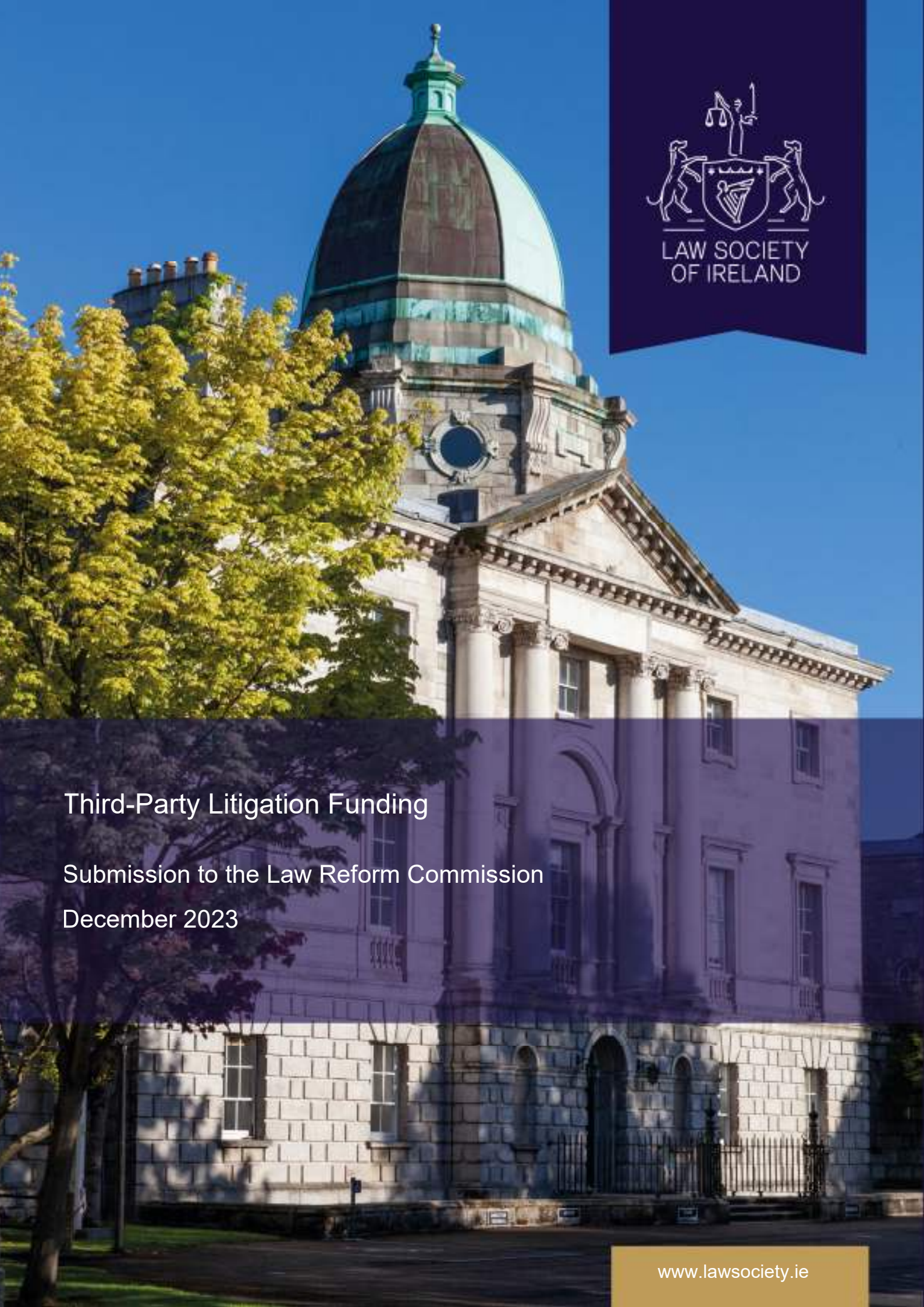

LAW SOCIETY OF IRELAND

Third-Party Litigation Funding

Submission to the Law Reform Commission

December 2023

www.lawsociety.ie

Executive Summary

The Law Society of Ireland appreciates the opportunity to make written submissions to the Law Reform Commission (the "Commission") on the topic of third-party funding ("TPF") for litigation. The following submission includes significant input from the Litigation, Business Law, Environment and Planning, and Human Rights Committees of the Law Society.

Despite historical prohibitions in common law jurisdictions, currently there is growing support for third-party funding as a means of facilitating access to justice. The primary benefit of third-party funding for litigation in Ireland, a jurisdiction without a comprehensive civil legal aid system, would be to allow greater access to justice for litigants, especially in litigation where there is a differential in the financial resources available to the opposing parties.

Regulation of third-party funding for litigation is currently on the European regulatory agenda. The European Parliament argues that third-party funding, if properly regulated, could be used as a tool to support access to justice, especially in countries where legal costs are high, such as Ireland. Third-party funding could also help to ensure that public interest cases are brought to court by reducing economic imbalances that exist between corporations and those citizens seeking redress, and thus support appropriate corporate accountability.

Beyond facilitating access to justice, if Ireland wishes to retain its competitive position in a globalised legal marketplace, then a shift to allow funding of litigation by third parties is necessary. Third-party funding is prevalent in Australia, the USA, Canada, the United Kingdom and the Netherlands. While third-party funding is less prevalent in Europe, it is a booming phenomenon in investment arbitration in the EU.

To regulate third-party funding in Ireland, the Law Society supports the Commission's third model of legislation for third-party funding (the statutory exception approach).

To oversee implementation of third-party funding for litigation in Ireland, the creation of a tailored regulatory regime that is already operated by an existing single regulator is the most appropriate, practical, and efficient regime to oversee third-party funding:

- The Central Bank is the most appropriate body to regulate third-party funding in Ireland. Collective collaboration from other regulators with the Central Bank is recommended.
- Funders should be required to obtain a licence (or other form of authorisation) before being permitted to engage in third-party funding in this jurisdiction.
- Specific provisions, set out in primary or secondary legislation, should stipulate how crucial elements of the funding relationship are dealt with in a funding agreement.

The legalisation of third-party litigation funding cannot be considered in isolation and must be viewed against the backdrop of the Irish legal and commercial landscape during its inception and development phase. We agree with the Commission that it is imprudent to introduce third-party funding into the three categories noted in the Consultation Paper, namely personal injury, family law, and defamation. In addition, claims against the State should be considered as a separate category that requires additional scrutiny on grounds of public policy.

This submission responds to specific questions posed by the Law Reform Commission and is organised accordingly.

Policy Considerations of Legalising Third-Party Funding

Question 3.1
Should the concerns about the commodification of justice and creating a market in legal claims be seen as fundamental obstacles to legalising TPF?

