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]
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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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Cover Note

To: Civil Justice Council

From: [redacted]

Date: 3 March 2025

Subject: Consultation: Review of the litigation funding sector

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Introduction

1. On 31 October 2024, the Civil Justice Council ("**CJC**") published its interim review and consultation as part of the first phase of its ongoing review of the third-party litigation funding ("**TPLF**") sector. The consultation is scheduled to close on 3 March 2025. Charles Lyndon Limited, as a law firm actively involved in proceedings funded by third-party litigation funders ("**Funders**") across various fora – primarily the Competition Appeal Tribunal ("**CAT**") – wishes to provide input on various relevant issues for the CJC's consideration.

Access to justice

2. In principle, TPLF is an important tool in promoting access to justice and facilitating private enforcement of law. It enables claimants who might not otherwise be able to afford the costs of litigation to pursue actions and obtain redress. However, TPFL does not come without concerns. There are a number of issues which could arguably affect the extent to which TPLF makes access to justice possible.

    a. Case selection:
        i. Funders typically only invest in claims that have strong prospects of recovering a significant financial return. A number of criteria may be considered by Funders, including: (i) the prospects of success; (ii) the amount likely to be recovered if the claim is successful; (iii) the costs and risks in prosecuting the claim; (iv) the complexity of the claim; (v) the estimated time until the claim is resolved; and (vi) whether there are risks in enforcing a favourable judgment. Cases that tend to meet these criteria are high-value, relatively low-risk commercial claims for damages or compensation. TPLF therefore arguably only facilitates access to justice in relation to cases that are commercially viable for Funders.

ii. The practice of filtering out applications for funding that do not meet stringent legal and commercial criteria is arguably beneficial in that it removes claims that do not have merit. We believe that this practice has likely contributed to the relatively high success rate of funded collective proceedings being certified by the CAT. However, we believe that lawyers and economists would not seek to pursue claims that lack merits, and so it is questionable whether the additional filter applied by Funders is material in this regard.

b. Funding arrangements:
    i. Funders can reduce the cost barrier of litigation for claimants by underwriting the cost of bringing the proceedings and indemnifying them against adverse costs. If the claimant wins, the Funder's costs are typically deducted from the amount awarded or negotiated between the parties. These may include (i) the Funder's return as determined by the relevant litigation funding agreement ("**LFA**"); (ii) reimbursement of the legal costs and disbursements paid for by the Funder; and (iii) court fees. A Funder is incentivised to maximise their return, prioritise the payment thereof ahead of payments to other stakeholders, and limit the amounts payable by them in respect of legal costs and disbursements.

c. Conflicts of interest:
    i. Funding arrangements may create or exacerbate conflicts of interest between a Funder and the claimant they fund. This issue is particularly obvious when the question of control of or influence over litigation is considered. As above, the interests of the Funder are not necessarily aligned with those of the funded claimant or the persons the claimant seeks to represent. By using funding as leverage, a Funder may seek to influence the course of litigation in order to ensure that it proceeds in the interests of the Funder and/or to subordinate the interests of the claimant to their own. For example, encouraging settlement at a time that maximises the Funder's return and pressuring a claimant into accepting a less favourable / advantageous settlement that is not in the best interests of the class that they represent.

3. Clearly, TPLF creates opportunities for claimants to seek compensation or damages for meritorious claims. However, there are also a number of risks that, if not properly managed, may subvert the interests of the claimant and the persons they seek to represent.

Regulation

4. Currently, in the United Kingdom, Funders may choose to self-regulate by becoming members of the Association of Litigation Funders ("**ALF**"). If they are admitted as members, they will be bound by ALF's Code of Conduct (the "**ALF Code**"), which establishes certain ethical and commercial standards. However, this model of self-

regulation has clear limitations. For example: membership is voluntary; it is not clear how ALF seeks to enforce compliance with the ALF Code, if at all; and it is not clear that ALF would be able to act sufficiently independently in resolving any disputes between an ALF member and third parties.

5. While we support the role that Funders play in promoting access to justice, we are concerned that they are currently largely unregulated. The most obvious means of regulating Funders would be through legislation. However, we would caution against the imposition of overly prescriptive regulation, which could significantly affect the risk / reward balance for Funders and render them reluctant to offer funding (which, in turn, would impact access to justice). Instead, we would recommend that legislation sets out principles derived from best practices. For example, these could include duties relating to (i) transparency; (ii) avoiding conflicts of interest; (iii) maintaining capital adequacy; (iv) confidentiality; (v) funder returns; and (vi) not seeking to control proceedings. Guidance could also be provided on the minimum contents and structure of an LFA, and recommended clauses regarding *inter alia* the Funder's return, dispute resolution, and termination.

