**RESPONSE TO LAW REFORM COMMISSION CONSULTATION PAPER:
THIRD-PARTY LITIGATION FUNDING**

Dear Law Reform Commission

We are delighted to respond to your Consultation Paper on this important and complex area of law. We have answered each of your questions, following the numbering in the Consultation Paper.

In summary, our view is that reform of this area should be cautious and on a phased basis, given the potential for abusive practices and the risks litigation funding poses to the Irish civil justice system. We largely favour the conservative approach suggested in the proposed EU Directive in this area.

We recommend that as a first step, litigation funding should be allowed in proceedings brought under the Representative Actions for the Protection of the Collective Interests of Consumers Act only. We also recommend that the area be strictly regulated by a regulator and that the courts have oversight of funding agreements in proceedings that come before them. The objective of regulation should be to reduce risk for all parties concerned and to protect and enhance the Irish civil justice system. Decisions on the level of regulation should not be influenced by pressures to open the Irish market to litigation funders motivated by the potential to make huge profits. We should use this opportunity to set standards and best practice in this unique, complex and developing area.

We oppose any moves to legalise the assignment of bare causes of action or personal causes of action.

We look forward to reading the Commission's report. Please contact us if you need any further information. We have included a list of contacts at the end of this paper.

3 Policy Considerations of Legalising Third-Party Funding

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?

We believe that these are serious concerns. If litigation funding is to be legalised, either wholesale or in a limited way, safeguards will need to be put in place to reduce the risk of importing US-style entrepreneurial litigation.

We discuss our views on the extent to which litigation funding should be legalised and how funders should be regulated in our responses to the questions at sections 4 and 5 below.

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?

Yes, we think it is possible and probable that third-party funding could lead to the commodification of justice and negatively affect the conduct of litigation. We share the concern set out in the 2020 Report on the Review of the Administration of Civil Justice (at para 10.2.6) of "*potentially significant risks arising from any resultant "commodification" of litigation, including the incentivising of the making of dubious claims and the imposition of a "litigation culture" on a courts system which is already overburdened.*"

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

Strict regulation of funders and funding arrangements is necessary to alleviate these concerns. We endorse the Commission's statement at para 7.48 of the Consultation Paper that "*practically all economic activity is regulated, and if the administration of justice is… an economic activity, it should also be regulated.*"

We discuss our views on the extent to which litigation funding should be legalised and how funders should be regulated in our responses to the questions at sections 4 and 5 below.

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?

We believe that the Commission should explore the risk of funders (or investors backing funders) funding litigation for motives other than pure financial motives, e.g. to get access to a company's commercially sensitive or proprietary information to gain a competitive advantage or to launder money. This risk needs to be mitigated by having clear disclosure and transparency requirements – a funded party should be required to disclose the fact that it is funded and the identity of the funder. But it should also be clear who is 'behind' the funded entity. The funder should also be required to confirm that it is not conflicted, i.e. that it is not connected in any way with a defendant

in the proceedings. We discuss our views on disclosure requirements at para 6.3 below.

Related to this is the risk of what has become known as "revenge litigation", i.e. where funders fund litigation to avenge a grievance with a defendant. In the US case of Bollea v Clem, Gawker Media LLC, Peter Thiel, a co-founder of Paypal, provided wrestler, Hulk Hogan with US$10 million to pursue litigation against news outlet, Gawker Media. Thiel had a grudge against Gawker because it had "outed" him as being a homosexual.[1] A Florida court awarded US$130 million to Hogan, resulting in Gawker Media filing for bankruptcy.

A further risk is that funders might invest in litigation to obtain discovery of documents to use in proceedings outside of Ireland. The Commission should consider whether funders should be subject to 'the implied undertaking' imposed on parties to litigation not to use documents obtained in discovery for purposes outside of the particular litigation, or whether some equivalent restriction can be imposed on funders and enforced effectively.

We would also like to draw the Commission's attention to this statement by the US Chamber of Commerce to the US House Committee on Oversight and Accountability for its hearing on "Unsuitable Litigation: Oversight of Third-Party Litigation Funding" (September 2023). This paragraph in particular caught our attention:

"Finally, there is a growing concern that a large volume of foreign-sourced money may be pouring into U.S. courts via TPLF, raising significant national and economic security risks. The limited information available because of the secrecy of the practice suggests that sovereign wealth funds and non-U.S. citizens are participating in TPLF against U.S. companies. The result is that a foreign actor could control the litigation and influence its strategy to advance their own national interests, such as to gain access to sensitive information, damage U.S. companies, and influence U.S. policy to advance its own strategic interests at the expense of U.S. priorities."

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?

We believe that all of the foregoing are valid concerns against legalising litigation funding and should carry significant weight given the problems experienced in other jurisdictions where litigation funding has developed without proper regulation. We recommend that the law be relaxed cautiously

[1] No 12012447 CI-011, 2016 WL4073660.

and on a phased basis. We also recommend that funders operating in Ireland should be subject to strict regulation.

We discuss our views on the extent to which litigation funding should be legalised and how funders should be regulated in our responses to the questions at sections 4 and 5 below.

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?

- **Increased access to justice**: This argument is over-played by those with a vested interest in litigation funding. The reality is funders are not motivated by facilitating access to justice and seeing those who have suffered a wrong being fully compensated. They are motivated by profits. They will only invest in litigation where due diligence shows there is a strong likelihood of success, and they will demand a high return on any investment. Generally the cases deemed worthy of investment are commercial cases, where the parties have no difficulty accessing justice in any case. The cases where access to justice is a genuine obstacle are unlikely to be highly profitable, except perhaps representative actions. Even if third-party funding is legalised, access to justice will still be a barrier for the non-profitable cases.

