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'

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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.

RESPONSE TO THE CIVIL JUSTICE COUNCIL'S REVIEW OF LITIGATION FUNDING CONSULTATION

Introduction

This is [redacted] response to the Civil Justice Council's Review of Litigation Funding Consultation (the "**Consultation**"). We have selected, and responded to, those questions from the Consultation which we consider to be most pertinent to our practice.

The Consultation provides that responses may be submitted anonymously and/or confidentially. We should be grateful if the content of this response is anonymised, such that it is not attributed to the firm. However, we wish for, and give you permission to include, the firm's name in the list of respondents to the Consultation.

Responses to selected questions

Q1 To what extent, if any, does third party funding currently secure effective access to justice?

Litigation funding is an indispensable resource. It allows claimants, who would not otherwise have the financial means, to bring civil claims for compensation. If litigation funding were to be stymied, and funders were dissuaded from participation in civil litigation, it would prejudice the ability of impecunious claimants to secure effective access to justice.

The availability of litigation funding also permits claimants who may be able to fund litigation but may be deterred from pursuing meritorious claims because of the associated cost, the option of relying on third-party funding in pursuing their claims. It can also, therefore, facilitate access to justice for well-resourced claimants.

Third-party litigation funding is particularly prevalent in competition litigation; indeed, the collective proceedings regime in the Competition Appeal Tribunal is reliant on third party litigation funding. This is for two principal reasons. First, collective proceedings are brought on behalf of a wide class of affected persons who are alleged to have suffered loss as a result of a competition law infringement. Opt-out collective proceedings are commonly brought without the participation (or even cognisance) of some members of the class. It would be entirely infeasible for such claims to be brought, if the costs of the proceedings were not funded by a third-party litigation funder. Secondly, the loss suffered by individual members of the class is frequently too low to merit an individual damages action, even if the affected person had the inclination and resources to pursue such a claim.

Q2 To what extent does third party funding promote equality of arms between parties to litigation?

Please see our response to question 1 above. Third-party litigation funding is essential in allowing impecunious claimants, or affected members of a class, to bring claims against well-resourced defendants. By way of illustration, the CJC will be aware that in the competition litigation sector, many collective proceedings have been filed against large, multi-national companies, such as Apple, Amazon, and Google, e.g., alleging that those companies have abused their dominant position in specified markets. Such claims would be wholly infeasible without recourse to third-party litigation funding.

Q4 Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding? If not, what improvements could be made to it?

The Code of Conduct for Litigation Funders (the "**Code**") sets out standards of practice and behaviour to be observed by litigation funders who are members of The Association of Litigation Funders of England and Wales ("**ALF**"). At present, compliance with the Code is not mandatory (although the Competition Appeal Tribunal has notably considered compliance with the Code in recent judgments in collective proceedings, regarding carriage and certification). We consider that if the CJC determines that litigation funding ought to be regulated, one option would be for compliance with (a version of) the Code to be made mandatory.

We propose below five modest reforms to the Code.

First, paragraph 9.1 of the Code states that a Funder will "*take reasonable steps to ensure 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*". We do not consider this to be sufficient, in circumstances where the litigation funding agreement ("**LFA**") will specify the circumstances in which solicitor(s) and barrister(s) with conduct of the proceedings are to be remunerated, for example whether they are to be paid in priority to the funded claimant (or class), such that there is a risk of an own-interest conflict. Litigation funders should be required to take reasonable steps to ensure that the funded party receives independent advice on the terms of the LFA prior to its execution, i.e., advice from a barrister or solicitor independent from those instructed on the underlying proceedings. This should include the obligation to fund the cost of that advice.

