

# Thank you for your attention



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# Third-Party Litigation Funding in Luxembourg

Ethical Aspects for Luxembourg Legal Practitioners

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# Lawyer's involvement in Third-Party Litigation Funding

- Nowadays common in the Anglo-Saxon world, not in civil law countries
- Article 6(2) LPA
- Article 33 (2) and (4) LPA

*"Je jure [...] de ne conseiller ou défendre aucune cause que je ne croirais pas juste en mon âme et conscience"*

*"(2) L'avocat ne peut assister, ni représenter des parties ayant des intérêts opposés. Il en est de même d'une association d'avocats."*

*"(4) L'avocat exerce librement son ministère pour la défense de la justice et de la vérité"*

- Representing a Funder
- Representing an opposing or a third Party

→ Potential conflicts of interest for the Lawyer



*No distinctive features regarding TPF*

# Distinctive features of Third-Party Litigation Funding

## ■ To be distinguished from:

- Insurance context (e.g. Insurer involvement, D.A.S.)
- Labour and Trade Union assistance
- Lawsuit loans
- *Quota Litis* agreements
- Useful for
  - Class actions
  - Bankruptcy proceedings

*No direct profit incentive on  
the outcome of litigation*

*Cases of many against a few  
(Legal framework coming)*



# Legal framework regarding Best Practice in TPF

- Few or no specific framework
- International Level
- European Level
  - Charter of core principles of the European legal profession
  - Code and Model Code of conduct for European lawyers
- National Level
  - National Law (*e.g. Loi sur la Profession d'Avocat – LPA*)
  - Luxembourg Bar Association Rules (*Règlement Intérieur de l'Ordre – RIO*)
- European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))



# Ethical challenges for the Lawyer

- What ethical issues may arise out of TPF agreements for the lawyer?
  - I. Regarding Privileged information and Disclosure
  - II. Regarding the steering and strategy of the Litigation or Arbitration
  - III. Regarding Lawyer fees
  - IV. Legal Costs & damages for frivolous proceedings



## I. Privileged Information and Disclosure in TPF

### ■ Funded Party – Lawyer relationship

- Privileged communication solely between Lawyer and Client
- Communication by, with, or through the funded Party with the Funder
- Funding agreement should foresee update provisions for informing the Funder

### ■ Disclosure of Funding agreement to Courts

- Possible Duty to disclose for the funded Party
- Advising client to disclose Funding Agreement



# II. Control of the Litigation in TPF

## ■ Who decides on legal arguments?

- The Funder?
- The funded Party?
- The lawyer?

*Article 33(1) LPA: "Dans l'exercice de sa profession,  
l'avocat est maître de ses moyens"*



## ■ Termination of mandates

- To end a Lawyer mandate
- In case of a lawyer ending its mandate

## ■ Who decides on Decision in Proceedings

- Appeals & Remedies?
- Settlements?

# III. TPF and Lawyer's fees

- Not illegal in Luxembourg law
  - Article 1236 Civil Code -Third parties can pay in lieu of the debtor
- Fees calculated its fees set by Article 38(1) LPA
- However: Legal Ethics > Contract Law
- Taxation of the Bar Association
  - The payor may request taxation
  - Disciplinary sanctions
- Court may lower fees on its own

*"Dans la fixation des honoraires l'avocat prend en compte les différents éléments du dossier, tels l'importance de l'affaire, le degré de difficulté, le résultat obtenu et la situation de fortune du client."*

*"En l'occurrence, l'essential n'est pas de savoir si la convention d'honoraire est valable d'un point de vue civil. Les règles déontologiques dépassent les articles du code civil et définissent des exigences propres, notamment en matière d'honoraires, que les parties ne sauraient écarter par une convention"*  
-CDAA, 12 June 2012, decision 07/12

# IV. Legal Costs & damages for frivolous proceedings

- Court costs (“Frais et dépens”)
- Cost allowances (“Indemnité de procédure”)
- Damages for frivolous proceedings
- Lawyer costs

→ Should be provided for in the financing agreement



# Final observations



- What if:
  - Funder terminates financing agreement?
  - Funder becomes insolvent?
  - Criminal action against funded party?



Open questions and challenges for the Lawyer

# THANKS FOR YOUR ATTENTION

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