  That said, we acknowledge that funding can facilitate access to justice in representative actions. In the European Parliament resolution of 13 September 2022 with recommendations to the Commission on responsible private funding of litigation (2020/2130(INL)), the Parliament cites two reports that recognise that third-party funding has become an essential factor in the realisation of collective redress.[2]

  We also acknowledge the concerns that the effectiveness of the Irish Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (the "**Representative Actions Act**") will be undermined if qualified entities, which must be non-profit making bodies, cannot access funding to maintain proceedings.[3] Section 27 of the Act also envisages that representative actions might be funded.

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[2] See paragraph D. The reports cited are the British Institute of International and Comparative Law (BIICL) report on the 'State of Collective Redress in the EU in the context of the Commission recommendation', and the Commission Report COM (2018)0040 on the implementation of the 2013 non-binding recommendations on collective redress.

[3] During pre-legislative scrutiny of the Bill, an issue was raised as to the capability of qualified entities to fund representative actions. The Department of Enterprise Trade and Employment confirmed that the State would not fund or underwrite representative actions. The Joint Committee on Enterprise, Trade and Employment expressed concern that the vast cost burden of representative actions may

For these reasons, we recommend legalising third-party funding for proceedings brought under the Representative Actions Act. We discuss this further in our answers to the questions in section 4.

But if the rationale for allowing third-party funding for these proceedings is that it facilitates access to justice, this must follow through in the regulatory framework. The level and extent of regulation should be determined by reference to the goal of facilitating access to justice, and not whether the Irish market will be attractive to private entities driven purely by profit. We discuss our views on regulation in our responses to the questions in sections 5 and 6.

- **Strengthened equality of arms between parties:** In practice, as alluded to by the Commission, the "inequality in arms" argument only carries weight in very limited circumstances, i.e. where the parties are not already equal in terms of finance, and where court procedures and the civil legal aid system is not sufficient to protect the "weaker" party's equal standing. If anything, third-party funding tilts the balance of power in favour of the funded party, usually the plaintiff.

- **Increased available pool of assets on insolvency:** We agree with the analysis at paras 3.80 to 3.84 of the Consultation Paper. We see merit in allowing liquidators, receivers, administrators and the Official Assignee or trustee in bankruptcy to access funding to fund proceedings intended to increase the pool of assets available to creditors, where the company has a reasonable case against a prospective defendant. We believe that a limited statutory exception to the torts of maintenance and champerty could be introduced to allow for third-party funding in such cases. We understand that this is being separately considered by the Company Law Review Group and we do not address it further in our responses to the questions raised in the Consultation Paper.

- **Closing of loopholes around champerty and maintenance:** We understand this to be a reference to the "corporate anomaly", i.e. the position whereby corporate entities can lawfully secure finance from third parties to pursue a claim, but non-corporate entities cannot. We acknowledge this is an anomaly, but it has not resulted in the commodification of justice or the creation of a claims market. We do not believe that this is a strong enough argument to justify legalising litigation funding across the board.

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be an obstacle to many consumers seeking to achieve redress and that groups who genuinely require access to this redress will not be accounted for and may be excluded due to funding issues. The Committee recommended that proper provision be made for litigation funding of representative actions. See Bill Digest: Representative Actions for the Protection of the Collective Interests of Consumers Bill, 13 April 2023, published by the Houses of the Oireachtas, Library and Research Services.

4 Models of Legalisation

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?

We prefer legalisation model 3: the "statutory exception" approach. This approach opens the Irish market to third-party funding, but does so cautiously, reducing the risk of inadvertently legalising other activities that have not been properly risk-assessed (e.g. the bare assignment of causes of action and/or the crowdfunding of litigation).[4]

As noted in the Consultation Paper, the statutory exception model is consistent with the approach already adopted across many Irish statutes, including most recently the Courts and Civil Law (Miscellaneous Provisions) Act 2023.

We consider that a cautious approach is warranted given the likely impact of a change of law in this unique, complex and uncertain area. We caution against legalising third-party funding wholesale. As a first step, we recommend that third-party funding be allowed in proceedings brought under the Representative Actions Act only.

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?

We have not identified any additional concerns or advantages with the preservation approach. We endorse the concerns set out in the Consultation Paper (at paras 4.17 to 4.20), particularly as regards the lack of clarity and certainty offered by this approach.

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

We have not identified any additional or different considerations, and we agree with those identified in the Consultation Paper (at paras 4.21-4.22).

4.4 The second model, abolition, simply abolishes the offences and torts of maintenance and champerty all together without expressly providing for

[4] As to concerns on the crowdfunding of litigation, the Commission may be interested in a report written for the Legal Services Board in England and Wales: "What does it mean for lawyers to uphold the rule of law?" (October 2023).

any preservation of underlying public policy. Are there additional concerns or advantages related to this approach not previously discussed?

Given the likely impact of a change of law in this area, we are of the view that abolishing the torts of maintenance and champerty would be impulsive as a first step. As noted in the Consultation Paper (at para 4.26), this approach may legalise activities that have not been properly risk-assessed, e.g. the bare assignment of causes of action or the crowd-funding of litigation.

We are also of the view that third-party funding should be legalised on a phased basis. This approach would not allow for that.

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?

We have not identified any additional advantages or concerns.

However, as discussed at para 4.1 above, we believe that, as a first step at least, the statutory exception should be limited to proceedings brought under the Representative Actions Act.

5 <u>Models of Regulation</u>

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?

Yes, we agree.

These arguments should underpin the regulatory framework, i.e. the purpose of regulation should be to reduce financial and other risk for funded and non-

funded parties to disputes; and to protect and enhance the administration of justice in Ireland. The goal of the regulatory framework should not be to make Ireland an attractive place for funders to do business and make potentially huge profits.

Funders have been allowed to operate largely unregulated in may parts of the world. Ireland has an opportunity to set best practice in this area and to design a framework that safeguards against the risks of third-party funding.

