

DELHI ARBITRATION WEEK END

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THIRD PARTY FUNDING : HOW READY ARE WE ?

« TOWARDS A EUROPEAN REGULATION »

*By Christian Roth, avocat à la Cour, Paris - France,
Président d'Honneur de l'Union des Avocats Européens*

FACILITATING ACCESS TO JUSTICE

What are the means implemented by the European institutions to facilitate access to justice while guaranteeing the rights of the consumers ?

COMMISSION RECOMMENDATION (2013/396/EU) of 11 June 2013

on common principles for injunctive and compensatory collective redress mechanisms
in the
Member States concerning violations of rights granted under Union Law

Published in the Official Journal of the European Union, **26 July 2013**.

The Recommendation of the EU Commission is about the guarantees for the
use of third-party funding in **injunctive and compensatory class actions**.

DIRECTIVE (EU) 2020/1828 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2020

on representative actions for the protection of the collective interests of consumers
and repealing Directive 2009/22/EC

Published in the Official Journal of the European Union, **4 December 2020**.

Member States should have implemented the Directive (EU) 2020/1828 into their own national law on **25
December 2022**.

Member States shall apply the Directive (EU) 2020/1828 from **25 June 2023**.

Article 10 of the Directive (EU) 2020/1828 : Funding of representative actions for redress measures

It provides that Member States shall ensure that, where a representative action seeking redress is financed by a third party, conflicts of interest are avoided and that the financing by third parties does not distort the representative action from the protection of the collective interests of consumers.

Member States shall ensure in particular that:

The decisions of qualified entities in representative action, including decisions on an agreement, are not unduly influenced by a third party in a way that would prejudice the collective interests of consumers affected by the representative action ;

To this aim, qualified entities shall provide the court or administrative authority with a financial overview listing the sources of funds used to support the representative action.

Thus, the declaration of its third-party funder, will allow the jurisdiction or administrative authority to take appropriate action. For example, requiring the qualified entity to refuse or modify the funding in question and, if necessary, denying the qualified entity standing in a representative action.

The directive thus intends to regulate third-party funding to ensure greater transparency and the absence of conflicts of interest.

EUROPEAN PARLIAMENT RESOLUTION of 13 September 2022 With a proposal of a Directive

Concern of the European Parliament :

Third-party litigation funders could **abuse** the largely unregulated European market.

Solutions provided :

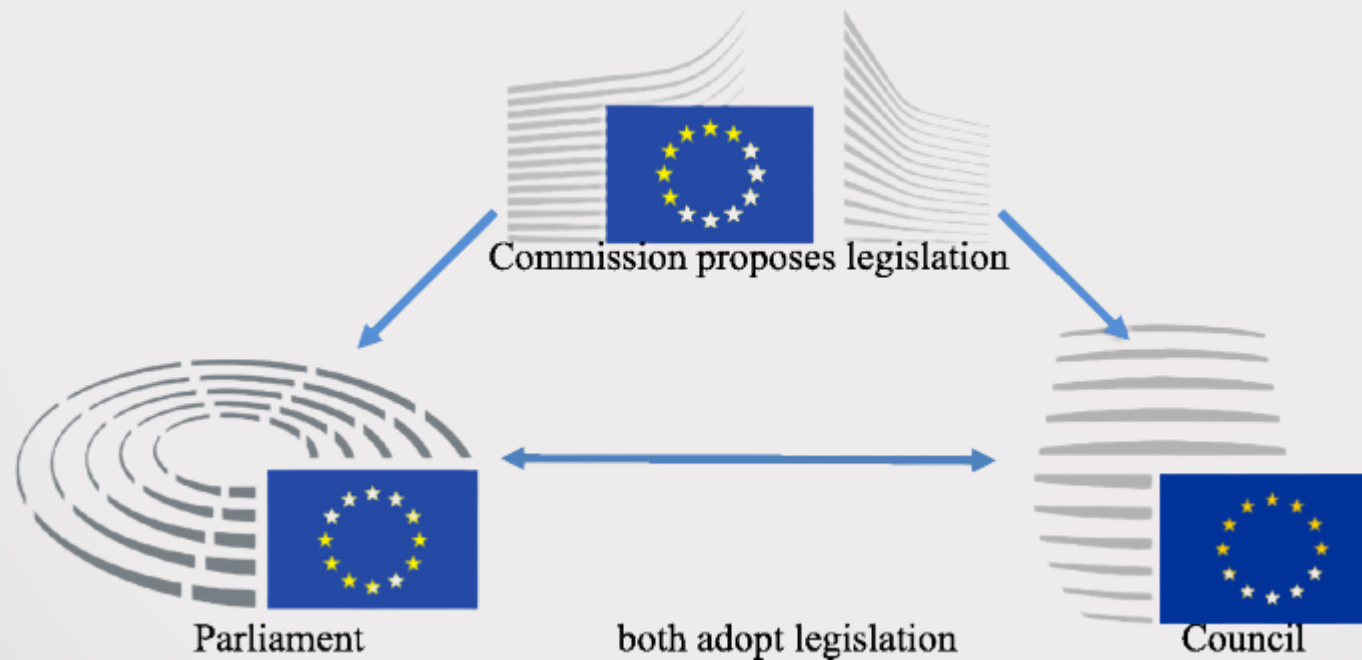
The European Parliament proposes a Directive on third-party litigation funding.