Secondly, paragraph 9.4.2 of the Code requires Funders to maintain access to a minimum of £5m of capital or such other amount as stipulated by ALF. In our view, this requirement in relation to capital adequacy is ambiguous. It may be read as applying either to each claim funded by a Funder (i.e. £5m per funded claim) or as an overarching requirement (i.e. £5m regardless of the number of funded claims). We therefore consider that the Code ought to clarify the application of any capital adequacy requirement. Furthermore, the Code ought to specify how Funders may demonstrate (where necessary) that they have the capacity to meet (i) all debts arising from their LFAs when they become due and payable; and (ii) fund all stages of any proceedings they have committed to fund.

Thirdly, whilst paragraph 13.1 of the Code provides that if a litigation funder terminates the LFA, the funder "*shall remain liable for all funding obligations accrued to the date of termination*" (save insofar as the termination is due to a material breach by the funded party), the Code does not impose any obligations on the Funder to cover costs incurred post-termination. If the LFA is terminated during ongoing litigation, then a funded claimant may be cut adrift, unable to fund the litigation to its conclusion, or explore alternative funding arrangements. In our view, the Code ought to require that where a litigation funder terminates an LFA during ongoing proceedings, it must cover reasonable costs incurred by the funded party in an application to stay the proceedings, provided such an application is made within a reasonable period post-termination. Such an application would, if successful, enable the funded

party time to explore the availability of replacement funding, and avoid a situation in which the cessation of funding automatically and irrevocably prejudices the litigation.

Fourthly, we consider that it should be a mandatory requirement for a litigation funder to provide (by way of indemnity) or procure (by way of ATE insurance policy) insurance against adverse costs liability for a funded party; save where a funded claimant elects to obtain its own insurance. Such insurance should extend to certain adverse costs liabilities that a funded claimant might incur following termination of an LFA; specifically, an adverse costs liability arising from (i) an unsuccessful, contested application for a stay of proceedings (provided such an application was made within a reasonable period following termination of the LFA); and/or (ii) the discontinuation of proceedings (provided the proceedings were discontinued within a reasonable period of the later of the termination of the LFA, the court dismissing the claimant's application for a stay, or the expiry of a stay ordered by the court). This would avoid a scenario where a funded claimant is liable for adverse costs incurred in discontinuing proceedings, after a funder has exercised its right to terminate the LFA (noting that a funder may terminate an LFA for its own commercial considerations, as opposed to any breach by the funded party).

Fifthly, we consider that where a funder and a funded party are in dispute as to either party's right to terminate the LFA, the dispute resolution procedure outlined in paragraph 13.2 of the Code should run its course prior to termination taking effect (i.e., it should apply ex-ante to the funder's right to terminate, rather than ex-post in relation to a termination that the funder claims has already taken effect). If the dispute resolution procedure is only engaged after the funder has already purported to exercise its right of termination, then that will have implications for the funding of the ongoing litigation, and potentially the funded party's adverse costs exposure, pending resolution of the dispute (because the funder may argue that its obligations to fund the proceedings and/or indemnify the funded party against adverse costs exposure ceased on termination of the LFA).

We would also note that whilst it is sometimes contended that third party funding allows for spurious claims to be litigated, which would not be litigated if the claimants concerned had to fund the costs of those proceedings, in our experience such concerns are ill-founded. Third party funders tend to exercise significant care and caution in electing to fund a claim. Litigation is a long-term investment, and funders tend rigorously to review the merits of any potential claim before committing capital. Further, the courts possess substantial case management powers to prevent spurious cases from progressing.

Q8 What is the relationship, if any, between third party funding and litigation costs? Further in this context:

[...]

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?.

Regarding question 8(e) it is necessary first to define what is meant by the "costs of litigation funding". Legal costs incurred by the solicitor(s) and barrister(s) with conduct of the action are, of course, litigation costs, and they will constitute the bulk of a funder's capital outlay.

At present, the "success fee" due to a funded claimant's legal representatives who are working under a conditional fee arrangement is paid out of the damages award, as is the funder's return. In the context of collective proceedings, treating any success fee and funder's return as litigation costs may mitigate the risk of the represented class being under-compensated, because those amounts would not be taken out of the aggregate damages award.