1. No, concerns about the commodification of justice and creating a market in legal claims should not be seen as fundamental obstacles to legalising third-party funding for litigation. These concerns can be managed by effective regulatory models, as set forth in the following submission.
2. At European Union level, a resolution of the European Parliament dated 13 September 2022 set out recommendations to the Commission on Responsible private funding of litigation[1] (the "Recommendations") to regulate third-party funding in member states. The Recommendations remain under consideration, but they do confirm that regulating third-party funding for litigation to promote access to justice is on the European agenda.
3. Furthermore, the *Courts and Civil Law (Miscellaneous Provisions) Act 2023,* when commenced, will amend the *Arbitration Act 2010* and permit third-party funding in international commercial arbitration and in related proceedings (including court proceedings arising out of an international commercial arbitration). In this way, third-party funding is already becoming part of the litigation landscape in Ireland.
4. The primary benefit of third-party funding for Ireland would be to allow greater access to justice for litigants, especially in litigation where there is a differential in the financial resources available to the opposing parties. Cases from international jurisdictions can be instructive. For example, in Australia, Litigation Lending Services funded the class action *Pearson v State of Queensland* (No 2) (2020) FCA 619 for the historical underpayment of wages to indigenous workers, which settled with an award A$190 million payable to approximately 11,948 claimants.

Question 3.2
Do you agree with the concern that TPF 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?

5. While there are valid concerns that allowing third-party funding in Ireland might lead to the commodification of justice, and that changing the core motivation behind litigation might negatively affect the conduct of litigation, it is the Law Society's opinion that these concerns can be managed with effective regulation.
6. A primary concern around allowing third-party funding is that litigation will be conducted to achieve maximum return on investment for the funder rather than to ensure justice for the plaintiff. This incentive could reward unethical and improper litigation strategies and/or give rise to significant conflicts of interest between litigants and funders.
7. Another concern is that because the litigation funder will require a share of the ultimate award, the plaintiff is not adequately compensated.
    a. The latter concern should be considered in the context of the alternative which is that the litigant would not have been able to access any compensation but for the involvement of the litigation funder. It is preferable that plaintiffs receive a portion of the compensation rather than nothing at all.

[1] European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))

b. Moreover, beyond merely providing compensation for plaintiffs, monetary awards in litigation also have both punitive and preventive intents.

8. Both concerns can be managed through effective regulation and through the terms of the litigation funding agreement between the litigant and the funder.
9. It is also worth noting that the motivation of the funder is to achieve a return, and the motivation for the plaintiff is to be compensated. The plaintiff can only recover the losses which it has incurred so there is limited scope to make a greater return. Arguably, therefore, the motivations are aligned.
10. Ireland can learn from other jurisdictions such as Australia, Hong Kong and the UK to see how they have managed these concerns so that they do not negatively affect the conduct of litigation.

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

11. The regulatory controls proposed in the Recommendations of the European Parliament are a good starting point in addressing concerns around potential commodification of justice. Those controls include the following:
    a. Create a minimum standard for third party funders in the EU and to establish a supervisory authority granting permits to funders and monitoring their activities;
    b. Hold funders jointly liable with the funded disputing party to pay the cost of the proceedings that may be awarded;[2]
    c. Impose an obligation on funders to ensure adequate financial resources to fulfil their liabilities under the funding arrangement;
    d. Impose a fiduciary duty of care on the funder to the funded party;
    e. Establish specific disclosure and transparency obligations to inform competent judicial or administrative organs of the existence of a funding arrangement; and
    f. Limit the financial stake of funders to 40% of the amount of compensation awarded, save for exceptional circumstances.
12. These regulatory controls are instructive, however, in our view, the point "b" above merits further consideration. In circumstances where a litigant does not have the funds to litigate independently, it is likely that it would not have the funds to cover an adverse costs order. Agreement in relation to adverse costs should be addressed in the funding agreement between the parties.
13. Another approach could be to introduce a licencing regime like that in Australia. The Australian Federal Government introduced new regulations designed to improve transparency around litigation funding and to increase the accountability of funders operating in Australia. On 24 July 2020, the Corporations Amendment (Litigation Funding) Regulations 2020 ("Regulations") came into effect. The Regulations give effect to the Australian Government's announcement on 22 May 2020 that litigation funders would be required to hold an Australian Financial Services Licence and comply with the regulatory regime applicable to managed investment schemes, which would mean they were regulated by ASIC (Australian Securities and Investments Commission).

[2] *Where litigation funders have supported or funded proceedings which are not successful, they should be jointly liable with claimants for any adverse costs they caused defendants to incur and that may be awarded by courts or administrative authorities. Courts or administrative authorities should be granted adequate powers to ensure the effectiveness of such an obligation, and TPF agreements should not exclude responsibility for such adverse costs.*

Question 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?

14. There is an argument in favour of third-party funding to keep Ireland competitive globally as an international jurisdiction for litigation. The global landscape in this area has shifted in the last decade and Ireland requires a legal and policy shift to accommodate third-party funding for litigation if we wish to remain competitive.
15. Since the 1990s there has been a general international trend (in common law jurisdictions) towards liberating or abolishing the doctrines of maintenance and champerty to facilitate access to justice for parties who do not have independent means. There is a need for reform if Ireland wishes to retain its presence as an international destination for litigation. Considerable work has been done by *Ireland for Law* in this space, but its potential is limited when third-party funding is not legal. This is particularly the case when TPF is legal in competing jurisdictions.
16. The *Representative Actions for the Protection of the Collective Interests of Consumers Act 2023* (the "Consumers Act") was enacted on the 11 July 2023. The aim of which is to improve consumers' access to justice by allowing consumers who are affected by the same alleged infringements of EU law, to bring a representative action, collective or group action. The Consumers Act provides that a representative action can be funded by a third party "*insofar as permitted in accordance with law*." The *Consumer Act* anticipates the liberalisation of third-party funding in Ireland, and it is difficult to see how Ireland can give effect to representative actions without these funders.

Question 3.5
The Commission identified five policy arguments against legalising third-party litigation funding: 1) increased vexatious and meritless proceedings; 2) undercompensated claimants; 3) increased legal costs; 4) increased insurance premiums; and 5) 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?