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?

Leaving aside the issue of resources, we believe that a sui generis regulatory regime administered by a new regulator would best mitigate the potential dangers associated with third-party funding.

However, as set out below, given the significant resources needed to establish a new regulator, the best alternative is a sui generis regulatory regime administered by an existing regulator.

The regulator should be charged with regulating the third-party funding market and the activities of funders operating in Ireland. We discuss this further in section 6, but by way of example, funders should be required to have a licence to operate in Ireland; meet certain capital adequacy requirements; ensure their funding agreements meet certain requirements; and agree that they will not use material discovered in Irish litigation for purposes outside of the litigation.

In addition to this, the courts should have a role in overseeing funding agreements in proceedings that come before them.

(2) Should the regulatory regime involve a requirement for a licence or other form of pre-authorisation?

Yes. We recognise that few jurisdictions require funders to obtain a licence or some other form of pre-authorisation. However, we do not consider the novelty of a licensing regime or the fact that it would place an additional burden on funders to be valid arguments against introducing such a regime.

We also note that the proposed EU Directive recommends the establishment of a system of authorisation for funders and recommends that member states should mutually recognise prior authorisations granted in other member states.[5]

In order to qualify for a licence, we consider that a funder should have a presence in Ireland (to facilitate the enforceability of any court orders made against funders) and should also meet certain capital adequacy requirements to mitigate the risk of insolvency. We discuss this in more detail at para 6.9.

(3) How stringent or flexible should the regulatory regime be?

We are of the view that a stringent regulatory regime is necessary to achieve the policy goals set out above. It will also help to set high standards while the market is in its infancy, which is an easier task than 'correcting' established market behaviour.

We discuss the specifics of regulation in detail in our responses to the questions in section 6. Generally, our view is that the regulator should regulate entry into the Irish market by means of a licensing or other authorisation regime; and should mandate that funding agreements include certain terms (see para 6.7 below).

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?

Yes. As noted in the Consultation Paper, a voluntary self-regulatory framework arises where the sector is left in complete control of setting and implementing its own standards. Giving any sector "complete control" to regulate itself is, in our view, giving it too much autonomy.

We consider a voluntary self-regulation model is high risk and uncertain, particularly in such a new and complex market. Self-regulation would not address the policy goals of regulating a third-party funding system, namely to (i) 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 (ii) protect and enhance the proper and efficient administration of justice in

[5] 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.

Ireland. There is no incentive for funders to set strict standards or to prescribe meaningful sanctions for breach of supposed standards.

We note in this regard the EU Parliament's comments on the proposed EU Directive that voluntary regulatory mechanisms and codes of conduct "*so far have not been subscribed to by the large majority of funders, leaving claimants significantly exposed.*"

In the UK, for example, the Association of Litigation Funders (the "**ALF**") only has, according to its website, 15 funder members, but we understand there are many more funders active in the UK. Members of the ALF agree to adhere to its Code of Conduct, a code that is a mere 5 pages long. This is astonishingly short given the complexity of this area. Sanctions for breach of the code lack any teeth. They include a private warning; a public warning; publication of the opinion; suspension of ALF membership; expulsion from the ALF; a fine of up to £500; and the payment of the costs of determining the complaint.

Indeed, there have been recent calls to regulate the third-party funding sector in the UK. The results of the London Solicitors Litigation Association 2023 litigation trends survey are worth noting.[6] Of those who responded to the survey, 88% believe it is time that the litigation funding sector was regulated. Interestingly, 79% of respondents are involved in cases where one or both parties are financed by a litigation funder.

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?

Yes, our view is that the fact that there is no extant litigation funding market in Ireland means that this is not a viable option for regulation and that the novelty of the sector requires more institutional support.

There is no reality to the expectation that funders that are new to the Irish market and have yet to establish their market share will immediately come together to agree an appropriate code of conduct for the Irish market. It may be that this would happen in time, but we do not envisage it happening on the passing of legislation to legalise third-party funding. Indeed, it took funders in the UK close to 44 years to form the ALF and it was only when Lord Justice Jackson waved the "stick" of full statutory regulation that they were provoked to do so.

[6] Survey conducted by the London Solicitors Litigation Association, which has 3,935 individual members. See https://www.lawgazette.co.uk/news/regulate-litigation-funding-say-88-of-london-litigators/5118019.article#:~:text=Last%20year%2060%25%20of%20respondents,encouraging%20but%20not%20a%20boom'.

We also note that the proposed EU Directive proposes that the sector be regulated and not left to regulate itself.

Our view is that clear standards should be set at the outset, a “start as you mean to go on” approach. This will create certainty for all parties involved. We do not believe that the voluntary or enforced models proposed can achieve this.

We believe that the sector requires institutional support in the form of a regulator and a bespoke regulatory regime. We discuss this in further detail in our answers to the questions in section 6 below.

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?

We do not believe that the courts should be tasked with regulating the sector. Regulation is not a judicial role; this role should be carried out by a regulator with a statutory mandate to regulate the sector.

Subject to there being a specific regulator setting and enforcing standards for the sector, we do not believe that there is a need for a court to separately approve individual funding agreements in proceedings before it. If the regulator requires that funding agreements adhere to certain standards, there must be a presumption that agreements meet those standards. An additional certification requirement would be a waste of court resources and would also lead to an increase in litigation costs. However, we stress that this view is subject to there being a regulator in place.

However, the courts should have an oversight-role and this is in line with the approach provided for in the Representative Actions Act. A non-funded party should be able to ask the court to review a funding agreement where it has reasonable grounds to believe that it does not comply with the law and/or the requirements set by the regulator. The court should also have the power to request an unredacted copy of the funding agreement on its own initiative. The court should have this power at any stage of the proceedings, not only at the commencement stage.

