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CONSULTATION PAPER

THIRD-PARTY LITIGATION FUNDING

Consultation Paper

Third-Party Litigation Funding

(LRC CP 69 - 2023)

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EXECUTIVE SUMMARY

1. In *Persona Digital Telephony Ltd v Minister for Public Enterprise*, the Supreme Court confirmed that the torts and offences of maintenance and champerty remain part of Irish law.[1] These ancient legal concepts prohibit, in most cases, the funding of litigation by third parties. One of the effects of these torts and offences is to make third-party funding (investment by non-parties in dispute resolution), subject to certain recognised exceptions, illegal in this jurisdiction. In *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*,[2] the Supreme Court held that maintenance and champerty also prohibit the assignment of a "bare" cause of action, that is, the transfer of the right to litigate a claim to a party who has no direct interest in that claim.

2. As part of its Fourth Programme of Law Reform,[3] in 2016 the Commission published an *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice*.[4] This sought submissions on whether the torts and offences of maintenance and champerty should be abolished, whether third-party funding should be permitted and how, if legalised, third-party funding should be regulated. Only two submissions were received on these issues.

3. Since publication of the Issues Paper, the legal and policy context for third-party funding has shifted considerably. The Commission therefore concluded that it was appropriate to publish a detailed Consultation Paper, setting out the up-to-date position in respect of the legalisation and regulation of third-party funding in Ireland and seeking further views. In addition, the issue of assignment of actions should be taken into account. The Commission has generally refrained from expressing even preliminary or provisional views on the issues discussed in this Consultation Paper. Its purpose is to inform debate and stimulate discussion which, it is hoped, will generate responses

[1] [2017] IESC 27.

[2] [2018] IESC 44, [2019] 1 IR 1.

[3] Law Reform Commission, *Fourth Programme of Law Reform* (LRC 110-2013), Project 4.

[4] Law Reform Commission, *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10-2016).

from all interests and perspectives that will enable the Commission to move to a final report setting out its recommendations.

4. In **Chapter 1 (Third-Party Funding: Context and Overview of the Sector)**, the Commission explains the context for the Consultation Paper, setting out the different ongoing legislative and regulatory developments affecting third-party funding at national and European Union level. The chapter specifies what the Consultation Paper means by the term "third-party funding" and gives a general overview of the third-party funding sector, its typical investment activities, and its typical participants.

5. **Chapter 2 (Current Irish Law on Third-Party Funding)** focuses on the law on maintenance and champerty and how it affects third-party funding. It identifies and discusses the different elements of maintenance, namely:

   (a) that there is a legal dispute,
   (b) that assistance is provided to bring or continue that legal dispute,
   (c) that the funder does not have a legitimate and independent interest in the dispute, and
   (d) that the provision of funding does not come within a recognised exception to maintenance and champerty.

   Champerty consists of these four elements plus a fifth element—that the funder stipulates for profit in the case of success.

6. The arguments for and against the legalisation of third-party funding are assessed in **Chapter 3 (Policy Considerations of Legalising Third-Party Funding)**. A fundamental question is whether third-party funding and assignment of actions promotes the commodification of justice. The Commission identifies five principal arguments that are made against legalised third-party funding:

   (a) that it would encourage the bringing of vexatious and meritless disputes;
   (b) that it would cause funded parties to be under-compensated. This is because third-party funders may take from the funded party's compensation to secure their return on investment, meaning that the funded party is not fully compensated for the harm they have suffered;
   (c) that it would cause legal costs to increase;
   (d) that it would cause an increase in insurance premiums and costs for business;
   (e) that it would not be appropriate for all types of dispute.

7. The Commission identifies four principal arguments in favour of legalising third-party funding:

   (a) that it would help to expand access to justice in Ireland;
   (b) that it would improve equality of arms between opposing parties. Where one party has significant financial resources, and the other does not, this can lead to power imbalances and force "weaker" parties to accept unsatisfactory settlements;
   (c) that it would help to increase the pool of assets available to creditors in insolvency proceedings;
   (d) that it would address an inconsistency in the law, whereby corporate entities can effectively engage in third-party funding under another name, by issuing shares or transferring ownership of the company to fund its participation in dispute resolution.

8. In **Chapter 4 (Models of Legalisation)**, the Commission discusses three different means of legalising third-party funding if that step was to be taken. These are:

   (a) the "preservation" approach: abolishing the torts and offences of maintenance and champerty but preserving the rules of public policy behind the torts and offences;
   (b) the "abolition" approach: abolishing the torts and offences of maintenance and champerty outright;
   (c) the "statutory exception" approach: retaining the torts and offences of maintenance and champerty but creating statutory provision permitting third-party funding in some cases as an exception to these torts and offences.

9. If legalising third-party funding becomes a reality in Ireland, it is likely that the "statutory exception" approach is the optimum method in this jurisdiction. Legalising only third-party funding while preserving the torts and offences of maintenance and champerty avoids the difficulties presented by the "preservation" and "abolition" approaches.

10. In **Chapter 5 (Models of Regulation)**, the Commission moves to look at models of regulation for legalised third-party funding. The Commission considers that regulation of this sector, if it were to emerge in Ireland, should aim to:

    (a) reduce, as far as is reasonable and possible, the financial and other risks that third-party funding and funders might create for those who use

third-party funding services and, indeed, for non-funded parties to funded disputes;
(b) protect and enhance the proper and efficient administration of justice in Ireland.

11. Chapter 5 analyses five possible regulatory models for third-party funding in Ireland. In order of increasing control, these are:

(a) a voluntary self-regulatory regime, as in England and Wales, with the third-party funding sector in control of regulating itself,
(b) an enforced self-regulatory regime, as in Hong Kong, with the state reserving a supervisory role to regulate the third-party funding sector more intrusively if self-regulation is insufficient,
(c) a regulatory regime structured primarily around certification by the court as to the reasonableness and fairness of the third-party funding agreement, as recommended by the New Zealand Law Commission for class or collective actions,
(d) a regulatory regime administered by an existing regulator, such as the Central Bank of Ireland or the Legal Services Regulatory Authority, and
(e) a regulatory regime administered by a new and specialist regulator established specifically to regulate third-party funders and funding.

12. In **Chapter 6 (Six Specific Issues in a Regulatory Framework for Third-Party Funding)**, the Commission focuses on six issues concerning the regulation of a possible future legalised system of third-party funding. These six issues are likely to be priority topics for consideration by lawmakers.

13. The first specific issue is whether third-party funding should be prohibited in certain dispute types, including personal injuries proceedings.

14. The second specific issue is that of disclosure in funded disputes. The Commission sees value in mandatory disclosure in funded disputes. Among many other supporting arguments, disclosure permits opposing parties to know the true nature of their adversary and, in the case of funded representative actions, it is an important aspect of the State's ability to comply with the Representative Actions Directive (Directive 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). At the very least, it appears that funded parties should be required to disclose the fact that they are in receipt of third-party funding and the funder's identity to both the opposing party and the court.

15. Whether the funded party should have to disclose the third-party funding agreement to the opposing party, as well as to the court, is less straightforward, due to the sensitive commercial information such agreements are likely to contain and the possible litigation advantage that the opposing party may gain as a result.

16. Third, the Commission identifies mechanisms that could be developed to address excessive funder control over proceedings. These mechanisms include:

    (a) amending legal practitioners' ethical frameworks to better reflect the complexities of the tripartite client–lawyer–funder relationship,
    (b) expanding the definition of misconduct in section 50 of the Legal Services Regulation Act 2015 to specifically provide that ceding control of a dispute to a third-party funder subjects a legal practitioner to the complaints and disciplinary provisions of Part 6 of the Legal Services Regulation Act 2015, and
    (c) empowering the court to assess, of its own motion and from time to time and at any time, and on application by a party, whether a funded representative action has diverted from consumers' collective interests.

17. The fourth specific issue is that of funder insolvency during the course of the funded dispute. Funder insolvency can lead to significant adverse impacts on both the funded party (in terms of further progressing their claim) and the non-funded party (in terms of recovery of their costs). The Commission discusses whether respondent-side concerns surrounding funder insolvency could be addressed by developing a specific security for costs regimen in funded disputes, whereby the funder is subject to a rebuttable presumption that they will provide security. The Commission also identifies two possible mechanisms for addressing funder insolvency from the perspective of the funded claimant. These are:

    (a) minimum capital adequacy requirements for third-party funders, and
    (b) prohibiting a funded party's legal practitioners from recovering their costs in the case of funder insolvency.

18. The fifth specific issue is withdrawal by funders from third-party funding agreements. The Commission analyses two possible mechanisms to manage the difficulties caused by the unilateral termination by third-party funders of third-party funding agreements, namely:

    (a) prohibiting unilateral withdrawal by the third-party funder, and

(b) imposing statutory restrictions on the circumstances in which third-party funders may withdraw from third-party funding agreements.

19. Sixth, the Commission discusses two possible mechanisms for managing the under-compensation issue. These are:

(a) imposing a cap on the level of return on investment that third-party funders can take from a funded party's compensation, and
(b) allowing funding costs and returns on investment as part of normal legal costs recovery.

20. In **Chapter 7 (Assignment of Causes of Action)**, the Commission explores the considerations applicable to any potential liberalisation of the law on assigning causes of action, that is, selling on the right to sue. In effect, where a party assigns their case to another party, that other party is buying the claimant's case from them.

21. The Commission acknowledges that, as noted by the Supreme Court in the *SPV Osus* case, many of the issues that arise concerning reform of the current law on assignment of causes of action overlap with those concerning third-party funding in general.

22. In Chapter 7, the Commission points out that certain types of assignment of action, notably those involving assignment of debts, have long been recognised as important exceptions to maintenance and champerty.

23. Equally, however, the assignment of a "bare" cause of action, that is, the assignment of the right to litigate to a person with no direct interest in the dispute in question, has been prohibited in many jurisdictions. Indeed, as noted by the Supreme Court in the *SPV Osus* case, a number of jurisdictions that have lifted restrictions on litigation funding (whether by case law or legislation) have retained significant restrictions, including in some instances complete bans on assigning "bare" causes of actions.

24. **Appendix A (Questions)** contains the questions raised in each of Chapters 3 to 7.

SEEKING YOUR VIEWS

A Consultation Paper contains an analysis of issues that the Commission considers arise in a particular law reform project, together with a series of questions intended to assist consultees. A Consultation Paper does not usually contain any settled view of the Commission. It is therefore intended to provide consultees with an opportunity to express their views and to make any related submissions on the questions that arise in the Consultation Paper.

Consultees need not answer all questions and are also invited to add any additional comments they consider relevant.

Consultees should note that submissions are, in principle, subject to the possibility of disclosure under the Freedom of Information Act 2014 (FOI). Any person may make a submission saying that they are making it on a confidential basis, especially if it contains personal information, and we would then treat it as confidential as far as possible. If we receive a request for any material to be disclosed under FOI, we will, before releasing the information, contact the person concerned for their views.

You can send a submission in either of the following ways:

(a) You can email your submission—in whichever format is most convenient to you—to the Commission at ThirdPartyFunding@lawreform.ie.

or

(b) You can post your submission to:

Law Reform Commission,
Styne House,
Upper Hatch Street,
Dublin 2,
Ireland.

We would like to receive submissions on this Consultation Paper no later than close of business on Friday **3 November 2023** if possible.

CHAPTER 1
THIRD-PARTY FUNDING: CONTEXT AND OVERVIEW OF THE SECTOR

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1. Context for this Consultation Paper

[1.1] Third-party funding is investment in dispute resolution. Broadly speaking, third-party funding occurs when an entity ("the funder"), who is otherwise unconnected to a party to a legal dispute, finances the cost of resolving that dispute on behalf of that party. If the dispute is resolved in favour of the funded party, whether that resolution is through a court decision following a hearing, or through a settlement, the funder is reimbursed the amount of their initial investment and receives additional remuneration as a return on that investment.

[1.2] Profit-motivated third-party funding is, subject to some recognised exceptions, illegal in Ireland.[1] This illegality was confirmed by the Supreme Court's 2017 decision in *Persona Digital Telephony Ltd v Minister for Public Enterprise*.[2]

[1.3] This Consultation Paper is not the first time that the Commission has written on third-party funding. In 2016, the Commission published an *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* ("the Issues Paper").[3] Among other topics, this sought submissions on whether third-party funding of litigation should be legalised in this jurisdiction, and, if so, whether it should be subject to a form of statutory regulation or, instead, permitted to self-regulate.[4] Only two submissions were received on this topic.

(a) National and European Legislative Developments

[1.4] Since publication of the Issues Paper, the policy background to third-party funding in Ireland, static for decades, has shifted considerably. The third-party funding question has recently featured across several different fronts of state activity. In October 2020, *the Report of the Review of the Administration of Civil Justice* recommended permitting third-party funding in bankruptcy proceedings and in proceedings concerning liquidation, receivership and administration under the Insurance (No. 2) Act 1983, though reserved its views on third-party funding

[1] The current exceptions are discussed in Chapter 2 (Current Irish Law on Third-Party Funding).

[2] [2017] IESC 27. See further, Chapter 2 (Current Irish Law on Third-Party Funding).

[3] Law Reform Commission, *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10-2016).

[4] *Ibid* at page 77.

generally pending completion of the Commission's project.[5] In December 2021, a majority of the Company Law Review Group similarly recommended that third-party funding should be legalised in the specific context of insolvency proceedings, though considered that the matter warranted further examination by the Commission.[6] The Department of Justice's *Implementation Plan on Civil Justice Efficiencies and Reform Measures*, published in May 2022, and which proposes to implement the recommendations in the 2020 *Report of the Review of the Administration of Civil Justice*, commits to carrying out a policy review on third-party funding by the first half of 2024, again taking into account the Commission's current project.[7]

[1.5] The Courts and Civil Law (Miscellaneous Provisions) Act 2023 permits third-party funding in international commercial arbitration and in related proceedings (including court proceedings arising out of an international commercial arbitration).[8] Further reference is made to this provision later in this Consultation Paper.

[1.6] Article 10 of Directive (EU) 2020/1828 on representative actions in collective consumer disputes ("the Representative Actions Directive")[9] requires EU Member States to regulate the operation of third-party funding in such representative actions where such funding is allowed by national law (the Directive does not require that third party funding be allowed by Member States). Section 27 of the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 implements Article 10 of the Representative Actions Directive. Further reference is made to the Representative Actions Directive later in this Consultation Paper, in particular in Chapter 5 (Models of Regulation).

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[5] Group for the Review of the Administration of Civil Justice, *Report on the Review of Administration of Civil Justice* (2020) at page 324.

[6] Company Law Review Group, *Report on the Consequences of Certain Corporate Liquidations and Restructuring Practices, Including Splitting of Corporate Operations from Asset Holding Entities in Group Structures* (Company Law Review Group 2021) at page 41.

[7] Department of Justice, *Implementation Plan on Civil Justice Efficiencies and Reform Measures* (2022) at page 41.

[8] Section 114 of the Courts and Civil Law (Miscellaneous Provisions) Bill 2022, as passed by Dáil Éireann (3 March 2023). The number of this section in the Act as enacted may differ.

[9] 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.

[1.7] Also at European Union level, the European Parliament passed a Resolution in September 2022 requesting the European Commission to draft a Directive regulating third-party funding in the 27 Member States, and the Resolution contains the full text of a draft Directive intended to assist the European Commission.[10] That is a potentially significant development. Should such a Directive be adopted by the EU, Ireland will be obliged to give effect to it, notwithstanding any national law provisions to the contrary.[11] The Parliament's Resolution, and the draft Directive, are considered in detail later.

(b) Other developments not directly related to third-party funding

[1.8] Even where third-party funding is not directly implicated or affected, other ongoing national developments engage similar policy considerations. For example, as set out in Chapter 3 (Policy Considerations of Legalising Third-Party Funding), third-party funding has potential to expand access to justice in Ireland. The ongoing Review of the Civil Legal Aid Scheme is currently seeking submissions from stakeholders on potential reforms to the civil legal aid system as a means of improving access to justice in this jurisdiction.[12]

[1.9] In light of this dynamic national and international background, the Commission has opted to publish a Consultation Paper to contribute to a debate on these topics. The Consultation Paper builds on the work of the Issues Paper while acknowledging and accounting for the radically different policy context for third-party funding in Ireland in 2023 by comparison with what existed when the Issues Paper was published.

[1.10] In this Chapter, the Commission explains precisely what it means by "third-party funding" and provides a basic overview of the entities and procedures encountered in typical, profit-motivated, commercial third-party funding

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[10] European Parliament Resolution of 13 September 2022 with recommendations to the Commission on responsible private funding of litigation (2020/2130 (INL)). The Annex to the Resolution contains the text of a Draft Directive on the Regulation of Third-Party Litigation Funding.

[11] It now appears that adoption of any measure by the European Union will be delayed until further studies have been carried out: Pinsent Masons, "EU third-party litigation funding regulation delayed until further studies" Out-Law News (7 July 2023) < https://www.pinsentmasons.com/out-law/news/eu-third-party-litigation-funding-regulation-delayed-until-further-studies>

[12] <https://www.gov.ie/en/consultation/a7aa6-stakeholder-consultation-on-the-review-of-the-civil-legal-aid-scheme/> accessed on 3 December 2022.

arrangements. We emphasise that this Chapter deals in typical arrangements only—the third-party funding sector is diverse, and not all real-world third-party funding activity or third-party funding agreements will fall neatly into our analysis.[13]

[1.11] Given the current general illegality of third-party funding in Ireland (subject to the exceptions discussed in Chapter 2), any descriptions of the third-party funding sector are based on activities in other, mainly common law, jurisdictions.

[1.12] It is considered appropriate to also deal with the topic of assignment of causes of action in this Consultation Paper. There are, of course, differences between third party funding and the assignment of causes of action. These differences are set out in greater detail in Chapter 7. However, there are many similarities between the issues and considerations which arise in both cases. Both third party funding and the assignment of a cause of action have the potential to give to a party who has suffered a genuine wrong, but who does not have the resources to pursue court proceedings the opportunity to obtain some compensation for that wrong. Such compensation may be in the form of a payment made for the assignment of the cause of action in question or the recovery of appropriate compensation from a court (less the share agreed to be paid to a third-party funder). On the other hand, the problems which may arise from relaxing the law, particularly in an unregulated way, are similar in both cases. Ultimately both the conduct of litigation and the benefits of successfully pursuing a claim will be focused more on the funder or assignee than on the party who suffered the original wrong. The precise extent to which this may be so will be likely to depend on the precise terms of any relevant funding agreement or assignment.

[1.13] In addition, it would seem that any regulatory regime which it was thought fit to put in place in the event of liberalisation should at least be similar in respect of both funding arrangements and assignments. To allow for a liberalisation of the law in respect of one but not the other could potentially create unintended consequences. Likewise, to provide for a regulatory regime in respect of one which did not have at least similar provisions to that provided in respect of the other, could create unnecessary distortions. For those reasons the Commission

[13] On the diversity of activities and actors in the third-party funding sector, see Steinitz, "Whose Claim is this Anyway? Third-Party Litigation Funding" (2011) 452 Minnesota Law Review 1269 at page 1302.

considers it appropriate to also deal with the question of whether there should be any change in the law in respect of the assignment of causes of action.

2. Defining Third-Party Funding

[1.14] The Commission notes the proposed definition of "third-party funding contract" in section 5A of the Arbitration Act 2010 as inserted by the Courts and Civil Law (Miscellaneous Provisions) Act 2023, which defines a "third-party funding contract" as:

> a contract or agreement between a party or potential party to dispute resolution proceedings and a third-party funder, for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the dispute resolution proceedings to which the party or potential party may become entitled.[14]

[1.15] Although, as accurately captured in this definition, the return structure in the majority of third-party funding agreements is based around the funder taking a percentage or proportion of a funded party's compensation, this may not be the case for all third-party funding agreements, some of which adopt return structures not linked to compensation. Regardless of the return structure adopted in a third-party funding agreement, it seems that any attempt to derive third-party profit from investing in dispute resolution is, in general, currently illegal in Ireland.[15]

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[14] This definition appears to be based directly on Reg. 4 of the Singapore Civil Law (Third Party Funding) Regulations 2017 (and cited in the 2018 ICCA-Queen Mary Report, p.57), which defines a third-party funding contract as "a contract or agreement by a party or potential party to dispute resolution proceedings with a Third-Party Funder for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled." It is also similar to the definition in draft Article 3(h) of the European Parliament's 2022 Draft Directive on the Regulation of Third-Party Litigation Funding, in which "third-party funding agreement" is defined as "an agreement in which a litigation funder agrees to fund all or part of the costs of proceedings in exchange for receiving a share of the monetary amount awarded to the claimant or a success fee, so as to reimburse the litigation funder for the funding it provided and, where applicable, cover its remuneration for the service provided, based wholly or partially on the outcome of the proceedings. This definition covers all agreements in which such a reward is agreed, whether offered as an independent service, or achieved through a purchase or assignment of the claim."

[15] See Chapter 2 (Current Irish Law on Third-Party Funding).

[1.16] So as to capture as wide a range of third-party funding agreements as possible, for the purposes of this Consultation Paper, the Commission defines "third-party funding" as follows:

> Third-party funding means an agreement by an entity that is not:
>
> (a) a party or a prospective party to a legal dispute,
>
> (b) an affiliate of or otherwise connected to that party or prospective party, or
>
> (c) a law firm or legal practitioner representing that party or prospective party in that dispute,
>
> to provide a party or a prospective party with funds or other material supports to finance part or all of the costs of the dispute either individually or as part of a specific range of cases in exchange for remuneration that is wholly or partially dependent on the outcome of the dispute.

[1.17] This definition borrows heavily from the definition of third-party funding developed by the Task Force on Third-Party Funding in International Arbitration,[16] though the Commission has modified it to include references to parties and to prospective parties, and to remove before-the-event insurance, after-the-event insurance, and outcome-dependent legal costs agreements from its scope.[17] This definition is not intended to be a statutory definition. It is included here only to clarify the scope of this Consultation Paper.

3. The Third-Party Funding Agreement

[1.18] If, after assessing the case prospects, a third-party funder decides to invest in a dispute, the funder and the prospective funded party (and/or their legal representatives) will negotiate the terms of a third-party funding agreement.

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[16] International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018) at page 50. The Task Force was a joint project between the International Council for Commercial Arbitration and Queen Mary University of London to analyse the third-party funding sector in the arbitration sphere.

[17] Before-the-event insurance, after-the-event insurance and outcome-dependent legal costs agreements are outside the scope of this Consultation Paper.

[1.19] The basic hallmark of most profit-motivated third-party funding agreements is that a funder will agree to finance the costs (either in whole or, as discussed in greater detail below, in part) of initiating, continuing or defending legal proceedings for a party. In exchange, the funded party agrees that, if the dispute is resolved successfully for the funded party, whether that resolution is through decision or settlement, the funder will be reimbursed and will obtain a return on the deployed capital. This return on investment may be structured as a proportion of the award (for example, the funder will receive 25% of the award), as an uplift on the deployed capital (for example, the funder will receive three times the value of the capital invested) or as a combination of the two (for example, the third-party funder will receive 25% of the award or three times the capital invested, whichever is greater). For third-party funding agreements which use a percentage-based return structure, the remuneration for third-party funders will typically be between 10% and 40% of the value of the claim, though may be higher.[18]

[1.20] Key to the attraction of third-party funding is that most third-party funding is provided on a "non-recourse" basis. This means that the third-party funder agrees that, if the dispute ends unsuccessfully for the funded party, the funder can only recover against the funded party out of the collateral that the funded party has provided to secure the agreement (if any), and not out of the funded party's other assets.[19]

[1.21] The non-recourse nature of the financial arrangement between the funder and the funded party makes the provision of third-party finance an obviously risky venture for the funder. As a result, profit-motivated third-party funding merits extensive pre-investment due diligence by the funder and is said to justify seeking high returns on investment for those funded cases that have successful outcomes. In the sense that both are mechanisms to shift the risk of the negative consequences of an unsuccessful legal action, third-party funding has clear similarities to outcome-dependent (or "no win, no fee") legal costs agreements, except that, rather than a legal practitioner agreeing to shoulder the costs of a

[18] Friston, *Friston on Costs* 3rd ed (Oxford University Press 2018) at page 1109.

[19] Samra, "The Business of Defense: Defense-Side Litigation Financing" (2016) 83 University of Chicago Law Review 2299 at page 2302.

dispute in the case of failure, the provider of funds is a complete stranger to the dispute.[20]

[1.22] Not all third-party funding agreements commit the funder to finance all of the costs of a dispute. Agreements that a third-party funder will provide only a proportion of the costs, for example, 60% of the necessary finance, with the funded party or another funder providing the remaining amount, are not unprecedented.[21] Nor do all third-party funding agreements commit the funder to pay the whole of any adverse costs order made against the funded party on behalf of that party. The courts in England and Wales have held that, if a successful non-funded party seeks to enforce a costs order against a third-party funder rather than against the funded party, the third-party funder is usually liable to pay to the non-funded party only the amount that it has invested in the claim. For example, if the third-party funder has provided €50,000 worth of funds to the funded party, then the maximum amount that the funder can, usually, be obliged to pay to the non-funded party is €50,000, even if the legal costs of the non-funded party are far in excess of this.

[1.23] This "pound-for-pound" practice is known as the "*Arkin*" cap, after the decision of the England and Wales Court of Appeal in *Arkin v Borchard Lines Ltd* ("*Arkin*").[22] The Court of Appeal in *Arkin* (whose principal judgment was delivered by Phillips MR) considered that such a cap would encourage third-party funders to limit the finance they provided to funded parties, thus keeping costs in funded disputes proportionate.[23] In more recent years, as the third-party funding sector in England and Wales has developed to a greater degree, the England and Wales courts have adopted a more flexible approach to the *Arkin* cap. In *Chapelgate Credit Opportunity Master Fund Ltd v Money*, the Court of Appeal (whose principal judgment was delivered by Newey LJ) held that the *Arkin* cap was not a "binding rule" and that its application was a discretionary matter for the court, dependent

[20] The Commission notes that while Irish law allows for conditional cost agreements on the "no win, no fee" model (that is, fees are only charged to the client if the case is successful) it does not allow for the costs of the legal professional to be based on a percentage of the award (sometimes called a "damages based agreement").

[21] See, for example, the financing by the claimant in the funded proceedings in *The ECU Group plc v HSBC Bank plc* [2021] EWHC 2875 (Comm).

[22] [2005] EWCA Civ 655, [2005] 3 All ER 613.

[23] [2005] EWCA Civ 655 at para 42, [2005] 3 All ER 613 at para 42.

on the circumstances of the case.[24] This approach was also applied in the *Excalibur* case, discussed below.

[1.24] Other terms typically found in third-party funding agreements include those commonly found in most commercial contracts, for example, terms prescribing the rights and obligations of the funder and of the funded party, the method of resolution if there is a contractual dispute between the funder and the funded party and any conditions of termination of the third-party funding agreement.

4. Entities Involved in the Third-Party Funding Sector

[1.25] Several different types of actor populate the third-party funding sector. Funders, brokers, claimants, respondents, legal services firms, and legal practitioners all take part in a complex, growing and difficult-to-analyse industry spanning multiple countries, continents, and legal systems.

[1.26] The largely unregulated nature of the third-party funding sector results in a bafflingly divergent range of estimates of the sector's size.[25] One estimate places the third-party funding sector's global value at between €40 billion and €80 billion, though the Commission has not yet been able to source the statistical analysis underpinning these figures.[26] On the whole, due to its reliance on up-to-date statistics from a range of objective sources, the Commission prefers the recent analysis of the third-party funding sector carried out in 2021 by the European Parliamentary Research Service.[27] This estimates the global third-party

[24] [2020] EWCA Civ 246, [2021] 1 All ER (Comm) 207. See also *Davey v Money* [2019] EWHC 997 (Ch), [2019] 1 WLR 6108; *Laser Trust v CFL Finance Ltd* [2021] EWCA Civ 228, [2021] 4 All ER 717.

[25] One European third-party funder suggests that it is in the interests of funding sceptics to overestimate the size of the third-party funding market "in an attempt to highlight what they describe as 'the social costs of an increasing American-style litigation culture' to regulators": Deminor Litigation Funding, *Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends* (Deminor 2022) at page 3.

[26] See this estimate cited in Insurance Europe, "EU should develop rules on third-party litigation funding" Insurance Europe (22 June 2022) <https://www.insuranceeurope.eu/news/2650/eu-should-develop-rules-on-third-party-litigation-funding> accessed on 25 November 2022. Also Wheal and Dean, "The End of the Regulatory Vacuum in Europe and a New Era for International Arbitration in Ireland? Developments in Third-Party Funding Regulation" White & Case (27 October 2022) <https://www.whitecase.com/insight-alert/end-regulatory-vacuum-europe-and-new-era-international-arbitration-ireland> accessed on 25 November 2022.

[27] Saulnier et al, *Responsible Private Funding of Litigation: European Added Value Assessment* (European Parliamentary Research Service 2021).

funding market as generating nearly €10 billion in revenue internationally. In Australia, with a small litigation market overall, but a mature and sophisticated third-party funding sector, the sector is estimated to generate revenues of €0.11 billion.[28] The sector in the United States is worth approximately €6.6 billion. The European third-party funding sector is said to make up about €1 billion (about 0.8% of the total revenue of the European legal services market) of the €10 billion total,[29] with the sector in the United Kingdom currently worth around €0.4 billion.[30] The United Kingdom appears to be the largest single market for third-party funding in Europe.[31] Its market is expected to grow further still, with large corporations based in the United Kingdom reportedly demonstrating an increased willingness to avail of third-party funding services in their dispute resolution.[32]

(a) Third-Party Funders

(i) Specialist Third-Party Funders

[1.27] Most commercial, profit-motivated third-party funding is provided by entities specialising in the provision of this investment business. The European Parliamentary Research Service counts 44 specialist third-party funders active in England and Wales, 24 in the Netherlands, and at least 13 specialist third-party funders in Germany.[33]

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[28] The commercial third-party funding sector developed first in Australia and has been described as an "Australian export": Legg, "The Rise and Regulation of Litigation Funding in Australia" (2011) 38 Northern Kentucky Law Review 626 at page 629.

[29] This figure is calculated using data from 2019: Saulnier et al, *Responsible Private Funding of Litigation: European Added Value Assessment* (Directorate General for European Parliamentary Research Services 2021) at page 5.

[30] In practice, most of the third-party funding activity that takes place in the United Kingdom occurs in England and Wales. Although third-party funding is legal in Northern Ireland and in Scotland, there appears to be little to no measurable third-party funding activity occurring in those jurisdictions at the time of writing.

[31] Deminor Litigation Funding, *Litigation Funding from a European Perspective: Current Status of the Market, Recent Issues and Trends* (Deminor 2022) at page 1.

[32] Fritzsche and Stilwell, "How Covid-19 Impacts the Claims and Disputes Landscape" Ernst & Young LLP (19 April 2021) <https://www.ey.com/en_uk/assurance/how-covid-19-impacts-the-claims-and-disputes-landscape> accessed on 25 November 2022.

[33] Saulnier et al, *Responsible Private Funding of Litigation: European Added Value Assessment* (Directorate General for European Parliamentary Research Services 2021) at page 8.

[1.28] Some of the most active specialist third-party funders internationally include Harbour Litigation Funding, Omni Bridgeway, Burford Capital, Woodsford Litigation Funding, Litigation Capital Management, Manolete Partners, and Therium Capital Management. The largest of these are listed on stock exchanges in the United States, the United Kingdom and Australia.[34]

[1.29] Specialist funders often tend to be staffed and managed by legal practitioners (both current and former), arbitration professionals (again, both current and former) and finance and investment professionals. Lawyers appear to be particularly dominant among third-party funder personnel. In examining the staffing patterns of specialist funders, one study found that former legal practitioners comprised over half of the personnel of ten different specialist third-party funders, with four of those funders staffed entirely by former legal practitioners.[35]

(ii) Multi-Strategy/Generalist Investment Funds

[1.30] Some non-specialist or "multi-strategy" investment funds, hedge funds, private equity firms and venture capitalists have diversified into directly investing in legal disputes as third parties.[36] This branching out is understandable: the value represented by some legal disputes is an attractive alternative asset class, with returns on investments often in double digit percentages and unrelated to the unpredictability of the stock market.[37]

[1.31] While some non-specialist funders have likely met with success in financing legal disputes, the risks of failing to specialise, and the resulting lack of knowledge of the intricacies of third-party funding, were starkly evidenced in the England and Wales Court of Appeal judgment in *Excalibur Ventures LLC v Texas Keystone Inc* ("*Excalibur*"). In *Excalibur*, the Court of Appeal (whose principal judgment was

[34] Publicly listed third-party funders include, but are not limited to: Burford Capital, which is listed on the London Stock Exchange and the New York Stock Exchange, Omni Bridgeway, which is listed on the Australian Stock Exchange, and Manolete Partners, which is listed on the London Stock Exchange.

[35] Williams and Dafe, "Banking on Courts: Financialisation and the Rise of Third-Party Funding in Investment Arbitration" (2020) Review of International Political Economy 1 at page 15.

[36] As in, acting as a third-party funder by funding proceedings directly, rather than multi-strategy investment firms investing in specialised third-party funders.

[37] As noted by the International Council for Commercial Arbitration: *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018) at page 26.

delivered by Tomlinson LJ) held numerous non-specialist third-party funders jointly and severally liable for an indemnity costs order made against the claimant to the value of £32 million. Only one of the funders had any prior experience of third-party funding, with that experience relating to litigation outside the United Kingdom. The industry-led representative group, the Association of Litigation Funders of England and Wales, which was permitted to intervene in the *Excalibur* proceedings by way of written submissions, observed in a post-judgment press release that "the risks involved in litigation funding are not easily managed by anyone other than professional funders, staffed by experienced litigation and arbitration experts".[38]

(iii) Private Individuals Using Their Own Personal Funds

[1.32] A category of third-party funders that is particularly difficult to control and to categorise are private individuals—that is, natural persons—who use their own personal funds to finance someone else's legal dispute. Such funders act by themselves and do not provide funds as part of a "crowd".[39]

[1.33] Although some persons in this category fund legal disputes to generate profit, not all are motivated by money. Some private individuals provide finance to a party out of personal, political or commercial animosity towards the opposing party. The funder "stirs up" or facilitates the legal dispute against that opposing party to cause them financial or reputational harm.

(b) Beneficiaries of Third-Party Funding

(i) Claimants

[1.34] Most beneficiaries of third-party funding are claimants. This is because, in a dispute, the claimant is the most likely party to benefit financially from a settlement or court award, and therefore the most likely to provide a return on investment for a third-party funder.

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[38] Association of Litigation Funders, *Statement from the Association of Litigation Funders of England and Wales regarding the Court of Appeal Judgment in Excalibur*. Available at <http://associationoflitigationfunders.com/2016/11/statement-from-the-association-of-litigation-funders-of-england-wales-regarding-the-court-of-appeal-judgment-in-excalibur/>. On the Association of Litigation Funders of England and Wales, see Chapter 5 (Models of Regulation).

[39] "Crowdfunding" of legal proceedings is outside the scope of this Consultation Paper, which is concerned with for-profit third-party funding.

[1.35] In terms of their identity, claimants who pursue third-party funding services are diverse. Maya Steinitz[40] notes that funded claimants can be individuals, a class made up of several individuals (as in a representative action), a corporation or a sovereign state.[41]

[1.36] In terms of financial power, the International Council for Commercial Arbitration divides claimants who seek third-party funding into one of three categories.[42]

Claimant Type 1 is the claimant without resources. For Claimant Type 1, third-party funding is the only means by which they can seek any degree of redress through the legal system unless some formal legal aid or contingent fee arrangement is available.

Claimant Type 2 may have enough money to finance their own dispute resolution, but is nonetheless smaller and less powerful than the party against which it wishes to pursue legal action. Even if Claimant Type 2 manages to self-fund the matter, they will likely be outmatched in financial resources by their opponent.[43]

Claimant Type 3 is a large, well-resourced corporation, with sufficient resources to allow them to participate in legal proceedings without funding from a third party. For Claimant Type 3, third-party funding is part of their corporate finance strategy, allowing them to "hedge" risks and manage legal disputes without negatively impacting their profit-and-loss statements.

[40] Steinitz, "Whose Claim is this Anyway? Third-Party Litigation Funding" (2011) 95 Minnesota Law Review 1269.

[41] Third-party funding is now commonly used in investor–state arbitration: Shao, "Disrupt the Gambler's Nirvana: Security for Costs in Investment Arbitration Supported by Third-Party Funding" (2021) 12 Journal of International Dispute Settlement 427.

[42] International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018) at page 20.

[43] One commentator describes the provision of third-party funding to these types of claimant as "helping millionaires pursue claims against billionaires": Schwartz, "Should You be Allowed to Invest in a Lawsuit?" *New York Times Magazine* (22 October 2015).

(ii) Respondents/Defendants

[1.37] In comparison to the volume of third-party funding provided to claimants, the provision of third-party funding to respondents is rare, though respondent-side funding is a developing aspect of the third-party funding sector.[44]

[1.38] Where respondent-side third-party funding does occur, it is often in the context of a counterclaim made by the respondent against the claimant, thus offering a clear potential of return on investment for the third-party funder. For example, one of world's largest specialist third-party funders, Burford Capital, underwrote the defence and counterclaim in US litigation between the claimant, personal care product brand Gillette, and the respondent, start-up company ShaveLogic. The court dismissed Gillette's action for disclosure of confidential information and breach of contract, while allowing ShaveLogic's counterclaims (for intentional interference with prospective business relations and violation of Massachusetts' consumer protection statute) to proceed. The remaining claims were dismissed in August 2017 after the parties reached an undisclosed settlement.[45]

[1.39] In an effort to increase investment streams, some specialist third-party funders are developing specific respondent-side funding mechanisms.[46] These mechanisms include "revenue sharing", where, in exchange for funding a defence, the funder receives a percentage of revenue from the funded respondent's assets or business, and "reverse contingency" arrangements, where the funder receives a return on their investment only if the legal dispute is resolved according to a mutually agreed definition of "success". The definition of success may be achieving settlement or judgment below a set threshold, with the funder indemnifying the funded respondent for any amount over this threshold, and the funded party agreeing to pay to the funder a percentage of any savings below the threshold.[47]

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[44] See further Samra, "The Business of Defense: Defense-Side Litigation Financing" (2016) 83 *University of Chicago Law Review* 2299; Pollard, "Is funding defendants the future of disputes?" *Fivehundred Magazine* <https://www.legal500.com/fivehundred-magazine/editors-views/is-funding-defendants-the-future-of-disputes/>.

[45] *Gillette Company v Provost* 91 Mass App Ct 133 (2017).

[46] See "A Primer on US Defense-Side Litigation Finance", *Omni Bridgeway* (7 July 2022) <https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2022/07/07/a-primer-on-defense-side-litigation-finance>.

[47] Emily Samra, "The Business of Defense: Defense-Side Litigation Financing" (2016) 83(4) *University of Chicago Law Review* 2299.

[1.40] Respondent-side funding might also occur as part of a portfolio of funded cases. In a so-called "portfolio financing" arrangement, a third-party funder may agree to fund the defence for a party in one case in exchange for being permitted to provide funding—and to potentially secure returns on investment—in other high-value matters in which that same party is a claimant (or, where the recipient of the funding is a legal services firm, in exchange for being permitted to provide funding in high-value matters in which that same firm acts on behalf of a claimant—see further the section on "Legal Services Firms and Legal Practitioners", below).

(iii) Legal Services Firms and Legal Practitioners

[1.41] Legal services firms and legal practitioners are normally indirect recipients of third-party funding, in that their fees and disbursements will be paid via the monies that their client receives from the third-party funder. Increasingly, however, legal services firms receive funding directly from third-party funders. This is often as part of a portfolio financing arrangement, with funders providing finance to fund a number of different legal disputes all being handled by the same firm. In portfolio financing, the funder's return depends on the overall net performance of the portfolio of cases.[48] In this way, portfolio financing allows third-party funders to reduce their exposure to risk through diversification—that is, by investing across a range of different actions with different risk profiles. The funder's relationship with the legal services firm means the funder is given a steady supply of investment-worthy legal disputes by the firm, creating a degree of stability for the third-party funder in a competitive and ever-changing marketplace. The legal services firms in receipt of the funding benefit not only from the supply of finance, but also from an enhanced ability to attract clients via the availability of alternative financing arrangements. These arrangements appear to change the lawyer–client relationship. The lawyer now has two interests that might be competing: acting in the best interests of their client, and ensuring that they have a sufficient amount of investment-worthy legal disputes to supply to the funder to create stability for the funder.

[48] Guven and Johnson, "The Policy Implications of Third-Party Funding in Investor–state Dispute Settlement" *Columbia Center on Sustainable Development* CCSI Working Paper (2019) at page 8.

