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:

[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
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[redacted]	[redacted]

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.

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CJC Review of Litigation Funding

<u>Preliminary note:</u>

For clarity, we have worked with external counsel in preparation of our responses below. We have identified at appropriate points throughout where we reference our own first-hand experience to support our views.

Question 1

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

<u>Response:</u>

1 Whilst third-party funding (**TPF**) can and does contribute towards the promotion of access to justice, we consider that it does not currently "*secure effective access to justice*" to any meaningful extent. In its current unregulated form (we do not consider that self-regulation by the Association of Litigation Funder (**ALF**) is working or is likely to work in the future), TPF has had material adverse consequences for claimants in claims we have had to defend (which we refer to in our answers below), with claimants frequently left in a mis-informed position (resulting from large scale advertising) as to the true nature of the commercial arrangements they are signing up to, the share of potential damages the funder would take (at their expense) if their claim was successful, the control over the litigation they are ceding to the funder or their adverse costs risk. It is our experience that the advertising of funded claims we defend leads prospective claimants to believe they are signing up to claims which are a one way bet with no downside.

2 We make the following high-level points (some of which are expanded upon in responses to subsequent questions), but our over-arching concern is that the current TPF regime does not strike the right balance for all concerned or the wider economy.

3 Access to justice concerns not only (i) the ability of claimant parties to bring claims before the Courts, but also (and amongst other things) (ii) their ability to secure appropriate remedies/levels of compensation and (iii) the ability of defendants to defend and/or to compromise such claims. A better terminology might be whether TPF "*secures effective access to <u>and promotes quality of</u> justice*".

3.1 As regards (i), the contribution that TPF makes towards the ability of claimants to bring claims is limited to the extent that such claimants could not reasonably have pursued their claims from their own resources in any event or where no resources would have been required in any event (as was the case in *Smyth v British Airways & anor*[1]). While this ought in theory to be very rare, the pursuit of very weak or totally without merit claims funded by TPF obviously has no positive impact on access to justice and indeed detracts from it, including by diverting the Court's time and resources away from other Court users. Whilst a defendant has the remedy of applying for summary judgment or strike out, by the time that such applications can be made significant time, resource and costs have often already been incurred.

3.2 As regards (ii), where a claimant receives compensation, in any amount, in a dispute which could not otherwise have been pursued without TPF, TPF might be said to have made a material contribution towards the ability to secure a remedy and compensation. This must again be viewed in the overall context, including whether the

[1] Smyth v British Airways Plc & Anor [2024] EWHC 2173 (KB) (02 September 2024)

compensation actually received after the funder is repaid represents adequate redress for the harm suffered (compared to the hypothetical scenario where the claimant was able to progress their claim without the involvement of TPF – i.e. is the use of TPF 'worth it' for the claimant?) and the level of control the claimant has been able to exercise over the conduct (and any settlement) of their claim.

3.3 As regards (iii), we are concerned that the involvement of TPF (whatever model is adopted) can have an inhibitive or even prohibitive effect on the ability of defendants to defend and/or the parties to compromise claims. This in turn can also have negative impacts for funded claimants.

3.3.1 While the involvement of TPF has no effect on the legal merits of a claim, or on the duties which solicitors owe to their clients and to the Court, it does nonetheless introduce an additional line of influence (depending on the precise terms of the funding arrangements) on how the claim is pursued and/or compromised. As a matter of economic reality, that influence is driven solely by the funder's commercial interest and, to an extent depending on the funding model, that of the solicitors.

3.3.2 There is a risk that claims backed by TPF are pursued in a more aggressive and/or unreasonable manner, with settlement negotiations more protracted, than might otherwise have been the case where a claimant funds a claim from their own resources. This could have the effect of increasing costs unnecessarily on all sides which in turn would either make it more expensive than it might have been for defendants to obtain summary disposal of claims which have no realistic prospect of success (and increase any resultant adverse costs order against the claimants), or delay and reduce any compensation which claimants might ultimately receive after the funder is repaid.

4 More generally, as noted in the March 2024 report submitted to the Legal Services Board (the **Mulheron report**), "*litigation funders carefully choose a minority of cases (between 3% and 5% of funding opportunities), which means that litigation funding is not a solution that could be scaled up to provide access to justice to a large proportion of the population across a wide range of subject matters, types of grievances, and value of claims*".

4.1 While we do not know what percentage of cases are (rightly) declined on the grounds of poor merits, it seems a reasonably safe assumption that there is a material percentage of potential claims which had reasonable or good prospects of success, but which were declined on purely economic grounds as not presenting a sufficiently attractive investment proposition to the funder(s) they were considered by.

4.2 That is the funder's prerogative, however it illustrates the fundamental point made by Tomlinson LJ in *Excalibur v Texas Keystone*[2], reiterated by Popplewell LJ in *Rowe & ors v Ingenious Media Holdings Plc & ors*[3], that "*commercial funders are not motivated by considerations of access to justice, although the facilitation of access to justice **may** be an incidental by-product*" (emphasis added). While a potential, incidental by-product at best, for the reasons explained above, in some instances we consider that TPF can actually work against the securing of access to effective and quality justice.

4.3 We acknowledge the inevitability of market forces, but we do not consider it can be said that TPF helps to secure effective access to justice across the jurisdiction where only those (very few) funding opportunities which present a sufficiently attractive investment proposition are taken forward. As explained further below in our response to Question 5, we are also concerned that, even within the small percentage of funding opportunities which are progressed, there remain a significant proportion of unmeritorious claims.

5 Finally, we also have concerns about how TPF backed group claims and class actions are advertised to consumers via multiple channels (including via text messages, Facebook, Instagram and TikTok, and TV, radio and media (both print and non-print) advertising) on an

[2] Excalibur Ventures LLC v Texas Keystone Inc & Ors [2016] EWCA Civ 1144 (18 November 2016)
[3] Rowe & Ors v Ingenious Media Holdings PLC & Ors [2021] EWCA Civ 29 (15 January 2021)

unsolicited basis. As developed in our responses below, what is effectively being advertised is a financial promotion with a guaranteed payout and with no mention of potential downsides (such as adverse costs) or commercial terms, when they are in fact cases at an early pre-action stage in respect of claims which are often novel or untested. That does not promote quality of access to justice and potentially has the opposite effect of tarnishing the reputation of lawyers (as a general body) and the civil justice system in the eyes of consumers.