17. The five policy arguments against legalising third-party funding outlined by the Commission are valid concerns meriting consideration, but it is our view that these concerns can be adequately overcome through the regulatory regime that will be implemented to govern third-party funding in Ireland. Ireland can learn from the regulatory controls implemented in other jurisdictions. In Hong Kong, for example, the Secretary for Justice issued the Code of Practice for TPF for Arbitration to set out the practices, standards, and obligations of third-party funders to carry on TPF in Hong Kong.[3]
18. The Hong Kong Code provides that a funding agreement must
    a. include a Hong Kong address for service for the funder;
    b. set out the name and contact details of the specified advisory body responsible for monitoring and reviewing their operation;
    c. state whether (and if so to what extent) the third-party funder is liable to the funded party to meet any liability for adverse costs, pay any premium for costs insurance, provide security for costs, and meet any other financial liability.
19. For the duration of the funding agreement, the funder must maintain effective procedures for managing any conflict of interest that may arise. It must not take any steps that cause or may cause the funded party's legal representative to act in breach

[3] The Government of the Hong Kong Special Administrative Region, Code of Practice for Third Party Funding of Arbitration issued.

of its professional duties. Moreover, the funder must observe the confidentiality and privilege of all information and documentation relating to the arbitration and the subject of the funding agreement.

20. According to the Hong Kong code, the funder must maintain access to a minimum of HK$20 million of capital and ensure that it maintains the capacity to pay all its debts and cover its aggregate funding liabilities for a minimum period of 36 months; and take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice on the funding agreement before entering into it.
21. Third party funders also have obligations in terms of control. For example, the funding agreement must set out clearly that the third-party funder will not seek to influence the funded party or its legal representative to give control or conduct of the arbitration except to the extent permitted by law. As for disclosure requirements, the funder must remind the funded party of its obligation to disclose information about the funding agreement.
22. This approach of requiring the funder to prepare a funding agreement, with mandatory provisions, and to abide by a Code of Practice would reduce the risk of the five policy arguments mentioned against legalising third-party funding.

Question 3.6

The Commission identified four policy arguments in support of legalisation: 1) increased access to justice; 2) strengthened equality of arms between parties; 3) increased available pool of assets in insolvency and 4) closing of loopholes around champerty and maintenance. In your view, what weight should be given to these arguments?

23. We agree with each of these four policy arguments in support of legalisation of TPF in Ireland. We particularly highlight the first and second policy arguments namely increasing access to justice and strengthening the equality of arms between parties. We submit that these two policy considerations are critical reasons to introduce third-party funding in Ireland.

Models of Legislation

Question 4.1
The Commission identified three models by which TPF could be legalised 1) the preservation approach, 2) the abolition approach, and 3) the statutory exception approach. Which model do you think is the most suitable and why?

24. The Society submits that the third model, statutory exception, overcomes many of the identified limitations of the first two models and is the most suited for implementation into Irish law.
25. While there is no requirement that litigation and arbitration models be dealt with in the same fashion, this "limited legislative change" model would align with the approach already adopted in the international arbitration context, per the Courts and Civil Law (Miscellaneous Provisions) Act 2023, which when commenced will amend the Arbitration Act 2010. From a drafting point of view the synergy is obvious.
26. Aligning the state's international arbitration approach with its domestic third-party funding legislation is already successfully accomplished in Hong Kong. This approach continues to protect public policy considerations, while providing a predictable and certain legislative framework.
27. This approach will also reduce regulatory and judicial intervention, thereby providing certainty in the market and facilitating efficient interactions between funders and parties to litigation as set out in our reply to question 4.2 below.

Question 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?

28. The first model, the preservation approach, as exists in the UK, may be incompatible with a European approach which is more desirous of regulation.[4]
29. Specifically, the intended aim of improving access to justice at a European level, seeks to achieve community wide common minimum standards in respect of inter alia:
    a. Regulation & supervision of litigation funders
    b. Ethical issues
    c. Incentives & limits on recovery
    d. Disclosure & transparency
    e. Powers of supervisory authorities & review by courts & administrative authorities.
30. Given the evidenced need for the extensive interventions of supervisory, judicial & administrative authorities in the UK context,[5] one must wonder about the additional impact of the first model on regulatory, administrative, and judicial resources in this jurisdiction.

[4] European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)),
[5] Considerable uncertainty has arisen in the UK since the decision of the Supreme Court in July 2023, in the ruling of R (on the application of PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC28, where the Supreme Court has now determined that the percentage method of repayment for litigation funding is not enforceable by funders.

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

31. Yes, the preservation approach would require a specific review about the repeal of existing Statutes and the requirement to draft new primary legislation to provide for appropriate implementation. Additionally, there would exist a lack of consistency and approach between this model and that adopted in the international arbitration context in Ireland.

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

32. The Society submits that the requirement to preserve public policy safeguards is paramount in the context of how Ireland is viewed internationally as a well-regulated, professional, consumer friendly locus for international business. Reputationally it is essential that these standards are maintained through the preservation of underlying public policy considerations. We do not see any advantages related to the second model, abolition, not previously outlined in the Consultation Paper.

Question 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?

33. The principal advantage of this model is the certainty and flexibility this approach provides by adhering to recognised European regulatory principles while utilising a familiar legislative approach.

Models of Regulation

Question 5.1
The Commission considers that there are two policy goals of regulating a TPF system: to reduce, as far as is reasonable and possible, the financial and other risks that TPF and funders might create for those who use TPF services and, indeed, for non-funded parties to funded disputes; 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 TPF becomes legal?

34. The Law Society agrees that the two policy goals identified by the Law Reform Commission should be primary concerns when regulating third-party litigation funding in Ireland. These policy goals are best placed to protect against the risks associated with third-party funding.
35. The purpose of the Irish compensatory system is to ensure that claimants are fully compensated for the actual losses they have experienced. Therefore, without proper regulations in place, it is submitted that there is a real risk that third-party funding could undermine the Irish justice system by failing to ensure adequate compensation for claimants (while providing funders with remuneration disproportional to the risk incurred). Furthermore, as the Commission outlined, there is a concern that without proper regulation, third-party funding and the assignment of actions promotes the commodification of justice.
36. The Law Society agrees that if legalisation of third-party funding is proposed in this jurisdiction any legalisation measures should be accompanied by a regulatory framework capable of mitigating the dangers that third-party funding might otherwise pose. The Law Society agrees that such a regulatory framework should not be so onerous that it impedes the sector's development and operation in this jurisdiction.

Question 5.2
The Commission discussed five regulatory models: 1) voluntary self-regulation; 2) enforced self-regulation; 3) regulation based on court certification; 4) a regulatory regime administered by an existing regulator; or 5) a *sui generis* regulatory regime administered by a new regulator.
Which proposed regulatory framework would best mitigate the potential dangers associated with the legalisation of third-party funding?

37. The Law Society proposes a regulatory model of a *sui generis* regulatory regime administered by an existing regulator (combination of 4 and 5 above). The existing regulators identified by the Commission include the Central Bank (of Ireland), the Legal Services Regulatory Authority ("LSRA") and the Competition and Consumer Protection Commission ("CCPC"). Based on the information available at this time, it is submitted that the Central Bank is likely to be an appropriate body to regulate third-party funding having regard to its own objectives in its regulation of the financial sector.
38. The Central Bank has developed a strong reputation for regulating and supervising all areas of the financial sector in Ireland through authorisation procedures, assessment of applications, development of financial regulation policy, supervision, and enforcement. The Law Society would respectfully suggest that each of these skills would be necessary to regulate third-party funding in Ireland. While collective collaboration from each of these regulators would clearly be welcomed, having the role of regulator undertaken collectively by several existing regulators with different expertise is not a practical or efficient way of regulating third party funders in Ireland.