(c) Third-Party Funding Brokers

[1.42] Third-party funding brokers arrange agreements between parties in search of funding and funders in search of profitable legal proceedings to fund. The function of a broker is to streamline the process for a party or prospective party of sourcing a third-party funder and negotiating a third-party funding agreement with them.

[1.43] Different types of third-party funding broker services exist. Some brokers function as "introducers" who can introduce the party seeking funding to a sub-set of the funding market. Others operate as "sell-side" brokers who can introduce the party seeking funding to the whole or a sub-set of the third-party funding market, but who act in the interest of the funders. Still other brokers are "buy-side" brokers, who can introduce the party seeking funding to the whole or a sub-set of the funding market, and who represent the interests of the party seeking funding.[49]

[1.44] Brokers are not integral to third-party funding—neither finding a profitable dispute nor striking an advantageous bargain necessarily requires outsourcing. Despite this, brokers appear to be a reasonably common feature of third-party funding arrangements in jurisdictions where third-party funding is a more established investment activity.[50]

5. Seeking Third-Party Funding and the Third-Party Funding Selection Process

[1.45] The process of obtaining third-party funding varies from dispute to dispute and from party to party. Some parties will seek to enter third-party funding arrangements before they initiate legal proceedings. Others will seek third-party funding only after the dispute has been initiated. The funds from the third-party funder may be used to cover legal fees, out-of-pocket costs such as expert

[49] International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018) at page 22.

[50] *Ibid*.

witnesses,[51] discovery, or, sometimes, the costs associated with enforcement actions after a judgment has been given.[52]

[1.46] Once a party or prospective party has made a "pitch" to a third party for investment, that third party, particularly if they are a specialist funder, will assess the dispute prospects to determine whether it is an appropriate vessel for investment.[53] Bernardo Cremades has compiled a list of the factors that specialist third-party funders tend to consider in deciding whether to fund a dispute. These are:

(1) the value of the proceedings,

(2) the amount to be advanced,

(3) any jurisdictional obstacles,

(4) any defences (or, if the funding is provided to the respondent, the strength of the claim),

(5) the nature and expected length of the proceedings,

(6) the possibilities of settlement,

(7) the creditworthiness of the client and the opposing party (particularly with a view to the prospects of collecting on any award),

(8) the visibility and location of the opposing party's assets,

(9) the counsel chosen and the compensation structure for counsel, and

[51] For example, in *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 3 All ER 613, the funded party sought third-party funding to pay expert witness fees.

[52] International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018) at page 20.

[53] Multi-strategy investors or private individuals motivated by factors other than profit may not always undertake this same careful analysis.

(10) additional obligations of the party to be funded linked to the potential risk of recovery (such as previous third-party funding agreements or any other alliance).[54]

[1.47] This careful pre-investment analysis of a dispute's prospects means that third-party funders provide finance to relatively few of the disputes for which funding is sought. Specialist third-party funders refuse most of the funding requests they receive, with overall industry rejection rates stated to be as high as 90%.[55]

6. Funded Disputes

(i) Subject of Funded Disputes

[1.48] The vast majority of disputes funded by third parties are commercial matters. As a rule, commercial disputes entail far larger awards and settlements than most other types of action. They therefore represent more attractive assets in which to invest. In 2020, the New Zealand Law Commission[56] identified a total of 40 cases in New Zealand between 2000 and 2020 where the plaintiff had received litigation funding. This included 10 representative actions, which comprised five consumer claims, three shareholder claims, one investor claim and one claim against the New Zealand Government. The total of 40 funded cases also included 11 insolvency cases, 15 insurance contract cases, a claim for negligence and breach of fiduciary duty, a statutory demand for repayment of a loan, and a land claim.

[1.49] That said, it appears that third-party funders can be found to invest in practically any type of legal dispute, as long as it offers a reasonable return on investment for the funder.[57] Third-party funding can be found on different sides of disputes spanning the entire spectrum of political and civil perspectives. For example,

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[54] Cremades, *Third-Party Funding in International Arbitration* (Wolters Kluwer 2015) at page 154.

[55] International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018) at page 25.

[56] New Zealand Law Commission, *Issues Paper on Class Actions and Litigation Funding* (NZLC IP45) at paras [14.24]–[14.32].

[57] See the reference to funders financing "virtually anything which has a damages outcome" in Mulheron and Cashman, "Third-Party Funding: A Changing Landscape" (2008) 27(3) Civil Justice Quarterly 312.

third-party funders have successfully provided funding to investors suing states for damage caused by environmentally friendly policies to fossil fuel investments.[58] Third-party funders have also, again successfully, invested in human rights-focused actions: consider, for example, the representative action (*Hans Pearson v State of Queensland*) suing the Queensland Government for the historical underpayment of wages to indigenous workers between 1939 and 1972. Litigation Lending Services, an Australian funder, funded the action, which settled for A$190 million to approximately 11,948 claimants in December 2019, making it, at that stage, the largest human rights case in the history of Australia.[59] Third-party funders have even invested in divorce proceedings, particularly where the value of the contested assets is high.[60]

(ii) Value of Funded Disputes

[1.50] Third-party funders are, usually, investors in search of profit. They normally seek to fund high-value legal disputes with the potential for large returns. As a result, many specialist third-party funders will only invest in disputes worth above a certain financial threshold. These thresholds ensure that the quantum of the claim can justify the level of financial investment required to fund the action.[61]

[1.51] Data from 2009 indicate that different funders operating in England and Wales required a minimum potential return value of between £150,000 and £25,000,000

[58] For example, the third-party funder Harbour Litigation Funding financed an investor–state dispute brought by an investor under the Energy Charter Treaty against Italy: *Rockhopper Exploration PLC, Rockhopper Italia SpA and Rockhopper Mediterranean Ltd v Italy* ICSID Case No. ARB/17/14.

[59] See also the work of the third-party funder Aristata Capital, which funds—for profit—cases relating to the environment, climate change, human rights, justice reform, access to justice, foreign aid and equality: https://www.aristata.co.uk/.

[60] For example, a family law case in the England and Wales High Court, *Young v Young* [2013] EWHC 3637 (Fam), [2014] 2 FLR 786, attracted funding from at least two different specialist funders who, between them, invested £1.4 million in the claim of one of the parties, who insisted that her former spouse was hiding billions of pounds to avoid paying her maintenance. In another family law case, *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), [2021] 1 FLR 1, the spouse of a billionaire enlisted a prominent third-party funder to finance her divorce proceedings and to trace the assets of her husband. The funding arrangement survived a legal challenge brought on public policy grounds.

[61] International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018) at page 25.

before considering whether to provide funding.[62] The website of specialist third-party funder Nivalion currently (January 2023) states that it sets a "minimum threshold" of €7 million for investment in legal proceedings.[63]

(iii) Form of Funded Disputes

[1.52] The precise form that a dispute takes—that is, whether it is litigation, arbitration, or some other form of dispute resolution—will not necessarily be relevant to the decision on whether to fund a dispute. In practically all cases, the funder's primary concern will be whether the dispute represents a financially viable investment prospect. As long as it appears to offer a potential return on investment, third-party funders do not appear to be deterred by the particular form that a dispute takes, and have invested in practically all forms of dispute resolution, including standard court-based litigation, international commercial arbitration,[64] investor–state dispute settlement,[65] adjudication[66] and, though apparently only rarely, mediation.[67]

[1.53] In those jurisdictions where third-party funding is permitted, representative actions are particularly common vehicles for investment. A representative action, sometimes called a "class action", is one which is brought by a member of a class of persons on behalf of themselves and the other members of the class.[68] Under the current rules providing for such actions under Irish law, a representative action can only be advanced in Ireland where all the plaintiffs agree—this differs

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[62] Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report, Volume One* (Stationery Office 2009) at page 161.

[63] <https://nivalion.com/en/what-we-do/direct-funding> accessed on 14 January 2023.

[64] See further, Nieuwveld and Sahani, *Third-Party Funding in International Arbitration* (Kluwer Law International 2016).

[65] For example, article 8.26 of the EU–Canada Comprehensive Economic and Trade Agreement envisages third-party funding being used in investor–state dispute resolution. See also Brekoulakis and Rogers, "Third-Party Funding in Investment Arbitration" in Chaisse et al (eds), *Handbook of International Investment Law and Policy* (Springer 2021) at page 1397.

[66] As used in *Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Co Ltd* [2019] EWHC 2651 (TCC).

[67] <http://mediationblog.kluwerarbitration.com/2017/04/01/7498/> accessed on 4 December 2022.

[68] Hunt, *Murdoch and Hunt's Dictionary of Irish Law* 6th ed (Bloomsbury Professional 2016) at page 273. See further Order 15, rule 9 of the Rules of the Superior Courts.

from other jurisdictions, such as the United States, where there is not necessarily the same expectation of formal agreement between all the plaintiffs.

[1.54] Representative actions are a form of multi-party litigation. Multi-party litigation was the subject of a 2005 Report by the Commission.[69] That Report contained a number of recommendations intended to lead to the introduction of an effective procedural regime for multi-party actions (though it did not address third-party funding). In its 2020 Report, the Review Group on the Administration of Civil Justice considered the Commission's recommendations and noted developments in the area since 2005 (including developments at EU level such as the proposed Representative Actions Directive, which has since been adopted). The Review Group shared the preference of the Commission for the introduction for a multi-party litigation regime along the lines of the Group Litigation Order (GLO) in England and Wales.[70] The Government has committed to introducing primary legislation to implement the Review Group's recommendations.[71]

[1.55] The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 facilitates representative actions for the protection of the collective interests of consumers arising from any actual or apprehended breach of any "relevant enactment" (as defined) (in essence, EU acts, or domestic law acts giving effect to EU acts, enacted for the protection of consumers). By bundling together the claims of many consumers—each of which may be relatively modest in itself—the potential value of the claim is increased and its attraction to potential third-party funders is also increased.

[1.56] Indeed, the trend towards third-party funding being particularly directed at multi-party litigation (whether characterised as "class actions" or "representative actions") is so evident in Australia and New Zealand, where a large majority of representative actions are funded by third parties,[72] that various law reform bodies there have examined third-party funding specifically in the context of its

[69] Law Reform Commission, *Report: Multi-Party Litigation* (LRC 76-2005).

[70] *Report of the Review of the Administration of Civil Justice* (2020), chapter 8, section 6.2 (conclusions and recommendations).

[71] *Civil Justice Efficiencies and Reform Measures, A Civil Justice System for the 21st Century* (May 2022, Department of Justice).

[72] In 2017–2018, approximately 78% of representative actions filed in the Australian Federal Court were funded by a third party: Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (ALRC Report 134 2018) at page 66.

application in representative actions.[73] The experiences of other common law jurisdictions which have both third-party funding and a representative actions system show that third-party funders appear particularly attracted to invest in representative claims brought by shareholders and investors. The President of the Australian Law Reform Commission has noted that, of 71 funded representative actions in the Australian Federal Court between 2013 and 2018, 76% had investors or shareholders as claimants, while a much smaller minority centred on consumer protection or mass tort claims.[74]

[1.57] In light of the transposition of the 2020 EU Representative Actions Directive[75] by the enactment of the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023, third-party funders' participation in representative actions elsewhere is likely to be of particular interest to policymakers in Ireland. The activities of third-party funders in these other jurisdictions are, perhaps, an indicator of the types of disputes in which funders might invest, were third-party funding legalised in this jurisdiction. That no doubt explains why the European Union legislature considered it appropriate to address the issue of third party litigation funding in the Representative Actions Directive. While not imposing any requirement on Member States to allow such funding in litigation within the scope of the Directive, the Parliament and Council clearly contemplated that such funding would be permitted in at least some Member States and sought to impose certain minimum requirements in the interests of consumers where it is permitted.

(iv) Crowdfunding

[1.58] Crowdfunding is a term which has come into use in recent times and involves, as its name implies, a large number of persons providing funding (often a small

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[73] See, for example, Victorian Law Reform Commission, *Report on Access to Justice—Litigation Funding and Group Proceedings* (2018); Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (ALRC Report 134 2018). See also New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022).

[74] Derrington, *Litigation Funding: Access and Ethics* (Australian Academy of Law Lecture 2018) at page 8.

[75] Directive (EU) 2020/1828 provides for representative actions in the context of investments: see the list of provisions of Union law to which the Directive applies, as contained in Annex 1 of the 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.

amount for each individual) for a particular project. Its use has been facilitated by developments in IT and social media. Crowdfunding has been used to raise monies for many purposes. It can, however, in principle, also be used to fund litigation both for persons or bodies wishing to bring claims or to defend proceedings. It would not appear that crowdfunding can be a breach of the law on champerty for it would not normally be the case that those providing such funding would hope to gain financially by the successful prosecution of proceedings. Neither does it appear that crowdfunding could be regarded as being in breach of the law prohibiting maintenance in cases where the funding concerned was provided for the defence of proceedings. So far as the funding of the bringing of claims is concerned, the question of whether crowdfunding might be in breach of the law against maintenance may well depend on whether the circumstances could be said to come within one of the exceptions recognised in law, such as where funding is provided for charitable or analogous purposes.

[1.59] It may well be that it would be appropriate for the law concerning the crowdfunding of litigation to be considered in due course. However, this Consultation Paper is concerned with methods of funding where the funder (either in the form of a third-party funder or an assignee who purchases a cause of action) hopes to gain financially as a result of the funding provided, that is to say, funding that is provided on a commercial basis. This could be by means of the successful bringing of proceedings by the original wronged party utilising third-party funds, in circumstances where some of those proceeds are, as a result of the funding arrangement, to be paid to the funder. Alternatively, if proceedings are successfully brought by an assignee of the relevant cause of action, then the proceeds of those proceedings will be paid to the assignee, although a net profit would only arise where those proceeds exceeded the monies paid or agreed to be paid by the assignee as part of the assignment. The issues which are explored in the Consultation Paper concerning third-party funding and the assignment of causes of action are centrally concerned with the potential difficulties which may arise in allowing litigation to be run for the benefit, at least in significant part, of parties who did not suffer the original wrong. Those issues are not relevant in the case of crowdfunding. On that basis the Commission does not deal with issues concerning crowdfunding of litigation in this Consultation Paper.

CHAPTER 2
CURRENT IRISH LAW ON THIRD-PARTY FUNDING

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[2.1] The case of *Persona Digital Telephony Ltd v Minister for Public Enterprise* ("*Persona*") brought to a head the question of the legality of profit-motivated third-party funding in this jurisdiction.[1] The claimants in *Persona*, alleging unlawful interference in a large government procurement process, had initiated legal proceedings against the respondent Minister. To finance those proceedings, the claimants entered into a third-party funding agreement with a

[1] [2017] IESC 27.

specialist third-party funder. The respondent Minister argued that the third-party funding agreement was void for illegality.

[2.2] A majority of the Supreme Court[2] confirmed that the ancient torts and offences of maintenance and champerty remained part of the common law in Ireland. This was the result of a combination of, firstly, the express retention in force, by the Statute Law Revision Act 2007, of three statutes— the Maintenance and Embracery Act 1540,[3] the Maintenance and Embracery Act 1634 ("the Act of 1634")[4] and the Statute of Conspiracy (Maintenance and Champerty)[5]— which were declaratory of that common law, and secondly, the consistent statements of the Irish courts as to that law.[6] The effect of this subsisting tortious and criminal liability is that it is unlawful, subject to any recognised exceptions, to enter into a third-party funding agreement in this jurisdiction.

[2.3] This Chapter provides an overview of the law on maintenance and champerty insofar as that law affects the legality of third-party funding.

1. The Elements of Maintenance and Champerty

[2.4] The Commission does not propose to dwell on the historical development of the torts and offences of maintenance and champerty. For the purposes of this Consultation Paper, it suffices to observe that these torts and offences are of

[2] The 4–1 majority in *Persona* comprised Denham CJ, Clarke, MacMenamin and Dunne JJ. McKechnie J dissented on the ground that the torts of maintenance and champerty constituted a barrier to the right of access to justice, and he would have adjourned the case in order to allow the Government and Oireachtas an opportunity to respond, The majority also expressed concern in a number of *dicta* that maintenance and champerty could potentially restrict the right of access to the courts, but also pointed out that the constitutional issue had not been expressly raised in the case. As noted below, the majority also expressed the view that the question of third-party funding was better resolved by legislation, including taking account of any recommendations of the Commission, the majority being aware that the Commission's Issues Paper had already been published.

[3] 1540 (32 Hen. 8) c. 9.

[4] 1634 (10 Chas. 1) c. 15.

[5] The Statute of Conspiracy (Maintenance and Champerty) is one of the small number of "Statutes of Unknown Date" retained in force by the Statute Law Revision Act 2007. These are statutes that were enacted sometime in the 12th century, but in respect of which there is no available record of the specific year of enactment.

[6] [2017] IESC 27 at para 54(ii).

ancient origin and crystallised into something close to their modern forms during the medieval period.[7]

[2.5] Case law suggests that maintenance consists of the following four cumulative elements:

(1) a person or entity is a party to a legal dispute,
(2) a person or entity who is not a party to that legal dispute ("the funder") assists the party in bringing or continuing that legal dispute,
(3) the funder does not have an independent and legitimate interest in the outcome of the legal dispute, and
(4) the funder cannot rely on one of the recognised exceptions to maintenance.[8]

[2.6] Champerty, generally characterised as a sub-species of maintenance, consists of all four of the elements cited above, with the added factor that:

(5) the funder stipulates that they will receive a share of or profit from any award if the legal dispute is successful for the party.

[7] On the historical development of the tortious and criminal liability for maintenance and champerty, see further, Winfield, *The Present Law of Abuse of Legal Procedure* (Cambridge University Press 1921) and Rose, *Maintenance in Medieval England* (Cambridge University Press 2017).

[8] Irish case law on maintenance and champerty includes *McElroy v Flynn*, High Court, 31 May 1990, [1991] ILRM 294 (digest); *Fraser v Buckle* [1994] 1 IR 1 (HC), [1996] 1 IR 1 (SC); *O'Keeffe v Scales* [1998] 1 IR 290, [1998] 1 ILRM 393; *Waldron v Herring* [2013] IEHC 294, [2013] 3 IR 323; *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187, [2017] IESC 27; *Moorview Development Ltd v First Active plc* [2018] IESC 33, [2019] 1 IR 417; *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2018] IESC 44, [2019] 1 IR 1; and *Atlas GP Ltd v Kelly and Ors* [2022] IEHC 443. English and Welsh case law of relevance includes *British Cash and Parcel Conveyors Ltd v Lanson Store Service Company Ltd* [1908] 1 KB 1006; *In re Trepča Mines Ltd (No 2)* [1963] Ch 199; *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, [1981] 3 All ER 520; *Giles v Thompson* [1994] 1 AC 142, [1993] 3 All ER 321; *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381; and *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25 at para 55, [2011] 2 All ER 240.

[2.7] Someone who commits the tort and/or offence of champerty, then, automatically also commits the tort and/or offence of maintenance, though someone who commits maintenance is not necessarily guilty of champerty.[9]

(a) Element 1: A Party to a Legal Dispute

[2.8] To establish maintenance or champerty, there must be a party to a legal dispute. Where there is no legal dispute, in the sense of two opposing parties arguing their cases before a decision-maker, the prohibition on maintenance and champerty should be of no application.[10] For example, where a third party paid a solicitor to assist in progressing a divorce bill through Parliament for her daughter's husband, this was held not to be maintenance, as there was no lawsuit.[11]

[2.9] For some forms of legal dispute, the application of the prohibition on maintenance or champerty is clear. For example, it obviously applies in respect of court-based litigation.[12] Less certain, however, is whether that same prohibition applies with respect to forms of dispute resolution other than litigation. Does it apply to non-court-based dispute resolution, such as arbitration or adjudication, for example, or to proceedings in front of non-court adjudicative bodies like the Workplace Relations Commission or the Residential Tenancies Board?

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[9] Some English dicta suggest that champerty can exist without (unlawful) maintenance: see *Thai Trading Co v Taylor* [1998] EWCA Civ 370 at para 17, [1998] 3 All ER 65 at 69; *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25 at para 55, [2011] 2 All ER 240 at 55. However, this should be viewed in light of the English abolition of tortious and criminal liability for maintenance and champerty in the Criminal Law Act 1967. The extent to which the proposition can apply to Irish law, which has retained liability on both the criminal and civil fronts, is unclear.

Case law reveals isolated instances where courts have found maintenance or champerty where there is, properly speaking, no legal **dispute**. In *McElroy v Flynn* [1991] ILRM 294, the lodging by the claimant of evidence with the Treasury Solicitor of the respondent's relationship to the deceased, and instructing the deceased's solicitors to pay the respondent's share of the estate to the claimant's solicitors, was held to amount to legal action sufficient to void any agreement on the grounds of maintenance and champerty. The question of litigation or any other form of dispute resolution did not expressly arise in the impugned agreement, though it is arguable that some form of impending litigation was implicit in the claimant's actions.

[11] *Moore v Usher* (1835) 7 Sim 383.

[12] As was the case in, for example, *Persona*.

[2.10] The common law world has developed two conflicting approaches to the scope of the application of the prohibition of maintenance and champerty. What this Consultation Paper terms the "restrictive" approach limits the prohibition's application to litigation only. In *Pickering v Sogex Services (UK) Ltd* ("*Pickering*"), the High Court of England and Wales considered that the prohibition on maintenance and champerty did not apply in a district valuation court, as the valuation court was an administrative court only, not a court of law.[13] Similarly, in the much older case *Saville Bros Ltd v Langman*, an application made to licensing justices was not considered to have been made before a court proper, and the agreement was therefore held not to engage the prohibition on maintenance.[14]

[2.11] The Hong Kong Supreme Court in *Cannonway Consultants Ltd v Kenworth Engineering Ltd* took a similarly restrictive view of the prohibition's application, holding that it did not apply to arbitration.[15] The Court considered that, as the rationale for the prohibition was the protection of civil public justice, it did not extend to arbitration, which is conducted in private.

[2.12] As against the restrictive approach, there is the more expansive attitude displayed by the English High Court in *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* ("*Bevan Ashford*").[16] In *Bevan Ashford*, Scott VC was prepared to find that the prohibition on maintenance and champerty applied to arbitration. In doing so, he held, perhaps controversially, that arbitration was a form of litigation in itself, albeit not a court-based one. The Singapore Court of Appeal decision of *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* ("*Otech*") did not go so far as to consider arbitration to be litigation, but did consider that:

> the purity of justice and the interests of vulnerable litigants are as important in [arbitration] proceedings as they are in litigation. Thus the natural inference is that champerty is as applicable in the one as it is in the other.[17]

[13] (1982) 20 BLR 66, (1982) 262 EG 770.

[14] (1898) 79 LT 44.

[15] [1994] HKCFI 173 at para 24, [1995] 2 HKLR 475, [1995] 1 HKC 179.

[16] [1999] Ch 239.

[17] [2006] SGCA 46 at para 36.

[2.13] The Commission considers that there is legislative backing for an expansive interpretation. The Commission notes that the foundational statute of maintenance and champerty in Ireland, the Act of 1634, originally prohibited maintenance only when it occurred "in any of *the King's courts* of the chancery, castle-chamber, or elsewhere within this his Highnesse Realme of Ireland".[18] The words "in any of the King's courts" in the Act of 1634 arguably limited the prohibition on maintenance and champerty to court-based activity only, meaning that third-party funding was not necessarily unlawful when used to finance alternative dispute resolution proceedings or proceedings in front of non-court adjudicative bodies.[19]

[2.14] The Statute Law Revision (Pre-Union Irish Statutes) Act 1962 deleted the phrase beginning with "in any of the King's courts" from the Act of 1634.[20] As a result, it is arguable that Ireland's prohibition on maintenance and champerty expanded in 1962 to also prohibit maintenance and champerty in non-court-based legal disputes, and therefore to prohibit the provision of third-party funding in those disputes.

[2.15] Regardless of whether the Irish courts might follow the expansive or restrictive approach, the Commission notes that the Courts and Civil Law (Miscellaneous Provisions) Act 2023—which inserts a new section 5A into the Arbitration Act 2010—expressly provides that the offences and torts of maintenance and champerty do not apply in international commercial arbitration or in related proceedings, thus removing a significant obstacle to third-party funding and assignment of causes of action in such cases. The Act also proposes a "statutory exception" approach to third-party funding agreements. It provides that a third-party funding contract that meets the criteria (if any) prescribed in Regulations that the Minister for Justice may make under the proposed new section 5A of the 2010 "shall not, insofar as it relates to dispute resolution proceedings, be treated as contrary to public policy or otherwise illegal or void." This would address the uncertainty around the prohibition on third-party funding and assignment of causes of action in the context of international commercial

[18] Section 3 of the Act of 1634. Emphasis added.

[19] Interpreting the Maintenance Act 1377 (1 Ric. 2) c. 4, a mere two hundred years after its passing, in the year 1596–97, the court in *Tisdale v Bedington* held that no action in maintenance could lie in ecclesiastical courts, as they were not courts of common law.

[20] Section 1 and schedule of the Statute Law Revision (Pre-Union Irish Statutes) Act 1962. The Statute Law Revision (Pre-Union Irish Statutes) Act 1962 labels this phrase in the Act of 1634 as "obsolete". Ironically, it may have been one of the Act's most important parts.

arbitration, as well as dispute resolution proceedings related to international commercial arbitration, including mediation and conciliation.

[2.16] Case law is clear that the prohibition on maintenance and champerty applies in respect of civil disputes. A further question arises as to whether it also applies to criminal prosecutions. The Law Commission of England and Wales was of the view in 1966 that the prohibition was of "no application to criminal proceedings".[21] That said, in at least one case, *Bradlaugh v Newdegate*, which involved a third party funding a party in bringing a private prosecution against a Member of Parliament, the English High Court (Queen's Bench Division) (Lord Coleridge CJ) considered, obiter, that "the doctrine of maintenance is not confined to civil actions".[22] The issue does not yet appear to have arisen for discussion in Irish courts, and, as public prosecutions are brought by bodies, such as the Director of Public Prosecutions, which rely on public funds, it seems likely that it could only ever arise in the context of private prosecutions.[23] This is discussed in greater detail in Chapter 6 (Six Specific Issues in a Regulatory Framework for Third-Party Funding).

(b) Element 2: Provision of Assistance in Initiating or Continuing a Legal Dispute

[2.17] The second element of maintenance and champerty is the provision of assistance to a party to the legal dispute. In the Commission's view, this element is made up of two sub-elements:

(1) the funder must intend the assistance to go towards the dispute, and
(2) the assistance must actually be provided to the party.

[21] Law Commission of England and Wales, *Report on Proposals for Reform of the Law Relating to Maintenance and Champerty* (LC007 1966) at page 4. See also *Grant v Thompson* (1895) 72 LTR 204, in which the court considered that the tort of malicious prosecution is sufficient remedy for wronged parties in maintained or champertous prosecutions.

[22] (1883) 11 QBD 1. On the background to this case, see Harlow and Rawlings, *Pressure Through Law* (Routledge 1992) at page 34.

[23] This raises the question, possibly of historical interest only, of the legality of "prosecution societies" (private groups which pursue criminal prosecutions against individuals). See further, Koyoma, "Prosecution Associations in Industrial Revolution England: Private Providers of Public Goods?" (2012) 41 Journal of Legal Studies at page 95.

(i) Funder's Intention

[2.18] To establish maintenance or champerty, the funder must intend the finance to go towards the legal dispute, and there must be a causal connection between the provision of support and the continuation of the dispute. For example, someone who provides financial assistance to a party who is engaged in litigation, with the intention that that party use it to go on holiday, does not engage in maintenance: paying for a holiday is not supporting the party's legal dispute. English[24] and Canadian[25] courts have adopted purpose-based tests—that is, they examine the intention of the alleged maintainer in providing the finance to the funded party—to determine whether maintenance arises in particular cases.

(ii) Actual Provision of Assistance

[2.19] There are at least two reasons why an agreement to maintain an action might, fail: (1) the party with the right to sue might not initiate or pursue the action, and (2) the party providing the funding might not in fact provide that funding. Authorities are mixed on whether these cases amount to the tort of maintenance, though any such agreement is unlawful and unenforceable as a contract regardless of whether the parties perform their respective obligations under that agreement.[26]

[2.20] The Supreme Court in *Persona* did not consider that the point at which third-party funding was provided during the course of a dispute was a "relevant factor" in assessing the legality of such funding. Regardless of when the agreement was entered into, the Court held that it was illegal.[27]

(c) Element 3: No Legitimate and Independent Interest in the Outcome of the Legal Dispute

[2.21] Where the funder and the funded party have an interest in common in the outcome of the legal proceedings, the provision of finance to the funded party

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[24] *Camdex International v Bank of Zambia (No 2)* [1997] 1 WLR 632, [1997] 1 All ER 728.

[25] *S v K* (1986) 55 OR (2d) 111, 116 (Dist Ct).

[26] See the discussion in Winfield, *The Present Law of Abuse of Legal Procedure* (Cambridge University Press 1921) at pages 10–21.

[27] [2017] IESC 27, para 54(ix). This is consistent with other authorities from the courts of England and Wales: see, for example, *Greig v National Amalgamated Union of Shop Assistants* (1906) 22 TLR 274; *Neville v Express London Newspaper Ltd* [1919] AC 404.

will not constitute maintenance or champerty. The type of interest that will permit non-parties to finance legal proceedings has been described, variously, as a "legitimate interest",[28] a "direct or legitimate interest"[29] or a "*bona fide* independent interest".[30] This interest must exist independently of the funding agreement,[31] that is, the third party's interest in the dispute should not only arise because of the agreement to finance the proceedings.

[2.22] It is not always easy to determine whether a legitimate interest arises between the funder and the funded party, and courts in other jurisdictions have held that this can only be decided on the individual circumstances of each case,[32] having regard to all aspects of the transaction taken together as a whole.[33] It has also been held that, whether or not a sufficient interest actually exists, a reasonable belief that it does exist will serve to legitimise the maintained action.[34]

[2.23] Examples of agreements where there was held to be a sufficient common interest between the alleged maintaining party and the litigating party to take the alleged maintenance outside the prohibition include:

- where an interested creditor of an insolvent company (often the Revenue Commissioners) funds a liquidator to bring court proceedings by the company or its liquidator against third parties or former directors, etc, to try to swell the company's assets;
- where there is a familial or intimate relationship between the litigating and the maintaining parties[35] (although this may not extend to champerty);[36]

[28] *Waldron v Herring* [2013] IEHC 294, [2013] 3 IR 323 at para 28.

[29] *Greenclean Waste Management v Leahy (No 2)* [2014] IEHC 314 at para 10.

[30] *O'Keeffe v Scales* [1998] 1 IR 290 at 295; [1998] 1 ILRM 393; *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187 at para 46.

[31] *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2015] IEHC 602 at para 33; [2017] IECA 56 at para 35; [2018] IESC 44 at para 97, [2019] 1 IR 1.

[32] *Dal-Sterling Group plc v WSP South & West Ltd* [2001] EWCA Civ 1826.

[33] *Crittenden v Bayliss* [2002] EWCA Civ 50.

[34] *Harris v Brisco* (1886) 17 QBD 504; *Findon v Parker* [1843] 11 M & W 675.

[35] *Bradlaugh v Newdegate* (1883) 11 QBD 1 at page 11; *Condliffe v Hislop* [1996] 1 WLR 753.

[36] *Hutley v Hutley* (1873) LR 8 QB 112.

- where an employer assists an employee or an employee assists an employer;[37]
- where residents of an area fund a challenge to a planning decision affecting that area;[38]
- where an angling association supports its members in respect of litigation concerning river pollution;[39]
- where a trade union supports its members in respect of actions against employers for wages;[40]
- where a trade union supports its members in respect of alleged libels on the members,[41]
- where a landlord supports their lessee, should the landlord's title be prejudiced;[42]
- where an employer supports an employee in an action arising out of the employment;[43]
- where an action is supported by a motorist's insurer, including through the well-established principle of subrogation (that is, in effect, "substitution") in insurance, in which the insurer "steps into the shoes" of the insured;[44]
- where persons act in legitimate defence of commercial interests.[45]

[37] *Neville v London Express Newspaper* [1919] AC 368.

[38] *Atlas GP Ltd v Kelly* [2022] IEHC 443.

[39] *Martell v Consett Iron Co Ltd* [1955] Ch 363, [1955] 1 All ER 481.

[40] *Greig v National Amalgamated Union of Shop Assistants* (1906) 22 TLR 274.

[41] *Hill v Archbold* [1968] 1 QB 686.

[42] 1 Hawk PC (8th ed) 456–7; 2 Roll Abr 115g; *Alabaster v Harness* [1894] 2 QB 897 at page 901.

[43] *Elborough v Ayres* (1870) LR 10 Eq 367.

[44] *Bourne v Colodense* [1985] ICR 291; *Compania Colombiana de Seguros v Pacific Steam Navigation* [1965] 1 QB 101.

[45] *British Cash and Parcel Conveyors Ltd v Lanson Store Service Company Ltd* [1908] 1 KB 1006; *Wood v The Freehold United Quartz Mining Co Registered* (1870) 1 VR (Eq) 168; *Plating*

[2.24] The last of these, agreements between persons acting in defence of commercial interests, has been subject to some judicial scrutiny. As we have seen, to qualify as a justification for maintenance or champerty, the "commercial interests" must arise independently of the maintained agreement. A legitimate and independent commercial interest was found to exist in *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd* ("*Thema International*"), in which the High Court (Clarke J) considered that shareholders and creditors who fund an action brought by a company, and who may benefit financially from that action, have an interest in that action sufficient to bring it beyond the rule against maintenance. This interest arose from "the hope that that entity will be able to pay them monies due (in the case of creditors) or dividends or capital distributions (in the case of shareholders)".[46]

[2.25] However, where the likely benefit from an action far outweighs any commercial interest in that action, a legitimate interest in defending commercial interests may not be made out.[47]

(d) Element 4: Not a Recognised Exception

[2.26] Maintenance will not be established where the case comes within one of the recognised exceptions to maintenance. It has been observed that the rules against maintenance and champerty are subject to "strings of exceptions which are neither based on any logical principle nor in their nature afford any warrant that they are exhaustive".[48] Two of these exceptions that have arisen in Irish case law are outlined below.

(i) Charity

[2.27] It is a long-established principle in the common law that, where the alleged maintainer acts out of charitable motives, it is a good exception to the rule

Company v Farquharson [1881] 17 Ch D 49; *London and Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526; *Thema International Fund Plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357, [2011] 3 IR 654.

[46] *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357 at para 5.7, [2011] 3 IR 654 at page 662.

[47] As in, for example, *Advanced Technology Structures Ltd v Cray Valley Products Ltd* [1993] BCLC 723.

[48] *British Cash and Parcel Conveyors Ltd v Lamson Store Service Company Ltd* [1908] 1 KB 1006 at page 1014.

against maintenance. As with so much of the law concerning maintenance and champerty, the origins of this exception are not entirely clear.[49]

[2.28] Irish case law is open to the existence of a charitable exception to maintenance. In *Thema International*, the Court identified charity as being a "legitimate concern" operating to bring the legal action outside the prohibition on maintenance.[50] This was cited with approval in both the High Court[51] and Supreme Court decisions in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*.[52] "Charitable intent" on the part of the funder created an exception to maintenance "where the funder does not hope to benefit personally".[53]

[2.29] Outside *Thema International* and some limited Australian dicta, there has been relatively little judicial or academic expansion on the charitable exception to maintenance, in either local or foreign precedent.[54] The lack of commentary is somewhat surprising, given the extent to which maintained but charitable legal proceedings have influenced the Irish legal system.[55] It is easy to forget that any legal practitioner who acts *pro bono* (that is, for free), or anyone who makes donations to allow charities to bring strategic public interest litigation, appears at face value to commit the tort and offence of maintenance. The legitimacy of *pro bono* actions or actors in Ireland has never been seriously questioned, and it would appear that legal practitioners and donors could rely on the charitable exception to maintenance, if such an issue were ever to arise.

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[49] See Fry LJ's remarks on the origins of the charitable exception in *Harris v Brisco* (1886) 17 QBD 504.

[50] [2011] IEHC 357 at para 5.6, [2011] 3 IR 654 at para 22.

[51] [2015] IEHC 602 at paras 35 and 48.

[52] [2018] IESC 44 at para 24 (O'Donnell J), [2019] 1 IR 1 at para 35.

[53] [2011] IEHC 357 at para 5.6, [2011] 3 IR 654 at para 22.

[54] For example, the Australian High Court case of *Stevens v Keogh* (1946) 72 CLR 1 establishes that, in order to ground the charitable exception to maintenance, there is no need to prove any element of poverty on the part of the funded party.

[55] For example, the plaintiff in *Sinnott v Minister for the Environment* [2017] IEHC 214, [2017] 2 IR 570, which vindicated the right to a secret ballot in elections for people with visual impairments was supported by the Public Interest Law Alliance acting *pro bono*. The applicant in *Foy v An tArd Chláraitheoir* [2007] IEHC 470, [2012] 2 IR 1, concerning the rights of transgender people, was represented by the Free Legal Advice Centres, again acting *pro bono*. See further, Whyte, *Social Inclusion and the Legal System* 2nd edn (Institute of Public Administration 2015) at page 476 fn 108.

[2.30] It seems that a champertor cannot avail of the charitable exception, as, regardless of what factor is used to determine charity, supporting an action in exchange for a share of the proceeds would appear antithetical to most conceptions of charitable behaviour.

(ii) Wardship

[2.31] Where a third party provides monies to a party to instigate wardship proceedings in respect of another person, this does not amount to maintenance.[56]

[2.32] This exception to maintenance and champerty was established in an Irish case, *Persse v Persse*.[57] The respondent son in *Persse*, Dudley Persse, had agreed to advance money so that his father, Robert Persse, presumptive heir-at-law to the estate of a large Galway landowner, could prosecute a "commission of lunacy". The commission of lunacy allowed Robert Persse to secure the property of the Galway landowner during the landowner's lifetime. In exchange for the funds, father and son agreed that, once the landowner had died and the property accrued to the father, the remainder of the property would go to the respondent son. On the death of the landowner, the respondent son sued his father, seeking specific performance of their agreement.

[2.33] The UK House of Lords focused on the public interest served by the institution of proceedings in lunacy as a means of protecting the person and their property, and that this public interest would be impeded if agreements to finance the cost of these proceedings were not enforceable. The agreement between father and son was therefore held not to be void for maintenance or champerty.

(e) Element 5: Share in or Profit from the Award

[2.34] The element of stipulating for a share in or profit from the legal dispute, a feature of many third-party funding agreements, differentiates champerty from

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[56] The 19th-century wardship system under the Lunacy Regulation (Ireland) Act 1871 (34 & 35 Vict) has now been replaced by a new system brought into force by the Assisted Decision-Making (Capacity) (Amendment) Act 2022, although at the time of publication some transitional arrangements apply (for a recent case considering detention orders under the new law, see *In Re KK* [2023] IEHC 306; for an extended discussion of the complex basis and history of the wardship jurisdiction, see the judgments of Baker and McKechnie JJ in *In Re JJ* [2021] IESC 1).

[57] (1840) 7 Cl. & F. 279.

maintenance simpliciter. It also makes champerty an "aggravated",[58] "obnoxious"[59] or "more severe or heinous" form of maintenance.[60]

[2.35] A question might arise as to whether champerty only occurs when a funder takes a percentage or proportion of the funded party's compensation, rather than, for example, when a funder receives an uplift on the deployed investment capital, the amount of which is not related to the amount of compensation. The Supreme Court in *O'Keeffe v Scales* did not appear to consider that champerty was restricted only to instances where the champertor took from the proceeds of the dispute, noting that it arises whether the benefit is "a share of the proceeds of the litigation or a promise of remuneration, such as money or a transfer of property if the claim is successfully defended".[61]

2. Maintenance and Champerty as Torts

[2.36] Maintenance and champerty are torts actionable at the suit of the party who has suffered actual loss as a result of the maintained or champertous proceedings.[62] The tortfeasor is the entity who provides the finance to the funded party—in a case of third-party funding, then, the tortfeasor is the third-party funder. The tort of maintenance arises regardless of whether the maintained action was successful or not.[63]

[2.37] Although modern Irish decisions readily acknowledge the existence of tortious liability for maintenance and champerty in Ireland, few of those decisions have directly concerned actions seeking damages[64] Rather, they have tended to address the enforceability of allegedly champertous or maintained agreements or the validity of allegedly champertous or maintained litigation.

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[58] *Camdex International Ltd v Bank of Zambia (No. 1)* [1998] QB 22 at 29, [1996] 3 All ER 431.

[59] *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, [1981] 3 All ER 520.

[60] *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2017] IECA 56 at para 34.

[61] [1998] 1 IR 290 at page 295.

[62] Quill, *Torts in Ireland* (Gill & MacMillan 1999) at page 344.