Question 2

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

Response:

1 The extent to which TPF promotes equality of arms between parties to litigation, if at all, varies in each case. It may also range from a very clear and positive promotion of equality of arms, to exacerbating (or at least solidifying) an existing inequality.

2 It has been widely noted, including in the Civil Justice Council's interim report in the present consultation (the **Interim Report**), that the ALF Code of Conduct does not make any provision for TPF only to be provided where it can facilitate access to justice and/or equality of arms. It is therefore open to corporate (or indeed wealthy individual) parties to seek TPF (whether the funder is a member of the ALF or not) to avoid having to expend their own financial resources. While this may be for entirely reasonable and justifiable commercial reasons, to the extent that party did already have sufficient resources to deal with the litigation we do not consider that the provision of TPF to them can be said to promote equality of arms. This is particularly the case where TPF is not readily available to defendants for the obvious reason that funders' business models cannot be made to work in reverse (i.e. there is no potential "pot" for funders to be repaid from if the defendant is successful).

3 Where (as noted by the Mulheron report) TPF is commonly deployed in group/class actions concerning broad consumer interests and influencing consumer markets (thereby affecting a significant proportion of the general population), against very large corporate entities, we acknowledge the argument that TPF has contributed to the promotion of equality of arms. Against this, it should be noted that, in some instances, a funder's budget for the litigation will far exceed the corporate defendant's, in which case an apparent inequality of arms is reversed[4]. Further, where a funder's sole purpose is to maximise the return on their investment and so they are less concerned about the level of costs being incurred, corporate defendants to large litigations are forced to channel significant resources away from their core business which might otherwise be invested in new or improved products and services, to the overall detriment to both consumers and the wider UK economy.

Question 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;**
- **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**

[4] While we do not know how the total sum was allocated across the firm's cases (a further issue we return to in our response to Question 9), see for example Gramercy's £450m of funding provided to Pogust Goodhead - Pogust Goodhead receives $450M in largest litigation funding deal - Pogust Goodhead)

be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.

Response:

Encouragement of unmeritorious and/or poorly conducted litigation

1 We recognise that the commencement of entirely unmeritorious and/or poorly conducted litigation is, unfortunately, a risk that has and will always exist in the civil justice system, and various remedies are available to defendants facing such litigation. We also acknowledge that larger and more established funders (who may or may not be members of the ALF) generally retain significant legal expertise on their investment committees and are therefore generally less likely to back unmeritorious litigation (or perhaps be swayed by over-optimistic claimant lawyers)[5]. Nonetheless we are concerned that the availability of TPF, combined with a lack of regulation, has increased the prevalence of unmeritorious and often very large-scale claims being brought, commonly backed by smaller or less established funders. Such claims appear to be driven by purely commercial factors, including for example a belief that by claimants, or more likely their funders and legal teams, simply applying scale, pressure and/or aggressive litigation tactics, defendants will prefer to settle rather than defend – irrespective of the claims' merits. For defendants who seek summary disposal of unmeritorious claims, a very significant time and cost commitment is still required to get to that point. Those costs are unlikely to be fully recoverable, and may be to the significant detriment of their other business activities: funds required to invest in growth and innovation are diverted elsewhere. Aside from the harm to businesses (and, potentially, entire industries), unmeritorious and/or poorly conducted litigation also wastes the Court's time and resources, diverts that from other Court users, and fails the claimants it professes to serve.

2 We of course acknowledge the conclusion of the Mulheron report that funders *tend* only to take on claims that have reasonable prospects of success; however, this is not an absolute position, particularly if a funder forms a belief that defendants will look to settle proceedings on purely commercial grounds, simply because of the scale of a claim they are facing. Such a belief can encourage the pursuit of unmeritorious and poorly-structured claims.

2.1 For example, a recent attempt to bring a funded representative action under CPR r.19.8 against two airlines in respect of delayed flights[6], for which a free and easily accessible compensation scheme already existed, would (had it proceeded), on what was understood of the funding arrangements, have resulted in "*a sum in excess of £70 million available for payment to what might loosely be called the claimant's "team"*" (i.e. lawyer and funder).

2.2 The High Court had little hesitation in striking the claim out on both jurisdictional and discretionary grounds, but harms to the defendants remained. In order to achieve strike-out, the two Defendants had been obliged to engage with the claim since at least January 2023 (when it was issued), instruct legal teams, make their application and attend a 2-day hearing in July 2024, at significant cost[7]. We believe it is inconceivable that such a claim would have been seriously contemplated, much less pursued, but for the commercial motivations of the funder.

2.3 The Court appeared to share this view: "*as a matter of discretion, I would not allow the claim to go forward as a representative action because the dominant motive for it lies in the financial interests of its backers, principally Mr Armour, and not the interests of consumers*"[8]. The judgment also stated: "*That motive has translated into a proposed deduction from the compensation available to each represented party which is excessive*

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[5] Indeed the Mulheron report notes (at page 36) that "*The rate of cases funded, as a fraction of the cases which are pitched to funders as being 'meritorious', is extraordinarily low*" and one funder was quoted as attributing this to the pitching law firms taking "*an overly optimistic view about everything*".

[6] Smyth v British Airways plc & anor [2024] EWHC 2173 (KB)

[7] The claimants provided security for the defendants' costs in the sum of £800,000, indicating the level of expenditure required to defend claims of this kind.

[8] [2024] EWHC 2173 (KB) at [27].

and disproportionate"[9]. We note the judgment striking out this case was handed down some months after the Mulheron report was published.

3 We have experience of the harmful consequences of poorly-conducted litigation in very large group claims concerning motor finance commissions. We list below some (non-exhaustive) examples of poor conduct in those cases. While these issues are primarily the fault of the claimants' legal representatives, the volume model adopted by such firms – with backing from funders – appears to encourage or even require the use of inexperienced paralegals with inadequate supervision by properly experienced lawyers. This produces the potential for wasted costs and inefficiency in the conduct of the litigation.

3.1 Particulars of Claim are often generic (NB not on a Court-ordered basis) and often contain clear and obvious errors (for instance, pleading breaches of regulations which were not in place at the relevant time).

3.2 Witness statements also appear to be produced generically from templates, to the extent that they sometimes contain blanks and/or sections marked as "[to complete]" even when served.

3.3 Multiple claims are often issued on behalf of the same claimant resulting in duplication of effort and costs, increased disbursements (Court and Counsel's fees) and a waste of court time.

