



18. Are there any reforms to legal expenses insurance, whether before-the-event or afterthe-event insurance, that you consider are necessary to promote effective litigation funding?

Should a regulatory regime be recommended, we would consider it be a **requirement for third-party funders** ("TPF") to use, or demonstrate that they have considered the use of, specialist before-the-event or after-the-event (/adverse costs) ("ATE") brokers when Insureds purchase such insurance policies. The implementation of such a requirement would increase the quality and effectiveness of the insurance secured, at a more competitive price. This in turn would lower the costs incurred by TPF in funding litigation, which could be passed on to TPF clients (the users of litigation services, namely, individual claimants or class representatives who can only access the courts with the support of such funding). The competitiveness of TPF offerings would be increased, resulting in lower costs, potentially more entrants into the TPF space and a greater ability of TPF clients to arrange Funding, thereby being afforded access to justice.

Our reasons for recommending this approach are as follows. We are specialist ATE insurance brokers and so the below reasons focus on the ATE market; from our experience TPF do not purchase nor (given their business model) are likely to secure before-the-event insurance. We make these observations as one of the leading brokers in the ATE insurance space (by way of example, of the over 30 collective proceedings currently before the Competition Appeals Tribunal ("CAT"), we have either been approached to broker, or have concluded ATE insurance arrangements on approximately 65% of these cases:

1. Access to more insurance markets: The vast majority of the specialist ATE underwriters do not deal directly with businesses, instead only accepting enquiries passed to them through a broker. As is common throughout other insurance sectors, ATE insurers rely on their 'network' of brokers for their flow of new business, reducing their need for expensive marketing and administration costs. Specialist ATE brokers (many of whom, like ATE underwriters, are former litigation solicitors or barristers now working in the insurance market, thus having expertise in both the insurance and litigation worlds) speak the same insurance language as ATE underwriters, making it

much easier and more cost-effective for underwriters to work with insurance brokers rather than dealing directly with potential Insureds. This arrangement justifies lower premiums as well as the cost of the brokers' commission.

- 2. Lower premiums: It follows that access to a larger choice of insurance markets, and the increased competition that this generates, will naturally reduce the cost of the premiums offered. Risks assessed and presented through a broker will also represent a lower risk to underwriters (with unsuitable risks having been screened out and the correct cover selected by the broker thus avoiding claims and maintaining an insurers' income) and be reflected in reduced premium. Furthermore, a brokers' specialist knowledge will allow them to focus on markets with certain risk appetites or specialisms according to the nature of the litigation risk. Brokers understand the best rates that are likely to be achieved from their review of the risk, thus reducing the costs and improving the efficiency of the placement process. Typically, brokers are able to use a combination of their market knowledge, technical arguments, auctioning, commercial weight and their existing business relationships in order to present the risk in the most persuasive manner and secure the most competitive price available. By way of example, in the Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and others [2024] CAT 47 (Related Costs Application) matter, WTW recently submitted evidence to the CAT demonstrating that the final ATE policy premia secured reflected an approximately 25% reduction from initial market indications as the result of our involvement.
- 3. **Product suitability:** All the ATE underwriters in the market provide policies on their own standard terms. Whilst these policies are broadly similar, they are complex documents using insurance and legal terminology. Similarly, all litigation risks are unique and bespoke terms and solutions are required to ensure that the policies are tailored to meet these specific requirements. Use of a broker will ensure that the TPF and by extension their clients have appropriate cover in place for their needs as well as a full understanding of the extent of the policy's coverage. Relying on specialist brokers for such assessments again, in turn, reduces TPF's administration costs in obtaining ATE insurance.



- 4. **Cost Efficiency:** In many instances, ATE insurance is not a simple case of one insurer providing cover, more often than not (due to individual insurers' limits of capacity for single risks, or their need to diversify their risk portfolios) insurance policies are provided by multiple insurers providing insurance either on a co-insurance basis or on multiple excess layers to provide an "insurance tower". Sufficient time and resources are required to negotiate such arrangements, which are most efficiently expended through the use of a specialist broker, again reducing the TPF's administration costs in obtaining ATE insurance. A similar point is also true in relation to case ongoing case management (e.g to obtain insurers' approval pursuant to the policy terms) and in a claims context (see below).
- 5. Disclosure and compliance with the Insurance Act 2015: The Insurance Act 2015 requires an Insured to make certain disclosures to an Insurer in order to make a fair presentation of a proposed risk. In practice this is often a complex question that can require detailed analysis, with the obligation continuing throughout the policy's duration. Brokers guide their funding client through the requirements and obligations under the Act, as well as assist in the information gathering and risk presentation process. Failure to comply with the duty of fair presentation can ultimately result in an ATE policy being voided without the need for the Insurer to return the insurance premium. Aside from the high wasted costs that this would entail, it could open the TPF / TPF's clients up to a large adverse costs liability should the litigation be unsuccessful (which in a policy avoidance situation is almost always the case).
- 6. Claims support: Litigation by its very nature is a risky business and there will always be a substantial chance that the case underlying an adverse costs policy may lose prompting a claim on the ATE policy by the Insured. Brokers have specialist claims advisory teams who can provide advice and support throughout the process, which can be complicated and time-consuming. In a similar manner to the placement of policies, brokers can use their specialist understanding of the policy, as well as their commercial weight and their existing business relationships to help remove any unfair or



unnecessary "reservations of rights" to ensure that an Insureds claim is fairly accepted and paid by the Insurer.

- 7. **Regulation:** The insurance industry and in turn brokers are highly regulated, having to comply with the FCA's Conduct of Business requirements for Insurers. Such regulation ensures that TPF and their clients have their rights protected and are getting the correct advice and service. As agents for TPF, brokers must put their clients' interests first in all dealings with Insurers. As a final layer of protection, a brokers' client will be protected by the broker's professional indemnity insurance should there ever be an issue with the advice provided or any coverage issues regarding an ATE policy.
- 8. Reduced Litigation Costs: There has been an increasing trend for the Court or CAT to examine the appropriateness of, or the scrutiny given to this analysis, (including by way of cross-examination - see Christine Riefa Class Representative Limited v Apple Inc. & Others [2025] CAT 5) a party's funding arrangements, including their adverse costs coverage. It is a necessary consideration for the CAT under Rule 78(2)(d) when certifying an opt-out claim; but it is also an issue that has come in front of the CAT in relation to the CAT's power to order damages pursuant to settlement agreements be paid to cover relevant costs, fees and disbursements of litigation stakeholders (for example, Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and others [2024] CAT 47 (Related Costs Application)). Issues that have arisen are as to the adequacy of the adverse cover secured and whether the premia secured reflects fair market value (particularly given the CAT has ruled that ATE Premia is not disclosable for reasons of commercial confidentiality (Case 1408/7/7/21- Elizabeth Helen Coll v Alphabet Inc and Others)). For the reasons given above, the investigation and determination of such issues by the Court and respective parties will be far more efficient and secure where regulated brokers are involved in the process. Regulated brokers will easily be able provide evidence in support of these issues, reducing the time and expense of the parties and the Court/CAT in dealing with them.

28 January 2025