[63] *Neville v London Express Newspaper Ltd* [1919] AC 368; *Oram v Hutt* [1914] 1 Ch 98 (CA); *Scott v National System for the Prevention of Cruelty to Children* [1909] 2 TLR 789.

[64] Though it arose indirectly in *GE Capital Woodchester Ltd v Staunton Fisher Ltd* [2016] IEHC 172 and *Atlas GP v Kelly* [2022] IEHC 443, in both of which the claimants had sought damages for maintenance and champerty from the respondents.

[2.38] It is not entirely clear, for the purposes of the torts of maintenance and champerty, what constitutes recoverable damage. In 1966, the Law Commission of England and Wales was firmly of the view that damage in the tort of maintenance was "almost impossible of proof".[65] This Commission does not share the same confidence in this position as their English and Welsh counterparts of 50 years ago. While it may in some cases be difficult to prove damage, it seems plausible that cases could present themselves where the damage caused by tortious acts of maintenance or of champerty is easily quantifiable.

[2.39] In *Neville v London Express Newspaper Ltd*, the UK House of Lords considered that an action for damages for maintenance would not lie without proof of special damage.[66] However, the Irish High Court (O'Regan J) in *GE Capital Woodchester v Staunton Fisher Ltd* ("*GE Capital Woodchester*") doubted the persuasiveness of this authority, noting that it was "one hundred years old, is authority of the jurisdiction of England and Wales" and, further, that the relevant part of the judgment was obiter.[67] Some authorities specifically indicate that damages for tortious maintenance or champerty can include the costs incurred by the wronged party in defending the maintained or champertous action.[68]

[2.40] To the still limited extent to which Irish courts have examined the question of damage in maintained or champertous actions, they appear to favour an expansive interpretation. The Supreme Court (in a judgment delivered by Lynch J) in *O'Keeffe v Scales* considered that, while a claim of maintenance or champerty could not bar a maintained or champertous action, it would be open to the party who had suffered from the unlawfully maintained action to sue the maintainer or champertor "for all the damage suffered by [the wronged

[65] Law Commission of England and Wales, *Proposals for Reform of the Law Relating to Maintenance and Champerty* (LC-007, 1966).

[66] [1919] AC 368.

[67] [2016] IEHC 172 at para 13.

[68] *Alabaster v Harness* [1895] 1 QB 339 (CA); *Newswander v Giegerich* (1907) 39 SCR 354 at 359. See also *Oram v Hutt* [1914] 1 Ch 98 (CA). In the Queensland case of *JC Scott Construction v Mermaid Waters Tavern Pty Ltd*, the unmaintained party recovered special damages against the maintained party for the cost of alternative dispute resolution proceedings which the unmaintained party had to undergo after their banker withdrew accommodation because of the illegally maintained litigation against them: [1984] 2 Qd R 413.

party]".[69] In *GE Capital Woodchester*, the High Court (O'Regan J) considered that it was therefore clear that "the damages which might be suffered are not limited to the costs of the action".[70]

[2.41] Establishing the torts of maintenance or champerty before the conclusion of the maintained or champertous dispute does not appear to be a defence to the merits of that action or a reason to stay that dispute,[71] although it has been suggested that, where the maintenance or champerty is clear and obvious or the maintained or champertous proceedings are an abuse of process, dismissal of the proceedings may be warranted.[72]

3. Maintenance and Champerty as Common Law Offences

[2.42] As well as being civil law wrongs, maintenance and champerty are also offences at common law. This makes the provision of third-party funding a criminal act in Ireland.

[2.43] The criminal offences of maintenance and champerty have little-to-no ongoing vibrancy in this jurisdiction. Dunne J in the Supreme Court decision in *Persona*, while agreeing with the majority that maintenance and champerty remained both civil and criminal wrongs in Irish law, questioned the constitutionality and continued existence of the criminal offences of maintenance and champerty:

> The question remains as to whether the definitions of these offences … are sufficiently clear to enable a criminal prosecution to take place for either champerty or maintenance … What of the *mens rea* involved in the offence? What intention would the Director of Public Prosecutions have to prove in order to obtain a conviction? … Given that the status of the offences of champerty and maintenance has not been challenged on the application before the Court, unless and until the issue of their status is raised and argued in an appropriate case, it would be

[69] *O'Keeffe v Scales* [1998] 1 IR 290 at page 297, [1998] 1 ILRM 393.

[70] [2016] IEHC 172 at para 11.

[71] *O'Keeffe v Scales* [1998] 1 IR 290 at page 295, [1998] 1 ILRM 393; *GE Capital Woodchester Ltd v Staunton Fisher Ltd* [2016] IEHC 172 at para 38.

[72] *SPV Osus Ltd v HSBC International Trust Services (Ireland) Ltd* [2015] IEHC 602, as interpreted by O'Regan J in *GE Capital Woodchester Ltd v Staunton Fisher Ltd* [2016] IEHC 172 at para 17. See also the cases cited in Tolhurst, *The Assignment of Contractual Rights* 2nd ed (Bloomsbury 2016) at page 194, fn 380.

> inappropriate to reach any conclusion on their continued presence in this country as criminal offences.[73]

[2.44] In 2001, when asked for "the number of complaints, investigations, prosecutions and convictions in relation to the offences of maintenance and champerty over the past decade", the Minister for Justice responded that "[t]he information sought by the Deputy … is not readily available. The information could only be compiled by diverting staff resources from other important work."[74] From the Commission's research, there appear to have been no Irish prosecutions or convictions for maintenance or champerty in the history of the State. There have previously been attempts to abolish the offences in Ireland, though abolition proposals have not advanced very far.[75]

[2.45] This uncertainty surrounding the criminal offences is not mirrored everywhere. Hong Kong, another common law jurisdiction in which the offences remain in force, has seen relatively recent prosecutions and convictions for maintenance and champerty. In *HKSAR v Winnie Lo*, the Hong Kong Court found that a solicitor had conspired with a recovery agent to unlawfully maintain a personal injury action by entering into a conditional fee agreement.[76] She was sentenced to 15 months' imprisonment. Although the Hong Kong Court of Final Appeal later quashed the sentence, it still held that the ingredients of the criminal offences of maintenance and champerty were certain enough to remain law in that jurisdiction.

[2.46] When determining whether a crime of maintenance had been committed, the Hong Kong Court suggested that a jury consider at least these three questions:

(1) Did the defendant officiously intermeddle with someone else's litigation?

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[73] [2017] IESC 27 (Dunne J).

[74] Dáil Éireann Debates 3 April 2001 vol 533 no 6.

[75] Section 16 of the Contempt of Court Bill 2017, a Private Member's Bill, proposed to abolish the offences of maintenance and champerty, but did not provide for the repeal of any Acts. The 2017 Bill did not advance beyond the First Stage in Dáil Éireann (the introduction of the Bill).

[76] [2012] 1 HKC. The offence of champerty is uniquely vibrant in Hong Kong: see also the convictions for champerty in *HKSAR v Mui Kwok Keung* [2014] 1 HKLRD 116 and *HKSAR v Ip Hon Ming* (DCCC 216/2013, 22 April 2014, DC).

(2) Did the defendant's conduct come within one of the categories excluded from the scope of maintenance?

(3) On the totality of the circumstances, did the defendant's conduct pose a genuine risk to the integrity of the court's process?[77]

[2.47] If the charge was one of champerty, the Hong Kong Court was of the view that the jury should also be asked to decide whether the agreement had provided for the defendant to receive a share of the proceeds of the maintained litigation.[78]

4. Maintenance and Champerty in Contract Law

[2.48] Contracts that stipulate for acts constituting maintenance or champerty, such as third-party funding agreements, are illegal at common law.[79] Clark characterises such contracts as illegal due to their being prejudicial to the administration of justice. Where contracts are illegal at common law, the traditional rule is that the entire contract is invalid, as are all collateral transactions.[80] Parties who enter into third-party funding agreements in this jurisdiction, then, find themselves on profoundly shaky territory.

[2.49] There is no requirement to establish the elements of the torts or offences of maintenance and champerty for an agreement to be void.[81] Irish courts have been consistent in holding that mere agreements to engage in maintenance or champerty, without more, are unenforceable in this jurisdiction.[82] This is because, while such agreements do not constitute acts of maintenance or champerty in themselves, they "savour of" maintenance or champerty—that is, they are conducive to or facilitate the carrying out of maintenance or champerty.[83]

[77] (2012) 15 HKCFAR 16 at paras 13–15.

[78] (2012) 15 HKCFAR 16 at para 16.

[79] Clark, *Contract Law in Ireland* 8th ed (Round Hall 2016) at page 499.

[80] *Ibid*. at page 491.

[81] *Rees v De Barnardy* [1896] 2 Ch 437.

[82] See, for example, *Persona*; *SPV Osus Ltd v HSBC Institutional Trust Services Ltd* [2018] IESC 44 at para 83, [2019] 1 IR 1.

[83] Anthony Guest, *Guest on the Law of Assignment* (Sweet and Maxwell 2012) at page 17.

CHAPTER 3
POLICY CONSIDERATIONS OF LEGALISING THIRD-PARTY FUNDING

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1. The Legalisation Question in Context

[3.1] The Commission is far from the first body in the history of the State to consider whether third-party funding should be legalised. Actors in Ireland's judicial,[1] legal,[2] academic,[3] political,[4] non-governmental[5] and private[6] spheres have all addressed this question in recent years. The ongoing legislative developments with relevance to third-party funding, set out in Chapter 1 (Third-Party Funding: Context and Overview of the Sector), make this an opportune time for the Commission to examine the arguments both for and against legalising third-party funding in Ireland.

2. Commodification of Justice

[3.2] A fundamental debate related to the legalisation of third-party litigation funding concerns commodification. First, there is anxiety about litigation being treated as a commercial business and causes of action being treated as a product. That appears to be intuitively wrong. These concerns were articulated by O'Donnell J in the decision in *SPV Osus* in the context of assignment of actions where the concern is arguably more acute as a claim is being sold, but similar concerns can be expressed about third-party litigation funding. There is a risk that that the litigation is conducted to achieve maximum return to the funder rather than to ensure justice for the plaintiff. This may have various consequences for the way litigation is conducted, not all of which can be predicted or anticipated in advance. Changing the core motivation behind litigation may negatively affect the conduct of that litigation and incentivise and reward unethical and improper

[1] See, for example, the discussion across the different judgments in *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2017] IESC 27.

[2] See, for example, the submission of the Law Society to the Joint Oireachtas Committee on Justice and Equality, 27 November 2019.

[3] Corbett, "Third-Party Litigation Funding – Time for a Rethink?" (2023) 69 Irish Jurist 12.

[4] See, for example, Dáil Éireann Debates 31 January 2017 question 3969/17.

[5] See, for example, the submission of FLAC to the Joint Oireachtas Committee on Justice and Equality, 27 November 2019.

[6] See, for example, the submissions to the public consultation run by the Department of Enterprise, Trade and Employment on the transposition of Directive (EU) 2020/1828 <https://enterprise.gov.ie/en/consultations/public-consultation-on-the-transposition-of-directive-eu-2020-1828.html>.

litigation strategies and/or give rise to significant risk of conflict between the interests of litigants and funders.

[3.3] Third party funding ensures litigation may be used as a vehicle to generate profit and thus incentivises the funders to generate, or at least to promote, litigation. Litigation may cause delays in the completion of transactions, including conveyancing, and its existence may have negative consequences for the parties involved, due to the time and resources eaten up by litigation.

[3.4] In the principal judgment for the Supreme Court in *SPV Osus*, O'Donnell J considered that one of the reasons there was a public policy objection to assigning causes of action was the offensiveness of commoditising or commercialising dispute resolution. It was, he noted:

> not necessary to regard litigation as a positive evil … to consider that it is an activity which society should not encourage. The considerable costs, both financial and in resource terms, which the community incurs in providing a court system is not justified on the basis of facilitating a commercial activity, but rather because it is necessary for the administration of justice …[7]

[3.5] In the same paragraph of his judgment, O'Donnell J also stated:

> In my view… the objections of the common law to the commodification of litigation retain force and vitality … Commodification of claims runs counter … to important interests in the administration of justice. Therefore, while there may be choses in action that can be properly assigned, and of which assignment should be encouraged (for example, in the case of commercial debts), the general suspicion and antipathy of the common law to the trading in claims remains, in my judgement, well founded.

[3.6] This position was supported by dicta from the extensive range of authorities cited by O'Donnell J.[8]

[7] [2018] IESC 44 at para 93 (O'Donnell J), [2019] 1 IR 1 at para 105.

[8] O'Donnell J's judgment contains an extensive discussion and analysis of the case law from a number of jurisdictions: see [2018] IESC 44 at paras 33-79 (O'Donnell J), [2019] 1 IR 1 at paras 45-91.

[3.7] Professor Wendel, Cornell Law School, who had previously practised in the US as an attorney in product liability cases, describes the level of discomfort surrounding the purported commodification of the justice system as the "ick factor" of alternative legal financing.[9] He notes that opponents of alternative legal financing appear to equate the civil justice system with other, arguably objectionable, areas which should be properly characterised by their separation from market norms and values. In their view, commodification of the civil justice system is:

> objectionable in the same way that prostitution, selling babies, surrogate pregnancy, or establishing a market mechanism for the allocation of blood or organs for transplantation are potentially believed to be—some things just should not be for sale.[10]

[3.8] Wendel nonetheless argues that, provided that assignment and third-party funding, and any other form of alternative legal financing, is subject to "reasonable regulation", the anti-commodification argument is not in itself sufficiently strong to resist any relaxation of the law on how or in what circumstances legal disputes can be financed or traded.[11] He points out that those who make the anti-commodification argument in respect of the civil justice system do not identify the underlying values of the civil justice system that they are seeking to protect.[12]

[3.9] It can be said that O'Donnell J's judgment was merely a warning against untrammelled commodification, not against any reform. O'Donnell J commented on the commodification of civil litigation in some jurisdictions, notably in the US, and added: "[o]n this view, the objections of other common law systems to out-and-out assignments of a right to litigate may seem like doomed Victorian priggishness which cannot survive in the face of modern commercial reality."[13]

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[9] Wendel, "Alternative Litigation Finance and Anti-Commodification Norms" (2013-2014) 63 DePaul Law Review 655 at page 657.

[10] *Ibid*.

[11] *Ibid*.

[12] *Ibid*. at page 686.

[13] *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2018] IESC 44 at para 92 (O'Donnell J), [2019] 1 IR 1 at para 104.

[3.10] O'Donnell J also cited Lord Sumption's extrajudicial lecture, "Abolishing personal injuries law: a project,"[14] which was, in part, about the growth in personal injuries claims since the 1960s. Lord Sumption commented: "It seems likely that the increased propensity to claim is due at least in part to greater knowledge of these matters. This is not in itself a bad thing. If people know more today about their rights, that may well be due, at least in part, to the active solicitation of claims by solicitors and claims management companies. To those like me who believe that litigation is an evil, the active solicitation of claims can seem distasteful. But it is really not a matter of taste, and I find it impossible to say that it is wrong. If the law entitles the victim of an accident to compensation, it ill becomes us to criticise him for knowing it and claiming."[15] O'Donnell J distanced himself to some extent from Lord Sumption by stating that it was "not necessary to regard litigation as a positive evil [then citing Lord Sumption's lecture] to consider that it is an activity which society should not encourage."[16]

[3.11] Moreover, while the constitutional dimension of access to law and the related principle of *ubi jus ibi remedium* (where there is a wrong, there is a remedy) were not directly considered by the majority judgments in either *Persona* or *SPV Osus*, they nonetheless were discussed, and are relevant to the policy analysis in this area. It should also be noted that the commodification concern is arguably stronger for assignment than for third-party litigation funding where the plaintiff/claimant is still notionally in control.[17]

3. Policy Considerations Opposing Legalised Third-Party Funding

[3.12] This Consultation Paper identifies and discusses five arguments frequently raised against legalised third-party funding. These are that third-party funding may:

(1) lead to an increase in vexatious and meritless legal proceedings,

(2) result in claimants being under-compensated,

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[14] (2018) 1 JPIL 1

[15] *Ibid*.

[16] *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2018] IESC 44 at para 93 (O'Donnell J), [2019] 1 IR 1 at para 105.

[17] For further discussion, see Chapter 7.

(3) cause an increase in legal fees,

(4) cause an increase in the price of insurance premiums and costs for business,

(5) not be appropriate for some types of legal disputes.

(a) Increase in Vexatious and Meritless Proceedings

[3.13] Opponents of legalised third-party funding often cite the concern that its availability will cause an increase in the number of vexatious and meritless legal claims.[18]

[3.14] There are two means by which third-party funding could cause an increase in vexatious and meritless disputes. The first relates to the cost- and risk-mitigation effect of third-party funding: if, as a result of receiving funding from a third party, a party will risk less and spend less in initiating or continuing a legal dispute, that party therefore has less to lose in initiating and continuing that dispute.[19] Economic theory terms this the "moral hazard" problem, whereby an actor is incentivised to take bigger risks than they normally would because they do not bear the full costs of that risk.[20]

[3.15] The second means by which third-party funding could increase the volume of vexatious or meritless proceedings, again in theory, is the incentive it may provide to funded parties to instigate legal disputes solely to force the non-funded party into a "nuisance" settlement. Nuisance settlements occur where the non-funded party settles an otherwise defensible funded case, rather than

[18] See, for example, the submission of Experian to the public consultation run by the Department of Enterprise, Trade and Employment on the transposition of Directive (EU) 2020/1828 <https://enterprise.gov.ie/en/consultations/public-consultation-on-the-transposition-of-directive-eu-2020-1828.html> accessed on 25 November 2022. The *Report on the Review of Administration of Civil Justice*, by no means an anti-funding publication, also expressed trepidation that third-party funding might incentivise "dubious claims": Group for the Review of the Administration of Civil Justice, *Report on the Review of Administration of Civil Justice* (2020) at page 324.

[19] See further, Guven and Johnson, "The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement" (2019) Columbia Center on Sustainable Investment Working Paper at page 21.

[20] See further, Dowd, "Moral Hazard and the Financial Crisis" (2009) 29 Cato Journal 141.

being drawn into a protracted, expensive and potentially embarrassing dispute-resolution process.[21]

[3.16] If third-party funding is legalised in this jurisdiction, it is certainly reasonable to believe that more legal disputes will be initiated and continued than if it were to remain illegal. This is particularly the case if such legalisation is accompanied by the introduction of a system for bringing representative or collective actions in consumer disputes (by the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023) as well as a more generally applicable form of multi-party action (as recommended by this Commission in 2005,[22] supported by the Civil Justice Review Group in 2020[23] and accepted by the Government in 2022).[24] However, it does not follow that, merely because some legal proceedings might not be initiated or pursued without third-party funding, those proceedings are, in a legal sense, vexatious or meritless.

[3.17] It is therefore not obvious that third party funding would necessarily increase the volume of vexatious or meritless litigation. It is also important to stress that the Irish legal system contains several safeguards to help prevent funded vexatious or meritless legal disputes from becoming a serious concern. Below, the Commission sets out what it considers to be the existing bulwarks against funded vexatious and meritless actions in the third-party funding sector and the Irish legal system. These are:

(1) the existing powers of the courts to strike out meritless or vexatious proceedings,
(2) the jurisdiction of the courts to make costs orders against unsuccessful parties, including wasted costs orders against legal practitioners, and

[21] Abramowicz considers nuisance settlements to be at least a theoretical possibility where third-party funding is used, though suggests that the problem can be managed by what appears to be a quasi-security for costs mechanism, with the funder providing the security: Abramowicz, "Litigation Finance and the Problem of Frivolous Litigation" (2014) 62(2) DePaul Law Review 195 at page 216. The Commission recommends a similar security for costs mechanism in Chapter 6 (Six Specific Issues in a Regulatory Framework for Third-Party Funding).

[22] *Report on Multi-Party Litigation* (LRC 76-2005).

[23] *Report on the Review of Administration of Civil Justice* (2020), ch.8.

[24] Department of Justice, *Implementation Plan on Civil Justice Efficiencies and Reform Measures: A Civil Justice System for the 21st Century* (2022), p.16 (Work stream 4: Multi-Party Litigation) and pp.38-39, available at https://www.gov.ie/en/publication/cb6f0-implementation-plan-on-civil-justice-efficiencies-and-reform-measures/.

(3) the ethical obligations of legal practitioners not to facilitate vexatious or meritless actions.

(i) Court's Power to Strike Out Proceedings

[3.18] One of the protections against funded meritless and vexatious actions is that the Irish courts already have powers to filter out meritless and vexatious actions. Order 19, rule 28 of the Rules of the Superior Courts 1986, which applies to the High Court, Court of Appeal, and Supreme Court, provides that:

> [t]he Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

[3.19] An equivalent power of the District Court to strike out pleadings in the case of frivolousness or vexatiousness can be found in Order 42, rule 15 of the District Court Rules 1997. In respect of the Circuit Court, while there is no equivalent in the Circuit Court Rules 2001 of Order 19, rule 28 of the Rules of the Superior Courts 1986, the Circuit Court would appear to have the same jurisdiction as the High Court to deal with frivolous or vexatious claims. This is because Order 67, rule 16 of the Circuit Court Rules 2001 provides: 'Where there is no Rule provided by these [2001] Rules to govern practice or procedure, the practice and procedure in the High Court may be followed.'

[3.20] The power to strike out pleadings is to be exercised sparingly and only in clear cases.[25] Where, however, the necessary threshold is met (in that it is clear that the facts do not give rise to the cause of action or where the claimant cannot prove the facts alleged) there is no reason to think that the courts would not strike out meritless or vexatious pleadings in funded disputes.

[3.21] In addition to the rules-based powers to strike out pleadings, Irish courts enjoy an inherent jurisdiction to stay or strike out civil proceedings where they constitute an abuse of the right of access to the courts, or, as it is more

[25] *Barry v Buckley* [1981] IR 306; *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425.

commonly known, where the proceedings comprise an "abuse of process".[26] While the court is limited to examining only the pleadings under the rules-based powers, when it is exercising its inherent jurisdiction to strike out due to abuse of process, the court may take a wider examination, incorporating affidavit evidence and exhibited documents.[27]

[3.22] The existence of the same inherent power to strike out for abuse of process in the New Zealand legal order was central to the New Zealand Law Commission's recommendation to abolish the torts of maintenance and champerty. The New Zealand Law Commission considered that the power to strike out for abuse of process represented a sufficient defence against vexatious and meritless proceedings, and that suing for abuse of process was "a more principled and effective control than relying on defendants to sue under the torts [of maintenance and champerty]".[28]

[3.23] Although, as set out in Chapter 4 (Models of Legalisation), the Commission does not necessarily favour the abolition of the torts or offences of maintenance and champerty, it shares the view of its New Zealand colleagues on the usefulness of the abuse of process jurisdiction in managing the risk of third-party funding causing an increase in vexatious or meritless proceedings.

(ii) Costs Orders

[3.24] If third-party funding is legalised in this jurisdiction, it is expected that the jurisdiction of the courts to make costs orders—that is, orders requiring a person or entity to pay the legal costs of another person or entity—against parties, legal practitioners and, in certain circumstances, non-parties, would play a role in deterring the bringing and facilitating of funded vexatious and meritless civil proceedings.[29]

[3.25] As regards parties who bring vexatious or meritless proceedings, costs in Ireland largely "follow the event"—that is, the party who is successful is entitled to an

[26] The availability of a cause of action of abuse of civil process in Ireland was first confirmed in *Dorene Ltd v Suedes (Ireland) Ltd* [1981] 1 IR 312, [1982] ILRM 126.

[27] *VK v MW, BW and HSE* [2018] IECA 290 at para 17.

[28] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 372.

[29] See this argument in De Brabandere and Lepeltak, "Third-Party Funding in International Investment Arbitration" (2012) 27(2) ICSID Review 379 at page 389.

award of costs against the party who is not successful.[30] The prospect of unsuccessful parties having to meet an adverse costs order can, in the right circumstances, act to deter vexatious and meritless disputes. Indeed, this deterrence effect is one of the primary purposes of a costs regime, such as Ireland's, which shifts the obligation to pay the legal costs incurred by the successful party onto the unsuccessful party.[31]

[3.26] In the case of legal practitioners who facilitate the bringing and continuing of vexatious or meritless actions, the courts have specific jurisdiction, under order 99, rule 9 of the Rules of the Superior Courts, to make wasted costs orders.[32] A wasted costs order either prevents a legal practitioner from recovering their costs from their client or makes them personally liable to pay costs to their client where, in the view of the Court, the costs were incurred improperly, or by undue delay or misconduct on the part of the practitioner. The power to make wasted costs orders is a reflection of the court's inherent jurisdiction to exercise control over its officers.[33]

[3.27] The courts also have an inherent jurisdiction to make costs orders against non-parties, including third-party funders, in certain circumstances. We consider this jurisdiction in greater detail in Chapter 6 (Six Specific Issues in a Regulatory Framework for Third-Party Funding).

(iii) Ethical Obligations of Legal Practitioners

[3.28] In the Commission's view, proper adherence by legal practitioners to their existing ethical obligations represents another safeguard against the bringing, continuing and facilitating of vexatious or meritless legal action, across both funded and non-funded cases. Solicitors and barristers already owe ethical obligations to the court and to their clients not to facilitate vexatious or meritless cases.

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[30] Section 169 of the Legal Services Regulation Act 2015; Order 99 of the Rules of the Superior Courts; Order 66 of the Circuit Court Rules; Order 42 of the District Court Rules.

[31] Rowe, "The Legal Theory of Attorney Fee-Shifting: A Critical Overview" (1982) Duke Law Journal 651 at page 665.

[32] The equivalent rule does not feature in either the Circuit Court Rules or the District Court Rules.

[33] *Ward v Tower Trade Finance (Ireland) Ltd* [2022] IECA 70 at para 19.

[3.29] The Solicitor's Guide to Professional Conduct places solicitors under a clear express ethical obligation not to conduct frivolous or vexatious cases, stating that "[a] solicitor should avoid improper or abusive litigation, predatory litigation, abuse of process, taking unfair advantage, misleading the court, and conducting frivolous and/or vexatious cases".[34]

[3.30] In the case of practising barristers, paragraph 4.7 of the Legal Services Regulatory Authority's Code of Practice for Practising Barristers provides that a barrister must, in every case, use their best endeavours to avoid unnecessary expense and wasting the court's time.[35] Bringing, continuing or facilitating a clearly meritless or vexatious action could arguably be construed as a breach of this ethical obligation.[36]

[3.31] While breach of such codes could lead to investigation under the Legal Services Regulation Act 2015, the Commission accepts that ethical standards and obligations are, essentially, non-justiciable.[37] Nonetheless, when they are taken cumulatively with the other mechanisms considered here, we believe that legal practitioners' existing ethical obligations should still be considered a valuable tool in mitigating against any increase in vexatious or meritless proceedings.

(iv) Profit Motive

[3.32] In addition, another major safeguard against funders facilitating vexatious or meritless legal proceedings is the simple desire of most third-party funders to achieve a return on their investment. As set out in Chapter 1 (Third-Party Funding: Context and Overview of the Sector), commercial third-party funders generally seek to fund claims that have a reasonable prospect of generating a return, whether that return is through a court award after a hearing or settlement. Third-party funders typically engage in considerable due diligence

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[34] Law Society of Ireland, *Solicitor's Guide to Professional Conduct* 4th ed (Law Society 2022) at page 62.

[35] At the time of writing, the Code of Practice for Practising Barristers remains in draft form only. <https://www.lsra.ie/wp-content/uploads/2019/09/Draft-Code-of-PB-28-Sept.pdf> accessed on 14 June 2023.

[36] Paragraph 3.40 of the Code of Practice for Practising Barristers further permits a barrister who is instructed to run a case with no reasonable chance of success to withdraw without prejudice to their fee.

[37] In *McMullen v Clancy (No. 2)* [2005] IESC 10, [2005] 2 IR 445, the Supreme Court held that breaches of the Code of Conduct for the Bar of Ireland are not justiciable. It is assumed that breaches of other voluntary ethical codes are similarly non-justiciable.

before financing a claim. Disputes that offer little or no opportunity for return (that is, most disputes that are truly vexatious or meritless) are therefore unlikely to prove particularly attractive investment vehicles for third-party funders. The Commission notes the observation of one large third-party funder that "no funder in its right mind would agree to fund an unmeritorious claim".[38]

[3.33] This is not to suggest that no third-party funder, whether in their right mind or not, has ever invested in a claim without merit, nor that no funder ever would. The funded proceedings in *Excalibur Ventures LLC v Texas Keystone Inc* ("*Excalibur*"), involved what the English High Court (Clarke LJ) described as a "speculative and opportunistic" claim by Excalibur to a share in a number of oil fields in Kurdistan, claiming that this share was worth US$ 1.6 billion. Excalibur had entered into a conditional fee agreement with its solicitors. Excalibur had no assets and therefore the action required third party funding to proceed. Funding was provided by four commercial funders, only one of which had any experience of funding litigation and this being its first experience of litigation in the UK. The funders advanced £31.75 million to enable the claim through a full hearing, of which £14.25 million was for Excalibur's solicitors' fees and disbursements, and £17.5 million to cover court orders for security for the defendants' costs of the proceedings.

[3.34] At the end of a 60-day hearing in the English High Court, Clarke LJ held that Excalibur's claim should be dismissed on every ground, describing it as "a resounding, indeed catastrophic, defeat."[39] The Court added that the value asserted by Excalibur on the share in the oil fields in Kurdistan, US$ 1.6 billion, was in fact a gross exaggeration, and that in reality the maximum value of the share was about US$ 3.3 million. For the reason that the litigation had been conducted in such an egregious manner, the Court held that the £17.5 million security provided, which was based on an assessment for standard basis costs, was inadequate. The Court therefore ordered that a further £5.6 million in additional security for costs should be provided.

[3.35] The Court gave the defendants leave to join the funders in the proceedings with a view to determining whether costs orders should be made against them pursuant to the discretion of the Court under section 51(3) of the English Senior

[38] IMF (Australia) Ltd, *Submission to the Productivity Commission: Access to Justice Arrangements* (2013).

[39] [2013] EWHC 4278 (Comm) at para 9.

Courts Act 1981 to make a non-party costs order. After a further three days of argument on this, the Court concluded that each of the funders should be jointly and severally liable to pay the defendants' costs on the indemnity basis, subject to them only being liable in respect of costs incurred after the date of their first contribution.[40]

[3.36] While *Excalibur* is a cautionary tale, the Commission tentatively observes that similar reports of third parties investing in truly unmeritorious or vexatious claims are uncommon. However, when it does happen the effects on parties and the legal system can be huge.

(b) Under-Compensation

[3.37] A second argument against legalised third-party funding is the problem of under-compensation. As seen in Chapter 1 (Third-Party Funding: Context and Overview of the Sector), third-party funding's commercial model involves third-party funders investing capital in legal proceedings. If those proceedings are successful for the funded party, the funder is reimbursed the capital they have deployed as part of that investment ("the funding costs") and normally receives an uplift on the funding costs.

[3.38] If a third-party funder, who has suffered no harm and therefore legally merits no compensation, takes from the compensation of a funded party who **has** suffered harm, that depleted compensation does not fully compensate the funded party. In this way, third-party funding's profit model represents a marked deviation from the foundational principles of compensation in legal disputes. In the case of a claim involving tortious liability, the purpose of an award of damages is to place the claimant back in the position in which they had been before the wrong had been committed.[41] In the case of damages for breach of contract, an award is supposed to place the claimant in the position they would be in had the contract been performed.[42] Neither outcome is possible if a third party takes from the funded party's compensation.

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[40] See also the England and Wales Court of Appeal decision in *Excalibur*: [2016] EWCA Civ 1144 at para 13 (Tomlinson LJ).

[41] McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury Professional 2013) at page 1569.

[42] *Robinson v Harman* (1848) 1 Ex 850 at page 855; *Hamilton v Magill* (1883) 12 LR Ir 186 at page 202.

[3.39] The extent to which the under-compensation issue should concern policymakers is open to debate. Funding sceptics might argue that the principle of full compensation is so integral to fairness, equality and the administration of justice that the prospect of any under-compensation outweighs all arguments in favour of legalised third-party funding. Funding proponents might argue that funded parties voluntarily agree to surrender part of their compensation when they enter into a third-party funding agreement, and that this is simply the price that must be paid by funded parties to access justice. Lord Justice Jackson, in his 2010 review of civil litigation costs in England and Wales, espoused this second view. The report noted that "[a]lthough a successful claimant with third-party funding foregoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all".[43]

[3.40] Those who press the under-compensation issue must also acknowledge that the principle of full compensation is not a rigid, inflexibly applied part of Irish law. For example, as long as they have their client's prior written agreement and as long as it is not based on a percentage or proportion of the award, legal practitioners may deduct their legal costs from a client's compensation.[44] This also acts to reduce a wronged party's compensation, but is nonetheless a permitted, regulated and accepted feature of the Irish legal landscape. If under-compensation is not problematic in one scenario (deducting a legal practitioner's legal costs from compensation), it is arguably not problematic in another, highly similar one (deducting a third-party funder's investment returns from compensation).

[3.41] However, the Commission considers that the under-compensation issue has the potential to be problematic where claimants have no choice but to pursue their claim via a particular third-party funder, and therefore have no choice but to agree to a set, and possibly exploitative, return structure. This might arise in the context of representative actions, the use of which is expected to expand following the transposition of the Representative Actions Directive into Irish law. The Commission is aware of one egregious example of under-compensation in a funded representative action in the Australian state of Victoria, where an insurer defending a representative action settled on behalf of 336 former employees of Huon Corporation for AUD$ 4.5 million. The actual claimants, however, received

[43] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010) at page 117.

[44] Section 149(2) of the Legal Services Regulation Act 2015.

nothing from the settlement, with the entire amount diverted to the third-party funder to pay the fees associated with funding, legal fees, and the costs associated with administration and with otherwise bringing the legal action on behalf of the parties.[45]

[3.42] Concerns about excessive returns being exacted by third party funders, and consequent under-compensation of claimants, appear to be one of the principal drivers for the European Parliament's Resolution of 13 September 2022 and the draft Directive that it has recommended to the Commission.

[3.43] While the under-compensation issue does not undermine the entire case for third-party funding, it does appear to merit a specific regulatory response from policymakers if third-party funding is legalised. It is open to policymakers to build mechanisms into a regulatory framework to minimise the risk of under-compensation for vulnerable funded parties, while also maintaining a competitive space for third-party funders to operate and obtain reasonable returns. Potential mechanisms for achieving this are discussed in Chapter 6 (Six Specific Issues in a Regulatory Framework for Third-Party Funding).

(c) Increase in Cost of Legal Services and Litigation

[3.44] Since one of the key effects of a third-party funding agreement is that it relaxes budgetary constraints that would otherwise apply to the funded party, it might seem intuitive to think that with an enhanced budget the funded party will rack up the costs of its litigation. However, as De Mot, Faure, and Visscher have observed, this intuition does not always play out:

> In contrast to what intuition may suggest, relaxing budget constraints does not always increase litigation expenditure. Due to strategic interaction between the parties, expenditure under [third-party funding] may either decrease or increase. Interestingly, expenditure is more likely to decrease for meritorious suits and more likely to increase for relatively weak cases. The reasoning behind this result is the following. For weak claims, when the plaintiff spends more due to vanishing budget constraints, the case becomes closer, and it becomes more valuable for the defendant to spend additional resources as well. For relatively strong claims, when the plaintiff spends more, the

[45] "Victims get nothing as litigation funder, lawyers share the spoils" *The Australian* (22 August 2016).

> case becomes even less close and it becomes less worthwhile for the defendant to spend more.[46]

[3.45] Aside from the risk that the funded party might increase overall litigation costs, it might be queried whether third-party funding could more generally affect the price of legal services in Ireland. If third-party funding is successful it should increase demand for litigation in the sense that a cohort of prospective litigants who are willing to undertake litigation, but would be unable to do so because of the costs involved, would now be able to sue. If there is no commensurate increase in the supply of legal services to meet that increased demand (that is, it is the same pool of lawyers dealing with increased demand for their services) then basic economic theory suggests this should put upward pressure on the price of those legal services.

[3.46] However, the picture may not be so simple as this. For example, it could be argued that the simple picture in the preceding paragraph takes a homogeneous view both of the legal services market and the impact of third-party funding on that market. In reality, it may transpire to be the case that third-party funding has more concentrated and localised effects within certain subsets of the legal services market (for example, insolvency proceedings). If there is an increased demand for legal services in this subset of the market, it may indeed attract other legal services providers into that section of the market. This would mean an increase of supply of legal services to meet demand stoked by third-party funding, albeit at the cost of supply of legal services in other sectors of the market that those providers might leave.

[3.47] In the absence of more detailed modelling of the legal services market in this jurisdiction, it is not possible to predict with high confidence what effect, if any, third-party funding may have on the cost of legal services in this jurisdiction. The Commission does not possess the necessary expertise to carry out this modelling and analysis; however, it would welcome such analysis in submissions to it in response to this Consultation Paper to assist in its deliberations.

(d) Increase in Insurance Premiums and Costs for Business

[3.48] In its report on the use of third-party funding in representative actions, the New Zealand Law Commission considered the possibility that the legalisation of third-party funding would cause the cost of insurance premiums to increase by

[46] De Mot, Faure, and Visscher, "TPF and its alternatives: An economic appraisal" in van Boom (ed), *Litigation, costs, funding and behaviour – Implications for the Law* (Routledge 2017).

incentivising litigious activity.[47] Specifically, the New Zealand project examined third-party funding's potential effect on directors' and officers' liability insurance. This is a form of insurance designed to protect company directors and other senior employees against personal loss arising from liabilities incurred in the performance of their duties. In some cases, the insurance product may fund the costs of legal defences.[48]

[3.49] The New Zealand Law Commission did not consider that a potential effect on the insurance market amounted to a compelling argument against either expanding the representative actions regime[49] or legalising third-party funding, as long as the system contained sufficient bulwarks against unmeritorious litigation.[50]

[3.50] In theory an increase in litigation flowing from a new source of funding could increase the costs of doing business and have a knock-on effect on insurance premiums.

(e) Not Appropriate for all Types of Legal Proceedings

[3.51] It is frequently suggested that some types of legal dispute are inappropriate vehicles for third-party funding. In matters typically involving parties who are particularly vulnerable, for example, childcare proceedings or criminal law matters, it is certainly arguable that a third-party funding agreement could be conceived of as exploitative. On the other hand, it is also rather unlikely that many profit-motivated third-party funders would be persuaded to invest in matters such as these, which typically do not involve any (significant) damages outcome.

[3.52] In any event, the mere fact that third-party funding may not be appropriate for some dispute types is not a persuasive or weighty argument against its broader legalisation, as long as third-party funding is appropriately restricted and regulated. If legislators are of the opinion that some areas of litigation are not suitable for profit-motivated third-party litigation funding, it will be open to them to expressly exclude those areas from any third-party funding regime. This

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[47] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 362.

[48] *Ibid*. at page 6.

[49] *Ibid*. at page 67.

[50] *Ibid*. at page 369.

is discussed further in Chapter 6 (Six Specific Issues in a Regulatory Framework for Third-Party Funding).

4. Policy Considerations Supporting Legalised Third-Party Funding

[3.53] The Commission has identified four principal policy considerations which tend to support the legalisation of third-party funding in Ireland. These are that legalised third-party funding may:

(1) widen access to justice in Ireland;

(2) in some cases strengthen equality of arms between parties to legal proceedings;

(3) help to increase the pool of assets available to the creditors of insolvent debtors in insolvency proceedings;

(4) resolve a particular "corporate anomaly" whereby corporate entities can effectively acquire third-party investment in disputes, notwithstanding the prohibition on maintenance and champerty.

(a) Access to Justice

[3.54] The idea that legalised third-party funding improves access to justice has been influential in garnering positive attitudes towards third-party funding in several jurisdictions. Lord Justice Jackson, in his 2010 report on civil litigation costs in England and Wales, observed that third-party funding is "for some parties, the only means of funding litigation. Thus, third party funding promotes access to justice."[51] In 2012, the Australian Commonwealth Government declined to impose more stringent regulatory requirements on third-party funders because of concerns that any controls on their activity would affect "access to justice".[52]

[51] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010) at page 117.

[52] Specifically, the Commonwealth Government passed the Corporations (Amendment) Regulation 2012. This exempted nearly all third-party funders from most aspects of the regulatory regime (other than conflict of interest provisions) applied to "managed investment schemes" under the Corporations Act 2001. The reason for this exemption was "to ensure that consumers do not lose this important means of obtaining access to the justice system": Corporations (Amendment) Regulation 2012 (No. 6) (SLI No. 172 of 2012), Explanatory Statement.