3.4 Following allocation of claims to the Small Claims Track, applications are then often issued by claimants seeking, in our view inappropriately or at best unnecessarily, reallocation to the Fast Track. The applications incur further costs for each party in attending the hearing, the sole purpose of which appears to be to maximise the potential for the claimant firm's cost recovery. That increases litigation risk for the claimant.

3.5 Bulk claims are issued without consideration for operational resource, resulting in multiple procedural failings and relief from sanctions applications. This places the claimant at risk as to strike out of their claim (if relief is not granted) and wastes court time and the costs of both parties in having to attend the hearing of each application.

4 The wholesale adoption by some claimant law firms of this high-volume funder-backed model has led to some very poor outcomes for their clients (and staff). In 2024 alone, both SSB Law and McDermott Smith Law went into administration, and BPS Solicitors was intervened, leading to a complete breakdown of service provision and in some cases costs orders against claimants personally on non-attendance at hearings. Some of these costs orders have been reported to credit reference agencies resulting in negative outcomes on claimant credit profiles. It has been reported in the legal press (see for example here and here) that both SSB and McDermott Smith were 'backed' by litigation funder Katch Fund Solutions and, of particular note here, that the administrators of McDermott Smith were appointed by one of the firm's other lenders, litigation funder Fenchurch Legal. Many McDermott Smith staff reportedly transferred to BPS Solicitors, only for the latter to be intervened by the Solicitors Regulation Authority shortly afterwards. Since the interventions, former clients of McDermott Smith and BPS Solicitors have reported the following to our legal representatives:

4.1 Being pressured into signing up with the firm, having not instigated the contact themselves.

4.2 Having no understanding that a court claim was being issued and that they would have to attend trial.

4.3 That they were not kept updated and couldn't get hold of either firm by phone or email.

4.4 Not being given notice of hearing dates.

[9] [2024] EWHC 2173 (KB) at [27].

4.5 Over inflated claim values leading to claimants feeling misled about the amount they might actually recover.

4.6 Having engagement letters which refer to the fact that ATE insurance will be taken out but none of the claimants have been able to locate a copy of the policy.

4.7 Distress and anxiety with one claimant being signed off work through stress directly caused by the litigation.

5 Whilst such conduct is an issue primarily for the Solicitors Regulation Authority, we consider these examples to be symptomatic of the high-volume low-cost approach favoured and facilitated by litigation funders, with scant regard for the interests of the funded clients and/or law firms, the reputation of the legal profession, or the administration of justice. This is our lived reality as a defendant to various TPF-backed claims – we note that claimants who have brought claims against us have in many cases been very badly treated by the law firms who act for them, likely adding to their sense of overall grievance.

6 In relation to the excessive costs which TPF-funded litigation can inflict on a defendant, we have direct experience from the diesel NOx emissions group claim. Proceedings were commenced in 2021. Trials are expected to go on through to the end of 2026 and potentially beyond in order to reach final determination. We incurred costs of more than £11M in the period from receiving the Letter of Claim in August 2021 to the Costs and Case Management Conference in July 2024. Such costs do not take into account the significant additional (and irrecoverable) internal cost of management time or the costs of maintaining document preservation holds.

7 We would also highlight the 5 July 2024 judgment from the Costs and Case Management Conference in the Pan-NOx litigation[10] of which we were a party as demonstrating the relationship between litigation funding, inefficient conduct and excessive costs.

7.1 At [36] it was noted by the judge that "*the Claimants' approach to budgeting* [the claimants' solicitors had said their costs were £3.65M for the budgeting process alone] *is redolent of financial incontinence*" and that it "*may be that this approach is driven by the overall model of this group litigation in which the traditional downward pressure imposed by a client on their lawyers is lacking in the overall funding model*".

7.2 The judgment draws on numerous examples of the "*frankly absurd*" and "*wholly unreasonable*" costs budgeted for by the Claimants, concluding that (amongst other things) "*such enormous numbers* [of hours] *could only be generated by wildly inefficient resourcing*". As a result, the claimants' proposed cost budget was reduced by the Court from £207M to just £51M. The claimants had incurred £135M at this stage, a figure described in the judgment as "*eye-watering*" [59]. The defendants, on the other hand, had incurred £95M in costs, as a group, to the point of the CCMC, and had a budget approved of £114M. These huge sums cover only the costs required to deal with two tranches of issues rather than to get to a final resolution of the claims. Mr Justice Constable estimated that the trials scheduled to conclude at the end of 2026 represented "*somewhere around 33% progression*" through the claims if every issue between the parties had to be resolved at trial.

7.3 We consider that this judgment is a prime illustration of the risk that TPF can be to the detriment of effective and efficient administration of justice if it is not properly regulated. The incurring of those costs was made possible, in our view, as a direct result of TPF. In those circumstances, claimant firms are weakly incentivised to control their costs appropriately: the costs are paid by a funder and adverse costs risk may be covered by ATE insurance. Controls in the form of costs budgeting provide some protection, but have little if any effect on costs incurred prior to the budgeting process which can be substantial. In our view, more fundamental protections against excessive incurring of costs are urgently required.

[10] [2024] EWHC 1728 (KB)

8 In short, we consider that the current voluntary self-regulatory regime fails to address or mitigate the risks involved. While a funder naturally would not be inclined to fund a claim it does not believe it will make a return on, as discussed above this does not necessarily equate to an assessment that the claim has good or even reasonable merits on a strict legal basis. The ALF Code of Conduct does not make any provision for a process for assessing legal merits and/or setting a 'baseline'; it merely states that a funding agreement must explain whether/how the funder may terminate a funding agreement if it "*reasonably ceases to be satisfied about the merits of the dispute*". This does not deal with the preliminary issue of trying to ensure that only claims with reasonable (or better) legal merits are commenced in the first place. Effectively, funders may exploit businesses' reluctance to face even a low level of litigation risk in circumstances where claims are advanced on a very large scale (and thus generate potentially significant financial risk). Instead, the Code leaves the door open to a funder to withdraw support part-way through proceedings once it becomes clear that a claim is likely to be defended successfully. Such outcomes may have been entirely avoidable had a more realistic assessment of the merits been undertaken at the outset. For example, we refer to the 'Primodos' litigation noted further below.