Funder's return

6. The Funder's return is a clear issue where a conflict of interest may arise between a Funder and the funded party. It is therefore worth considering whether the level of return should be prescribed by legislation.

    a. A cap set by legislation would provide clarity and help address the issue of unequal bargaining power when negotiating a Funder's return.

    b. However, mandating a cap could cool interest in litigation and leave those seeking to obtain funding with even fewer options (which, in turn, may promote unfair conditions in other aspects of funding arrangements). A legislative cap could also reduce the breadth of cases that can be funded and a claimant's access to capital.

7. Regardless of whether there is a cap, we are in favour of stakeholder entitlements being assessed separately rather than being subject to a priorities agreement, which favours the Funder regardless of the outcome and respective contributions.

8. If a cap were prescribed by legislation, there are a number of ways in which it could be set.

    a. A cap could be applied either to the total pound amount or percentage amount recoverable by a Funder.

    b. If the cap is by reference to the total pound amount, this could be based on (a) the costs of capital deployed (rather than committed, thereby incentivising Funders to put money through the door rather than withholding funds until the last minute); (there is no good reason why returns cannot be an interest rate,

adjusted to reflect risk, on the total amount of funding that is being funded at any one time)[1] and (b) the 'annualised' returns of a similar or comparable asset class.[2] However, finding such an asset class may be difficult, as Funders may seek to invest in litigation in order to have an alternative asset with returns that are uncorrelated to movements in the stock market or bond returns.

c. If the cap is by reference to the damages awarded / settlement amount, then arguably a cap of 50% would help ensure that the primary beneficiary of TPLF is justice itself, not profit. However, a cap such as this may not be appropriate in cases where the level of uptake at the distribution stage is uncertain. A possible option would be to cap the Funder's fee at a lower level, and then have an additional percentage allocation be subject to the level of uptake. For example, 33% could be allocated to the Funder's return and other stakeholder, 33% allocated for distribution to the class, and the remaining 33% allocated to the class in the first instance but available to the Funder and other stakeholders if it is not exhausted through distribution.

9. Prescribing a cap is one way of mitigating the risk that the bulk of any damages award or settlement goes to a Funder rather than to the claimant (or the class of persons that they represent). However, Funders may also stand to be the primary beneficiary in that under a priorities waterfall, the Funder's return is often one of the first amounts to be paid out. Even if a cap is in place, there is a risk that, once a Funder's return has been paid, relatively little may remain available for claimants and those who have done the substantive work on the case. While the structure of funding arrangements is of course subject to agreement between a Funder and a claimant, given the imbalance of power between the two, it is arguable that the claimant (and other stakeholders) should be afforded a means of protection. This may be through a recommended priorities waterfall structure that does not prioritise the payment of the Funder (i.e. does not place the Funder first and other stakeholders last); or through assessment of each individual stakeholder's entitlement after settlement when it will become clear what the overall position is and what each party has contributed towards the position.

10. Where parties other than a Funder carry the risk of costs (for example, where a Funder does not provide funding that they have undertaken to provide), then it is arguable that the Funder should not be entitled to its full return. Instead, the party that carried the risk should be entitled to a priority payment. If guidance provided for such an occurrence, then it would likely encourage Funders to pay timeously and help avoid situations where

[1] If Funders' returns were based upon an interest rate on capital deployed then there would be a number of significant benefits: (1) the returns would correlate to costs and risks; (2) interim costs awards would reduce the overall return making more money available for the class; (3) monthly statements could be produced enabling class representatives and the courts to understand the costs of the litigation more easily; and (4) it would be more difficult to game the system by making other stakeholders fund the litigation through WIP or unpaid invoices.

[2] https://www.blackrock.com/corporate/insights/blackrock-investment-institute/interactive-charts/return-map

https://www.reddit.com/r/Bogleheads/comments/168983q/20_year_annualized_returns_by_asset_class/?rdt=57554

Funders withhold funding (whether with a view to controlling proceedings or otherwise minimising their own cost of capital and maximising their own return on investment).