The court should also have the powers set out in Article 17 of the proposed EU Directive, namely:

- to make orders or give directions that are binding on a funder;

- to assess whether a funding agreement complies with the law;

- to assess whether the funding agreement complies with any relevant transparency requirements (i.e. that there is no conflict of interest and/or that any connections with the defendant have been disclosed).[7]

- to assess whether the funding agreement entitles the funder to an unfair, disproportionate or unreasonable share of any award (If there is a cap on the funder's return, to assess whether the agreement complies with the cap).

- to impose any penalty the court deems appropriate to ensure compliance with the legislation.

- to consult or seek expertise from the regulator or other suitably qualified person.

We recommend also that, where a funding agreement does not comply with the law, the court should have the power to refer the funder to the regulator.

We note also that section 27 of the Representative Actions Act gives the court power to require a qualified entity to refuse the sources of particular funding where it has "justified doubts" as to the whether the funder is unduly influencing decision and/or whether the funder is a competitor of the defendant.

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?

Taking the second part of this question first, of the regulators suggested, we believe the Central Bank is best equipped to take on the role of the industry regulator. It has unparalleled experience in supervising and regulating sophisticated financial entities and products. It is well-resourced with strong standing as a regulator both in Ireland and abroad. It also employs a large number of experienced in-house lawyers.

[7] This is provided for in the Representative Actions Act. Under section 27 of that Act, the court can assess compliance where it has "justified doubts" as to the whether the funder is unduly influencing decisions and/or whether the funder is a competitor of the defendant. The court can assess compliance on its own initiative, regardless of whether a party to the proceedings has raised an issue in relation to compliance.

At a minimum level, the Central Bank would need sufficient financial resources to:

- Hire suitably qualified staff or to re-allocate existing staff.
- Train staff on the myriad of legal and financial issues that third-party funding presents.
- Put systems in place to manage any reporting requirements that might be imposed on funders, both at an administrative level and at a supervisory level.
- Implement technology to track growth in the market and any potential impact on litigation, to identify trends, potential abuses and risks.
- Run an education campaign for the public generally to support people to make informed decisions about whether to avail of litigation funding.
- Establish a complaints handling procedure to effectively and efficiently deal with any complaints that are made against funders.
- Draft rules on what clauses must be included and what clauses cannot be included in funding agreements.
- Carry out investigations where there is reason to believe that funders are breaching regulations.

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?

We believe that a new regulatory regime administered by an existing regulator is the 'cleanest' of these options. This would allow for the creation of a bespoke regulatory framework that would take account of the unique risks and challenges presented by third-party funding. But at the same time, it takes advantage of existing regulatory expertise and experience. A known regulator with a strong track record will also carry weight and respect in the market.

(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?

We believe that it would be difficult to fit third-party funding into an existing regulatory regime. It raises unique and complex issues. An existing regime might regulate parts of the sector, but not the whole of the sector. Gaps in regulation will be exploited by funders.

(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?

As noted above, we believe that a new regulatory regime is the best option to mitigate the many potential dangers and risks associated with third-party funding.

We do not consider that the fact that a regulatory regime is new automatically means it will not be able to keep up with an emerging field. If the regime is properly structured and resourced, and is overseen and implemented by an experienced regulator, it should be in a position to hold its own.

As to whether the creation of a new regime is a waste of administrative resources, we do not believe that it is: legalising third-party funding will open the door to a unique, complex market that has the potential for rapid growth. If not properly regulated, we may see the commodification of justice and the growth of US-style entrepreneurial litigation. A long-term view should be taken.

(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?

We are not best placed to comment on whether cooperation among regulators would be "effective and efficient". However, it seems to us that this option would pose serious logistical challenges around the division of responsibility. This would lead to a lack of accountability and unintended gaps in regulation that could be exploited by funders.

Optically, it might convey the impression that, Ireland is a 'light-touch' jurisdiction and/or we do not have the capacity or ability to properly regulate the sector.

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?

As noted above, we believe that a new regulatory regime administered by a new regulator would best mitigate the potential dangers associated with third-party funding.

However, we acknowledge that a proposal to establish an entirely new regulator might be met with opposition given that the market has yet to be established.

If litigation funding is legalised, either wholesale or in the limited form we recommend, the middle ground might be to give responsibility for its regulation to an existing regulator (such as the Central Bank) for a defined period of time. At the end of the period, the regulator (or an appropriate Government department) could assess whether, based on the size of the market and the level of risk presented, there is a need for an independent regulatory body. If such a need exists, the team within the regulator that was responsible for third-party funding could be transferred to this new standalone regulatory body. This is key to ensuring that any regulatory knowledge of the sector is not lost.

Having a standalone regulator supervising the sector as a whole will help to develop a depth of knowledge and expertise of this complex area. This cannot be achieved with a court certification model where different judges would be left to review and approve individual funding agreements, without necessarily have any real understanding of the sector and the wider context.

As to whether a specific regime might dissuade development of a third-party funding sector to a meaningful extent, we do not believe that it would. Funders have the potential to achieve huge rates of return and are unlikely to be dissuaded to enter the Irish market on the basis of tight regulation. In some respects, a new, bespoke regime might be more advantageous to funders. If a regulator's sole area of focus is third-party funding, from an administrative perspective, it should be more efficient. It would also be staffed by professionals who have a real understanding of the challenges and complexities that litigation funding presents. In any event, the objective of the regulatory

regime should not be to facilitate private investors to make huge profits off the back of consumers who have a valid cause of action: it should be to reduce financial and other risks for funded and non-funded parties; and to protect and enhance the administration of justice in Ireland.

