CIVIL JUSTICE COUNCIL

Review of Litigation Funding

Interim Report and Consultation

Contents

1. Foreword

1.1 In spring 2024 the Lord Chancellor requested the **Civil Justice Council (CJC)** provide advice on litigation funding. He did so consequent upon the Supreme Court's decision in **R (PACCAR) v Competition Appeal Tribunal [2023] UKSC 28; [2023] WLR 2594 (PACCAR),** which called into question the validity of a significant number of TPF agreements.

1.2 Litigation funding refers to the various ways in which claimants and defendants to proceedings before the civil courts (including tribunals) are able to pay for the cost of those proceedings. It encompasses both costs to them of seeking legal advice and representation and, where they are unsuccessful in the proceedings, the liability they incur for costs incurred by the successful party to those proceedings.

1.3 **Third party litigation funding (TPF)** is one way in which parties to proceedings can pay for the cost they are liable to incur. It specifically involves funds being advanced by organisations (third party funders) either directly or indirectly to litigants on the basis that, if the funded party's claim is successful, they will repay the funds advanced plus a specified additional amount. The Supreme Court's decision in PACCAR considered whether TPF agreements that calculated the funder's payment in the event of success by reference to a percentage of the damages recovered by the funded party in the litigation fell within the scope of regulations that governed **damages-based agreements (DBAs).** The Supreme Court held that they did. This had not previously been considered to be the case, so calling into question a significant number of TPF agreements, which had not been entered into with the application of the DBA Regulations in mind.

1.4 Consequent upon the Supreme Court's decision, the then Government intended to consider the question of litigation funding in the round, hence the basis of the request to the CJC. The Government also intended to legislate via the Litigation Funding Agreements (Enforceability) Bill 2024 to clarify that TPF agreements did not come within the scope of the DBA Regulations, i.e., to return the legal position to what it had been believed to be before the PACCAR decision. In the event, the Bill was not enacted prior to the July 2024 General Election.

1.5 The current Government has indicated that it does not intend to reintroduce the 2024 Bill, but indicated that, like the previous Government, it wishes to consider the question of

reform, including any potential legislation that may require, following consideration of publication of the CJC's advice to the Lord Chancellor on the issues raised in Terms of Reference in the Summer of 2025.[1]

1.6 Those Terms of Reference asked the CJC to consider a range of issues concerning TPF agreements. It also asked it to look at litigation funding more widely. The Terms of Reference are set out at Appendix B. Membership of the CJC Working Party set up to conduct this review is set out at Appendix C.

1.7 The Working Party will carry out its work in three phases. The first phase consists of the publication of this Interim Report and Consultation. It sets out background to the issues and provides necessary context for the Consultation Questions that are set out in Appendix A.

1.8 The second phase is the consultation phase. Responses to the Consultation Questions set out in this report are invited. Please send them to CJCLitigationFundingReview@judiciary.uk by **Friday 31 January 2025 at 23:59**. The CJC aims to be transparent and to explain the basis on which conclusions have been reached. The CJC may therefore publish or disclose information provided in consultation responses, including personal information. For example, the CJC may publish an extract of a consultation response or publish the response itself. Additionally, the CJC may be required to disclose this information, such as in accordance with the Freedom of Information Act 2000.

1.9 In addition to the consultation, there will be opportunities for a wider debate at a series of events planned, including the CJC's National Forum, between October 2024 and February 2025. The CJC National Forum is scheduled to take place on 29 November 2024. Information concerning it and further events is available on the CJC's website at https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/events-and-conferences/.

1.10 The third phase will begin once the consultation phase has concluded. The Working Party will prepare its Final Report, with Recommendations, and submit it to the CJC during this

[1] Lord Ponsonby, Written Answer to Parliamentary Question (1 August 2024), '*The Government recognises the critical role third-party litigation funding plays in ensuring access to justice. Following the PACCAR judgment, concerns have been raised about the need for greater regulation of Litigation Funding Agreements, or greater safeguards for claimants. The Government is keen to ensure access to justice in large-scale and expensive cases, whilst also setting up adequate safeguards to protect claimants from unfair terms. The Civil Justice Council is considering these questions and others in its review of third-party litigation funding, and hopes to report in summer 2025. The Government will take a more comprehensive view of any legislation to address issues in the round once that review is concluded.*' It is available at: https://questions-statements.parliament.uk/written-questions/detail/2024-07-29/hl449.

phase. Once approved, its Final Report will be submitted to the Lord Chancellor and published. It is intended that this will be done by the summer of 2025.

1.11 The Working Party will be assisted by a wider consultation group during each of the three phases of its work. The initial membership of the Consultation Group is set out in Appendix C. It is subject to review and may be revised during the course of the work.

1.12 This report is divided into six parts. Part One provides background to the development of TPF in England and Wales. Part Two more specifically focuses on the development of self-regulation of TPF in England and Wales. Part Three then discusses different approaches to regulation. This is important as a focus of the Terms of Reference requires the Working Party to consider and make recommendations concerning the regulatory approach to be taken to TPF. Part Four provides comparative information concerning the approach to regulation of TPF in other jurisdictions. Part Five then turns to consider the relationship between TPF and costs. Finally, Part Six outlines other litigation funding options available, which may be subject to reform recommendations. It, for instance, looks at **legal expenses insurance (LEI), conditional fee agreements (CFAs)** and DBAs. It also discusses crowdfunding, pure funding, and civil legal aid. It thus provides the context for the Consultation Questions concerning the wider consideration of litigation funding required by the Terms of Reference. For the avoidance of doubt the Working Party is not engaging in a review of civil legal aid. Reference to civil legal aid is purely to provide context.

Mr Justice Simon Picken (Working Party, co-chair)
Dr John Sorabji (Working Party, co-chair)

2. Part One – The Development of Third Party Litigation Funding in England and Wales

(A) Key Points

2.1 The following key points are emphasised in Part One concerning the initial development of TPF:

- TPF was initially prohibited due to the application of maintenance and champerty. It was prohibited to protect the administration of justice, claimants, and defendants from the adverse effects of abusive litigation and the corruption of the litigation process;
- Following the abolition of the criminal offences and torts of maintenance and champerty, and particularly with the acceptance that TPF promotes access to justice, it developed as an additional source of funding from the 1990s, and specifically from the start of the 21st century. The key rationale for its acceptance as a valid form of funding was the public policy in promoting access to justice and equality of arms;
- The access to justice rationale is particularly stressed where collective or representative actions are concerned. Where these forms of proceedings are concerned, while other funding options may be available it may be suggested that TPF is the most effective one available;
- Other factors underpinning its promotion are: to enable corporate litigants to pursue or defend proceedings without having to divert funding from the carrying on of their business; the diversification of investment portfolios by financial institutions; and, to facilitate corporate litigation by companies in financial difficulties;
- Notwithstanding the rationale for TPF's acceptance as a valid funding source, some have suggested that TPF could lead to under-compensation for funded parties and the

promotion of frivolous, vexatious and/or unmeritorious litigation. It can also be argued that: specific categories of funded parties, e.g., consumers, may not be in an effective position to enter into TPF arrangements on a properly informed basis; that both the court and other parties ought to be informed of the existence and nature of such funding; that the risk exists that funders will control the litigation; and that TPF discourages and/or undermines just settlement;

- Its legitimisation as a form of funding was initially provided by Parliament via section 28 of the Access to Justice Act 1999, which made provision for regulated TPF agreements. That provision has never been brought into force. Its practical legitimisation and growth have, however, been a product of common law developments by the courts, albeit without reference to the legislative regime that has not been brought into force;

- The CJC in 2005 and then 2007 considered the role of TPF, ultimately accepting it as a mainstream source of funding. It did, however, consider in 2007 that some form of regulation was required either by way of rules of court, statutory provision or regulation by the (now) Financial Conduct Authority;

- Its early development was unregulated. It was and remains, however, subject to the residual application of maintenance and champerty and the application of generally applicable rules of court that can be applied to protect the administration of justice, claimants and defendants from abusive, vexatious and frivolous claims;

- Evidence is sought on the incidence, or otherwise, of both the suggested benefits of TPF and of the problems that it is said to create, and the effect that the current self-regulatory approach to TPF has on them and the effects that other regulatory approaches may have. Where available, evidence on these issues as they affect different types of claimant and defendant, different types of dispute, and different types of proceeding is sought.

(B) The Initial Development of Third Party Litigation Funding

2.2 This Part considers the first of the issues raised by the Terms of Reference. It provides an outline of the initial development of TPF in England and Wales.

2.3 TPF is the provision of finance by a commercial party to cover some or all of the legal expenses incurred by a party in a legal dispute. The funding is provided on a non-recourse basis, i.e., in the event that the party to whom the financing is provided (either directly or indirectly) is not successful in the litigation, the funding is not repaid. It is also provided on the basis that if the party funded is successful, then the funder receives a share of the proceeds of the litigation. That is usually, but not always, calculated as a percentage of any damages awarded to the funded party. The funder's return is intended to ensure they secure a profit on their investment in the litigation.[2]

2.4 TPF is generally provided to fund particular disputes where the potential recovery would provide a sufficient return on the funding provided in the event of success. It has also developed as a means to fund a basket of claims which, taken separately, would not provide a sufficient potential return to justify the provision of funding. This form of TPF, which is known as **Portfolio Funding**, involves the bundling together of a collection of cases handled by a single firm with varying merits. It may involve a range of low value disputes which would not otherwise be funded individually, or a basket of unitary claims which have varying merits. The aim is to ensure that the portfolio of disputes has sufficient merit, overall, to justify the provision of funding, i.e., there is an expectation that sufficient of the disputes will have success to enable the funder to realise sufficient profit on the funding provided. As Mulheron notes, there are two forms of portfolio funding: first, where funding is provided to a law firm to enable them to manage a claim or a range of claims, whether or not the law firm acts on a contingency, i.e., no-win no-fee, basis; or, secondly, the provision of funding to specific litigants in respect of a range of disputes in which they are involved.[3] Portfolio funding may be provided on a non-recourse basis but is more commonly provided to a law firm on a full recourse basis.

[2] R. Mulheron, *A Review of Litigation Funding in England and Wales*, (A Report for the Legal Services Board, 2024) at 11.

[3] R. Mulheron (2024) at 45-47.

2.5 An increasingly common form of litigation funding, **Work-in-Progress or WIP funding**, has developed in the past few years pursuant to which law firms share their costs receipts in successful claims with funders. This can be either part of a portfolio arrangement, or for unitary actions, often involving group claims. In essence the law firm will enter into a DBA or CFA with the client cohort on conventional terms so that the client will be liable to pay either a percentage of the damages recovered to the law firm (the DBA model) or the profit costs and associated success fees (CFA model). Both arrangements will involve the law firm having to 'fund' or carry its own **work-in-progress (WIP).** The law firm may have sufficient balance sheet liquidity or banking liquidity to maintain the WIP for many months or even years. But in those case where the firms lack the liquidity or wish to reduce the WIP associated with the claims, the firm may turn to litigation funders to provide non-recourse finance against the WIP. Such arrangements allow the firm to drawn down funds to cover a proportion of the WIP – perhaps at least to cover the operating costs of the claim (overheads etc). In return for the funding facility, the law firm will agree to share its profit costs income, which could be receipts from the DBA payment or CFA basic costs and success fee, with the funder. The extent to which litigation funders can avoid applications for security for costs through this form of indirect funding remains to be seen. [4]

2.6 TPF should not be confused with **third party transfer**. That is the assignment, for a price, of claims by a party to litigation to a third party who is unconnected with the litigation. It is a means by which a party to litigation can, in so far as it is permitted in England and Wales,[5] effectively sell their claim to a third party, who then litigates it on their own behalf.

2.7 TPF was historically prohibited in England and Wales. Until 1967 it was a criminal offence for litigation to be funded by an individual otherwise unconnected to a dispute. That was the case whether the funding was provided by the funder in return for a share in any proceeds of the litigation or not. Such funding arrangements were also common law torts, i.e., the tort of maintenance (the provision of funding by a stranger to litigation) and of champerty (the provision of funding by a stranger to litigation without justification in return for a share in the proceeds of the litigation[6]). There were several rationales justifying the prohibition. They

[4] See, for instance, *Various Claimants v Mercedes-Benz Group AG* [2024] EWHC 695 (KB).

[5] *Gregg v Bromley* [1912] 3 KB 474; *Re Oasis Merchandising Services Ltd* [1995] 2 BCLC 493; *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1; *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, [2012] QB 640 at [15].

[6] *Giles v Thompson* [1994] 1 AC 142 at 161.

were intended to protect the integrity of the administration of justice. Permitting funding was believed to pose the risk that judges, parties and witnesses would be suborned, and evidence suppressed by the funding party so that funded claims would improperly succeed. It was particularly believed that permitting funding would promote perjury by parties and witnesses and improperly increase damages.[7] They were also intended to protect claimants from having to sacrifice their damages to the funder and to protect defendants from having to respond to unmeritorious or vexatious claims brought abusively or oppressively due to the provision of funding and to the advantage of the funder.[8] In essence, maintenance and, particularly, champerty were underpinned by the public policy aim of protecting the administration of justice and vulnerable claimants and defendants.[9]

2.8 Both the criminal offence and torts were abolished by the Criminal Law Act 1967. They were abolished for three reasons: first, they arose rarely and the law concerning them was uncertain; secondly, where the torts were concerned, quantification of damages was difficult to assess; and, thirdly, developments after the Second World War had seen increasing types of third parties being permitted to fund litigation, e.g., insurance companies and Trade Unions.

2.9 Given the three developments and, by then, a longstanding acceptance that the dangers of suborning judges, parties and witnesses was unfounded in view of the manner in which justice was administered by the mid-20th century, it was difficult to justify maintaining the prohibitions.[10] For instance, fears of perjury and the suborning of witnesses had been shown to be overstated in the 19th century, and, by then, courts were well-able to take steps to protect the administration of justice and vulnerable parties by striking out or giving summary judgment on abusive or unmeritorious claims and by making adverse costs awards against parties and third parties, including funders. And, from the 1990s and especially after the introduction of the **Civil Procedure Rules (CPR)** in 1999, active court case management enabled the judiciary to take a robust approach to controlling the ability of parties to use the civil courts abusively or vexatiously to pursue unmeritorious litigation. It should be noted that the promotion of such claims continues to be viewed by some as a problem that TPF generates, albeit it might also be suggested that is difficult to see the basis on which a

[7] See, for instance, *Re Trepca Mines (No. 2)* [1963] Ch 199; *Giles v Thompson* [1994] 1 AC 142 at 153.
[8] See, for instance, R. Mulheron, *The Modern Doctrines of Champerty and Maintenance*, (OUP, 2023) at 6-7.
[9] *Massai Aviation Services v Attorney General (Bahamas)* [2007] UKPC 12 at [13].
[10] R. Mulheron (2023) at 22 and following.

funder that pursued such litigation would remain in business.[11] **The Working Party is keen to receive evidence on this issue**.

2.10 The 1967 reforms did not, however, open the door to TPF as maintenance and champerty continued, and continue, to operate to render some forms of TPF arrangement void for public policy reasons, e.g., where a specific arrangement has a tendency to corrupt public justice.[12] Developments in the 1990s and early 21st century, however, provided the basis for the wider, current, development of TPF. Three specific developments can be highlighted in this respect.

2.11 The first specific development was a move by both the courts and Parliament in the 1990s to promote the use of TPF. The first such step was taken by the House of Lords in *Giles v Thompson* in 1994, where car credit hire agreements entered into by claimants following road traffic accidents were held not to be champertous.[13] This development widened out the scope of funding mechanisms from those that had informed the 1967 Act reforms, i.e., insurance and trade union funding, that did not fall foul of the public policy limitation on such funding.

2.12 The House of Lords' decision was, however, taken against a wider change in public policy concerning litigation funding. In 1990 there had been an initial shift away from public funding as the primary means of financial support for individuals who could not otherwise afford to litigate. Section 58 of the Courts and Legal Services Act 1990 had, for the first time, enabled solicitors to enter into a form of contingent fee agreement, known as CFAs, with their clients as a means of financing litigation. Previously, such agreements would have been champertous. The inroad was broadened by the Access to Justice Act 1999,[14] which expanded the scope of CFAs and did so as a justification for further reduction in civil legal aid provision. A form of funding that had previously been contrary to public policy was by the end of the 20th century thus promoted as a means to secure the public policy objective of access to justice.[15]

2.13 The Access to Justice Act also introduced provision for TPF through inserting into the 1990 Act a new section 58B. A copy of the provision is set out at **Appendix D**. That section

[11] Irish Law Reform Commission, *Third-Party Funding Consultation Paper*, (2023) at 50-57.
[12] *London & Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 (TCC) at [103].
[13] *Giles v Thompson* [1994] 1 AC 142.
[14] Section 27 of the 1999 Act inserted new section 58A into the Courts and Legal Services Act 1990.
[15] J. Peysner, *Access to Justice – A Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding*, (Palgrave, 2014).

authorises the Lord Chancellor to issue regulations permitting '*litigation funding agreements,'* which comply with specified conditions, to be entered into between third party funders and litigants. It therefore provided a means to enable the development and use of regulated TPF.[16] Again, the rationale behind this development was to promote access to justice. Unlike the provisions concerning CFAs, this power has never been brought into force. It remains, however, capable of being brought into force at any time. Should TPF regulation be recommended, the means already exist to implement it in those circumstances where section 58B would apply, i.e., in cases of funding where the cost is linked to the amount of the funding, not a percentage of damages.

2.14 The second specific development was taken by the courts. It was clearly established from, at least the 1950s, that public policy as it related to litigation funding had to be considered by reference to contemporary standards and that the court's approach to it had to be flexible and capable of development.[17] Given the introduction of CFAs as a means to promote access to justice and its increased importance generally as an aspect of public policy and the liberalising approach taken by the courts to litigation funding in the 1990s, the courts accepted the validity of TPF. As Lord Phillips MR put it, acknowledging the greater weight to be given to access to justice, in *Gulf Azov Shipping Co Ltd v Idisi* (2004),

'Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure those who are involved in litigation have the benefit of legal representation.'[18]

2.15 Further endorsement of TPF's validity was later given by the Court of Appeal in *Arkin v Borchard Lines Ltd* (2005),[19] in which the court accepted not only the legitimacy of TPF, but also established that the funder's potential liability for adverse costs should be limited by reference to the amount of funding they had provided to the funded party (**the Arkin Cap**). These two decisions form the basis on which TPF has developed.

[16] Section 28 of the Access to Justice Act 1999; Explanatory Memorandum to the Access to Justice Act 1999, paras 135-136.

[17] *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 382; *Hill v Archbold* [1968] 1 QB 686 at 697; *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679.

[18] *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 92 at [54]. That the Court of Appeal took this approach could be queried given this was an area where Parliament had explicitly intervened via the Access to Justice Act 1999, notwithstanding statutory authorisation and regulation of TPF had not been brought into force.

[19] *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655; [2005] 1 WLR 3055 at [39]-[43].

2.16 Inherent in the access to justice rationale for TPF's acceptance is that it is also understood to promote equality of arms. There may, for instance, be a significant power imbalance between a well-resourced corporate defendant and a single, non-corporate claimant or, where multi-party litigation is concerned, a large number of non-corporate claimants or a party representing their interests in collective or representative proceedings. A lack of equality of arms is likely to be particularly acute, for instance, for consumers or for individuals who have been the alleged victims of mass torts. Such imbalances may have particular adverse impact on the ability of claimants to pursue claims, secure a just settlement of their dispute or to conduct litigation as effectively as the defendant. Promoting equality of arms may reduce barriers to access to justice in such situations and for such claimants. Its promotion, and the promotion of access to justice generally, by TPF may also help secure fairer settlements and just adjudication by the court.[20] It may do so because, as repeated players, funders are likely to have a more sophisticated understanding of litigation, and litigation risk, than funded parties, particularly where the funded parties are engaged in collective proceedings or group litigation.[21]

2.17 It is, however, argued that TPF is problematic for several reasons. Those reasons are helpfully summarised by van Boom.[22] They are that:

- TPF promotes the pursuit of unmeritorious or vexatious litigation. The corollary of this is that it can also therefore promote unjustifiable settlements as defendants seek to 'buy off' such claims rather than incur the cost of litigation. In response, it is suggested that this is not the case, and that the involvement of funders acts as an effective means to filter out such claims. As Mulheron concluded on evidence provided to the Legal Services Board, only 3-5% of proposed claims pitched to funders ultimately come to be funded. As she concludes, funders tend to only take on claims that have reasonable prospects of success;[23]

- TPF reduces the prospect that claims will settle because its presence in a system where there is adverse cost shifting (i.e., the losing party will pay all or the majority of the

[20] As noted by the Irish Law Reform Commission (2023) at 70-71.

[21] A. Cordina, *Is It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe*, 14 Erasmus L. Rev. 270 (2021) at 273.

[22] W. van Boom, *Litigation Costs and Third Party Funding*, in W. van Boom, *Litigation, Costs, Funding and Behaviour* (Routledge, 2017) at 21-25.