Question 5.2 (2)
Should the regulatory regime involve a requirement for a licence or other form of pre-authorisation?

39. Yes. It is submitted that the requirement of a license (e.g., a requirement for funders to obtain a licence or other form of authorisation before being permitted to engage in litigation funding in this jurisdiction) is a sensible and practical approach.
40. A system of prior authorisation is contemplated by the European Parliament Recommendations. The European Parliament supports a system of authorisation for litigation funders that should include, designating an independent supervisory department or authority tasked with granting, suspending, or withdrawing authorisations for litigation funders, and supervising the activities of litigation funders. A licensing system would meet these requirements and ensure that certain minimum standards were being met by funders entering the Irish market.
41. The requirement of a license will ensure that
    a. it becomes more difficult for commercial funders to pay a party's legal costs in a manner which would result in an injustice; and
    b. if a conflict of interest did exist, it should be evident from an early stage and without the need to disclose commercially sensitive documents.

Question 5.2 (3)
How stringent or flexible should the regulatory regime be?

42. It is submitted that priority must be given to an effective regime that ensures adequate compensation for claimants. The Law Society acknowledges, however, that there is a balance to be struck as the regulatory framework should not be so stringent that it impedes development of the sector or imposes overly burdensome costs on potential third-party funders.
43. It is also submitted that whatever regulation framework is put in place, it should recognise the different types of legal proceedings and the specific risk associated with those proceedings. By way of example, commercial claims which typically involve commercially sophisticated parties should avail of a more relaxed regulatory approach (as the risk is low) whereas representative actions may require a more enhanced level of regulation (where there is a perceived higher risk).

Question 5.3
Do you think that the voluntary self-regulation model provides too much autonomy to the emerging field/industry of TPF? If so, why?

44. Yes. The Law Society agrees with the Law Reform Commission on the drawbacks of a self-regulation model which include the following:
    a. As Ireland has never facilitated a third-party litigation funding sector, there remains uncertainty as to whether the industry can regulate itself.
    b. The voluntary nature of self-regulation could create a situation whereby third-party litigation funders are not being regulated at all.
    c. A failure to properly regulate third-party funding could interfere with the proper administration of justice.

Question 5.4
Does the absence of a TPF industry in Ireland make self-regulation models, like voluntary and enforced models, difficult to implement?

45. Yes. This is well set out in the Consultation Paper. The Law Reform Commission sets out two basic prerequisites for a voluntary self-regulatory framework including:
    a. that a sector exists which is capable of organising to regulate itself and,
    b. that there is a strong likelihood that that sector can and will be both capable of and willing to set and implement appropriate standards.
46. Both prerequisites were present in England and Wales when voluntary self-regulation was put forward as the most viable regulatory option; there was an existent and active third-party funding sector combined with a clear willingness and ability on the part of that sector to regulate itself.
47. The difficulty with implementing a self-regulated model in Ireland can be summarised as follows:
    a. There has been no third-party funding sector operating in Ireland and so it is unclear if the sector can or will regulate itself.
    b. Any legalised third-party litigation funding activity in Ireland would likely be dominated by funders located outside the State which presents practical challenges for the sector in organising itself to develop responsible funding practices in Ireland.
    c. The voluntary nature of self-regulation means there is a real risk that it may not occur at all.
    d. There is no guarantee that voluntary standards would be enough to address the dangers and policy concerns of third-party funded litigation within the Irish context.
    e. It will not comply with the Recommendations which requires Members States to designate an independent public supervisory authority for the purpose of granting or withdrawing the authorisation of litigation funders and supervising their activities.

Does the novelty of such an industry require more institutional support? If so, what does that institutional support look like?

48. Yes, one would expect institutional support from the existing regulators and other entities operating within this area.

Question 5.5
Does the third model discussed, court certification, make sense in practice?

49. Insofar as court certification is already prescribed by law, this practice should continue in parallel to the implementation of the regulatory regimes that have been advanced in this submission and the Consultation Paper.
50. If Court certification was required for all cases involving third-party litigation funding, the Law Society would share the concerns outlined by the Commission including
    a. slowing down the progress of funded actions;
    b. increase to legal costs;
    c. increase in court time and resources;
    d. potentially a disproportionate measure for commercially sophisticated litigants; and

e. may dissuade funders from entering the market or users from availing of third-party funding if they are required to disclose financial details at the outset of a case.

Is it an efficient use of judicial resources?

51. No, please see reply above.

Are courts best equipped to regulate this industry, especially when the issue presented is not a judicial one?

52. No, it is submitted that an existing regulator is best equipped to regulate third-party funding in Ireland.

Do you consider that the courts are not the most practical or efficient regulatory regime?

53. Yes, please see reply above.

Question 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?

54. Once a regulator is appointed, it will require funding and adequate resourcing including personnel with the necessary expertise who can quickly become familiar with the unique policy concerns raised by third-party funded litigation.
55. The Law Society recognises that no single regulator has a comprehensive regulatory remit over all the areas affected by third-party funding. Equally, the Law Society does not believe that it is practical for a collective framework between different existing regulators to be put in place.
56. It is submitted that the Central Bank of Ireland should be nominated as regulator over third-party funding in Ireland. Furthermore, a formal collaboration framework could be put in place whereby personnel from the CCPC and the LSRA could share knowledge with the Central Bank while it establishes itself as regulator. This will ensure that the expertise of all existing regulators are used and developed in order to build a comprehensive team with the necessary expertise within the regulatory body.

Question 5.7
The Commission identified three means by which an existing regulator under the fourth model might administer a regulatory regime: 1) Using an existing regulatory regime; 2) Creating a new regulatory regime; 3) Coordinating between multiple existing regulators, each regulating according to their own remit.

Question 5.7(1)
Which means seemed the most efficient and practical and why?

57. It is submitted that the creation of a sui generis regulatory regime that is already operated by an existing single regulator is the most appropriate, practical, and efficient regime to oversee third-party funding. The use of an existing regulator would likely

avoid many of the disadvantages associated with a regime administered by an entirely new regulator. It would also allow the sector to begin operating in Ireland relatively quickly and the regulatory costs would be minimal as the framework, case law, regulatory practices, and real estate would already exist.

58. However, as above, the Law Society recognises that no single regulator has a comprehensive regulatory remit over all of the areas affected by third-party funding and that is why there will need to be strong collaboration between other existing regulators including the CCPC and the LSRA.