CJC Review of Litigation Funding – Call for Consultation

No.	Question	Comments
Questions concerning 'whether and how, and if required, by whom, third party funding should be regulated' and the relationship between third party funding and litigation costs.		
1.	To what extent, if any, does third party funding currently secure effective access to justice?[1]	• The availability of funding is essential for enabling legal actions to commence which may otherwise be financially unviable or financially prohibitive for many claimants. Litigation funding is particularly important in consumer litigation, where the costs of individual claims may be prohibitive. Even where law firms are willing and able to act on Damages Based Agreements or Conditional Fee Agreements, there will often still be a need for third party funding to be secured to pay for disbursements which can (and frequently do), dwarf the costs of the lawyers in these types of actions. • As the Court of Appeal stated in *Justin Le Patourel v BT Group PLC* [2022] EWCA Civ 593: o [29] "*Pulling the threads together, the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase ex ante incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims*." • At present, with regards to collective proceedings instituted before the Competition Appeal Tribunal ("**CAT**"), but for litigation funding, it is difficult to see how cases could otherwise be funded. Third party funding therefore plays a significant role in securing access to justice. • However, the current system is still far from perfect. For example, those who seek to fund litigation will understandably primarily be motivated by their own commercial interests. This may mean that meritorious claims may go unfunded if a successful result would not benefit a potential funder as well. • Access to justice, private enforcement and competition would be improved if law firms were able to take funder style returns and fund collective proceedings. This should result in the cost of funding being reduced and net damages to class members increasing.
2.	To what extent does third party funding promote equality of arms between parties to litigation?	• Justice unfunded is justice denied. As noted above, without litigation funding, access to justice would be significantly reduced. Third party funding therefore plays a significant role in promoting equality of arms by providing financial resources to parties who might otherwise be unable to pursue legal action (or appoint experienced legal teams to represent them) due to cost constrains. This is particularly the case in group actions, such as collective proceedings, where the costs of litigation can be high. • However, third party funding does not necessarily provide equality of arms where funders seek to influence or wrest control of litigation from the funded party. If alternative sources of funding are not available, then the funded party may be under severe pressure to concede to the funder's pressure and act in a manner that is not necessarily in the best interests of the class of persons that the funded party represents.
3.	Are there other benefits of third party funding? If so, what are they?	• Third party funding can help to reduce the overall cost of litigation by allowing for multiple potential claimants to be represented in group proceedings, rather than having each potential claimant institute separate proceedings themselves. • Third party funding can also improve the funded party's chances of success by providing them with access to top legal counsel and experts whose services might otherwise be too expensive to obtain. • The Supreme Court in *Merricks* has also highlighted the importance of the regime being applied in a manner that encourages compliance with the law, acknowledging that the creation of strong enforcement powers "...serves as a disincentive to unlawful anti-competitive behaviour of the type likely to harm consumers