- I. Respect of the principle of **transparency**
- II. **The consequences of non-compliance** with the principle of transparency
- III. **Financial** consequences

I. Respect of the principle of transparency

A. At the European level

European Union's ordinary legislative procedure :



Article 13 of the Draft Directive :

Transparency requirements and avoidance of conflicts of interest

« Member States shall **ensure** that third-party funders are not permitted **to influence the decisions** of a claimant in the course of proceedings in a manner that would **benefit the litigation funder itself at the expense of the claimant.**

To that end, any clause in third-party funding agreements granting a litigation funder the power to take or influence decisions in relation to proceedings shall have **no legal effect**. Any such clause or arrangement consisting of, inter alia, the following shall have no legal effect:

- (a) the **grant of an explicit power** to a litigation funder to take or influence decisions in the course of proceedings, such as with respect to specific claims pursued, settlement of the case, or management of expenses associated with the proceedings;
- (b) the provision of capital or any other **resource with a monetary value** for the purposes of proceedings, contingent on the approval by third-party funders of its specific use ».

Article 17 of the Draft Directive :

Review of third-party funding agreements by courts or administrative authorities

« Member States shall **designate** the competent court or administrative authority to perform the **different judicial and administrative tasks** provided for under this **Directive** ».

This designation specifies in particular that : « The court or administrative authority before which a privately funded case is brought is **to conduct controls, without undue delay** and at the request of a party to the proceedings or on their own initiative, on the impact of funding agreements on the cases before them ».

B. At the extra-European level

SINGAPORE

Article 24 (1) of the SIAC Investment Rules Additional Power of the Tribunal

The tribunal shall have the power to « **order the disclosure** of the **existence** of a Party's third-party funding arrangement and/or **the identity** of the third-party funder and, where appropriate, **details** of the third-party funder's interest **in the outcome of the proceedings**, and/or whether or not the third-party funder **has committed to undertake adverse costs liability** ».

HONG KONG

Article 44.1 of the HKIAC Rules Disclosure of Third-Party Funding of Arbitration

« If a funding agreement is made, the funded party shall **communicate a written notice** to all other parties, the arbitral tribunal, any emergency arbitrator and HKIAC of

- (a) the fact that a funding agreement has been made; and
- (b) the identity of the third-party funder».

ICSID (International Centre for Settlement of Investment Disputes)

Rule 14 (1) of the ICSID Arbitration Rules Notice of Third-Party Funding

« A party shall **file a written notice** disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). If the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person ».