9 One way of addressing this risk is through industry-wide regulation to discourage the pursuit of unmeritorious claims. We discuss the best practices that we consider should underpin regulation in more detail in our response to Question 7. For the purposes of this response, we consider that the regulatory arrangements should include a requirement to the effect that, before issuing a Claim Form in a funded claim, both the solicitors acting for the claimant(s) and a KC engaged by the funder (whether as a standing member of its investment committee or otherwise) provide a certification to the regulator that they have assessed the legal merits of the case as being 50% or greater and to confirm to the other party/ies to the claim that they have done so. To the extent that funded parties, their advisers and funders are already undertaking serious assessments of the legal merits of a case, this should not place any additional burden upon them. It may also be appropriate to include a similar requirement prior to any substantive correspondence under an applicable Pre-action Protocol (since a defendant may be put to very substantial cost even prior to proceedings being issued), and to provide an updated certification following the conclusion of pre-action correspondence and prior to the issue of proceedings, reflecting the fact that the assessment of merits may have changed as a result of pre-action exchanges. In addition to reducing the chances of unmeritorious litigation being backed by funders, this measure also ought to improve the quality of the TPF market as a whole, and reduce some of the other harms that flow from unmeritorious litigation being pursued as identified above. Broadly speaking (although not without exceptions), a more meritorious claim should be more capable of being pursued efficiently and at proportionate cost.

Harms to unsophisticated claimants

10 We are concerned that unregulated TPF can result in claimants (particularly unsophisticated and/or vulnerable claimants) being exploited for the funder's commercial gain, to the detriment of the claimant(s). This arises through the imbalance in bargaining power which may result in claimants agreeing to unfavourable funding terms – particularly as regards how returns are distributed. We emphasise again that we consider TPF has a role to play in promoting access to justice. As discussed in our response to Question 1, however, in the current environment there may be circumstances where a claimant receives minimal compensation despite a 'successful' outcome overall, and comparatively very substantial returns to the funder, which gives rise to serious doubts as to whether that claimant has truly benefitted from access to 'justice'. Claimants have limited bargaining power in any circumstances where they depend on funding to commence and pursue their claims. In such circumstances, they may be forced to accept terms which leave them with a relatively small share of returns[11]: for some, the alternative is to bring no claim.

11 A well-known example is that of the 2019 settlement in *Bates v Post Office* in which the post masters received c£22,000 each (£11.7m between 555 class members) while the funder

[11] Claimant firm's fees may take between 40% and 50% of the damages recovered, and some also require a contribution to the costs of obtaining ATE insurance coverage.

made a profit of £24m (a return of 41%)[12]. This relatively inequitable share of returns in part led to the Government setting up the taxpayer-funded GLO Compensation Scheme to address the "unequal treatment" of the GLO claimants as against their non-GLO peers who received compensation from the Post Office via the Historical Shortfall Scheme[13]. It is clearly undesirable for the taxpayer to be required, in effect, to subsidise funders' profits; without controls on funder activity, there is a risk that similar situations may recur.

12 The argument that without litigation funding the claims could not have been brought has its limits. The power wielded by a funder with substantial financial resources should not enable it, unchecked, to adopt a 'take it or leave it' approach to negotiations with the claimants whose cases it is funding, no matter the level of funding committed. While wealthier claimants[14] may have a reasonably strong bargaining position in the sense that they could take over funding of the litigation, less affluent claimants (and particularly unsophisticated and/or vulnerable individuals), even in very large numbers, do not. It is a particular irony that this dynamic may exist in circumstances where the case concerns – as funded cases often do – the protection of consumer rights.

13 Equally, funders should not be able to force the continuation of litigation if the funded party wishes to compromise it (subject to the terms of the funding agreement). The recent reports of a dispute between Sir Walter Merricks CBE as class representative in the Mastercard CAT litigation and the funder, Innsworth, vividly illustrate the potential for satellite disputes between funders and claimants, and abuse of a dominant position. In particular, as part of the settlement agreed between Merricks and Mastercard (now approved by the CAT), it has been reported that Mastercard have agreed to fund Merricks' costs in defending an intended arbitration claim against him by Innsworth (this despite Innsworth reportedly receiving a more than 100% return on the amount they funded from the underlying settlement) Disputes between funders and claimants, such as the dispute between Therium Litigation Funding and Bugsby Property LLC[15], represent yet further demands on the Court's limited resources.

14 We do not consider that the current voluntary self-regulatory regime sufficiently addresses these risks and harms. It is noted the ALF Code of Conduct provides (amongst other things) that:

14.1 a Funder will "*take reasonable steps to ensure that the Funded Party shall have received independent legal advice on the terms of the LFA* [Litigation Funding Agreement] *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*" (9.1); and

14.2 If under the terms of the LFA the funder is permitted to "*provide input to the* [Funded] *Party's decisions in relation to settlements*" (11.1), then in the event of a dispute about settlement, "*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*" (13.2) (similarly to a determination as to whether an insurer may rely on a 'fraud exception' clause in a professional indemnity insurance contract).

15 While both these provisions are ostensibly helpful, their real impact is questionable:

15.1 Clearly, only members of the ALF commit to complying with these provisions. There is no obvious penalty or sanction to them not doing so however.

15.2 It is entirely unsatisfactory that the 'independent' legal advice provided to the Funded Party on the terms of the LFA should come from the solicitor or barrister instructed in

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[12] As the government has said: "Much of the agreed GLO settlement monies went to the firm which funded the litigation, leaving those postmasters worse off than their peers".

[13] We acknowledge the point made in the Mulheron report at 102-103 as to the inaccurate media reporting around the settlement. However even on the accurate figures contained in the report's helpful breakdown the contrast is stark.

[14] We understand that some businesses may choose to use litigation funding, instead of committing their own funds to litigation, as a means of moving litigation off their balance sheets. It may be appropriate to distinguish between the restrictions applicable to such claimants, and those who obtain litigation funding out of necessity.

[15] Therium Litigation Funding A IC v Bugsby Property LLC [2023] EWHC 2627 (Comm).

the dispute. At the very least, as such lawyers stand to benefit from the funding, there is a clear risk of, if not actual, conflict of interest.

15.3 While we consider that the 'KC clause' is broadly appropriate, its utility really depends on when it can be said that "*there is a dispute*" which in turn depends on the level of control afforded to the various stakeholders in the first place as part of the terms of the LFA. As noted above, the Code refers to the Funder "[providing] *input to the* [Funded] *Party's decisions in relation to settlements*". The extent of this "*input*" may vary very significantly, and in some instances may take matters largely out of the claimants' hands in any event, thus precluding a "*dispute*" arising. There is also the issue of who pays for the opinion in circumstances where the instruction is a joint one. If the funded party could not afford its share of the fees, it may be discouraged – or at worst precluded – from raising concerns around settlement. Funded claimants (particularly consumers) must be better protected and empowered to have true command of the cases being run in their names.