[3.55] The Commission notes that in many cases where it is used in the context of third-party funding, the phrase "access to justice" is amorphous. Precisely whose access to justice is enhanced by the availability of finance from a third party? How does third-party funding improve that access? What, for that matter, does "justice", both generally and in relation to actions funded by a third party, mean?

[3.56] Conscious that this is a Consultation Paper with restricted scope, the Commission does not propose to dwell on the broader and highly nuanced question of what access to justice looks like, or should look like, in Ireland today. For the purposes of this Paper, it suffices to observe that, in theory, the availability of third-party funding appears capable of improving at least two specific forms of access to justice.

[3.57] The first form of access to justice theoretically enhanced by third-party funding is "access to the courts".[53] By this is meant that the availability of third-party funding in theory results in an enhanced ability to use the services of professional legal practitioners to argue one's case in a legal dispute in front of a qualified decision-maker.

[3.58] The second form of access to justice enhanced by third-party funding, closely connected to the first form, is "access to a just and lawful outcome". By enabling parties to fully and ably present their case to a decision-maker though qualified legal practitioners and by meeting the ancillary costs of dispute resolution, access to third-party funding can allow funded parties to better secure an objective, considered and lawful outcome.

[3.59] The third-party funding market is able to exist primarily because the costs associated with instigating, continuing, and generally participating in legal proceedings are prohibitive for most people. The services of qualified legal practitioners are expensive. So too are the ancillary costs of dispute resolution, such as discovery and expert witnesses. Empirical analyses indicate that access to qualified legal representation leads to better outcomes for claimants in court and for society as a whole.[54] These ancillary costs and the costs of effective

[53] In *Persona*, the claimants' inability to pursue their case without funding from a third party, coupled with their inability to legally access said funding, was considered to be a possible denial of their right of "access to the courts": *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2017] IESC 27 (Clarke J) at para 2.2.

[54] See the sources cited in OECD/World Justice Project, *White Paper on Building a Business Case for Access to Justice* (OECD 2019) at page 37.

access to the services of legal practitioners are frequently too expensive for anyone other than the very poor, who may be entitled to statutory civil legal aid, or the very wealthy, who have ample resources.

[3.60] The issue of high legal costs is particularly true in the case of Ireland. The State ranks among the most expensive jurisdictions in the world in which to litigate.[55] Irish courts[56] and Irish access to justice organisations have consistently expressed their concerns at the high cost of conducting and participating in legal proceedings for both claimants and respondents.[57] A complicating factor serving to increase costs is that legal costs in Ireland "follow the event", meaning that responsible litigants must have access to enough money to cover the fees and disbursements for their own lawyers and those of their opposing party, should the action be unsuccessful for them.[58]

[3.61] Against the backdrop of high legal costs in Ireland, and the low income thresholds to qualify for state-funded legal aid—which makes legal aid for civil proceedings inaccessible for many—it is necessary to give some consideration to the different ways in which assistance may be given to parties to pursue appropriate litigation in circumstances where the party concerned does not have the resources required. In addition to the possibilities created by liberalising the law in respect of either or both third-party funding and the assignment of causes of action, the Commission noted in Chapter 1 the possibilities associated with crowd funding and also set out the reasons why issues concerning crowd funding are not dealt with in this Consultation Paper.

[3.62] Certain types of litigation in Ireland (particularly, but not only, personal injuries cases and certain types of judicial review) are frequently brought using the so called "no foal, no fee" system (this is a reference to a form of agreement sometimes entered into by lawyers whereby it is agreed that the lawyers bringing a case on behalf of a plaintiff will not be entitled to recover any fees

[55] Group for the Review of the Administration of Civil Justice, *Report on the Review of the Administration of Civil Justice* (2020) at page 267.

[56] See, for example, *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2019] IESC 44 (Clarke CJ), [2019] 1 IR 1 at page 7; *Tom McEvaddy Property Ltd v National Asset Loan Management DAC (No. 2)* [2021] IEHC 125.

[57] See, for example, Free Legal Advice Centres (FLAC), *Towards Equal Access to Justice: Annual Report 2021* (FLAC 2022); Chief Justice's Working Group on Access to Justice (2021).

[58] As noted by Capper, "Third-Party Litigation Funding in Ireland: Time for Change?" (2018) 37 Civil Justice Quarterly 193.

save to the extent that costs may be recovered from a defendant against whom successful proceedings are brought). The term is borrowed from a common practice in the blood stock industry. It may well be that this practice will continue to provide an effective means of ensuring representation in meritorious cases at least where the litigation concerned is relatively straight forward. However additional difficulties potentially arise which stem from the increasing complexity of certain types of litigation (not least clinical negligence claims, as well as historic abuse claims). The amount of work which lawyers are typically required to put into such cases is necessarily greater the more complex the litigation becomes. Thus, the scale of the risk associated with not being paid in the event that the proceedings are unsuccessful becomes all the greater. In addition, there is the question of the cost associated with procuring the often-significant expert evidence required in many such cases. This will involve either the legal firm representing the plaintiff discharging the cost of obtaining such evidence itself (thus increasing even further the risk associated with unsuccessful proceedings) or the experts themselves agreeing not to be paid unless the proceedings are successful. In the latter case there is the potential for a perception of conflict of interest if an expert witness is unlikely to be paid unless that expert's side wins.

[3.63] In addition, it is important to note that fee arrangements which provide for legal practitioners to take a percentage of damages awarded if a claim is successful are illegal in this jurisdiction.[59] Such arrangements are lawful in other jurisdictions such as England and Wales.

[3.64] It is also necessary to consider the potential role of "before the event" and "after the event" insurance. Both of these forms of insurance involve an insurer providing cover, subject to the relevant terms of the policy, for, typically, both the legal costs which a party may incur and any costs which that party might be required to pay as a result of being unsuccessful in proceedings. As its name implies, "after the event" insurance, involves a policy entered into subsequent to the circumstances giving rise to the claim in question having occurred. Obviously, the insurer will require a premium to cover the risk that the proceedings will be unsuccessful and that the insurer will thus potentially have to cover the costs of both sides. The premium is likely to reflect the insurers assessment of the likelihood or otherwise of the proceedings being successful and, indeed, the likelihood of the insured, should it be successful, being actually

[59] Section 149 of the Legal Services Regulation Act 2005.

able to recover any costs that might be awarded. Such insurance is potentially available to both plaintiffs and defendants. There remain, however, questions as to whether such insurance is lawful in this jurisdiction.[60]

[3.65] As its name also implies, "before-the-event" insurance involves providing cover for legal costs associated with potential future events which may give rise to litigation. It is distinguished from liability insurance where the insurer agrees to indemnify the insured against any award of a particular type which may be made. Before-the-event insurance is, in contrast, concerned with the legal cost of the litigation rather than the underlying liability. However, it is commonplace for before-the-event insurance relating to legal costs to be present as an add-on in liability insurance products so that the insurer will cover the cost of defending any relevant claim and paying any costs awarded against the insured in the event of a successful claim being brought against that party. It is also possible, however, to obtain "before-the-event" insurance on a standalone basis, although it is understood that this form of insurance is not widely used in Ireland and, in particular, is rarely used in respect of parties who may be likely to bring claims rather than have to defend them. The Commission does not propose to make recommendations is respect of any of these other forms of support for litigation, but they do form part of the general background picture against which it is necessary to consider the desirability or otherwise of liberalising the law in respect of both third-party funding and the assignment of causes of action.

[3.66] The Commission now turns to the second and connected reason that third-party funding improves access to justice: its effect on risk. For a long time, much of the "heavy lifting" in access to justice in Ireland has been done by so-called "no foal, no fee" arrangements. These are legal costs agreements where the legal practitioner and client agree that, if the legal action is unsuccessful, the client will not be required to pay the practitioner's fees, or will not be required to pay them in full. In the case of success, the practitioner may recover their normal fees or may recover their normal fees plus a success uplift. While conditional fee agreements ostensibly appear to offend against the prohibition on maintenance

[60] *Greenclean Waste Management Ltd v Leahy* (No 2) [2014] IEHC 314.

and champerty,[61] they are an accepted aspect of the Irish legal system and a key instrument for many in accessing justice.[62]

[3.67] Despite their frequent and established use in Ireland, such arrangements are still a risky venture for the legal practitioner, who must shoulder the legal costs burden themselves. Novel cases, or cases where evidence-gathering may be particularly challenging or costly, are therefore far less likely to find legal practitioners who are willing to take on this risk.

[3.68] Where legal practitioners are unwilling to shoulder the risk associated with bringing a case under an agreement or where the party cannot avail of *pro bono* legal services or statutory legal aid, the costs and associated risks of bringing or continuing legal proceedings in Ireland are frequently prohibitive. This means that actions are sometimes not pursued even where parties have very strong claims.[63] Alternatively, parties may be forced to pursue or defend legal proceedings as lay litigants, without access to legal representatives.[64]

[3.69] For legal practitioners, the availability of funding from a third party could reduce, or at least recalibrate the risk profile of novel or challenging disputes which are simply too risky for legal practitioners to take on.

[3.70] At its most basic, then, the receipt of funding from a third party means that funded parties will have the financial resources to bring and continue legal disputes, thus reducing the risk for practitioners and allowing parties to vindicate their rights in front of a decision-maker. Even for parties who ostensibly have sufficient resources to litigate, for example, large corporate entities, third-party funding can still play a valuable role in their finance

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[61] See this argument made by Donnelly and O'Callaghan, "The Case for Litigation Funding" (2019) 24(4) Bar Review 107 at page 109.

[62] For example, in *Persona*, Denham CJ observed that "[t]here is a long history at the Bar, and amongst solicitors, of taking cases on a 'no foal no fee' basis. Many of the most important cases have been taken in such circumstances": [2017] IESC 27 at para 54(vii). Other approving or neutral references to these agreements can be seen in *McHugh v Keane* (Unreported, High Court, 16 December 1994); *Synott v Adekoya* [2010] IEHC 26, [2010] 4 IR 520; *Minister for Justice v Olsson* [2011] IESC 1, [2011] 1 IR 384; *LM v Garda Commissioner* [2015] IESC 81 at para 28, [2015] 2 IR 45; *CA v Minister for Justice and Equality* [2015] IEHC 432.

[63] See the remarks of Kirby J in the Australian High Court case of *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386.

[64] "A scan of cases on [the British and Irish Legal Information Institute] indicates a very large number of litigants in person [in Ireland]": Capper, "Litigation Funding in Ireland" (2021) 14 Erasmus Law Review 211.

strategies by allowing them to remove the costs of dispute resolution, and therefore the cost of risk, from their profit-and-loss accounts, and to retain that capital to continue business "as usual".[65]

[3.71] As well as improving access to justice for funded parties, it appears that the provision of third-party funding to claimants may play an indirect role in improving access to justice for respondents.[66]

[3.72] If poorly resourced claimants can rely on the financial resources of a third-party funder, this may go some way to addressing the problems experienced by respondents who are sued by claimants with little or no assets. Twomey J in the High Court Commercial case of *James Street Hotel Ltd v Mullins Investment Ltd* observed that, where an impecunious claimant institutes legal proceedings against a wealthy respondent, then, regardless of the merits of the claim:

> that [claimant] is effectively blackmailing a [respondent] into a settlement …. In this "blackmail", the key issue for the [respondent] is often not the substance of the claim (which she may believe to be without merit), but the irrecoverable legal costs which will be saved by the [respondent by] settling, be that a sum in the tens of thousands, hundreds of thousands or millions of euro. Therefore, the key lever in the settlement of such a case will often not be the merits of the case but the massive legal bill, which will have to be incurred to defend the claim, and which will never be recovered by the [respondent], win, lose or draw.[67]

Twomey J concluded that this leads to the respondent experiencing "something short of justice".[68] It may be that recourse against third-party litigation funding for costs would alleviate this problem in some cases.

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[65] Williams and Dafe, "Banking on Courts: Financialisation and the Rise of Third-Party Funding in Investment Arbitration" (2020) Review of International Political Economy 1 at page 11; see sources cited at International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018) at page 19.

[66] This point is also made by Capper in "Third-Party Litigation Funding in Ireland: Time for Change?" (2018) 37(2) Civil Justice Quarterly 193.

[67] [2022] IEHC 549 at paras 44-46.

[68] [2022] IEHC 549 at para 48.

[3.73] As with so much of the third-party funding area, it is difficult to find data on the extent to which third-party funding actually results in more actions being instigated or pursued, or how many of those actions would not have been instigated or pursued without funding from a third party. The few studies that have been carried out have not found a particularly large increase in the number of legal proceedings going to court post-legalisation of third-party funding. Australian research from 2011 suggested that the availability of third-party funding resulted in only a 0.1% increase in civil cases.[69] The Victorian Law Reform Commission stated that, in relation to representative actions brought in the Supreme Court of Victoria, third-party funders "clearly have had little impact in enabling [representative] actions to be brought", with just 10 out of 85 [representative] actions funded by third parties since 1986[70] (though they still considered third-party funding to have improved access to justice in Australia).[71] However, another study has found an increase in litigation post-legalisation of third-party funding in Australia (and a consequent backlog in courts).[72] This benefit could bring with it a potential downside from an access to justice perspective: if there is an increased demand for court time without an increase in supply of court resources, then the increase in litigation could itself contribute to delays that frustrate access to justice. However, it is doubtful if limiting demands on court time so as to prevent delays can be justified if the limitation disproportionately affects those with less resources.

[3.74] In any case, the Commission notes that justice is not easily measured in proportion to the volume of litigation: a single case, funded by a third party, may have immeasurable (positive or negative) effects on a significant number of individuals.

[3.75] The Commission acknowledges that the object of most third-party funding is not to promote access to justice, but to generate profit for the funder. Any

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[69] Barker, "Third-Party Litigation Funding in Australia and Europe" (2011-2012) 8 Journal of Law, Economics and Policy at page 451. The Commission notes the age of these data.

[70] Victorian Law Reform Commission, *Report on Access to Justice—Litigation Funding and Group Proceedings* (2018) at para 7.10.

[71] *Ibid*. at para 2.1.

[72] Abrams and Chen, "A Market for Justice: A First Empirical Look at Third-Party Litigation Funding" (2013) 15 *University of Pennsylvania Journal of Business Law* 1075. Third-party funders dispute any correlative effect between third-party funding and a backlog in courts: IMF (Australia) Ltd, *Submission to the Productivity Commission: Access to Justice Arrangements* (2013).

improvement in access to justice that does occur as a result of third-party funding is a by-product of that funding.

[3.76] It is also accepted that any improvement in access to justice as a result of third-party funding will, for the most part, likely be concentrated on a particular type of litigation.[73] Third-party funders select the cases that they fund carefully, and reject most.[74] Selected cases must normally meet a range of criteria, the most important of which is the prospect of high-value returns. The experiences of other jurisdictions show that the actions which most often receive third-party funding tend to be high-value commercial cases involving large corporate entities, though other high-value claims also receive financing.

[3.77] That funded actions largely tend to be high value-claims and/or commercial actions, however, is not in itself sufficient reason to maintain a general prohibition on third-party funding for the broader cohort of claimants.

(b) Equality of Arms

[3.78] Where a party to legal action is able to finance that action themselves, and the other party is not, or is not able to do without risking significantly more than the opposing party, this creates an imbalance in power between parties. Funding from a third party may help to redress that power imbalance. Steinitz argues that having access to the might of well-resourced and experienced third-party funders can increase the bargaining power of historically marginalised and weak (in a social, rather than legal, sense) litigants.[75] She gives the (fictional) example of:

> villagers [living in Angola and] suffering environmental harms and human rights abuses by a multinational corporation based in the United States. Physically remote, poor and living within a compromised legal system, the Angolan villagers would have little chance of vindicating their rights against the corporation that injured them. With [third-party] funding, however, the

[73] Boom, "Litigation Costs and Third-Party Funding" in Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge 2018) at page 42.

[74] See further, Chapter 1 (Third-Party Funding: Context and Overview of the Sector).

[75] Steinitz, "Whose Claim is this Anyway? Third-Party Litigation Funding" (2011) 452 Minnesota Law Review 1269.

> villagers … would not only gain access to U.S. courts, but would be able to litigate without having to settle at a discount.[76]

[3.79] Naturally, however, this argument carries weight only where the parties are not already equal in terms of finance, and where court procedures and existing funding mechanisms such as civil legal aid are not sufficient to protect the "weaker" party's equal standing in the eyes of the law. Further, third-party funding is usually only available to claimants, and in the case of more modestly resourced respondents the shifted balance of power could overwhelm them.

(c) Increasing the Assets Available to Creditors of Insolvent Debtors

[3.80] In their 2018 submission to the Review of the Administration of Civil Justice, the Irish Society of Insolvency Practitioners ("the ISIP") suggested that third-party funding should be made available to administrators appointed under the Insurance (No. 2) Act 1983, liquidators, receivers and the Official Assignee or trustees in bankruptcy in legal proceedings intended to increase the pool of assets available to creditors of insolvent debtors.[77] The October 2020 *Report of the Review of the Administration of Civil Justice* concluded that general reform of maintenance and champerty should await the outcome of the Commission's current project, but also that the Review Group:

> sees merit, in the immediate term, in the more limited proposal of the Irish Society of Insolvency Practitioners that third-party funding should be available to liquidators, receivers, administrators under the Insurance (No. 2) Act 1983, the Official Assignee or trustees in bankruptcy to fund proceedings intended to increase the pool of assets available to creditors, on condition that the applicant was satisfied that a reasonable case against a prospective defendant existed and would result in increasing the pool of available assets.[78]

[3.81] In December 2021, the Company Law Review Group similarly indicated that a majority of that Group were "broadly supportive of provision being made to allow for [third-party] funding in such proceedings", though recommended that

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[76] *Ibid*. at page 1336.

[77] Irish Society of Insolvency Practitioners, *Submission to the Review of the Administration of Civil Justice* (2018) at page 7.

[78] *Report of the Review of the Administration of Civil Justice* (October 2020), Chapter 9 at page 324.

further consideration be given to the conditions and safeguards necessary to manage the risks of third-party funding.[79]

[3.82] The ISIP set out the difficulties caused by the current prohibition on third-party funding in Ireland:

> Our members … all too regularly encounter scenarios where a company or its liquidator may have a substantive and robust claim against former company officers, counterparties or other parties which, if pursued, would benefit the creditors of the company … However, invariably by the time the company has entered liquidation there are insufficient assets to fund litigation against such parties…

[3.83] The ISIP explained how the unavailability of third-party funding may encourage unscrupulous directors to adopt a "scorched earth" approach in running a company, with the director purposely driving the company to the point at which it has no assets available to pursue actions against that same director.

[3.84] A lack of company assets available to instigate or continue proceedings to recover assets and prosecute breaches of directors' duties means that, often, the company's creditors are not reimbursed, and alleged breaches of directorial duties go unsanctioned. The Commission considers this state of affairs to be contrary to the administration of justice and also that it fails to cultivate good commercial practices.

(d) The "Corporate Anomaly"

[3.85] What the Commission terms a "corporate anomaly" permits corporate entities to mimic the types of arrangement which would normally underlie a third-party funding agreement, even where third-party funding is unlawful. The possibility of this kind of circumvention was explained by Clarke CJ in *SPV Osus*:

> Where the original wronged party is a corporate entity, then it has never been suggested that it is impermissible for the shares in that entity to be transferred to a third party so that the ultimate beneficial interest in the proceeds as to the cause of action will, in substance, also transfer. Even where there are

[79] Company Law Review Group, *Report on the Consequences of Certain Corporate Liquidations and Restructuring Practices, Including Splitting of Corporate Operations from Asset Holding Entities in Group Structures* (Company Law Review Group 2021) at page 41.

> complications deriving from the fact that the allegedly wronged corporate entity has other assets or liabilities, it is unlikely to be beyond the abilities of corporate lawyers and advisors to devise a re-structuring of the corporate entity concerned in such a way that the relevant cause of action remains in the hands of the same entity to whom the wrong was done but where all other assets and liabilities are transferred into other corporate vehicles within the same ownership, thus freeing up the wronged corporate entity for sale. Thus, at least in many cases, it might well prove practically possible to devise a system whereby the substance of a cause of action which is owned by a corporate entity can be transferred to a purchaser by means of a sale of the shareholding in the entity concerned.[80]

[3.86] This position, whereby corporate entities though not non-corporate entities could currently and lawfully secure finance from third parties to pursue a claim, is anomalous with a prohibition on third-party funding.[81]

[80] *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2018] IESC 44 (Clarke CJ) at para 2.7, [2019] 1 IR 1 at page 8.

[81] For further discussion of the corporate anomaly, see Catherine Donnelly, "*SPV Osus* and *Persona*: Reflecting on Relationships While Waiting for the Greek Kalends?" (2019) 1 Irish Supreme Court Review 83 at page 101.

5. Questions

Q. 3.1 Should the concerns about the commodification of justice and creating a market in legal claims be seen as fundamental obstacles to legalising third party funding?

Q. 3.2 Do you agree with the concern that third-party funding might lead to the commodification of justice? Is there any validity to the idea that changing the core motivation behind litigation is likely to negatively affect the conduct of litigation?

Q. 3.3 What regulatory controls (if any) might address concerns about potential commodification?

Q. 3.4 Are there arguments in favour of or against third party litigation funding, other than those discussed in the Paper that you think the Commission should consider?

Q. 3.5 The Commission identified five policy arguments against legalising third party litigation funding: increased vexatious and meritless proceedings; undercompensated claimants; increased legal costs; increased insurance premiums; and the change being potentially inappropriate for all types of legal proceedings. In your view, what weight should be given to these arguments? What regulatory controls might address these concerns?

Q. 3.6 The Commission identified four policy arguments in support of legalisation: increased access to justice; strengthened equality of arms between parties; increased available pool of assets in insolvency; closing of loopholes around champerty and maintenance. In your view, what weight should be given to these arguments?

CHAPTER 4
MODELS OF LEGALISATION

Table of Contents

[4.1] For profit-motivated third-party funding to take place in Ireland on any scale, it must first be legalised. This chapter explores three models by which third-party funding could be legalised in this jurisdiction. These are:

(1) abolishing civil and criminal liability for maintenance and champerty, but preserving the law relating to public policy and illegality ("the preservation" approach),

(2) abolishing civil and criminal liability for maintenance and champerty altogether (the "abolition" approach),

(3) retaining maintenance and champerty, but creating a statutory exception for third-party funding (the "statutory exception" approach).

[4.2] Whichever model of legalisation is chosen, it will have to interact with the model of regulation that policymakers select to supervise the third-party funding sector.[1] It will also have to be consistent with liberalising steps taken in other contexts, in particular the provision in the Courts and Civil Law (Miscellaneous Provisions) Act 2023 to permit third-party funding in international arbitration and related court proceedings.[2]

1. Legalisation Model 1: The "Preservation" Approach (England and Wales)

[4.3] The first approach to legalisation discussed in this Consultation Paper is the "preservation" approach, first developed in England and Wales. Following recommendations from the Law Commission of England and Wales, maintenance and champerty no longer comprise distinct common law offences or torts in England and Wales.[3] This was effected by the coming into force of the Criminal Law Act 1967, section 13(1) of which provides that:

> The following offences are hereby abolished, that is to say—
>
> > (a) any distinct offence under the common law in England and Wales of maintenance (including champerty, but not embracery)[.]

[4.4] Section 14(1) of the Criminal Law Act 1967 proceeded to abolish tortious liability for maintenance and champerty, stating that:

> [n]o person shall, under the law of England and Wales, be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law, except in the case of a cause of action accruing before this section has effect.

[1] Potential models of regulation are discussed in Chapter 5 (Models of Regulation).

[2] Dáil Éireann Debates 20 October 2022 vol 1028 no 2.

[3] Law Commission of England and Wales, *Proposals for Reform of the Law Relating to Maintenance and Champerty* (LC 007,1966). The Law Commission's 1996 Report contained draft statutory provisions, which formed the basis for sections 13 and 14 of the English Criminal Law Act 1967.

[4.5] Despite appearing to abolish tortious and criminal liability for maintenance and champerty, however, the Criminal Law Act 1967 also expressly preserved certain aspects of the same liability. Section 14(2) of the Criminal Law Act 1967 acts as a "preservation provision". It provides that:

> [t]he abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

[4.6] The effect of section 14(2) is that, although the torts and offences of maintenance and champerty are no longer distinct parts of the English and Welsh legal order, the law on illegality and public policy, including the public policy that evolved from those torts and offences, can continue to render unenforceable contracts that are otherwise lawful.

[4.7] Identical provisions to those in sections 13 and 14 of the English 1967 Act were enacted in Northern Ireland in sections 16 and 17 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968. The comments below on sections 13 and 14 of the English 1967 Act apply equally to sections 16 and 17 of the Northern Ireland 1968 Act.

[4.8] At the time of its enactment in 1967, the purpose of the preservation provision in section 14(2) was to maintain the prohibition on damages-based legal costs agreements.[4] The subsequent liberalisation of the legal costs regime in England and Wales to allow for certain types of damages-based legal costs agreements has made its original function somewhat redundant. However, section 14(2) retains a role in controlling damages-based legal costs agreements which do not come within the permitted categories of costs agreements,[5] and also continues to allow the courts a means of exercising control over the assignment of "bare" rights to litigate.[6]

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[4] Law Commission for England and Wales, *Proposals for Reform of the Law Relating to Maintenance and Champerty* (LC007 1966) at page 5.

[5] See, for example, *Meadowside Building Developments Ltd (in liquidation) v 1218 Hill Street Management Company Ltd* [2019] EWHC 2651 (TCC); *Rees v Gateley Wareing (a firm)* [2013] EWHC 3708 (Ch), [2014] 2 Costs LO 210.

[6] See, for example, *Giles v Thompson* [1994] 1 AC 142, [1993] 3 All ER 321; *Casehub Ltd v Wolf Cola Ltd* [2017] EWHC 1169 (Ch); *Farrar v Miller* [2022] EWCA Civ 295.

[4.9] It is noteworthy that, despite the abolition-oriented phrasing used in sections 13 and 14 of the Criminal Law Act 1967, few of the major post-1967 authorities on maintenance and champerty in England and Wales in fact treat maintenance and champerty as truly having been "abolished" in that jurisdiction. The public policies which underpinned the development of tortious and criminal liability for maintenance and champerty continue to be treated as relevant considerations in English and Welsh law, and are closely scrutinised when a question arises as to the enforceability of an action which, pre-abolition, would have been unlawful. Where public policy is considered to have been breached by an agreement, the courts continue to describe that agreement as being "champertous" in nature.[7] One commentator likens section 14(2) to the ghost of Hamlet's father, who continues to influence events in the living world despite his death. In this case, the spectres of the torts and offences of maintenance and champerty, despite their apparent abolition, haunt the law.[8]

[4.10] Precisely what the public policies underpinning the torts and offences of maintenance and champerty are, or when they will render an agreement unenforceable, is not always certain. As observed by Danckwerts LJ in *Hill v Archbold*, one of the first decisions to interpret section 14(2) of the Criminal Law Act 1967, public policy "is not a fixed and immutable matter. It is a conception which, if it has any sense at all, must be alterable by the passage of time."[9] This is nowhere better exemplified than in the context of third-party funding. While public policy would once have prohibited profit-motivated third-party funding outright, whether before or after the so-called "abolition" of maintenance and champerty,[10] the courts in England and Wales now broadly consider third-party

[7] See, for example, *Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm)* [1995] 4 All ER 695; *Arkin v Bouchard Lines Ltd* [2005] EWCA (Civ) 655, [2005] 3 All ER 613; *Diag Human SE v Volterra Fietta (a firm)* [2022] EWHC 2054 (QB).

[8] Walters, "A Modern Doctrine of Champerty?" (1996) 112 Law Quarterly Review 560.

[9] [1968] 1 QB 686 at page 697.

[10] See the comments of the UK House of Lords in *Trendtex Trading Corporation v Crédit Suisse* [1982] AC 679 that, despite the abolition of the torts and offences of maintenance and champerty, nothing in law justified a third party taking "a share in the fruits of the litigation".

funding to increase access to justice.[11] Public policy now therefore *supports* what it would once have opposed.[12]

[4.11] This is not to say that public policy has completely reversed its view on all instances of third-party funding. Phillips MR in *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No. 8)* considered public policy to have been breached where an agreement was of a type to "tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice".[13] The courts in England and Wales now seem to agree that public policy has been breached where the funding agreement or the conduct of a funded dispute undermines the integrity of the administration of justice,[14] though the terminology of agreements "corrupt[ing] public justice"[15] or undermining "the purity of justice" has also been used.[16] No generally applicable rules as to when an agreement will corrupt or undermine the administration of justice have been developed. The courts have emphasised the need to determine public policy matters in a section 14(2) sense on a case-by-case basis.[17]

[11] As in, for example, *Arkin v Bouchard Lines Ltd* [2005] EWCA (Civ) 655, [2005] 3 All ER 613, where the Court of Appeal considered that a commercial funder who finances part of the costs of the litigation in a manner which facilitates access to justice, and which is not otherwise objectionable, was to be commended. See also the comments of Knowles J in *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), [2021] 1 FLR 1.

[12] On the shift in public policy considerations in the context of third-party funding in England and Wales, see Mulheron and Cashman, "Third-Party Funding of Litigation: A Changing Landscape" (2008) 27(3) Civil Justice Quarterly 312.

[13] [2003] QB 381.

[14] *Papera Traders Co Ltd v Hyundai (Merchant) Marine Co Ltd (No. 2)* [2002] EWHC 2130 (Comm), [2002] 2 Lloyd's Rep 692.

[15] See, for example, *Giles v Thompson* [1994] 1 AC 142; [1993] 3 All ER 321; *Mansell v Robinson* [2007] EWHC 101 (QB); *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25, [2011] 2 All ER 240.

[16] *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25, [2011] 2 All ER 240.

[17] *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25, [2011] 2 All ER 240; *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No. 8)* [2002] EWCA Civ 932, 2003 QB 381.

(a) The "Preservation" Approach in Other Jurisdictions

[4.12] England and Wales was the first major jurisdiction to abolish tortious and criminal liability for maintenance and champerty. Their "preservation" approach has now been more or less replicated in several other common law jurisdictions. In Northern Ireland, sections 16 and 17 of the Criminal Justice (Miscellaneous Provisions) (Northern Ireland) Act 1968 repeat, word for word, the formula of the Criminal Law Act 1967. This is also the case for Victoria,[18] New South Wales,[19] Western Australia,[20] Singapore[21] and the Cayman Islands.[22]

[4.13] Other jurisdictions have adopted the preservation approach, though have employed different and sometimes more specific wording to that used in the Criminal Law Act 1967. This is often with the aim of continuing existing prohibitions on damages-based legal costs agreements. In South Australia, for example, schedule 11(1)(3) of the Criminal Law Consolidation Act 1935 abolishes the common law offence of maintenance, including champerty. Schedule 11(3)(1) abolishes liability in tort for conduct constituting maintenance or champerty, but, under schedule 11(3)(2), this abolition does not affect:

(a) any civil cause of action accrued before the abolition;

(b) any rule of law relating to the avoidance of a champertous contract as being contrary to public policy or otherwise illegal;

(c) any rule of law relating to misconduct on the part of a legal practitioner who is party to or concerned in a champertous contract or arrangement.

[4.14] In the Australian Capital Territory, section 221(1) of the Civil Law (Wrongs) Act 2002 abolishes the torts of maintenance and champerty, with section 221(2)(a) providing that this abolition does not affect "the illegality or avoidance of contracts that are tainted with maintenance or are champertous". Section 221(2)(b) further provides that the abolition does not affect any rule of law concerning "the misconduct of a lawyer who (i) engages in conduct that would

[18] Section 322A of the Crimes Act 1958.

[19] Section 6 of the Maintenance, Champerty and Barratry Abolition Act 1993.

[20] Section 36 of the Civil Procedure (Representative Proceedings) Act 2022.

[21] Section 5A of the Civil Law Act 1909.

[22] Section 18 of the Private Funding of Legal Services Act 2020.

have been maintenance at common law; or (ii) is a party to a champertous agreement".[23]

(b) Applying the "Preservation" Approach in Ireland

[4.15] As a means of legalising third-party funding in this jurisdiction, the preservation approach has obvious advantages. One of the main arguments in favour of its adoption into Irish law is the substantial body of relevant case law that has been developed by the courts of England and Wales and of the other jurisdictions that have adopted the preservation approach. This case law, which assists in clarifying the meaning, scope and operation of the preservation provision, could be "imported" into Ireland for use by Irish courts. It is, however, noted that approaches in case law to the preservation provision are not always consistent between those jurisdictions that use it.[24]

[4.16] An additional argument in favour of the preservation approach is the political value in stressing that, notwithstanding the apparent abolition of maintenance and champerty, the courts retain a measure of control over previously illegal activities. While acknowledging that a provision equivalent to section 14(2) of the 1967 UK Act might not be technically necessary, the Law Reform Commission of Western Australia considered that it nonetheless had a role in publicly emphasising the court's continuing jurisdiction, that is, that a preservation provision:

> underscore[d] the legitimacy of the court's role in scrutinising [third-party] funding agreements, providing a safeguard to balance the torts' abolition and addressing concerns about control of an action by a third-party funder.[25]

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[23] Criminal liability for maintenance and champerty in the Australian Capital Territory was abolished by section 68 of the Law Reform (Miscellaneous Provisions) Act 1955, as inserted by section 6 of the Law Reform (Miscellaneous Provisions) (Amendment) Act 2002.

[24] For example, while a funder which exercises control over the course of funded litigation acts in breach of public policy in England and Wales, this does not appear to be the case in Australia: *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386.

[25] Though perhaps more influential for the Law Reform Commission of Western Australia in recommending the preservation approach was the need to ensure consistency between different Australian states and territories to reduce "forum shopping": Law Reform Commission of Western Australia, *Report on Maintenance and Champerty* (Project 110 2020) at page 18.

The Law Reform Commission of Western Australia considered that, if it emerged that the preservation provision was unnecessary to protect the administration of justice or the integrity of the litigation process, the provision could be repealed later on.[26]

[4.17] Whether the preservation approach to legalisation is, in fact, the best or clearest means of legalising third-party funding or of abolishing maintenance and champerty is open to question. The New Zealand Law Commission pointed out in a 2001 report that:

> [n]o great simplification of the law is achieved by following the English, Victoria, New South Wales and South Australian examples … of abolishing the torts while preserving the underlying public policy issues in their application to contract legality.[27]

[4.18] The New Zealand Law Commission reiterated this view in 2022.[28] This Commission considers this a legitimate point: abolishing the torts and offences of maintenance because the policy concerns they serve are no longer considered valid, while simultaneously retaining public policy against maintained and champertous contracts, is not altogether logical. Nor, from the perspective of funders or funded parties, does it provide a particularly certain or stable basis on which to legalise third-party funding.[29]

[4.19] It might also be argued that, where a legislative provision requires a substantial body of case law to clarify it, that provision is not sufficiently clear.[30] It is

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[26] Law Reform Commission of Western Australia, *Report on Maintenance and Champerty* (Project 110 2020) at page 18.

[27] New Zealand Law Commission, *Report on Subsidising Litigation* (R72 2001) at page 11.

[28] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 373: see further, below.

[29] For example, in England and Wales, where third-party funding has been legal and accepted for many decades, perfectly legitimate third-party funding agreements continue to be challenged on public policy grounds. As well as increasing litigation and legal costs, this creates a climate of uncertainty for funders and funded parties.

[30] Cases interpreting the remit of section 14(2) of the Criminal Law Act 1967 in England and Wales include *Singh v Observer Ltd* [1989] 2 All ER 751; *Mainwaring v Goldtech Investments* [1991] 1 WLUK 216; *Camdex International Ltd v Bank of Zambia (No 1)* [1998] QB 22, [1996] 3 All ER 431. In Ireland, see *Greenclean Waste Management v Leahy (No 2)* [2014] IEHC 314 at paras 8 and 9.

noteworthy that, in Western Australia, all consultees bar one rejected the preservation approach, favouring either retention of the torts or their total abolition.[31]

[4.20] A further potential difficulty with the preservation approach is that, if the English and Welsh wording is followed to the letter and the entirety of the torts and offences of maintenance and champerty are "abolished", then, regardless of whether vestiges of public policy are expressly preserved, a host of different actions become legal. These actions include, but are not limited to, third-party funding, the "bare" assignment of causes of action (outside the already permitted statutory exceptions), and litigation crowdfunding by the public. Other than in the case of third-party funding, the policy concerns behind these actions will not have been assessed by the time of their legalisation, and no regulatory regimes will have been considered or designed for them. It is accepted that the consequences of this full-scale legalisation may not be either particularly large or particularly negative; however, policymakers may prefer a cautious and step-by-step approach to legalising these currently illegal activities, rather than legitimising them all in one fell swoop.

(c) Considerations for Drafting the "Preservation" Approach in Legislation

[4.21] The preservation approach would require repeal of the statutes considered to still be in force and which currently root the torts and offences of maintenance and champerty in the Irish legal order.[32] Thought would also have to be given to when the preservation approach should take effect, bearing in mind that practically all jurisdictions have drafted the legalisation provision to have prospective effect only, so that causes of action in maintenance and champerty accruing before the provision takes effect remain extant.

[4.22] A further element requiring consideration is the interaction of legislation with the statutory unenforceability of damages-based legal costs agreements in contentious business, as provided for in section 149(1)(a) of the Legal Services Regulation Act 2015, and with the express protection of the right of action for

[31] Law Reform Commission of Western Australia, *Report on Maintenance and Champerty* (Project 110 2020) at page 18.

[32] These statutes are discussed in greater detail in Appendix B (Maintenance and Champerty in Irish Legislation).

the tort of maintenance given by section 168(3)(a) of the Legal Services Regulation Act 2015.

2. Legalisation Model 2: The "Abolition" Approach (New Zealand)

[4.23] Another legalisation option is simply to abolish the torts and offences of maintenance and champerty altogether, without expressly providing for any "preservation" of the public policy or illegality issues underpinning them.

(a) The "Abolition" Approach in Other Jurisdictions

[4.24] The British Virgin Islands is considered to have implemented the abolition approach to maintenance and champerty.[33] In addition, the New Zealand Law Commission has recently recommended that New Zealand abolish the torts of maintenance and champerty entirely, without expressly preserving any elements of public policy or illegality.[34]

(b) Applying the "Abolition" Approach in Ireland

[4.25] The abolition approach has clear advantages. It is undeniably less complicated than the preservation approach. In recommending outright abolition, the New Zealand Law Commission considered that the New Zealand courts' inherent power to stay or dismiss proceedings deemed to be vexatious or an abuse of process would allow the courts to manage the public policy concerns behind the torts of maintenance and champerty without an express preservation provision.[35] There is no reason to think that the courts' powers to strike out pleadings and proceedings where they can be shown to be frivolous, vexatious,

[33] Section 328 of the Criminal Code 1997; *Crumpler v Exential Investments Inc (in liquidation)* VG 2020 HC 73.

[34] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022). The criminal law in New Zealand was consolidated by statute in 1893. Statute is the only source of criminal liability. With no provisions corresponding to the common law offences of maintenance and champerty, the common law offences of maintenance and champerty have already been *de facto* abolished in New Zealand: New Zealand Law Commission, *Subsidising Litigation* (E3172 2001) at page 2.

[35] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 371.

or an abuse of process, would not allow for the same approach to be taken in this jurisdiction.[36]

[4.26] Perhaps the sole difficulty with the abolition approach is that, as with the preservation approach, it would result in the inadvertent legalisation of activities that have not been, and will not be, adequately risk-assessed or regulated. For instance, abolition would remove limitations on crowdfunding for litigation. That term describes arrangements where a large number of persons provide funding, maybe in small amounts, to fund litigation they support but without the expectation of profit. While, as explained above, this Consultation Paper does not deal with the crowdfunding of litigation it would have to be taken account of, if a broad abolition of maintenance and champerty was planned.

(c) Considerations for Drafting the "Abolition" Approach in Legislation

[4.27] The considerations for drafting for the abolition approach are the same as for the preservation approach. Legislation of relevance to maintenance and champerty would require repeal, and some provisions of the Legal Services Regulation Act 2015 would require amendment.

3. Legalisation Model 3: The "Statutory Exception" Approach (Hong Kong)

[4.28] Another option to legalise third-party funding is to preserve the torts of maintenance and champerty, but to expressly provide that third-party funding does not offend against the torts and offences of maintenance and champerty, that is, that third-party funding constitutes a statutory exception to the prohibition on maintenance and champerty. A "statutory exception" approach allows Ireland to legalise third-party funding while retaining restrictions on other activities, such as crowdfunding of litigation, for which risk assessments have not yet been carried out.