II. The consequences of non-compliance with the principle of transparency

A. At the European level

Recital 11 of the Draft Directive

« Supervisory authorities should be empowered to make **any necessary orders**, including the power to receive from litigation funders applications for authorisation and to decide upon them, to **gather** any necessary information, **grant, deny, suspend or withdraw any authorisation or to impose any condition, restriction or penalty** upon any litigation funder, as well as to investigate without undue delay complaints against any litigation funder conducting activities within their jurisdiction submitted by any natural or legal person, with the exception of the defendant ».

Article 19 of the Draft Directive

Sanctions

« Member States shall lay down the rules on sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The sanctions provided for shall **be effective, proportionate and dissuasive**.

Supervisory authorities may in particular **impose proportionate fines** calculated on the basis of an undertaking's turnover, temporarily or indefinitely withdraw the authorisation to operate, and **may impose other appropriate administrative sanctions** ».

B. On a non-European scale

The **Investor-State Dispute Settlement (ISDS)** mechanism

In **Cortec Mining v. Kenya**, the court rejected the investors' claim of more than \$2 billions due to the lack of proper environmental permissions for the mining project in question. In **Churchill Mining and Planet Mining v. Indonesia**, the court again rejected the investors' claim of more than \$1 billions due to concerns about fraudulent conduct during the operation and expansion of the investment.

Examples of possible sanctions could include

- (1) requirements for arbitration chambers to reject (or overturn) the decision;
- (2) rules requiring the claimant (and its counsel) to certify that the remedy (and) or counsel is not receiving third party funding;
- (3) mandatory stay of proceedings for a specified time to remedy deficiencies (including transparency or certification);
- (4) instructions regarding the allocation of costs and expenses in cases of violation of the regulations.

III. The financial consequences

A. Recovery of arbitration costs by the successful funded party

Article 14 paragraph 4 of the Draft Directive

Invalid agreements and clauses

« Absent exceptional circumstances, where a litigation funding agreement would entitle a litigation funder to a share of any award that would dilute the share available to the claimant and the **intended beneficiaries to 60% or less of the total award, including all damages amounts, costs, fees and others expenses, such an agreement shall have no legal effect** ».

B. Recovery of arbitration costs by the successful unfunded party

Article 14 paragraph 5 of the Draft Directive

Invalid agreements and clauses

« Member States shall ensure that third-party funding agreements do not contain provisions that limit the liability of a litigation funder in the event of an order for adverse costs following unsuccessful proceedings. **Provisions that purport to limit a litigation funder's liability for costs shall have no legal effect** ».

Article 18 of the Draft Directive

Responsibility for adverse costs

« Where the claimant party has insufficient resources to meet adverse costs, Member States shall ensure that courts or administrative authorities are empowered **to make cost orders against litigation funders, whether jointly or severally with claimants, following an unsuccessful outcome in proceedings.** In such a case, courts or administrative authorities may require litigation funders to pay any appropriate adverse costs, having regard to:

- (a) the value and proportion of any award that the litigation funder would have received had the claim been successful;
- (b) the extent to which any costs that are not paid by a litigation funder would instead fall on a defendant, the claimant, or any other intended beneficiaries;
- (c) the conduct of the litigation funder throughout the proceedings and, in particular, its compliance with this Directive and whether its conduct has contributed to the overall cost of the proceedings; and
- (d) the value of the litigation funder's initial investment ».

Conclusion

We are facing an emerging market and **strong disparities** between the Anglo-Saxon world and the continental mode.

The existing EU legislation does not protect the consumer in regard to the use of a **third party financing** within the framework of the arbitration.

The driving force behind this Draft Directive is to **guarantee access to justice**. The principle of the third-party funder responds to this guarantee. However, its use is not regulated, neither at the level of the Community law, nor at the level of the national laws of the Member States.

In order to **put an end to the harmful consequences of the use of third party financing**, it is desirable, through the prism of the European institutions, to **adopt at the European level a directive** which provides for the **distinction between the economic interests of the litigation and the strict necessities of the conduct of litigation**.

Thank you for your attention !



International Law firm in Paris – FRANCE

Member of :