[23] R. Mulheron (2024) at 33.

successful party's litigation costs) means that there is little incentive to settle. It is also suggested that TPF may reduce the prospect of settlement through artificially inflating the value of claims. That said, Van Boom notes that there is little evidence to support these suggested criticisms. On the contrary, he notes the converse: that TPF may, as commented on above, promote settlement as its presence can act as a signal to defendants of confidence on the part of the funder in the quality and prospects of success of the funded claim. The 3-5% funding acceptance rate may support this conclusion. It is, however, also argued that TPF may promote under-settlement on the basis that funders can push funded parties to settle early and at lower than otherwise obtainable rates for commercial reasons;[24]

- Except where funded parties are sophisticated, commercial entities and/or have effective legal representation, potential litigants may not be in a position to enter into TPF arrangements on a properly informed and advised basis. This potential problem is particularly acute where vulnerable parties are concerned since, in the absence of regulation, poor business practices can develop, which could see individuals induced into entering into funding arrangements that are contrary to their best interests. A similar potential problem may arise where collective actions in the **UK Competition Appeals Tribunal (CAT)** are concerned, where a class representative may not have a strong inventive to shop around or obtain independent legal advice on the funding package offered by any particular funder. This potential criticism could, however, be ameliorated through effective regulation, class certification procedures by courts or the CAT in collective actions when the suitability of proposed class representatives is being considered, or through the current Code of Conduct of the **Association of Litigation Funders of England & Wales (ALF)**, which requires its funder members to ensure that they take reasonable steps to ensure access to independent legal advice concerning their proposed TPF arrangements for those who are considering entering into them. (See further in **Part Two**, below);

- The extent to which a funder or funded party could or should disclose the existence of funding arrangements (including how and by whom a funder is funded) and/or their

[24] A. Cordina (2021) at 277. It should be noted that the ALF Code of Conduct expressly prohibits funders from controlling proceedings, see **Part Two**.

nature to the court and other parties may be problematic. The absence of effective disclosure could result, for instance, in conflicts of interest between the funder and the funded not being brought to light. Effective disclosure could thus be particularly important where it could bring to light a funder's motivation for funding, i.e., whether the motivation was improper, such as to facilitate the pursuit of a claim abusively to harass a defendant. Disclosure may, however, depending on its nature and extent, adversely affect the funded party's right of access to justice as it may impair that party's ability to conduct litigation effectively, including settlement endeavours. It might, for instance, provide the defendant with an indication of the funded party or funder's assessment of the merits of the claim, thus undermining the funded party's litigation strategy or its ability to secure a just settlement. Within the CAT it should be noted that funding arrangements are generally disclosed as part of the application for certification as a collective proceeding, e.g., as part of the collective proceeding order application;

- TPF could exercise control over the litigation and, hence, funders may do so for their own benefit rather than that of the funded party. Again, van Boom notes an absence of evidence on the extent to which this arises in practice. He does, however, go on to acknowledge that, under the ALF Code of Conduct, funders in England and Wales adhere to a commitment not to seek to or to exercise control over litigation. (See **Part Two**, below);

- Finally, van Boom notes that problems may arise concerning lawyers' professional ethics. This focuses on the need to provide funders with information to assess a claim's potential viability for funding. Such disclosure may raise issues concerning client confidentiality and legal professional privilege. Again, it should be noted that the ALF Code of Conduct makes provision for this issue. (See **Part Two**, below).

2.18 It is also argued that the use of TPF, while it may promote access to justice, also results in the under-compensation of funded claimants as the funder's profit is taken from any award of damages. This might arise from the absence of any cap on the amount of profit a funder can derive from each funding agreement. It might arise from the fact that it properly reflects the level of risk involved in funding a particular claim, such that no funder would or could properly fund the claim for a lower potential return. Additionally, it might arise due to an absence of effective competition between funders or from the absence of incentives on the

part of the funder or funded party in collective claims to secure the widest possible distribution of any damages award or settlement. It might also arise due to the existence of divergent interests between funders and funded parties. The funder's interest would here focus on maximising its potential return, which it could do through the unreasonable application of its stronger bargaining power during negotiations to enter into a TPF agreement in relation to that of individual litigants or vulnerable ones, and particularly those who may wish to commence collective proceedings or group litigation. The potential risk that collective proceedings could be exploited abusively by those who fund them was noted by the minority in the UK Supreme Court in *Mastercard Inc. v Merricks* [2020].[25] The current approach to managing conflicts of interest is dealt with in **Part Two**, below.

2.19 A recent example of the effect of the absence of a cap on profits is the funding of the civil claim arising from the Post Office Scandal. Group litigation pursued by 555 sub-postmasters against the Post Office resulted in a settlement of £57.75 million being reached.[26] The claim was funded by TPF. Hence TPF promoted access to justice where the sub-postmasters would have had no alternative means to fund the litigation and helped secure equality of arms for the claimants. Without this form of funding, it could be said that this, and other such collective proceedings, would not be capable of being pursued. Thus, it could be argued that TPF is the means by which collective proceedings become a viable means to secure access to justice consistent with Parliament's policy intentions as they underpin the collection proceedings regime in the CAT;[27] a point recognised by the UK Supreme Court in *Mastercard Inc v Merricks* [2020].[28] The same point can also be made where group litigation before the

[25] *Mastercard Inc. v Merricks* [2020] UKSC 51; [2021] 3 All ER 285 at [98], '*A class action procedure which has these features provides a potent means of achieving access to justice for consumers. But it is also capable of being misused. The ability to bring proceedings on behalf of what may be a very large class of persons without obtaining their active consent and to recover damages without the need to show individual loss presents risks of the kind already mentioned, as well as giving rise to substantial administrative burdens and litigation costs. The risk that the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly is exacerbated by the opportunities that it provides for profit. . .*'

[26] *Bates and Others v The Post Office* [2017] EWHC QB 2844, [2018] EWHC QB 2698, [2019] EWHC QB 606, [2019] EWHC QB 2871, [2019] EWHC QB 1373, [2019] EWHC QB 3408.

[27] Specifically see the liberalisation of the collective proceedings regime provided for in the Consumer Rights Act 2015, schedule 8.

[28] Mastercard Inc. v Merricks [2020] UKSC 51; [2021] 3 All ER 285 at [98], '. . .As the Court of Appeal observed in the present case, "the power to bring collective proceedings … was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding": [2019] EWCA Civ 674; [2019] Bus LR 3025, para 60. Those who fund litigation are, for the most part, commercial investors whose dominant interest is naturally to make money on their investment from the fruits of the litigation.'

courts is concerned. As Mulheron puts it, in the absence of TPF there are '*no ready alternatives available*' where funding collective proceedings is concerned.[29]

2.20 However, if the settlement figure in litigation such as the Post Office litigation is considered, once the funding and the funder's profit is deducted from the settlement, a different picture needs to be considered. Taking account of those deductions, only £12 million was left for distribution amongst the individual claimants. Hence the claimants received an equal share of £12 million rather than an equal share of £57.75 million minus any reasonable reduction to take account of irrecoverable costs (as would be the case if the litigation had been self-funded) and, if the claim was funded via a CFA, any success fee uplift. The net effect was that approximately £20,000 in damages was payable to each claimant as opposed to approximately £99,000 being payable to each claimant.[30] It could be said that the amount of profit taken reflected the risk, duration and/or complexity associated with pursuing the litigation.[31] Such matters may be particularly acute where, as Mulheron puts it, consumer collective proceedings and those brought by small and medium-sized enterprises pursued in the CAT are concerned as the Tribunal's approach to such proceedings is still being developed.[32] However, HM Government subsequently accepted that each claimant should be able to claim full and fair compensation for their losses, and established **the Group Litigation Order (GLO)** Compensation Scheme, funded by taxpayers.[33] As at August 2024, £34 million had been paid to the claimants from public funds.[34] It could be said that this outcome represents a failure in the earlier settlement produced by the justice system, not least the high cost of litigation and the defendant's conduct during the course of the litigation. It might also be said that it represents a systemic problem in collective actions arising from inequality of arms between the respective parties or an inability by the courts to manage such claims effectively.

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[29] R. Mulheron (2024) at 17.

[30] http://questions-statements.parliament.uk/written-statements/detail/2022-03-22/hcws705.

[31] It should be remembered that calculating the profit taken should not be conflated with recovery of expenditure provided by the funder to underwrite the costs of the litigation.

[32] R. Mulheron (2024) at 17.

[33] See http://www.gov.uk/government/publications/compensation-scheme-for-group-litigation-order-case-postmasters/the-glo-compensation-scheme-questions-and-answers. For the position as of July 2024 see http://www.gov.uk/government/publications/glo-compensation-scheme-financial-redress-reports-for-2024/july-2024-report-on-glo-compensation-scheme-progress.

[34] http://www.gov.uk/government/publications/post-office-horizon-compensation-data-for-2024/post-office-horizon-compensation-data-march-2024. The £34 million total comprises interim payments to almost all of the 555 claimants, and full and final payment to 80 of them. A further 52 claims received remain in progress.

2.21 Other factors that have been identified as underpinning TPF's development and which do not relate to either access to justice or equality of arms are: that it is a means by which corporate claimants or defendants can litigate without diverting their own financial resources from their businesses; that it is a viable means for financial institutions to diversify their investment portfolios; and, that it is a means by which corporate claimants (or counterclaiming defendants) who are in financial difficulties can litigate in an effort to generate income through bringing claims, and hence vindicating their rights, successfully.[35]

2.22 The third specific development focused on consideration by the CJC of TPF as a mainstream funding mechanism and how, as such, it might be regulated. First, after *Arkin*, the CJC recommended that TPF be considered as a 'last resort' where funding was required to give effect to access to justice. It did so as part of a wider consideration of a variety of different private funding options.[36] The CJC revisited the issue in 2007. It concluded that rather than being viewed as a funding method of last resort, TPF should be accepted as a mainstream form of litigation funding, with specific utility where consumer rights claims and multi-party litigation were concerned. It concluded that some form of regulation was advisable. Its preferred option was regulation via rules of court, although it did also canvass the possibility of regulation by the Financial Services Authority (the forerunner of the Financial Conduct Authority) or via statutory provision in the Compensation Act.[37] Those recommendations were not acted upon. TPF, despite consideration of regulation and further promotion of its use, thus remained unregulated, save for the residual application of the champerty doctrine to it. This remained the case until the Jackson Costs Review, which is considered in **Part Two**.

2.23 TPF's development raises a specific issue at this stage pertinent to the Consultation: whether there is a continuing role for maintenance and champerty where it is concerned. Evidently, if section 58B of the Courts and Legal Services Act 1990 had been brought into force, TPF agreements regulated under it would not be subject to the residual role played by champerty. Additionally, there is an argument that neither maintenance nor champerty ought properly to have been maintained as public policy considerations following the 1967 Act. As the Irish Law Reform Commission put it in this context, '*Public policy now . . .*

[35] As noted by Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, Cardozo Law Review, (2015) Vol. 36, 361 at 869.

[36] Civil Justice Council, *Improved Access to Justice – Funding Options & Proportionate Costs,* (2005), recommendation 13.

[37] Civil Justice Council, *The Future Funding of Litigation - Alternative Funding Structures*, (2007) at [153], and recommendation 3.

supports what it would once have opposed' and their continued application in the light of that is not an entirely logical position.[38]

2.24 Different approaches could be taken to reform in this area. The status quo could be maintained. That would leave TPF subject to the court's residual ability to find a funding agreement to be champertous and thus void, albeit as Sir Rupert Jackson concluded, any such agreement entered into with a funder that complied with the requirements of the current self-regulatory regime would be unlikely to be held by a court to offend against champerty or tend to corrupt public justice.[39]

2.25 Alternatively, a statutory exception excluding maintenance and champerty's application to TPF could be introduced (or section 58B of the 1990 Act could be brought into force) or they could be abolished in their entirety.[40] Removing TPF from their application would, arguably, increase certainty in the law, as would their abolition entirely. Abolition in its entirety would, however, mean that they would not apply where other, novel forms of litigation funding, such as **crowdfunding**, developed or evolved.[41]

2.26 Either approach would, arguably however, not give rise to any problems as the court has sufficient powers to control litigation. It particularly – and as noted in the context by the Law Commission of New Zealand – has sufficient power to strike out abusive litigation or vexatious claims.[42] The protective effect that the residual application of maintenance and champerty is, arguably, therefore already provided for in other powers that the court has to control litigation.

[38] Irish Law Reform Commission (2023) at 4.10 and 4.18.

[39] Sir Rupert Jackson, *Jackson Costs Review – 6th Lecture in the Implementation Programme*, cited with approval in *Akhmedova v Akhmedova* [2020] EWHC 1526 (Fam) at [41]-[45].

[40] Sir Rupert Jackson, *Review of Litigation Costs – Final Report* (December 2009) at 124 recommended that TPF should be excluded, either by statute or court decision, from the application of maintenance and champerty where the funding complied with the terms of any applicable regulatory scheme.

[41] Crowdfunding is discussed further in **Part Six**.

[42] New Zealand Law Commission, *Report on Class Actions and Litigation Funding*, (No. 147, 2022) at [13.14] and following.

3. Part Two – The Development of Self-Regulation of Third Party Litigation Funding

(A) Key Points

3.1 The following key points are emphasised in Part Two concerning the development of self-regulation of TPF:

- Initial consultations on the approach to regulation by the CJC had concluded that light touch regulation of TPF was the preferable approach to take;
- The Jackson Costs Review concluded in 2009 that a self-regulatory voluntary Code be developed and that the question of statutory regulation be revisited. Its endorsement of a self-regulatory approach was predicated on two points: first, that all funders sign-up to the Code (that was not achieved when the Code was introduced); and, secondly, that concerns about the Code's approach to funders' capital adequacy be addressed (that was achieved);
- Self-regulation was introduced in 2011 at a time when the TPF market was still beginning to develop. Both the Jackson Costs Review and a later CJC Consultation concluded that, if the market expanded, the question of full statutory regulation should be revisited;
- Since 2011, when self-regulation via the ALF was introduced, the TPF market has expanded very significantly, especially in respect of funding collective proceedings and group litigation;
- An estimated 44 funders operate in England and Wales. 16 funders are members of the ALF, of which 8 are also members of the **International Litigation Funders Association (ILFA);**

- The ALF Code imposes obligations on funders concerning: the maintenance of confidentiality; the provision of independent advice to funded parties; the maintenance of lawyers' professional duties; the avoidance of control of funded litigation; the maintenance of capital adequacy to a level comparable to capital adequacy requirements in Singapore, where there is statutory regulation; the achieving of settlements; and the termination of funding agreements;

- The ALF Code does not specify the purpose for which funding may legitimately be given, i.e., it makes no reference to the promotion of access to justice or equality of arms;

- While the ALF Code does not make explicit provision requiring members to avoid conflicts of interest, it does make provision for a binding dispute resolution procedure where disputes arise between funders and those they fund where settlement of funded claims or the termination of funding agreements is concerned;

- ILFA members are additionally required, under its best practice requirements, to provide clear and transparent client information to funded parties and to avoid conflicts of interest. A similar approach is taken in the Code of Conduct of the European Litigation Funders Association.

(B) The development of self-regulation

3.2 The single legal jurisdiction of England and Wales is unique in its approach to the regulation of TPF. Other jurisdictions either have no regulatory regime or make it subject to formal, statutory regulation. A summary of these different approaches is set out in **Part Four**.

3.3 England and Wales's adoption of self-regulation in 2011 followed a series of stakeholder consultations conducted by the CJC after the publication of its 2007 Report.[43] Those consultations considered a range of issues concerning self-regulation, including whether it was necessary or desirable as a means to aid the development of TPF. They also looked at questions concerning whether regulation should be carried out by a recognised industry body, self-regulation by those providing TPF, the creation of minimum standards, voluntary codes of guidance or best practice, case by case regulation by the courts or guidance issued by the Senior Courts Costs Office. Again, the question of regulation by the Financial Services

[43] Civil Justice Council (2007).

Authority was also raised. A key issue for consideration at that time was whether any of the proposed forms of regulation were sufficient to protect what was, then, viewed to be an embryonic market for TPF from bad actors and from the courts. The general conclusions drawn were that a light touch form of regulation was preferable, although some funders did express the view that no regulation was preferable, while others felt that there was a need for formal system of regulation. In the light of that, the CJC engaged in work to develop a Code of Conduct and a Voluntary Third Party Funding Code.[44]

3.4 TPF in general, including the CJC's work in the area, was then considered by the Jackson Costs Review.[45] It recommended that all third party funders should subscribe to an appropriate voluntary code, which should contain a provision prohibiting funders from withdrawing funding while litigation was ongoing as well a provision concerning their capital adequacy. It further recommended that, if and when the TPF market expanded, the question of statutory regulation should be revisited, again with consideration of the Financial Services Authority as the regulator. It finally recommended the rejection of the Arkin cap, with funders to be liable for all adverse costs, subject to the court's discretion where costs awards were made.[46] Following the Court of Appeal's decision in *Chapelgate Credit Opportunity Master Fund Ltd v Money* [2020], it is apparent that the Arkin cap is no longer treated by the courts as a binding rule.[47]

3.5 The Final Report specifically concluded,

'I support the approach of the CJC in trying to establish, in the first instance, a voluntary code for third party funding. Provided that a satisfactory code is established and that all funders subscribe to that code, then at this stage, subject to my concern about capital adequacy requirements, I see no need for statutory regulation. However, if the use of third party funding expands, there may well be a need for full statutory regulation.'[48]

[44] Summarised in Civil Justice Council, *Consultation Paper – A Self-Regulatory Code for Third Party Funding*, (2010).
[45] Sir Rupert Jackson, *Review of Litigation Costs – Preliminary Report* (May 2009), Vol. 1 chap. 15, and *Final Report* (December 2009), chap. 11.
[46] R. Jackson (December 2009) at 124.
[47] *Chapelgate Credit Opportunity Master Fund Ltd v Money* [2020] EWCA Civ 246 at [38]. In Laser Trust v CFL Finance Ltd [2021] EWHC 1404 (Ch), the funder was found to have exercised significant control over the litigation. That was sufficient to disapply the Arkin cap.
[48] R. Jackson, (December 2009), at 121.

3.6 In the light of the Jackson Costs Review's recommendations, the CJC in 2010 consulted on a revised draft of its previously prepared voluntary Code of Conduct. That exercise concluded that there was a general acceptance at that time that, due to it being at an early stage of development, '*self-regulation was the most practical solution in the first instance, but that statutory regulation may be required if the market expanded significantly*'.[49] The Law Society, at that time, however, took the view that statutory regulation was required and that the CJC should press the Government to introduce legislation.

3.7 Since the Jackson Costs Review, the TPF market has expanded significantly. This has particularly been the case since 2015 when collective proceedings before the CAT were reformed by the Consumer Rights Act 2015. That Act enabled collective proceedings to be brought on an opt-out basis. Previously, they could only have been brought on an opt-in basis. Opt-out collective proceedings may also be referred to as opt-out class actions or representative actions. They refer to the situation where a large number of individuals have the same or a similar cause of action against a defendant or defendants. Rather than litigate the claims as separate claims, a representative party may bring proceedings on behalf of all the affected individuals. If an individual does not want to be represented in the proceedings, they must opt-out, i.e., notify the representative of that fact.

3.8 Data collected by Mulheron illustrates the growth of TPF in collective proceedings. She notes that as at March 2024, 27 collective proceedings before the CAT were funded by TPF. She also notes that three representative actions, with a further 25 proceedings, including group litigation, were being funded by TPF in the High Court.[50] As Mulheron goes on to note, the majority, but not all, of funded actions are brought by or on behalf of consumers who absent funding '*would be powerless to sue.*'[51] More broadly, its growth is noted in the 2022 edition of the Third Party Litigation Funding Law Review. This stated that the TPF industry in England and Wales is now the second largest such market in the world. It also noted that it had seen UK third party funders' assets increase from £198 million in 2011/2012 to £2.2 billion in

[49] Civil Justice Council (2010) at [2].
[50] R. Mulheron (2024), Appendix B.
[51] Ibid. at 22.

2021.[52] That is a ten-fold increase since 2012, three years after the publication of the Jackson Costs Review.[53]

3.9 In the light of the Jackson Costs Review's recommendation, a CJC Working Group was established in 2010 to finalise the voluntary Code of Conduct. It was completed and subsequently adopted by the, then, newly established ALF in 2011.[54] The current version of the ALF Code of Conduct is at **Appendix E**.[55] Key features of the Code are:

- **Maintain confidentiality**: funders must maintain confidentiality concerning information and documentation relating to the dispute.

- **Independent Advice for funded party**: funders are required to take reasonable steps to ensure that funded parties receive independent advice concerning the terms of the litigation funding agreement into which they are considering entering. The importance of independent advice has been stressed by the Court of Appeal in *Excalibur Ventures LLC v Texas Keystone Inc* [2016];[56]

- **Maintenance of lawyer's professional duties**: funders are to take no steps that would or be likely to cause the funded party's lawyers to act in breach of their professional duties;

- **No control over the litigation**: funders are to take no steps to seek to influence of control the conduct of the funded claim;

[52] It should be noted that the assets of UK funders is not the same thing as funding deployed into litigation in England and Wales or arbitration whose seat is England and Wales. UK funders also fund internationally.

[53] Third Party Litigation Funding Law Review (2022), England and Wales Report. A copy is available here: https://www.augustaventures.com/news/the-third-party-litigation-funding-law-review-2022-6th-edition/.

[54] Civil Justice Council, *News Release - Civil Justice Council Working Group Agrees Code of Conduct on Litigation Funding* (2011).

[55] It is also available at the ALF's website. The website also contains the ALF's Complaints Procedure, the Rules of the Association, and its Articles of Association. They are available here: https://associationoflitigationfunders.com/code-of-conduct/documents/. The CJC has since published a statement on endorsements available here: 20230601-CJC-Endorsements-Statement-.pdf. As of September 2023, the CJC does not envisage providing endorsements in the future.

[56] *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144; [2017] WLR 2221 at [31]. As Tomlinson LJ put it, '*. . . For the avoidance of doubt I should mention that on-going review of the progress of litigation through the medium of lawyers independent of those conducting the litigation, a fortiori those conducting it on a conditional fee agreement, seems to me not just prudent but often essential in order to reduce the risk of orders for indemnity costs being made against the unsuccessful funded party. When conducted responsibly, as by the members of the ALF I am sure it would be, there is no danger of such review being characterised as champertous*.'

- **Capital Adequacy**: members are required to maintain adequate financial resources. They must maintain an independently verified minimum of £5 million in capital and maintain the capacity to pay all debts when they become due and payable and cover aggregate funding liabilities for at least 36 months. This is broadly consistent with the level of the capital adequacy requirement specified in Singapore under its statutory regulation of TPF;[57]

- **Settlements**: funders must ensure that funding agreements specify whether they may provide input into a funded party's settlement decisions. Where a dispute arises between the funder and the funded party concerning a potential settlement, it would be referred to a **King's Counsel (KC)** for their opinion. The KC's opinion is binding on both funder and funded. This provision provides one means to mediate potential conflicts of interest between funder and funded;[58]

- **Limit on termination of funding agreement**: funders may not terminate a funding agreement at their own discretion.

