# VOSS REPORT

# RECOMMENDATIONS TO THE COMMISSION ON RESPONSIBLE PRIVATE FUNDING OF LITIGATION

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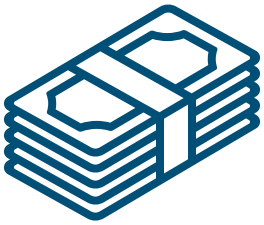
The potential for regulation is a key consideration for any emerging asset class as it reaches a level of maturity, and legal assets are no exception. Indeed, appropriate and well-informed regulation can promote stability within an asset class, potentially enabling new market opportunities. Over- or heavy-handed regulation can have the opposite effect.

On this note, the recommendations to the Commission on Responsible Private Funding of Litigation (commonly known as the "Voss Report"), passed by the European Parliament on 13th September 2022 and proposed Directive (EU) 2020/1828[1] require further analysis prior to any statutory implementation.

Below, we look at five of the key recommendations of the Voss Report[2] in the context of the current litigation funding market in Europe and provide our commentary.



## 1. Capital adequacy:

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

The issue of capital adequacy is a key tenet of the best practices promoted by the International Legal Finance Association and the code of conduct of the Association of Litigation Funders. In an increasingly competitive market, it is in a funder's interests to be able to provide comfort to clients with respect to its creditworthiness - but what level of comfort are we looking at and at what stage of proceedings will capital adequacy be assessed? Are other industries subject to such tests?

## 2. Adverse costs:

**Litigation funders should be responsible for defendants costs arising from unsuccessful litigation, such as due to an adverse cost award.**

Depending on the Member State, rules currently vary as to whether a funder can be held liable for adverse costs. A

1 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 Nov. 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC

2 Summary- Responsible private funding of litigation, 2020/2130 (INL)- 25/07/22

degree of harmonization makes sense in principle, but needs to be assessed in conjunction with the wider judicial framework - for example, the basis on which costs are assessed and factors taken into consideration such as conduct of the parties.

The Voss Report emphasizes the importance of lowering costs of litigation and facilitating the use of third party litigation funding as a "tool to support access to justice."[3] However, an important factor to consider in relation to the recommendation that funders be responsible for adverse costs is the knock-on effect on pricing. As addressed further below, funders often receive a substantial reward in the event of a successful case, but they also take on considerable risk - something which is only increased by the threat of adverse costs.

## 3. Fiduciary duty:

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

If we consider the concept of fiduciary duties, we are effectively looking at an obligation of a principal to act in the best interests of a beneficiary, in circumstances where power has been delegated by one party to another. That duty inarguably exists between a funder and its investors - being the pension funds, family offices, high net worth individuals or others who allocate capital for investment in litigation funding. It does not logically exist between a funder and a claimant. It is somewhat misguided to suggest that this is an appropriate development - that a funder should balance a duty of care between investors on whose behalf it is making a non-recourse investment, and a claimant to which it ultimately has no recourse in the event of an unsuccessful case. Should banks owe a fiduciary duty to their borrowers?

## 4. Cap on fees:

**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.**

While undeniably a funder can potentially stand to make a large return on its investment should a case be successful, the Voss Report fails to address the issue of the transfer of risk from the claimant to the funder.

In the event that the case is unsuccessful, the funder loses its investment and has no recourse to the claimant - it may even, in certain jurisdictions, also have an additional liability in the form of adverse costs. How can a regulator have a blanket cap on returns when each case represents a bespoke risk? Further, how can a cap based on a percentage of the recovery be agreed at the outset when neither the claimant nor the funder have a precise idea of the costs? An arbitrary cap will simply make litigation funding unavailable to EU residents. Perhaps that is the Commission's aim.

## 5. Disclosure of funding agreements:

**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.**

The intention of this recommendation may be to promote transparency, but it is clear to see how disclosure of un-redacted commercial terms of funding agreements may leave claimants exposed from a tactical perspective. Deep-pocketed defendants will be granted full visibility of the resources available to claimants and may employ tactics to delay proceedings and expend remaining funds. What happened to the notion of dispute adjudication simply on the merits? Furthermore, if the court starts from the position that documents should be fully disclosed, with arguments to be made for "necessary confidentiality", this increases the likelihood of further process, delays and legal costs which would seem counter to the original intention.

In terms of questions raised, there are many. As 2022 draws to a close, the situation is watched closely, with the hope and expectation that 2023 will see more in-depth consultation by the Commission with market participants prior to any further submissions being made.

3 Report with recommendations to the Commission on Responsible private funding of litigation, 2020/2130 (INL), p.4/39