



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

**EMBARGO: Midnight Sunday 16 July 2023**

## **Law Reform Commission publishes Consultation Paper on Third-Party Litigation Funding**

**Monday 17 July 2023:** The Law Reform Commission has today published a Consultation Paper on Third-Party Litigation Funding.

Third-party funding is investment in dispute resolution. 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, the funder is reimbursed the amount of their initial investment and receives additional remuneration as a return on that investment. Assigning a cause of action is a related issue: it means selling the right to sue to another person or entity.

The law in Ireland prohibits the funding of legal cases by outside parties who do not have a legitimate and independent interest in the dispute, subject to the certain exceptions. The prohibition is founded on the ancient concepts of maintenance and champerty which determine such activity as torts and offences under Irish law. In *Persona Digital Telephony Limited v Minister for Public Enterprise* (2017), the Supreme Court confirmed that these torts and offences remain part of the law in Ireland. In *SPV Osus v HSBC Institutional Trust Services (Ireland) Ltd* (2018) 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 view of the evolution of the legal and policy context for third-party funding, which has resulted in the liberalisation of the statutory and regulatory framework in many countries, the Commission concluded that it was appropriate to publish a Consultation Paper setting out the up-to-date position in respect of the regulation of third-party funding in Ireland and to seek views on the matter. It also concluded that the issue of assignment of actions should be considered.

The Consultation Paper is the result of an extensive project undertaken by the Commission involving research and analysis of the issues involved, as well as an examination of the developments that have taken place concerning third-party funding of legal cases in other jurisdictions.

The Consultation Paper consists of seven chapters:

### **Chapter 1 (Third-Party Funding: Context and Overview of the Sector)**

In this chapter 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 level.

## **Chapter 2 (Current Irish Law on Third-Party Funding)**

This chapter focuses on the law on maintenance and champerty and how it affects third-party funding. It identifies the different elements of maintenance, primary among them the provision that the funder does not have a legitimate and independent interest in the dispute. Champerty is founded on the same elements as maintenance, with an additional defining provision: that the funder stipulates for profit in the case of success.

## **Chapter 3 (Policy Considerations of Legalising Third-Party Funding)**

In this chapter the Commission sets out and assesses the arguments for and against the legalisation of 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 the legalisation of third-party funding: (a) it might encourage the bringing of vexatious and meritless disputes; (b) it causes funded parties to be under-compensated, as the funder may take their return on investment, with the result that the funded party is not fully compensated for the harm they have suffered; (c) legal costs might increase; (d) the price of insurance premiums might increase; (e) that it is not appropriate in all types of disputes.

The Commission identifies four arguments in favour of legalising third-party funding: (a) that it will help expand the access to justice in Ireland; (b) that it will improve equality of arms between the parties in cases where one party has the benefit of significant financial resources compared to the other and can force the weaker party to accept an unsatisfactory settlement; (c) that it can help 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.

## **Chapter 4 (Models of Legalisation)**

The Commission discusses three different means of legalising third-party funding should that step be taken: (a) the "preservation" approach, whereby the torts of maintenance and champerty would be abolished, but the rules of public policy behind the torts and offences would be preserved; (b) abolishing the torts and offences of maintenance and champerty outright; (c) the "statutory exception" approach, involving the retention of the torts of maintenance and champerty, but creating statutory provision permitting third-party funding in some cases as exceptions.

The Commission is of the view that if third-party funding is to become a reality in Ireland, it is likely that the "statutory exception" is the optimum method of legalising third-party funding.

## **Chapter 5 (Models of Regulation)**

In this chapter the Commission looks at models of regulation for legalised third-party funding. It considers that the regulation of this sector, if it were to emerge in Ireland, should aim to: (a) reduce the financial and other risks that third-party funding and funders might create, both for users of such services and for non-funded parties to funded disputes, and (b) protect and enhance the proper and efficient administration of justice in Ireland.

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

These approaches are not entirely separate, as it is likely that any future regulatory system would consist of a combination of them.

## **Chapter 6 (Six Specific issues in a Regulatory Framework for Third-Party Funding)**

The Commission focuses on six issues concerning the regulation of a potential future legalised system of third-party funding which are likely to be priority topics for consideration by lawmakers.

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

The second specific issue is that of disclosure in funded disputes. The Commission sees value in mandatory disclosure in funded disputes, as disclosure permits opposing parties to know the true nature of their adversary and, in the case of representative actions, 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 that they are in receipt of third-party funding, and the funder's identity, to both the opposing party and the court.

Whether the funded party should have to disclose the third-party funding agreement to the opposing party, as well as the court, is less straightforward, due to the sensitive commercial information such agreements are likely to contain. The Commission would welcome submissions in this area.

Third, the Commission focuses on the exercise of excessive control by third-party funders over funded disputes. It suggests a number of new mechanisms to address the issue including: (a) amending the legal practitioners' ethical framework to reflect the complexities of the client-funder-relationship, (b) expanding the definition of misconduct in Section 50 of the Legal Services Regulation Act 2015, to include a specific provision that ceding control of a dispute to a third-party funder subjects the practitioner to the complaints and disciplinary provisions of the Act and (c) empowering the court to assess, of its own motion and from time to time and any time, and on the application by a party, whether a funded representative action has been diverted from consumer's collective interests.

The fourth specific issue is that of funder insolvency during the course of the funded dispute, which can leave both funded and non-funded parties at risk of significant unanticipated legal costs. The Commission discusses whether respondent-side concerns 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 the issue: (a) minimum capital adequacy requirement for third-party funders and (b) prohibiting a funded party's legal practitioners from recovering their costs in the case of funder insolvency.

The fifth specific issue is withdrawal by funders from third-party funding arrangements. The Commission analyses two possible mechanisms to deal with the difficulties that can arise in such circumstances: (a) prohibiting unilateral withdrawal by the third-party funder, and (b) imposing statutory restrictions on the circumstances in which third-party funders may withdraw.

Sixth, the Commission discusses two possible mechanisms for managing the under-compensation issue: (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 cost recovery.

## **Chapter 7 (Assignment of Causes of Action)**

In Chapter 7 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. The Commission acknowledges that many of the issues that arise concerning reform of the current law on assigning causes of action overlap with those concerning third-party funding in general. The Commission notes that there are, nonetheless, important differences which need to be taken in to account in proposing reform in the law.

The Commission points out that certain types of assignment of actions, notably involving debts, have long been recognised as important exceptions to maintenance and champerty. 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.

**Seeking views by 3 November 2023.** The Law Reform Commission seeks the views of consultees on the issues raised in this Consultation Paper **by 3 November 2023**. To assist in this process, the Commission, at the conclusion of each chapter, poses a series of questions which focus on the key issues.

The Consultation Paper will be available on the Law Reform Commission's website, [www.lawreform.ie](http://www.lawreform.ie), from 7am on 17 July. Responses can be submitted to the Law Reform Commission by email at [ThirdPartyFunding@lawreform.ie](mailto:ThirdPartyFunding@lawreform.ie), or by post to the Law Reform Commission, Styne House, Upper Hatch Street, Dublin 2 D02 DY27.

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