3.10 Questions may be raised concerning the Code. It does not, for instance, make provision concerning the purpose for which funding can be provided. It could, by way of illustration, have included a requirement that funding is only to be provided where it can facilitate access to justice and/or equality of arms, those being the explicit and, arguably, implicit rationales on which the courts have legitimised the use of TPF. In this respect it might be said that such a requirement is unjustified, as the courts have suggested that funders do not, in fact, provide funding to facilitate access to justice. As Tomlinson LJ explained in *Excalibur Ventures LLC v Texas Keystone Inc* [2016]:

'[28] . . . I do not myself think that commercial funders are greatly motivated by the need to promote access to justice, and nor do I suggest that they should be. They are, as it seems to

[57] Civil Law (Third-Party Funding) Regulations 2017, reg 4(1). specifies a capital adequacy requirement of 5 million Singaporean Dollars. It is available here: https://sso.agc.gov.sg//SL/CLA1909-S68-2017?DocDate=20210621.

[58] R. Mulheron (2024) at 143 notes that two funders provided evidence to the Legal Services Board study to the effect that they had never had to resort to the dispute resolution mechanism to resolve a difference in approach to settlement by them and a funded party. One specified that this was based on 20 years of experience in providing TPF.

me, making an investment and are motivated by largely commercial considerations. Those whose money they invest would no doubt be aggrieved if it were otherwise.'

3.11 While that might well be the case from the perspective of funders and their investors, consideration might be given to whether from a regulatory perspective a specific link between the ability to provide funding and access to justice and/or equality of arms is justifiable.

3.12 Questions have also been raised by the courts concerning the efficacy of the terms of the Code of Conduct. In *Rowe v Ingenious Holdings Plc* (2020),[59] Nugee J considered the Code's capital adequacy provision. As he explained, while also concluding that he was not satisfied that relevant third party funder would meet a costs order made against it, given the lack of evidence before the court concerning its financial situation,

'[106] . . . Nor am I confident that its membership of the ALF, and the obvious pressure which that puts on it to comply with the ALF rules, is sufficient to give one enough confidence that if it were facing a large liability for costs at the end of the day, that the money would be forthcoming.'[60]

3.13 The context of *Rowe* should, however, be noted. The Court in that case was being asked by the claimants not to order security for costs in circumstances where there was no after-the-event (ATE) insurance. It was being asked not to do so solely on the basis that there was a funder against whom the Court could make a costs order and that funder was an ALF member and therefore subject to the Code. The funder, however, had not agreed to indemnify the claimants for adverse costs; the reverse was in fact the case. The Court was therefore being asked to rely on the fact that the funder would be obliged by the Code to pay a costs order made against it in circumstances where the funder otherwise had not accepted liability for those costs, was not being paid to accept that liability, had no obligation to pay those costs absent an order of the Court, and the funder had declined to represent that it had the assets to pay the costs (because to do so would be an implicit statement to the Court that it would pay the costs when it had not accepted that obligation).[61]

[59] *Rowe v Ingenious Holdings Plc* [2020] EWHC 235 (Ch).
[60] *Rowe v Ingenious Holdings Plc* [2020] EWHC 235 (Ch) at [106].
[61] See Jacobs J in *Omni Bridgeway (Fund 5) v Bugsby* [2023] EWHC 2755 (Comm) at [28] distinguishing *Rowe*.

3.14 Where capital adequacy is concerned, it is also important to bear in mind that a funded party's legal representatives should take steps to ensure that the funder, and any relevant insurer, has sufficient capital to satisfy any claims or fund the costs of the funded claim.

3.15 The ALF has also implemented a complaints procedure, under which complaints against members are investigated by an independent solicitor or barrister. Sanctions may be imposed where a complaint is upheld. The range of sanctions is:

'(25) (1) a private warning (including where appropriate recommendations as to future practice);

(2) a public warning (including where appropriate recommendations as to future practice);

(3) publication of the Opinion (subject to any redactions which Independent Legal Counsel shall identify in order to ensure that no matter confidential to the parties is disclosed);

(4) suspension of membership of the ALF for any identified period of time;

(5) expulsion from membership of the ALF;

(6) the imposition of a fine payable by the Member to the ALF, up to a limit of £500;

(7) the payment of all or any of the costs of determining the Complaint.'[62]

3.16 In so far as the potential fine for misconduct is concerned, it could be questioned whether a £500 limit is able to provide a sufficient deterrent. It could also be questioned whether there should be a provision for awarding compensation for loss, so as to avoid further satellite litigation.

3.17 The ALF, its Code of Conduct, and Complaints Procedure apply to some but not all funders active in England and Wales.[63] It currently has sixteen funder members[64] and eight associate

[62] ALF, *Complaints Procedure*. It is available here: https://associationoflitigationfunders.com/wp-content/uploads/2018/03/ALF-Complaints-Procedure-October-2017.pdf

[63] R. Mulheron (2024) at 50-51. Non-ALF members include, for instance, Lionfish and Litigation Capital Management

[64] Its funder members are: Asertis, Augusta Finance, Balance Legal Capital, Bench Walk Advisors, Burford Capital, Calunius, Deminor Litigation Funding, Erso Capital, Harbour Litigation Funding, Innsworth, Omni Bridgeway, Orchard Global, Redress Solutions, Therium, Vannin Capital, Woodford Litigation.

members[65], the latter being either litigation funding brokers, costs or adverse costs insurers, law firms, barristers, overseas funders, academics, or overseas academics. In 2021, the European Parliament Research Service noted that there were 44 specialist funders active in England and Wales, i.e., funders who specialise in the provision of TPF.[66] Assuming that remains the case today, just over a third of active funders are ALF members.

3.18 That specialist funders do not all subscribe to the ALF should be considered in a broader context. As the Irish Law Reform Commission noted, specialist funders tend to be staffed by legal professionals or former legal professionals.[67] Where the former is the case, those professionals are likely to be subject to professional regulation by either the Solicitors Regulation Authority or the Bar Standards Board, in so far as they are English and Welsh qualified. Some funders are also regulated by **the Financial Conduct Authority (FCA)** given the manner in which they manage their investors funds. Regulation by the FCA is not, however, necessary for a funder to provide TPF, and nor does it regulate TPF itself.[68]

3.19 In addition to specialist funders, other third parties may also provide TPF while not being ALF members. The provision of funding by such organisations was noted as being problematic by the Court of Appeal in *Excalibur Ventures LLC v Texas Keystone Inc* [2016].[69] Where a funder is not a specialist and/or is not an ALF member, questions can be raised as to its understanding of litigation, its ability to assess risk, its capital adequacy, and its professionalism. Such problems could arguably be resolved by compelling funders to subscribe to the ALF. Mulheron notes that there is an argument that any attempt to compel all funders to join the current self-regulatory scheme would be contrary to competition law.[70] If that is the case, non-ALF funders could be required by the courts to demonstrate their compliance with effective standards before litigation funded by them is permitted to proceed. Statutory regulation or licensing, were it to be introduced, could also set effective conduct principles and standards. Mulheron does also note that non-ALF funders tended to apply the ALF Code to their funding activities as it is perceived by them to be *'best practice*

[65] Its associate members are: Gallagher, ClaimTrading, Factor Risk Management, Mourant, QLP, Sentry Funding, Stevens & Bolton, Philip Ells.

[66] J. Saulnier et al, *Responsible Private Funding of Litigation*, (EPRS, 2021) at 8. It is available here: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf.

[67] Irish Law Reform Commission (2023) at 14.

[68] R. Mulheron (2024) at 51, noting that Balance Legal Capital, Burford Capital, and Harbour Litigation Funding are regulated by the FCA in respect of other aspects of their businesses.

[69] *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144; [2017] WLR 2221 at [30].

[70] R. Mulheron (2024) at 50.

and useful to the funded client'. That was not, however, supported by evidence from non-ALF funders but was based on information provided to the LSB's 2024 study of TPF by law firms who work with non-ALF funders. It is not evident how many law firms or how many non-ALF funders there are to which this is said to apply.[71]

3.20 In addition to self-regulation via the ALF, several funders are also members of ILFA.[72] ILFA is not a regulatory or self-regulatory body. It is a representative body, which seeks to promote TPF.[73] Its members commit to abide by four best practice principles, which are:

*'**Clarity** – ILFA members should provide services to users in a clear and forthright manner. The terms, expectations and contractual arrangements associated with the financing should be set forth unambiguously and comprehensively. The process of obtaining financing should be transparent.*

***Respecting duties to the courts** – ILFA members should not interfere with the performance of lawyers' duties to the courts and to their clients and respect the proper administration of justice.*

***Avoid conflicts of interest** – ILFA members will maintain effective systems to detect and manage potential conflicts of interest, including conflicts that could affect the enforcement of an award or judgment.*

***Preserve confidentiality and legal privilege** – ILFA members will only receive confidential or privileged information pursuant to an approach which is expected to be respected in the relevant jurisdiction(s) and take all necessary steps to preserve confidentiality and legal privilege in information which they receive.'*[74]

3.21 The requirement to respect lawyer's duties essentially mirrors the requirement in the ALF Code, which requires its members to maintain lawyer's professional duties. It can also be seen as requiring the ILFA member not to exercise control over litigation, consistently with

[71] R. Mulheron (2024) at 128.

[72] Funders who are members of both the ALF and ILFA are: Balance Legal Capital, Burford Capital, Harbour Litigation Funding, Innsworth, Omni Bridgeway, Orchard Global, Therium, Woodford Litigation.

[73] Its 'core mission' is: '*to engage with legislative, regulatory and judicial interests to ensure that legal finance is understood objectively and treated reasonably when under consideration by those authorities*.' More detail is available here: https://www.ilfa.com/#about-legal-finance.

[74] The principles are available here: https://www.ilfa.com/#best-practice.

the ALF Code, as that would likely amount to an interference with the proper administration of justice. The requirement to preserve confidentiality replicates a similar requirement in the ALF Code. The requirement to provide clarity to users of their services, what might be termed more generally effective customer or client care, does not generally form part of the ALF Code, although it does provide for promotional literature to be clear and not misleading.[75] Nor does the ALF Code include a conflict of interest rule. In these two respects ILFA's best practice goes beyond the ALF Code. One reason for the difference where the approach to conflict of interest is concerned might be said to be the fact that the ALF Code only applies to litigation, whereas the ILFA Code applies to both litigation and arbitration. Where arbitration is concerned, conflicts of interest may be more of a potential risk due to the potential for arbitrators to have a relationship with the funder in their other capacity as a lawyer acting in cases where that funder is involved.

3.22 A further contrast can be drawn between the ALF Code and that of the European Association of Litigation Funders' Code of Conduct.[76] That Code makes provision for its members to provide 'clear and comprehensive' information to funded parties. It also specifies the minimum content of funding agreements, again with the aim of ensuring clarity to funded parties. It also has an express conflict of interest provision.[77] That Code is reproduced at **Appendix F**. Further detailed provision for Best Practices, which include provision for conflicts of interest, disclosure of information, and the provision of information by funders to funded parties is also set out in the American Bar Association *Best Practices for Litigation Funding*.[78]

3.23 As not all ALF members are ILFA members, and not all funders are ALF or ILFA members, it is an open question whether all funders do or should comply with these or other best practices. It is also an open question whether these or other best practices would be most effectively given effect through amendments to the ALF Code or via some other regulatory approach. **The Working Party specifically seeks evidence on these issues. It is particularly interested in receiving submissions on what principles and best practices should inform**

[75] See ALF Code, para. 6. Also the requirements at paras. 10 and 11 on matters to be set out in TPF agreements and the obligation to ensure funded parties receive independent advice.

[76] Its members are: Deminor, Nivalion and Omni Bridgeway. Deminor and Omni Bridgeway is also members of ALF. Omni Bridgeway is also a member of ILFA.

[77] The Code is available here: https://elfassociation.eu/about/code-of-conduct.

[78] The American Bar Association Best Practices are available here: https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf

the future development of TPF and which could underpin whichever regulatory approach is recommended.

3.24 When considering the regulatory approach to TPF, it should be borne in mind that in all cases the funded party will be represented by solicitors, who are themselves subject to professional regulation. It is important therefore to bear in mind the role and efficacy of the professional obligations placed on a funded party's advisers to advise them properly concerning the nature of any proposed TPF agreement and the availability, advantages and disadvantages of it and other funding methods.

4. Part Three – Different Approaches to Regulation

(A) Key Points

4.1 The following key points are emphasised in Part Three concerning different approaches to regulation:

- The core purpose of regulation is to protect from harm or unfairness;
- Relevant harms where litigation funding is concerned that were outlined in Part One as well as broader harms may affect the financial and legal services market and the national economy;
- It is essential to identify the most effective and proportionate regulation method for TPF from a range of available possible regulatory approaches. Differential approaches to regulation may be possible, depending on the identification of differential risks and harms. Those differential risks and harms may affect different types of litigation and different types of litigant differently, which may justify a differentiated approach to regulation;
- Any recommendation concerning the regulation of TPF by the Working Party should be evidenced-based and should take account of potential risks and harms that may be caused by TPF.

(B) Different regulatory approaches

4.2 This Part will set out and discuss different approaches to regulation. It will look at, amongst other things, self-regulation, regulation, co-regulation, different approaches to regulation (e.g., licencing, conditions, regulatory standards, accreditation, guidance). It will particularly provide necessary background to the consultation questions on regulation.

4.3 The core purpose of any regulation is to provide *protection* from harm or unfairness. This signifies '*the sustained and focused attempt to alter the behaviour of others according to*

standards or goals with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.'[79]

4.4 In the context of litigation and litigation funding, relevant harms potentially include potential harm to claimants, defendants, intermediaries, access to justice, the delivery of justice, the legal system, the markets for financial and legal services, and the national economy generally. The potential harms, e.g., those identified in paragraphs 16 to 20, may be of various kinds, but generally revolve around financial loss and loss of confidence in justice and a fair system.

4.5 There are various modes of 'regulation', largely classifiable into public, private, or social mechanisms. The typology includes:[80]

- **Formal state regulation**, involving laws made by Parliament (or under delegated powers), typically including legal rules (e.g., requirements, duties, prohibitions) and formal enforcement mechanisms (fines and other sanctions). Laws made by Parliament include the CPR and the CAT Rules. Such regulation might also include regulation of the costs of litigation.[81] It might also include the provision of Practice Directions issued by the senior judiciary.

- **Self-regulation**, where some private sector actors voluntarily observe obligations arising under a Code of Practice of a trade or professional association, sometimes also involving complaint mechanisms, and some form of sanctions, such as exclusion from the association.

- **Co-regulation**, involving some combination of state regulation and self-regulation, perhaps making observance of a private Code mandatory for all defined types of traders.

[79] J. Black, 'What is Regulatory Innovation?' in Julia Black, Martin Lodge, and Mark Thatcher (eds), *Regulatory Innovation* (Edward Elgar, 2005), 1, at 11.

[80] See *Reducing Regulation Made Simple: Less regulation, better regulation and regulation as a last resort* (HM Government, 2010). *Recommendation of the Council on Regulatory and Policy Governance* (OECD, 2012), Recommendation 4. The descriptions attached to each type above are those of Professor Christopher Hodges.

[81] See, further, **Part Five**.

- **Information and education**, whether for traders or consumers/customers, and whether provided or mandated by public or private actors and mechanisms.

- **Economic instruments**, such as fees for membership of a professional body or dispute resolution scheme, training requirements (initial and/or continuing), financial penalties for breaching rules, civil law requirements to make good damage caused.

- **Informal, social and reputational levers**, which influence traders' behaviour by providing consumers with better information on what they should ask or choose and nudging them towards traders with greater reliability.

4.6 Different forms of formal regulation can utilise a range of tools. Examples may include:

- **general rules**; rules on what actions or activities may or may not be done;

- **judicial supervision**; the management of collective actions and group litigation by the courts, including supervision and approval of settlement proposals;

- **standards**; where agreed or formal standards and conditions are to apply (or able to be applied) to certain goods, services, traders, distributors, other actors or markets; or that certain legal requirements will be deemed satisfied if certain standards are applied;

- **accreditation**; where use of private accreditation systems will confer certain legal advantages or presumptions of compliance;

- **licensing***;* where a formal approval is required from a public authority before carrying out specified activities, based on satisfaction of specified preliminary and/or ongoing requirements;

- **continuous post-marketing requirements**; such as recording, monitoring and reporting information of adverse occurrences, perhaps formally within a post-marketing safety or vigilance system, collaborating with the authorities to repair harm and take corrective action;

- **auditing or inspection**; where checking of systems or activities is required by a public or private body;

- **redress**; adhering to a dispute resolution, ombudsman or injury redress system.

4.7 The major differences between the possible mechanisms lie in their governance, transparency, applicability, coverage, compliance and enforceability.[82] A major issue in practice is whether the risk of unacceptable harm(s) is such that formal requirements are required to be mandatory for all specified traders or activities.

4.8 A regime may provide adequate controls on behaviour and outcomes (the risk of and occurrence of harm) through a 'light' mechanism, such as information and education, or self-regulation through a code of practice written by a trade association. But if the level of risk, in terms of the severity and likelihood of occurrence of harm, are high, then it is necessary to have a system of formal regulation, involving legal rules enforceable by state institutions and applicable to all who come within the stated ambit.

4.9 The strength of a regulatory system can also differentiate between different types of risk. Hence, some risks might only need 'light touch' controls, whereas other more serious risks may need formal regulation. A differentiated approach is, therefore, theoretically possible between different issues, for example, issues relating to capital adequacy, provision of information, achieving adequate understanding and control by parties, avoiding unacceptable levels of influence or decision-making by non-parties, and so on.

4.10 Recent Government policy is not only to carry out full consideration of all options,[83] and their advantages and disadvantages, using an Impact Assessment based on available evidence, but also to seek to avoid unnecessary formal regulation if acceptable alternatives exist.[84]

4.11 The Working Party, therefore, seeks evidence, if any, of the various potential risks and harms that may be caused by litigation funding, and the incidence and severity of any such risks or harms risk. From that evidence base, the objective is to analyse and compare the relevant regulatory options and conclude what level of regulatory intervention seems appropriate to manage them, so that it is likely to be at an acceptable level. It will be necessary to evaluate the effectiveness of the relevant optional interventions in adequately identifying, preventing, responding to, and controlling the relevant risks(s) and harm(s).

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[82] K. McEntaggart, J. Etienne, J. Uddin, *Designing Self-and Co-Regulation Initiatives: Evidence on Best Practices: A literature review*, BEIS Research Paper Number 2019/025 (Department for Business, Energy & Industrial Strategy, 2019).

[83] *Guidance: The Green Book (2022)* (Government Finance Function and HM Treasury, 2022).

[84] Ibid., para 7.9.

4.12 This approach informs the consultation questions set out at **Appendix A**. Respondents are invited to submit as much empirical evidence as possible.

5. Part Four – Approaches to Regulation in Other Jurisdictions

(A) Key Points

5.1 The following key points are emphasised in Part Four concerning different approaches to regulation in other jurisdictions:

- A range of approaches to regulation are taken in other jurisdictions;
- Countries that adopted prohibitions on maintenance and champerty have tended to take a cautious approach to the development of TPF. They can be seen to have permitted it subject to statutory legislation;
- Australia, which also had historic prohibitions on maintenance and champerty, has moved to permitting TPF. It was subject to limited statutory regulation as a financial service, but all statutory regulation has been removed. Since the introduction of TPF, Australia has never imposed caps on TPF success fees. It is now subject to self-regulation and, where it is provided for class actions (collective proceedings), to regulation by the courts via Practice Notes, the court's powers over settlement proposals including whether any fees payable to funders are fair and reasonable, and the court's power to make orders for adverse costs;
- Canada continues to place regulation of TPF in the hands of the courts;
- Some US states, by contrast, appear to have moved towards statutory regulation, having not generally done so initially, while others have not done so;
- Countries that have not adopted prohibitions on maintenance and champerty have generally permitted TPF without any specific regulation. They tend to leave its regulation

to the general law, particularly the law of contract, and to the application of lawyers' professional and ethical obligations;

- The **European Union (EU)** is currently investigating whether there is a need for the introduction of TPF in its member states.

(B) Regulatory approaches in other jurisdictions

5.2 TPF is not unique to England and Wales. It is available in several other countries. It is a global industry. Funders are, consequently, subject to different forms of regulation depending on the country in which they are providing TPF. In this Part, a short survey of some of those jurisdictions is presented. Its aim is to illustrate the differential approaches taken to TPF availability and regulation.

Australia

5.3 Australia has a very well established TPF market. It is particularly well-established for class action litigation (collective proceedings), where it has developed following the High Court of Australia's judgment in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006). In that case, the High Court held that such funding was not contrary to public policy. It was then further clarified by the Federal government in 2012 that TPF was not subject to Australian financial services regulation.[85] The TPF market in Australia was noted to be worth 128 million Australian Dollars in 2021. It is predominately focused on civil and commercial litigation, not least securities class actions, and arbitration. Portfolio funding is a growing aspect of it. In 2021 over half of TPF was believed to fund class actions.

5.4 Australia has taken different approaches to regulation. In 2020 its TPF market was to become subject to regulation, as funders were required to obtain and maintain a licence to provide financial services. Following a change in the Federal government, that requirement was set aside.[86] Funders are also not subject to a cap on their return from funding. There was, however, a proposal in 2021 that such a cap be introduced by legislation.[87] It was to provide that, where TPF funded a class action, the represented class members would have to

[85] S. Friel, *The Law and Business of Litigation Finance*, (2024) at 55-56.
[86] Corporations Amendment (Litigation Funding) Regulations 2022.
[87] See Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders. It is available here: https://treasury.gov.au/consultation/c2021-211417.

receive no less than 70% of the damages or settlement, i.e., the return was to be capped at 30%. With a change in government that proposal did not go forward.[88]

5.5 TPF is now subject to a mix of regulatory approaches:

- It is subject to self-regulation via **the Association of Litigation Funders of Australia (ALFA),** which prescribes best practice Guidelines for its members. This is akin to the ALF. Its best practice guidelines are broadly analogous to those of the ALF's Code of Conduct. One notable departure from the ALF approach is that the Guidelines, while they specify capital adequacy requirements, do not do so by reference to a specific amount. As in England and Wales, not all funders are members of the ALFA;[89]

- Where class actions are concerned, both in the Federal Courts and State courts, a degree of regulation is specified by court-issued Practice Notes, which are equivalent to Practice Directions that apply in the courts in England and Wales. These Practice Notes, for instance, make provision governing conflicts of interest, disclosure of redacted copies of funding agreements.[90]

- Funders can also be made liable to pay adverse costs by the courts on a comparable basis that taken in England and Wales.[91]

5.6 One particular feature of Australia's approach to TPF is the availability of what are known as **common fund orders (CFOs)**.[92] These provide for all members of a represented class in a class action to pay a funder from the judgment damages or settlement of a class action. They are required to do so irrespective of whether the class member was party to a TPF agreement.