Interestingly, only 10% of respondents to the London Solicitors Litigation Association 2023 litigation trends survey (referred to above at para 5.3) foresee a reduction in the availability of funding or increase in costs following the UK Supreme Court ruling in PACCAR.[8] That decision casts doubt on the enforceability of certain litigation funding arrangements where the funder's return is calculated as a percentage of the damages recovered in the litigation. The ALF in the UK commented that the decision was *"not generally expected to impact the economics of legal finance and [would] not deter [its] members' willingness to finance meritorious claims."*[9] This suggests funders are not 'put off' by a level of regulation given the potential to make huge returns on investment.

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?

Resources aside, we believe that a new/sui generis regulatory regime, administered by a new regulator, would be the best solution.

But, the next best alternative is a new regime under the remit of an existing regulator, such as the Central Bank.

As noted in the Consultation Paper, any regulatory regime is likely to be a hybrid or blended one: even if a specific regulatory regime is introduced, some existing regulators will automatically exercise some oversight over funders; and the State's civil and criminal law will have an independent regulatory effect on third-party funding.

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?

As set out above, we believe that, as an initial step, third-party funding should only be legalised in respect of proceedings brought under the Representative Actions Act.

[8] R (on the application of PACCAR Inc) v The Competition Appeal Tribunal [2023] UKSC 28. See https://www.irishlegal.com/articles/england-calls-for-regulation-of-litigation-funding.

[9] https://litigationfinancejournal.com/funders-respond-to-the-uk-supreme-court-judgement/

There should be strict regulation of the funding of proceedings brought under the Representative Actions Act on the basis that these proceedings will involve consumers.

But at a general level, we believe that where parties to legal proceedings are commercially sophisticated, there is less of an argument for stringent regulation (although we consider that some form of regulation is still warranted).

6 Six Specific Issues in a Regulatory Framework for Third-Party Funding

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?

We recommend that as an initial step, third-party funding should only be legalised in proceedings brought under the Representative Actions Act.

As a general principle, we do not believe that third-parties should be allowed to fund the three kinds of dispute discussed in the Consultation Paper, namely personal injuries proceedings; proceedings concerning adoption, guardianship, custody of or access to children; or matrimonial and other family law proceedings.

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)?

We believe there are strong policy reasons as to why third-parties should not be allowed to fund personal injuries claims. The Commission has identified these reasons at para 6.7 of the Consultation Paper, i.e. (i) general damages for pain and suffering in a personal injuries claim are inherently individual to the injured person; and (ii) the value and extent of personal injuries claims have an economic impact on society. We should not be actively seeking to encourage a personal injuries claim culture.

We consider that allowing third-parties to fund personal injuries proceedings will undermine recent reforms aimed at moderating damages in personal injuries proceedings and encouraging mediation as an alternative to litigation.

'No foal, no fee' arrangements common in personal injuries cases alleviate access to justice concerns in personal injuries proceedings to a certain degree. Additional access to justice concerns should be addressed by strengthening

Ireland's civil legal aid scheme, which unfortunately is unfit for purpose. We note a review of the civil legal aid scheme is ongoing.

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?

Yes, we agree that the fact of funding and the identity of the funder should be disclosed to the opposing party, and we endorse the points made at para 6.19 of the Consultation Paper in favour of disclosure.

We consider that the fact of funding and the identity of the funder are matters that should be disclosed to the opposing party as a matter of course when the litigation commences or as soon as the funder becomes involved. The funded party should be obliged to disclose this information – it should not be necessary for the non-funded party to apply to court to find out whether its opponent is funded and, if so, who the funder is.

We also consider that a disclosure requirement should extend to disclosure of the ultimate beneficial ownership of any company behind the funder and the economic beneficiaries. This is necessary to prevent revenge litigation or funding for the purpose of getting access to a company's commercially sensitive data and/or to reduce the risk of money laundering. We discussed these risks at para 3.4 above.

We note that the proposed EU Directive proposes that the funded party must inform the court/administrative authority of the existence of the funding agreement and the identity of the funder at the earliest stage possible of the proceedings. The court/administrative authority must then make the defendant aware of this information. We do not believe that the onus should be on the court/administrative authority to relay this information to the defendant. Our view is that the funded party should be obliged to inform the defendant directly as soon as the funder is engaged.

Disclosure and transparency requirements should work hand-in-hand with the safeguards in the Representative Actions Act (once commenced). A body seeking to be designated as a qualified entity under the Representative Actions Act must be independent and not influenced by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties; and must have procedures to prevent any influence and any conflicts of interest between itself, its funding providers and the interests of consumers. It must also make information about the sources of its funding publicly available.[10]

Any qualified entity bringing a representative action must provide the court with information on the sources of its funding.[11] The Representative Actions

[10] Section 8.

[11] Section 27(3).

Act also provides that, subject to funding being permitted by law, where a representative action is funded by a third-party, the court must ensure that the representative action is not brought against a defendant who is a competitor of the funder or a defendant on whom the funding provider is dependent.[12]

6.4 Is a blanket rule requiring disclosure appropriate?

We understand this question to mean a blanket rule requiring disclosure of the fact of funding, the identity of the funder and the funding agreement to both the court and the opposing party in every case.

As noted above, we believe that the fact of funding and the identity of the funder should be disclosed to the opposing party as a matter of course. This information should also be disclosed to the court.

As regards the disclosure of funding agreements, however, our view is that a blanket disclosure rule is problematic and likely to be challenged. Further, if there is a regulator in place and the regulator requires that funding agreements adhere to certain standards, there must be a presumption that agreements meet those standards.

We believe that the court should have the power to request, on its own initiative or at the request of the opposing party, an unredacted copy of the funding agreement. The court should also have the power to order the disclosure of a funding agreement to the opposing party (with commercially sensitive information redacted, if necessary) where there are reasonable grounds justifying its disclosure.