(a) The "Statutory Exception" Approach in Other Jurisdictions

[4.29] At the time of writing, Hong Kong has not abolished either tortious or criminal liability for maintenance or champerty. However, third-party funding is nonetheless permitted in arbitration through a statutory exception for such

[36] See further, Chapter 3 (Policy Considerations of Legalising Third-Party Funding).

funding. Hong Kong's Arbitration Ordinance disapplies the prohibition on maintenance and champerty in the case of third-party funding, while also combining it with elements of the preservation approach. Sections 98K to 98M provide:

> "98K: The common law offences of maintenance (including the common law offence of champerty) and of being a common barrator do not apply in relation to third-party funding of arbitration.
>
> 98L: The tort of maintenance (including the tort of champerty) does not apply in relation to third-party funding of arbitration.
>
> 98M: Sections 98K and 98L do not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".

(b) Applying the "Statutory Exception" Approach in Ireland

[4.30] Ireland's corpus of legislation already contains a number of statutory exceptions to maintenance and champerty. The purpose of most of these statutory exceptions is to permit the assignment of causes of action in particular types of proceedings. For example, section 33(1) of the Credit Institutions (Stabilisation) Act 2010 provides that the Minister for Finance may make an order proposing to transfer the assets or liabilities of a relevant institution under that Act. Section 37(8) then clarifies that, "notwithstanding any enactment or rule of law, a cause of action capable of being exercised by the transferor may be transferred to the transferee by a transfer order".[37] It is noted that section 5A of the Arbitration Act 2010 (inserted by the Courts and Civil Law (Miscellaneous Provisions) Act 2023), which provides that the torts and offences of maintenance and champerty "do not apply to dispute resolution proceedings" (as defined), also reflects the statutory exemption approach.

[37] Other statutory provisions permitting the assignment of causes of action, notwithstanding the prohibition on same by the torts and offences of maintenance and champerty, include section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877, section 45 of the Central Bank and Credit Institutions (Resolution) Act 2011 and section 12 of the Irish Bank Resolution Corporation Act 2013. Causes of action can also be assigned pursuant to the Bankruptcy Act 1988: see *Governor and Company of Bank of Ireland v O'Donnell* [2015] IESC 89 at para 31 and sections 3, 44 and 61(3)(d) of the Bankruptcy Act 1988.

[4.31] Given Ireland's familiarity with other statutory exceptions to the prohibition on maintenance and champerty and the desirability of attaining consistency throughout the regulatory regime for third-party funding, the statutory exception approach might represent a cautious but pragmatic solution to the legalisation of third-party funding in Ireland.

(c) Considerations for Drafting the "Statutory Exception" Approach in Legislation

[4.32] The statutory exception approach does not require the repeal of any maintenance and champerty statutes, nor does it require any amendments to or consideration of the legislation on the unenforceability of damages-based legal costs agreements. Legislators might consider whether there is a requirement to preserve rights of actions in maintenance and champerty for third-party funding agreements entered into before the legalisation of third-party funding.

4. Questions

Q. 4.1 The Commission identified three models by which third-party funding could be legalised: the preservation approach, the abolition approach, and the statutory exception approach. Which model do you think is the most suitable and why?

Q. 4.2 The first model, the preservation approach, abolishes tortious and criminal liability for champerty and maintenance while preserving the underlying public policy issues in their application to contract legality. Are there additional concerns or advantages related to this approach not previously discussed?

Q. 4.3 Are there any additional or different considerations that must be acknowledged when drafting the preservation approach in legislation?

Q. 4.4 The second model, abolition, simply abolishes the offences and torts of maintenance and champerty all together without expressly providing for any preservation of underlying public policy. Are there additional concerns or advantages related to this approach not previously discussed?

Q. 4.5 The third model, statutory exception, would preserve the torts of maintenance and champerty, but expressly provide that an identified category of third-party funding does not offend those torts. Are there additional concerns or advantages related to this approach not previously discussed?

CHAPTER 5
MODELS OF REGULATION

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[5.1] If legalisation of third-party litigation funding is proposed in this jurisdiction, any legalisation measures should be accompanied by a regulatory framework capable of mitigating the dangers that third-party funding might otherwise pose.

[5.2] The Commission believes that a regulatory framework for third-party funding should serve two broad policy goals:

(1) to reduce, as far as is reasonable and possible, the financial and other risks that third-party funding and funders might create for those who use third-party funding services and, indeed, for non-funded parties to funded disputes;

(2) to protect and enhance the proper and efficient administration of justice in Ireland.

[5.3] However, a regulatory framework should not be so onerous that it impedes the sector's development and operation in this jurisdiction. Striking a balance between these seemingly competing priorities is, perhaps, the most challenging aspect of developing a regulatory framework for third-party funding. It is unlikely that it will be possible to mitigate and protect against every single risk in third-party funding while also creating an attractive environment for third-party funders and funded parties.

[5.4] In this chapter, the Commission discusses five models which, if third-party funding is legalised, lawmakers might consider as part of a regulatory framework for the sector. Each of the models we discuss here has advantages and drawbacks.

[5.5] The five models featured in this chapter are:

(1) **regulation model 1:** voluntary self-regulation;

(2) **regulation model 2:** enforced self-regulation;

(3) **regulation model 3:** regulation based around court certification of the third-party funding agreement;

(4) **regulation model 4:** a regulatory regime administered by an existing regulator;

(5) **regulation model 5:** a *sui generis* regulatory regime administered by a new and specialist regulator.

[5.6] For ease of analysis and discussion in this chapter, each potential model is discussed separately. However, it is accepted that any regulatory framework for third-party funding is likely to be a hybrid one, incorporating aspects of different models and existing regulatory frameworks. For example, a certain level of voluntary self-regulation (model 1) will probably occur even if a stricter regulatory framework (models 4 or 5) is selected. Existing regulators, such as the Legal Services Regulatory Authority and the Central Bank, are likely to have some regulatory role even if a regulatory framework relying on an existing regulator (model 4) is rejected as the primary framework for regulation. Further, as noted throughout this chapter, the State's existing criminal and civil law will exert an independent regulatory effect on third-party funding, whichever model is selected.

[5.7] A regulatory framework adopted for the third-party funding must be capable of operating coherently in conjunction with regulatory and legislative developments in other spheres. This includes the impending legalisation and statutory regulation of representative actions (to include representative actions funded by a third party),[1] the legalisation of third-party funding in international commercial arbitration and in related proceedings[2] and movements at EU level to regulate the third-party funding sector.[3]

[1] *Per* the requirements of Article 10 of 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.

[2] Courts and Civil Law (Miscellaneous Provisions) Act 2023.

[3] European Parliament Resolution of 13 September 2022 with recommendations to the Commission on responsible private funding of litigation (2020/2130 (INL)).

[5.8] Where the Commission identifies and discusses different possible models of regulation for third party funding it must be kept in mind that these models are not completely separate, mutually exclusive options. The optimum outcome, in the event that the proscription of third-party funding was to relax, might well be a combination of the different models of regulation for the different situations where funding can arise. Whether third-party funding requires regulation (or the same stringency of regulation) across all types of legal proceedings remains open to discussion.[4] For example, funding of commercial claims could be regulated in a manner that recognises that the participants have a business focus and access to expert legal advice and due diligence. Policymakers may consider that some types of funded legal disputes, which typically involve particularly vulnerable parties or large cohorts of beneficiaries, as may be the case in representative actions, require an enhanced level of regulation, and that other disputes typically involving commercially sophisticated parties, like commercial actions, can avail of a more relaxed regulatory approach.

[5.9] Legislative provisions about the terms of a third-party funding agreement constitute a form of state regulation. The content of funding agreements can be dictated by primary or secondary legislation or through a statutory code of practice from a statutory body. Disputes about the agreement might be for a court, or even for a non-court alternative such as a special panel established under legislation or connected to existing relevant agencies, to resolve. The manner in which funding agreements could be regulated also presents different options; the rules could identify principles to be reflected in such agreements or could identify provisions that must (or must not) be included or issues which have to be addressed (without necessarily prescribing how they are to be addressed).

1. Regulatory Model 1: Voluntary Self-Regulation

[5.10] The first model under discussion in this chapter is that of voluntary self-regulation. Apart from wholly unconstrained freedom (that is, no regulation

[4] For example, the New Zealand Law Commission considers that, while the particular vulnerability and complexity of multi-party litigation means that third-party funding in representative actions should be regulated, regulation is not required for other types of funded legal proceedings, as these are likely to involve "sophisticated" (in a commercial sense) parties: New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147) at page 445.

whatsoever), voluntary self-regulation offers more operational discretion to a sector than practically any other regulatory regime that could be implemented.

[5.11] For the purposes of this Consultation Paper, a voluntary self-regulatory framework is considered to arise where the sector is left in complete control of setting and implementing its own standards, with no state involvement in what those standards are or in how, or whether, they are implemented. In other words, in a voluntary self-regulatory framework, the sector polices itself.

[5.12] Voluntary self-regulatory frameworks are a relatively unusual feature of Ireland's regulatory landscape. While many sectors might appear to regulate themselves, this is rarely within a truly *voluntary* self-regulatory framework, and is far more likely to involve self-regulation within a state-controlled framework, involving varying levels of governmental control over and involvement in how a sector regulates itself.[5]

[5.13] One of the few examples of true voluntary self-regulation in Ireland is the regulatory framework applied to advertising, which is regulated by the industry-led Advertising Standards Authority for Ireland ("the ASAI"). This operates within the statutory framework of the Consumer Protection Act 2007 and in specific sectors, including for health products and legal practitioners, statutory regimes on advertising have also been enacted. The ASAI, which has no statutory footing, has drawn up its own Code of Standards for Advertising and Marketing Communications in Ireland ("the ASAI Code of Standards") and operates its own regime to ensure implementation of this code within the advertising sector.[6] Funded by levies on ASAI members, the ASAI board, made up of a chairperson, advertiser representatives, agency representatives and media representatives, administers the ASAI Code of Standards. A Complaints Committee investigates and adjudicates on complaints submitted to the ASAI about individual marketing communications. Where complaints are upheld or where ASAI members do not otherwise comply with the Code of Standards, the ASAI has empowered itself to impose sanctions. These sanctions include imposing fines,

[5] As in an enforced self-regulatory structure, discussed further below, or where the self-regulatory structure is set out in primary legislation, as is the case in the regulation of architects and quantity surveyors: see the Building Control Act 2007.

[6] ASAI, Code of Standards for Advertising and Marketing Communications in Ireland (7th ed).

requiring the member to withdraw or amend an advertisement, and suspending ASAI membership.[7]

(a) Voluntary Self-Regulation in Third-Party Funding: England and Wales

[5.14] In England and Wales, between 1967 (when the torts and common law offences of maintenance and champerty were abolished) and 2011, the third-party funding sector operated with largely unconstrained freedom. There was little government involvement in its activities and no discernible effort on the sector's part to regulate itself. While specific third-party funding agreements in England and Wales were subject to the scrutiny of the courts, this took place on an individualised and *ad hoc* basis only, and normally in the context of deciding whether the terms of the specific funding agreement contravened public policy.[8] Other than this individualised and *ad hoc* court-based assessment, there was no external regulatory force controlling the third-party funding sector in England and Wales.

[5.15] Much, though not all, of the English and Welsh third-party funding sector now operates according to a voluntary self-regulatory framework. This regime began to develop from June 2007, when the English Civil Justice Council[9] recommended to the Lord Chancellor that properly regulated third-party funding should be recognised as part of mainstream litigation.[10] A series of stakeholder meetings concluded that, although it was not the most favoured option among consultees, a self-regulatory framework was the most practical and cost-effective solution to regulating the third-party funding sector.[11] It

[7] *Ibid.* at Appendix I, clauses 23, 24.

[8] See further, the discussion on the "preservation" approach to legalising third-party funding in Chapter 4 (Models of Legalisation).

[9] The Civil Justice Council is a non-departmental advisory body sponsored by the Ministry for Justice.

[10] Civil Justice Council, *Improved Access to Justice, Funding Options and Proportionate Costs—The Future Funding of Litigation, Alternative Funding Structures* (Civil Justice Council 2007) at page 12.

[11] Civil Justice Council, *Consultation Paper: A Self-Regulatory Code for Third-Party Funding* (Civil Justice Council 2010) at page 5.

appears that, in significant part, this was because no UK regulator could be found to take on the role of third-party funding regulator.[12]

[5.16] The English and Welsh voluntary self-regulatory framework was finalised in light of recommendations made by Lord Justice Jackson in his 2010 Review of Civil Litigation Costs ("the Jackson Review").[13] The Jackson Review considered that "[as] third party funding is still nascent in England and Wales … what is required is a satisfactory voluntary code, to which all [third-party] funders subscribe".[14] To this was added the significant caveat that, "if the use of third-party funding expands, then full statutory regulation may well be required".[15] Following publication of these recommendations, a voluntary representative group, known as the Association of Litigation Funders of England and Wales ("the ALF"), officially formed on 23 November 2011.[16]

[5.17] Membership of the ALF for third-party funders in England and Wales is entirely voluntary. The ALF regulates its members via a Code of Conduct ("the ALF Code").[17] The ALF Code operates in combination with the ALF's Articles of Association,[18] the ALF Rules[19] and the ALF Complaints Procedure.[20]

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[12] Ells, "Third-Party Funding: Self-Regulation in the UK" (2019) 5(2) *New Vistas* 14 at page 17.

[13] Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010) at page 124.

[14] *Ibid*. at page 119.

[15] *Ibid*.

[16] Ells, "Third-Party Funding: Self-Regulation in the UK" (2019) 5(2) *New Vistas* 14 at page 18.

[17] Association of Litigation Funders, *Code of Conduct for Litigation Funders*, January 2018. http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf> accessed on 14 September 2022.

[18] Association of Litigation Funders, *Articles of Association of the Association of Litigation Funders of England and Wales*. <http://associationoflitigationfunders.com/wp-content/uploads/2015/02/ALF-Articles-of-Association-final-July-2014.pdf> accessed on 14 September 2022.

[19] Association of Litigation Funders, *Rules of the Association*. <http://associationoflitigationfunders.com/wp-content/uploads/2016/09/ALF-Rules-finalJuly2016PDF.pdf> accessed on 14 September 2022.

[20] Association of Litigation Funders, *Procedure to Govern Complaints Made Against Funder Members by Funded Litigants* <http://associationoflitigationfunders.com/wp-content/uploads/2018/03/ALF-Complaints-Procedure-October-2017.pdf> accessed on 14 September 2022.

[5.18] The England and Wales Court of Appeal has observed of the ALF Code that it "is not a very long or detailed document".[21] Its brevity notwithstanding, the ALF Code covers the chief areas of concern that tend to arise in relation to third-party funders and third-party funding. It contains provisions for ensuring the capital adequacy of third-party funders,[22] for attaining confidentiality in third-party funding arrangements,[23] and for the withdrawal of funders from funded proceedings.[24] It also establishes procedures for making and determining complaints against third-party funders and for imposing sanctions on funders who act in breach of the ALF Code.[25] Sanctions that may be imposed on members where they have acted in breach of the ALF Code extend to private warnings, public warnings, publication of the opinion containing the conclusions as to what sanctions should be imposed, payment by the funder to the ALF of the costs of determining the complaint against them, the funder's suspension or expulsion from the ALF, and the imposition of a penalty payable to the ALF, up to a limit of £500.[26]

[5.19] The ALF's regulatory framework applies to the funding of litigation only: agreements to fund arbitration and other dispute resolution mechanisms were removed from its remit in January 2018.[27]

[21] *Rowe v Ingenious Media Holdings PLC* [2021] EWCA Civ 29 at para 77 ("*Rowe*"), [2021] 1 WLR 3189.

[22] Clause 9.4 of the ALF Code (note 17). In the Court of Appeal decision in *Rowe*, the Court noted that the ALF Code required funders to accept responsibility for capital adequacy to the ALF only, and not to the funded party.

[23] Clause 8 of the ALF Code (note 17).

[24] Clause 11 of the ALF Code (note 17).

[25] Clause 15 of the ALF Code (note 17). Broadly speaking, complaints against a funder member of the ALF are referred by the ALF board to an independent legal counsel. This independent legal counsel investigates the matter and determines whether to impose a sanction.

[26] Clause 25 of the Complaints Procedure (note 20).

[27] Baldock, "The current scope of the regulatory regime of the Association of Litigation Funders—what is in and what is out in light of recent changes" (2019) Civil Justice Quarterly 400.

(b) Voluntary Self-Regulation as a Regulatory Framework for Third-Party Funding in Ireland

(i) Advantages of Voluntary Self-Regulation

[5.20] Voluntary self-regulation is among the least coercive options in regulating a sector of activity. This is not to say that it is inappropriate in all cases or, indeed, that it does not carry certain advantages.

[5.21] As there is no way to know how many, if any, third-party funders would seek to enter an Irish third-party funding market if it was legalised in Ireland, investing significant resources in constructing a regulatory framework may be a disproportionate first response. A voluntary self-regulatory framework may represent a pragmatic allocation of regulatory resources on the part of the State, especially while the sector is developing.

[5.22] Due to the flexibility and control that self-regulation offers to the sector, it is reasonable to assume that a voluntary self-regulatory framework would be attractive to third-party funders who are considering whether to participate in an Irish third-party funding market.[28] It must certainly be acknowledged that, although there have been some instances of poor and fraudulent practices in the English and Welsh third-party funding sector, these are fairly isolated when compared to the level of activity in the sector.[29] There is currently little if any evident political energy to regulate the sector more stringently in England and Wales.[30]

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[28] See, for example, the pro-self-regulation response of Harbour Litigation Funding to the Australian Law Reform Commission's Inquiry into Class Action Proceedings and Third-Party Litigation Funders (DP 85) <https://www.alrc.gov.au/wp-content/uploads/2019/08/17_harbour_litigation_funding.pdf>.

[29] See, for example, the experience of Jersey-based Argentum Capital Ltd, which voluntarily withdrew from the ALF after close association with a funder alleged to be allied to a Ponzi scheme: Mulheron, "England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments" (2014) 73(3) Cambridge Law Journal 574. See also the experience detailed in *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144, [2017] WLR 2221, discussed further below.

[30] In response to a question asked in the House of Lords, the Ministry of Justice stated in January 2017 that "[t]he Government does not believe that the case has been made out for moving away from voluntary regulation … The market for third party litigation funding remains at a relatively early stage in its development in this jurisdiction and we are not aware of specific concerns about the activities of litigation funders. The Government has not

[5.23] It is further important to emphasise that, whichever regulatory framework is selected, it will operate in tandem with any relevant Rules of Court and with the exigences of the civil and criminal law. Actors in a voluntarily regulated sector are rarely entirely unaccountable to any state oversight whatsoever.[31]

(ii) Disadvantages of Voluntary Self-Regulation

[5.24] While voluntary self-regulation has advantages, it is difficult to ignore the potential disadvantages of bestowing near-total operational autonomy on a complex, controversial and, for Ireland, entirely novel sector. The Commission has identified at least six potential drawbacks of voluntary self-regulation being the primary regulatory framework for third-party funding in this jurisdiction.

[5.25] The first obstacle to opting for voluntary self-regulation in an Irish third-party funding sector is a practical one: there is no third-party funding market as yet active in the State. The Commission considers that two basic prerequisites for a voluntary self-regulatory framework for any sector should be:

(1) one, that a sector exists which is capable of organising to regulate itself and,

(2) two, that there is a strong likelihood that that sector can and will be both capable of and willing to set and implement appropriate standards.

[5.26] Both of these prerequisites were present in England and Wales when voluntary self-regulation was put forward as the most viable regulatory option: there was an extant and active third-party funding sector combined with a clear willingness and ability on the part of that sector to regulate itself.[32] At the time of writing, however, these ingredients are lacking in the case of Ireland. There is no extant third-party funding sector because most forms of third-party funding

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therefore undertaken a formal assessment of the effectiveness of the voluntary code of conduct or the membership of the Association of Litigation Funders": HL Deb 24 January 2017, UIN HL4216. Section 28 of the Access to Justice Act 1999, which would have regulated third-party funding along similar lines to conditional fee agreements in England and Wales, has never been enacted.

[31] Though whether it is properly an advantage of voluntary self-regulation that other more coercive forms of regulation can make up for its weaknesses is debatable.

[32] Five funders already active in the third-party funding market in England and Wales formed the first iteration of the ALF in 2010: Civil Justice Council, *Consultation Paper: A Self-Regulatory Code for Third-Party Funding* (Civil Justice Council 2010) at page 9.

are illegal. With no extant sector, there can be no likelihood or guarantee that the sector will regulate itself appropriately. The unpredictability of the potential size of any Irish third-party funding market is a further challenge. The number of operators may be too low to organise to regulate themselves appropriately for the Irish market, or the regulatory system may be dominated by a very small number of large funders.

[5.27] A second disadvantage of voluntary self-regulation lies in the fact that any legalised third-party funding activity in Ireland would, at least initially, and possibly in the longer term, be dominated by third-party funders located outside the State. The likely dispersal of funders around the world presents practical challenges for the sector in organising itself to develop responsible funding practices in Ireland. The difficulties of establishing a sectoral regulatory group for the New Zealand third-party funding market, when that group would likely be composed entirely of Australia-based funders, was one of the reasons that the New Zealand Law Commission ultimately rejected a self-regulatory model for third-party funders in the context of multi-party litigation.[33]

[5.28] Aside from market-structural issues, a third problem, inherent in any voluntary self-regulatory framework, is its voluntariness. While an industry-led third-party funding group *may* form in response to the legalisation of third-party funding and *may* empower itself to impose sanctions on its members, there is a real risk that this might not occur.

[5.29] The problem of voluntariness arises even if there is a concerted and responsible effort from part—even a large part—of the third-party funding sector to regulate itself. If third-party funders are nonetheless able to provide funding outside the confines of that self-designed, self-managed regulatory structure, self-regulation does little to ease the policy concerns surrounding consumer protection and the administration of justice.[34] In England and Wales, a funder

[33] New Zealand Law Commission, *Issues Paper on Class Actions and Litigation Funding* (Issues Paper 45, 2020) at page 364; New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147, 2022) at page 376.

[34] Though consumers may prefer to deal with funders who voluntarily subscribe to a regulatory regime. Note the OECD's observation that "[c]onsumers who are aware of a self-regulatory scheme and understand the benefits it may provide to them may be willing to change their purchasing behaviour in favour of participation in the scheme": Organisation for Economic Cooperation and Development, *Industry Self-Regulation: Role and Use in Supporting Consumer Interests* (OECD Directorate for Science, Technology and Innovation Committee on Consumer Policy 2015) at page 11.

can operate perfectly legitimately on the third-party funding market without being a member of the ALF and therefore without being subject to the standards and sanctions of that organisation and, indeed, many do so.[35] In *Excalibur Ventures LLC v Texas Keystone Inc*, in which the England and Wales Court of Appeal held numerous funders jointly and severally liable for an indemnity costs order of £32 million, none of the funders were ALF members.[36] Only one funder had any prior experience of third-party funding, with that experience taking place outside the United Kingdom. The ALF, permitted to intervene in the proceedings by way of written submissions, observed in a post-judgment press release that "the risks involved in litigation funding are not easily managed by anyone other than professional funders, staffed by experienced litigation and arbitration experts, who 'live and breathe' the asset class".[37]

[5.30] A fourth disadvantage of a voluntary self-regulatory framework is that, quite simply, it may not work. Even were an industry-led group to form, and even were all funders to ostensibly subscribe to its standards, there is no guarantee that voluntary standards would be enough to meet the policy goals of regulating the third-party funding sector and to address the dangers and policy concerns, as discussed in previous chapters, of third-party funding. Regulatory theory emphasises that, without external forces encouraging or pressuring the sector's compliance with voluntary standards, self-regulation can be ineffective in ensuring that private entities operate in the public interest.[38] Casting doubt

[35] At the time of writing, third-party funders and third-party funding brokers active in the English and Welsh market, but who are not members of the ALF, include Manolete Partners PLC, AxiaFunder, Ferguson Litigation Funding Ltd and Apex Litigation Finance Ltd. Their corporate structures would also appear to put them beyond regulation by the Financial Conduct Authority, the conduct regulator for financial services firms and markets in the United Kingdom.

[36] *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144, [2017] WLR 2221.

[37] Association of Litigation Funders, *Statement from the Association of Litigation Funders of England and Wales regarding the Court of Appeal Judgment in Excalibur*. <http://associationoflitigationfunders.com/2016/11/statement-from-the-association-of-litigation-funders-of-england-wales-regarding-the-court-of-appeal-judgment-in-excalibur/>.

[38] See, for example, Segerson and Miceli, "Voluntary Approaches to Environmental Protection: The Role of Legislative Threats" in Carraro and Lévèque (eds), *Voluntary Approaches in Environmental Policy* (Kluwer Academic Publishers 1999) at page 105; Kagan, Gunningham and Thornton, *Shades of Green: Business, Regulation and Environment* (Stanford University Press 2003); Cartwright, *Banks, Consumers and Regulation* (Bloomsbury Publishing 2004) at page 124.

on the usefulness of the English and Welsh approach to self-regulation in third-party funding in 2020, in the England and Wales High Court (Nugee J) in *Rowe v Ingenious Media Holdings PLC* was sceptical that the mere fact that the funder involved in the legal action was an ALF member inspired sufficient confidence that, were it facing a large liability for costs, the money would be forthcoming[39]

[5.31] A fifth disadvantage of voluntary self-regulation, and indeed soft-law regimes more generally, is the growth of regulation by legislation (that is, hard law) in different parts of the third-party funding sector. This development of hard law is occurring at both national and EU level. It seems clear that any purely voluntary self-regulation framework would not satisfy the requirements of the Representative Actions Directive in respect of third-party funding of representative actions within the scope of the Directive. Article 10 of the Directive clearly requires **Member States**, not the sector itself, to regulate the provision of third-party funding in representative actions. Where third-party funding is permitted for such actions, Article 10(3) requires that Member States "shall ensure" that the courts or administrative authorities in representative actions for redress measures "are empowered to address compliance" with the requirements of Article 10(1) and (2). In this jurisdiction, there are no administrative authorities with jurisdiction to hear representative actions and the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 vests such jurisdiction in the High Court. It is that court, therefore, that is required to have the power to assess compliance with Article 10(1) and 10(2). That is reflected in section 27 of the Act. There is nothing voluntary about this regime and a voluntary code would clearly not comply with Article 10 of the Directive as regards actions for collective redress.

[5.32] Equally, a voluntary self-regulation model would not comply with the proposed regulatory framework recommended by the European Parliament. The proposed Directive it has sent to the Commission would require Member States that permit third party funding (and the proposed Directive leaves that decision to Member States) to designate an independent public supervisory authority (either a court or administrative authority) for the purpose of (inter alia) granting or withdrawing the authorisation of litigation funders and supervising their activities.[40] Sanctions for breach of the rules—including the imposition of

[39] [2020] EWHC 235 (Ch) at para 106(31).

[40] Article 4(1) of the Proposed Directive.

"proportionate fines calculated on the basis of an undertaking's turnover"—are also proposed.

[5.33] We also note the amendment of the Arbitration Act 2010 by the Courts and Civil Law (Miscellaneous Provisions) Act 2023, which permits third-party funding in international commercial arbitration and in related proceedings, subject to requirements to be prescribed in Regulations to be made by the Minister for Justice. In light of these hard-law developments, the Commission considers that, if there is any desire to secure a consistent approach in regulatory structure across the entire third-party funding sector, this must militate against a self-regulatory framework.

[5.34] A sixth disadvantage of voluntary self-regulation is that it remains a contentious and frequently unpopular regulatory structure in Ireland. This unpopularity may stem from a perception that voluntary self-regulation in the Irish financial and banking sectors was a factor in the economic crash of 2008 and the ensuing recession. Although, on a technical level, the financial and banking regulatory system between 2003 and 2008 was not a true voluntary self-regulatory framework,[41] the experiences of the recession appear to have created a certain scepticism in Irish civil and political society towards voluntary or light-touch regulatory systems generally.[42] Policymakers will have to engage with this scepticism when identifying and developing an effective and achievable regulatory framework within which legalised third-party funding in Ireland can operate.

2. Regulatory Model 2: Enforced Self-Regulation

[5.35] A second regulatory option open to Ireland is that of "enforced" self-regulation. This offers flexibility and control to the third-party funding sector, but also

[41] Although "light-touch" regulation was promoted, the sectors were officially overseen by the Financial Regulator, which had the power to impose financial sanctions on errant actors. See further, McGrath, "'Walk Softly and Carry No Stick': Culture, Opportunity and Irresponsible Risk-Taking in the Irish Banking Sector" (2020) 17(1) European Journal of Criminology 86; and the Commission's *Report on Regulatory Powers and Corporate Offences, Vol. 1* (LRC 119-2018) at para 1.27.

[42] See, for example, the recent negative commentary on voluntary self-regulation in the context of the regulation of the manufacturers of concrete blocks (Dáil Éireann Debates 30 June 2022 vol 1024 no 5) and online safety (Dáil Éireann Debates 11 May 2022 vol 285 no 2).

contains some external forces to pressurise compliance with voluntary standards,

[5.36] The concept of enforced self-regulation was first propounded by Australian legal writer John Braithwaite, who considered it a means of controlling corporate crime. Enforced self-regulation was, Braithwaite suggested, "a response both to the delay, red tape, costs and stultification of innovation that can result from imposing detailed government regulations on business, and to the naiveté of trusting companies to regulate themselves".[43] Braithwaite's classic vision of an enforced self-regulatory framework contained the following hallmarks:

(1) a government regulator requires a group representative of a sector to prepare rules governing that sector—this is normally in the form of a code of practice;

(2) the representative group prepares draft rules and submits them to the regulator;

(3) the regulator approves the rules or returns them for revision to the representative group, sometimes after a period of public consultation;

(4) once the rules are approved, the sector's representative group, rather than the regulator, will monitor and enforce the sector's compliance with the approved rules, with the regulator retaining a supervisory role.[44]

[5.37] In a framework of enforced self-regulation, then, much as in a system of voluntary self-regulation, responsibility for ensuring compliance with standards is delegated to the sector itself. This is the "self-regulatory" aspect of enforced self-regulation and occurs through a soft-law regime. The "enforced" aspect of enforced self-regulation arises in the fact that the State oversees and monitors the sector's regulation of itself. The State reserves the right, should the sector's regulation of itself fail, to intervene and enforce a more intrusive regulatory system. In this way, while the State harnesses the sector's own capacity to regulate and enforce standards, ultimate sectoral oversight remains with the

[43] Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 Michigan Law Review 1466 at page 1470.

[44] *Ibid* at page 1471.

state.[45] The State's supervisory role in enforced self-regulation serves to differentiate it from both voluntary self-regulation, where the State has no regulatory function at all, and statutory-based "command and control"-style regulation, where the State performs all regulatory functions.

[5.38] Ireland's regulatory ecosystem already contains regimes of enforced self-regulation. One such example appears in the Mediation Act 2017. Section 12(1) of the Mediation Act 2017 empowers the Minister for Justice to make an order ("the designation order") recognising a body as the Mediation Council of Ireland.[46] The Schedule to the Mediation Act 2017[47] sets out the general functions of the Mediation Council of Ireland, one of which is the preparation of a soft law code of practice setting standards for the conduct of mediations and requirements for mediators ("the Mediation Code of Practice"). A draft version of the Mediation Code of Practice is submitted for approval to the Minister for Justice.[48] Section 9(3) of the Mediation Act 2017 provides for a mandatory consultation procedure for this draft version of the Mediation Code of Practice. After consultation and once the Mediation Code of Practice is approved by the Minister, the Mediation Council oversees implementation of the Mediation Code of Practice in the mediation sector.

[5.39] The "self-regulatory" aspect of this regulatory framework arises in the fact that the mediation sector, through the Mediation Council, drafts the soft law Mediation Code of Practice. The "enforced" aspect arises in the statutory power reserved to the Minister for Justice to approve the Mediation Code of Practice, to withdraw their approval of the Mediation Code of Practice and the Minister's power, set out at section 12(5) of the Mediation Act 2017, to revoke the designation order where they are "of the opinion that the body for the time being standing recognised by order … no longer complies with the minimum requirements" of the Mediation Council of Ireland.

[5.40] This approach in the 2017 Act was modelled on the similar approach to the designation of a Press Council under the Defamation Act 2009. Section 44 of the

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[45] Hutter, "Understanding the New Regulatory Governance: Business Perspectives" (2011) 33(4) *Law and Policy* 459 at page 460.

[46] As the time of writing, no organisation has been recognised as the Mediation Council by order under section 12 of the 2017 Act.

[47] At the time of writing, section 12 of the Mediation Act 2017 concerning the recognition of a body as the Mediation Council of Ireland has not yet been brought into force.

[48] Sections 9(1)(b), 12(4)(a) and Schedule of the Mediation Act 2017.

2009 Act provides for the recognition, through a statutory Order made by the Minister for Justice, of a Press Council, provided that the Minister is satisfied that it complies with the minimum requirements of a Press Council in Schedule 2 to the 2009 Act. This model of enforced self-regulation was inserted into the 2009 Act as a means of providing a form of regulatory framework to prevent, in particular, undue breaches of privacy by the media. Media entities, such as newspapers and journals, were also strongly "encouraged" to sign up to the self-regulatory codes of the Press Council, because this also conferred on them the benefits of the reforms to defamation law enacted in the 2009 Act, many of which had been advocated for, and welcomed by, media representatives. In 2010, the Minister for Justice made an Order under section 44 of the 2009 Act[49] recognising the media sector's Press Council, which had been established in 2008 in anticipation of the enactment of the 2009 Act.

(a) Enforced Self-Regulation in Third-Party Funding: Hong Kong

[5.41] Third-party funding in Hong Kong operates under an unusual regulatory system, possessing many of the features of enforced self-regulation. At the time of writing, third-party funding in Hong Kong is permitted for arbitration only.[50] Section 98P of Hong Kong's Arbitration Ordinance provides that an authorised advisory body may issue a non-statutory code of practice "setting out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration". The authorised advisory body in question, Hong Kong's Secretary for Justice, issued the Code of Practice for Third Party Funding of Arbitration ("the Hong Kong Code") on 1 February 2019.

[5.42] The Hong Kong Code addresses typical third-party funding-related concerns, including capital adequacy requirements,[51] conflicts of interest,[52]

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[49] Defamation Act 2009 (Press Council) Order 2010 (SI No 163 of 2010).

[50] Third-party funding of mediation in Hong Kong will be permitted on the coming into force of section 4 of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017. The section commencement was deferred in August 2021 to "a future date" pending publication of a draft Code of Practice for Third-Party Funding of Mediation and the conclusion of a public consultation process. Available at <https://www.info.gov.hk/gia/general/202108/16/P2021081600518.htm>.

[51] Paragraph 2.5 of the Hong Kong Code. Paragraph 2.5(2) sets a minimum capital access threshold of HK$20 million to be permitted to provide third-party funding. At the time of writing, this is about €273,500.

[52] Para 2.6 of the Hong Kong Code.

confidentiality,[53] funder control over proceedings,[54] disclosure obligations,[55] liability for costs[56] and withdrawal from funding agreements.[57]

[5.43] The self-regulatory aspect of Hong Kong's regulatory framework arises in the fact that the Hong Kong Code is soft law and there are, essentially, no civil or criminal sanctions if a funder breaches it. Non-compliance with the Hong Kong Code does not render any person or entity liable to any judicial proceedings, although a court or arbitral tribunal may take into account compliance or non-compliance with the Hong Kong Code if it is relevant to another question being decided by the court or arbitral tribunal.[58]

[5.44] The "enforced" aspect of Hong Kong's regulatory framework for third-party funding is innovative. When the Law Reform Commission of Hong Kong recommended the legalisation of third-party funding, the recommendation for "light touch" enforced self-regulation was for an initial period of three years only. After this time, the Law Reform Commission of Hong Kong considered that the Secretary of Justice should issue a report reviewing the effectiveness of the regime and should:

> also make recommendations on whether a statutory or other form of body is needed, how it could be set up and as to the criteria for selecting members of such a body. In the meantime, the [Secretary of Justice] could at the end of each year review whether or not to speed up the process for regulation by an independent statutory or other form of body. The report should also deal with the effectiveness of the [Hong Kong] Code and make recommendations as to the way forward.[59]

[5.45] The Hong Kong Legislative Council accepted this recommendation. Hong Kong's framework for regulating third-party funding is therefore subject to

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[53] Para 2.8 of the Hong Kong Code.

[54] Para 2.9 of the Hong Kong Code.

[55] Para 2.10 of the Hong Kong Code.

[56] Para 2.12 of the Hong Kong Code.

[57] Para 2.13 of the Hong Kong Code.

[58] Section 98S of the Arbitration Ordinance.

[59] Law Reform Commission of Hong Kong, *Report on Third Party Funding for Arbitration* (2016) at page 61.

change, with the extent of this change seemingly dependent on the level of voluntary compliance by funders with the Hong Kong Code.[60]

[5.46] The Hong Kong Code requires third-party funders to submit to the Secretary for Justice annual returns of complaints made against them and of any findings by a court or arbitral tribunal of their non-compliance with the Hong Kong Code.[61] This requirement appears to serve both as a coercive mechanism, impressing upon funders that they operate under the watchful eye of the Secretary for Justice, and a data-gathering mechanism to provide a means by which the Secretary for Justice can assess the success of the framework and consider whether to adopt a more intrusive style of regulation.

(b) Enforced Self-Regulation as a Regulatory Model for Third-Party Funding in Ireland

(i) Advantages of Enforced Self-Regulation

[5.47] The advantages of an enforced self-regulatory framework are the same as those of voluntary self-regulation. As with voluntary self-regulation, the soft-law nature of enforced self-regulation may be a more resource-conscious and flexible option than statutory regulation. Self-regulation reduces the budgetary and regulatory burden on government and harnesses the sector's own knowledge of itself. The prospect of sectoral self-regulation, even with a certain level of government oversight, would likely attract third-party funders to participate in an Irish third-party funding market.

[5.48] While enforced self-regulation is undeniably "light-touch" regulation, that light touch is accompanied by a stern gaze. The State retains influence over the sector's operations through the express power to approve or amend procedures and standards; through the power to monitor, at a supervisory level, the sector's compliance with those procedures and standards; and through the power to impose sanctions or impose a more intrusive/coercive regulatory framework on the sector if voluntary compliance is poor. This may compensate for some of the disadvantages of a voluntary self-regulatory framework. It may, for example, act to reduce scepticism towards self-regulation generally and to pressurise greater

[60] Hong Kong Legislative Council Brief LP 19/00/16C, Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, Annex B at page 4.

[61] Para 2.19 of the Hong Kong Code.

participation by funders in the voluntary structure (though there is, of course, no means by which to guarantee this).

[5.49] As with all other types of regulatory framework considered in this Consultation Paper, third-party funding and funders subject to an enforced self-regulatory framework would, as a matter of course, be subject to the requirements of the Rules of Court and of the State's civil and criminal law.

(ii) Disadvantages of Enforced Self-Regulation

[5.50] An enforced self-regulatory framework for third-party funding engages many of the same drawbacks as a voluntary self-regulatory system. As in voluntary self-regulation, unavoidable structural issues pose a particular barrier. The absence of an extant third-party funding industry in Ireland, the relative lack of specific domestic expertise or experience to feed into the process of drafting appropriate soft-law standards for self-regulation and the current absence of any existing sectoral representative group to which self-regulatory responsibilities can be delegated may make opting for any kind of self-regulation a challenging, and, in no small way, an inadvisable regulatory route.

[5.51] Second, as with voluntary self-regulation, there can be no guarantee that enforced self-regulation will work. The safety valve of the "enforced" aspect of enforced self-regulation may not be sufficient to avert poor standards and procedures in the sector. Any form of self-regulation, whether voluntary or enforced, represents an undeniable risk on the part of policymakers.

[5.52] A third difficulty with an enforced self-regulatory framework is its unique blending (or, it might be suggested, confusion) of regulatory accountabilities. In a system of enforced self-regulation, there is distinct uncertainty as to who is actually ultimately liable for permitting poor practices in the sector: the sector or the statutory supervisor. The enforced self-regulatory model leaves itself open to accusations of being unclear as to who is in charge, with too many grey areas.

[5.53] A fourth disadvantage is that the effectiveness of enforced self-regulation relies, to some extent, on an openness and an ability to increase the stringency of that regulatory system—that is, to change from an enforced self-regulatory framework to another, different form of regulation. To be an effective method of regulation, enforced self-regulation relies on policymakers being able (and being *seen* as being able) to rapidly design, develop and implement a new and more coercive regulatory framework in case of insufficient compliance with voluntary standards. This means that an enforced self-regulatory framework

necessarily entails a level of unpredictability and instability for policymakers funders and funded parties.

[5.54] A fifth and final disadvantage of enforced self-regulation is that, as with voluntary self-regulation, it clear that a regime based around a non-binding/soft-law code would not comply with Ireland's obligations under the requirements of the Representative Actions Directive (and, still less, the requirements of the proposed Directive recommended by the European Parliament). Again, if there is a desire to achieve a consistent regulatory approach across an Irish third-party funding sector, this would seem to exclude enforced self-regulation as a viable regulatory option for legalised third-party funding in the State.

