

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 outside third parties. One of the effects of these torts and offences is 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. In *Moorview Developments Ltd v First Active plc*,³ the Supreme Court held that the courts could make a non-party costs order against a litigation funder and in favour of the successful party.
2. As part of its Fourth Programme of Law Reform,⁴ in 2016 the Commission published an *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice*.⁵ 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 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.
4. In **Chapter 1 (Third-Party Funding and the Organisation and Make-Up of the Third-Party Funding Sector)**, the Commission explains the context for the Consultation Paper, setting out the different ongoing legislative and regulatory developments affecting third-party funding at a national and European Union level. The chapter specifies what the Consultation Paper means by the term “third-party funding” and gives a basic 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:
 - (1) that there is a legal dispute,
 - (2) that assistance is provided to bring or continue that legal dispute,
 - (3) that the funder does not have a legitimate and independent interest in the dispute, and
 - (4) that the provision of funding does not come within a recognised exception to maintenance and champerty.

¹ [2017] IESC 27.

² [2018] IESC 44, [2019] 1 IR 1.

³ [2018] IESC 33, [2019] 1 IR 417.

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

⁵ Law Reform Commission, *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10-2016).

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 (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 arguments against legalised third-party funding:
 - (a) that it will encourage the bringing of vexatious and meritless disputes.
 - (b) it causes 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 might cause legal costs to increase.
 - (d) that it could cause an increase in the price of insurance premiums.
 - (e) that it is not appropriate for all types of disputes.
7. The Commission identifies four arguments in favour of legalising third-party funding:
 - (a) that it will help to expand access to justice in Ireland.
 - (b) that it will improve equality of arms between opposing parties. Where one party has vast financial resources, and the other does not, this can lead to power imbalances and force "weaker" parties to accept unsatisfactory settlements.
 - (c) that it can help to increase the pool of assets available to creditors in insolvency proceedings.
 - (d) that it will 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, and
 - (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 of legalising third-party funding 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. After this, 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, and

- (b) protect and enhance the proper and efficient administration of justice in Ireland.
11. **Chapter 5 (Models of Regulation)** 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 licensing regime administered by an existing regulator, such as the Central Bank of Ireland or the Legal Services Regulatory Authority, and
 - (e) a licensing 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, 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. Mandating disclosure of third-party funding agreements to the opposing party would likely reduce the volume of disclosure applications, which would, in turn, benefit the efficient administration of justice. The Commission would welcome submissions in this area.
 16. Third, the Commission focuses on the exercise of excessive control by third-party funders over funded disputes. We identify some existing mechanisms in the Irish legal system which we consider can counter, to an extent, funders taking control of funded disputes to the detriment of the funded party. These existing mechanisms are:
 - (a) non-party costs orders, and
 - (b) the existing ethical duties of legal practitioners to act in their clients' best interests and on their client's instructions only.
 17. The Commission also suggests some new mechanisms which could be developed to address excessive funder control. These new mechanisms are:

- (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.
18. The fourth specific issue is that of funder insolvency during the course of the funded dispute. Funder insolvency can lead to both funded and non-funded parties having to face steep and unanticipated legal 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.
19. 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.
20. 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.
21. 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.
22. 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. The Commission also notes, nonetheless, that important differences arise between the arrangements involved. While the Commission's detailed analysis is that these differences are often more ones of form, rather than of substance, they need to be taken into account in proposing any reform of the law.

23. In Chapter 7, the Commission points out that certain types of assignment of actions, notably those involving assignment of debts, have long been recognised as important exceptions to maintenance and champerty, and indeed, are to be encouraged.
24. 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.
25. For reference and research purposes, **Appendix A (Maintenance and Champerty in Irish Legislation)** sets out and discusses Irish legislation concerning the torts and offences of maintenance and champerty.

Appendix B (Questions)