However, treating either as litigation costs would risk penalising defendants to funded claims. First, the potential for defendants to pay funder's returns may encourage funders to seek large uplifts on their investments. Secondly, the risk of paying not just ordinary legal costs, but also the funder's return, may encourage defendants to settle funded disputes even where they may have reasonably good prospects of defending the relevant claim against them. Thirdly, such a mechanism may unduly incentivise well-resourced claimants to seek third-party litigation funding (and third-party litigation funders to provide funding to such claimants); this may be at the detriment of impecunious claimants who require third-party funding to litigate. Treating any success fee and funder's return as litigation costs would appear particularly unjust where a claimant has elected to fund the claim through recourse to third-party funding, as opposed, for example, to collective proceedings, where third-party funding is a necessity.

If reform were to permit the success fee and funder's return to be treated as litigation costs, then we consider that recovery should not be mandated. Instead, the court should have a discretionary power to make such a costs order, taking into account all the relevant facts and circumstances. Factors which may feature in the exercise of the court's discretion could include, but not be limited to: whether the defendant has been given advance warning that it may be liable for the legal representatives' success fee and/or the funder's return by way of adverse costs liability; whether it was reasonable for the claimant to have recourse to third-party funding; whether the funder's return is deemed reasonable; and whether the conduct of the defendant justifies such an order. The last of these factors, in particular, could assist in discouraging defendants from engaging in vexatious or unreasonable behaviour (for example, unreasonably refusing to engage in settlement discussions). Such behaviour may escalate costs, thereby reducing the overall damages pot available to the claimant (or class) and increasing the risk of a conflict of interests between the claimant (or class) on the one hand and the funder and/or legal representatives on the other (particularly in the context of settlement and/or negotiating an increase in the funding budget).

Q9 What impact, if any, does the recoverability of adverse costs and/or security for costs have on access to justice? What impact, if any, do they have on the availability of third-party funding and/or other forms of litigation funding?

We consider that the recoverability of adverse costs does not, in and of itself, limit access to justice. The possibility of incurring adverse costs liability in this jurisdiction plays an important role in dissuading claimants from bringing spurious claims or seeking to use litigation as leverage to extract concessions from a defendant. There is a mature market for ATE insurance, and policies can be taken out by funded claimants, or by litigation funders for the benefit of funded claimants. A robust ATE policy, coupled with an appropriate anti-avoidance endorsement, is usually seen as a basis for defending an application for security for costs. In our experience adverse costs risk does not disincentivise funders from funding claims; it is simply part of the litigation risk priced by a funder at the inception of a claim.

As explained in response to question 4 above, we do consider that as part of any reform introduced by the CJC it ought to be made mandatory for litigation funders to provide or procure

insurance for funded claimants against adverse costs liability (save where a funded claimant elects to obtain its own insurance).

Q10 Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so, to what extent?

Yes, we consider that where a funder terminates an LFA during ongoing proceedings, it should be required to continue funding certain costs incurred post-termination; namely costs incurred by the funded party in seeking to stay the proceedings, to allow for replacement funding options to be explored, or discontinue the proceedings. Please see our response to question 4 above.

Q11 How do the courts and how does the third-party funding market currently control the pricing of third-party funding arrangements?

In collective proceedings, the Competition Appeal Tribunal is reluctant to venture into a commercial assessment of the terms of an LFA at the certification stage, save where those terms are "*sufficiently extreme to warrant calling out*" – see *Gormsen v Meta* [2024] CAT 11 and *Christine Riefa Class Representative Limited v Apple Inc., Amazon.com, Inc. & Ors* [2025] CAT 5. However, the Tribunal does closely scrutinise the terms of a funder's return in the context of an application for a collective settlement approval order, or in making a damages award at trial, to ensure the interests of the class are appropriately protected. This includes considering the level of the funder's return and whether it is reasonable for the funder to be paid out of undistributed damages – i.e., prior to distribution to the class.