16 Again, one way of addressing this risk is through industry-wide regulation, and we discuss the best practices that we consider should underpin regulation in more detail in our response to Question 7. For the purposes of this response, however, we consider that there should be a requirement to the effect that entirely independent legal advice is provided to the funded party (paid for by the funder) on (i) the funding terms and rights of control in the litigation; (ii) the share of damages the funder will take and that the claimant can expect in relation to damages as a result of the funding terms; (iii) merits of the case and the probable times scales and the extent to which the claimant may be required to be involved in the proceedings; and (iv) ATE cover and potential personal adverse costs liability. Some form of certification of this should be provided to the regulator before the LFA is entered into.

17 A cap on returns to funders as a percentage of total recoveries is needed also, so as to prevent situations like those recently experienced by the postmasters. In addition to ensuring that returns to claimants are fairer, such a cap would also encourage funders to focus on more meritorious claims where the likelihood of returns is greater. It may also require claimant law firms to conduct litigation more efficiently and effectively if a funder needs to have greater scrutiny on the costs being incurred to ensure it still achieves a commercial return on its funding.

Misinformation around likely recoveries, funding arrangements and liability for legal costs from TPF backed claims advertising

18 This overlaps with our concerns around the encouragement of unmeritorious litigation and exploitation of unsophisticated claimants but is a significant issue in its own right. While not a 'pure' funding issue, we consider how consumer rights claims are advertised goes hand in hand with the expansion of the litigation funding market in risky and potentially harmful ways. We highlight and endorse the contents of Fair Civil Justice's (**FCJ's**) December 2023 report "Claimant law firm advertising in the United Kingdom" which found that (as summarised by the FCJ):

- Consumers are increasingly exposed to widespread and targeted adverts, particularly from claimant law firms, which consistently understate and conceal the risks of litigation, while overstating potential.

- The number of specialist claimant law firms, sophistication of litigation funders, technological advances, lack of pre-contractual information, and increases in class action mechanisms are spiking a trend resulting in an increased number of claims.

- The UK's regulatory framework has not kept pace with the latest trends and, as a result, there are gaps in the regulatory environment.

19 Four case studies identified in the report found that (again as summarised by the FCJ):

- 5,800 claimants thought they were litigating "risk free" in the case of Sharp v Blank – a claim on behalf of a large group of shareholders in Lloyds TSB against five former directors of Lloyds seeking damages of £385m concerning the role of those directors in Lloyds' 2008 takeover of HBOS plc – but that was not the case. In fact, the court ruled that the claimants were in-principle liable for the defendants' legal costs.

- Consumers received much lower compensation than was suggested in the aftermath of the 2018 cyberattack on British Airways when 400,000 customers' data was compromised or stolen. Advertising by the claimant law firm suggested recoveries of up to £2,000 per consumer, but when a consumer expressed dissatisfaction online at receiving a much lower payout than was suggested (£130), the claimant law firm insisted that their client remove these comments because the settlement agreement was confidential.

- Claimants were left unrepresented and liable for defendants' costs when the claimant law firm discontinued acting for them in 2022 following the funder withdrawing funding for what was understood to be commercial reasons. The claimants pursuing these proceedings were women (and on behalf of children) who suffered injuries alleged as a result of taking a hormone-based pregnancy test, Primodos, which was widely used in the UK in the 1960s and '70s until it was withdrawn from the market in 1978.

- In a case against Uber over the employment status of their drivers, claimants were onboarded onto claims without their knowledge. The claimant law firm then approached Uber directly for compensation, purportedly on behalf of the drivers, taking their fee in the process. When Uber sought to make direct contact with its drivers to settle in full, the law firm said it would apply a "termination fee" to a driver looking to disinstruct the firm.

20 From our own direct experience, although the relevant period to sign up to the register for the diesel emissions GLO has long since passed, advertisements encouraging individuals to get in contact with claims firms to sign up remain prominent. Such adverts also suggest potential damages payments that are far greater than are realistic on any view (and make no reference to the fact that liability is denied by the targeted defendants).

21 In terms of addressing this issue, we also endorse the FCJ's proposals, in particular that:

21.1 The regulation of legal advertising should be standardised across the sector, rather than different regulations applying to SRA-regulated law firms and to FCA-regulated claims management companies (**CMC**s). By the same token, any advertising by, or on behalf of, a litigation funder (and any other parties promoting sign-up to a claim) itself should be brought within the regulatory perimeter and treated as a financial promotion.

21.2 There should be stricter regulation around the use of the term 'no win, no fee' such that the same prescriptive rules that currently only apply to CMCs also apply to law firms and litigation funders.

21.3 As what is being promoted is, essentially, a financial product (the provision of funding and protection against downside risk in the form of ATE insurance), we consider that any advertising of litigation funding backed litigation should comply with chapter 3 of the FCA's Consumer Credit (CONC) Sourcebook, or be subject to similar requirements. Adverts should, as a minimum, state the name of the law firm, funder, the level or percentage of any damages the funder expects to receive if the claim is successful, the fact that the claim may not be successful, and that participants may incur personal costs liability.

21.4 By way of illustration the existing provisions of CONC 3 may be adopted in largely the same form, e.g.:

(1) A firm [to be defined as encompassing solicitors' firms, claims management companies and/or litigation funders] must ensure that a relevant communication or claim promotion is clear, fair, and not misleading.