3. Regulatory Model 3: Court Certification

[5.55] The third regulatory model explored in this Consultation Paper is structured around certification by the court of the fairness and reasonableness of the individual third-party funding agreement. Court certification of the agreement at an early stage would be necessary for the third-party funder to be able to enforce the terms of the third-party funding agreement against the funded party. This model essentially places the court in the position of regulator, providing it with significant oversight of the sector on an individualised basis.

[5.56] As we shall see, court certification of third party funding arrangements is frequently addressed in the context of an existing or proposed requirement for court certification of representative or class actions. That is the case in New Zealand and Ontario and in the United Kingdom as regards collective proceedings before the Competition Appeals Tribunal. The Representative Actions Directive also follows that structure.

(a) Court Certification in Third-Party Funding: New Zealand

[5.57] The New Zealand Law Commission has recently recommended the adoption of a regulatory framework based on court certification for third-party funding agreements in representative actions.[62] The New Zealand court certification framework aims to ensure that potentially vulnerable claimants in representative actions are empowered to secure redress through the courts by being able to

[62] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147) at page 443.

avail of third-party funding where necessary, while also ensuring that the conditions under which funding is provided and the amount of redress secured is, as far as possible, reasonable and fair to claimants and to funders.

[5.58] New Zealand is not the only jurisdiction to recommend a regulatory framework for third-party funding based around certification by the courts. The Canadian province of Ontario already applies a court-certification regime where representative actions are funded by third parties.[63] The Competition Appeals Tribunal in the United Kingdom has also adopted a court-certification regime (a "collective proceedings order") for representative actions in competition matters under section 47B of the Competition Act 1998. In relevant cases, applications for collective proceedings orders include an assessment of the adequacy and appropriateness of any third-party funding.[64] Note that all these examples are limited to court certification in representative actions.

[5.59] The proposed New Zealand framework envisages that primary legislation ("the proposed New Zealand Class Actions Act") would provide that a funder may only enforce a third-party funding agreement in a funded representative action where the court has first approved that agreement. This requirement for court certification of the funding agreement would apply even where the matter settles before the court has heard any part of the action.

[5.60] The proposed New Zealand Class Actions Act would set out the factors necessary for the court to approve a funding certification application from a representative claimant. These are that:

a) the representative claimant in the class action has received independent legal advice on the third-party funding agreement, and

b) the third-party funding agreement is fair and reasonable.[65]

[63] Section 33.1(2) of Ontario's Class Proceedings Act 1992 provides that third-party funding agreements in representative actions in Ontario courts are "subject to the approval of the court, obtained on a motion of the representative [claimant] made as soon as practicable after the agreement is entered into, with notice to the defendant".

[64] See, for example, *UK Trucks Claims Ltd v Stellantis NV* [2022] CAT 25; *Paccar Inc v Competition Appeals Tribunal* [2021] EWCA Civ 299, [2021] 4 All ER 737.

[65] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147) at page 443.

[5.61] In assessing whether the third-party funding agreement is fair and reasonable, the proposed New Zealand Class Actions Act would permit the court to take into account the following:

(a) the circumstances in which the third-party funder is entitled to terminate the third-party funding agreement.

(b) whether the third-party funding agreement will diminish the rights of the representative claimant to instruct their lawyer or control the proceedings, or otherwise impair the lawyer-client relationship,

(c) any process for resolving disputes between the third-party funder, the representative claimant, and class members, including disputes about settlement and termination of the third-party funding agreement,

(d) whether the third-party funding agreement prescribes that the governing law under the agreement is the law of Aotearoa New Zealand,

(e) if the third-party funding agreement provides for an adverse costs indemnity, the terms and extent of that indemnity,

(f) the fairness and reasonableness of the commission to be taken by the third-party funder in the case of a successful outcome,

(g) any other matters that the court considers to be relevant.[66]

[5.62] For the New Zealand court to determine whether the return to be taken by the third-party funder is fair and reasonable, the proposed New Zealand Class Actions Act would provide for the following matters to form part of the court's assessment:

(a) the type of relief claimed, including the estimated total amount of monetary relief,

(b) the number of people likely to be entitled to a share of any relief,

(c) the estimated costs if the litigation is successful or unsuccessful,

(d) the complexity and likely duration of the case,

[66] *Ibid*.

(e) the estimated returns to the funder, and how the returns will accommodate variation in the factors identified above in (a)–(d),

(f) any other matters the court considers are relevant.

[5.63] Interestingly, the New Zealand Law Commission did not consider that this (or indeed any) level of court oversight was required for third-party funding agreements outside the context of representative actions (though certain of its recommendations do apply to funded actions other than representative actions).[67] This is because individual claimants in funded legal proceedings are more likely to be, in the New Zealand Law Commission's words, "commercially sophisticated".[68]

> In such cases, the [claimant] may themselves have litigation experience or expertise, or access to their own lawyers or in-house legal team. They are able to promote and protect their own interests when negotiating [third-party] funding agreements and are likely to be actively engaged in their claim and able to monitor and protect their interests during the proceedings.[69]

(b) Court Certification as a Regulatory Framework for Third-Party Funding in Ireland

(i) Advantages of Court Certification

[5.64] A court certification framework would be based primarily in legislation, both primary and secondary, and would, in particular, involve the creation of new and amended Rules of Court. A general advantage of a court certification process is that it would involve an examination of the funding agreement in an open legal process before a recognised impartial forum.

[5.65] A further and significant benefit of this regulatory model is that it appears to be consistent with—and, indeed, required by—Ireland's transposition obligations in respect of the Representative Actions Directive. Article 10 of the Representative

[67] Specifically, recommendations relating to disclosure of the funding agreement, security for costs and the making of orders for costs against funders and the management of conflict of interests.

[68] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147) at page 383.

[69] *Ibid*.

Actions Directive imposes different, but closely connected, requirements on the State. The first requirements are contained in Article 10(1). Article 10(1) obliges Member States to prevent conflicts of interest where a representative action is funded by a third party, and to ensure that third-party funding "does not divert the representative action away from the protection of the collective interests of consumers". These Article 10(1) requirements appear to be given further definition by Article 10(2) of the Representative Actions Directive, which specifies that Member States must ensure that funded representative actions are not brought "against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent". Where a representative action is brought by a qualified entity, Member States must ensure that the third-party funder does not influence the qualified entity's decisions in the context of the representative action in a manner detrimental to the claimants' collective interests.

[5.66] The other requirement is contained in Article 10(3) of the Representative Actions Directive. Article 10(3) obliges Member States to empower courts (or other administrative authorities) to assess compliance with the requirements in Article 10(1) where there are "justified doubts" as to a qualified entity or third-party funder's compliance with those requirements.[70]

[5.67] The Article 10(1) requirements are *generally applicable*: the State must take steps to prevent conflicting interests in funded representative actions and to prevent the diversion of funded representative actions from the collective interests of claimants *in all funded representative actions*. The Article 10(3) requirement is *limited and specific*: the State must provide courts with the power to assess whether a funded representative action causes interests to conflict and whether it has diverted from protecting claimants' collective interests, *specifically* where there are justified doubts, in a *specific case*, about compliance.

[5.68] Section 27 of the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 implements Article 10 of the 2020 Directive. Section 27(1) provides:

> "Where a representative action for redress measures brought in accordance with section 26 is funded by a third party, insofar as

[70] A "qualified entity" is an organisation or public body representing consumer interests which is designated to bring a representative action in accordance with the Representative Actions Directive; see Article 3(4) of the Representative Actions Directive.

> permitted in accordance with law, the Court shall ensure, having regard to the matters referred to in subsection (2), that conflicts of interests are prevented and that funding by third parties who have an economic interest in the bringing or the outcome of the representative action for redress measures does not operate to divert the representative action from the protection of the collective interests of consumers."

[5.69] Although Article 10 of the Representative Actions Directive does not provide for court certification of funding arrangements as such, it clearly contemplates that the issue of funding will be addressed at an early stage of any such action: see in particular Article 10(4), which requires Member States to empower courts (or administrative authorities) to reject the legal standing of the qualified entity in a specific representative action. Issues regarding funding can therefore be seen as an element of the courts' general supervisory jurisdiction over representative actions under the Directive.

[5.70] As already mentioned, the proposed Directive recommended by the European Parliament would, if adopted in its current form, require Member States permitting third party funding to designate a court or administrative agency to exercise the regulatory functions recommended by Parliament (including, under Article 16(2), the power to review third-party funding agreements).

(ii) Disadvantages of Court Certification

[5.71] A significant disadvantage of a court certification regulatory framework is that it adds an additional layer of formal approval to third-party funding in the State. This is especially the case if the certification requirement is applied in the case of all third-party funding agreements (and not just representative or class actions). It would potentially slow down the progress of funded actions through the courts while also increasing legal costs. Further, in single party cases such as *Persona*, a funder will, presumably, be funding the initial court application for approval of the funding agreement, which, again, is likely to involve a High Court hearing, and is also likely to involve in many instances either a full fight or else significant arguments about, for example, capital adequacy or security for costs. If the High Court determines that the funding agreement is not valid, the plaintiff/claimant might appeal to the Court of Appeal (subject, presumably, to the funder's view); and if the High Court determines that the funding agreement is valid, the defendant/respondent might appeal to the Court of Appeal. A further application for leave to appeal to the Supreme Court by either party cannot be ruled out (even if rejected, the application for leave will entail some cost). In addition court certification and supervision puts the court into the role

of regulator in an economic sector, without the necessary tools or skills and leading to a confusion of roles.

[5.72] Further, as the New Zealand Law Commission has already identified, a certification requirement specifically designed and structured to protect the vulnerable may not be a proportionate regulatory response in all cases. It appears particularly disproportionate if, as with most users of third-party funding services, the funded party is already a "commercially sophisticated" litigant, and is content that the financial arrangement between them and the third-party funder is suitable for their own purposes. The Commission notes other instances of financial regulation in which entities considered to possess sophisticated experience, knowledge, and expertise to properly assess risks for themselves are exempt from meeting certain regulatory requirements.[71]

[5.73] It must also be accepted that a regulatory framework in which the courts have a certification role will, as a matter of necessity, increase the level of activity in, and consequently the burden on, the courts. There is a risk that a regulatory framework that depends on court processes and court certification for its effectiveness may simply not be particularly efficient. The weight that should be attached to this particular disadvantage will, naturally, depend on the level of activity in the third-party funding sector, on the level of adherence to statutory obligations and on the willingness of funded parties to cooperate with the court in its certification obligations.

[5.74] A fourth disadvantage of this model, especially if it is applied to all instances of third-party funding, regardless of the commercial sophistication of the funded party, is that, of necessity, it will require funders and funded parties to reveal to the court (and, perhaps, to non-parties to the third-party funding agreement) the terms of a private commercial arrangement.[72] This may dissuade third-party funders from entering into agreements in Ireland, and may deter parties and prospective parties from availing of third-party funding, out of reluctance to

[71] For example, financial transactions carried out between so-called "professional clients" are exempt from some requirements contained in the European Union (Markets in Financial Instruments) Regulations 2017 (SI No 375 of 2017). See regulation 51(1) and schedule 2 of the European Union (Markets in Financial Instruments) Regulations 2017 (SI No 375 of 2017).

[72] Having to disclose the terms of a third-party funding agreement is a different and more onerous requirement to having to disclose the fact of being in receipt of third-party funding. Disclosure obligations requiring disclosure of the fact of third-party funding are discussed in Chapter 6 (Six Specific Issues in a Regulatory Framework for Third-Party Funding).

disclose details of the state of their finances and of their private dealings with other entities.

[5.75] Finally, there is the disadvantage that court certification will be an uncertain process as far as funders are concerned and is very likely to discourage funders coming into the Irish market as the costs and uncertainty of an individual certification process will undermine their model.

[5.76] A variation on court certification could require such certification in some types of case only, with criteria plus negative clearance for other cases. Thus, the funded party in a case such as a commercial law situation, could choose the security of a certificate to show compliance with criteria and the respondent party could challenge a non-certified case by reference to criteria. This could lessen the burden on the courts.

4. Regulatory Model 4: Existing Regulator

[5.77] A fourth regulatory model open to the State is for an existing regulator to regulate the third-party funding sector. Such regulation could involve a licensing regime (ie, a requirement for funders to obtain a licence or other form of authorisation before being permitted to engage in litigation funding in this jurisdiction). At the time of writing, no other jurisdiction has opted to regulate the sector in this way.[73] A system of prior authorisation is, however, contemplated by the Draft Directive proposed by the European Parliament. In principle, however, regulation by an existing regulator (or by a *sui generis* regulator) does not necessarily involve a licensing or pre-authorisation regime. The regulatory regime could involve the development and/or enforcement of regulatory standards (which standards could be developed by the regulator or by some other body, such as by way of primary legislation enacted by the Oireachtas or by Ministerial regulations made pursuant to statue or some combination of these) without any requirement to obtain a licence.

[5.78] Three existing Irish regulators which might take on the role of regulator in this model, either separately or collectively, are the Central Bank, the Legal Services Regulatory Authority and the Competition and Consumer Protection Commission. Each of these bodies has clear insight into and regulatory

[73] Although it was considered in England and Wales, no existing regulator could be identified as either willing or able to take on the role of regulator: Ells, "Third-Party Funding: Self-Regulation in the UK" (2019) 5(2) New Vistas 14 at page 17.

experience of certain aspects of the issues that third-party funding gives rise to. The Central Bank licenses and supervises sophisticated financial products and entities in accordance with an intricate set of legislative requirements. The Legal Services Regulatory Authority has the statutory objectives of protecting and promoting the public interest, supporting the proper and effective administration of justice and protecting and promoting the interests of consumers relating to the provision of legal services, all of which clearly intersect with the policy goals of regulating the third-party funding sector.[74] The Competition and Consumer Protection Commission is statutorily tasked with promoting and protecting the interests and welfare of consumers.[75]

[5.79] Expanding the remit of existing regulators, rather than creating a new regulator, could be said to meet the wider goal of agency rationalisation. Since 2011, a programme of agency rationalisation, focused on merging agencies and regulatory bodies into other agencies and bodies, has aimed to reduce the number of regulators in the State.[76] A distinct advantage of this model is that regulatory resources are "recycled" or "repurposed", instead of an entirely new framework or agency being created.

[5.80] In this section, we discuss the viability of using existing regulators as the *primary* regulators of third-party funders and third-party funding. However, the Commission notes that, even if this fourth model is not the framework selected to regulate third-party funding, some existing regulators will nonetheless automatically exercise some regulatory oversight over certain aspects of the entities that are third-party *funders*, and, perhaps to a lesser extent, over the activity of third-party *funding*. For example, the Central Bank already regulates aspects of third-party funding, because both before-the-event insurance (BTE insurance) and after-the-event insurance (ATE insurance) come within Class 17, legal expenses insurance, in Directive 2009/138/EC, the 2009 EU "Solvency II" Directive on Insurance and Reinsurance. As a result, Regulations 204-210 of the European Union (Insurance and Reinsurance) Regulations 2015 (SI No 485 of 2015), which implemented the requirements in Solvency II, regulate such

[74] Though only in performing its functions of the regulation of the provision of legal services under the Legal Services Regulation Act 2015, not in a general sense: section 13(4) of the Legal Services Regulation Act 2015.

[75] Section 10(1)(b) of the Competition and Consumer Protection Act 2014.

[76] Boyle, *Review of National Non-Commercial State Agencies in Ireland: 2010-2015* (Institute of Public Administration 2016) at page 9.

policies. Equally, where third-party funders are structured as listed companies that fund disputes by means of operations involving financial instruments, the Central Bank would exercise a regulatory role over such funders through its jurisdiction under the European Union (Markets in Financial Instruments) Regulations 2017.[77] Where third-party funders employ legal practitioners as in-house counsel, those practitioners would be subject to the supervisory authority of the Legal Services Regulatory Authority. The Legal Services Regulatory Authority would also have a role in regulating the provision of services by legal practitioners who participate, on behalf of clients, in funded disputes. To some extent, then, whichever regulatory model is selected, it will incorporate at least some aspects of this fourth model.

[5.81] The three means by which an existing regulator might take on the task of administering a regulatory regime for third-party funding are:

(1) by accommodating third-party funding within an *existing* regulatory regime already administered by an existing single regulator, for example, regulating third-party funders as insurers;

(2) by creating a *sui generis* regulatory regime for third-party funding to be administered by an existing single regulator;

(3) by coordinating between multiple existing regulators, with each regulator regulating according to its own remit.

(a) Using an Existing Regulatory Regime

[5.82] This option would see third-party funding and third-party funders regulated by an existing regulator applying an existing regime to the third-party funding sector. For example, third-party funding might be regulated as an insurance product, and third-party funders as insurance providers.[78] As already noted, before-the-event insurance and after-the-event insurance, come within Class 17,

[77] Through the second Markets in Financial Instruments Directive ("MiFID II"): Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, given effect to in Irish law by the European Union (Markets in Financial Instruments) Regulations 2017 (SI No 375 of 2017).

[78] On the similarities between third-party funding and insurance products, see Silver, "Litigation Funding versus Liability Insurance: What is the Difference?" (2014) 63 De Paul Law Review 617; Lindgren, "Some Current Practical Issues in Class Action Litigation" (2009) 32 University of New South Wales Law Journal 900 at page 905.

legal expenses insurance, in Directive 2009/138/EC, the 2009 EU "Solvency II" Directive on Insurance and Reinsurance. As a result, Regulations 204–210 of the European Union (Insurance and Reinsurance) Regulations 2015, which implemented the requirements in Solvency II, contain detailed requirements concerning how legal expenses insurance is to be managed by insurance undertakings, including that it must be provided as an add-on (not included within a general non-life insurance policy), the right of the insured to choose their lawyer under the legal expenses contract, and other management arrangements, including to avoid conflicts of interest where legal expenses insurance cover may overlap with a general non-life insurance policy.

[5.83] Thus, at least two forms of litigation funding, which might previously have been regarded as amounting to maintenance or champerty, already come within the existing general insurance regulatory framework of the Central Bank.

(i) Advantages of Using an Existing Regulatory Regime

[5.84] If a suitable existing regulatory regime as already administered by an existing regulator can be identified, this regulatory model offers clear benefits. First, the regulatory costs would be fairly minimal: the framework, comprised of Irish and potentially EU-derived legislation, case law, and regulatory practices, would already exist. This leads onto a second advantage: the fact that the regime already exists and has a history of operations in the State would provide a firm and predictable regulatory base from which regulators, funders and parties can operate. Third, the regulatory expertise and experience of the regulator's personnel are retained.[79] Fourth, using an existing regulatory framework would allow the sector to begin operating in Ireland far sooner than were a bespoke regulatory regime to be designed, as there would be no set-up time required.

(ii) Disadvantages of Using an Existing Regulatory Regime

[5.85] The chief problem with using an existing regulator is that, while many regulators will have experience and expertise in particular aspects of the third-party funding sector (as set out above, the Central Bank has experience in regulating BTE insurance and ATE insurance, and in assessing the solvency of financial entities, while the Legal Services Regulatory Authority, through its supervision of legal practitioners, has regulatory remit over parts of the administration of

[79] Though this expertise and experience will likely not be of specific relevance to third-party funding, if third-party funding shares characteristics with the regulated sector, it may be transferable.

justice in Ireland), no single regulator has a comprehensive regulatory remit over *all* of the areas affected by third-party funding. Second, even were a suitable regulator to be identified, the unique policy concerns raised by the third-party funding sector are unlikely to easily lend themselves to being accommodated within a single existing scheme. This is the case even though third-party funding might share many characteristics with another, already regulated, sector, such as insurance. The regulatory regime for insurance, for example, has not been specifically designed to take account of the administration of justice issues that third-party funding raises. That regime, or indeed any other existing regulatory regime, cannot therefore be capable of guarding against those dangers.

(b) Creating a *Sui Generis* Regulatory Regime

[5.86] If third-party funding and funders cannot be accommodated within a regulatory regime already operated by an existing regulator, a second option is to create a new *sui generis* regulatory regime under the authority of an existing single regulator. This regime would be developed specifically to regulate third-party funders and funding in this jurisdiction.

[5.87] This regulatory option—*a sui generis* regime administered by an existing regulator— was suggested by the Australian Law Reform Commission in their Discussion Paper on Class Action Proceedings and Third-Party Litigation Funders.[80] The Australian Law Reform Commission identified the Australian Securities and Investments Commission ("the ASIC"), Australia's equivalent to the Central Bank, as the appropriate regulator to administer this new regime. The Discussion Paper proposed the development of:

> a unique litigation funding licence that would sit outside the [Australian Financial Services Licence, Australia's financial licensing framework] regime but impose comparable obligations. A unique litigation funding licence would enable a bespoke regulatory regime to be designed and implemented to address the risk associated with litigation funding.[81]

[80] Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (DP 85 2018).

[81] Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (DP 85 2018) at page 44.

[5.88] After publication of this suggestion, and before publication of the final report, the ASIC made a submission to the Australian Law Reform Commission opposing this bespoke licensing system. The ASIC argued that the courts were "better placed to regulate [third-party] funders, through court rules and procedure, oversight and security for costs".[82] Based on the comparatively small number of active participants in the third-party funding market, the ASIC also stated that "given ASIC's risk-based approach to regulation, it seems unlikely that such an area would be a main focus of our work even if we had jurisdiction for it".[83]

[5.89] It should be noted that the ASIC's submission to the Australian Law Reform Commission was made in a context where the limitations of Australia's financial services licensing regime in providing meaningful consumer protection had come under recent and severe public criticism.[84] It is possible that this contributed, in part at least, to the ASIC's reluctance to have their regulatory remit increased. In its final publication, the Australian Law Reform Commission ultimately recommended enhancing court oversight over third-party funding agreements in class or collective actions, rather than regulating third-party funding via the ASIC.[85]

(i) Advantages of a Sui Generis *Regime Administered by an Existing Regulator*

[5.90] A *sui generis* regulatory regime administered by an existing regulator would be designed specifically to account for third-party funding's unique policy concerns. It therefore avoids the problem (of being unable to address third-party funding's specific policy concerns) that arises with repurposing an existing regime. The use of an existing regulator serves the goal of agency rationalisation and takes advantage of the regulatory experience of personnel in the existing regulator.

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[82] ASIC, *Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Submission by the Australian Securities and Investments Commission* (ASIC 2018) at page 16.

[83] *Ibid*. at page 18.

[84] *Ibid*. at page 162.

[85] *Ibid*.

(ii) Disadvantages of a Sui Generis *Regime Administered by an Existing Regulator*

[5.91] This option does not avoid the obvious difficulty that arises in identifying a suitable regulator. A further and major disadvantage is that existing regulators may not have the capacity or willingness to take on increased regulatory responsibilities, particularly where the sector to be regulated is as novel and complex as third-party funding. Although this option offers the distinct benefit of retaining the regulatory experience and expertise of the existing regulator, if that experience and expertise is not relevant to the unique challenges of regulating third-party funders, it might not be as valuable an asset as it initially appears.

(c) Regulatory Cooperation Between Existing Regulators

[5.92] A third option by which existing regulators might regulate third-party funding is for different regulators to regulate the sector according to their specific expertise only. In theory, the different regulators could coordinate with each other in regulating the sector via a cooperation agreement.[86] For example, the Central Bank could regulate for funder solvency. At the same time, the Competition and Consumer Protection Commission could regulate to ensure that the users of third-party funding services are protected.

[5.93] This option would require striking a delicate balance between the various different responsible bodies, who would have to participate in an extremely complex bespoke and novel regime involving interlinking and potentially conflicting responsibilities and priorities. The administrative and legal complexities inherent in creating and operating a bespoke regulatory regime overseen by multiple different bodies simultaneously are significant but not insurmountable.

[5.94] A further—and potentially significant—disadvantage of this regulatory model (and it applies equally to regulatory model 5) is that it would not appear possible to vest in any regulator—whether existing or specially established—the functions which, under the Representative Actions Directive, Member States are required to give to the courts hearing actions under the Directive (under the Act, the High Court). Regulatory functions in respect of other classes of action could

[86] The Competition and Consumer Protection Commission has the power to enter into cooperation agreements with prescribed bodies under section 19 of the Competition and Consumer Protection Act 2014.

be vested in an administrative regulator. It might also be possible to give such a body a regulatory role in respect of the funding of representative actions, provided that such a role did not trench upon the role of the High Court. On any view, however, such a division of responsibility would appear to be undesirable.

5. Regulatory Model 5: *Sui Generis* Regime Administered by a New Regulator

[5.95] The most specific regulatory model featured in this Consultation Paper is a *sui generis* regulatory regime administered by a new regulator that has been specifically established to regulate third-party funding and funders in Ireland. At the time of writing, were Ireland to opt for this regulatory framework to regulate third-party funding, it would be internationally unique, though it is noted that the European Parliament's proposed Directive to regulate third-party funding does contemplate this model.[87]

[5.96] Ireland is no stranger to establishing new regulators. The Commission's 2018 Report on Regulatory Powers and Corporate Offences noted that:

> [a]ccording to one estimate, the number of regulatory agencies operating in Ireland between 1990 and 2010 grew exponentially, doubling from approximately 40 to 80. If the net is widened to include those bodies the functions of which are not necessarily principally regulatory … the number increases to approximately 100. Another report, adopting a relatively strict definition, concluded that there were some 213 regulatory bodies operating in Ireland (including local authorities).[88]

[5.97] Notwithstanding the above-mentioned goal of agency rationalisation, however, new regulatory agencies continue to be created.[89] For example, the Gambling

[87] European Parliament Resolution of 13 September 2022 with recommendations to the Commission on responsible private funding of litigation (2020/2130 (INL)).

[88] Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018) at page 41.

[89] Boyle, *Review of National Non-Commercial State Agencies in Ireland: 2010-2015* (Institute of Public Administration 2016) at page 11.

Regulatory Authority of Ireland, a new regulator to be established under the Gambling Regulation Bill 2022, is expected to become operational in 2023.[90]

(a) *Sui Generis* Regime Administered by a New Regulator as a Regulatory Framework for Third-Party Funding in Ireland

(i) Advantages of a Sui Generis Regime Administered by a New Regulator

[5.98] The advantages of this regulatory framework are obvious. It appears quite likely that this regime would be capable of meeting the policy goals of regulating the third-party funding sector generally. There can be little doubt that a tightly controlled regime, particularly one administered by a specialist regulator whose only role is to monitor and control the third-party funding sector, would guard against poor practices which potentially place consumers or the administration of justice at risk. As a result of its specific focus, it would likely attract considerable public and political confidence.

[5.99] Concerns surrounding the expertise of regulators are also well addressed by this model. With a specialist regulator, personnel can be recruited in light of the specific requirements for specialised knowledge of and expertise in sophisticated financial products, consumer protection and the administration of justice in Ireland. If necessary, such recruitment could draw on the talent pools in other jurisdictions with greater experience of third-party funding,

(ii) Disadvantages of a Sui Generis Regime Administered by a New Regulator

[5.100] There is, however, no certainty that a specialist regulatory agency administering a bespoke regime would actually be a proportionate means of achieving the policy goals of regulating the third-party funding sector. It does not follow from the mere fact that a sector *can* be tightly regulated that it *must* be tightly regulated. Operating a highly intrusive regulatory regime such as this might prove so onerous that it has the effect of deterring third-party funders from operating in Ireland. This may lead to the third-party funding sector not

[90] At the time of writing, the Gambling Regulation Bill 2022 had passed Second Stage in Dáil Éireann and was awaiting Dáil Éireann Committee Stage. The 2022 Bill proposes to establish the Gambling Regulatory Authority of Ireland (Údarás Rialála Cearrbhachais na hÉireann).

developing in Ireland to any meaningful extent, or to new funders being unable to enter the Irish market.

[5.101] An additional issue with a specialist regulator stems from the simple lack of certainty as to the level of activity in a legalised third-party funding market in Ireland. There is no way of knowing how many, if any, third-party funders would seek to participate in that market. As a result, there is no way of knowing whether the considerable financial and administrative resources required to develop and implement a regulatory regime and to set up an entirely new regulator would be justified, at least initially. It further goes without saying that establishing a new regulator, and thus increasing the number of regulators operating in the State, would run very obviously contrary to the goal of agency rationalisation.

6. Final Remark

[5.102] In summary possible models of regulation give rise to hard decisions. It is not a matter of choosing a model from those listed above. An effective framework is likely to combine court certification in some cases (especially class actions) and in other cases certification or approval by a non-court statutory body, while at the same time there may be specific provisions set out in primary or secondary legislation about how crucial elements of the funding relationship are dealt with in a funding agreement.

7. Questions

Q. 5.1 The Commission considers that there are two policy goals of regulating a third-party funding system:

(1) to reduce, as far as is reasonable and possible, the financial and other risks that third-party funding and funders might create for those who use third-party funding services and, indeed, for non-funded parties to funded disputes;

(2) to protect and enhance the proper and efficient administration of justice in Ireland.

Do you agree that these are the policies that should be considered for regulation in the event third-party funding becomes legal?

Q. 5.2 The Commission discussed five regulatory models: voluntary self-regulation; enforced self-regulation; regulation based on court certification; a regulatory regime administered by an existing regulator; or a *sui generis* regulatory regime administered by a new regulator.

(1) Which proposed regulatory framework would best mitigate the potential dangers associated with the legalisation of third-party funding?

(2) Should the regulatory regime involve a requirement for a licence or other form of pre-authorisation?

(3) How stringent or flexible should the regulatory regime be?

Q. 5.3 Do you think that the voluntary self-regulation model provides too much autonomy to the emerging field/industry of third-party litigation funding? If so, why?

Q. 5.4 Does the absence of a third-party funding industry in Ireland make self-regulation models, like the voluntary and enforced models discussed, difficult to implement? Does the novelty of such an industry require more institutional support? If so, what does that institutional support look like?

Q. 5.5 Does the third model discussed, court certification, make sense in practice? Is it an efficient use of judicial resources? Are courts best equipped to regulate this industry, especially when the issue presented is not a judicial one? Do you consider that the courts are not the most practical or efficient regulatory regime?

Q. 5.6 If the fourth regulatory model (existing regulator) is adopted, what support, either separately or collectively, would the existing regulators (the Central Bank, the Legal Services Regulatory Authority, and the Competition and Consumer Protection Commission) need to effectively regulate and monitor the emerging industry? If one regulator is chosen, which one appears best equipped to take on the role of the industry regulator?

Q. 5.7 The Commission identified three means by which an existing regulator under the fourth model might administer a regulatory regime: using an existing regulatory regime; creating a new regulatory regime; or coordinating between multiple existing regulators, each regulating according to their own remit.

(1) Which means seemed the most efficient and practical, and why?

(2) If the first means were to be adopted (using an existing regulatory regime), how feasible is it that an existing regime can adequately

respond to the needs of an emerging third-party litigation funding sector?

(3) If the second means were to be adopted (creating a new regulatory regime), would it be too inefficient to keep up with an emerging field? Is it a waste of administrative resources to create a new regime?

(4) If the third means were to be adopted (regulatory cooperation between existing regulators), would cooperation among the existing regulators be effective and efficient? Would there be any barriers or roadblocks to cooperation among the regulators?

Q. 5.8 The last regulatory model discussed requires a new regime administered by a new regulator. Would the creation of an entirely new regulator and new regulatory regime be justified for a market that has yet to be established? Would a specific regime dissuade development of a third-party funding sector, to a meaningful extent, in Ireland?

Q. 5.9 Is there one model or a blend of models discussed above that would be the best solution to regulating and monitoring an emerging third-party funding sector?

Q. 5.10 Does third-party funding require regulation or the same stringency of regulation across all types of legal proceedings? Do certain types of case require more regulation and control than others? How should these cases be identified and regulated?

CHAPTER 6
SIX SPECIFIC ISSUES IN A REGULATORY FRAMEWORK FOR THIRD-PARTY FUNDING

Table of Contents

[6.1] In this chapter, the Commission focuses on six priority issues with which policymakers would have to engage as part of a regulatory framework for third-party funding if it was decided to proceed to legalisation. These are:

(1) prohibiting the provision of third-party funding in certain disputes,

(2) making disclosure in funded disputes,

(3) managing and mitigating excessive funder control of funded disputes,

(4) mitigating the consequences of funder insolvency during the lifetime of the funded dispute,

(5) managing the withdrawal of third-party funders from third-party funding agreements, and

(6) under-compensation.

[6.2] These six issues are priority matters for consideration but are unlikely to be the only complexities arising in legalising and regulating third-party funding. The Commission anticipates that, following publication of this Consultation Paper, submissions to it may identify other specific issues.

[6.3] As indicated in the chapter 5, the solution to these issues may invoke a combination of regulatory approaches or schemes. there may be express statutory restrictions addressing any of these issues, there may be regulatory regimes of general application or there may be individualised requirements. Indeed, there might well be a combination as there might be some absolute requirements in legislation, some left to general regulation and some possibly to be dealt with on an individualised basis. The regulatory concerns addressed in this chapter, and any other regulatory concerns besides, might be dealt with in any or all of these ways.

1. Prohibiting Third-Party Funding in Certain Dispute Types

[6.4] In Chapter 3 (Policy Considerations of Legalising Third-Party Funding), the Commission observed that, were third-party funding to be legalised, it would be open to the legislature to prohibit third-party funding in certain types of dispute, perhaps those dispute types engaging particular policy concerns or involving particularly vulnerable parties.

[6.5] The Commission remains conscious that, if any prohibitions on third-party funding in certain dispute types are drafted too widely, this may undermine the access to justice objective in legalising such funding. It also notes that most of the dispute types in which third-party funding might be considered to be inappropriate are low-profit vehicles, and do not typically involve any significant damages outcome. In reality, few profit-motivated funders will have much interest in investing in these sensitive dispute types.

[6.6] This Consultation Paper does not express any views on the dispute types in which third-party funding might be prohibited. However, the below sections identify contentious and sensitive dispute types. These sections may prove useful guides in the discussion that follows publication of this Consultation Paper.

(a) Personal Injuries Proceedings

[6.7] Consultees may wish to consider whether third-party funding, if legalised, should be permitted in personal injuries proceedings. Such proceedings are thought to give rise to heightened policy concerns for at least two reasons. The first is that general damages for past and future pain and suffering in a personal injuries claim are inherently individual to the injured person. There might be a societal reaction to seeing such damages as an investment opportunity. The second is that the value and extent of personal injuries claims have an economic impact on society. Thus, recent years have seen a concerted effort to promote alternatives to personal injuries litigation and to moderate the level of damages paid out to personal injuries claimants. This effort includes the adoption of the Judicial Council Personal Injuries Guidelines, which have set new and reduced guideline amounts for personal injuries compensation awards.[1] When the Personal Injuries Resolution Board Act 2022 is brought into force by commencement order, the Personal Injuries Assessment Board (to be renamed the Personal Injuries

[1] Pursuant to section 7 of the Judicial Council Act 2019.

Resolution Board) will be empowered to provide mediation as a means of resolving personal injuries claims and reducing the volume of personal injuries litigation. Further, solicitors have long been prohibited from advertising in such a way as to expressly or impliedly solicit, encourage or offer inducements to litigants to make a claim for damages for personal injuries.[2] Barristers have been expressly prohibited from advertising in such a way since 2020.[3]

[6.8] While it is again emphasised that the Commission does not take a position on this in this Consultation Paper, a prohibition on the provision of third-party funding in personal injuries proceedings would not be inconsistent with policy stances taken elsewhere.

[6.9] A prohibition could be achieved by providing that the statutory exception to tortious and criminal liability for maintenance and champerty does not apply to actions falling within the definition of "civil action" as contained in section 4 of the Personal Injuries Assessment Board Act 2003 ("the Act of 2003") and to which section 3 of the Act of 2003 applies. This would preserve the current prohibition on maintenance and champerty in respect of personal injuries actions and actions involving personal injuries and damage to property where the injuries and damage have been caused by the same wrong.[4]

[6.10] However, a blanket prohibition of funding in personal injuries actions might have the effect of discouraging access to justice in claims which have a personal injuries aspect, or must for legal reasons be presented as a personal injuries claim. Mass claims for newly recognised areas of claim, such as historic abuse, will often have to be presented as personal injuries claims, but could benefit from access to funding. A blanket ban might exclude a wide area of justice where proponents of funding see funding as of real value to society.

[6.11] A prohibition on third-party funding in personal injuries actions would not necessarily prohibit third-party funding in medical negligence proceedings—that is, actions arising out of the provision of a health service to a person, the carrying

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[2] See, for example, regulation 4(a)(viii) of the Solicitors Acts 1954 to 2002 (Advertising) Regulations 2002 (SI No 518 of 2002), most recently re-enacted in regulation 4(a)(vi) of the Solicitors (Advertising) Regulations 2019 (SI No 229 of 2019).

[3] Regulation 4(a)(vi) of the Legal Services Regulation Act 2015 (Advertising) Regulations 2020 (SI No 644 of 2020).

[4] "Personal injuries" under the Personal Injuries Assessment Board Act 2003 are defined by reference to section 2 of the Civil Liability Act 1961, that is, they include "any disease and any impairment of a person's physical or mental condition".

out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person.[5] Medical negligence proceedings in Ireland have not been subject to the same or similar restrictive regulatory responses as personal injuries actions. The policy concerns behind personal injuries actions therefore do not appear to arise to the same extent in medical negligence proceedings.[6]

(b) Proceedings Concerning Adoption, Guardianship, Custody of or Access to Children

[6.12] Lawmakers may consider it inappropriate for third-party funders to invest in proceedings concerning adoption, guardianship, custody of or access to children. In any event, these matters typically do not involve any damages outcome and it is unclear how professional funders could obtain a return on investment. Nonetheless, lawmakers may wish to take a "belt-and-braces" approach, out of concern that funders might, in the future, develop a funding product that can derive a return on investment from these cases.

[6.13] Such a belt-and-braces approach was taken by section 58B of the English and Welsh Courts and Legal Services Act 1990, inserted by section 28 of the Access to Justice Act 1999. This section, which has never been commenced, would have prohibited third-party funding in specific childcare proceedings in England and Wales, including matters under the Adoption Act 1976, matters under Parts 1, 2 and 4 of the Children Act 1989 and matters "under the inherent jurisdiction of the England and Wales High Court in relation to children".[7] The logic for this prohibition, which applied equally in the case of conditional fee agreements, appears to have been that "work concerning children is manifestly unsuitable to [such] agreements … [T]here are no winners or losers in such cases, except perhaps the children themselves".[8]

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[5] This is because section 3(d) of the Act of 2003 provides that it does not apply to medical negligence proceedings.

[6] The Commission notes that the actions around symphysiotomy surgical practices were brought as medical negligence proceedings: see *Kearney v McQuillan* [2010] IESC 20, [2010] 3 IR 576; *Farrell v Ryan* [2016] IECA 281.

[7] Parts 1, 2 and 4 of the English and Welsh Children Act 1989 refer to, inter alia, care orders for children, access to children, special guardianship orders, family assistance orders and the acquisition of parental responsibility.

[8] Hansard, Lord Meston, vol. 595, col. 1184, 14 December 1998, HL.

[6.14] Third-party funding appears to be unsuitable for proceedings about caring for children, both for the reason outlined above—it is difficult to identify clear "winners"—and because of the vulnerability and desperation of many parties to such disputes. The recent increased focus on alternative dispute resolution and a desire to depart from the traditional adversarial model in these proceedings, coupled with the constitutional requirement for the best interests of the child to be the "paramount consideration", arguably risk being undermined by the involvement of a third party whose interest may not be aligned with the best interests of the child and is not centred on the need to secure a workable outcome for all parties.[9] These considerations appear to cover the following dispute types:

(1) matters under the Guardianship of Infants Act 1964,

(2) matters under the Child Care Acts 1991 to 2022,

(3) matters under the Child Abduction and Enforcement of Custody Orders Act 1991,

(4) matters under the Convention on the Civil Aspects of International Abduction,

(5) matters under Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000,

(6) matters under the Adoption Act 2010,

(7) matters under the Child and Family Relationships Act 2015.