We note that a similar approach is envisaged in the proposed EU Directive: the funded party can be requested (by the court/administrative authority or the defendant) to provide to the court/administrative authority a complete and unredacted copy of the funding agreement. The court/administrative authority can review the agreement on its own initiative or at the request of a party where that party had "justified doubts" as to whether the agreement complies with the Directive.

The Representative Actions Act also requires that a qualified entity bringing a representative action disclose to the court a financial overview that specifies the sources of funds used by it to support the representative action.

6.5 Do you think a disclosure requirement would stunt the development of a third-party funding sector?

[12] Section 27(2)(b).

We do not expect that a rule requiring disclosure along the lines proposed above would impact negatively on the growth of the sector in Ireland.

We note that many jurisdictions have adopted a similar position as regards disclosure of the fact of funding and the identity of the funder. Indeed it might be in the funded party's interest to disclose this information to its opposing party.

As regards disclosure of the funding agreements, if the approach proposed in the proposed EU Directive is adopted, EU member states will be obliged to introduce disclosure requirements. This will level the playing field across EU member states.

In any event, decisions on the appropriate level of regulation should not be based on a desire to create an attractive market for private enterprises to profit from litigation.

6.6 How much control should funders have over the litigation proceedings?

Funders' control of litigation proceedings should be kept to a minimum. A certain level of control is inevitable given that funders will want to protect their investment. But the level of control a funder can exert should be regulated.

We know anecdotally, from speaking to US defence attorneys, that while "officially" funders will say that they will have no involvement or only limited involvement in the running of the litigation, the reality is quite different: the funder controls the purse strings and wields the power.

We discuss in more detail below our views on how the level of control a funder can exert over proceedings should be regulated.

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?

Yes, we agree that this is a legitimate concern; indeed, we believe that it is a fundamental concern. As noted in the Consultation Paper, the funded party's interests may be broader than the funder's interests, which will be purely financial.

The Representative Actions Act provides for a range of redress measures, in addition to compensation, including repair, replacement, price reduction, contract termination and reimbursement of the price paid.[13] A qualified entity can seek one of these measures and/or the court may, of its own initiative, require the defendant to provide a consumer with one or more of these measures. Where a funder perceives a risk that the court might order a non-financial redress measure, it might push for a settlement on monetary terms. The Representative Actions Act requires the court to ensure, having regard to the various redress measures, that there are no conflicts of interest and that funding by third parties does not operate to divert the representative action from the protection of the collective interests of consumers.[14] In particular, the court must ensure that when making decisions, including decisions on settlement, the qualified entity is not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned.[15] While these provisions acknowledges the risk, we query whether in practice they will prove to be effective safeguards.

A further concern, shared with us by a US defence attorney, is that in practice the involvement of a funder can make settlement more difficult: it adds another "decision-maker" to the mix. To get around this, US defence attorneys try to identify the key decision-maker in the funder, the person who is "the main driver", and deal with them directly, rather than with the plaintiff's lawyer. This raises serious conflict of interest issues and ethical concerns.

While the checks identified in the Consultation Paper might reduce the risk of a funder dominating the litigation proceedings for their own interests, we do not believe they are sufficient.[16] We are also concerned that these checks are directed solely at the funded party's lawyers, and not the funder. We accept that lawyers have a certain role to play, and the Law Society, the Bar Council and the Legal Services Regulatory Authority will need to clarify the duties and role of lawyers who advise or act for clients who obtain funding from third-parties. But the burden of policing a funder's control of proceedings should not sit with the funded party's lawyers.

We believe that there is merit in the more stringent approach put forward in the proposed EU Directive. Article 14(2) provides that any clause in the funding agreement which permits the funder "*to influence the decisions of a [funded party] in the course of proceedings in a manner that would benefit the litigation funder itself at the expense of the [funded party]*" will have no legal effect.

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[13] Section 26.

[14] Section 27(1).

[15] Section 27(2)(a).

[16] The 'checks' set out in the Consultation Paper are: (i) duties of legal practitioners to act in their clients' best interests and on their clients' instructions; (ii) amending the ethical and professional frameworks for legal practitioners; and (iii) ceding control as misconduct.

It gives two specific examples of clauses that will have no legal effect:

- the grant of an explicit power to a litigation funder to take or influence decisions in the course of proceedings, such as with respect to specific claims pursued, settlement of the case, or management of expenses associated with the proceedings; and

- the provision of capital or any other resource with a monetary value for the purposes of proceedings, contingent on the approval by third-party funders of its specific use.

As noted above, the Representative Actions Act will (once commenced) require the court to ensure that decisions of qualified entities, including decisions on settlement, are not unduly influenced by a third-party in a manner that would be detrimental to the collective interests of the represented consumers.[17] The court will also be required to approve settlements in representative actions.[18] This is an important safeguard as in reality the vast majority of cases do not proceed to full trial.

In addition, we believe that the regulator should require that funding agreements adhere to certain mandatory requirements. This approach is in line with Article 12 of the proposed EU Directive. We recommend that funding agreements should include as a minimum:

- the different costs and expenses that the litigation funder will cover;

- the share of any award or fees that will be paid to the litigation funder or any other third party, or any other financial costs to be borne, directly or indirectly, by the claimants, the intended beneficiaries, or both;

- acknowledgement of the funder's liability for any adverse costs order that the court may make;

- a clause specifying that any awards from which the fees of the funder are deductible will be paid in full first to the claimants who may then subsequently pay any agreed sums to litigation funders as fees or commission, retaining at least a certain minimum amount;

- the risks that the claimants, intended beneficiaries or both are assuming, including, the scope for escalating costs in the litigation, and how that impacts the financial interests of the claimants, beneficiaries or both;

- confirmation that the funder cannot unilaterally withdraw from the agreement, and must apply to the court for permission to withdraw and the agreement should set out the risks to claimants, beneficiaries or both

[17] Section 27.