(1A) A firm must ensure that each relevant communication and claim promotion:

(a) *is clearly identifiable as such;*
(b) *is accurate;*
(c) *is balanced and, in particular, does not emphasise any potential benefits of participating in the claim (such as the amount of damages that may potentially be received by the claimant) without also giving a fair and prominent indication of any relevant risks (such as the fact that the claim may not be successful, and/or that the claimant may incur personal costs liability);*
(d) *is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to which it is directed, or by which it is likely to be received; and*
(e) *does not disguise, omit, diminish or obscure important information, statements or warnings.*

(1B) *A firm must ensure that, where a relevant communication or claim promotion contains a comparison or contrast, the comparison or contrast is presented in a fair and balanced way and is meaningful.*

(2) *If, for a particular relevant communication or claim promotion, a firm takes reasonable steps to ensure it complies with (1), (1A) and (1B), a contravention does not give rise to a right of action under s.138D of the Financial Services and Markets Act 2000.*

(3) *A firm must ensure that a relevant communication or a claim promotion:*

(a) *uses plain and intelligible language;*
(b) *is easily legible (or, in the case of any information given orally, clearly audible);*
(c) *specifies the name of the firm making the communication or communicating the claim promotion or the person on whose behalf the claim promotion is made, as well as any other firm involved in the conduct of the claim being promoted.*

(4) *When communicating information, a firm should consider whether omission of any relevant fact will result in information given to the consumer being insufficient, unclear, unfair or misleading.*

(5) *Examples of practices that are likely to contravene the clear, fair and not misleading rule above include:*

(a) *stating or implying that a firm is regulated by the Solicitors Regulation Authority or [proposed new litigation funding authority] (where this is not the case);*
(b) *misleading a consumer as to legal merits of the claim being promoted, the terms of the relevant litigation funding agreement and/or the terms of any After The Event insurance policy or similar policy;*
(c) *concealing or misrepresenting the identity or name of the firm or any other firm involved in the conduct of the claim being promoted;*
(d) *using false or exaggerated testimonials, endorsements or case studies;*
(e) *using false or unsubstantiated claims as to the size or experience or pre-eminence of the firm or any other firm involved in the conduct of the claim being promoted".*

Question 7

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

Response:

1 Self-regulation is simply not working. Instead, we consider that TPF should be subject to a combination of statutory, rule/Court-based and independent regulation for all funders funding litigation in the Courts of England & Wales, in order to achieve the following (as a minimum):

1.1 An appropriate statutory cap on the funder's return (this is discussed further below in our response to Question 12) - to prevent highly unfair terms being agreed/imposed upon funded parties with limited bargaining power and to help inform prospective funded parties of what a realistic potential recovery may 'look like'. We also consider that some changes to the Civil Procedure Rules may be appropriate and this is discussed further below in our response to Question 23.

1.2 Additionally, a statutory minimum percentage of any settlement reached (which as explained elsewhere in this response we consider should also be subject to the approval of the Court), or of any judgment sum, to be paid to the claimant(s).

1.3 The development of new provisions in the CPR (please see further our response to Question 23).

1.4 Consistent, market-wide compliance with an independent regulatory body's requirements – including, for example, around the issues noted below. The establishment of an independent regulator and its rules would help to ensure an appropriately level playing field between funders operating in the market, to establish the reputation of the industry, and to inform potential funded parties' expectations.

1.4.1 **Capital adequacy** – Clause 9.4 of the ALF Code of Conduct contains various provisions in relation to member funders' financial resources generally, however these obviously do not apply to non-member funders and are inadequate in any event. In particular in relation to capital adequacy the Code provides that members "*maintain access to a minimum of £5m of capital or such other amount as stipulated by the Association*". It is not clear whether "*such other amount*" means any revised figure applicable to all members or any alternative figure the ALF may specify for any particular member(s). Either way, the current default minimum of £5m is woefully insufficient in the context of many large group actions and certainly collective actions in the CAT. The minimum requirement should either be increased for all funders or be a percentage requirement based on the amount of committed litigation funding. Regulations will also need to address the question of funders who are based outside of the UK jurisdiction (our own experience as to who claimant firms pursuing claims against us are funded by suggests that, where we are aware of funding being in place, approximately 1 in 3 are funders based outside of the UK) against which adverse cost orders may be more difficult to enforce.

1.4.2 **Anti-money laundering obligations** – Litigation funders should be subject to the same anti-money laundering rules and regulations as other finance providers, in particular the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the **MLRs**), and registered with the FCA and/or the new independent funding regulator for these purposes.

1.4.3 **Level of control** – While (as discussed above) the 'KC clause' in the ALF Code may be of some assistance in the event of a 'dispute' in certain circumstances, and clause 9.3 provides that a funder will "*not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder*", these simply do not constitute sufficient safeguards for funded parties around control of the proceedings generally. In particular, the wording of clause 9.3 is not broad or explicit enough to prohibit a funder from exerting significant influence over the funded parties' legal team and/or the funded parties themselves, without necessarily going as far as to relinquish control/conduct entirely. The KC clause only comes into play in relation to a settlement or termination of the LFA, and not in relation to other significant milestones/points on which instructions are needed. We consider that a new independent regulator should set out much more stringent restrictions on the ability of funders to influence decisions around the conduct of their funded cases and/or broaden the circumstances in which a dispute around conduct of the case is to be referred to a KC.

1.4.4 **Withdrawing funding –** Clause 11.2 of the ALF Code provides that member funders may terminate an LFA in certain circumstances, including where it "*reasonably ceases to be satisfied about the merits of the dispute*" and where it "*reasonably believes that the dispute is no longer commercially viable*". Again, there are no safeguards for the funded parties. This is wholly unsatisfactory, particularly where the funded parties are consumers.

(a) In relation to merits, the Code fails to specify that funders should only support claims which have been independently assessed as having prospects of success of at least (say) 50%. Our concerns around the proliferation of unmeritorious litigation generally are discussed above. In relation to this point, we envisage a situation where claims with poor prospects of success are commenced, some (further) unhelpful evidence or arguments arise later, and the funder then looks to terminate the LFA on the basis it is no longer 'satisfied about the merits' which may have decreased from say 40% to 30%. The funded parties then find themselves liable for costs for claims which ought never to have been commenced in the first place. As discussed elsewhere in this response, a certification process should be implemented to ensure better due diligence is conducted, and better advice to prospective funded parties is provided, before claims are commenced. To the extent disputes still arise in this respect, we consider the existing KC clause to provide an appropriate resolution, provided that it is funders who are required to meet the costs of instructing the KC.

(b) In relation to commercial viability, we do not consider it appropriate for a funder to be able to terminate an LFA solely on this ground, particularly in relation to consumer claims. We also consider the KC clause provides less protection to the funded parties in relation to a dispute in this respect as opposed to one relating to the merits. Funders should be required to satisfy themselves of, and commit themselves to, the full range of reasonably foreseeable commercial outcomes before agreeing to fund the litigation at all. While there may still be some very limited circumstances in which it is reasonable for a funder to terminate on the basis of commerciality, this must only be in highly exceptional circumstances, subject to regulatory approval, and further safeguards of the funded parties' positions.