Question 5.7 (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 TPF sector?

59. It is submitted that an existing regime should be able to adequately respond to the needs of an emerging third-party funding sector if the necessary funding and experienced personnel are put in place. However, there needs to be prompt engagement with the relevant existing regulators to assess whether they can adequately regulate third-party funding having regard to the policy concerns that exist in Ireland. This engagement should take the form of an institutional needs assessment and should also consider how the regulators will coordinate and share resources in order to ensure that adequate regulation of third is implemented.

Question 5.7 (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?

60. The Law Society shares the concern that the creation of a new regulatory regime to administer a bespoke regime may be disproportionate to achieving the policy goals of regulating the third-party funding sector. The cost and time to establish such a regime would be significant, and it is possible that domestic expertise may be insufficient to staff and run the new regulatory body given the novelty of third-party funding in Ireland. Furthermore, the uncertainty a new regime brings might deter funders to the market.
61. If an existing regulator is satisfied that it can take on the role of regulator of third-party funding in Ireland and can protect the issues and policy concerns that arise then yes, the Law Society submits that it would be a waste of administrative resources.

Question 5.7(4)
If the third means were to be adopted (regulation cooperation between existing regulators), would cooperation among existing regulators be effective and efficient? Would there be any barriers or roadblocks to cooperation among the regulators?

62. In theory, cooperation among existing regulators would ensure that the necessary expertise and experience from different regulators is fully utilised. However, the Law Society equally acknowledges that “conflicting responsibilities and priorities” that each regulator has would make it difficult for seamless cooperation between existing regulators.
63. While the Central Bank should be nominated as regulator over third-party funding in Ireland. Furthermore, a formal collaboration framework could be put in place whereby personnel from the CCPC and the LSRA could share knowledge with the Central Bank while it establishes itself as regulator. This will ensure that the expertise of all existing

regulators are used and developed in order to build a comprehensive team with the necessary expertise within the regulatory body.

Question 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 TPF sector, to a meaningful extent, in Ireland?

64. The Law Society shares the concern that the creation of a new regulatory regime to administer a bespoke regime may be disproportionate to achieving the policy goals of regulating the third-party funding sector. The cost and time to establish such a regime would be significant, expertise may need to be recruited from abroad, and the uncertainty a new regime might bring could deter funders to the market.

Question 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 TPF sector?

65. It is submitted that a blend of models is best placed to regulate the emerging third-party funding sector in Ireland. In particular, the Law Society submits that:
    - The creation of a *sui generis* regime to be administered by the Central Bank of Ireland is the most efficient and practical solution to regulate and monitor third-party funding in Ireland.
    - Funders should be required to obtain a licence (or other form of authorisation) before being permitted to engage in third-party funded litigation in this jurisdiction.
    - Court certification should be required in some but not all cases (i.e., where there are vulnerable parties).
    - There may be specific provisions set out in primary or secondary legislation about how crucial elements of the funding relationship are dealt with in a third-party funding agreement.

Question 5.10
Does TPF require 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?

66. No. It is submitted that whatever regulation framework is put in place, it should recognise the different types of legal proceedings and the specific risk associated with those proceedings. As outlined above, commercial claims which typically involve commercially sophisticated parties should avail of a more relaxed regulatory approach (as the risk is low) whereas representative actions may require a more enhanced level of regulation (where there is a perceived higher risk). High risk claims should be defined in the legislation appropriately.

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

Question 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?

67. In our opinion, the ultimate goal of third-party funded litigation should be to facilitate access to justice. The breadth of third-party funding must be carefully considered, therefore, so that this overarching goal is not perversely affected or diminished by the introduction of such funding. Furthermore, the legalisation of third-party funding cannot be viewed in isolation and must be considered against the backdrop of the Irish legal and commercial landscape at the date of its establishment and during its initial development in the market.
68. A key consideration of the breadth of the introduction of third-party funded litigation is whether a regulatory body is to be concurrently established at the inception. Strictly on the basis that such a body exists, restrictions in funding should only be introduced where it may be envisaged that such funding is anticipated to inhibit access to justice or distort the functioning of the legal system in such a way that it offends public policy.
69. If such a regulatory body is not concurrently established, then it may be prudent to limit the establishment of third-party funding to commercial litigation, with suitable protections for those affected. This position could be reviewed contingent on how such an unregulated market develops.
70. Furthermore, in considering the breadth of third-party funded litigation, the reality of how this sector has developed in other jurisdictions should be considered. The fact that claims are generally commercially based and of a high value is reflective of the market's appetite to engage in such matters. While the Irish legislature should not lose sight of its moral objectives, it must be cognisant of other jurisdictions experience of third-party funding and how it has remained largely limited to a narrow set of high value claims.
71. While the ideals of access to justice must be preserved, the reality that large commercial entities are likely to influence the development of third-party funded litigation cannot be ignored.
72. Taking these factors into account it is submitted that the breadth of applicable cases during the commencement of the third-party funding sector may be limited to claims that must maintain the following key elements:
    a. An inequality of arms regarding the financial positioning of the parties; and
    b. Claims that do not offend public policy.
73. The breath of claims will undoubtedly have to be reviewed and tempered in response to the market uptake of such funding and the impact this has upon the justice system. These remain variables that only time will reveal.
74. It is inadvisable to introduce funding into the three categories noted in the Consultation Paper, which are personal injury claims, family law matters and defamation. Such funding would invariably be publicly contentious and are better approached by altering the structure in which parties seek justice, as evidenced by the establishment of PIAB or amending the rules of civil legal aid in family law matters.
75. Defamation remains an area of contention and has often led to criticisms by media outlets regarding their role in a functioning democracy. It is highly questionable as to whether this delicate balance of competing constitutional rights would be assisted by the introduction of third-party funding.
76. Outside the areas identified by the Consultation Paper, claims against the State should also be considered as a separate category that require additional scrutiny on grounds

of public policy. While third-party funding is designed to grant access to justice, often to individuals or certain groups, this must be weighed against the separate concerns of the State as a whole.

Question 6.2
Are there any policy reasons, in support or opposition, as to why TPF should be permitted in personal injury actions (access to justice, meritless or vexatious litigation, etc)?

77. In support of funding personal injury actions, the basic principle still stands, namely that if a claimant suffers a wrong and they are unable to fund their own litigation then there is an access to justice issue which third-party funding helps address. For large multi-party cases such as a toxic tort case, it may make sense to avail of third-party funding if the claim is very complex, involves significant costs, and there is an overall public interest in the long term (e.g., by pursuing such claims and deterring bad actors causing pollution). In opposition to personal injury actions the following practical realities apply:
    a. PIAB already exists to expedite claims and lower costs.
    b. Solicitors often work on a "no foal no fee" basis and therefore if a claim is genuinely valid, a party should in theory be able to find a solicitor who will take the claim. However, it is arguable that separate consideration may be given to the funding of necessary disbursements in personal injury cases where neither the claimant, nor indeed the solicitor, is able to fund same (i.e., extensive medical reports).
    c. PI claims can be contentious, and it is certainly arguable that spurious claims may be further encouraged as claimants will be given additional financial support to pursue same in the hopes of settlement offers.