Solicitors and funders may agree terms with the class representative in a particular case, but ultimately the payment of costs and expenses is subject to the approval of the Tribunal, which must balance the interests of class members and stakeholders, whilst also bearing in mind the importance of having a workable collective proceedings regime. The scrutiny paid by the Tribunal to funding arrangements is a powerful disincentive for a funder to negotiate a return in an LFA which is outside of the commercial norm.

Outside of the context of collective proceedings, courts exert less control over parties' funding arrangements.

Q12 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?

A funder's return on a given case cannot be considered in isolation. As Hodge Malek KC recognised in *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd & Ors* [2024] CAT 47, "[f]*unders work on a portfolio basis recognising that they may lose some actions, but in others they may do well such that as a minimum they make a reasonable rate of return*". Litigation is inherently unpredictable, and even cases which are considered highly meritorious when proceedings are incepted may fail or may deliver a level of damages far below what was initially anticipated. The return that a funder stands to earn on a given case cannot be abstracted from the funder's overall portfolio and the associated litigation risk.

In our view this makes introducing a fixed cap on a funder's return challenging. The unintentional consequence may be to dissuade funders from funding claims on which the merits

are less certain (including claims that may raise novel issues, and require innovative arguments), because they may not feel able to price the risk as required. Such an outcome would also be contrary to the promotion of access to justice – while a fixed cap could theoretically provide higher returns to class members, it may preclude other claims from being brought.

One area in which greater flexibility could be introduced, without imposing a cap on funders' returns, would be to introduce legislation to reverse the Supreme Court's decision in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28. By effectively removing the option of funders taking a percentage share of the damages awarded in the litigation, the Supreme Court's decision in *PACCAR* imposed a significant restriction on funding options. Funders now have no alternative but to price their returns as a multiple of committed (or drawn) capital. Under a percentage share of damages model, there is a clear alignment of interests of the funder and the claimant (or class), because the greater the overall damages award, the greater the funder's return. This is not the case, at least to the same extent, under a multiple return on capital model.

Q19 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?

In our view, reform is required to ensure funded litigants are protected if a third-party funder elects to withdraw funding. In many cases, third-party funders will not provide funding unless they are able to take out ATE insurance. However, it is not compulsory for a funder (or litigant) to obtain ATE insurance, and litigants sometimes rely on an indemnity against adverse costs liability provided by the funder. Therefore, a funded litigant can be exposed to adverse costs liability where a funder terminates an LFA. We have suggested some proposals for reform in our response to question 4 above.

Q28 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?

In most cases, under the terms of third-party funding arrangements, funders are entitled to be kept informed of material developments in a case and to regular reports on the litigation. Funded litigants are also generally required to set out the basis of any request for additional funding, for approval by the funder. Funders will generally be consulted on, and may have input on, strategic decisions relating to the conduct of the litigation. However, they should not, and in our experience do not, seek to exert control over the conduct of the litigation.

Q34 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?

There are certain points within litigation where there is a recognised risk of a conflict of interest between funded claimants and their legal representatives and/or third-party funders.

One such juncture, which we have discussed in our response to question 4 above, concerns the terms of the LFA; it is important for the funded claimant to receive independent advice on the terms of that agreement. Another stage at which a conflict may arise concerns settlement. The Code provides that if there is a dispute between the funder and the funded party about settlement, a binding opinion shall be obtained from a KC, who shall be instructed jointly or nominated by the Chairman of the Bar Council. In our experience, it is common for a term to this effect to be included in the LFA.

Q35 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.

We have suggested in response to question 4 above some reforms that we consider would assist in addressing the risk of conflicts of interest, including the imposition of an obligation on a litigation funder to take reasonable steps to ensure that the funded party receives independent advice on the terms of the LFA prior to its execution, which should extend to an obligation to fund the cost of that advice.