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[88] S. Friel (2024) at 58.

[89] The Guidelines are available here: http://www.associationoflitigationfunders.com.au/uploads/5/0/7/2/50720401/alfa_best_practice_guidelines.pdf.

[90] The most detailed provision is set out in the Federal Court of Australia's Class Actions Practice Note, paras. 5, 6 and 15.4 (the last concerning TPF and court approval of settlements). The Practice Note is available here: https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca. Also see, for instance, Practice Note SC GEN 17 – Supreme Court Representative Proceedings, para. 7.2. The Practice Note is available here: http://www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/d38ff9ca2c6152e9ca25816f00052cc2?OpenDocument.

[91] See, for instance, *Court House Capital Pty Ltd v RP Data Pty Limited* [2023] FCAFC 192.

[92] *Elliott-Carde v McDonald's Australia Limited* [2023] FCAFC 162.

Austria

5.7 Austria did not, historically, adopt prohibitions on maintenance and champerty. The Austrian Supreme Court confirmed that it was a permissible for TPF to be used in 2013. It is and remains unregulated. Reliance on it is, however, subject to compliance with restrictions imposed on the Austrian legal profession. Those restrictions, for instance, prohibit lawyers from acting on a contingency fee basis. TPF agreements must ensure that they do not, therefore offend such restrictions. TPF is well-established as a means to fund class actions, i.e., what would be group actions or collective proceedings in England and Wales. It is also available as a means to fund individual disputes and arbitration.[93]

Canada

5.8 TPF is generally unregulated in Canada. Its evolution to a degree mirrors that of Australia and England and Wales: it developed against the background of the prohibition on maintenance and champerty and the shift in public policy that understood it to be a means to promote access to justice.[94] Again, as in Australia, this has particularly been the case where class action litigation is concerned, with representative parties in such litigation entering into TPF agreements to finance the litigation. Court-based regulation of TPF continues to evolve, particularly where class action litigation is concerned. It has, for instance, in Ontario seen the courts hold that TPF agreements that provide for a return of greater than 50% of damages awarded to the funded party were unlawful.[95]

5.9 Where class action litigation is concerned, the practice has developed where funded representative parties seek court-approval of the TPF agreement they have entered into at the certification stage of the proceedings.[96] The test for approval of such TPF agreements has been summarised as requiring the funded party to demonstrate that:

'. . . [TPF] is necessary to provide access to justice for the class members;

[93] M. Wegmüller & J. Barnett, Austria – National Report, Third Party Litigation Law Review 2020. The article is available here: https://nivalion.com/uploads/pdf/Litigation_Funding_Law_Review_Austria_2021.pdf.

[94] *9354-9186 Québec inc. v Callidus Capital Corp.* [2020] 1 SCR 521.

[95] R. Howie & G. Moysa, *Financing Disputes: Third-Party Funding in Litigation and Arbitration*, (2019) 57:2, 465 at 486.

[96] R. Howie & G. Moysa (2019) at 487.

the division of any settlement or judgment as between the class members and the funder is appropriate;

the representative [party]will instruct counsel and counsel's duties are to the [claimants] and not the third party funder;

the [claimants] will conduct the proceeding in a manner that avoids unnecessary costs and delays;

the representative [party] will not become indifferent to giving instructions to class counsel in the best interests of the class members if he is insulated from an adverse costs award;

the [TPF] contains appropriate restrictions with respect to the sharing of information with the third party funder;

the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information; and

the [TPF] is governed by the laws of Canada and the province where the action is commenced and is subject to the exclusive jurisdiction of the courts of the province where the action is commenced.'[97]

The European Union

5.10 The European Union does not regulate TPF. It is, however, currently engaged in an examination of the TPF market in its member states. This is part of consideration by the EU Commission of whether it is necessary to introduce regulation. This consideration arose following a recommendation of the European Parliament in 2022 that regulation should be introduced. The Parliament recommended that:

- TPF should be subject to regulation carried out by a public regulatory authority;
- Funders should be subject to annual capital adequacy requirements;

[97] R. Howie & G. Moysa (2019) at 488.

- Funders' recovery under TPF agreements should be subject to a 40% cap;
- Prohibit funder control of litigation;
- Require disclosure of the fact of funding to courts, and also at the court's request disclosure to it of an unredacted copy of the funding agreement;
- Funders should be subject to fiduciary duties to funded parties;
- Funders to be jointly liable, with the funded party, for any adverse costs.[98]

5.11 While the EU does not regulate TPF, it does, under its Representative Actions Directive, impose the following obligation on EU member states where TPF is concerned,

'Member States shall ensure that, where a representative action for redress measures is funded by a third party, insofar as allowed in accordance with national law, conflicts of interests are prevented and that funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers.'[99]

France

5.12 France did not, historically, adopt prohibitions on maintenance and champerty. TPF is relatively undeveloped in France. It is not subject to any specific regulation, nor was it historically prohibited. It is treated as another form of contractual relationship between funder and funded party. As such funding arrangements must comply with the general law of contract, it is also subject to guidance issued by the French legal profession, which stresses that lawyers must ensure that they maintain compliance with the professional and ethical duties and responsibilities where TPF is provided. TPF is primarily provided in

[98] Responsible private funding of litigation, European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)). The proposed Directive is available here: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.pdf.

[99] Representative Actions Directive 2020, art. 10(1). The Directive is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828

arbitration proceedings. It has also developed, to a limited extent, as a means to fund class actions (particularly ones concerning consumer disputes and competition disputes).[100]

Germany

5.13 Germany did not, historically, adopt prohibitions on maintenance and champerty. TPF is permitted in Germany, where it is not subject to any specific regulation. A more restrictive approach is, however, taken to lawyers acting on contingency fee funding. The main forms of litigation funding are legal aid and legal expenses insurance (see **Part Six**).

5.14 Where TPF is provided, it is available for collective proceedings and, to some degree, for the funding of small claims. Funding of collective proceedings has to a degree focused on consumer claims, such as the Diesel Emissions litigation. Some oversight of the terms and conditions of TPF agreements is carried out by the German courts. In one instance, the Higher Regional Court of Munich held that a funder could recoup a 50% share in the damages. They could do so because of the level of risk involved, as funding was provided after the claim had been dismissed at first instance. By necessary implication, the court could have held that the 50% share of the damages was too high, and thus set aside or varied to a more reasonable amount.

5.15 Where collective actions are concerned, Germany has implemented a cap on the return that funders may receive further to the EU's Representative Actions Directive. That cap limits the funder's recovery to a maximum of 10% of the damages awarded.

Hong Kong

5.16 TPF is generally prohibited in Hong Kong, where maintenance and champerty remain torts and criminal offences. Since 2019,[101] a comparable position to that which has also developed in Singapore has been in place. Division 3 of the Arbitration Ordinance[102] and Part 7A of the Mediation Ordinance have permitted TPF in respect of arbitration proceedings and related court proceedings. They have also permitted TPF of mediation.[103] TPF is not therefore generally available to disputes in a way comparable to that in England and Wales. The

[100] Clyde & Co, The Landscape of Litigation Funding in France (2023). The article is available here: https://www.clydeco.com/en/insights/2023/11/the-landscape-of-litigation-funding-in-france#21.
[101] Introduced via The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.
[102] The Ordinance is available here: https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1546499747323_001.
[103] The Ordinance is available here: https://www.elegislation.gov.hk/hk/cap620?xpid=ID_1498202413400_001.

intention behind the reform was to promote arbitration and mediation both international and domestic in Hong Kong, with the latter helping to divert disputes from the courts. By helping to divert disputes from the domestic courts, TPF's promotion was intended to enable the courts to deal more effectively with litigation that could not be resolved via arbitration or mediation.[104] In 2021 six disputes were funded. In 2022, 74 disputes were funded. The TPF market in Hong Kong thus remains in an early stage of development.

5.17 TPF is not subject to self-regulation. It is subject to regulation by an Advisory Body, appointed by the Justice Minister, which has oversight of a regulatory code: the *Code of Practice for Third-Party Funding of Arbitration*.[105] The Code, which was issued by the Justice Minister, is broadly comparable to the ALF Code of Conduct. The Code imposes a 20 million Hong Kong Dollar capital adequacy requirement on funders. It also contains provision requiring funders to avoid conflicts of interest, to maintain confidentiality and legal privilege in respect of the funded party's information, provision concerning disclosure of the fact of funding and the funder's identity, provision prohibiting the funder from taking control of or influencing the management of the funded claim, and the provision of information to the funded party concerning costs and whether funder is responsible for providing security for costs.

Ireland

5.18 Ireland has historically prohibited TPF through the application of maintenance and champerty. It is currently consulting on whether and, if so, how TPF may be permitted.[106]

The Netherlands

5.19 TPF is permitted in the Netherlands, where it is not subject to any specific regulation. As in France, funding agreements must comply with the generally applicable law of contract. Its use should be understood in the context of the availability of forms of contingency fee agreement and the widespread use of legal expenses insurance. Given the general availability of these forms of litigation funding, TPF use appears to be focused on funding of

[104] Hong Kong, Department of Justice Report (2019). The report is available here: https://www.doj.gov.hk/en/legal_dispute/pdf/brief_note_tpf_e.pdf.
[105] The Code is available here: https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf.
[106] Irish Law Reform Commission (2023).

collective proceedings is concerned. This has particularly been the case since 2020 when collective actions became available.[107] In 2021 it was believed that some 50 collective actions were funded via TPF.[108]

Singapore

5.20 TPF was until recently prohibited in Singapore due to its application of the prohibition on maintenance and champerty. It has been permitted since 2017. In that year, an amendment to the Civil Law Act and the introduction of the Civil Law (Third Party Funding) Regulations 2017, brought about the effective abolition of the historic prohibition and permitted TPF for international arbitration proceedings and for related court proceedings. The scope of permitted TPF was expanded by an amendment to the 2017 Regulations in 2021. As a consequence, TPF is now permitted in the following:

- arbitration proceedings, including applications for stays and enforcement of arbitral awards;
- court proceedings arising from or out of or in any way connected with any arbitration proceedings;
- proceedings commenced in the Singapore International Commercial Court for so long as those proceedings remain in the Singapore International Commercial Court and appeals from decisions in such proceedings; and
- mediations carried out in connection with the foregoing.[109]

5.21 It is apparent therefore that TPF in Singapore is not available for the wide range of disputes that it is available for in England and Wales. It is mainly focused on commercial, including insolvency, proceedings, and arbitration proceedings.

[107] See the Act on Redress of Mass Damages in a Collective Action (WAMCA).

[108] R. Philips, Netherlands – National Report, Third Party Litigation Law Review (2021). The Report is available here: https://redbreast.com/wp-content/uploads/2022/04/2021-LBR-Third-party-litigation-Funding-Netherlands.pdf.

[109] The 2017 Regulation is available here: https://sso.agc.gov.sg//SL/CLA1909-S68-2017?DocDate=20210621.

5.22 Permitted TPF is also subject to a limited form of statutory regulation. While there is no statutory regulatory and no self-regulatory body, the 2017 Regulations prescribe minimum conditions that a funder must comply with in order to provide TPF. They are:

- The funder carries out its principal business of providing TPF in Singapore or elsewhere;
- The funder has a paid-up share capital of not less than 5 million Singapore Dollars or their equivalent in another currency or not less than that amount in managed assets (a capital adequacy requirement).

5.23 Additionally, the Singapore Institute of Arbitrators, amongst other such bodies, has issued guidance on TPF.[110] It requires funders to ensure that there are no conflicts of interest between themselves and any party who seeks funding, and that such parties obtain independent legal advice on any proposed funding agreement. It requires funding agreements to be clear and concise and that a transparent and independent dispute resolution mechanism is provided. It specifically requires funders not to exercise control over funded litigation, to respect legal professional's professional obligations, and to maintain confidentiality and legal privilege over information provided to it by the funded party. It also requires the funder to co-operate with any appropriate disclosure requirements. It is an approach that is, generally, comparable to the ALF Code of Conduct.

5.24 The development of TPF in Singapore should also be considered against the background that contingency fee agreements were, until 2022, prohibited. Since May 2022, Singapore has, however, also permitted the use of CFAs on a similar basis to that which they are permissible in England and Wales.[111]

The United States of America

5.25 There is no single legal jurisdiction in the United States. TPF has to be considered both at the Federal level and by reference to each of the 50 US States. At the Federal level there is neither regulation nor self-regulation.[112] At the State level different approaches are evident.

[110] The Guidance is available here: http://mail.siarb.org.sg/images/SIArb-TPF-Guidelines-2017_final18-May-2017.pdf.

[111] Legal Profession (Amendment) Act 2022, s.6. The Act is available here: https://sso.agc.gov.sg/Acts-Supp/8-2022/Published/20220222?DocDate=20220222.

[112] S. Friel (2024) at 45.

At a basic level, its development has had to navigate differential approaches to prohibitions on maintenance and champerty. Fifteen states have enacted legislation governing TPF, of those some only regulate it where consumer litigation is concerned, i.e., funding of commercial litigation is not regulated. Others, i.e., the majority of states, have no regulation and hence TPF is left to the courts to scrutinise. Over the last two years, sixteen states have considered TPF regulation and declined to enact legislation. As of February 2024, legislation concerning regulation was pending in ten states.[113] The different approaches currently taken can, for instance, be seen in the following states.[114]

5.26 California does not regulate TPF. Like, for instance, France and Germany, it has no provisions that prohibit maintenance and champerty.[115] Hence TPF has always been lawful. An attempt to introduce legislation regulated TPF in 2023 was not enacted. It would have made the Secretary of State for California responsible for regulating TPF. It would have required funders to register with the Secretary of State as a precondition for offering funding and would have also required them to file a $250,000 bond with their registration. The legislation would also have introduced provisions requiring disclosure of TPF agreements.[116]

5.27 New York has not introduced statutory regulation, notwithstanding several attempts to do so since 2005. It has, however, implemented a form of self-regulation, which operates by way of an agreement reached between the State Attorney-General and funders, which sets out the equivalent to best practice for funding.

5.28 Maine has since 2007 regulated via legislation. It has, particularly, required funders to register bi-annually, with payment of a $5000 registration fee; prohibited funder involvement in litigation itself; and made provision for disclosure of information.

5.29 Montana enacted statutory regulation in 2023. It requires funders to register with its Secretary of State. It makes further provision for the disclosure of TPF agreements, for funders to be jointly liable for litigation costs, and it caps the funder's return at 15% per

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[113] See LexisNexis Insights. It can be accessed at https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/state-lawmakers-wade-into-third-party-litigation-funding.

[114] Summarised in S. Friel (2024) at 45-54.

[115] *Mathewson v Fitch* (1863) 22 Cal. 86 at 94-95, '*The offense of maintenance was created by statute in England in early times, in order to prevent great and powerful persons from enlisting on behalf of one party in a lawsuit, by which the opposite and feeble party would be oppressed and prevented from obtaining justice. . . In the absence of a statute creating it, the offense of maintenance does not exist in American law as a part of the common law. In the absence of . . .a statute, the offense of maintenance is unknown to the laws of this state*'.

[116] A copy of the Bill is available here: https://legiscan.com/CA/text/SB581/2023.

annum or 25% of any damages awarded or settlement, whichever is lower. It has been suggested that the nature of these requirements has resulted in funders to cease to provide TPF in the state.[117]

5.30 Vermont also requires funders to register, and to renew their registration every three years, with annual filing of information on its funding activities. Its registration fee is $600. It also requires the provision of evidence that it is properly financed. Failure to comply with the regulatory regime can result in the funder no longer being permitted to provide TPF. The legislation also provides for client care requirements, e.g., requirements concerning the clarity of TPF agreements and that funded parties obtain legal advice from their lawyer prior to entry into the agreement. Provisions governing conflicts of interest between funder and the funded party's lawyers are also contained in the legislation. Fees recoverable by the funder are capped by reference to duration of the funding agreement. Other states, such as Indiana, cap the recoverability by reference to the duration of the agreement and by reference to the amount the funder can charge by way of interest on the funded amount.

5.31 West Virginia also requires registration, which is to be secured by the funder through payment of a $50,000 bond. It requires disclosure of the funding agreement during the pre-trial phase of litigation. It also restricts the duration and interest rate that funders can charge. It has been suggested that the rate at which the interest rate cap has been set is such that TPF is not economically viable for funders and has as a consequence meant that TPF no longer exists in West Virginia.[118]

5.32 The development of TPF in the US should be considered against the long-established background of the use of contingency fee agreements entered into between lawyers and litigants. It should also be viewed against the minimal availability of legal aid. It should also be considered against a key difference with England and Wales: in the US costs are generally not recoverable from the losing party in litigation, hence litigants will bear their own litigation costs. TPF is generally available for consumer claims, personal injury litigation, commercial claims, and arbitration. It is particularly available as a means to fund collective proceedings, for instance multi-district litigation. It is also used for portfolio funding.

[117] S. Friel (2024) at 51.
[118] S. Friel (2024) at 51.

6. Part Five – The Relationship between Costs and Funding

(A) Key Points

6.1 The following key points are emphasised in Part Five concerning the relationship between costs and funding:

- It is essential to understand the relationship between litigation cost and funding. Any reform of litigation funding may have an impact on litigation cost, and vice versa;
- Where TPF is concerned, if funders were unable to recover the litigation costs, they incurred on behalf of the funded party, it is likely that the TPF market would decline. Where group litigation or collective proceedings are concerned, given the cost of litigation, TPF's importance as a means to enable claims that would not be economically viable to be pursued has repeatedly been commented upon by the courts;
- TPF increases the costs payable by a funded party. The increase in costs is essentially a function of the cost to the funder of providing the funding;
- The effect of *R (Paccar Inc) v Competition Appeal Tribunal* [2023] has been to see TPF provided in collective proceedings to shift from calculating the funder's profit by reference to damages. This has been done to try to ensure that such funding is not classified as a DBA;
- It is an accepted feature of litigation that litigants should bear some of their own litigation costs. This applies where the litigation is funded by TPF as it does generally;
- Litigation cost and funding are both subject to various statutory and rule-based controls;
- It can be expected that claims will be more difficult to settle where there is insufficient recovery under a proposed settlement to compensate an injured party for an actionable

wrong. In such circumstances, a question arises whether and to what extent funders may have to reduce their expected return on funding to facilitate settlement;

- As a general rule, losses to parties incurred from litigation funding lie where they fall. It is an open question whether there should be a departure from this approach;
- The relationship between TPF and security of costs should be subject to review.

(B) Costs and Funding

6.2 It is essential to any meaningful review of litigation funding to explore and understand the relationship between costs and funding. This is because consideration of the impact of any reforms in respect of litigation funding must inevitably involve a consideration of whether such reforms will have an impact on the underlying costs of the litigation being funded or not. Without understanding the relationship between funding and costs it is not possible to understand the impact reform of one may have on the other. This includes the impact of funding on the incidence of costs, any deflationary or inflationary impacts on the level of costs and legal spends across the litigation landscape, and the nature and effect of the control of litigation costs.

Are the costs of litigation and funding costs inextricably linked?

6.3 It is a statement of the obvious that, without the incidence of litigation costs, there would be no requirement for the funding of litigation costs. Litigation funding would not exist absent the need of parties to incur costs liabilities, whether in respect of their own legal representative's costs, or in respect of their liabilities for their opponent's costs. It might therefore be entirely reasonable to proceed on the basis that litigation funding and the incidence of costs are inextricably tied.

6.4 Questions plainly arise over the extent to which litigation funding impacts on the incidence of litigation costs and their amount. Does the availability of litigation funding increase demand for litigation services? If it does, then it will plainly result in a demand for more litigation services and hence the incidence of further costs. Does litigation funding have a direct impact on the level of costs incurred in cases? For example, is it the experience of litigators that involving TPF in claims impacts directly on the level of costs to be incurred? Do litigation funders have an indirect control over the level of litigation cost, or is litigation

funding so open ended that it leads to uncontrolled costs potentially being incurred? These are some of the questions which the current review will seek to explore.

6.5 In his review of civil litigation costs in 2009, Sir Rupert Jackson came to the conclusion that '*third party funding was beneficial in that it promoted access to justice*'.[119] More recently, in the Legal Services Research into Litigation Funding, the importance of litigation funding for access to justice was again recognised.[120] Litigation funding, despite its associated costs, has been recognised as an essential ingredient to the pursuit of collective proceedings. As the Tribunal remarked in *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd* [2024], '*Funding will dry up if funders are unable to recover their costs and disbursements and make a profit even on cases where there is a successful outcome overall.'*[121] The importance of funders to collective proceedings and of proceedings being economically viable for them has been repeatedly remarked upon in the authorities, including *O'Higgins v Barclays Bank plc* [2020]; *Consumers Association v Qualcomm* [2022]; and *UK Trucks Claim Limited v Stellantis* [2022].[122]

6.6 Given that one of the recognised virtues of litigation funding is that it provides or promotes access to justice to those who might not otherwise litigate without funding, logically it would follow that the availability of litigation funding is likely to have the effect of increasing the demand for litigation and legal spends generally. It might then be thought obvious that litigation funding itself contributes to increasing the overall national (indeed global) litigation legal spend.

6.7 It might equally be said with some force that, where litigation is made available in a particular case, it will be subject to budget restraints which impose agreed limits on the available legal spend. These limits may be imposed by the funder (where the funder wishes to exercise control over how its financial commitment is deployed) by reference to an agreed budget or set agreed periodic draw downs, or by the client recipient of the funding, who looks to control the legal spend (despite the level of funding) in order to protect and maximise net damages/proceeds. This is particularly so where the litigant cannot afford to 'give up' more than an expected level in damages beyond that considered by the litigant as

[119] R. Jackson (December 2009) chap. 11, para 1.2.
[120] R. Mulheron (2024).
[121] *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd* [2024] CAT 47.
[122] *O'Higgins v Barclays Bank plc* [2020] EWCA 876 at [129]; *Consumers Association v Qualcomm* [2022] CAT 20 at [100]; *UK Trucks Claim Limited v Stellantis* [2022] CAT 25 at [110].

an acceptable economic outcome. Some litigation funding may, albeit this may well be exceptional, comprise a lump sum which can be spent by the recipient without constraint.