Question 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?

78. Yes, the Consultation Paper contains very sensible reasons for this. The main reasons are costs, preventing conflicts of interests, and the general benefit of transparency.
79. Litigation is generally meant to be public by nature and a lack of disclosure creates an unnecessary opacity.

Question 6.4
Is a blanket rule requiring disclosure appropriate?

80. Yes, a blanket disclosure is appropriate. Transparency in general should be encouraged within the mechanisms of the legal system. In particular, the Court should be permitted to consider security for costs applications or third-party costs orders and whether they should be extended to the relevant funder. The Court must be fully informed of at least the presence of funding, prior to making any such determination.
81. The degree of disclosure is more debatable, and it may be preferable to limit disclosure in the form of redaction to the third-party funding agreement itself.
82. In addition to the degree of disclosure that should be required, the timing of such disclosure is also a key consideration. It is submitted that it is preferable to ensure that such funding is disclosed at the outset, as this would permit a scrutiny of any possible conflicts or issues surrounding the determination of the treatment of costs generally.
83. This issue of disclosure is related to the perhaps larger concern of a funder abandoning a claimant during proceedings. It is submitted that these concerns can be addressed

by specifying in legislation the exact circumstances that give a funder a right to terminate (for example where the funded party has acted inappropriately). The disclosure of such termination would then be triggered by the funded party's own actions. Funded parties would also enjoy a relative contractual certainty regarding the maintenance of such funding for the duration of the proceedings.

84. It is certainly arguable that disclosure may generally give a tactical advantage to the funded party's opponent. It is submitted however that third-party funding should be considered as an innovation that is being bestowed on claimants as an additional means of assistance to them and that the benefit of such a provision dramatically outweighs any prejudice of disclosure. The provision of third-party funding must not be permitted to act as a concealed weapon at a funded party's disposal. Ultimately the general rule of transparency in court proceedings is of paramount concern and the court, together with the parties and greater society, are entitled to know items that may so radically affect the functioning of the court system.

Question 6.5
Do you think a disclosure requirement would stunt the development of a TPF sector?

85. The experience of other jurisdictions would not support the proposition that a disclosure requirement would stunt the development of a third-part litigation funding sector in Ireland.
86. For example, Hong Kong and Singapore both have third-party funding industries with disclosure rules, and while such industries may be limited to arbitration and other discrete areas, the disclosures rules do not appear to stifle this market. Funders would obviously prefer not to disclose and may be more attracted to jurisdictions that do not disclose. The desires of the funders, however, should not be the overriding determining feature of the matter.
87. Funders can make a commercial risk assessment of cases and disclosure will be only one factor in such computation. It is an inescapable conclusion that disclosure does expose the funder to a risk of an adverse costs order for assisting the advancement of a claim, however the presence of such a risk already exists in our common law for good reason. It is submitted that the rationale that permits third party costs orders should not be diluted or avoided by the concealment of funders.
88. Finally, it is submitted that if Ireland is to follow other jurisdictions where such funding has been permitted, the real growth of the industry will be based on high value claims in traditionally commercial sectors. For example, funders appear to display a particular preference for shareholders disputes. The context and merits of such cases should in such scenarios outweigh any detracting disclosure requirements.

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

89. While the parties should contract within a baseline of standards set by legislation, the ultimate control of the case and its management before the Courts should almost wholly sit with the funded party. In short, the funder should not be able to dictate the course of proceedings or overly influence litigation strategy.
90. The funder is an investment vehicle making an investment. The basis of investing in many assets is that the investor assesses the risks and potential returns and then decides whether or not to invest. The performance of the investment is reliant on all sorts of factors but one of these is the abilities of the funded entity, in this case, the claimant.
91. The funded party is the person pursuing the litigation. By analogy, a bank may have certain requirements from businesses it lends to, but it is not sufficiently qualified or knowledgeable to run the borrower's business. Third-party funding is not a venture

capital funding arrangement where the venture capitalist nurtures and incubates the "start-up claimant." Furthermore, there is no ability in the usual model of third-party funding to buy company shares as it is the litigation/claim itself that is being turned into an investment class. The funder therefore lies somewhere in the middle between the traditional bank and the enterprising venture capitalist.

92. Some funders specialise in third-party litigation funding whereas other funders have been diversifying their portfolios into third-party funding. It is an unfortunate cohort of unsophisticated funders that appear to carry more risk for the recent history of third-party funding. For example, in the Excalibur case the English Courts made an over £30 million-pound adverse costs order against a funder which was largely based upon their scathing criticism of the case being brought in the first place.
93. The funder will want the best return for the cheapest cost. On the other hand, the funded party may consider reputational or other issues regarding how the case should be run that may be of no concern to the funder. Ultimately however, the claimant must maintain control of their own action, or we risk the commoditisation of claims and the motivational factors of proceedings being dominated entirely by third parties' profit motives.

Question 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?

94. Yes, this concern is accepted. The Consultation Paper identifies this risk quite clearly.
95. The funder may have economic and, if permitted, contractual leverage over the funded party. The motivations of the two parties will not always be aligned as the funder is seeking the best return on its investment, whereas the funded party's goals and objectives may significantly differ. For example, a funded party may wish for a quick resolution even if such an act would significantly diminish the settlement award. On the other hand, the funder is more likely to reject a low offer and seek a larger return on its investment.
96. It would also be naïve to entirely dismiss the possibility of the legal representatives being influenced by the funder contrary to their duties to the client. While it would clearly be a fundamental failing of legal representatives, a situation may arise where a funder who regularly uses a particular legal team, could create a subconscious, or possibly even a conscious financial incentive, to encourage the legal representatives to prefer the interests of the funder to those of the funded party.
97. Ultimately, there must be some preventative measures to prohibit a funder dominating the proceedings and that control remains firmly ceded in the funded party.
98. While it may be argued that some claimants may be perfectly content to adopt a "hands off" approach and leave their claim in the control of the funders, this is not to be encouraged as it may distort the whole rationale of a case and fundamentally undermine the mechanisms for the calculation of damages.

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?

99. The avenues for checks against excessive control set out in the Consultation Paper are as follows:
    (1) the existing ethical and fiduciary duties on legal practitioners to act in their clients' best interests.
    (2) that the professional bodies should consider amending their ethical frameworks to better reflect the novelties and complexities presented by the tripartite client-lawyer-funder relationship in funded disputes,

(3) that lawmakers could consider whether section 50 of the Legal Services Regulation Act 2015 should be amended to clarify that a legal practitioner who illicitly cedes control of a legal dispute to a third-party funder commits misconduct.