[18] Section 30(3).

in the event the court grants permission; (we discuss unilateral termination below at para 6.12);

- a disclaimer with regard to non-conditionality of funding in relation to procedural steps; and
- a declaration of absence of conflict of interest by the litigation funder (in line with that proposed in Article 13 of the proposed EU Directive).

In addition to this, we recommend that the regulator also require that funding agreements include:

- confirmation that the party seeking funding has received independent legal advice on the terms of the funding agreement.
- a governing law clause stating that the agreement is governed by Irish law and the funder submits irrevocably to the jurisdiction of the Irish courts.
- acknowledgement by the funder that it owes a fiduciary duty to the claimant and intended beneficiaries and that it will act in a manner consistent with its fiduciary duty throughout the course of the proceedings, including during any settlement negotiations (in line with what is proposed in Article 7 of the proposed EU Directive).

6.8 Are there any potential interventions not discussed in this Consultation Paper to support a party whose funder becomes insolvent during the proceedings?

One option not considered in the Consultation Paper is requiring all funders operating in the State to pay into an indemnity fund set up for the purpose of meeting any unmet funding obligations.

This is in line with the approach proposed in the proposed EU Directive. Article 6(4) provides that member states may set up an insurance fund to compensate the costs of a litigant who pursued litigation in good faith and where the funder becomes insolvent during the course of the litigation.

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?

The options discussed in the Consultation Paper are: (i) minimum capital adequacy requirements; (ii) prohibition on recovery of costs by legal practitioners; and (iii) statutory declaration from auditor or accountant as to funder's solvency.

We believe that the most appropriate options are (i) and (iii). We do not see why legal practitioners should be prohibited from recovering their fees from funded clients where the funder becomes insolvent or fails to pay legal costs.

We do not agree that a minimum capital adequacy requirement is inadvisable. On the contrary, we are in favour of imposing capital adequacy requirements as one of the measures to deal with the risk of funder insolvency. We believe that funders should be required to demonstrate they meet certain capital adequacy requirements before being licensed or authorised to operate in the Irish market.

The proposed EU Directive also envisages member states imposing capital adequacy requirements and "supervisory authorities" having responsibility for their enforcement. The proposed EU Directive also provides that funders be able to meet capital adequacy requirements through insurance.

Article 6 of the proposed EU Directive proposes that supervisory authorities ensure that funders have the capacity to (a) pay all debts arising from their third-party funding agreements when they become due and payable; and (b) fund all stages of any proceedings they have committed to, including the trial and any subsequent appeal.

We note the concern in the Consultation Paper around monitoring and enforcing compliance with capital adequacy requirements. We do not see this as an obstacle. We have recommended above that litigation funders be regulated by an existing regulator (such as the Central Bank) under a new/sui generis regulatory regime. The Central Bank is well-positioned to monitor the capital adequacy of funders. Again we say that the regulatory framework must be designed with the goals of regulation in mind, one of which is to reduce the financial risk to funded and non-funded parties.

Indeed even outside of a regulatory approach, we do not see this as an issue. In the UK, where the sector is self-regulated, the ALF requires that its members meet certain capital adequacy requirements.

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?

We do not believe it would be fair to require legal practitioners to assume the risk of funder insolvency.

We note that the view of the New Zealand Law Commission was that such an approach is appropriate because solicitors are "*repeat users of [third-party] funding services.*" But it is not the solicitor who is the "user", it is the funded party.

We also note the view that this approach 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.*" Our view, however, is that the lawyer is not the party who needs to be incentivised; the funder is.

The regulatory body could put measures in place to reduce the risk of funder insolvency. Regulation of funders would also help ensure that funders are "*reputable, competent and financially stable*". Further, while lawyers will likely recommend funders to their clients (as they do counsel, mediators, experts etc), the client will be the person instructing the funder (not the lawyer).

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?

We agree that a combined approach is needed. This should include the imposition of capital adequacy requirements and a requirement that funders provide a statutory declaration of solvency from their auditor/accountant. We also recommend the establishment of an indemnity fund (as described at para 6.8 above).

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?

We agree that a total prohibition on unilateral withdrawal may be too strict. We do not consider the approach favoured in the proposed EU Directive to be a "total prohibition" because it allows for the possibility of withdrawal where the court/administrative authority grants permission to withdraw. We believe that this is a fair approach. This would allow the funder to apply for permission to withdraw where, for example, the funded party misled the funder or did not disclose material facts which would have influenced the funder's decision to fund the litigation. Provision should be made, however, to require the court/administrative authority to make an order as to how the costs incurred prior to withdrawal should be allocated. The presumption should be that the

funder is obliged to honour costs incurred prior to the circumstances that lead to the withdrawal, except in the case of a material non-disclosure by the funded party.

Yes, we believe that there should be some instances in which a funder may withdraw (e.g. where the funding was advanced on the basis of incomplete facts), but we believe that these should be dealt with on a case-by-case basis by the courts. We do not believe that it is prudent to list specific circumstances justifying withdrawal because it is difficult to predict what types of situations might arise. We also query whether allowing a funder to withdraw on the basis that they “reasonably cease to be satisfied about the merits” of the litigation, as is the case in Hong Kong and the UK, is fair – the funder must assume some risk that the funded party’s case may not ultimately turn out to be as strong as initially believed. The funder should not be allowed to withdraw because it made a bad investment decision.

A prohibition on unilateral withdrawal (subject to a court ordering otherwise) would also reduce the risk that a funder might use a threat of withdrawal to push the funded party to settle or to otherwise steer the litigation to suit its purposes.

As discussed above, the funding agreement should confirm that the funder cannot withdraw from the funding agreement unless it has permission of the court to do so and it should set out the risks to claimants, beneficiaries or both in that scenario (see above at para 6.7).