6.8 Other litigation funding may be provided by reference to an agreed tightly controlled ongoing budget or to 'reasonable legal spends' or 'costs as determined by the court to be reasonable.' These kinds of costs limitations would suggest that, whilst funding may increase the available funds to incur costs, it does not, in these scenarios, demand increases in legal spend beyond what would otherwise be considerable reasonable.

6.9 Funding limited to strict budgets approved by the court would plainly be conducive to minimising the risk of litigation funding increasing unreasonably the extent of any legal spend.

6.10 Similarly, funding by reference to lump sums made available without constraint as to their deployment might permit excessive and unreasonable costs burdens being placed on the recipients of the litigation funding. However, given the ability of clients to challenge the reasonableness of costs as between solicitor and client, the risks of this arising to any concerning extent might be considered to be low.[123] It should also be noted that if a funded case is not successful, the funder will not recover its financial outlay as TPF is non-recourse funding. Given this, and the incentive it could be seen to create on the part of the funder, an incentive to ensure that cases are kept on budget and run cost-effectively, the extent to which excessive and unreasonable cost burdens might arise is also low.

6.11 These different permutations of conditional or unconditional budgeted funding might suggest that the answer to the question of whether litigation funding impacts on the level of legal spends is more nuanced than one might first think, but this is something that will be explored in the Review.

The Costs of Litigation Funding

6.12 There is obviously a direct cost to the recipient of commercial litigation funding. Litigation funding provided by third parties, beyond that of a pure funder,[124] will entail a cost to the recipient of the litigation funding. That cost is an additional cost which would not otherwise arise but for the demand for the litigation funding procured. The costs can be considerable. Experience would suggest that multiples ranging from 2x the litigation spend (funding

[123] Solicitors Act 1974, s.70.
[124] See **Part Six**.

commitment or drawn down funds) to as much as 10 x and sometimes more,[125] are not unheard of.

6.13 The cost of funding is, of course, essentially a reflection of the costs to the funder of raising the capital demanded by the particular litigation funding agreement plus a profit. It will also include the administrative and business costs (including the risk that a funded party will default on their obligation to pay the funder where their claim succeeds) of the funder associated with the procurement of the funding by the funder. It might be said that too little is known currently about the costs to litigation funders of securing funding commitments and that perhaps more transparency is required as part of any review of whether downstream funding costs should be subject to constraints, including caps. On the other hand, market forces alone may be sufficient in controlling the costs of funding at source, where the market is sufficiently transparent and there is sufficient 'shopping around' within that market, such that the need for regulatory constraints is less obvious. Lessons might be learnt from the 2000s where ATE premium levels were investigated by the senior courts. In the final analysis, the courts left it to market forces to set what was in effect a reasonable premium.[126] **The Working Party would welcome evidence on transparency and the working of the TPF market.**

6.14 Funding models vary considerably but it is generally understood that commercial funders will look to recover their funding outlay together with a return on their investment. The return is usually calculated by reference to a percentage of the proceeds or by reference to a multiple of the funded amount or even of the capital commitment. Since *R (Paccar Inc) v Competition Appeal Tribunal* [2023],[127] there has been a clear shift towards returns

[125] *Gormsen v Meta* [2024] CAT 11 at [39].

[126] *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134 at [117], '*If an issue arises about the size of a second or third stage premium, it will ordinarily be sufficient for a claimant's solicitor to write a brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client, and the basis on which the premium is rated – whether block rated or individually rated. District judges and costs judges do not, as Lord Hoffmann observed in Callery v Gray (Nos 1 and 2) [2002] UKHL 28 at [44]; [2002] 1 WLR 2000, have the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces. Although the claimant very often does not have to pay the premium himself, this does not mean that there are no competitive or other pressures at all in the market. As the evidence before this court shows, it is not in an insurer's interest to fix a premium at a level which will attract frequent challenges.*'

[127] In *R (Paccar Inc) v Competition Appeal Tribunal* [2023] UKSC 28, the UKSC held that a litigation funder's LFA entered into with a funded client, and where the success fee paid to the funder is determined by reference to the amount of damages recovered in the funded litigation, is a DBA within the meaning of that term in section 58AA of the Courts and Legal Services Act 1990.

calculated by reference to multiples to avoid the consequences of the Damages-Based Agreements Regulations 2013 having any application to the funder. Whichever return calculation is deployed, both come at considerable cost. Ultimately, the cost falls to be paid by the claimant/funded party from the damages and costs recovered. This is a cost burden which has the prospect of making claims uneconomic but profitable for commercial funders in successful cases. Plainly, in cases which are not successful, the costs of funding will be borne by the funder. These costs can be substantial.

6.15 The costs recovered in the claim will invariably be held on trust for the commercial litigation funder to discharge the funder's entitlement to its success fee/return. The costs recovered will either have been assessed by the court as the recoverable reasonable costs of the action or will have been agreed between the parties as representing the reasonable recoverable costs of the action. All of this goes to further demonstrate the intrinsic relationship between litigation costs and litigation funding.

Bearing the Cost of Litigation Funding

6.16 It is a given that most claimants will need to fund costs which are incurred, whether by way of legal fees or disbursements, for the period between advancing the claim and satisfaction of a final judgment. They may do so from their own resources; they may be funded in whole or in part by commercial loans or personal support which requires repayment with interest; they may contract with commercial litigation funders or others for funding in return for a share of the proceeds of the claim if and when successfully established. They may have generous personal supporters who are prepared to assist in funding a claim without a return.

6.17 Commercial litigation funding is not confined to those who cannot afford other forms of funding. Some estimates suggest that as many as 50% of claimants who now take up commercial litigation funding would be able to finance their costs from other sources.[128]

6.18 The starting point is that generally claimants are not insulated from having to bear costs or losses incurred as a result of pursuing claims in civil litigation. Whatever method is adopted to fund one's own costs, or the potential of an adverse costs order, there will usually be a cost associated with the funding.

[128] *Rowe v Ingenious Media Holdings* [2021] EWCA Civ 29 at [47].

6.19 The costs to a litigant in funding litigation range from the costs of a tangible additional cost of funding (such as a liability to a commercial funder to pay a multiple of the funding provided) to a shortfall in the recovery of costs for which no additional funding cost arises. A party who is awarded costs will rarely, if ever, recover its full legal spend. It is well known that an assessment of costs on the standard basis usually results in a portion of the costs being irrecoverable from the defendant - typically something in the order of 65-70% being awarded, with the claimant left to bear the balance. Even an indemnity basis costs order will not make a receiving party whole in respect of its costs. There are also often inherent risks associated with the recovery of costs that have been ordered to be paid. If the paying party lacks sufficient assets to pay the costs, the receiving party carries the costs of funding the entire claim.

6.20 There is therefore an inherent acceptance within the civil procedure regime that litigants will bear some costs of their litigation. Whatever method is adopted, there will be a cost of funding which is additional to the costs of the litigation. A claimant who is funding from their own resources loses the opportunity to employ that capital to earn money, whether by way of interest on investment or profit on a business venture. A claimant who borrows at interest incurs the cost of borrowing. A claimant who engages litigation funding will generally have to forgo a portion of the damages recovered in a successful claim to compensate the funder for the risks of the claim failing.

6.21 Similarly, a defendant will usually incur a cost of funding in defending the claim, whether through the opportunity cost of employing their own resources or an interest cost on financing.

6.22 Whether a litigant choses to bear an additional cost of funding, the inevitable incidence of costs is a matter of choice, economics, and commercial demand set alongside a demand for access to justice.

Litigation costs controls versus litigation funding costs

6.23 Litigation costs, both as between parties to litigation and as between legal representatives and their clients, are the subject of statutory controls. As between the parties, the Civil Procedure Rules 1998 provides controls on the level of costs that can be recovered and the nature of the costs that can be recovered. The standard basis essentially ensures that costs are reasonable, both reasonable in amount and reasonably incurred. Clients who are

overcharged in fees and expenses have the right to challenge those charges pursuant to section 70 of the Solicitors Act 1974, subject to various time limitations.

6.24 There is no similar control over the level of funding, which instead is subject to contractual restraints alone embedded in often quite complex litigation funding agreements. Furthermore, the controls on the funding costs are limited. Basic economics of supply and demand, market forces, the funders' lack of control over litigation and, where applicable, any settlement currently contribute to what a reasonable litigation funder's costs might be in the context of the particular risk associated with the funding case. The costs are all negotiated and agreed at the outset, with such negotiations taking place in the light of independent advice where funders are ALF members. **There is very often no review mechanism, although the Working Party would be interested to understand the degree to which flexibility in the final funding costs demands is exercised**.

6.25 The Working Party would, for example, be interested to understand more about how funding costs are re-negotiated, if at all; where the recoveries in the claim have the consequence that, absent some accommodation by the funder, the damages recovered would be exhausted by the funding costs. To what extent do funders currently exercise any flexibility in their contractual entitlements where there are downward pressures on anticipated damages recoveries?

6.26 It might be said with some force that, if society expects legal costs to be controlled by standards and limitations of recovery enforced by the courts (through rules based regulation (i.e., CPR) or statutory controls (i.e., Solicitors Act 1974)), then there may be a legitimate expectation that standards and limitations be imposed on the costs of financing the very claims in which the costs are controlled. This may be all the more compelling where the finance costs greatly exceed by many multiples of the litigation costs incurred.

6.27 That is not to say that funding costs are not presently overseen or subject to some control in some contexts, specifically where ordinary consumers are likely to be a party to litigation funding agreements in collective actions. In the CAT, where class representatives seek the permission to bring claims in opt in or opt out cases, Rule 78 of the Competition Appeal Tribunal Rules 2015 (the Tribunal Rules) sets out the criteria to be applied by the Tribunal in assessing whether to authorise an applicant to act as a class representative in collective proceedings. A class representative's funding arrangements may be relevant to whether they will be able to pay the defendant's recoverable costs if ordered to do so (Rule 78(2)(d)).

In the light of this, it is common practice in the CAT for the Tribunal to be provided with copies of the funding arrangements with the ultimate aim of allowing the Tribunal to consider the funding terms in the context of whether or not certification should be granted or not. The CAT has held that the costs of litigation funding in collective proceedings are subject to the Tribunal's overall jurisdiction.[129]

6.28 Additionally, section 47C of the Competition Act 1998 (CA) introduced new and distinct provisions concerning the costs of collective proceedings. Section 47C(5)-(6) CA provides:

'(5) Subject to subsection (6), where the Tribunal makes an award of damages in optout collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.

(6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings.'

Rule 93(4)-(5) of the Tribunal Rules provides:

'(4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.

(5) In exercising its discretion under paragraph (4), the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session.'

[129] *Merricks v Mastercard Incorporated* [2017] CAT 16.

6.29 In *Merricks v Mastercard Incorporated* [2017], the Tribunal held that the words 'costs, fees or disbursements' either did not carry a special meaning or were to be treated as terms of art governed by case law governing the recovery of litigation costs. The Tribunal held that, in the ordinary sense, if a third party agrees to provide substantial monies in order to fund litigation, the payment which has to be made to that third party in consideration of this commitment, whether out of the damages recovered or otherwise, is a cost or expense incurred in connection with the proceedings.

6.30 It is of some interest that the Tribunal took the view that there would be no difficulty or lack of expertise on the part of the Tribunal in deciding what is an appropriate price for litigation funding. It held that an assessment of funding costs was no more novel a task than the process of approving a collective settlement under s.49A or 49B CA. The Tribunal observed that '*there is now a developing market in litigation funding, and the Tribunal can if necessary hear evidence as to what would represent an appropriate return*'.[130] The Tribunal noted that Sir Philip Otton had taken the view that, as the arbitrator faced with such a question (of reasonableness of the costs of funding) in *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016],[131] he was well placed to determine such questions given the market that has developed. **The Working Party is interested in consideration of the effectiveness of the approach taken by courts and tribunals on the assessment of questions concerning the appropriate price of litigation funding.**

6.31 The Tribunal has consistently recognised that on distribution of awards, whether following a judgment, award or settlement, the Tribunal will have a role to play in determining whether the funding costs are a reasonable expense to discharge from the proceeds of the claim. It has also more recently also considered the extent to which such scrutiny and control may take place at the earlier certification stage of collective actions. Such a role of scrutiny will necessarily involve the Tribunal 'assessing' the reasonableness of the funding costs taking into account all of the circumstances of the case and the available evidence and experience of the Tribunal as to reasonableness.[132] The judgment of the Tribunal emphasises that the payment of costs and expenses in collective competition proceedings is subject to close

[130] *Merricks v Mastercard* [2017] CAT 16 at [116].

[131] *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm).

[132] *Gutman v First MTR South Western Trains Ltd &* [2024] CAT 32 at [65]; *McLaren v MOL (Europe Africa) Limited* [2024] CAT 47 at [56]; *Gutmann v Apple Inc. and others* [2024] CAT 18, and *Gormsen v Meta* [2024] CAT 11 where the Tribunal said at [35], '*the return to the funder, and questions of costs generally, are controlled by the Tribunal on settlement or judgment . . .*'

supervision by the CAT to balance the competing interests of class members and stakeholders such as funders, insurers, solicitors and counsel, whilst ensuring a workable collective proceedings regime.

6.32 In the CAT it is not uncommon for the Class Representative's liability for funding costs to be limited to the sum that the Tribunal consider is reasonable for the represented class to bear and which may therefore properly be deducted from the proceeds of the claim and/or such sums as are recovered from any collective settlement. Arrangements along the lines of 'CFA Lites'[133] provide comfort to Class Representatives that they will not become personally liable to pay the cost of funding in the event that the costs of funding are not recovered from the proceeds whether following a settlement or award following trial.

Costs Capping

6.33 Litigation cost may be subject to control through **costs capping orders (CCOs).** There are two forms of such orders, and both are dealt with separately in the Civil Procedure Rules. The first, and most familiar to mainstream litigation, are orders made pursuant to CPR 3.19. Under this rule, a CCO means an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made; and (b) 'future costs' means costs incurred in respect of work done after the date of the CCO but excluding the amount of any additional liability.[134] A CCO may be made in respect of the whole of the litigation or any issues which are to be tried separately. A CCO can be made at any stage of the proceedings against all or any of the parties. The threshold for the making of such an order is (1) it is in the interests of justice to make the order, (2) there is a substantial risk that, without such an order, costs will be disproportionately incurred, and (3) the court is satisfied that the costs cannot be adequately controlled by costs management and detailed assessment.

6.34 Litigation Funders will doubtless always prefer certainty over uncertainty and one of the benefits of a CCO in funded cases is that it does set the parameters against which funding is required and/or the funder's exposure. To the extent that such orders are likely to reduce risk to some extent it may well have an effect on the costs of the funding; reductions in risk

[133] 'CFA Lites' are a form of conditional fee agreement under which the client's liability for the costs incurred by the legal representatives are limited to the sums recovered by way of costs from the opponent or other third parties including ATE insurers or funders: *Jones v Wrexham Borough Council* [2007] EWCA Civ 1356.

[134] CPR 3.19

should equate with a reduction in funding costs. However, practice has shown that CCOs under CPR 3.19 are relatively rare in the post costs budgeting climate. This is because it is generally thought that costs management combined with detailed assessment procedures are likely to be sufficient in any given case to ensure costs are kept reasonable and proportionate.

6.35 The second form of CCO arises under 'public interest' judicial review litigation. This aspect of costs capping reflects the development of common law and the imposition of 'protective costs orders.' See R (Corner House) v Secretary of State for Trade and Industry [2005] EWCA Civ 192. These orders are increasingly common in cases involving crowd funding.

6.36 Invariably, in non-environmental judicial review claims, campaigning groups will seek a CCO as way of limiting a claimant's potential cost liability to the other parties (principally the defendant) in the dispute. They will seek to raise funds, often through crowd funding, to put in place sufficient funding to cover work in progress costs together with a fund for adverse costs if the claim is not successful/permission is refused.

6.37 This second form of costs capping is governed by sections 88 to 89 and 90 of the Criminal Justice and Courts Act 2015 ('the Act') and CPR Parts 46.16-46.19. Such orders are reserved for cases where there are serious issues of the highest public interest, in cases granted permission for judicial review, which would otherwise not be able to be taken forward. The 2015 Act sets out the conditions that need to be satisfied before a court can make a CCO under the Act:

- First, the Court must have granted permission in respect of the underlying claim for judicial review (section 88(3)).

- Second, the claimant (and only the claimant – neither a defendant nor an interested party nor an intervener can apply for a CCO) must have made an application for a CCO (section 88(4)).

- Third, the claimant's application for a CCO must be supported by certain information including, for example, information about the source, nature and extent of financial resources available, or likely to be available, to the claimant to meet liabilities arising in connection with the judicial review claim (section 88(5); CPR 46.17).

6.38 Once these conditions are met, the court then must exercise its discretion to determine whether or not to impost a costs cap and in doing so will consider whether the proceedings are 'public interest proceedings' and whether in the absence of the CCO, the claimant would withdraw its application for judicial review or cease to participate in the proceedings, if so whether that would be a reasonable response.

6.39 Section 88(7) provides that proceedings are 'public interest proceedings' only if: an issue that is the subject of the proceedings is of general public importance, the public interest requires the issue to be resolved, and the proceedings are likely to provide an appropriate means of resolving it. The matters which the court must have regard to when determining whether proceedings are 'public interest proceedings' include:

(a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review;

(b) how significant the effect on those people is likely to be; and

(c) whether the proceedings involve consideration of a point of law of general public importance.

6.40 The order must include a limit on the amount a claimant can recover if that claimant enjoys a cost order made in its favour. These 'public interest' CCOs are naturally aligned with campaigning groups and crowd funding forms of litigation finance.

6.41 An example of the interaction between CCOs of this kind and litigation funding, is *R (All-Party Parliamentary Group on Fair Business Banking) v The Financial Conduct Authority* [2023] EWHC 1662 (Admin). In that case the application for judicial review was brought with the benefit of crowd funding. Fordham J helpfully summarised the principles and procedure governing the CCO regime. In that case crowd funding had raised £101,130 but there was the possibility of further funding if permission were granted on the application. Up to £40,000 had been allocated by the claimant to adverse costs. Rather than capping the costs at a fixed figure, Fordham J capped the claimants costs at 40% of the funds raised by the claimants, including future funds. That figure was then imposed as a reciprocal cap on the respondent.

6.42 Another example is *Hawking v Secretary of State for Health & Social Care and National Health Service Commissioning Board* [2018] EWHC 989 (Admin) where crowd funding had

raised £265,000 to pursue judicial review proceedings challenging the government's policy to create accountable care organisations in which it was argued that the policy would lead to privatisation of the NHS. Cheema-Grubb J ordered a CCO of £80,000 in respect of each defendant's costs (£160,000 in total) and a reciprocal cap of £115,000 in respect of the claimant's costs. If the claimants lost, they would be liable for adverse costs of £160,000 leaving a balance of the funding available to cover just over £100,000 of their own side's costs. If the claimants succeeded, they would recover costs of £115,000 from which they could pay their own lawyers and draw from the crowd funding for any additional own side's costs. The court positively acknowledged that where a judicial review is being crowdfunded, the public is funding both sides: the government is funded by taxpayers and the claimants by crowdfunding – and that such a case being publicly funded on both sides was eminently suited for a CCO.

Litigation Costs – the impact on Litigation Funding on settlements

6.43 The relationship between litigation costs and the litigation funding becomes all the more acute where there is downward pressure on the anticipated damages in a funded claim. Litigation funders look to the costs and damages for their capital repayment and success fee returns. There is always a threshold of recoverable damages in a case which tips the balance between an acceptable economic outcome and an unacceptable outcome. As damages are squeezed and litigation costs rise, there may well be greater challenges in settling the claim.

6.44 **Cases become harder to settle where the recoveries for the funded client are insufficient to compensate for the actionable wrong. The Working Party would be interested to hear from those affected by issues of this kind.** To what extent is the funder forced to reduce its return in order to encourage the funded client to accept a settlement offer? Whilst there may still be funding available to take the case to a conclusion, as costs escalate this will doubtless have the effect of making a case more difficult to settle. What of the funded client who sees little incentive to settle despite and becomes intent on going to trial whilst the funder or law firm may think that the offer on the table is reasonable? Also, what of situations where funded clients have unreasonable settlement expectations, which cause them to run cases forward and incur costs whilst they have funding to do so? To what extent is the impact of litigation costs on settlement decisions provided for in the litigation funding

agreements, whether through termination clauses entitling the funder to withdraw funding where certain economic parameters are not met or otherwise?

6.45 Another equally prevalent effect of rising litigation costs in static or depressed damages valuation cases is that, as costs further continue to rise, the case reaches a stage where there is not enough likely value left in the claim to allow the funder to increase the funding budget, or at least to do so while the claimants would expect to get what they need from the claim. To what extent can this lead to cases collapsing with financial support being withdrawn and the claimant(s) then forced to settle at levels they would not otherwise accept but for the demands of the funders' costs and the litigation costs?

6.46 That having been said, it is right to recognise that the influence of costs and the duration of litigation on settlement and decisions to fight a case to trial is not limited only to funded cases. In all cases where claims become uneconomic due to rising costs, the duration of litigation, and downward pressure on damages, parties face difficult decisions on settlement and case progression.

6.47 All of this goes to demonstrate that any reform of litigation funding must take account of the incidence of litigation costs and the role it plays alongside the provision of funding.

The burden of the costs of Litigation Funding

6.48 As the Court of Appeal put it in *Rowe v Ingenious Media Holdings* [2021],[135] losses caused to a claimant or defendant in funding litigation generally lie where they fall, with the party who incurs them bearing them, subject only to specific and limited statutory exceptions. Questions which this review will explore is whether there is a compelling reason to depart from this status quo.