(c) Matrimonial and Other Family Law Proceedings

[6.15] A related question is whether third-party funding should not be permitted in divorce and separation proceedings. As with proceedings about childcare, it can be difficult to identify clear winners and losers in these matters, and the provision of funding to make it easier for parties to litigate may not be coherent with the

[9] Department of Justice, *Family Justice Strategy 2022-2025* (Department of Justice 2022): see in particular the reference on page 10 to the need to build a family justice system that is "less concerned with winning and losing but more focussed on achieving working solutions that families can live with".

drive to encourage greater take-up of restorative, non-adversarial dispute resolution in this area.[10]

[6.16] As against this, third-party funding has the potential to be of value in matrimonial proceedings. One of the reasons in favour of legalised third-party funding is the potentially equalising effect between parties.[11] It is not uncommon for one party in separation or divorce proceedings to have vastly fewer financial resources than the other, particularly where one spouse works during the marriage while the other spouse remains at home. The working spouse will have control of the finances and will be in a better position to avail of the services of qualified legal practitioners. The non-working spouse may find themselves unable to access or trace assets to which they should be entitled. A South African court has observed that:

> [w]here there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse—usually the wife—will be forced to settle for less than that to which she is legally entitled simply because she cannot afford to go to trial. On the other hand, the husband, who controls the purse strings, is well able to deploy financial resources in the service of his cause.[12]

[6.17] The uncommenced section 58B of the English and Welsh Courts and Legal Services Act 1990 included divorce and separation proceedings on the list of disputes in which third-party funding could not be provided in England and Wales. Since the enactment of section 58B in 1999, however, England and Wales have taken significant steps away from this position.[13] The England and Wales High Court (Francis J) in *Weisz v Weisz* observed that the provision of third-party funding in divorce proceedings was "a necessary and invaluable service in the right case".[14] Moor J in *Young v Young* considered that nothing should be said "that makes it even more difficult for [family law] litigants to obtain [third-party]

[10] Department of Justice, *Family Justice Strategy 2022-2025* (Department of Justice 2022).

[11] See further, Chapter 3 (Policy Considerations of Legalising Third-Party Funding).

[12] *AF v MF* [2019] ZAWHC 111 at para 41.

[13] See, for example, *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), [2021] 1 FLR 1.

[14] [2019] EWHC 3101 (Fam), [2020] 2 FLR 95.

funding in the future, particularly given that there is no legal aid available in this area anymore".[15]

2. Disclosure in Funded Disputes

[6.18] A second priority area for consideration is the question of disclosure in funded disputes. In the Commission's view, the question of disclosure in fact consists of six questions, addressed below:

(1) Should the funded party be required to disclose the fact that they are in receipt of third-party funding, and the identity of the funder, to the decision-maker?

(2) Should the funded party be required to disclose the fact that they are in receipt of third-party funding, and the identity of the funder, to the non-funded/opposing party?

(3) Should the funded party be required to disclose the third-party funding agreement to the decision-maker?

(4) Should the funded party be required to disclose the third-party funding agreement to the non-funded/opposing party?

(5) If disclosure is mandatory, when should this disclosure be made?

(6) If third-party funding is terminated, should the funded party be required to disclose this to the non-funded/opposing party?

(a) Requiring Disclosure of the Fact of Funding and the Funder's Identity

[6.19] The Commission considers that there is merit to requiring disclosure by the funded party of the fact that they are funded and the identity of the funder to the non-funded/opposing party. Disclosure in funded disputes:

(1) allows the opposing party to know the true nature of its adversary,[16]

[15] [2013] EWHC 3637 (Fam), [2014] 2 FLR 786.

[16] See this argument made in *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357 at para 5.8, [2011] 3 IR 654 at para 24; *Merchantbridge & Co Ltd v Safron Advisors Ltd* [2011] EWHC 1524 (Comm).

(2) allows the opposing party the opportunity to consider whether to make an application for security for costs,[17]

(3) allows the opposing party to decide whether to apply for non-party costs order, and[18]

(4) helps to prevent conflicts of interest.[19]

[6.20] These benefits can only be realised when such disclosure is mandatory. There are at least seven advantages to mandating some form of disclosure in funded disputes. In addition to the benefits of disclosure generally, the Commission considers that mandatory disclosure:

(1) cultivates an overarching culture of transparency and openness in the third-party funding sector and in dispute resolution generally,

(2) reduces potential instances of, and opportunities for, conflicting interests,

(3) is crucial to the proper functioning of a regulatory framework over the third-party funding industry—indeed, it might be said that, without some form of mandatory disclosure, a regulatory system for third-party funding is close to pointless, as there would be no clear way of determining which entities are supposed to be conforming with the requirements of that regulatory system,

(4) will reduce the volume of satellite litigation that otherwise might be directed at enforcing that same disclosure, thus enhancing efficiency in the dispute resolution process,[20]

[17] Okubote, *Transparency and Third-Party Funding* (International Bar Association 2020).

[18] *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357 at para 5.8, [2011] 3 IR 654 at para 24.

[19] Okubote, (note 17).

[20] Such satellite litigation demanding disclosure of a third-party funder's identity occurred in *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357, [2011] 3 IR 654. See also *The RBS Rights Issue Litigation* [2017] EWHC 463 (Ch), [2017] 1 WLR 3539; *Re Hellas Telecommunications (Luxembourg)* [2017] EWHC 3465 (Ch)*; Merchantbridge & Co Ltd v Safron Advisors Ltd* [2011] EWHC 1524 (Comm).

(5) places Ireland in line with a number of other jurisdictions, thus reducing the prospect of forum-shopping,[21]

(6) will reduce the potential for commercial secrecy or national security issues—bad faith actors will be unable to secretly fund proceedings with a view to undermining the business or state interests of the opposing party or to obtaining sensitive information or documentation

(7) complies with the obligation in Article 10(3) of Directive (EU) 2020/1828 ("the Representative Actions Directive") for qualified entities in funded representative actions to disclose to the court a list of the sources of funds used to support the action.

(b) Requiring Disclosure of the Third-Party Funding Agreement

[6.21] Should a third-party funding agreement also be disclosed to the opposing party? The High Court (Donnelly J) in *Persona Digital Telephony v Minister for Public Enterprise* ("*Persona*") grappled with this precise question. The Court noted in particular the decision in *Thema International Fund v HSBC Institutional Trust Services (Ireland) Ltd*,[22] in which the Court (Clarke J) was:

> clear that the giving of detailed information about funding to an adversary was bound to convey a litigation advantage and that ordering such disclosure would need to be justified to a sufficient extent as to make it proportionate to confer the obvious litigation advantage that would arise in favour of the opponent by ordering such disclosure.[23]

[6.22] Reviewing case law from an array of jurisdictions, including Australia, Canada, New Zealand, Jersey and Bermuda, the High Court in *Persona* observed that there

[21] For example, Article 98T of Hong Kong's Arbitration Ordinance requires the funded party to give written notice of the existence of a funding agreement and the name of the funder. In Singapore, rule 49A of the Legal Profession (Professional Conduct) Rules 2015 requires the legal practitioner representing a funded party to disclose both the fact of a third-party funding agreement and the identity and address of the third-party funder. We also note the Canada-EU Comprehensive Economic and Trade Agreement, the EU-Vietnam Investment Protection Agreement and the Transatlantic Trade and Investment Partnership, all of which contain mandatory disclosure provisions. The most recent iteration of the Rules and Regulations of the International Centre for Settlement of Investment Disputes, a major international arbitration institution, also mandates the disclosure of third-party funding in arbitral proceedings.

[22] [2011] IEHC 357, [2011] 3 IR 654.

[23] [2015] IEHC 457 at para 64, [2015] 1 IR 124 at para 64.

was no dominant common law position in respect of disclosure of third-party funding agreements to the opposing party. Ultimately, however, the Court considered that the novelty of third-party funding in this jurisdiction justified disclosure of the (partially redacted) agreement to the opposing party and to the court.[24]

[6.23] The obvious difficulty with disclosing a third-party funding agreement to an opposing party is its clear potential to bestow an advantage on that opposing party. Any third-party funding agreement is likely to contain details as to the circumstances in which the funder will terminate funding and how much the funder has agreed to invest. An opposing party with this information could force the funded dispute to continue to a point at which the funder reaches its investment limit or terminates the agreement. Third-party funding agreements could also contain sensitive commercial information in respect of the funder and/or the funded party. This sensitive information could give rise to legitimate disputes about full disclosure.

[6.24] One of the reasons supporting mandatory disclosure of the fact of third-party funding and of the funder's identity is that it reduces the instances of inevitable, time-consuming and costly applications from non-funded/opposing parties seeking such disclosure. This logic applies equally to the disclosure of third-party funding agreements and was one of the reasons that the New Zealand Law Commission recommended that the third-party funding agreement should be disclosed to the non-funded/opposing party as well as to the court. The New Zealand Law Commission also considered that disclosure of the third-party funding agreement supported its "access to justice objective for permitting and regulating [third-party] funding, which includes access to justice for [non-funded/opposing parties]".[25]

[6.25] The Representative Actions Directive does not, in terms, require disclosure of any third party funding agreement to the court or to the defendant. But it is apparent that, where an agreement is in place, significant levels of disclosure are required if the court's capacity to exercise its functions is not to be frustrated. The fact that a funding agreement is in place clearly must be disclosed as must the source of the funds. It is also difficult to see how a court could properly assess whether the

[24] [2015] IEHC 457 at para 67, [2015] 1 IR 124 at para 64.

[25] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147) at page 391.

funding would divert the representative action away from "the protection of the collective interests of consumers" without having some understanding of the terms of funding, including the funders' share in the event of success.

[6.26] The European Parliament's proposed Directive is more prescriptive in its terms, Article 17(1) would require the automatic disclosure of an unredacted copy of any third party funding agreement to the relevant court or administrative body and Article 17(3) would require Member States to empower the relevant court or administrative authority to direct the disclosure of such agreement to the defendant, subject to the possibility of redaction of any information that might confer a tactical advantage on the defendant.

(c) Timing of Mandatory Disclosure

[6.27] Jurisdictions such as Hong Kong and Singapore, both of which mandate disclosure (though only of the fact of third-party funding and of the funder's identity), set different time periods within which that disclosure must be made. In Hong Kong, if the third-party funding agreement is entered into before the commencement of funded proceedings, disclosure is required on or before the commencement of those proceedings.[26] Singapore requires disclosure of pre-commencement agreements only on the date of commencement of the funded proceedings. Where the third-party funding agreement is entered into only after the commencement of proceedings, Hong Kong requires disclosure to be made within 15 days of the agreement being made,[27] while Singapore requires it "as soon as practicable".[28]

(d) Disclosure of the End of Third-Party Funding Agreements

[6.28] Terminating a third-party funding agreement seems capable of exerting as much effect on the administration of justice and on court processes as entering into such an agreement. In particular, termination of a third-party funding agreement may affect the validity of security for costs provided by the third-party funder to the non-funded party. For this reason, the Commission is open to mandating disclosure of the termination of a third-party funding agreement.[29]

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[26] Section 98U(2)(a) of Hong Kong's Arbitration Ordinance.

[27] Section 98U(2)(b) of Hong Kong's Arbitration Ordinance.

[28] Rule 49A of the Legal Profession (Professional Conduct) Rules 2015.

[29] As in, for example, Hong Kong: see section 98Y of the Arbitration Ordinance.

[6.29] It is arguable that mandating the disclosure of a terminated contract is likely to reveal to the funded party's opponent that the funded party's financial situation has altered. Some tactical advantage might adhere to that opponent as a result.

3. Excessive Funder Control in Funded Proceedings

[6.30] When it is acting as a funder, rather than as a party to litigation in its own right, the most appropriate role of third-party funders is to provide finance to the actual party to the proceedings. This is not to say that third-party funders cannot or should not responsibly monitor the legal proceedings that they fund. The New Zealand Law Commission has acknowledged that third-party funders have a legitimate commercial interest in protecting their investment, and are unlikely to be motivated to provide funding if they are prevented from exercising any measure of control over the funded proceedings.[30]

[6.31] What this Commission considers to be a potential danger in legalised third-party funding is not a third-party funder responsibly monitoring and reviewing their investment and developing a case strategy in collaboration with the funded party. Rather, it is the effective provision of instructions by the funder to a funded party's legal representatives, and/or the control by the funder of settlement terms and conditions contrary to the funded party's wishes and interests. On this, the Commission shares the sentiments of the New Zealand Supreme Court, which considered in *PricewaterhouseCoopers v Walker* that the control of funded proceedings by a third-party funder becomes excessive and objectionable when it goes "beyond that which is reasonable to protect money actually advanced or committed to by the [third-party] funder".[31]

[6.32] The issue of excessive exercise of control by third parties over legal proceedings is not unique to third-party funding. For example, insurance providers may also control legal disputes on behalf of insured respondents, through the long-established concept of subrogation in insurance contract law, in which the insurer "steps into the shoes" as a substitute for the insured and concerns are rarely raised over this.[32]

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[30] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 428.

[31] [2017] NZSC 151 at para 122, [2018] 1 NZLR 735 at para 122.

[32] As noted by Molot, "A Market in Litigation Risk" (2009) 76 University of Chicago Law Review 367 at page 380.

[6.33] Both funder and funded party share a core objective: winning the funded case. This is the way that the funded party secures (at least partial) compensation, and the funder receives a return on its investment in the litigation. However, the parties diverge in their incentives to manage or minimise cost: since the funded party is financially protected both if the litigation is won and if it is lost, they have no financial incentive to streamline their approach to how the litigation is conducted. Conversely, since the funder is (by definition) paying for the litigation, they have an incentive to reduce the expense involved as this will maximise the overall profit from the venture.

[6.34] The primary situation, therefore, in which disagreements about who should be in control of the litigation will, therefore, be around cost and risk mitigation. Both parties want to win, but only the funder wants to win as cheaply as possible. Several of the topics previously discussed in this chapter—lawyers' ethical obligations, controls on vexatious litigation etc—would help to prevent the funded party from leveraging its cost-protected position to the disadvantage of the funder. This corrects for the principal moral hazard that arises. Since many of the entities that will be involved in third-party funding arrangements will be sophisticated commercial operators, leaving the finer details of how the litigation is conducted (or how disputes between funder and funded party are resolved) to the contract between the funder and funded party may be appropriate, at least so far as these financial risks are concerned.

[6.35] There are certain non-financial (or, at least, not directly financial) costs that may also be relevant. Reputational issues may arise that affect the way in which a funded party might wish to see a case run (for example, there may be potential evidence that might be embarrassing but that would be likely to emerge if certain issues are raised). The only focus of the funder here would be whether the evidence is damaging to the case, not whether it is damaging to the funded party in a way that does not imperil the litigation. There may also be instances of potential evidence that is embarrassing, but not directly detrimental to the prospects of the case being successful. These factors may also, in some instances, lead to differences of opinion on the terms on which proceedings might be settled. It is worth noting that similar issues can often arise on the defence side where the defendant's case is taken over by an insurer. They can, although less frequently, arise where there is permitted funding of a plaintiff in place (such as by a creditor of an insolvent company). They are managed in those types of situations so it might also be hoped that they could also be managed in the event that third-party funding is permitted.

[6.36] On the whole, the Commission considers that the danger of potential excessive control by funders over funded proceedings can be mitigated to some extent by existing bulwarks in the Irish legal system. These existing bulwarks include:

(1) the existing ethical and fiduciary duties on legal practitioners to act in their clients' best interests.
(2) that the professional bodies should consider amending their ethical frameworks to better reflect the novelties and complexities presented by the tripartite client-lawyer-funder relationship in funded disputes,
(3) that lawmakers could consider whether section 50 of the Legal Services Regulation Act 2015 should be amended to clarify that a legal practitioner who illicitly cedes control of a legal dispute to a third-party funder commits misconduct.

(a) Duties of Legal Practitioners to Act in their Clients' Best Interests and on their Clients' Instructions

[6.37] The duties of legal practitioners to act in their clients' best interests, if properly adhered to, could also act as a protection against third-party funders' exercising excessive control over funded disputes where that control is detrimental to the interests of the legal practitioners' clients. Solicitors[33] and barristers[34] owe fiduciary and ethical duties to act in the best interests of their clients, and their clients alone.

[6.38] Excessive funder control could also be managed by the duties of legal practitioners to act on their clients' instructions. In the case of solicitors, their authority to act is derived from their client. If someone other than a solicitor's client (for example, a third-party funder) attempts to provide instructions to a solicitor in a particular matter affecting their client, the current ethical guidelines for solicitors would require the solicitor to confirm these instructions directly with the client.[35] In the case of barristers, where the proceedings are contentious, they

[33] Law Society of Ireland, *Solicitor's Guide to Professional Conduct* 4th ed (Law Society 2022) at page 61.

[34] Paragraph 3.3 of the draft Code of Practice for Practising Barristers; rule 3.1 of the Code of Conduct of the Bar of Ireland.

[35] Law Society of Ireland, *Solicitor's Guide to Professional Conduct* 4th ed (Law Society 2022) at page 23.

must act according to the instructions of their instructing solicitor,[36] though they would appear to be under an ethical duty to act in the best interests of their client, rather than of the instructing solicitor.[37]

[6.39] Under the current ethical framework for legal practitioners in Ireland, then, should a third-party funder attempt to provide instructions to a legal practitioner acting for a client without that client's consent, and should a legal practitioner then act according to those instructions without confirming them either with the client (in the case of solicitors) or instructing solicitor (in the case of barristers), this would represent a breach of the ethical duties of legal practitioners. The Commission considers that proper and full adherence by legal practitioners to their existing ethical and fiduciary obligations, as set out above, should go a considerable way to reducing the risk that third-party funders could gain illicit control of proceedings to the detriment of the funded party and client of the legal practitioner.

(b) Amending the Ethical and Professional Frameworks for Legal Practitioners

[6.40] It must be accepted that the ethical obligations of legal practitioners have been designed for the traditional bipartite client–lawyer relationship, and not for a tripartite client–lawyer–funder relationship.[38] If third-party funding is legalised, the professional bodies (the Bar Council and the Law Society) and the Legal Services Regulatory Authority could consider amending their ethical guidelines and codes of practice to specifically account for the involvement of the third-party funder in funded disputes.[39]

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[36] Paragraph 3.11 of the draft Code of Practice for Practising Barristers; rule 3.4 of the Code of Conduct of the Bar of Ireland.

[37] *McFarland-Cruickshanks v England Kerr Hands Solicitors* [2021] EWHC 525 (Comm), [2021] 4 WLR 57.

[38] See, for example, the concerns outlined in "Third-party funder ethics needs 'careful navigation'" Law Society Gazette (24 November 2020). See also Fischer, "Litigation Financing: A Real or Phantom Menace to Lawyer Professional Responsibility" (2014) 27 Georgetown Journal of Legal Ethics 191.

[39] One interesting issue arises as regards legal practitioners' duties towards third-party funders. In *Hall v Saunders Law Ltd* [2020] EWHC 404 (Comm), the Court held that no common law or fiduciary duty arises as between funders and legal practitioners. Further, as the third-party funding agreement did not impose any direct obligations on the practitioner in respect of the funder, there were no contractual duties owed to the funder either.

[6.41] Singapore is a useful example of how professional legal bodies have amended their ethical and statutory frameworks to accommodate the complexities created by third-party funders. Following third-party funding's limited legalisation in that jurisdiction,[40] the Law Society of Singapore published a thorough and detailed Guidance Note for legal practitioners who advise or act for clients who obtain funding from third parties.[41] This contains sensible guidance that:

> [r]egardless of the structure of the funding agreement, you owe your ethical duties to the party that retains you. You should ensure that the terms of the funding agreement are consistent with your ethical duties and with the terms of your retainer.[42]

(c) Ceding Control as Misconduct

[6.42] As seen elsewhere, ethical standards are, essentially, non-justiciable.[43] While proper and full adherence by legal practitioners to ethical duties would be optimal, non-binding standards may not be sufficient to ensure best practice in all funded cases.

[6.43] It may be necessary to expand section 50 of the Legal Services Regulation Act 2015 to specifically provide that legal practitioners who allow funders to gain control of legal proceedings without the consent of their client engage in misconduct within the meaning of that section. This would subject legal practitioners to the complaints and disciplinary mechanisms contained in part 6 of the Legal Services Regulations Act 2015.

4. Funder Insolvency During the Lifetime of the Funding Agreement

[6.44] If a third-party funder invests in a dispute, but becomes insolvent or otherwise unable to meets its liabilities to the funded party or (in the case of an adverse costs order, for example) to the non-funded party, this creates clear difficulties,

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[40] Through section 5A of the Civil Law Act 1999 and the Civil Law (Third-Party Funding) Regulations 2017.

[41] General Council of the Law Society of Singapore, *Guidance Note 10.1.1: Third-Party Funding* (Law Society of Singapore).

[42] Clause 38 of the General Council of the Law Society of Singapore, *Guidance Note 10.1.1: Third-Party Funding* (Law Society of Singapore).

[43] *McMullen v Clancy (No. 2)* [2005] IESC 10, [2005] 2 IR 445.

with funded and non-funded parties left exposed to steep and unexpected costs. Below, the Commission sets out how these difficulties might be countered.

(a) Respondent-Side Concerns

[6.45] If a funder has insufficient financial resources to meet any adverse costs order made against a funded claimant (or, if a non-party costs order is made, against the third-party funder themselves), the respondent who faces that funded claimant will lose out financially, even if they successfully defend the legal dispute. This engages the same "blackmail settlement" problem identified in Chapter 3 (Policy Considerations of Legalising Third-Party Funding).

[6.46] To address the problem of funder insolvency from the perspective of non-funded respondents to funded disputes, the Australian Law Reform Commission recommended the creation of a statutory presumption that third-party funders will provide security for costs.[44] This statutory presumption would see the onus in security for costs applications shift from the respondent to the funded claimant. Rather than the respondent having to satisfy the court that the claimant should provide security, as would be the case in security for costs applications in non-funded proceedings, the funded claimant would instead have to rebut the presumption that security should be provided.

[6.47] The Australian Law Reform Commission considered a presumption to be preferable to creating a mandatory requirement for the funded claimant to provide security for costs in all funded disputes, both because it allowed the court to retain its discretion and because the provision of security for costs might not be appropriate in all matters, for example, public interest cases.[45] The New Zealand Law Commission followed the Australian Law Reform Commission's recommendation to create a rebuttable presumption in favour of security for costs in funded disputes in its own report on third-party funding in representative actions, though specified that the court should also be empowered in a funded dispute to make orders directly against the third-party funder for the provision of security for costs.[46]

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[44] Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (ALRC Report 134 2018) at page 164.

[45] *Ibid*.

[46] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 403.

[6.48] A specific security for costs regime based on a presumption of security from funded claimants is a pragmatic means of minimising the potential negative impact of funder insolvency on non-funded parties. The following elements of what this rebuttable presumption might look like are offered for consideration:

(1) Unlike the current security for costs regime applicable to individual non-corporate claimants under the various Rules of Court, a funder's residence or presence out of the jurisdiction should not be a prerequisite for a non-funded respondent to receive security for their costs.[47]
(2) If non-funded respondents are required to prove that they have a defence on the merits before being entitled to security for costs, as with some existing security for costs regimens, this would potentially undermine the policy behind the presumption.

(b) Funded Claimant-Side Concerns

[6.49] If a third-party funder goes insolvent either during the course of a funded dispute or after its conclusion but before having fully met its financial obligations, the once-funded claimant risks having to pay their legal costs themselves, and, potentially, having to personally meet the costs of any adverse costs order.[48] Although all claimants—funded and non-funded—expose themselves to this financial risk when they participate in legal disputes, it is arguable that, where a claimant funded by a third party is particularly vulnerable, some degree of scrutiny of the third-party funder's solvency before the funder can be permitted to fund a dispute warrants consideration.

[6.50] The Commission has identified three potential mechanisms which may help claimants to ensure that their funder is solvent or, if a funder does become insolvent, serve to mitigate their financial loss. These mechanisms are:

(1) imposing a minimum capital adequacy requirement on third-party funders,

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[47] Order 29 of the Rules of the Superior Courts 1986, Order 16 of the Circuit Court Rules 2001 and Order 45A of the District Court Rules 1997.

[48] For example, in the Australian funded representative action *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119, the insolvency of the third-party funder's parent company led to the proceedings settling, with the Commonwealth agreeing that each party would bear their own costs, thus preventing the applicants from having to pay millions of dollars in adverse costs. This appears to be one of the few instances of a third-party funder failing to meet its financial obligations in the relatively long (by international standards) history of legalised third-party funding in Australia.

(2) prohibiting legal practitioners from recovering their costs in the case of funder insolvency, or
(3) requiring the funder to provide a statutory declaration from an auditor or accountant as to the funder's solvency.

(i) Minimum Capital Adequacy Requirements

[6.51] Imposing a minimum capital adequacy requirement on third-party funders would require funders to retain or to have access to a set minimum amount of money. Minimum capital adequacy requirements are not unknown to the third-party funding sector. Singapore, which has a statute-based regulatory regime for third-party funding, requires third-party funders to have a share capital or managed assets of not less than S$5 million or the equivalent amount in foreign currency.[49] The voluntary, industry-led Association of Litigation Funders of England and Wales ("the ALF") requires its members to maintain access to a minimum of £5 million of capital or such other amount as stipulated by the ALF.[50]

[6.52] The obvious attraction of a minimum capital adequacy requirement for managing funder insolvency is its simplicity. It is clear what is required of funders, and it is clear when funders are in breach of that requirement. What is not clear, however, is how compliance with that capital adequacy requirement would be monitored and enforced outside an intrusive licensing regime administered by a regulator.

[6.53] It is also not clear what the minimum capital amount should be. A capital adequacy requirement that is sufficient in one funded dispute may not be adequate for another. Pitching the minimum capital amount too high may prevent new funders from entering the market, while pitching it too low may mean that funded parties (and, indeed, non-funded parties) are inadequately protected against funder insolvency.

(ii) Prohibition on Recovery of Costs by Legal Practitioners

[6.54] As a means of minimising concerns around funder insolvency from the perspective of funded representative claimants, the Australian Law Reform Commission[51] and the New Zealand Law Commission recommended prohibiting

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[49] Regulation 4(1)(b) of the Singapore Civil Law (Third-Party Funding) Regulations 2017.

[50] Clause 9.4.2 of the Code of Conduct for Litigation Funders.

[51] Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (ALRC Report 134 2018) at page 163.

legal practitioners from recovering their fees and disbursements from funded clients where the third-party funder becomes insolvent or otherwise fails to pay the relevant legal costs.[52] Essentially, this mechanism sees legal practitioners in funded disputes assume the risk of unpaid fees by funders.

[6.55] Although such a prohibition may not absolve the funded claimant from having to meet all financial liability in the case of funder insolvency (they may still have to pay the legal fees and disbursements of the non-funded party if required to meet the terms of an adverse costs order), it would meaningfully reduce that liability. If the third-party funder has already provided security for costs, this would also serve to reduce the funded claimant's liability, with the result that the excess owed by the funded claimant may not be entirely unmanageable.

[6.56] The Australian Law Reform Commission was of the view that it was appropriate for legal practitioners to assume this risk, because solicitors, in particular, were "repeat users of [third-party] funding services" and understood "the intricacies of … litigation and its costs".[53] The New Zealand Law Commission further considered that the prohibition on recovery of costs would encourage best practice among legal practitioners, incentivising lawyers to ensure that the funder pays fees up front or in regular instalments, and encouraging them to work only with reputable, competent and financially stable funding providers.[54]

(iii) Statutory Declaration from Auditor or Accountant as to Funder's Solvency

[6.57] A third option is for the funder to provide a statutory declaration from an auditor or accountant that that funder is sufficiently solvent as a preliminary requirement to the dispute going ahead. While this is less time-consuming than requiring the court to assess solvency, it nonetheless increases costs for funders.

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[52] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 425.

[53] Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (ALRC Report 134 2018) at page 164. This may not be as convincing a reason in Ireland, where there is significantly less familiarity with and expertise in third-party funding.

[54] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 425.

5. Funder Withdrawal from the Funding Agreement

[6.58] As is the case with any contract, one or both of the parties to a third-party funding agreement may, for perfectly legitimate reasons, seek to terminate that agreement before it reaches its natural conclusion. For example, the funded party may seek to terminate the agreement because they disagree with the funder's approach to the provision of finance, and want to be free to enter into an agreement with a different funder. The third-party funder may seek to terminate because they have uncovered unfavourable facts not disclosed to them during the pre-agreement due diligence process, or because unanticipated changes in the legal or political context have reduced the funded action's viability as an investment prospect.

[6.59] Although the reasons for a funder's withdrawal from a third-party funding agreement may be legitimate, withdrawal can create problems, particularly where the funded party is unable to avail of another source of funding. Withdrawal may leave the funded party with an unexpected exposure to steep legal costs that, had the funder never agreed to invest, would possibly never have arisen.

[6.60] Where funded parties are well-resourced and commercially-experienced, it might be argued that they could, or at least should, be capable of envisaging and accounting for this risk without any need for regulatory involvement. Where funded parties are more vulnerable, however, the prospect of a sudden termination of the third-party funding agreement by the third-party funder may warrant some degree of regulatory response.

[6.61] This section discusses two possible mechanisms for managing the risk posed by funder withdrawal from third-party funding agreements. These are:

(1) imposing a prohibition on unilateral withdrawal by the third-party funder from the funded agreement, or
(2) creating minimum contractual terms as to when a third-party funder may terminate a third-party funding agreement.

(a) Prohibition on Unilateral Withdrawal

[6.62] One particularly stringent approach to managing the consequences of unilateral withdrawal by third-party funders from third-party funding agreements is that proposed by the European Parliament. To protect funded parties from an unanticipated exposure to costs in the case of withdrawal, the European Parliament's draft 2022 Directive proposes simply to prevent third-party funders

from unilaterally withdrawing funding from any funding agreement unless there is an order from a court or administrative authority.[55]

[6.63] Prohibiting funders from withdrawing from third-party funding agreements is an effective way to protect users of third-party funding services from suffering adverse consequences. The focus in prohibiting unilateral withdrawal by funders from funding agreements is on remedying a perceived financial power asymmetry between the (stronger) third-party funder and the (weaker) funded party. Perhaps the clearest instance of where this financial power imbalance might arise, and where a prohibition on unilateral withdrawal could be said to serve the interests both of the administration of justice and of the funded party, is where a funder unreasonably threatens to withdraw funding if the funded party does not agree to a settlement.

[6.64] The drawbacks of a unilateral prohibition on withdrawing from third-party funding agreements are, however, considerable. While a financial power asymmetry likely exists in many instances of funding, it seems to the Commission that third-party funding will also often involve an information asymmetry, with the funded party likely holding the balance of power in this respect. Were a party to receive funding from a third-party funder based on a particular set of facts provided by that party, and were it later revealed that those facts were untrue or incomplete, a prohibition on unilateral withdrawal may result in the funder being locked into an unfavourable contract through no fault of its own.

[6.65] Another obvious drawback of a prohibition on unilateral withdrawal by the funder is that, without the freedom to back out of a bad bargain, third-party funders are unlikely to invest in many legal proceedings. One writer observes that:

> [f]rom a funder's point of view, withdrawing from funding is generally seen as an *extrema ratio* remedy for those situations where risks and losses could be high, and would be part of their right not to pursue an unviable commercial opportunity … Should

[55] Article 15 of the Draft Directive on Litigation Funding in the Annex to the European Parliament Resolution of 13 September 2022 with recommendations to the Commission on responsible private funding of litigation (2020/2130 (INL)).

> [withdrawing from an agreement] not be possible, a funder would fund far fewer cases.[56]

[6.66] In those jurisdictions that already permit third-party funding, none has so far opted for the blunt and severe instrument of prohibiting third-party funders from withdrawing from third-party funding agreements. Rather, regulatory frameworks have instead sought to strike a more reasonable balance between consumer protection and contractual freedom.

(b) Statutory Restrictions on the Circumstances of Withdrawal

[6.67] Another possible mechanism to minimise the negative consequences of funder withdrawal from third-party funding agreements is to provide for reasonable restrictions on the circumstances in which third-party funders may terminate third-party funding agreements. This approach essentially requires funders to include or exclude particular contractual terms as to withdrawal in third-party funding agreements.

[6.68] This is the approach taken in Hong Kong, where the soft-law regulatory regime sets minimum contractual terms for third-party funding agreements.[57] Clauses 2.13 and 2.14 of Hong Kong's Code of Practice for Third-Party Funding of Arbitration provides that third-party funding agreements must not contain a "discretionary right" for third-party funders to terminate third-party funding agreements, and that the third-party funder may only withdraw from the third-party funding agreement where the funder:

(1) reasonably ceases to be satisfied about the merits of the arbitration or mediation;

(2) reasonably believes that there has been a material adverse change of prospects to the funded party's success in the arbitration;

(3) reasonably believes that there has been a material adverse change of prospects to the funded party's being able to reach any agreement with the other party to the mediation to resolve in whole or in part the dispute in question; or

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[56] Solas, *Third-Party Funding: Law, Economics and Policy* (Cambridge University Press 2019) at page 281.

[57] The Association of Litigation Funders of England and Wales also takes this approach: see clause 11 of the Code of Conduct for Litigation Funders.

(4) reasonably believes that the funded party has committed a material breach of the funding agreement.[58]

[6.69] Regulating withdrawal in this way has its benefits. This mechanism is simple, clear and predictable for all parties to a third-party funding agreement. The fact that other jurisdictions, such as Hong Kong and England and Wales, have adopted this approach means that there are solid precedents for Irish policymakers to work from. A disadvantage, though, is that, however loosely they are drafted, statutory restrictions on withdrawal are unlikely to be able to encompass every scenario in which it might be considered objectively reasonable for a third-party funder to terminate a third-party funding agreement. In many parts of the world, not least Ireland, third-party funding remains a novel and developing product. It is quite possible that new and unforeseen circumstances will arise where a third-party funder ought reasonably be permitted to terminate the agreement, but is prevented from doing so by statutory restrictions on withdrawal. At the other extreme, as the New Zealand Law Commission has observed, setting statutory restrictions on when third-party funders may terminate an agreement may encourage a "race to the bottom", whereby third-party funders never agree to restrictions on their powers to terminate an agreement other than the bare statutory minimum.[59]

6. Under-Compensation

[6.70] In Chapter 3 (Policy Considerations of Legalising Third-Party Funding), the Commission considered that, where funded claimants were vulnerable, under-compensation in funded disputes risked being problematic. However, the Commission also considered that it was possible to develop mechanisms to reduce instances of severe and exploitative under-recovery by vulnerable claimants. This section discusses those potential mechanisms, including:

(1) imposing a cap on third-party funder returns, or

[58] See also clauses 11.2 and 12 of the ALF Code.

[59] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 447.

The Commission notes that Article 14 of the European Parliament's proposed Directive would impose significant restrictions on a funder's entitlement to withdraw from a funding agreement.

(2) permitting the costs and uplift on third-party funding as part of normal costs recovery.

(a) Cap on Return

[6.71] One way to address the under-compensation issue is to cap the amount that third-party funders are permitted to take from a funded party's compensation by way of their return on investment.

[6.72] A cap on a funder's return appears simple and predictable and provides maximum certainty for funded claimants and for funders. However, there is no clarity on the form that a cap should take, or how it should be calculated. Possible forms suggested by submitters to the New Zealand Law Commission included benchmarking against equity returns, the creation of a multiplier and multiplicand tabled system, the creation of a sliding scale to cap fees, capping fees by reference to multiples of the amount invested and legislating for a maximum percentage return (for example, third-party funders only being permitted to take 25% of a funded party's compensation).[60] Research for the European Parliament contemplated, but did not necessarily advocate for, a 30% cap on the rate of return for all litigation funders in the EU.[61]

[6.73] A cap could deter third-party funders from financing cases that raise novel, innovative issues and arguments. Funders require financial returns based on the level of risk in their investment. An inflexible mechanism which, in many cases, might reduce that return, means that third-party funders would become risk-averse, funding only the most certain of disputes.

(b) Permit Funding Costs and Returns as Part of Normal Costs Recovery

[6.74] A second approach to the under-compensation issue could be to permit the recovery of third-party funders' investment as part of normal legal costs recovery, so that unsuccessful parties pay full compensation and normal costs to the successful funded party, plus the funder's uplift. In this way, the funded party

[60] New Zealand Law Commission, *Report on Class Actions and Litigation Funding* (Report 147 2022) at page 442.

[61] Saulnier et al, *Responsible Private Funding of Litigation: European Added Value Assessment* (European Parliamentary Research Service 2021) at page 22.

receives full compensation and the funder receives the full return on their investment.

[6.75] This approach is not entirely unprecedented, at least not in international commercial arbitration conducted under the United Kingdom's Arbitration Act 1996. In the 2016 English Commercial Court decision of *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* ("*Essar Oilfields*"), the Court (HHJ Waksman QC) upheld the arbitrator's decision that the successful claimant, Norscot, could recover the costs of their third-party funding agreement, which had been used to finance the cost of English-seated arbitration, from the respondent.[62] This recovery included the initial capital deployed by the third-party funder and the funder's return on that investment. The decision in *Essar Oilfields* was highly fact-specific, and was heavily influenced by the "exploitative manner" in which the respondent had acted towards the claimant before and during the dispute. In the view of the court, this had left the claimant with no alternative but to seek third-party funding.[63]

[6.76] While permitting funding costs to be recovered as part of normal costs recovery solves the under-compensation issue—the funded party is fully compensated for any wrong suffered—it creates many others. The Commission is concerned that knowledge that non-funded parties will pay the return, rather than the funded party with whom they are contracting, may encourage third-party funders to seek very large uplifts on their investment. This would reduce competition in the third-party funding marketplace. Second, it raises the prospect of a new "blackmail settlement" problem in funded disputes: if non-funded parties who face funded parties may be forced to pay not just normal legal costs, but also the amount of the funder's investment and the relevant uplift, it will always be more pragmatic to settle funded disputes, even where there is a reasonably good prospect of defending the action.

[6.77] Third, this mechanism risks creating a "free rider" problem in third-party funding. By way of illustration, a party and third-party funder with an existing relationship could conspire to collaborate, with the funder providing investment even where the party is adequately-resourced and does not actually require additional finance. The funded party and third-party funder would be safe in the knowledge

[62] [2016] EWHC 2361 (Comm).

[63] See also *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm).

that, if the action is successful, the non-funded party will pay compensation to the funded party, that the non-funded party will pay the legal fees and disbursements of the legal practitioner and that the non-funded party will pay the funder's return. The funded party, who is fully compensated, consequently does not lose out by the involvement of a third-party funder, and has no incentive not to invite a friend or colleague to act as a "third-party funder". The "third-party funder" provides no real funding service and takes on no real risk in exchange for their return on their investment.

7. Questions

Q. 6.1 How narrow, or broad, should the class of dispute covered by potential third-party funding be? Beyond the three kinds of dispute discussed, are there any other types of dispute that should be excluded from third-party funding?

Q. 6.2 Are there any policy reasons, in support or opposition, as to why third-party funding should be permitted in personal injury actions (access to justice, meritless or vexatious litigation, etc)?

Q. 6.3 Do you agree that a funded party must disclose that it is funded and reveal the identity of the funder to the opposing party?

Q. 6.4 Is a blanket rule requiring disclosure appropriate?

Q. 6.5 Do you think a disclosure requirement would stunt the development of a third-party funding sector?

Q. 6.6 How much control should funders have over the litigation proceedings?

Q. 6.7 Do you agree with the concern that, if not checked, the funder might accept settlement terms and conditions contrary to the interests of the funded party to the dispute? Do you consider that the avenues for checks on excessive control discussed in the Consultation Paper are sufficient to prevent a funder from dominating the litigation proceedings for their own interests?

Q. 6.8 Are there any potential interventions not discussed in this Consultation Paper to support a party whose funder becomes insolvent during the proceedings?

Q. 6.9 Of the three options to ensure funder solvency discussed in this Paper, which appears best suited to ensure the funder has sufficient capital and funds to sponsor a party to litigation? Do you agree that a minimum capital adequacy requirement is inadvisable?

Q. 6.10 Is it fair to require legal practitioners to assume the risk of funder insolvency? Or would it dissuade some legal practitioners from accepting cases funded by non-parties to the dispute?

Q. 6.11 Would a combination of some form of the potential solutions discussed in this Paper be adequate to ensure funder solvency throughout the dispute?

Q. 6.12 Do you agree that a total prohibition on unilateral withdrawal is too strict? Should there be some instances in which a funder may withdraw?

Q. 6.13 Does setting statutory restrictions on when withdrawal is permitted strike a balance between always permitting withdrawal and total prohibition of withdrawal?

Q. 6.14 The Commission identified two potential mechanisms to combat under-compensation: (1) a cap on the funder's return, and (2) permitting funding costs and returns as part of normal costs recovery.

(1) If a cap on return was adopted, how should that cap be calculated? Should it be a fixed number, or a percentage of the damages awarded or settlement award? Or should the cap be calculated in an entirely different way? If so, how?

(2) Would the second approach, requiring the unsuccessful party to pay full compensation and normal costs to successful party plus the funder's uplift, be unfair to the unsuccessful party? Does it give the funded party a windfall?

Q. 6.15 Are there other aspects of third-party funding arrangements that give rise to particular concerns and which, in your view, would require specific regulation? If so, how should such aspects be regulated and by whom?