1.4.5 **Adverse costs and security for costs** – as discussed elsewhere in this response, we consider that the so-called *Arkin* cap should be expressly abolished (by legislation) and funders should be liable in principle for up to the full amount of costs incurred by the defendant(s). This links into the need for better capital adequacy requirements through regulation as discussed above. Again, regulations will also urgently need to deal with the situation of funders who are based outside of the UK jurisdiction. The CPRs should also be amended (as discussed in response to Question 23 below) to require funded parties to provide better transparency through provision of a notice of funding (including information in relation to ATE cover and proposals for security for costs) Instead, and as we have direct experience of, requests for this information can be time consuming and costly due to the lengths funded parties go to avoid disclosing such information (for instance, on the diesel NOx emissions litigation, it has taken more than two years of correspondence and several hundred thousand pounds of costs to obtain *some* information from the claimants about their positions, and to negotiate appropriate amendments to the ATE insurance arrangements).

1.4.6 **Certification** - (as discussed above) the provision of certain certificates to the regulator before commencing funded proceedings. As also discussed in response to Question 23 below, a requirement to give a similar certification to the defendant and/or Court (and to update it at key milestones) should also be introduced in the CPR.

Question 9

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.

Response:

1 The costs risks of funded claims, which are often brought on behalf of large groups of individuals in varying financial circumstances, inevitably have an effect on the dynamics of TPF. The usual protection against adverse costs, ATE insurance, represents an expense that is ultimately borne by the claimants (in the form of a reduced share of recoveries or otherwise). Negotiations of such insurance coverage may have an effect on all stakeholders in the litigation.

2 We note the empirical evidence and related conclusions in the Mulheron report (at page 88) show that, broadly speaking, liability for adverse costs and/or for security for costs tends to be covered by LFAs, either 'directly' or by stipulating as a condition of funding that the funded client has a suitable ATE insurance policy in place to cover such liabilities. Adverse costs and security for costs may, however, be 'carved out' by the funded client in order to reduce the overall fees: ATE insurance is often expensive and the terms of its coverage may be heavily negotiated (including with the defendants). This approach is more likely to be taken (and tolerated by funders) by a large corporate claimant, i.e. one which could better afford (i) to meet either or both such liabilities, if necessary, and indeed (ii) to fund the litigation as a whole from its own resources in any event. Accordingly, while funders' 'pricing' of the potential liability for adverse costs and/or security for costs does not appear to act as a barrier to funded clients of all types, it does appear that clients who do not necessarily require funding to obtain 'access to justice' could obtain more favourable terms than consumers. While we understand the commercial rationale for this, it does not represent a good outcome for consumers or equal access to justice.

3 Defendants are, entirely reasonably, concerned to ensure that they will be able to recover adverse costs. There is in our experience, however, often a complete reticence to the point of obfuscation from funded parties and/or their representatives to engage with legitimate and reasonable questions about where their funding comes from and/or provisions for security for costs. We are particularly concerned to note the increase in litigation funding being provided 'indirectly' via facilities extended to law firms (see for example further press reports of the arrangement between Pogust Goodhead and Gramercy[16] also mentioned in our response to Question 2). This type of indirect law firm funding arrangement appears designed at least in part to limit appropriate scrutiny and to avoid the provisions of CPR r.25.14 in relation to security for costs from third parties. Instead, if a law firm is receiving funding in order to conduct litigation on behalf of clients who are not paying costs, clearly either a third party or they themselves are acting as a funder.

4 As discussed further below in relation to Question 23, we consider that amendments to the CPRs are required to address this. This lack of transparency generally can and has led to expensive satellite applications where defendants are forced to apply for disclosure orders or for security for costs. Such satellite disputes place yet another significant costs burden on defendants (and of course the claimants – to their detriment) and a further burden on the Court's time and resources, but which could be easily avoided via appropriate regulation and/or amendments to the CPRs. In our experience on the diesel emissions litigation, it has taken more than two years of correspondence and several hundred thousand pounds of costs to obtain *some* information from the claimants about their positions, and to negotiate appropriate amendments to the ATE insurance arrangements. This issue is particularly acute in circumstances where claimants are represented by many separate firms with separate ATE insurance arrangements, requiring distinct lines of enquiry for each cohort (in the diesel emissions claims, the claimants are represented by eleven separate firms). Appropriate information could and should have been made available at the outset or at least when first

[16] https://www.lawgazette.co.uk/practice/first-legal-unicorn-in-552m-funding-deal/5117398.article

requested. Regulatory or procedural guidance about the terms of ATE insurance (where that stands in place of security for costs) would also be beneficial for the same reasons.

Question 10

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

<u>Response</u>:

1 Funders should remain exposed to paying the costs of proceedings they have funded and moreover the so-called *Arkin* cap should be expressly abolished (its significance has already been eroded in subsequent decisions). In circumstances where a successful defendant may have been put to very great expense directly and solely as a result of the funder having backed the litigation (on the basis that it would not otherwise have been pursued), we do not consider that it is just for a defendant's ability to recover its costs to be limited by reference to what the funder has spent. We also do not consider that the removal of any cap on recoveries of costs against funders would diminish access to justice. Major funders are well-capitalised organisations whose operations are unlikely to be threatened by the outcome in any one case. Looking at this another way, repeated exposure to adverse costs orders would suggest that a funder had repeatedly pursued unmeritorious claims, which is to be discouraged: access to justice would not be harmed by their exposure to paying the costs of failed proceedings.

2 The Pan NOx litigation is a good example of the potential inequity of a cap on recoveries from a funder. Because of the number of defendants (in separate groups) the defendants' combined approved cost budget is more than double that of the funded claimants. Of course, the question of how the funded party's costs compare to the defendant's costs may have some bearing on the costs award the Court decides to make in terms of reasonableness. That is a matter of discretion rather than a uniform rule.

3 As noted in the Mulheron report (at page 90) our understanding is that in practice most funders will pass adverse costs risk on via ATE insurance and so the *Arkin* cap (to the extent that it continues to exist) may be of limited relevance in today's market in any event. However, where there is a shortfall in the ATE cover (because the adverse costs risk was miscalculated or the funded client made a deliberate decision to take lower cover in order to reduce the premium), or the ATE insurer avoids cover, then we consider a successful defendant should still have recourse to the funder to the extent that the costs it is seeking to recover are attributable to the funder's backing of the litigation. How precisely that is assessed should be a matter for the Courts' discretion, however by way of examples:

3.1 If a funder provides 100% funding from the outset of a case until its conclusion, then the funder should be potentially liable for up to 100% of the adverse costs liability, to the extent this remains after any payment under the ATE insurance policy.