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

No.	Question	Comments
		generally"(paragraph 2) and that anticompetitive conduct would not be "effectively restrained" if wrongdoers could not be "brought to book" by mass claims (paragraph 53). • Enforcement of rights before a court or tribunal assists to fill gaps in the resources of a regulator, such as the Competition and Markets Authority, to investigate, complete the process and award compensation. The ability of those suffering harm to fill the regulatory gap is likely to be dependent upon some form of funding, particularly third-party funding. The greater the resource restrictions for the regulator and the gap in those resources between the national regulator and, potentially, a multi-national company, the more that access to court process, supported by litigation funding, is needed.
4.	Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[2] If not, what improvements could be made to it?	• No. Currently, certain litigation funders are self-regulated through membership of the Association of Litigation Funders ("**ALF**"). However, membership of ALF is voluntary – according to the CJC's report only 16 of the 44 funders currently operating in the jurisdiction are members of ALF. • Whether the regulation is undertaken by the court, statutory provision, or a regulator, we have concerns in six particular areas of funding agreements: o Resolving disputes o Capital adequacy o Control and influence of the litigation o Returns or the share of proceeds o Linking returns to average deployed capital o The circumstances in which the funder can terminate the agreement or withhold payment.
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;[3] c) For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.	<u>Resolving Disputes</u> • Given that ALF is comprised only of litigation funder members, it is arguably not well-placed to resolve disputes should such arise between an ALF member and a funded party / third party, as law firms with legitimate grievances fear raising issues with ALF, as the law firm and its clients may need to seek funding from members of ALF at some point in the future. <u>Concerns over a funder's financial resources and/or its capital adequacy</u> • In collective proceedings before the CAT, those bringing claims need to be able to demonstrate that they have adequate financial resources available to them in order to fund their own costs and pay any adverse costs orders that may be made against them. This means that claimants' legal teams need to undertake due diligence of funders, and often face challenges from defendants seeking to protect their position with regards to recovery of costs. These additional burdens come at a time when parties are often under significant pressures – time, financial and business. • The ALF Code provides that its members should maintain access to a minimum of £5m of capital or such other amount as stipulated by ALF. However, we understand that ALF members interpret this requirement in different ways (with the requirement potentially applying to disputes individually or all disputes which a member funds). • If there was a clear overarching requirement that funders active in this jurisdiction maintain a certain level of capital adequacy (on a case-by-case basis), that could help to reduce costs for both claimants and defendants by promoting certainty (as in which funders are 'accredited' to operate in this jurisdiction and that such funders have the necessary funding available). However, there is a risk that such a measure could be seen as overly prescriptive and deter funders from funding cases if they are concerned that they may, at some point, not satisfy the capital adequacy requirement. <u>Improper influence over proceedings</u> • Funders have a direct financial interest in the outcome of disputes they fund. There is therefore a risk that they might seek to interfere with the conduct of proceedings (for example, pressuring a party to agree to settlement even if it is not in the party's best interests, or withdrawing or withholding funding if the funder believes such

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

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

No.	Question	Comments
		conduct to be in its own commercial interest). Given that funders hold the proverbial purse strings, they hold significant direct and indirect bargaining power. • The ALF Code of Conduct provides that members should not seek to influence the funded party's legal teams to cede control or conduct of the dispute to the funder. However, membership of ALF is voluntary, and it is unclear how compliance with the Code is enforced. • In principle, making funders subject to regulation and requiring them to abide by an overarching code of conduct could help to curtail the risk of such egregious behaviour. However, there is a question as to what extent an overarching body would be able to enforce compliance with any code of conduct that it oversees. Furthermore, it is not clear what would happen to proceedings being funded should a dispute arise – if funding is withheld, that might deter funded parties from raising complaints out of concern that they may not be able to conduct the relevant litigation. <u>High cost of funding / funder's return</u> • There can be significant upfront costs of putting third-party funding in place (including conducting due diligence, putting in place confidentiality agreements, and drafting bespoke funding agreements). Parties that have obtained third-party funding are also vulnerable to security for costs applications. Furthermore, if a party is successful, most funders will expect to recoup the sum funded, plus a substantial fee. • Given the voluntary and unclear nature of the current system of self-regulation, it does little to help reduce the cost of funding. Funders are essentially able to set terms that serve their own commercial interests first, and, given the limited alternatives available, those seeking funding have little bargaining power to level the playing field. • Making funders subject to regulation could help reduce the up-front costs of obtaining funding – for example, there could be less due diligence for those seeking funding to do, and standard terms for litigation funding agreements could be set out. Furthermore, placing a cap on a funders' return could also help to reduce costs (and potentially increase the amounts that flow to classes on whose behalf proceedings are brought). • Given the inequality of bargaining power, we believe that lawyers should be able to self-fund with commensurate returns, and that stakeholder entitlements should be assessed individually (rather than subject to overarching priorities agreements) after settlement or judgment when each stakeholder's contribution will be known. <u>Compliance with obligations regarding making funding available / reimbursing legal teams</u> • During the course of litigation, funders may be incentivised to delay providing committed funding until the last possible minute so as to minimise the amount of time that the funder has to borrow money from its investors (e.g. a funder may withhold payment on funding notices and then release payment a few weeks before a settlement hearing, when it knows that it should get an order for costs, fees, and disbursements, meaning it has only actually deployed the funding for a few weeks, while it is the funded parties who have really funded the case by carrying their WIP or having invoices unpaid). • The current regulatory arrangement is insufficient to protect funded parties and those who do work for them. In practice, legal teams may have to operate unfunded and be exposed to claims from or disputes with third parties where funders do not make funding readily available. If a funder does not provide funding, alternative sources would need to be sought – however, such sources are generally not available. • Issues such as the above would be greatly reduced if law firms were allowed to self-fund and take returns similar to those of a funder. If law firms are effectively partially funding litigation through work-in-progress ("**WIP**") and paying disbursements, there are very good reasons for this to be formally recognised and for law firms to take funder-style returns. Other changes could include prohibiting funders from excluding third party rights in litigation funding agreements (or at least making it the 'default' position that such rights are not excluded), and/or making their returns dependent upon capital actually deployed (rather than committed) and the amount of time that the capital was deployed for.
6.	Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?	• We do not have any strong views on whether the same regulatory mechanism should apply across different types of litigation and arbitration.

