by outside third parties.

The proposal for a Directive is based on the understandable consideration that litigation financiers could instrumentalise the plaintiff for their own economic purposes. Such a risk does not exist in the case of litigation financing by the legal representative, if only because of the existing rules of professional conduct. Whether and when binding regulations on litigation funding will come into force, however, cannot yet be predicted. First, the EU Parliament must decide whether to submit the draft report to the EU Commission - if necessary with amendments. The EU Commission must then consider whether to submit a legislative initiative so that the ordinary legislative procedure can be followed. If the EU Commission refrains from doing so, it must justify this.