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Crowdfunding Consultation  
Financial Services Division  
Department of Finance  
Government Buildings,  
Upper Merrion Street,  
Dublin 2

2 June 2017

Dear Sir,

We refer to the Public Consultation Paper on the Regulation of Crowdfunding Published by the Department of Finance in April 2017.

The following are submissions in relation to the specific aspects of crowdfunding as it relates to crowdfunding for litigation purposes.

Crowdfunding for litigation purposes is contrary to public policy as it restricts rather than enhances access to the courts for the vast majority of citizens. At present, in most jurisdictions it is geared towards commercial litigation which are often lengthy and complex. The availability of crowdfunding for litigation purposes encourages heavy litigation and litigation trafficking which unduly absorbs scarce substantial resources in terms of availability of court time; judges and costly legal teams.

Accordingly, crowdfunding for litigation purposes would mean that many such substantial cases would cause major disruption in court listings and access to the courts system to the detriment of ordinary persons and small businesses who could not compete with or access the significant sums involved for the conduct of their own cases.

The Irish Times reported on 9 September 2016 that "*A backlog of some 1,800 cases that are waiting to be heard in the Court of Appeal could take more than a decade to clear*". Major backlogs are being experienced also in the High Court and the Circuit Court and District courts .

Crowdfunding for litigation purposes would lead to spurious claims being initiated to further clog up the courts and also trafficking in litigation.

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A further concern is that Ireland, as the only English speaking common law country in the European Union following Brexit, would become a magnet for international commercial claims to the detriment of ordinary Irish citizens who could be denied timely or any reasonable access to the courts as a result.

Investment based crowdfunding for litigation is a high risk activity designed for profit and is not predicated on timely and transparent access to justice for ordinary citizens and Irish business.

Such investment based crowdfunding for litigation raises possibilities for fraud by individuals or companies who offer fake or misleading investment information when proposing investment opportunities designed for taking a bet or a stake in litigation before the Irish courts. It is difficult to establish accurate and independent information on the parties to benefit from such litigation; their true motives in participating in such litigation.

In the undesirable event that crowdfunded litigation was to be permitted, should it not attract similar safeguards and controls for many other investment products such as those that investors must be sophisticated or high net worth individuals, or investing less than 10% of their net assets? Would such sensible safeguards for investment not (a) preclude the vast majority of Irish investors and citizens and make crowdfunded litigation the domain of the wealthy only? (b) would the disclosure requirements themselves set a barrier and a level of disclosure of information on participants that would be seen by the opposing parties in the litigation on the basis that they have a right to know who the opposing party is and where their cause of action and interest lies?

The prospects of success and the standing of crowdfunded litigation are difficult to establish in the absence of enforceable disclosure requirements. There is a risk that information communicated to third parties who are funders or prospective funders of litigation will not attract litigation privilege. This is a significant risk if the participants in the crowdfunded litigation do so through an online platform or as a result of online or remote marketing.

A further concern arises as to how a "client" in such crowd funded litigation would have access both to the initial and ongoing advice from their lawyer on the case. Misunderstanding of legal advice given or the failure or shortfall of such legal advice and services to participants in crowdfunded litigation may well lead to further dispute and acrimony in contentious cases and sometimes between co-litigants and their lawyers. It is respectfully submitted that crowd funded litigation could cause the litigant's lawyers to act in breach of their professional duties to provide ongoing and impartial advice to the client, whether or not they listed as parties in the litigation or are an investor in the crowdfunded investment in a particular case.

Crowd funded litigation also raises the serious issue of who is the actual client and who should be the party responsible for any adverse costs order in the event of an unsuccessful legal case that is funded in this way. Should this be the unsuccessful plaintiff or defendant in the action or should it also be the investor in the crowd funded litigation? A further problem arises if the investor seeks to cap his/her liability in the event of an adverse cost award, if unsuccessful in the law suit.

In the absence of any adequate complaints process for dispute resolution or redress in issues of crowdfunded litigation, the courts themselves may have to perform this role which will result in further delays and wastage of very scarce court and judicial resources.

To date the Irish courts have either refused to uphold in full or in part different variations of litigation funding or have heavily criticised it. These significant legal difficulties with litigation funding and, by extension, crowdfunded litigation as can be seen from the leading cases of:

- Thema International Fund PLC v HSBC Institutional Trust Services (Ireland) Limited and others (2011), and
- Greenclean Waste Management Limited v Leahy p/a Maurice Leahy Wade & Company Solicitors (No 2) (2014), and
- Persona Digital Telephony Ltd and another v The Minister for Public Enterprise and Others (2017).

For all the reasons set out above, it is submitted that crowd funded litigation is not in the public interest or in the interest of the administration of justice and therefore should not be permitted.

Yours faithfully,

*Eames*

**Eames Solicitors**