No.	Question	Comments
	a) If not, why not? b) If so, which types of dispute and/or form of proceedings should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings? c) Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?	• It may be beneficial to differentiate between different types of funded parties. For example, requirements against unfairness control should be stronger if the funded party is an individual (as opposed to a sophisticated business litigant). This would be in line with a principle against imposing unfair terms in consumer contracts. However, it may be that contextual changes should be introduced into individual agreements, rather than having generalised requirements imposed at an overarching level.
7.	What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?	• There needs to be a balance between flexibility and control. Principles should therefore not be overly prescriptive. However, the following general principles may be worth considering: ○ Transparency / avoiding conflicts of interest ▪ Adequate supervision of litigation funders and third-party funding agreements cannot be ensured in the absence of obligations on litigation funders to be transparent regarding their activities. This includes transparency vis-à-vis courts, defendants and claimants. Obligations should therefore be laid down to inform the relevant court of the existence of commercial funding and the identity of the funder, as well as to disclose third-party funding agreements in full to courts, upon their request or at the request of the defendant to the court, and subject to appropriate limitations to protect any necessary confidentiality. Courts should be empowered to access relevant information on all third-party litigation funding activity relevant to the legal proceedings under their responsibility. In addition, defendants should be made aware by the court or administrative authority of the existence of third-party litigation funding and the identity of the funder. ▪ Compliance with transparency requirements should ensure that claimants are fully aware of any relationship a litigation funder might have with defendants, lawyers, other litigation funders, or any other third party involved in the case, which could create an actual or perceived conflict. ▪ Litigation funders should establish internal good governance processes to avoid conflicts of interests between the litigation funder and claimants. ▪ Funders should also be transparent about the source of their funds. ▪ The funded party should be made aware of all of the terms of the arrangements which they are being asked to enter into and receive independent advice thereon. ○ Capital adequacy of funders ▪ Litigation funders should be able to meet all reasonably foreseeable liabilities arising under or in connection with the litigation they are funding. ▪ The absence of capital adequacy requirements creates a risk that an undercapitalised litigation funder enters into a third-party funding agreement and is not willing or able subsequently to cover the costs of the litigation it had agreed to support, including the costs or fees necessary to allow the proceedings to reach their conclusion, or any adverse cost award. ○ Funders' fees ▪ See below, but in short, there is no reason why this cannot be calculated as a function of cost of capital, plus genuine risk (given nearly all cases require merits advice of 60%), plus a reasonable return. ○ Confidentiality ▪ There should be complete transparency of the terms of LFAs and also the conduct of the parties when it comes to the assessment of various stakeholder entitlements. ○ Control ▪ The funded party should not seek to influence or control decisions regarding the relevant proceedings. Litigation funders should be bound by a duty to act fairly, transparently, efficiently and in the best interests of claimants and intended beneficiaries of claims. A lack of a requirement to place the interests of claimants and intended beneficiaries ahead of a litigation