3.2 If a funder provides 50% funding from a particular date part way through the dispute, then the funder should be potentially liable for up to 50% of the adverse costs liability incurred from the relevant date onwards, to the extent this remains after any payment under the ATE insurance policy.

3.3 The degree to which a funder can exercise control over the litigation will also be relevant. A funder which simply provides funding on interest only terms and/or repayable regardless of the litigation's outcome (akin to a conventional lender) is likely to be in a different position to a funder who has agreed to provide funding in return for a percentage of damages or a multiple of what has been funded depending on the stage the case has reached when it was concluded as its return. A funder of latter types of funding is likely to have more control over the litigation.

4 We also consider there should be a greater onus, via regulation, on funders and funded parties to secure, and demonstrate that they have secured, sufficient ATE cover – including

anti-avoidance endorsements where appropriate – in the first instance, or otherwise to provide security for costs.

Question 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?**

Response:

1 Yes, a funder's return should be subject to some controls, particularly in relation to consumer claims where claimants are more likely to be unsophisticated and/or without equal bargaining positions, without rendering the business of funding such litigation unviable. We do not think it is appropriate that this is currently left solely to market forces where there is – currently – little transparency and, as discussed above, a potentially very wide range in terms of funded parties' bargaining power. Statutory measures would offer much needed protection for consumer claimants in particular. As mentioned in our response to Question 7, we consider there should be a statutory 'floor' on the return to claimants in funded consumer claims to prevent highly unfair terms being entered into (for the avoidance of doubt, we do not consider this necessary in non-consumer claims). In our view a floor of 50% returns to claimants strikes an appropriate balance between on the one hand, the protection of all funded parties and their right to a 'fair share' of the proceeds of the litigation conducted on their behalf, and on the other the viability of the funding market.

Question 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?

Response:

1 At this stage we consider that amendments to the CPR are likely required in at least the following respects:

1.1 To introduce a requirement on the funded party to give prompt notice (within a timeframe to be specified) to the Court and their opponent(s) of (i) the existence and nature of funding arrangements, (ii) the parties to those arrangements including the jurisdiction where they are based and details of beneficial ownership (so AML checks can be completed); and (iii) their 'headline' terms/other key information (including in relation to any ATE insurance policy or proposals for security for costs).

1.2 To introduce a requirement for a certificate confirming a funded claimant's solicitors / counsel have assessed the merits of a claim as meeting a defined minimum threshold (e.g prospects of success of 50% or greater.

1.3 To require permission of funded parties in group or collective proceedings to apply ex-parte for permission to issue proceedings on the basis that the claim has a reasonable prospect of success, for instance akin to the 'good arguable case' test for freezing injunctions. This could be subject to certain qualifying criteria such as quantum or number of claimants.

1.4 To amend CPR r.25.14(2) to encompass any third party that has entered into a financial arrangement with the claimant and/or solicitors on the record for the claimant which allows said solicitors to fund their fees instead of being paid by the claimant, and that has a commercial interest in the outcome of the claim (whether directly or indirectly). This may be done either by expanding the wording of r.25.14(b) or introducing a third condition (c). We recognise that careful drafting of such language to exclude ordinary bank funding of law firms' day-to-day operations would be required.

1.5 To address the issues raised in *Rowe*, as summarised at 6.57 – 6.64 of the Interim Report. We consider that a funder's costs of putting up any security for costs should be borne by the funder, and should not be capable of being passed on to the defendant(s) by way of a cross-undertaking. As the Court of Appeal noted in *Rowe* (at [74]), "*If funding the pursuit of the claim requires security for costs to be provided, that is a normal and foreseeable aspect of the investment being made, and the funder can be expected to include it in his business model in determining the terms on which funding is provided*", and, in any event, (at [78]) "*A funder should be structured, and operated, in such a way that there is little doubt that it will be able to satisfy any adverse costs order which may be made against it*".

1.6 It may be worth considering introducing a new standalone section to the CPR bringing together provisions applying to funded claims in order to provide a clear 'regime' and point of reference for those engaged in funded disputes.

1.7 We also consider that it would be worth extending the duty on the parties to help the court further the overriding objective (CPR 1.3) so that it also encompasses those providing litigation funding for a claim. This would help underpin the other suggested amendments to the CPR.

Question 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?

Response:

1 As briefly discussed above in our response to Question 23, we consider amendments to the CPR are necessary to introduce a requirement on the funded party to give prompt notice (within a timeframe to be specified) to the Court and their opponent(s) of (i) the existence and nature of funding arrangements, (ii) the parties to those arrangements including the jurisdiction where they are based and details of beneficial ownership (so AML checks can be completed) and (iii) their 'headline' terms/other key information (including in relation to any ATE insurance policy or proposals for security for costs). Of course (iii) would need to be within appropriate parameters, looking to balance (a) the funded parties'/their legal teams' rights in respect of privileged and/or commercially sensitive information with (b) their opponents' reasonable expectation of not being disadvantaged in a funded claim in terms of assessing their overall costs risk.

2 This should not be regarded as a particularly novel or onerous requirement given the previous requirement to give notice of funding in cases involving Conditional Fee Agreements, and – as noted in the Interim Report – in the CAT, funding arrangements are generally disclosed as part of applications for collective proceedings orders. (Such requirements seem particularly appropriate in cases where a GLO is sought in relation to claims brought by funded parties.)

3 Disclosure requirements should extend broadly equally to the legal teams acting for 'funded parties' when the funding is provided to those legal teams rather than to the 'funded parties' directly. It is becoming more common that law firms (rather than claimants) are being funded directly by litigation funders, with delegated authority being provided to the law firm to take on appropriate cases at their election (i.e. the well-publicised arrangements between Pogust

Goodhead and Gramercy mentioned above, and see for instance the law firm portfolio litigation product offered by Burford amongst numerous other funders). In those scenarios, a claim is clearly still “funded” by a third party, be that a funder or the claimant law firm itself.

4 We consider the benefits of this approach (in conjunction with other measures) would include:

4.1 In the expectation of disclosure being provided - placing a greater onus on funded parties, funders and legal representatives to secure objectively suitable arrangements particularly with regards to ATE cover for liability for security for costs and adverse costs at the outset.

4.2 As a result of greater transparency following disclosure - reducing the necessity for security for costs applications in any event, including all associated correspondence, legal costs, use of the Court’s time, and delays to the progress of the case generally.

3 MARCH 2025