100. The Law Society expects and maintains the highest ethical standards and fiduciary duties of its members and this existing framework will greatly assist the introduction of any new third-party litigation funding model. The Law Society can further review and refine its recommendations upon publication of any proposed regulatory regime.
101. The Law Society has robust ethical frameworks in place and, ultimately, it is the degree of investigation and enforcement by regulatory bodies, (in this case the LRSA, Law Society and Bar Council), against their members that will prevent abuses.
102. *Section 50 of the Legal Services Regulation Act 2015* remains vague and would have to be succinctly redefined so that practitioners are not deterred from engaging in TPF in the first place. In particular, the definition of *"illicitly ceding"* control would have to be dramatically expanded upon before it could be properly considered.
103. It is submitted that more realistic and tangible checks could be implemented through minimum standards for third-party funding contracts prescribed in legislation and stronger regulatory oversight. For example, a licence system could be introduced for funders and revoked if a regulatory body deems their actions as unsatisfactory.

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

104. The Consultation Paper recommendations are comprehensive and should be adopted. The following are appropriate measures to guard against the risk of insolvency.
    a. Imposing a minimum capital adequacy requirement on third-party funders.
    b. Prohibiting legal practitioners from recovering their costs in the case of funder insolvency.
    c. Requiring the funder to provide a statutory declaration from an auditor or accountant as to the funder's solvency.
105. The Commission's observations regarding recommendations from the Australian and New Zealand Law Reform Commissions similarly appear to be particularly prudent and should be adopted.

Question 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?

106. It is submitted that that a minimum capital adequacy requirement on third-party funders is likely to be the most effective tool to ensure solvency.
107. As the history of the insurance and banking sectors in Ireland has demonstrated, capital adequacy ratios need to be meticulously monitored and assessed on an ongoing basis. Statutory declarations regarding such ratios together with appropriate regulatory oversight (possibly from the Central Bank) are essential for careful scrutiny and appropriate maintenance of such capital levels. Whatever strategy is adopted to monitor these matters, it must be carefully balanced against the cost, effectiveness, and burden on the institution charged with verification so that the regulatory framework does not dissuade funders from entering this new market in the first place.
108. This is a new investment class with potentially very high returns. However, these high returns largely arise because of the unpredictability of litigation. Funders ought to be sophisticated enough to be properly informed, know the risks and be suitably insulated against any adverse costs awards against them.

Question 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?

109. Legal practitioners are experienced professionals and are perfectly capable of making measured commercial decisions to bring cases based on contingencies surrounding the success of a case. For example, legal practitioners regularly bring cases on a "no foal, no fee" basis and are often content to cover necessary disbursements on the contingency of a successful judgement and ultimate recovery.
110. Legal practitioners can only make these informed determinations however when all the available facts are properly disclosed.[6] The question of fairness therefore hinges largely on transparency, particularly regarding the funder's solvency, and the terms of the funding contract itself. It may be necessary to create a regulatory framework that would impose capital adequacy rules for funders or at least that the legal practitioner should be informed of the funder's financial position if his recourse to recovering fees is to be limited.
111. There are also clearly situations where it would be highly unfair to limit a legal practitioner's recourse to recover their fees. For example, if a well-financed party chose to use litigation funding merely as a cash flow aid, it would seem unfair to not permit a legal practitioner to recover their costs against their client. Matters such as this can be appropriately dealt with by permitting a degree of flexibility regarding recovery of costs in the funding agreement itself (which should be disclosed to the legal practitioners) or as part of a legislative framework.

Question 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?

112. Yes. Please see answer to question 6.8.

Question 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?

113. Yes, a total prohibition on funder withdrawal would clearly be too strict. A total prohibition is a serious disincentive for a funder and would evidently appear as unfair where the funded party acted inappropriately or in complete breach of the funding contract.
114. Such instances where termination may be appropriate include:
    a. Illegal actions taken by the funded party or its legal representatives.
    b. Any illegality that arises in the claim itself that was not disclosed to the funder during its due diligence exercise with the funded party.
    c. Any type of fraud or false information given to the funder by the funded party /legal representatives.
    d. Money spent inappropriately or in a very negligent manner.
115. It is submitted that the basis of funder withdrawal should be tied to the funded parties and/or their legal representatives acting inappropriately. Any such exceptions should be very carefully drafted and should have no relationship to the diminishing likelihood of success in the funded litigation.

[6] *Oasis Merchandising Services Ltd; Ward v Aitken and others* [1995] 2 BCLC 493.

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

116. Yes, it is submitted that this appears to strike the appropriate balance. All of the parties to the litigation are given a degree of comfort that the case will not be stymied by funding concerns and can more appropriately focus on the issues within the case itself. The funders are forced to properly consider the merits of a case at the outset and are very limited in their ability to disrupt proceedings by the withdrawal of such funding.
117. This obligation further avoids the potential for tactical abuses of funders by leveraging their position and dominating the course of the proceedings by the threat of a withdrawal of funds.

Question 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.
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?
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?

118. A cap of circa 40% of the cumulative monies received, regardless of its composition, should be considered. How the award is constituted is somewhat irrelevant considering the unpredictable nature of litigation and the speculative nature of the investment. Making a distinction on how money should be apportioned based on what mechanism it derived from is inherently arbitrary.
119. In other jurisdictions, it appears that the industry standard for the funder is around 30 - 40% of the award. Forty percent recognises the value of the investment; can provide a good return, and does not lead to overcompensation. This calculation is based on the crude assumption that 50% or more of a claimant's award is overcompensation. A percentage cap still allows parties to negotiate a return based on a fixed number. In practice, funders will commonly offer an amount of money and ask for a return of a multiple of this investment (e.g., 3 times return). This approach should be cautioned against as it risks overcompensation if the damages awarded to a claimant are small, while the costs of bringing the case are high.
120. Requiring the losing party to pay for the funder's uplift seems rather egregious. This would make litigation unnecessarily punitive and create severe tension in how the law normally assesses damages. The award is the award. The law does not need to give funders some type of supplemental reward for the funder's successful speculations. It is submitted that the returns from third-party funding are sufficient without additional incentives.

Question 6.15
Are there other aspects of TPF 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?

121. For third-party funding to achieve its intended purpose, it is critical that such funding is properly applied to genuine cases. Other jurisdictions have seen the damaging and

wasteful effect of unsophisticated funders entering the market without demonstrating the requisite legal skills or exercising appropriate caution.