No.	Question	Comments
		funder's own interests may create the risk of proceedings being directed in a manner that ultimately serves the interests of the litigation funder, rather than those of the claimant. ▪ The funder should still be regularly informed as to how the litigation progresses. ○ Termination ▪ Funders should not have broad discretionary rights to terminate a funding agreement. ○ Dispute resolution ▪ There should be a specified fair, independent and transparent dispute resolution process that can be triggered by the main beneficiaries of the funding (e.g. law firms, counsel, experts). • Having regard to the above, it may be helpful for the minimum content of third party funding agreements to be made available for reference.
8.	What is the relationship, if any, between third party funding and litigation costs? Further in this context: a) What impact, if any, have the level of litigation costs had on the development of third party funding? b) What impact, if any, does third party funding have on the level of litigation costs? c) To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs? d) How might the introduction of a different regulatory mechanism or mechanisms affect that relationship? 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?	• High litigation costs may promote the development of third party litigation funding, as funding may help to provide access to justice to those who might not otherwise be able to afford litigating. • Third party funding can help reduce litigation costs by allowing multiple potential claimants to have their claims resolved collectively, rather than proceeding individually, which might be prohibitive. • The current self-regulatory regime is voluntary and, with only 16 reported members, is unlikely to have a significant impact on the relationship between litigation funding and litigation costs. However, it is submitted that any regulatory regime should encourage that such costs be reasonable. • A funder's success fee should, in principle, be recoverable from an unsuccessful defendant. However, the CAT should retain a discretionary power to approve such recovery, having regard to all the relevant facts and circumstances (for example, the claimant's financial position, whether that position has been directly impacted by the defendant's conduct, and the amount of the funder's success fee).
9.	What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.	• In collective proceedings, claimants are required to demonstrate that they have adequate financial resources to fund their own costs and pay any adverse costs award made against them. Where the claimants themselves are reliant on third party funding, this essentially means that they are reliant on third party funding (both to fund their own litigation and to cover the costs of any relevant insurance policies). Funded parties require protection in this regard, and ideally, there should be guidance provided to them and funders on (i) the issue of investigating and demonstrating capital adequacy; and (ii) how liabilities, such as potential adverse costs awards, should be appropriately covered. Reducing uncertainty would help to encourage persons to proceed with third party litigation, thereby promoting access top justice.
10.	Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?	• There is an argument that there should be a limit to adverse costs payable by a funder, with reference to the amount funded (although this would not apply where adverse costs are tied to the conduct of the funder). However, doing so could expose claimants to unforeseen material economic loss and risk them abandoning otherwise viable proceedings
Questions concerning 'whether and, if so to what extent a funder's return on any third party funding agreement should be subject to a cap.'		
11.	How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?	• Currently, funders have significant control over the pricing of third party funding arrangements. There are few established funders operating in the market and they are able to pick and choose which cases to fund. In practice, this means that those seeking to have claims funded are required to undertake a significant amount of unfunded work in order to garner the interest of funders. The funders can then, in turn, leverage this 'sunk cost' in negotiations and seek to impose arrangements that are heavily favourable to them. • In collective proceedings, at the certification stage, the CAT's practice has been to review a proposed class representative's funding arrangements and highlight any issues that may pose an obstacle to certification. While the CAT does not expressly specify what funding arrangements are and are not acceptable, is has shown that it is willing to call out those arrangements that it considers to be "*sufficiently extreme*" – see *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others* [2024] CAT 11, at para 36.