6.13 Does setting statutory restrictions on when withdrawal is permitted strike a balance between always permitting withdrawal and total prohibition of withdrawal?

As set out above, we believe that it would be difficult and unwise to try to list specific circumstances in which a funder is allowed to withdraw. But our view is that there should be strict regulation over the circumstances in which a funder can withdraw.

Our preferred approach is to prohibit withdrawal, unless the court orders otherwise. We believe that this should be clearly set out in the funding agreement (see above at para 6.7)

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?

We are of the view that there should be a cap on the funder's return.

As noted by the Commission, it is difficult to identify the form a cap should take. The most straightforward approach might be to calculate the cap as a percentage of the damages awarded or the settlement amount. However, this risk with this approach is that it incentivises funders to invest in high-value litigation and this goes against the access to justice basis for allowing litigation funding in representative actions.

A percentage cap approach is, however, in line with the approach outlined in the proposed EU Directive, which provides that any clause in the funding agreement that means the funded party would get 60% or less of the total award will have no legal effect. This in effect caps the funder's return at 40%.

However, we query whether it is fair that a party with a valid cause of action should only receive 60% of the amount a court finds they are entitled to or 60% of the settlement amount. This effectively means the claimant forfeits 40% of their award to access the Irish civil justice system. We understand that in Germany, the legislation transposing the Representative Actions Directive requires that the funded party gets 90% of any award/settlement.[19] We ask the Commission to explore this model.

The Commission may also need to consider the ruling of the UK Supreme Court decision in PACCAR.[20] In that case, the Court held, by a majority of 4:1, that litigation funding agreements that are structured such that "the funder's maximum remuneration is calculated with reference to a percentage of the damages ultimately recovered in the litigation" and where the amount payable "is to be determined by reference to the amount

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[19] Gesetz zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG sowie zur Änderung des Kapitalanleger-Musterverfahrensgesetzes (Verbandsklagenrichtlinienumsetzungsgesetz – VRUG). Gesetz zur gebündelten Durchsetzung von Verbraucherrechten (Verbraucherrechtdurchsetzungsgesetzt - VDuG), BGBl. 2023 I Nr. 272, p. 1-16. In English, the Act is called Act on the Bundled Enforcement of Consumer Rights (Consumer Rights Enforcement Act - VDuG), Federal Law Gazette 2023 I No. 272, p. 1-16. Section 4 of the Act is headed 'Consumer quorum; financing'. Under section 4(2) a representative action is inadmissible if it is financed by a third party… 3. to whom an economic share of more than 10 per cent of the performance to be provided by the entrepreneur being sued is promised.

[20] *R (on the application of PACCAR Inc) v The Competition Appeal Tribunal* [2023] UKSC 28. We understand that the UK Government has tabled an amendment to the Digital Markets, Competition and Consumer Bill to act as a workaround to Paccar. If passed, a litigation funding agreement that provides for a percentage of damages will not be considered a DBA. This proposed amendment relates to opt-out collective proceedings only.

of the financial benefit obtained" fall within the definition of a "Damages Based Agreement" ("**DBA**"). In the UK, DBAs that do not comply with 2013 DBA Regulations are unenforceable.

The prohibition under the Irish Legal Services Regulation Act 2015 on the calculation of charges as a percentage of damages only applies to "legal practitioners", defined to mean practising solicitors (including a firm of solicitors) or practising barristers. Funders would not be caught by this prohibition. But the Commission may wish to consider whether a specific legislative provision is needed to allow funders to recover a percentage of damages.

(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?

We are firmly of the view that this approach is manifestly unfair to the unsuccessful party for the reasons identified in the Consultation Paper (at paras 6.74 to 6.77).

The unsuccessful party is not a party to the funding arrangement, has no contractual or other relationship with the funder, and has not committed any wrong against the funder. The unsuccessful party will not have had any role in engaging the funder or in how the funded party conducted their litigation.

A further concern is that this approach would lead to an increase in legal costs because the costs will be passed on to the unsuccessful defendant's insurance company, resulting in an increase in insurance premiums. This would make it more expensive to conduct business in Ireland, making Ireland less attractive for foreign direct investment.

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?

We have addressed our main concerns above.

The Commission may wish to explore the trend in the UK and elsewhere of law firms partnering with funders and the risks this presents.[21]

7 Assignment of Causes of Actions

[21] https://www.lawgazette.co.uk/news/mishcon-sets-up-150m-litigation-arm/5109712.article

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?

We understand from para 7.19 of the Consultation Paper that the Commission is exploring a potential liberalisation of the prohibition on the assignment of bare causes of action and personal causes of action.

We believe that the current prohibition on the assignment of causes of action in these areas should be maintained.

We believe that the assignment of bare causes of action should be treated differently to third-party funding. For now, we only recommend that the prohibition on third-party funding be removed in the limited way we have recommended above. This is a sensible and cautious first step. We have serious concerns that removing the prohibition on the assignment of bare causes of action and personal causes of action would move us very quickly towards the commodification of litigation.

For example, if the law is relaxed, we might see:

- Vulnerable or impecunious claimants selling their claims at a gross undervalue in return for quick payment.
- The development of a market for middlemen, such as agents and brokers, seeking to profit from the secondary trading of claims.
- A rise in fraudulent claims, with “claimants” concocting claims and then “selling” them on for a quick payment.

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?

We agree with the differences identified by the Commission.

7.3 Do you agree that it is difficult to justify enforcing different regulatory regimes for third-party funding and assignment of actions?

Yes, it may be difficult to justify having two different regulators. But we agree with the statement at para 7.38 of the Consultation Paper that:

“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."

However, our view is that, for now at least, we should not remove the prohibition on the assignment of bare causes of action or the assignment of personal causes of action.

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?

We refer to the answer to question 7.3 above.

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