CHAPTER 7
ASSIGNMENT OF CAUSES OF ACTION

Table of Contents

[7.1] As outlined in Chapter 1 (Third-Party Funding: Context and Overview of the Sector), the Commission first considered the topic of third-party funding in its 2016 Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice.[1] Significant legal and policy developments in the area of third-party funding since publication of the Issues Paper led the Commission to publish this Consultation Paper.[2]

[7.2] The period following the publication of the Issues Paper also saw developments in the closely-connected area of law concerning the assignment of causes of action to third parties. In particular, the decision of the Supreme Court in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*[3] ("*SPV Osus*") reaffirmed the traditional view on the validity of assignment in Irish law—that is, unless the assignment is of a nature permitted by statute or at common law, it is invalid. In particular, the Court in *SPV Osus* held that assignment of a "bare" cause of action, that is, a cause of action not legitimately connected to other commercial activity, is void. In doing so, the Supreme Court followed long-established case law that implies that assignment, while not strictly speaking maintenance, is so closely connected to it that it should be considered on the same basis and, therefore, invalid as being contrary to public policy.

[7.3] In *SPV Osus*, Clarke J (in a judgment in which he concurred with the principal judgment of O'Donnell J) suggested that, while the matters that apply in

[1] Law Reform Commission, *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10-2016).

[2] See discussion in chapter 1 above.

[3] [2018] IESC 44, [2019] 1 IR 1.

considering reform of the law on third-party funding were not necessarily identical to those that might apply in relation to a potential change in the law concerning the validity of the assignment of causes of action, nonetheless there were significant similarities between the two areas. Both because of these legal developments and because of conceptual similarities between third-party funding and assignment, the Commission considers it appropriate to consider reforms to the law in respect of the assignment of causes of action in this Paper.

1. Explaining Assignment

[7.4] A "cause of action" is a right to litigate. For example, a person ("Person A") who enters into a contract with another person ("Person B"), has a cause of action against Person B if Person B does not fulfil the agreed obligation, in that Person A has a right to litigate to seek compensation from Person B.

[7.5] A cause of action is assigned when the person or entity transfers their right to litigate to another person or entity, perhaps in exchange for money. In the example outlined above, if the contract between Person A and B concerned a mortgage, Person A might, for example, assign their right to litigate concerning any default on the mortgage against Person B to a company that specialises in purchasing such debt-and-mortgage-related contract claims.[4] The entity transferring the action is known as the "assignor". The entity to whom the cause of action is transferred is the "assignee" or "purchaser". The assignee may then pursue the claim themselves as if they were the assignor (the original wronged party).

[7.6] Both third-party funding and assignment result in third parties to legal disputes becoming involved, to differing extents, in those disputes. There appear to be at least two key differences between third-party funding and the assignment of causes of action. With third-party funding, the original wronged party remains a party to the dispute, whereas, in the case of assignment, the cause of action is transferred to another person or entity to pursue in their own right. Further, with third-party funding, the funded party will normally receive at least some compensation if the dispute resolves successfully, even if the funder takes a part

[4] Such claims purchasing companies do exist. For example, the claimant in *Casehub Ltd v Wolf Cola Ltd* [2017] EWHC 1169 (Ch) was a company specialising in purchasing causes of action from consumers who believed they had been wrongfully charged by third parties.

of that compensation. With assignment, however, the financial burdens and benefits of the assigned cause of action are entirely in the hands of the assignee.

[7.7] As discussed in Chapter 6 (Six Specific Issues in a Regulatory Framework for Third-Party Funding), it would seem unlikely that any practical or realistic third-party funding agreement could avoid providing for or permitting some degree of control or oversight by the funder in the conduct of the funded dispute. Similarly, involvement by the assignee in assigned disputes will often be necessary purely from a practical point of view. For example, the evidence and materials that the assignee of a cause of action would need to present to a court to prove its case would likely be in the hands of the original claimant (the assignor). In many (if not most) cases where the assigned cause of action proceeds to trial witnesses from the original claimant will be needed.

[7.8] In respect of compensation, much as third-party funding agreements can engage several different types of possible return structure, so too can agreements to assign causes of action. There is no reason to believe that agreements to assign, giving the assignor additional payment if the assigned claim is successful, could not be put in place. The Commission also discusses this in more detail below.

2. Permitted Assignments of Causes of Action and the Relevance of Public Policy

[7.9] There are a number of situations in which a cause of action may be lawfully assigned to another person or entity. However, as noted by the Supreme Court in the *SPV Osus* case, the distinctions currently made between lawful and unlawful assignments "are sometimes excessively refined and difficult to follow".[5] The Supreme Court added that the difficulty in distinguishing between illegal assignments of actions and legal assignments of actions is compounded by the fact that, as with any question of public policy, the approach is one that has changed over time, sometimes quite significantly.

(a) Assignments Currently Permitted by Legislation, including Assigning Debts

[7.10] Giving the principal judgment for the Supreme Court in the *SPV Osus* case, O'Donnell J stated that the general starting point for determining what

[5] *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2018] IESC 44 at para 18 (O'Donnell J), [2019] 1 IR 1 at para 29.

assignments of actions are currently lawful is section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877, which provides that:

> Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this [1877] Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[7.11] As O'Donnell J also noted in the *SPV Osus* case, the Judicature Acts represented the procedural fusion of law and equity, rather than the statutory regulation for the first time of the substantive law relating to the assignment of causes of action. Prior to the Judicature Acts, equity did not permit assignments "savouring" of champerty, and neither the Supreme Court of Judicature Act 1873 nor the 1877 Act made any change in that regard. O'Donnell J added, however, that:[6]

> the very existence of s.28(6) is relevant in one respect. It illustrates the fact that there is no absolute rule against the assignment of rights of action. In some cases, such as assignment of debts, assignment is permissible, and arguably to be encouraged. There are, therefore, some permissible and legitimate assignments of a right to litigate, and other assignments which are impermissible and void. The distinctions made between the two classes are sometimes excessively refined and difficult to follow.

[7.12] Thus, the decision in the *SPV Osus* case confirmed the long-established view that the assignment of a "bare" cause of action, whether in law or equity, was void on the basis of champerty. It also confirmed that certain other assignments, such as assignment of debts, is lawful. This also led the Court to reiterate, as it had done

[6] [2018] IESC 44, at para 18 (O'Donnell J) [2019] 1 IR 1 at para 29.

in the *Persona* case (discussed above), that the area required detailed consideration with a view to possible reform.

[7.13] In addition to the general rule concerning assignment of actions in section 28(6) of the 1877 Act, the Commission notes that other legislative provisions have been enacted that permit assignment in specific instances. These include the following non-exhaustive list:

(1) section 29(1) of the Remediation of Dwellings Damaged by the Use of Defective Concrete Blocks Act 2022,

(2) sections 614 and 627 of the Companies Act 2014,

(3) section 12 of the Irish Bank Resolution Corporation Act 2013,

(4) section 45 of the Central Bank and Credit Institutions (Resolution) Act 2011,

(5) section 33 of the Credit Institutions (Stabilisation) Act 2010,

(6) section 44 of the Bankruptcy Act 1988,[7]

(7) section 50 of the Marine Insurance Act 1906,[8]

(8) section 1 of the Policies of Assurance Act 1867, and[9]

(9) section 1 of the Bills of Lading Act 1855.[10]

(b) Assignment that is Subsidiary to a Transfer of Property

[7.14] Other instances of permitted assignments have also developed in case law. One significant lawful class is where the assignment of the cause of action is incidental and subsidiary to a transfer of property.[11] Indeed, this reflects the historical origin of the word "champerty" from the Norman French "champart", that is, a portion

[7] See also *Bank of Ireland v O'Donnell* [2015] IESC 89.

[8] (6 Edw. 7) c. 41.

[9] (30 & 31 Vict.) c. 144.

[10] (18 & 19 Vict.) c. 111.

[11] *Williams v Protheroe* (1829) 3 Y & J 129; *Dawson v Great Northern and City Railway* [1905] 1 KB 260; *Performing Rights Society Ltd v Thompson* (1918) 34 TLR 351.

("part") of the produce of a field ("champ") that was due to a feudal lord from land held by a tenant.

[7.15] In *Ellis v Torrington*, the claimant took an assignment of the benefit of certain covenants to repair contained in an expired underlease, having already purchased the fee simple of the property from another person.[12] The transfer of property was superior to the assignment of the causes of action, so was deemed to be valid.

[7.16] In the Supreme Court in *SPV Osus*, O'Donnell J, delivering the principal judgment for the Court, confirmed the existence in Irish law of the principle that "a simple agreement to assign a right of action to sue will normally be void … but will be upheld if it is part (although not a necessary part) of a larger transaction … to which the cause of action related".[13]

(c) Genuine Commercial Interest in the Assigned Cause of Action

[7.17] Where the assignee has a genuine commercial interest in the assigned cause of action and seeks to enforce it for their own benefit, the assignment can be valid. This was the view of the UK House of Lords in *Trendtex Trading Corporation v Credit Suisse*.[14] With such a genuine commercial interest, the assignment is not invalid purely because the assignee may derive a profit from the cause of action.[15]

[7.18] In *SPV Osus*, O'Donnell J confirmed that the UK House of Lords' decision in *Trendtex* reflected the law on assignment in Ireland.

3. Prohibited Assignments of Causes of Action

[7.19] Certain types of assignment, or the assignment of specific causes of action, are currently prohibited. When the Commission speaks about a potential liberalisation of the law on assigning causes of action, it is in respect of these prohibited areas. Two of these prohibited categories—"bare" causes of action and "personal" causes of action—are discussed below.

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[12] [1920] 1 KB 399, 36 TLR 82.

[13] [2018] IESC 44 at paras 34 and 39 (O'Donnell J), [2019] 1 IR 1 at paras 46 and 51.

[14] [1982] AC 679, [1981] 3 All ER 520.

[15] *Brownton Ltd v Edward Moore Imbucon Ltd* [1985] 3 All ER 499.

(a) "Bare" Causes of Action

[7.20] In *Simpson v Norfolk & Norwich University Hospital NHS Trust* a "bare" cause of action was described as "a right to litigate unsupported by an interest of a kind sufficient to justify the assignee's pursuit of proceedings for his own benefit".[16] Where a purported assignment of a cause of action is not incidental or subsidiary to a superior property right or where the assignee has no genuine commercial interest in the assigned cause of action, this is referred to as a "bare" cause of action. Unless they are otherwise permitted by statute, assignments of bare causes of action are, broadly speaking, considered to "savour of" (constitute) maintenance and champerty and are therefore unlawful.

(b) "Personal" Causes of Action

[7.21] Where the cause of action is personal to the wronged party, it is not capable of being validly assigned.[17] When determining whether a cause of action is personal, the "critical question … is whether the identity of the person to whom the obligation is owed is an essential aspect of it".[18] The courts of England and Wales have interpreted this prohibition narrowly. Perhaps surprisingly, the prohibition does not necessarily always act to prohibit the assignment of what might be considered the classic "personal" cause of action—personal injuries actions.[19] However, it is not so surprising given how common subrogation is in personal injury actions, including road traffic, employer liability and public liability claims, which allows the insurer to "step into the shoes" of the insured.

4. Policy Considerations Affecting Reform of the Law on Assignment of Causes of Action

[7.22] As the decision of the Supreme Court in the *SPV Osus* case demonstrates, the conceptual and policy issues concerning third-party funding and assignment of actions overlap in many respects.

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[16] [2011] EWCA Civ 1149 at para 15, [2012] QB 640.

[17] *Glegg v Bromley* [1912] 3 KB 474; *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149. See further, Beale, *Chitty on Contracts* 31st ed (vol 1) (Sweet & Maxwell 2012) at page 1260.

[18] *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149 at para 8.

[19] *Ibid*.

[7.23] Because of this, it is appropriate for the Commission to consider here to what extent the arguments that have been addressed in Chapter 3 of this Consultation Paper concerning reform of the law on third party funding generally also apply to assigning causes of actions.

(a) Policy Considerations Opposing Liberalisation of the Law on Assignment

(i) Commodification of Litigation

[7.24] In the principal judgment for the Supreme Court in *SPV Osus*, O'Donnell J considered that one of the reasons that policy opposed assignments of causes of action is the offensiveness of commoditising or commercialising dispute resolution.[20] Widescale assignment of causes of action for profit amounts, essentially, to a commercial market in rights to litigate.

(ii) Increase in vexatious and meritless proceedings

[7.25] In Chapter 3, the Commission discussed an argument made against third-party funding that it could lead to an increase in vexatious and meritless proceedings. The same considerations apply whether the proceedings are brought by the original claimant with the assistance of funding by a third party, or by a "purchaser" who obtains an assignment of the same cause of action.

(iii) Under-Compensation

[7.26] The Commission also identified in Chapter 3 that legalised third-party funding can give rise to under-compensation of the claimant. Clearly, the underlying commercial substance of any third-party funding agreement will provide that, by reference to some agreed formula, the funder will share in the proceeds of the proceedings if successful. Thus, the original claimant will not make full recovery but rather will have the agreed proportion of the award deducted in favour of the funder.

[7.27] The equivalent consideration in respect of the assignment of a cause of action is somewhat different, in that, at least in the simplest model, the "purchaser" will pay a fixed sum to obtain the assignment of the cause of action. Clearly, the "purchaser" will, usually, hope to make a profit on the transaction so that the sum paid for the assignment of the cause of action, should such an assignment be

valid in law, would likely be less than what might be expected to be recovered in the "purchaser's" proceedings. Thus, the claimant, by "selling" the cause of action in question, is likely to receive less then might have been achieved were the claimant to pursue the case. Thus, under-compensation is likely to arise in both cases.

(iv) Increase in Cost of Litigation

[7.28] In Chapter 3, the Commission also discussed another argument made against legalised third-party funding, that its availability could cause the cost of litigation to increase. The same consideration applies in the case of assignment.

(v) Increase in Insurance Premiums and Costs of Doing Business

[7.29] The argument put forward against third-party funding that it might increase the cost of insurance has also been discussed in Chapter 3. Similar considerations apply to assignment.

(vi) Not Appropriate for all Types of Legal Proceedings

[7.30] Another argument, also discussed in Chapter 3, against the liberalisation of the law on third-party funding, is that such funding is not appropriate for every type of legal dispute. The Commission has explained in Chapter 3 that the mere fact that third-party funding may not be appropriate for some types of dispute is not necessarily a conclusive argument against its broader legalisation, provided that appropriate regulation is in place, including the possible express exclusion of certain types of proceedings from a liberalised, but regulated, system.

[7.31] Similar considerations apply in the context of widening the classes of valid assignments of causes of action. Thus, without expressing a definitive view on the matter, the Commission considers that significant analysis may be required in determining to what extent, if at all, "bare" assignment of causes of actions would be permitted under any proposed regulatory system framework.

(vii) Undermining of the Relational Nature of Civil Wrongs

[7.32] A final argument against any further liberalisation of this area stems from the idea that civil wrongs are personal to the wronged party and the wrongdoer. That is to say that they give rise to a claim on the part of the wronged party to hold

the wrongdoer directly accountable.[21] This relationship between wronged party and wrongdoer is founded on the idea of corrective justice: because of their actions, the wrongdoer owes the wronged party a moral obligation of repair.

[7.33] However, in practice the law of tort already features several instances of severing the direct connection between the wrongdoer and wronged party. The law of subrogation in insurance, which allows the insurer to "step into the shoes" of the insured person, is one such example.[22] Insurance plays a significant part in many tort-based claims. For example, in road traffic cases both parties must, by law, be insured[23] and the insurance providers often take over both the plaintiff and defendant's case.

[7.34] The corrective justice view of tort is also not the only theory that aims to describe or justify the law of torts: some private law theorists—most notably Richard Posner—view tort law as providing economic incentives for rational actors to minimise wasteful costs they might otherwise generate;[24] in other words, the law of tort is intended to make accidents more expensive and so encourage people to take measures to reduce the risk of those accidents happening.

[7.35] From a public policy point of view, there is no single perspective that provides a definitive answer, or objection to, the question as to whether there should be further liberalisation of the law on assignment of actions. Indeed, the existence of such competing theories echoes the comment of O'Donnell J for the majority of the Supreme Court in the *SPV Osus* case that the law on litigation funding generally, including assignment of actions, involves a consideration of public policy questions; and that the approach to such questions changes over time. The Commission therefore welcomes the views of consultees on these questions.

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[21] See, for example, Darwall and Darwall, "Civil Recourse as Mutual Accountability" (2011) 39 Florida State University Law Review 17; Goldberg and Zipursky, *Recognising Wrongs* (Harvard University Press 2020).

[22] For an argument that subrogation is in fact compatible with tort law doing corrective justice between the parties, see Beever "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28 OJLS 475 at page 495 et seq. See also Capper, "Access to Justice and the Assignment of Rights to Litigate" (2022) 41(3) Civil Justice Quarterly 274.

[23] Section 56 of the Road Traffic Act 1933.

[24] Posner, "A Theory of Negligence" (1972) 1 Journal of Legal Studies 29; Posner, The Economics of Justice (Harvard University Press 1983); Posner, "Instrumental and Noninstrumental Theories of Tort Law" (2013) 88 Indiana Law Journal 469.

(b) Policy Considerations Supporting Liberalisation of the Law on Assignment

(i) Access to Justice

[7.36] In Chapter 3, the Commission has already discussed that an argument in favour of legalising third-party litigation funding is the potential to improve access to justice. In the case of third-party funding, the original claimant is facilitated in bringing their case to court by the availability of funding to which the relevant claimant might not otherwise have access. In other words, the alterative to third-party funding may be that the claimant is not able to bring the case at all. Obviously, in the case of the assignment of causes of action, the claimant does not, at first sight, gain access to the court itself, but rather receives whatever payment is agreed in respect of the assignment of the cause of action.

[7.37] While that represents an obvious difference between the two situations under consideration, it must be noted that a claimant who is unable to pursue a potentially legitimate cause of action because of not having adequate resources to bring the case may, nonetheless, gain some value from their cause of action under either model. In the case of third-party funding, that value will be the full value of the case less whatever payment has been agreed with the funder, subject to that payment being consistent with whatever regulatory system might be put in place. Likewise, the assignor of a cause of action will obtain value in the form of the payment made to them, in relation to the assignment of the cause of action in question.

[7.38] Both models potentially provide for a claimant obtaining some value from a cause of action which they might not otherwise be able to obtain. In practice, the assignor may sometimes be more involved than simply being the recipient of a payment from the assignee. This could include not only being a likely witness if the case proceeds to hearing, but also in procuring documents, possibly on an ongoing basis during discovery. This is likely to be the case for the mass/multi-party/collective litigation that is likely to feature significantly in a regulated funding (including assignment) system. Nonetheless, the differences in form between third-party funding and assignment of actions raise questions as to whether the appropriate form of regulation that might be considered necessary in respect of third-party funding might need to be significantly adapted in the case of assignment of causes of action.

[7.39] The Commission notes that it is also arguably in the interests of justice for claims to be pursued against parties who have engaged in wrongdoing, even if the

wronged party is not necessarily the pursuer. It is reasonable to believe that some parties are unwilling to personally undergo the stress and anxiety of dispute resolution proceedings, but are nonetheless eager to see alleged wrongdoers experience some form of justice. This perspective is supported by the International Council for Commercial Arbitration, which has observed that claims-holders "may view lengthy arbitration (or litigation) proceedings as a costly and time-consuming nuisance", with the result that they may "prefer to transfer the rights to another party in exchange for an immediate payment of cents on the dollar".[25] As already noted, the Oireachtas has already, by passing the Courts and Civil Law (Miscellaneous Provisions) Act 2023, amended the Arbitration Act 2010 in order to permit third-party funding in international commercial arbitration and in related proceedings, subject to regulatory requirements to be prescribed in Regulations made by the Minister for Justice.

(ii) Equality of Arms

[7.40] Another argument discussed in Chapter 3 in favour of liberalising the law is that legalised third-party funding may, at least in some cases, strengthen the equality of arms between the parties to legal proceedings. In the case of assigning actions, a potential difference under this heading should be noted. It can be assumed that the purchaser of a cause of action will be likely to have the resources to fully pursue that cause of action. Thus, in both cases, there may be an increase in the likelihood that there will be equality of arms if and when the litigation proceeds. However there remains the obvious difference that, in the case of third-party funding generally, the claimant will pursue the action themselves with the help of funds provided by the funder, while in the case of the assigned action it will be "purchaser" who pursues the litigation.

[7.41] Nonetheless, this argument seems to have similar application to the case of the assignment of causes of action as it does in respect of the liberalisation of third-party funding in general. In this respect, arrangements in other jurisdictions insist that the funder make appropriate provision for security for costs for the other party (especially an unfunded other party) in the event of the funder losing the claim. Indeed, as already noted in this Paper, in *Moorview Developments Ltd v First*

[25] International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018) at page 41.

Active plc,[26] the Supreme Court held that the Irish courts can currently make a non-party costs order against a third-party funder of litigation.

(iii) Increasing the Assets Available to Creditors of Insolvent Debtors

[7.42] Another argument discussed in Chapter 3 in support of the legalisation of third-party funding is that it would provide the possibility of increasing the pool of assets available to the creditors of insolvent debtors in insolvency proceedings. Clearly, and to the extent that it might be lawful, the ability to assign a cause of action might have similar, even if not necessarily identical, benefits in that the payment made for the assignment of a cause of action from an insolvent party would likewise go to increase the pool of assets available to the creditors of that insolvent claimant.

(iv) Corporate Anomaly

[7.43] In Chapter 3, the Commission identified what it described as a "corporate anomaly" in this area. This anomaly allows corporate entities, but not individuals, to effectively secure finance from a third-party to fund dispute resolution. In the same way as that anomaly can effectively circumvent the law of maintenance and champerty, it can circumvent prohibitions on assignment. A company may have suffered wrongdoing, be it as a result of a breach of contract, a tortious act, an interference with property rights or any other source of a legitimate claim in law. The cause of action arising out of this wrongdoing may be the sole company asset. That company's shares could be sold, so that the ultimate beneficiary or beneficiaries of a successful claim based on the cause of action would be the new shareholders.

[7.44] There might, potentially, be greater complications in such an arrangement than would apply in a straightforward case of the assignment of the cause of action in question. By acquiring the shares in the entity that had that cause of action, a purchaser of those shares would be taking on the risk that there might be unknown liabilities or burdens associated with the company in question.

[7.45] The Commission also considers that there might be the possibility, in the case of a cause of action that accrues to a corporate entity, to mimic the types of arrangement that would normally underlie a third-party funding agreement. Again, provided that the only asset of the corporate entity in question was the

[26] [2018] IESC 33, [2019] 1 IR 417.

cause of action concerned (or if a reorganisation could achieve that position), there would appear to be no reason in principle why the original corporate claimant could not, subject to the rules contained in its constitutional document, by agreement issue additional shares sufficient to raise the funds to pursue the cause of action. The subscriber for those additional shares—in effect, a funder of the litigation—would gain an agreed proportion of the company, which might be very similar to the proportion of the damages which that party might by agreement become entitled to in a conventional third-party funding arrangement.

[7.46] It must also be pointed out, however, that none of this analysis would provide any potential benefit to a non-corporate claimant, who does not have the potential to sell shares as a means of transferring the ultimate beneficial ownership of a cause of action. That distinction may well provide another argument for liberalisation in relation to the law on the assignment of the causes of action. This is because the current law appears to involve an anomalous distinction between causes of action that accrue to a corporate entity, on the one hand, and a natural person, on the other.

5. A Regulatory Framework for Assignment of Actions

(a) Any Liberalisation of the Law on Assignment of Actions Needs to Be Regulated

[7.47] The Supreme Court in *SPV Osus* was of the view that, if the prohibition on currently-proscribed assignments was ever to be relaxed, an unregulated system of assignments might create more problems than it solved.[27] It also seems to the Commission that, if the law on assignments of causes of action is further relaxed, this should only be in the context of an accompanying regulatory framework. While it is open to policymakers to view the civil justice system as being subject to market norms and values, and consequently to ascribe little-to-no value to the anti-commodification argument, this does not mean that no regulation is warranted. Practically all economic activity is regulated, and if the administration of justice is, in the limited respect discussed in this Consultation Paper, an economic activity, it should also be regulated.

[7.48] At its most essential, the argument against liberalisation in either area is what might be said to be the undesirability of potentially turning litigation into a

[27] [2018] IESC 44 at para 2.2 (Clarke J), [2019] 1 IR 1 at page 4.

commodity that can be bought and sold. That can occur where a funder is enabled to buy in to litigation by a commercial arrangement that entitles the funder concerned to benefit from the successful bringing of the case in return for providing funding to enable the case to be brought. A similar, but not identical, consequence can arise if a purchaser is simply entitled to buy a "bare" cause of action by paying for an assignment of it. While there are obvious differences between, on the one hand, the consequences of permitting third-party funding, and, on the other hand, permitting the assignment of a cause of action, that broad argument has at least similar weight in both cases.

(b) Overview of Regulatory Issues Concerning Assignment of Actions

[7.49] Assignment involves complexities not necessarily encountered, or not encountered to the same extent, with third-party funding. If a court or other decision-maker were to be tasked with examining, in each case, the validity of an assignment before the cause of action could proceed to be heard, it would be, as O'Donnell J in *SPV Osus* described it, "by definition, ex-post. It would not be possible to tell at the date of any assignment if it was valid or not".[28]

[7.50] If policymakers wish to liberalise the law on assignment beyond the already permitted categories of assignment, one regulatory option is to provide, by way of legislation, that currently-prohibited categories of assignment can take place, but subject to a public policy exception. This has some similarities to the "preservation" approach to the legalisation of third-party funding, discussed in Chapter 4. Courts might apply, on a case-by-case basis, the case law on assignment that has developed in England and Wales and other jurisdictions or develop their own Irish body of case law on the subject. This is not, however, a particularly convenient or efficient approach. In the Commission's view, it risks the danger, identified in *SPV Osus*, of "lengthy and unpredictable assessments prior to any litigation advancing".[29] If the test for assignment is seen as less (or more) onerous than that applied to third-party funding agreements, there is an additional risk that professional investors in dispute resolution will choose one method (assignment or third-party funding) of investing in dispute resolution over another, in order to skirt around what might be perceived as tighter regulation in one sphere than another.

[28] [2018] IESC 44 at para 82 (O'Donnell J), [2019] 1 IR 1 at para 94.

[29] *Ibid*.

[7.51] In that respect, it is appropriate to consider whether, although the arrangements involved in third-party funding appear, at first sight, to be very different from those involved in assignment of actions, there are, in fact, any actual significant differences in practice. This is important when considering whether the regulatory arrangements for assignment of actions would need to be markedly different from those for third-party litigation funding in general.

[7.52] An issue that appears, at first sight, to distinguish third-party funding from assignment of actions concerns the different range of commercial arrangements that might be put in place. As already noted, typical arrangements in respect of third-party funding involve a commitment by the funder to put up all of the funding necessary to pursue the action, or part of it to an agreed formula. They would also typically involve a payment to the funder in the event that the action is successful, which may represent a percentage of the claim, or a formula by reference to the amount of money spent by the funder, or a combination of both. Thus, there are a range of measures that may be agreed, subject to it being lawful in accordance with whatever regulatory regime is put in place, which would govern the precise distribution of the proceeds of the action in the event of success.

[7.53] With assignment of actions, and again subject to the regulatory arrangements that might be put in place if more assignments than currently allowed were to become lawful, a range of commercial arrangements might also be likely to be agreed between parties. In its simplest model, the original claimant would receive an upfront payment, and the entire burden and benefit of the cause of action would pass to the assignee after the assignment. However, it is possible that agreements might be put in place to give the original claimant an additional payment in the event that the proceedings where successful beyond a certain, specified, limit.

[7.54] In this respect, and subject to whatever regulatory arrangements might be put in place in either case, the possible nuanced commercial arrangements for third-party funding or assignment of actions leads to the conclusion that there may be less difference in substance between the two cases than might have been thought. This would certainly be the case when considering the simplest model of either scenario involving, on the one hand, a simple percentage payment to a funder in the event of success and, on the other hand, a single upfront payment to the original claimant in the case of the assignment of a cause of action.

[7.55] A second major area of apparent difference stems from the fact that, in the case of third-party funding, the case will still be pursued by the original claimant while

in the case of the assignment of a cause of action, the case will be pursued by the assignee. However, that distinction is also likely to be less stark in practice than it might appear in principle.

[7.56] Subject to such regulation as might be put in place, it seems likely that the conduct of proceedings in respect of which legitimate third-party funding has been provided would remain substantially in the hands of the original claimant. However, it would seem unlikely that any practical arrangement could avoid making some provision for involvement on the part of the funder in the conduct of the case. At a minimum, it is likely that a funder would wish to retain the right to decline to provide further funding in certain circumstances. These might include a situation where there was a development in the case that brought about a significant reappraisal of the likely success, or the extent to which monies might actually be recovered in the event of success. Similar considerations might apply where it was suggested that the original claimant had unreasonably turned down an offer of settlement that was considered reasonable in the context of all of the risks involved in the case in question. It might well be that an assessment of whether there had been a sufficient change in the prospects for the case, or the reasonableness of a refused offer, might be made subject to some form of third-party view by, for example, a nominated lawyer. In any event, it follows that it is likely that a third-party funder would retain some degree of control over how the proceedings progress.

[7.57] In the case of assignment, there is, in practice, likely to be a similar situation, although perhaps in reverse. Thus, it is unlikely that the purchaser of, for example, a bare cause of action would be able to bring the proceeding without significant cooperation on the part of the original claimant. The evidence, including documentary material, that the assignee of a cause of action would need to present to a court to prove its case would be likely to be significantly in the hands of the original claimant. If the case were to go to hearing, then, at least in the vast majority of situations, witnesses from the original claimant would be likely to be required. Thus, in either scenario, some degree of ongoing cooperation with the original claimant, on the one hand, or a funder or assignor of a cause of action, on the other hand, would be required.

(c) Conclusions on a Regulatory System for Assignment of Actions

[7.58] In chapter 5, the Commission has already set out a number of options in relation to possible regulatory arrangements for third-party funding, if it were to be legalised.

[7.59] As the Commission has noted in this chapter, the arguments made in favour of and against retaining the current law on third-party funding are very similar to those that can be made concerning assignment of actions.

[7.60] The Commission has discussed how, although the arrangements involved in third-party funding appear, at first sight, to be very different from those involved in assignment of actions, there are, in fact, few actual significant differences in practice.

[7.61] Bearing in mind those matters, the Commission considers that it would be difficult to justify putting in place greatly different regulatory regimes for third-party funding and assignment of actions. Any differences could, the Commission considers, give rise to difficulties in practice, which it would be impossible to assess at this stage. The Commission is at present therefore of the view that, if third party funding and assignment of causes of action are legalised to a greater extent than at present, it would be appropriate to ensure that any regulatory system put in place in respect of permitted third-party funding would be mirrored as closely as possible in the regulatory arrangements put in place in relation to the assignment of causes of action.

[7.62] The Commission considers that this is especially clear when considering the application of the regime to assignment of actions involving corporate entities. Whatever wrongdoing the original corporate claimant may have suffered and whatever evidence may need to be put forward to satisfy a court that such wrongdoing had occurred, and that an appropriate remedy is required, there would be additional requirements should the assignor of a cause of action wish to bring proceedings. The ordinary evidence that would need to be presented by the original claimant would only go to show that the claimant had a valid cause of action and is entitled to whatever remedy the court considered appropriate. It would not, in any way, demonstrate why the new claimant, being the assignor of the cause of action, had any entitlement at all.

[7.63] It follows that the assignor would need to rely on the assignment to justify having any place in the proceedings at all. Under the current law, a court would be likely to conclude that the assignor could not bring the case because the purported assignment of the bare cause of action giving rise to the claim would be considered void. Under any proposed liberalisation of the law on assignment of actions and related regulatory reform, the court would need to consider whether whatever criteria had been put in place to allow for a valid cause of action were actually present.

6. Questions

Q. 7.1 Would it be appropriate to liberalise the current laws of maintenance and champerty which place restrictions on the assignment of causes of action?

Q. 7.2 Do you consider there are any differences between third-party litigation funding (TPLF) and assignment, other than those listed, that suggest that they should be treated differently?

Q. 7.3 Do you agree that it is difficult to justify enforcing different regulatory regimes for third-party funding and assignment of actions?

Q. 7.4 Would it be more efficient for any regulatory system for assigning causes of action to mirror a third-party funding regulatory system? Are there any reasons why any regulatory system for assigning causes of action should not mirror a third-party funding regulatory system?

APPENDIX A
SUMMARY OF QUESTIONS

Ch 3 Policy Considerations of Legalising Third-Party Funding

Q 3.1 Should the concerns about the commodification of justice and creating a market in legal claims be seen as fundamental obstacles to legalising third party funding?

Q 3.2 Do you agree with the concern that third-party funding might lead to the commodification of justice? Is there any validity to the idea that changing the core motivation behind litigation is likely to negatively affect the conduct of litigation?

Q 3.3 What regulatory controls (if any) might address concerns about potential commodification?

Q 3.4 Are there arguments in favour of or against third party litigation funding, other than those discussed in the Paper that you think the Commission should consider?

Q 3.5 The Commission identified five policy arguments against legalising third party litigation funding: increased vexatious and meritless proceedings; undercompensated claimants; increased legal costs; increased insurance premiums; and the change being potentially inappropriate for all types of legal proceedings. In your view, what weight should be given to these arguments? What regulatory controls might address these concerns?

Q 3.6 The Commission identified four policy arguments in support of legalisation: increased access to justice; strengthened equality of arms between parties; increased available pool of assets in insolvency; closing of loopholes around champerty and maintenance. In your view, what weight should be given to these arguments?

Ch 4 Models of Legalisation

Q 4.1 The Commission identified three models by which third-party funding could be legalised: the preservation approach, the abolition approach, and the statutory exception approach. Which model do you think is the most suitable and why?

Q 4.2 The first model, the preservation approach, abolishes tortious and criminal liability for champerty and maintenance while preserving the underlying public policy issues in their application to contract legality. Are there additional concerns or advantages related to this approach not previously discussed?

Q 4.3 Are there any additional or different considerations that must be acknowledged when drafting the preservation approach in legislation?

Q 4.4 The second model, abolition, simply abolishes the offences and torts of maintenance and champerty all together without expressly providing for any preservation of underlying public policy. Are there additional concerns or advantages related to this approach not previously discussed?

Q 4.5 The third model, statutory exception, would preserve the torts of maintenance and champerty, but expressly provide that an identified category of third-party funding does not offend those torts. Are there additional concerns or advantages related to this approach not previously discussed?

Ch 5 Models of Regulation

Q 5.1 The Commission considers that there are two policy goals of regulating a third-party funding system:

(1) to reduce, as far as is reasonable and possible, the financial and other risks that third-party funding and funders might create for those who use third-party funding services and, indeed, for non-funded parties to funded disputes;

(2) to protect and enhance the proper and efficient administration of justice in Ireland.

Do you agree that these are the policies that should be considered for regulation in the event third-party funding becomes legal?

Q 5.2 The Commission discussed five regulatory models: voluntary self-regulation; enforced self-regulation; regulation based on court certification; a regulatory regime administered by an existing regulator; *or a* sui generis regulatory regime administered by a new regulator.

(1) Which proposed regulatory framework would best mitigate the potential dangers associated with the legalisation of third-party funding?

(2) Should the regulatory regime involve a requirement for a licence or other form of pre-authorisation?

(3) How stringent or flexible should the regulatory regime be?

Q 5.3 Do you think that the voluntary self-regulation model provides too much autonomy to the emerging field/industry of third-party litigation funding? If so, why?

Q 5.4 Does the absence of a third-party funding industry in Ireland make self-regulation models, like the voluntary and enforced models discussed, difficult to implement? Does the novelty of such an industry require more institutional support? If so, what does that institutional support look like?

Q 5.5 Does the third model discussed, court certification, make sense in practice? Is it an efficient use of judicial resources? Are courts best equipped to regulate this industry, especially when the issue presented is not a judicial one? Do you consider that the courts are not the most practical or efficient regulatory regime?

Q 5.6 If the fourth regulatory model (existing regulator) is adopted, what support, either separately or collectively, would the existing regulators (the Central Bank, the Legal Services Regulatory Authority, and the Competition and Consumer Protection Commission) need to effectively regulate and monitor the emerging industry? If one regulator is chosen, which one appears best equipped to take on the role of the industry regulator?

Q 5.7 The Commission identified three means by which an existing regulator under the fourth model might administer a regulatory regime: using an existing regulatory regime; creating a new regulatory regime; or coordinating between multiple existing regulators, each regulating according to their own remit.

(1) Which means seemed the most efficient and practical, and why?

(2) If the first means were to be adopted (using an existing regulatory regime), how feasible is it that an existing regime can adequately respond to the needs of an emerging third-party litigation funding sector?

(3) If the second means were to be adopted (creating a new regulatory regime), would it be too inefficient to keep up with an emerging field? Is it a waste of administrative resources to create a new regime?

(4) If the third means were to be adopted (regulatory cooperation between existing regulators), would cooperation among the existing regulators be effective and efficient? Would there be any barriers or roadblocks to cooperation among the regulators?

Q 5.8 The last regulatory model discussed requires a new regime administered by a new regulator. Would the creation of an entirely new regulator and new regulatory regime be justified for a market that has yet to be established? Would a specific regime dissuade development of a third-party funding sector, to a meaningful extent, in Ireland?

Q 5.9 Is there one model or a blend of models discussed above that would be the best solution to regulating and monitoring an emerging third-party funding sector?

Q 5.10 Does third-party funding require regulation or the same stringency of regulation across all types of legal proceedings? Do certain types of case require more regulation and control than others? How should these cases be identified and regulated?

Ch 6

Six Specific Issues in a Regulatory Framework for Third-Party Funding

Q 6.1 How narrow, or broad, should the class of dispute covered by potential third-party funding be? Beyond the three kinds of dispute discussed, are there any other types of dispute that should be excluded from third-party funding?

Q 6.2 Are there any policy reasons, in support or opposition, as to why third-party funding should be permitted in personal injury actions (access to justice, meritless or vexatious litigation, etc)?

Q 6.3 Do you agree that a funded party must disclose that it is funded and reveal the identity of the funder to the opposing party?

Q 6.4 Is a blanket rule requiring disclosure appropriate?

Q 6.5 Do you think a disclosure requirement would stunt the development of a third-party funding sector?

Q 6.6 How much control should funders have over the litigation proceedings?

Q 6.7 Do you agree with the concern that, if not checked, the funder might accept settlement terms and conditions contrary to the interests of the funded party to the dispute? Do you consider that the avenues for checks on excessive control discussed in the Consultation Paper are sufficient to prevent a funder from dominating the litigation proceedings for their own interests?

Q 6.8 Are there any potential interventions not discussed in this Consultation Paper to support a party whose funder becomes insolvent during the proceedings?

Q 6.9 Of the three options to ensure funder solvency discussed in this Paper, which appears best suited to ensure the funder has sufficient capital and funds to sponsor a party to litigation? Do you agree that a minimum capital adequacy requirement is inadvisable?

Q 6.10 Is it fair to require legal practitioners to assume the risk of funder insolvency? Or would it dissuade some legal practitioners from accepting cases funded by non-parties to the dispute?

Q 6.11 Would a combination of some form of the potential solutions discussed in this Paper be adequate to ensure funder solvency throughout the dispute?

Q 6.12 Do you agree that a total prohibition on unilateral withdrawal is too strict? Should there be some instances in which a funder may withdraw?

Q 6.13 Does setting statutory restrictions on when withdrawal is permitted strike a balance between always permitting withdrawal and total prohibition of withdrawal?

Q 6.14 The Commission identified two potential mechanisms to combat under-compensation: (1) a cap on the funder's return, and (2) permitting funding costs and returns as part of normal costs recovery.

(1) If a cap on return was adopted, how should that cap be calculated? Should it be a fixed number, or a percentage of the damages awarded or settlement award? Or should the cap be calculated in an entirely different way? If so, how?

(2) Would the second approach, requiring the unsuccessful party to pay full compensation and normal costs to successful party plus the funder's uplift, be unfair to the unsuccessful party? Does it give the funded party a windfall?

Q 6.15	Are there other aspects of third-party funding arrangements that give rise to particular concerns and which, in your view, would require specific regulation? If so, how should such aspects be regulated and by whom?

Ch 7 Assignment of Causes of Action

Q 7.1	Would it be appropriate to liberalise the current laws of maintenance and champerty which place restrictions on the assignment of causes of action?
Q 7.2	Do you consider there are any differences between third-party litigation funding (TPLF) and assignment, other than those listed, that suggest that they should be treated differently?
Q 7.3	Do you agree that it is difficult to justify enforcing different regulatory regimes for third-party funding and assignment of actions?
Q 7.4	Would it be more efficient for any regulatory system for assigning causes of action to mirror a third-party funding regulatory system? Are there any reasons why any regulatory system for assigning causes of action should not mirror a third-party funding regulatory system?