122. The UK Association of Litigation Funding has flagged that funders should be specialised in third-party funding and not a general fund diversifying into the litigation market without specific expertise. In practice this means litigators and lawyers should be employed by the funders. It is submitted that Ireland should meticulously observe the failings of other jurisdictions in which third-party funding was introduced and not repeat those errors. It is further submitted that the recommendations of the UK Association of Litigation Funding appear prudent and could be achieved by regulatory / legislative rules being established to ensure that funding is provided in a responsible manner with the benefit of appropriate legal experience and advice.

123. The Central Bank would appear as an obvious candidate for such regulation, as it is the largest financial regulator in Ireland with the greatest expertise and resources. It is anticipated that third-party funding will initially be a relatively small area to cover and would not be unduly burdensome to such a body.

124. As a secondary protection, the existing regulatory framework of the LRSA, the Society and the Bar Council should be amended to include codes of conduct and disciplinary measures for legal representatives in respect of third-party funding.

125. The establishment of an industry association would also be of assistance as has been demonstrated by the Association of Litigation Funding in the UK. This would provide funders with a forum for feedback and a properly constituted body to lobby against regulation that in their view is excessive or impractical. This inherent counterweight from the industry itself, would provide balance to the imposition of regulatory requirements that are new and naturally inhibiting features to investment.

126. It is noteworthy in this regard that the UK market is self-regulated arising from their concerns that such a new industry would be stifled by initial regulation. This view may be contrasted with the European Parliament's general move towards regulation in this area. It should be accepted, however, that any regulatory framework, if imposed, must be responsive to the practicalities of the provision of funding and not serve as an overly burdensome feature that may prevent this new industry establishing a foothold in the Irish market.

127. A further consideration is that it remains to be seen how the culture of litigation itself may change. Ireland has an internationally recognised and independent system of justice and extreme care must be taken that such reputation is not in any way tarnished by the introduction of third-party funding. There is an obvious risk that third-party funding may commodify litigation. It cannot be forgotten that third-party funding is a tool to increase access to justice and should not have the distorting effect of disrupting a currently unbiased system, or commodifying claims at the expense of the impecunious.

128. Finally, the long-term impact of third-party funding may lead to a desire for a further easing of restrictions. Ironically, if third-party funders become a feature of the Irish legal market, it will invariably encourage other more aggressive funding models. For instance, should litigation claims be bought and sold on the market outright? Should complex financial products then be based upon those markets e.g., derivatives, swaps, options, shorts? All of these areas must be approached with extreme caution and fall outside the remit of the current considerations.

129. It would be unwise, however, not to anticipate the development of third-party litigation funding to properly consider its potential impact on the legal landscape in the future.

Assignment of Causes of Action

Question 7.1
Would it be appropriate to liberalise the current laws of maintenance and champerty which place restrictions on the assignment of causes of actions?

130. Yes, it is appropriate to liberalise the current laws of maintenance and champerty which place restrictions on the assignment of causes of action but in a careful and proportionate way.
131. Our judiciary have been calling on such reform by legislative intervention for some time. In January 2020, a joint report by the EU Bar Association and Irish Society for European Law recommended this liberalisation.[7] Similar recommendations were made in the Kelly Report in December 2020 (Review of the Administration of Civil Justice Report).[8]

Question 7.2
Do you consider there are any differences between TPF and assignment, other than those listed, that suggest that they should be treated differently?

132. Yes, we agree with the differences listed in the Consultation paper. It should also be noted in this context that unlike litigation funding, a right to assign a claim is expressly permitted by statute under section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877.
133. Perhaps, the most obvious practical difference is that with litigation funding there remains an inherent risk that the party with the claim receives nothing for it since the prospect of retrieving any return is dependent on success in the litigation whereas with an assignment of the action, the party with the claim generally receives a sum of money even though the litigation risk is likely to be factored into the amount so received.
134. Notwithstanding such differences, assignment of a claim often achieves the same purpose as procuring litigation funding from a third party. In each case, the party with a claim and limited means to pursue it, receives some money for it.

Question 7.3
Do you agree that it is difficult to justify enforcing different regulatory regimes for TPF and assignment of actions?

135. Yes. There are a few reasons why this would be difficult to justify.
136. Fairness and Transparency: if there is a difference between the two regulatory regimes, this provides scope for one regime to be exploited. If the test of assignment is more/less onerous than the third-party funding, there is a risk that professional litigation investors will choose one method over the other in order to skirt around what might be seen as stricter regulation than the other. To achieve fairness and transparency, both regulatory regimes should align as closely as practically possible.
137. Cause of confusion: if an individual is trying to pursue a claim by way of third-party funding or assignment and seeks advice on the best option, a professional litigation investor may advise that one regime is better as it is easier to engage with even if it is not in the individual's best interests. Obviously, this will depend on whether there is any ethical code of conduct for professional litigation investors in place to prohibit this behavior.

[7] Joint report by the Irish Society for European Law and the EU Bar Association on litigation funding and class actions in Ireland
[8] Review of the Administration of Civil Justice: Review Group Report

138. Overlap: Litigation funding and assignment of rights to litigate are similar in many ways but not identical. Like the position in England and Wales, in Ireland, the key questions concern when the assignee has a legitimate interest in the right being assigned and what is objectionable about the particular assignment. The latter element can create an overlap where the Court is required to consider whether the proposed assignment of the claim (even though it is coupled with a property interest) is still tainted by rules on maintenance and champerty. Here, the Supreme Court recently indicated that even assigning a debt claim where it has been traded onwards will attract scrutiny of maintenance and champerty principles that will be difficult to overcome.[9]

Question 7.4
Would it be more efficient for any regulatory system for assigning causes of action to mirror a TPF regulatory system? Are there any reasons why any regulatory system for assigning causes of action should not mirror a third-party regulatory system?

139. Yes, it would be more efficient for a regulatory system for assigning causes of action to mirror a TPF regulatory system, but it is submitted that the preexisting restrictions on assignment of a bare cause of action and personal action should remain.

[9] Persona Digital Telephony Limited and Another v The Minister for Public Enterprise, Ireland and Others [2017] IESC27 ("Persona"). By a 4/1 majority (McKechnie J. dissenting)

Conclusion

In conclusion, the Law Society supports the legalisation of third-party funding in Ireland. Third-party litigation funding will support greater access to justice for all claimants, regardless of their financial status, and partially fill the void left by Ireland's lack of a civil legal aid system.

The regulatory regime overseeing third-party litigation funding in Ireland must be effective and efficient which is why we support the statutory exception approach of legislation. The understandable concerns about the commodification of justice and creating a market in legal claims can be managed in the manner third-party funding is introduced and ongoing effective regulation of the market.

Ireland can learn from Australia, Hong Kong and the UK to ensure third-party funding does not negatively affect the conduct of litigation in Ireland but rather enhance our litigation framework and bring us up to date with other comparable legal jurisdictions.

We remain available to assist the Commission in any way we can.

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