6.49 Subject to certain statutory exceptions, these costs or losses involved in funding litigation costs, on both sides, are not recoverable from the other party. Section 51 of the Senior Courts Act 1981 provides the jurisdiction for an award of costs. It applies to 'costs of or incidental to' the litigation. It has long been established that the costs of funding litigation are not within such a definition. In *Hunt v RM Douglas (Roofing) Ltd* (1987) the Court of Appeal upheld the decision of a taxing master not to award as costs the 'on-cost of funding disbursements during the currency of the action' based on bank overdraft interest rates.[136]

[135] *Rowe v Ingenious Media Holdings* [2021] EWCA Civ 29.
[136] *Hunt v RM Douglas (Roofing) Ltd* (1987) NLJ 1133; (1987) 132 SJ 935.

Purchas LJ said that '*. . . by established practice and custom funding costs have never been included in the category of costs or disbursements envisaged by the statute and RSC Ord 62.*' In *National Westminster Bank v Kotonou* [2009], Briggs J sitting with a Chancery master and a costs judge, said: '. . . *there is a general principle that the costs of a claim do not include costs incurred by a party in seeking funding either for the prosecution or for the defence of that claim*.'[137] The principle was reaffirmed and applied in *Motto v Trafigura* [2012].[138]

6.50 There have been two specific exceptions made to this principle. The first is that there is a power under CPR 44.2(6)(g) to award interest on costs from a date prior to judgment. This is a power available under CPR 40.8 in relation to judgment debts more generally, which provides that a court may order interest to run on any judgment debt from a date prior to judgment. It is common for these provisions to be applied to award interest on costs to a successful party from the time that it has actually had to make the expenditure by putting its solicitors in funds or to make disbursements.

6.51 The second exception relates to premiums for ATE insurance. Apart from statute, these are costs of funding litigation and as such are irrecoverable.[139] The Access to Justice Act 1999 provided that such premiums should be recoverable. The position was largely but not wholly reversed by section 58C of the Courts and Legal Services Act 1990, introduced by section 46(1) of **the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO),** following the Jackson Review,[140] which restricts recoveries of such premiums to expert fees in relation to liability and causation in clinical negligence cases.[141]

6.52 In arbitration proceedings the law results in a different approach. Where the constraints of s.51 do not apply, the arbitral process has allowed for the recovery of funding costs where the facts and circumstances of the case demand it. In *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016], HHJ Waksman QC upheld the arbitrator's award which required the defendant Essar to pay the funder's return which had been calculated at 3x the funding provided. The award was based on the unusual facts of the case, in particular, Essar's '*reprehensible conduct going far beyond technical breaches of contract*.' Essar had '*set out to cripple Norscot financially,'* effectively forcing Norscot to resort to TPF.[142] In *Tenke*

[137] *National Westminster Bank v Kotonou* [2009] EWHC 3309 (Ch); [2010] 2 Costs LR 193 at [26].
[138] *Motta v Trafigura* [2012] 1 WLR 657 at [104] to [108].
[139] *McGraddie v McGraddie (No 2)* [2015] 1 WLR 560 at [14] and [17]-[19].
[140] R. Jackson (December 2009).
[141] The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013.
[142] *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm) at [21].

Fungurume Mining SA v Katanga Contracting Services SAS [2021],[143] the Commercial Court upheld an International Chamber of Commerce (ICC) award of funding costs.

6.53 In both cases the court was satisfied that section 61 of the Arbitration Act 1996[144] was wide enough to enable the tribunal to include in an award the costs of funding the arbitral proceedings. This was on the basis that the costs of funding were 'other costs' within the meaning of s.59. This distinction from the provisions of s.51 (which does not contain reference to 'other costs') paves the way to recovery of such costs outside of court proceedings. Questions arise as to whether this distinction is justified.

6.54 The case for implementation of reform in this area was considered by Mulheron. She concluded that,

'Implementation of this reform would (it was suggested) provide a counterpoint to the Arkin jurisprudence by which a successful defendant is entitled to seek a non-party costs order against the supportive funder; and it would curb the more egregious behaviour of defendants if it were the case that defendants knew that an 'Essar-type order' was possible to be made against them. A rule change would also net for the funded client a considerable advantage:

The commercial implications of this issue may be obvious but they are also hard to overestimate – if a funded claimant is allowed to recover some or all of the funding fee from its opponent, that will mean it can retain all or more of the damages recovered. Since litigation funding is generally non-recourse, this claimant will have reaped these rewards without having taken any of the downside risk associated with its claim failing. In other words, funding in arbitration [or in litigation, if an Essar-type order was possible] becomes a win/win scenario. (a reference to Exton Advisors Roundtable, 'The recoverability of third-party funding costs in arbitration' (London, 27 Apr 2023)'.[145]

6.55 The countervailing arguments might include that shifting the burden of the costs of funding claims on to losing defendants will increase the costs of defending litigation to

[143] *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm).

[144] The power to award costs is in Section 61 of the Act: '*(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.*'
Section 59 of the Act provides: '*(1) References in this Part to the costs of the arbitration are to – (a) the arbitrators' fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal or other costs of the parties.*'

[145] R. Mulheron (2024) at 122.

disproportionate levels, as well as promoting satellite costs litigation; a point that was illustrated by the development of CFAs, which generated disproportionate litigation cost, from 2000 until they were reformed following the Jackson Costs Review. This may well impact on the public and small and medium-sized enterprises at large, where litigation concerns the enforcement/defence of insured rights and obligations by way of increases in premiums. It was this upward pressure on legal costs that was instrumental in the abolition of the recovery of ATE premiums, as well as the abolition of recovery of CFA success fees by LASPO.[146]

6.56 There is however possibly something in the argument that 10 years on since the Jackson reforms a re-evaluation of the issue of recovery of funding costs is justified.

Third Party Funding and Security for Costs

6.57 In litigation in England & Wales, CPR r. 25.14 allows a defendant to seek security for costs from someone other than the claimant, for example a litigation funder. A litigation funder is defined in CPR r. 25.14 as a person who has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him or someone who has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and in either case is a person against whom a costs order may be made. The latter condition is a reference to the jurisdiction of the court to make costs orders against third parties pursuant to section 51 of the Courts and Legal Services Act 1990.

6.58 As explained by the Court of Appeal in *Rowe,* the jurisdiction to order security for costs against some claimants is of long standing, predating the fusion of the courts of equity and common law in the 19th century.[147] The jurisdiction to order security to be provided by litigation funders is more recent. It follows the establishment of a jurisdiction to award costs against such funders which was developed first by the common law and then enshrined in section 51 of the Senior Courts Act 1981. The Rules expressly provide in each case that the

[146] As the Explanatory Memorandum to the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 reveals '*In his Review of Civil Litigation Costs, Lord Justice Jackson argued that the current regime of recoverable CFA success fees and ATE insurance premiums from the losing party had led to excessive costs in civil litigation, with risk free litigation for claimants and additional costs being paid by defendants.*'

[147] *Rowe v Ingenious Media Holdings* [2021] EWCA Civ 29.

court may only make an order if satisfied that it is just to do so having regard to all the circumstances of the case (CPR rules 25.13(1)(a) and 25.14(1)(a)). In addition, only some categories of claimant are amenable to an order for security by reason of the 'gateways' to jurisdiction in CPR r. 25.13.

6.59 A corporate claimant may be ordered to provide security if there is reason to believe that it will be unable to pay the defendant's costs if so ordered. The court in *Rowe* observed that a corporate claimant, wherever incorporated, will not be required to provide security if it is sufficiently capitalised and solvent such that there is no reason to believe it will be unable to meet an adverse costs order. In relation to litigation funders, CPR r. 25.14 does not have the gateways which apply to orders for security against claimants. Accordingly, an order for security from a litigation funder is potentially available in respect of a defendant's costs of meeting a claim from a claimant against whom no order for security could be made under CPR rules 25.12 and 13, because, for example, the claimant is resident in this jurisdiction. Nor is CPR r. 25.14 in terms limited in the case of corporate funders to those who it is likely to believe will be unable to meet an adverse costs order. However, in *Rowe* the court confirmed that, since security from a funder is only available by the express terms of CPR r. 25.14, if in all the circumstances of the case it is just to make an order, a corporate funder will not be required to provide security if it is sufficiently capitalised and solvent that there is no reason to believe it will be unable to meet an adverse costs order, in the same way as obtains for a corporate claimant.

6.60 The court took the view that security for costs is a normal and foreseeable aspect of litigation and therefore of the investment, and that the funder should be expected to include it in its business model in determining the terms on which funding is provided.

6.61 The court accepted that funding litigation, by whatever means, comes at a cost. If a claimant funds its own litigation, it loses the opportunity to use that capital for another (more profitable) purpose. If it borrows, then it suffers the cost of that borrowing; and if it accepts funding from a litigation funder, then it will have to forego a portion of any damages it receives to repay the funding, and to pay the funder's return. These costs of funding are not generally recoverable from the other side. The court was asked to consider whether a claimant required to call on a litigation funder to put up security (at a cost to the claimant) could insist on a cross-undertaking as to damages in the event the funding for the security for costs was proved to have been unnecessary (the claimant winning at trial). The court

recognised that such a cross undertaking would reallocate the risk inherent in funding litigation and to that end held that it would therefore be an exceptional departure from the general principle that the costs or losses of funding litigation are not recoverable. The Court of Appeal took the firm view that funders need to be structured and operated in such a way so that there is no doubt they could meet an adverse costs order made against them; including being able to demonstrate adequate capital resources to meet the potential liabilities arising out of the litigation they fund. Indeed, the court proceeded on the basis that claimants should be wary of funders who are unable to demonstrate they are inadequately capitalised or who are opaque about their financial standing or unwilling to put up security voluntarily. The court went so far as to say that well-advised claimants can be expected to seek to avoid funding from funders who are set up in such a way that orders for security for costs might be required against them and that funders who choose to seek to recover the cost of putting in place security by charging their funded clients a multiple of the amount of the cash that they are ordered to put up, can be expected rapidly to lose market share to those funders who are properly capitalised (and demonstrably so) from the outset.

6.62 The issues, as noted above, raised in the *Rowe* case raise questions as to whether the costs of putting up security by funders is a costs liability that should be borne by the claimant or the litigation funder personally in circumstances where the claimant is unlikely to be able to recover the cost of funding security, and so it is likely to diminish any recoveries in the litigation.

6.63 The court suggested that, if there is to be a new practice in this area, it would be preferable that it be considered and developed by primary or delegated legislation, rather than by way of individual judicial decision. Quoting from paragraph 83 of the judgment:

'A synoptic review could then be undertaken by the Law Commission or the Civil Procedure Rules Committee of its potential effect on civil litigation in a wider context than that which arises in the current appeals. That applies with particular force in light of the rival arguments in this case as to the beneficial or adverse effect of such a practice on litigation funding and access to justice.'

6.64 The Review will consider the issues raised in *Rowe* and make recommendations for reform where they are considered necessary.

Costs of Regulation

6.65 The Review will consider the extent, if any, that the current self-regulatory regime impacts on the relationship between litigation funding and litigation costs. Little is known about the costs to litigation funders of the current self-regulatory regime and the extent to which those costs are passed on to consumers in the costs of funding. In considering the possible introduction of different regulatory regimes, it will be necessary to consider the impact, if any, of the costs associated with such regimes on the overall costs of the funding procured and of its impact, if any, on costs generally.

Conclusion

6.66 It will be necessary in considering any proposals for reform of the litigation funding landscape to maintain a keen eye on how such reforms may impact on litigation costs generally and/or specifically to individual funded cases. The brief examination summarised in this Part rather suggests that there is a close inextricable link between litigation funding and the incidence of costs and consideration of one without considering the impact on the other would be unwise.

7. Part Six – Funding Options

(A) Key Points

7.1 The following key points are emphasised in Part Six concerning the options that exist to fund litigation:

- Litigation funding methods must be considered against the background of self-funding and civil legal aid. In both cases, these forms of litigation funding are unlikely to form a viable alternative to other forms of litigation funding, particularly where group litigation and collective proceedings are concerned;

- Trade Unions can provide litigation funding for their members;

- Legal expenses insurance is a well-established form of litigation funding. It is, however, relied upon less than it is in other jurisdictions where it is either the main or a major source of litigation funding. In other jurisdictions, it also provides an effective means to fund group litigation or collective proceedings. In Canada, the reform of LEI into a mandatory, publicly administered form of litigation funding has been suggested;

- CFAs and DBAs are now well-established. The former were last reformed in 2013. The latter were introduced at the same time but have been subject to substantial criticism and recommendations for reform. They remain, however, unreformed;

- Pure funding, which is a form of altruistic litigation funding provided by third parties, is also well-established. It is not clear how often it is used. It is unregulated except by reference to legal tests developed by the courts;

- Crowdfunding is a form of litigation funding that can either be a form of pure funding or of TPF. It is unregulated except by reference to legal tests developed by the courts. It is believed to be increasingly used as a means to fund litigation;

- Portfolio funding is a form of TPF. It is subject to the same regulatory approach as TPF generally. It is also understood to be a growing area of TPF. Concerns have recently been raised concerning its use following the collapse of SSB Legal.

(B) Funding Options

7.2 TPF is one of several means, both public and private, by which litigants can obtain litigation funding. This Part provides background to the Consultation Questions that concern those other funding sources, as well as placing TPF within that wider context.

Self-funding

7.3 Any potential party to litigation may choose to fund its claim or defence from its own financial resources. It is generally accepted, though, that self-funding litigation is not generally viable. This is due to cost of litigation, which, despite serial attempts to reform and reduce it, remains disproportionately high in many cases and at too high a level for many individuals and businesses to afford. That litigants face the risk that they may have to pay their own litigation costs, and a proportion of those of the other party to litigation if their claim or defence is unsuccessful, compounds this problem, as does the historic general unpredictability of the level of such costs.

7.4 These issues are compounded where the cost of collective proceedings or group litigation is concerned, given the very significant cost that they engender for all parties. These problems, and the adverse effect that they have on the viability of self-funding generally, remain notwithstanding recent procedural reforms in the civil courts, albeit not in the CAT, to introduce cost budgeting, cost management and the recent extension of a fixed recoverable cost regime.[148]

7.5 The lack of viability of self-funding as a genuine, generally available form of litigation funding lies behind both the development of public and private means of litigation funding. It is likely that its lack of viability would remain, particularly for collective or group litigation, were reforms to be introduced to abolish cost-shifting, i.e., to remove the possibility that a party to litigation would be liable for their opponent's litigation costs in the even their claim or defence is unsuccessful. Its lack of viability is also likely to remain unless the cost of litigation

[148] See CPR Pt 3, Section II; Pt 45, Section VI and VII.

were to be reduced below a level where litigation could be conducted effectively, whether by a lawyer or by a party conducting the litigation on its own behalf.

7.6 Effective litigation funding is, realistically, only something that can be provided by either the state via public funding or a range of different sources of private funding.

Civil Legal Aid

7.7 Public funding of civil litigation is provided via the civil legal aid scheme. In 2022-2023, approximately £1 billion was spent by the state on civil and family legal aid. The total legal aid budget, which included criminal legal aid was approximately £2 billion.[149] That figure is one that is the result of significant reductions in legal aid provision since the 1970s, particularly in the current context of civil legal aid provision.

7.8 The Terms of Reference do not provide for the Working Party to consider the reform of civil legal aid. It is, however, necessary to take account of the very limited availability of civil legal aid:

- First, it is not anticipated that civil legal aid will be available to fund litigation that is currently being funded by private funding sources, not least litigation that is being funded by CFAs, DBAs, and TPF. The legalisation and promotion of these private funding mechanisms was done against a background of civil legal aid reductions; as such, they were intended, generally, to replace it.

- Secondly, civil legal aid is not (and nor was it previously) an available source of funding for group litigation or collective proceedings (or within the civil courts, representative actions).

- Thirdly, civil legal aid was not (and nor is it likely to be) available to fund litigation brought by businesses. It is thus not a viable means to fund group litigation, or collective proceedings brought by businesses, not least small and medium-sized enterprises.

- Finally, civil legal aid at no time provided universal coverage, i.e., it did not enable the funding of any and all types of civil claim, nor was it available to all members of society. At its greatest extent it was not, for example, available to fund litigation for the so-called

[149] HM Government Open Innovation Team, *Review of Civil Legal Aid in England and Wales – Comparative Analysis of Legal Aid Systems*, (March 2024) at 18.

MINELAs (Middle Income No Eligibility for Legal Aid). The development of private funding mechanisms from the 1990s, e.g., CFAs, was originally intended to promote access to justice for MINELAs.

7.9 In the absence of any fundamental reappraisal of the scope and application of civil legal aid, it is difficult to view it as a likely and effective alternative to the various private litigation funding mechanisms. Furthermore, it is likely to require a significant and radical shift in public policy, and available public funds, for civil legal aid to be reoriented so that it becomes available to fund the type of litigation currently funded by TPF. Given that, as noted above, the total assets of third party funders operating in England and Wales already exceeds the current total legal aid budget, to bring the types of claim currently funded by TPF, never mind those funded by CFAs, DBAs and other private funding methods, would thus require not just a significant policy shift but also a very substantial increase in public funds being made available to civil legal aid. Given that funders have seen a ten-fold increase in their assets since 2012, it could also be reasonably anticipated that any such increase in civil legal aid funding would require equally significant increases over time to enable the funding of claims that are and would be likely to otherwise be funded by TPF now and in the future.

7.10 In the circumstances, it is unlikely that civil legal aid could be expected to provide a viable alternative to TPF or to other private litigation funding mechanisms. This is particularly likely to be the case where group litigation or collection proceedings are concerned or where the party seeking funding is a business or an individual whose dispute falls outside the scope of legal aid provision.

Trade Union Funding

7.11 The provision of litigation funding by Trade Unions for their members is long-established. It was one of the first forms of litigation funding by third parties that did not fall foul of the rules against maintenance and champerty. Generally, two direct forms of support can be provided: legal advice and representation in respect of matters, such as grievances, arising from a Trade Union member's employment; and legal advice and representation in respect of legal matters unrelated to the member's employment.[150] Additionally, Trade Unions can

[150] J. Peysner in C. Hodges, S. Vogenauer, M. Tulibacka, *The Costs and Funding of Civil Litigation*, (Hart, 2010) at 295; Civil Justice Council, *The Law and Practicalities of Before-The-Event (BTE) Insurance – An Information Study*, (2017) at 118-123.

also require their members to take out legal expenses insurance to cover costs they incur in litigation. Until 2006, the recovery of specified insurance premiums from the losing party in litigation where the member was the successful party was possible.[151] That provision was repealed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.[152]

7.12 The Working Party seeks evidence concerning the availability, incidence, utility, and drawbacks of Trade Union funding.

Legal Expenses Insurance

7.13 LEI is well-established as a means of litigation funding. Its use as such is understood to be in the public interest.[153] It can be provided either on as **Before-the-Event (BTE)** insurance, i.e., the policy is taken out prior to a claim arising, or as ATE insurance, i.e., the policy is taken out after a claim has arisen. BTE insurance is typically taken out as an add-on to or bundled in with other forms of insurance, e.g., home and contents insurance or car insurance. Standalone BTE insurance is available but not particularly common; where consumers are concerned such standalone policies are virtually unheard of.[154] ATE insurance is typically taken out as a stand-alone form of insurance where an individual has entered into a CFA.

7.14 Where BTE insurance is concerned, the CJC noted in 2017 in an Information Study, that individuals who had BTE insurance had low levels of awareness of what it covered and what services it could provide. It also noted that its development had not been promoted as a substitute for civil legal aid.[155] It also noted that it is generally difficult to ascertain the take-up of BTE insurance in England and Wales. While the Jackson Costs Review concluded that some 10 – 15 million households out of 25 million had some form of BTE insurance, the Legal Services Consumer Panel concluded that take-up rates were 8% of the population in England and 13% of the population in Wales. It also noted that '*Many consumers will not opt-in to BTE insurance cover, thinking that the requirement for costs protection arising from a legal dispute will never arise*.'[156]

[151] Access to Justice Act 1999, s.30.
[152] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.47.
[153] *Murphy v Young & Co's Brewery Plc* [1996] EWCA Civ 1000; [1997] 1 WLR 1591 at 1604.
[154] Civil Justice Council (2017) at 90.
[155] Civil Justice Council (2017) at 9.
[156] Civil Justice Council (2017) at 99.

7.15 In some jurisdictions, BTE insurance is the main form of litigation funding. In Sweden, for instance, following a shift in government policy in the late 1990s from civil legal aid to LEI, 95% of the population has LEI.[157] In Sweden, in contrast to England and Wales, LEI was promoted as a substitute for civil legal aid. It had, since the 1960s, been well-established as a complement to civil legal aid, available to MINELAs, as a consequence of the Swedish Government requiring it to be included within household insurance at no additional cost to the insured.[158]

7.16 In Germany, where civil legal aid funds approximately 8% of civil litigation, LEI funds some 35% of civil litigation. Moreover, the German LEI market has 44 LEI insurers operating within it, which collects some 4,400 million Euro in premiums while making payments totalling 3,259 million Euro.[159] In Germany it is also evident that LEI can provide an effective means to fund group litigation or collective proceedings. As Hau explains:

'A notable example in recent years are the mass lawsuits in connection with the 'Diesel scandal' in Germany: by the end of 2021, German legal protection insurers had paid out a total of more than EUR 1,200 million to their policyholders in 380,000 cases for lawyers' fees, court costs and expert witness fees, with the average amount in dispute per case being around EUR 26,000.'[160]

7.17 One reason why LEI is well-established in Germany, and the same applies to Sweden and other such jurisdictions, is that litigation costs in those jurisdictions are clear and predictable. Insurers are thus able to price litigation risk, and insurance premiums, more effectively than they can in jurisdictions where litigation costs are unpredictable. Historically, litigation cost in England and Wales, as well as being high, has been unpredictable. With the expansion of fixed recoverable costs to claims with a value of up to £100,000 in April 2024, litigation cost is now, however, far more predictable in those areas where fixed recoverability applies.

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[157] IBA, *Legal Expenses Insurance and Access to Justice* (2019) at 21.

[158] F. Regan, *The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance,* Journal of Law and Society, (2003) Vol. 30, No. 1, 49.

[159] W. Hau, *Access to Justice and Costs – Private Funding*, (CPLJ, 2024) at 8. The report is available here: https://www.cplj.org/publications/3-7-private-funding. Also see B. Hess & R. Hübner in C. Hodges, S. Vogenauer, M. Tulibacka, (2010) at 357.

[160] W. Hau (2024) at 17.

7.18 While LEI has not been considered in England and Wales as a prominent means to provide litigation funding, there has been a suggestion in Canada – a jurisdiction that historically, like England and Wales, has had limited uptake and use of LEI – that its use should be promoted. There has, specifically, been a suggestion that LEI be promoted as an effective replacement of civil legal aid and that this be achieved by the introduction of a mandatory, publicly administered LEI scheme.[161] The rationale for making the scheme mandatory would be to ensure that the whole population would have access to the scheme and that it would have as diverse a risk profile as possible. Hence premiums would be capable of being as low as possible. Such a scheme would need, however, to consider how payment of premiums could be effected for individuals who were, for instance, on various forms of income support.

7.19 One concern that could be raised about any promotion of LEI, and particularly mandatory LEI, is that it could result in an increase in litigation. That was a concern raised in Germany when LEI was promoted there. It was, however, apparent in Germany that an increase in LEI did not result in an increase in litigation.[162] Furthermore, as Hau has noted, where LEI is prevalent it is not clear that more unmeritorious litigation is pursued, as a consequence of LEI being available, than is pursued in other jurisdictions where other funding mechanisms are available.[163]

7.20 The Working Party is keen to receive evidence on the operation of the LEI market. It is particularly keen to receive evidence and views on the utility, promotion, or reform of BTE insurance, and on the novel Canadian proposal concerning the promotion of mandatory public LEI. Evidence concerning the utility of LEI where group litigation and collective proceedings are concerned is also sought.

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[161] S. Choudhry, M Trebilcock, J. Wilson, *Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses* I*nsurance*, in M. Trebilcock, A. Duggan, L. Sossin, *Middle Income Access to Justice* (Toronto, 2012)

[162] B. Hess & R. Hübner in C. Hodges, S. Vogenauer, M. Tulibacka, (2010) at 359. P. Murray & R. Stürner, German Civil Justice (Carolina, 2004) at 124, noting that the statistics in Germany showed that the promotion of LEI had resulted in insured individuals being 5-10% more likely to commence proceedings than uninsured individuals, which resulted in between a 4-8% increase in claims being pursued before the courts. Generally, those claims were, however, meritorious. The one area where there was a noted increase in claims that were either viewed to be trivial or frivolous were where they concerned low value road traffic accidents. Given the current prevalence of LEI for such claims, any further promotion of LEI is unlikely to have any comparable effect in England and Wales.

[163] W. Hua (2024) at 15.

Conditional Fee and Damages-based Agreements

7.21 Conditional Fee Agreements (CFAs) and Damages-based Agreements (DBAs) are both forms of contingent fee funding. Both forms of agreement were historically unlawful and contrary to public policy for the same reason that TPF was historically unlawful. They were also historically viewed as unethical, as they give solicitors an interest in the outcome of litigation. They are both forms of funding agreement that litigants can enter into with solicitors under which a solicitor will only be paid by their client in the event that their client succeeds in the litigation.

7.22 They are generally, although not always, 'no-win, no-fee' agreements. In the event of success, a solicitor may recover their basic fees plus an additional sum (the success fee) from their client. Under a CFA, the success fee is calculated by reference to their basic fees. It is capped at 100% of the basic fees, except in respect of first-instance proceedings in personal injury claims where it is capped at 25%.[164]

7.23 Under a DBA, there is no distinction between the basic fee and the additional fee: the two aspects of the solicitor's fee are rolled together and paid out of the percentage of the damages. The exact amount of the percentage to be paid to solicitors under any particular DBA will be determined by the individual circumstances of a claim. The DBA Regulations do, however, impose limitations on the maximum percentage that can be charged. That maximum differs depending on the substantive nature of the claim: it is 25% of damages for pain, suffering, loss of amenity and past financial damages in personal injury cases; it is 35% in employment cases; it is 50% in all other civil claims; and, it is 100% in appeals.[165] Under a DBA, then, there is greater certainty for a client on their potential cost liability to their solicitor than under a CFA.

7.24 CFAs were rendered lawful by section 58 of the Courts and Legal Services Act 1990, when it was brought into force in 1993.[166] The first regulations authorising CFAs under this provision came into force in 1995. The rationale for their introduction was explicitly to increase access to justice; at that time, they were viewed by the Government as a means of funding that was additional to civil legal aid.[167] At that time, the success fee payable was recouped from the

[164] Conditional Fee Agreements Order 2013 (SI 689/2013), articles 4 and 5.
[165] S. Middleton & J. Rowley, *Cook on Costs*, (2023) at 152.
[166] A detailed account of the development of CFAs is set out in *Hollins v Russell* [2003] EWCA Civ 718; [2003] WLR 2487.
[167] Lord Mackay LC cited in J. Peysner (2014) at 27-28.

funded party. To enable CFAs to replace legal aid, rather than continue as an additional funding mechanism, the Access to Justice Act 1999 provided that the success fee could be recouped from the losing party.

7.25 CFAs were also made more attractive as the 1999 Act reforms enabled funded parties to recoup the cost of ATE insurance premiums from the losing party; such insurance was taken out to cover the payment of any adverse costs the funded party might have to pay in the event that they did not succeed in the litigation.[168] CFAs were reformed further following the Jackson Costs Review; while the post-1999 CFAs promoted access to justice for funded parties, they adversely and unfairly affected access to justice for losing parties.[169] That review led to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 providing that neither the success fee nor ATE insurance premiums were recoverable from the losing party. They thus, effectively, returned CFAs to the position they were in prior to the 1999 Act reforms.

7.26 The introduction of DBAs was recommended by the Jackson Costs Review. They were rendered lawful by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.[170] The rationale for their introduction was the need to extend the means by which litigation could be funded and, to an extent, offset the reforms to CFAs, i.e., to offset the abolition of the recoverability of success fees and ATE insurance premiums from losing parties. In other words, DBAs were intended to improve access to justice and their introduction was predicated on an, unstated, understanding that for funded parties the reforms to be effected to CFAs would reduce access to justice for such parties.[171]

7.27 DBAs did not, however, operate effectively. This was because the regulations that authorised them, and with which DBAs had to comply to be lawful, were not well-drafted; they were '*not fit for purpose*.'[172] Notwithstanding the CJC providing the Government with reform recommendations in 2014, which were responded to in 2019, no reforms have been introduced.[173] One consequence of *R (PACCAR) v Competition Appeal Tribunal* [2023],[174] as it

[168] See Courts and Legal Services Act 1990, s.58A, as originally inserted by The Access to Justice Act 1999, s.27.
[169] R. Jackson (December 2009) at 107.
[170] Courts and Legal Services Act 1990, s.58AA, as inserted by Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.45.
[171] R. Jackson (December 2009) at 131.
[172] S. Middleton & J. Rowley (2023) at 161.
[173] Ibid. at 161-162.
[174] *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594.

has brought some TPF agreements within the scope of the DBA Regulations, could arguably be said to have brought them within a funding regime that is itself inadequate.

7.28 It is now over a decade since CFAs were last reformed and DBAs were introduced. Both forms of funding agreement operate on a contingency basis. Both are intended to increase access to justice. Equally, they can both be seen to improve equality of arms by enabling litigants who would not otherwise be able to litigate to do so, and to do so on the same basis as funded defendants. Concerns have been raised about the operation of these forms of funding by, for instance, the Legal Ombudsman. In a report published in March 2024, it raised concerns about the marketing of CFAs, about law firms transferring the financial risk that ought to fall upon them under such agreements back onto their funded client, as well as concerns that in some circumstances the use of CFAs was contributing to unethical behaviour by some lawyers.[175]

7.29 **The Working Party is keen to consider evidence relating to the operation of CFAs and DBAs, what problems may exist concerning their operation, and what steps might be needed to improve their functioning.** It is particularly keen to obtain views on whether there is any justification for maintaining two separate regulatory regimes for CFAs or DBAs. Might it be possible, and might it be beneficial, to move to a single regulatory regime that encompasses all forms of contingent funding agreement? Alternatively, what steps could be taken to render CFAs and DBAs simpler, more certain, and more effective, while balancing both a funded party's and their opponent's right of access to justice? Furthermore, the Working Party seeks evidence on whether or not the prohibition on the use of DBAs in opt-out collective proceedings in the CAT ought to be reconsidered, and if so on what basis.[176]

Pure Funding

7.30 Litigation funding can be provided on commercial terms, as is the case when it is provided by third party funders, or it can be provided altruistically. Such altruistic funding, or as it is referred to by the courts, 'pure funding,' has been held to be in the public interest. It is because it promotes access to justice. As Simon Brown LJ explained in *Hamilton v Al Fayed (No. 2)* [2003]:

[175] Legal Ombudsman, Complaints in Focus: 'No win, no fee Agreements) (March 2024). The report is available here: https://www.legalombudsman.org.uk/media/5zon1hb1/250121-complaints-in-focus-cfa-report-v3-140103.pdf.

[176] Competition Act 1998, s.47C(8).

7.31 '*. . . in my judgment the pure funding of litigation (whether of claims or defences) ought generally to be regarded as being in the public interest providing only and always that its essential motivation is to enable the party funded to litigate what the funders perceive to be a genuine case. This approach ought not to be confined merely to relatives moved by natural affection but rather should extend to anyone - not least those responding to a fund-raising campaign - whose contribution (whether described as charitable, philanthropic, altruistic or merely sympathetic) is animated by a wish to ensure that a genuine dispute is not lost by default . . .*'[177]

7.32 This form of funding can be provided to funded parties either by individuals who know the funded party or by individuals or organisations who are sympathetic to the funded party's situation or claim and wish to ensure that that individual is able to bring a genuine dispute to court. A pure funder, as with a third party funder, must not control the litigation, nor can they have an interest in the outcome of the litigation; must not stand to benefit from it; and must not fund it in the course of their business.[178] Funding provided other than on such a basis does not come within the scope of pure funding and the funder, as in the case of third party funders who provide funding in the course of the business and for their own benefit, may be liable for the litigation costs incurred by the funded party, including any adverse costs. The court may order the disclosure of the identity of the funders where they are held to be liable for costs.[179] Where pure funding is provided, the funders will not be liable for any adverse costs.

7.33 The Working Party is particularly interested in receiving evidence concerning the incidence of pure funding, its benefits, and drawbacks. Evidence concerning the utility or otherwise of the current approach taken by the courts to pure funders is also sought.

Crowdfunding

7.34 Crowdfunding is a form of unregulated litigation funding that is similar to TPF and pure funding. Rather than being a form of funding that relies on a single individual or organisation to provide financial support for a litigant's claim or defence, it relies on a large number of individuals or organisations, including charities, i.e., the notional '*crowd*' to do so. Such

[177] *Hamilton v Al Fayed* [2002] EWCA Civ 665; [2003] QB 1175 at [47].
[178] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (No 2) [2004] UKPC 39; [2004] 1 WLR 2807 at [23]-[25]; *Germany v Flatman* [2013] EWCA Civ 27; [2013] 1 WLR 2676 at [48].
[179] *Germany v Flatman* [2013] EWCA Civ 27; [2013] 1 WLR 2676 at [48].

funding can either be sought by and given to a specific litigant or it can be sought by and given to an organisation that pursues litigant in specific areas.

7.35 Crowdfunding can be used to fund litigation on several bases. First, it can be provided in a disinterested way, i.e., as a form of pure funding. Secondly, it can be provided for a return on their 'investment,' i.e., as a form of TPF. Such a form of funding has been provided in the UK by AxiaFunder.[180] Thirdly, it can be provided because the funders wish to promote a specific interest, which they share with the litigant, i.e., a form a self-interested funding. For instance, the crowd may seek to promote public interest litigation, judicial review proceedings or environmental litigation, which is being pursued by the funded party. An example of such an approach is that which is taken by the Good Law Project, which is '*primarily funded by members of the public through regular and one-off donations, as well as crowd-funded donations to cover the costs of specific litigation*.'[181]

7.36 Crowdfunding can be obtained either directly by the individual or organisation, which wishes to have litigation funded. Typically, this will be done via the Internet. The Good Law Project, for instance, has its own website through which it runs 'crowdfunders,' i.e., campaigns to obtain funding for specific litigation. It can also be obtained via websites that enable individual litigants to set up their own internet-based funding campaigns. An example of such an approach is that taken by CrowdJustice, a website that enables prospective litigants to launch their own litigation funding campaigns.[182]

7.37 While it is a relatively new form of litigation funding, crowdfunding has been noted to have the following advantages.[183] First, it is available where a litigant seeks a non-financial remedy. In this sense it is available in a wider range of cases than TPF. Secondly, it is available where LEI is unavailable because, for instance, a defendant seeks funding after an alleged tort has occurred and the defendant was uninsured at that time. Thirdly, and linked to that, it is available to defendants who would not otherwise have access to TPF because, as a defendant, they would not be in a position to provide the funder with a return on their investment in the litigation. Fourthly and generally, it may be used to promote access to

[180] V. Raghupathil, J. Ren, W. Raghupathil, *Understanding the nature and dimensions of litigation crowdfunding: A visual analytics approach*, PLoS ONE 16(4): e0250522. https://doi.org/10.1371/journal.pone.0250522 at 4.

[181] The Good Law Project's website is available here <https://goodlawproject.org/about/governance-and-funding/>.

[182] CrowdJustice's website is available here: https://www.crowdjustice.com/how-it-works/

[183] V. Raghupathil, J. Ren, W. Raghupathil (2021) at 5.

justice and equality of arms for litigants who would not otherwise have the financial resources to litigate. This is particularly likely where public interest litigation is concerned.

7.38 Crowdfunding has, however, the potential to promote vexatious, unmeritorious, or abusive litigation. Unlike civil legal aid and TPF, for instance, there is no necessity for the funder to apply any merits-assessment before providing funding. As Tomlinson notes, both CrowdJustice and the Good Law Project provide examples where crowdfunding is subject to a merits-test. The former implements one through requiring those who seek funding via its platform to have a solicitor or barrister acting for them, i.e., it relies on the legal professional to vet the proposed litigation consistently with their professional obligations. It also, in cases that seek funding on a non-profit basis, places the onus on the party seeking funding to persuade prospective funders of the merits of the case. It is reasonable to assume that the first of the two approaches is more likely to protect against the promotion of vexatious, unmeritorious or abusive litigation. The Good Law Project relies on its Director to assess the merits of potentially funded litigation.[184]

7.39 More generally, notwithstanding the fact that a range of charities are believed to have funded litigation via crowdfunding, as Tomlinson goes on to note,

'. . . the crowdfunding model is open to use by a wide variety of actors and therefore potentially abuse of various kinds by both the malevolent or misguided. There have been no major scandals yet that relate to crowdfunded litigation, but there are anecdotal reports of dubious crowdfunding propositions being circulated and much of crowdfunding activity, despite being online, may not be particularly visible.'[185]

7.40 As a form of litigation funding, in principle, individuals who crowdfund litigation may be held liable for costs through an application of the legal test outlined by Simon Brown LJ explained in *Hamilton v Al Fayed (No. 2)* [2003], i.e., if they are held not to be pure funders, they may be liable to pay the adverse costs of funded litigation. Given the nature of crowdfunding, i.e., the provision of a small donations from a large to very large number of funders, that may not be a practical means to secure responsible funding behaviour. It is also difficult to see how it might reduce the possibility that those who seek funding may not do so in an exploitative or otherwise improper way.

[184] J. Tomlinson, *Crowdfunding Public Interest Judicial Reviews*, Public Law, (2019) at 174.
[185] Ibid. at 174.

7.41 Tomlinson concluded in 2019 that consideration needs to be given to the ethics and governance of crowdfunding. Given the significant amount of litigation that is funded by crowdfunding, e.g., between 2014 and 2020, 413 sets of judicial review proceedings had been crowdfunded via CrowdJustice,[186] and the likelihood that its role in litigation funding will continue to grow, the Working Party is keen to obtain evidence on role it can and is playing to promote access to justice and equality of arms as well as any problems that have or are arising in respect of it. It is particularly keen to obtain views on the potential regulation of this form of litigation funding, i.e., whether it is necessary; if so, how best to approach regulation; and which organisation might be best placed to regulate it.

7.42 Might it be necessary or beneficial, for instance, to require crowdfunding to be: limited to claims or defences that satisfy a merits-test; limited to certain types of litigation; that it only be permitted where a legal team is in place to act for the funded party; where there are sufficient funds available to pay the funded party's legal costs and/or any anticipated potential adverse legal costs; where there is a costs budget in place?[187]

Portfolio Funding

7.43 Portfolio funding is a specific type of TPF. It is currently regulated therefore as TPF generally is regulated, i.e., portfolio funding provided by members of the ALF is subject to self-regulation and where it is provided by funders who are not ALF members, it is unregulated.

7.44 Portfolio funding is believed to be increasingly popular as a means to fund litigation. It is because it is a means by which funders can enter into funding arrangements with specific

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[186] S. Guy, *Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation*, (2023) Vol. 86, 331.

[187] In this respect, H. Spendlove, *Could crowdfunding become a viable means of financing commercial litigation?*, (Litigation Funding, 2015) suggests the following criteria be applied to crowdfunding, '*In order to mitigate costs risks, suitable cases for crowdfunding would need the following characteristics:*
Strong prospects of success (likely to be around 65% or more);
Absence of complex or novel legal issues;
Contingency plan to fund excess costs and any adverse costs order in place; and
Clear budget for legal costs and/or a fixed fee arrangement.
In addition, crowdfunded cases should also have:
A reputable legal team instructed;
A creditworthy defendant able to pay damages and easy to enforce against; and
Appropriate steps having been taken to protect the privilege and confidentiality of information provided to investors.'
The article is available here: https://www.lawgazette.co.uk/practice-points/litigation-crowdfunding/5048431.article.

law firms, who for instance have expertise in specific types of litigation. Equally, it is a means by which law firms can fund a larger range of clients whose claims, for instance, have differing merits. It thus can help facilitate access to justice for claims that, while meritorious, would not satisfy a merits-test for funding applied, for instance, by a funder if they sought funding on a standalone or individual basis. It can be used as a means to enable law firms to cross-subsidise funding,[188] e.g., to fund a range of different types of claim, again relying on the higher merits or prospects of success of some claims to subsidise the funding of other types of claims that have lower prospects of success. It can also be used to fund group litigation or collective proceedings where, for instance, a third party funder provides a law firm with a specified amount of funding, which the law firm may draw from to fund a large number of individual claims that raise the same or similar issues.

7.45 One specific issue that has arisen concerning portfolio funding is the recent collapse of SSB Group, which traded as SSB Law. It went into administration in January 2024, owing approximately £200 million to six third party funders.[189] The funding was provided by the funders variously to fund a portfolio of claims, e.g., cavity wall insulation claims, personal injury claims, Japanese knotweed claims, mis-sold car finance claims, and Plevin claims (Plevin claims are those that concern the recovery of premiums paid under payment protection insurance).[190] This particular case raises questions concerning compliance by funded parties' legal advisers with their professional regulatory obligations. **The Working Group is particularly keen on receiving evidence concerning the role that professional regulation has where litigation funding generally, and portfolio funding specifically, is concerned.**

7.46 One consequence of SSB's collapse is that many of its clients who were pursuing cavity wall insulation claims are likely to become liable for costs of up to £38,000 each.[191] It is also possible that professional negligence claims will be pursued by SSB's former clients, not least

[188] And thereby reduce the cost of funding, especially where funding is provided on a full recourse basis.

[189] N. Rose, *Consumer claims firm went bust owing litigation funders £200m*, (15 January 2024, Legal Futures). The article is available here: https://www.legalfutures.co.uk/latest-news/consumer-claims-firm-went-bust-owing-litigation-funders-200m; N. Hilborne, *Collapsed SSB "faces up to 1,400 negligence claims"*, (31 January 2024, Legal Futures). The article is available here: https://www.legalfutures.co.uk/latest-news/collapsed-ssb-faces-up-to-1400-negligence-claims.

[190] *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 4222.

[191] J. Hyde, SRA investigating why SSB clients are facing huge legal bills, (11 March 2024, Law Gazette). The article is available here: https://www.lawgazette.co.uk/news/sra-investigating-why-ssb-clients-are-facing-huge-legal-bills/5119004.article.

because ATE insurance, which was supposed to cover any liability they may have for adverse costs has, in many cases, been repudiated by the insurers. The potential cost liability of these former clients is at a level not previously seen.

7.47 In addition to the potential serious and significant adverse consequences to SSB's former clients, its collapse may raise concerns about the effective regulation of solicitors' firms and public confidence in the legal profession. In this regard, the Solicitors Regulation Authority is currently investigating the issue.[192] It may also have wider impacts on the wider legal market due to the effect SSB's administration may have on its employees, many of whom were made redundant, and individuals to whom SSB owed money in respect of the management of litigation, e.g., barristers, expert witnesses etc. SSB's collapse further raises questions and raise wider questions concerning effective consumer protection in, for instance, the provision and regulation of insurance, claims management, and CFA/DBA regulation.

7.48 SSB's collapse is one example, and care needs to be taken not to generalise from single examples. It may be an outlier, but equally it may be indicative of wider problems, market failure in portfolio funding or a failure in effective legal services regulation. **The Working Party therefore seeks evidence concerning the extent to which portfolio funding is used, its benefits, and drawbacks. It is particularly interested in receiving any evidence that places the SSB collapse in a broader context that can help consideration of whether there is a need for regulatory reform concerning this form of funding, and if so what type of reform may be justified.**

Supplementary Legal Aid Schemes and Contingency Legal Aid Funds

7.49 Neither a **Supplementary Legal Aid Scheme (SLAS)** nor **a Contingency Legal Aid Fund (CLAF)** operate in England and Wales. They are different forms of self-sustained and funded litigation funding schemes. Provision within section 28 of the Access to Justice Act 1999 could be relied upon to provide for the creation of either such scheme.[193] The nature of such schemes was aptly summarised by Sir Rupert Jackson in 2009 in these terms,

[192] Solicitors Regulatory Authority, *Cavity wall insulation claims handled by the SSB Group*, (4 March 2024), which is available here: https://www.sra.org.uk/sra/news/ssb-group-mar/.

[193] R. Jackson (May 2009) Vol. 1 at 177.

'. . . The essential feature of a CLAF is . . . that once it is established it is expected to stand on its own feet and be fully self-financing. A SLAS on the other hand is a self-funding mechanism which is built into or added onto an existing publicly funded legal aid scheme, and administered by the relevant legal aid authority. In principle self-funding mechanisms could be introduced into any legal aid scheme across the board, in which case the effect would simply be to reduce the net cost of the scheme.'

7.50 Both types of funding mechanism are thus complements to the publicly funded legal aid scheme. CLAFs provide a self-funding complementary form of legal aid scheme, whereas a SLAS provides additional funding to the public civil legal aid scheme. Such schemes have been established in, for instance, Australia, Canada, and Hong Kong. As Jackson noted, Hong Kong's SLAS scheme was started by the private sector, through a loan (subsequently repaid) from the Hong Kong Jockey Club and operates through imposing a levy on damages awarded on claims it funds. He further noted that in Australia and, particularly, Canada, CLAFs operate to fund class action litigation and either recover a percentage of damages of funded claims or a percentage of any unclaimed class action damages.[194] In England and Wales, provision exists for unclaimed damages in collective actions brought before the CAT to be paid to the Access to Justice Foundation, which provides charitable funding to, for instance, free legal advice centres.

7.51 In 2009 Sir Rupert Jackson recommended that financial modelling be undertaken to consider whether a SLAS or CLAF would be a viable funding mechanism.[195] Since then there have been no further positive developments in this area.

[194] R. Jackson (May 2009) Vol. 1 at 178-182.
[195] R. Jackson (December 2009) at 141.

Table of abbreviations and acronyms

Abbreviation or acronym	Meaning
ALF	Association of Litigation Funders of England & Wales
ALFA	Association of Litigation Funders of Australia
ATE	After-the-Event (insurance)
BTE	Before-the-event (insurance)
CAT	UK Competition Appeals Tribunal
CCO	Costs capping order
CFA	Conditional fee agreement
CFO	Common fund order
CJC	Civil Justice Council
CLAF	Contingency Legal Aid Fund
CPR	Civil Procedure Rules
DBA	Damage-based agreement
EU	European Union
FCA	Financial Conduct Authority
GLO	Group Litigation Order
ICC	International Chamber of Commerce
ILFA	International Litigation Funders Association
KC	King's Counsel
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LEI	Legal expenses insurance

Abbreviation or acronym	Meaning
PACCAR	R (PACCAR) v Competition Appeal Tribunal [2023] UKSC 28; [2023] WLR 2594
SLAS	Supplementary Legal Aid Scheme
TPF	Third party litigation funding
WIP	Work-in-progress

Appendices:

Appendix A – Litigation Funding Consultation Questions

The consultation closes on **Friday 31 January 2025 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to CJCLitigationFundingReview@judiciary.uk. If you have any questions about the consultation or submission process, please contact CJC@judiciary.uk.

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

You must fill in the following and submit this sheet with your response:

Your response is (public/anonymous/confidential):	
First name:	
Last name:	
Location:	
Role:	
Job title:	
Organisation:	
Are you responding on behalf of your organisation?	
Your email address:	

Information provided to the Civil Justice Council:

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

- **Please give reasons for your answers. Please do so by reference, where applicable, to the guidance given in the footnotes.**
- **All answers should be supported by evidence where possible to enable evidence-based conclusions to be drawn.**
- **It is not necessary to answer all the questions.**

Questions concerning '*whether and how, and if required, by whom, third party funding should be regulated*' and the relationship between third party funding and litigation costs.

1. To what extent, if any, does third party funding currently secure effective access to justice?[196]
2. To what extent does third party funding promote equality of arms between parties to litigation?
3. Are there other benefits of third party funding? If so, what are they?
4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[197] If not, what improvements could be made to it?
5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:
    a. The nature and seriousness of the risk and harm that occurs or might occur;
    b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;[198]

[196] When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.

[197] This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

[198] Please give full details of each possible mechanism and explain how each would work (including who any potential 'regulator' or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.

c. For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.

6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?

   a. If not, why not?

   b. If so, which types of dispute and/or form of proceedings[199] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[200]

   c. Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?

7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?

8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:

   a. What impact, if any, have the level of litigation costs had on the development of third party funding?

   b. What impact, if any, does third party funding have on the level of litigation costs?

   c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?

[199] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.

[200] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[201]

e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?

i. If so, why?

ii. If not, why not?

9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.

10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?

Questions concerning 'whether and, if so to what extent a funder's return on any third party funding agreement should be subject to a cap.'

11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?

12. Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?

a. If so, why?

b. If not, why not?

13. If a cap should be applied to a funder's return:

a. What level should it be set at and why?

b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?

c. At which stage in proceedings should the cap be set?

[201] Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?

e. Should there be differential caps and, if so, in what context and on what basis?

Questions concerning how third party funding 'should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.'

14. What are the advantages or drawbacks of third party funding?

    Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

15. What are the alternatives to third party funding?

    a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?

       Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

    b. Can other forms of litigation funding complement third party funding?

       Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.

    c. If so, when and how?

16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?

17. Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?

18. Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?

19. What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?

20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?

21. Are there any reforms to portfolio that you consider necessary? If so, what are they and why?

22. Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?

Questions concerning the role that should be played by 'rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.'

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?

24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?

25. Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?

26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?

27. To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?

Questions concerning provision to protect claimants.

28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?

29. What effect do different funding mechanisms have on the settlement of proceedings?

30. Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?

31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?

32. What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?

33. To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?

34. To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?

35. Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.

Questions concerning the encouragement of litigation.

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:

    a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?

b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?

c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?

When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.

37. To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.

38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?

General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?[202]

[202] Please note that the Working Party is not considering civil legal aid.

Appendix B – Terms of Reference for CJC Review of Litigation Funding

The CJC will look to provide an interim report by summer 2024, and a full report by summer 2025.

The Review will be based on the CJC's function to make civil justice more accessible, fair and efficient.

The reports will be published.

The reports will provide advice to the Lord Chancellor and, where considered appropriate by the CJC, will make recommendations for change.

The interim report will facilitate an opportunity for wider engagement with the CJC, and this review, either through consultation, provision of evidence, or otherwise.

The scope of the review at its outset is as follows (but may be subject to necessary variation):

(1) To set out the current position of Third Party Funding (TPF)

TPF is currently subject to self-regulation. The review will consider:

- The background to TPF's development in England and Wales, with particular reference to the development of the current self-regulatory approach and the effect of the Jackson Costs Review (2009);
- The current position concerning self-regulation;
- Approaches to the regulation of TPF in other jurisdictions;
- How TPF is located within the broader context of funding options.

(2) To consider access to justice, effectiveness, regulatory options

This work will explore whether the current arrangements for TPF deliver effective access to justice and identify possible alternatives and limitations.

(3) To make recommendations

Set out clear recommendations for reform. This will include consideration of:

- As to whether and how and, if required, by whom, TPF should be regulated.
- As to whether and, if so, to what extent a funder's return on any TPF agreement should be subject to a cap;
- How TPF should be best deployed relative to other sources of funding, including but not limited to; legal expenses insurance, and crowd funding;
- As to the role that rules of court, and the court itself, may play in controlling the conduct of litigation supported by TPF, or similar funding arrangements, including: whether and, if so,
- what provision needs to be made for the protection of claimants whose litigant is funded via TPF; and the interaction between pre-action and post-commencement funding of disputes;
- The relationship between TPF and litigation costs;
- Duties concerning the provision of TPF, including potential conflicts of interest between funders, legal representatives and funded litigants.
- As to whether funding encourages specific litigation behaviour such as collective action.

Appendix C – Membership

Working Party

Mr Justice Simon Picken (CJC member) – Co-Chair

Dr John Sorabji (CJC member) – Co-Chair

Mrs Justice Sara Cockerill

Professor Christopher Hodges OBE (Regulatory Horizons Council)

Lucy Castledine (Financial Conduct Authority)

Nicholas Bacon KC

Wider Consultation Group

Alistair Kinley (Director of Policy & Government Affairs, Clyde & Co)

Professor Andrew Higgins (CJC member; Professor of Civil Justice Systems, University of Oxford)

Dr Mark Friston (Barrister, Hailsham Chambers; Bar Council Representative)

Jackie Griffiths (Head of Regulatory Policy, Solicitors Regulation Authority)

Jamie Molloy (Head of ATE, Ignite Speciality Risk)

Jennifer Morrissey (Partner, Harcus Parker; Law Society Representative)

Julian Chamberlayne (Partner, Stewarts)

Kenny Henderson (Legal Adviser, Fair Civil Justice; Partner, CMS Cameron McKenna Nabarro)

Lucy Anderson (Senior Lawyer, The Consumers' Association (Which?))

Neil Purslow (Chair of the Executive Committee, International Legal Finance Association; UK CIO, Therium Litigation Funding)

Professor Neil Rickman (Professor of Economics, University of Surrey)

Nicola Critchley (CJC member; Partner, DWF)

Professor Rachael Mulheron KC (Hon) (Professor of Tort Law and Civil Justice, Queen Mary University of London)

Rhea Gupta (Legal and Policy Research Consultant, Class Representatives Network)

Stephen Wisking (Partner, Herbert Smith Freehills)

Suganya Suriyakumaran (Legal Services Board)

Susan Dunn (Director, Association of Litigation Funders; Head of Litigation Funding, Harbour Litigation Funding)

Tajinder Bhamra (Interim Head of Civil Litigation Funding and Costs Policy, Ministry of Justice)

Tom Steindler (Managing Director, Exton Advisors)

CJC Secretariat

Sam Allan

Amy Shaw

Freya Prentice

Appendix D – Section 58B of the Courts and Legal Services Act 1990

Section 58B Litigation funding agreements.

(1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a litigation funding agreement.

(2) For the purposes of this section a litigation funding agreement is an agreement under which—

(a) a person ("the funder") agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person ("the litigant"); and

(b) the litigant agrees to pay a sum to the funder in specified circumstances.

(3) The following conditions are applicable to a litigation funding agreement—

(a) the funder must be a person, or person of a description, prescribed by the Lord Chancellor**;**

(b) the agreement must be in writing;

(c) the agreement must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed by the Lord Chancellor;

(d) the agreement must comply with such requirements (if any) as may be so prescribed;

(e) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services; and

(f) that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Lord Chancellor in relation to proceedings of the description to which the agreement relates.

(4) Regulations under subsection (3)(a) may require a person to be approved by the Lord Chancellor or by a prescribed person.

(5) The requirements which the Lord Chancellor may prescribe under subsection (3)(d)—

(a) include requirements for the funder to have provided prescribed information to the litigant before the agreement is made; and

(b) may be different for different descriptions of litigation funding agreements.

(6) In this section (and in the definitions of "advocacy services" and "litigation services" as they apply for its purposes) "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(7) Before making regulations under this section, the Lord Chancellor shall consult—

(a) the designated judges;

(b) the General Council of the Bar;

(c) the Law Society; and

(d) such other bodies as he considers appropriate.

(8) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any amount payable under a litigation funding agreement.

(9) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a litigation funding agreement.

Appendix E – Association of Litigation Funders – Code of Conduct

CODE OF CONDUCT for LITIGATION FUNDERS

January 2018

1. This code ('the Code') sets out standards of practice and behaviour to be observed by Funders (as defined in clause 2 below) who are Members of The Association of Litigation Funders of England & Wales ('the Association') in respect of funding the resolution of Relevant Disputes. Relevant Disputes are defined as disputes whose resolution is to be achieved principally through litigation procedures in the Courts of England and Wales.

2. A litigation funder:

2.1 has access to funds immediately within its control, including within a corporate parent or subsidiary ('Funder's Subsidiary'); or

2.2 acts as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control, including within a corporate parent or subsidiary ('Associated Entity'),

('a Funder') in each case:

2.3 to fund the resolution of Relevant Disputes; and

2.4 where the funds are invested pursuant to a Litigation Funding Agreement ('LFA') to enable a party to a dispute ('the Funded Party') to meet the costs (including pre-action costs) of the resolution of Relevant Disputes.

In return the Funder, Funder's Subsidiary or Associated Entity:

2.5 receives a share of the proceeds if the claim is successful (as defined in the LFA); and

2.6 does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.

3. A Funder shall be deemed to have adopted the Code in respect of funding the resolution of Relevant Disputes.

4. A Funder shall accept responsibility to the Association for compliance with the Code by a Funder's Subsidiary or Associated Entity. By so doing a Funder shall not accept legal responsibility to a Funded Party, which shall be a matter governed, if at all, by the provisions of the LFA.

5. A Funder shall inform a Funded Party as soon as possible and prior to execution of an LFA:

5.1 if the Funder is acting for and/or on behalf of a Funder's Subsidiary or an Associated Entity in respect of funding the resolution of Relevant Disputes; and

5.2 whether the LFA will be entered into by the Funder, a Funder's Subsidiary or an Associated Entity.

6. The promotional literature of a Funder must be clear and not misleading.

7. A Funder will observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party. For the avoidance of doubt, the Funder is responsible for the purposes of this Code for preserving confidentiality on behalf of any Funder's Subsidiary or Associated Entity.

8. An LFA is a contractually binding agreement entered into between a Funder, a Funder's Subsidiary or Associated Entity and a Funded Party relating to the resolution of Relevant Disputes.

9. A Funder will:

9.1 take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute;

9.2 not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties;

9.3 not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder;

9.4 Maintain at all times access to adequate financial resources to meet the obligations of the Funder, its Funder Subsidiaries and Associated Entities to fund all the disputes that they have agreed to fund and in particular will;

9.4.1 ensure that the Funder, its Funder Subsidiaries and Associated Entities maintain the capacity;

9.4.1.1 to pay all debts when they become due and payable; and

9.4.1.2 to cover aggregate funding liabilities under all of their LFAs for a minimum period of 36 months.

9.4.2 maintain access to a minimum of £5 m of capital or such other amount as stipulated by the Association;

9.4.3 accept a continuous disclosure obligation in respect of its capital adequacy, including a specific obligation to notify timeously the Association and the Funded Party if the Funder reasonably believes that its representations in respect of capital adequacy under the Code are no longer valid because of changed circumstances;

9.4.4 undertake that it will be audited annually by a recognised national or international audit firm and shall provide the Association with:

9.4.4.1 a copy of the audit opinion given by the audit firm on the Funder's or Funder's Subsidiary's most recent annual financial statements (but not the underlying financial statements), or in the case of Funders who are investment advisors to an Associated Entity, the audit opinion given by the audit firm in respect of the Associated Entity (but not the underlying financial statements), within one month of receipt of the opinion and in any case within six months of each fiscal year end. If the audit opinion provided is qualified (except as to any emphasis of matters relating to the uncertainty of valuing relevant litigation funding investments) or expresses any question as to the ability of the firm to continue as a going concern, the Association shall be entitled to enquire further into the qualification expressed and take any further action it deems appropriate; and

9.4.4.2 reasonable evidence from a qualified third party (preferably from an auditor, but alternatively from a third party administrator or bank) that the Funder or Funder's Subsidiary or Associated Entity satisfies the minimum capital requirement prevailing at the time of annual subscription.

9.5 comply with the Rules of the Association as to capital adequacy as amended from time to time.

10. The LFA shall state whether (and if so to what extent) the Funder or Funder's Subsidiary or Associated Entity is liable to the Funded Party to:

10.1 meet any liability for adverse costs that results from a settlement accepted by the Funded Party or from an order of the Court;

10.2 pay any premium (including insurance premium tax) to obtain adverse costs insurance;

10.3 provide security for costs; and

10.4 meet any other financial liability.

11. The LFA shall state whether (and if so how) the Funder or Funder's Subsidiary or Associated Entity may:

11.1 provide input to the Funder Party's decisions in relation to settlements;

11.2 terminate the LFA in the event that the Funder or Funder's Subsidiary or Associated Entity:

11.2.1 reasonably ceases to be satisfied about the merits of the dispute;

11.2.2 reasonably believes that the dispute is no longer commercially viable; or

11.2.3 reasonably believes that there has been a material breach of the LFA by the Funded Party.

12. The LFA shall not establish a discretionary right for a Funder or Funder's Subsidiary or Associated Entity to terminate a LFA in the absence of the circumstances described in clause 11.2.

13. If the LFA does give the Funder or Funder's Subsidiary or Associated Entity any of the rights described in clause 11, the LFA shall provide that:

13.1 if the Funder or Funder's Subsidiary or Associated Entity terminates the LFA, the Funder or Funder's Subsidiary or Associated Entity shall remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach under clause 11.2.3;

13.2 if there is a dispute between the Funder, Funder's Subsidiary or Associated Entity and the Funded Party about settlement or about termination of the LFA, a binding opinion shall be obtained from

a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council.

14. Breach by the Funder's Subsidiary or Associated Entity of the provisions of the Code shall constitute a breach of the Code by the Funder.

15. The Association shall maintain a complaints procedure. A Funder consents to the complaints procedure as it may be varied from time to time in respect of any relevant act or omission by the Funder, Funder's Subsidiary or Associated Entity.

16. Nothing in this Code shall prevent a Funder, when not engaged in the funding of the resolution of Relevant Disputes, from engaging in any other kind of financial or investment transaction that is permitted under the relevant law, such as taking an assignment of a claim from an insolvency practitioner.

17. This Code of Conduct shall only apply to a Funder in relation to the funding of the resolution of Relevant Disputes and does not purport to regulate the activities of a Funder if it engages in any other kind of financial or investment transaction.

18. Nothing in this Code shall be construed to prohibit a Funder from conducting appropriate due diligence, both before offering funding and during the course of the litigation procedures that are being funded, including but not limited to analysis of the law, facts, witnesses and costs relating to a claim, and including regularly reviewing the progress of the litigation.

Appendix F – European Litigation Funders' Code of Conduct

Code of Conduct

Adopted by the Board of Directors on 29 June 2022

1. **Scope of application and definitions**

   This Code of Conduct governs the conduct of Funders when providing Litigation Funding for the resolution of a Claim to a Funded Party based on a Funding Agreement (all as defined below).

   a. A Funding Agreement is a contract for the provision of Litigation Funding entered into between a Funder and a Funded Party.

   b. Funders are the members of the European Litigation Funders Association (ELFA). The articles of incorporation of ELFA set forth the membership requirements.

   c. A Funded Party is a natural or legal person who, based on a Funding Agreement, has the right to receive Litigation Funding from a Funder for the assertion of or the defense against a Claim.

   d. Litigation Funding is the provision by a Funder to a Funded Party of financial support for the costs of, and where applicable the risks related to, the resolution of a legal dispute, based on a Funding Agreement, in exchange for a remuneration or reimbursement that is dependent upon the outcome of the dispute.

   e. Claim relates to the claim (or the claims) which are asserted in a dispute whose resolution is sought primarily through litigation or arbitration procedures before a court or tribunal seated in a European Union member state and in member states of the European Free Trade Association.

2. **Funders' commitment to provide information**

   a. Funders shall timely provide clear and comprehensive information to the Funded Parties. This includes (without limitation):

i. The Funders' promotional information;

ii. The process of obtaining Litigation Funding; and

iii. The contents of the Funding Agreement.

b. Funders shall inform the Funded Parties, as soon as possible after the commencement of the negotiations of a Funding Agreement, of the legal entity deemed to enter into the Funding Agreement.

c. In the event that a Funded Party is without a legal advisor, a Funder shall recommend that the Funded Party seek legal advice and/or representation before entering into a Funding Agreement (and, if requested by the Funded Party, propose a list of suitable independent candidates).

3. **Funders' commitment regarding form and contents of a Funding Agreement**

a. A Funding Agreement shall be executed in writing in English or in a language that is understood by the Funded Party, its counsel or its advisor.

b. A Funding Agreement shall at least include clear and unequivocal provisions regarding:

i. The commercial terms and conditions of the Litigation Funding;

ii. The costs and, where applicable, the risks included in the Funders' funding commitment;

iii. A decision-making process regarding the conclusion of settlement agreements pursuant to which the parties shall seek each other's consent before agreeing to a settlement (such consent not to be unreasonably withheld);

iv. A resolution mechanism in case the parties disagree whether a settlement offer is appropriate;

v. The calculation and payment of the Funder's remuneration; and

vi. The possibilities and conditions for the parties to terminate the Funding Agreement.

c. Unless specifically agreed otherwise, the objective of the Funding Agreement is that the Funder's entitlement vis-à-vis the Funded Party is limited to the amount received by the Funded Party through the assertion of the Claim (non-recourse character).

d. Unless specifically agreed otherwise or if the Funded Party is in breach of the Funding Agreement, if a Funding Agreement is terminated by the Funder, all amounts provided by the Funder until the termination will remain invested for the benefit of the Claim.

4. **Funders' commitment to maintain confidentiality**

Funders shall take all necessary steps to preserve the confidentiality and legal privilege of information which they receive during the negotiation or the execution of a Funding Agreement, to the extent that the applicable law permits and subject to the terms of any agreed confidentiality or non-disclosure agreement.

5. **Funders' commitment to prevent conflicts of interests**

Funders shall maintain effective systems to detect and manage potential conflicts of interests.

6. **Funders' commitment to maintain capital adequacy**

Funders shall not enter into investment commitments without having adequate capital available to meet such commitments, and to adequately protect the Funded Parties' interests also in adverse scenarios. More specifically, Funders:

a. Shall at all times maintain the ability to pay debts when they become due;

b. Shall at all times have immediate access to sufficient capital to fulfil their obligations under a Funding Agreement;

c. Shall meet audit requirements and provide evidence of their financial ability under (a) and (b) pursuant to the articles of incorporation of ELFA.

7. **Funders' confirmation of the legality principle**

With regard to the funding relationship and the Funder's contractual duties, Funders shall at all times conduct their activities in accordance with the applicable legislation of the European Union members states and/or member states of the European Free Trade Association. This obligation, among others, applies to:

a. Funders assisting Funded Parties by providing information or strategic advice as well as Funders assisting in the pursuit of a Claim in other ways.

b. Funders and their relationship with lawyers and other professionals. The Funders shall not take any steps causing lawyers and other professionals to breach their professional duties.

8. **Complaints procedure**

Funders shall set up a complaints procedure by which the Funded Parties can bring potential deviations from this Code of Conduct to the attention of ELFA.