No.	Question	Comments
		The CAT Rules, together with the practice and case law developing around them, require the CAT to perform a qualitative analysis of funding terms, arrangements and pricing in relation to Opt-Out Collective Proceedings. There are two points in the procedure where this happens: (i) during the application for a Collective Proceedings Order ("**CPO**"), where the CAT will scrutinise and approve the funding (recent examples include *Gutman v Apple* and *Neill v Sony*); (ii) at the point of approving the costs, disbursements and distribution of proceeds at the conclusion of a successful or settled claim. At the CPO stage, the CAT's role in certification is binary; it either certifies the proceedings or it does not. Whilst it cannot impose alternative funding terms on the funder or the proposed class representative, it makes use of the certification process to highlight issues that it would require addressing if it were to certify. However, the CAT has recognised that it is generally not possible at the start of proceedings to assess the reasonableness of a funder's return (or indeed a CFA uplift), and therefore the CAT has made it clear that certification should not be interpreted as an endorsement of the funding terms. However, it can and will call out "sufficiently extreme" funder returns and has overridden claimed confidentiality to ensure sufficient public scrutiny when doing so (see *Dr Liza Lovdhal Gormsen v Meta, Inc and others* [2024]). The level of transparency in CAT proceedings and the terms of funding assist in setting a pricing framework by which the market can price, and where outliers can be readily identified. By contrast, in High Court proceedings, a litigation funder's fee is not determined or approved by the court. Unless there are concerns surrounding champerty or the funding is relevant in relation to a security for costs issue, the court will have little visibility or cause to investigate the funding arrangements. They are viewed as a private commercial matter, much like a litigant's normal funding arrangements with their bank. • Pricing outside the purview of the CAT is therefore set by market forces. This is not an entirely objectionable state of affairs. The CAT's oversight exists due to the special nature of opt-out collective actions and its important pastoral role in ensuring that consumers' interests are being advanced and protected. Funding of unitary cases on behalf of businesses or conducted by law firms should not require such oversight and protection. The market, with the continuation of new funding entrants, is capable of setting prices that fairly reflect the funder's risk and repayment timescale. The risks vary considerably from case to case, including factual and legal liability, assessment of damages, recoverability of costs, defendant's solvency, risk of appeal, procedural risks, and limitation, to mention a few. A court may not be best placed to assess all of these factors, and doing so at an early stage in the litigation would reveal much to the defendant in terms of strategy and perceived frailties in the claim. It would be incredibly uncomfortable if a funder was required to justify its high pricing because of the multitude of risks and unknowns it was facing in bringing the claim. Also, we should be weary before inviting too much intervention into the commercial arrangements of litigants, particularly given the need for litigation to be highly flexible to deal with an infinite set of potential circumstances.
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?	• Yes: ○ There have to be sufficient incentives for funders to enter, participate, and stay in the market; and often funders have high costs of capital that need to be factored into the returns they make. ○ However, provision needs to be made to prevent all of any damages award / settlement amount being payable to a funder (leaving nothing to the class and nothing to other stakeholders because there is a priorities agreement and they have been placed at the bottom of the priorities waterfall). ○ Under a priorities waterfall, the funder's return is often one of the first amounts to be paid out from an award / settlement amount. Where a funder's return is large, this risks leaving relatively little for those further down in the waterfall (including solicitors, counsel and class members). A cap on a funder's return would help to protect the interests of class members, as well as those parties who do the substantive work on cases. Other ways of addressing such an undesirable situation in collective proceedings would be for the question of funder's returns and solicitors' and counsel's costs recoveries to be dealt with separately, and/or or by law firms being able to self-fund.

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13.	If a cap should be applied to a funder's return: a) What level should it be set at and why? b) Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings? c) At which stage in proceedings should the cap be set? d) Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor? e) Should there be differential caps and, if so, in what context and on what basis?	Level: As stated above, third party funding is critical to secure access to justice. As such, it is critically important that there are sufficient financial incentives to retain the money already invested in litigation and attract new funding. However, perhaps the biggest barrier to further investment is the uncertainty around the returns. JP Morgan and Blackrock have modelled the performance of various different asset classes over a 10 and 20-year period (see below). https://www.blackrock.com/corporate/insights/blackrock-investment-institute/interactive-charts/return-map https://www.reddit.com/r/Bogleheads/comments/168983q/20_year_annualized_returns_by_asset_class/?rdt=57554 The best performing asset classes over the last 10-20 years have generated 10-12% per annum returns. There are three factors which should influence a funder's return. These are: (i) cost of capital, (ii) litigation risk, and (iii) duration risk (i.e. length of time that the capital is actually deployed). Most funders have to borrow money from investors. Typically, a funder may borrow at 12-15%/annum compounded monthly on drawn down amounts and 1-2% on amounts not drawn down. £1,000,000 15%/annum compounded monthly over a year would look like the following: 1 1,012,500 2 1,025,156 3 1,037,971 4 1,050,945 5 1,064,082 6 1,077,383 7 1,090,850 8 1,104,486 9 1,118,292 10 1,132,271 11 1,146,424 12 1,160,755 Over 5 years the total amount of interest would be £1,107,181, or 22% per annum simple interest. In order to secure funding, most cases require a merits opinion of 60% or more. It is therefore possible to reflect both litigation risk and duration risk in an interest rate. If a litigation funder wanted to make a 10% per annum return, factoring in a 40% risk rate, they would have to charge 16.67%, and a 12% per annum return with a 40% risk rate would be 20%. Therefore, an annual interest rate on capital deployed from time to time of approximately 35% should cover a funder's costs, including cost of capital, the litigation risk and the duration risk. Three categories could then be applied (reasonable, rebuttable presumption of unreasonableness, and unreasonable). For example, returns under 35% per annum on capital deployed from time to time would be reasonable. There could then be a rebuttable presumption of unreasonableness if the interest rate is between 35% and 45% per annum on capital deployed from time to time. If a funder is seeking between 35% and 45% per annum on capital deployed from time to time, they would have to justify it by reference to their cost of capital or the risk. Finally, returns over 45% would be unreasonable.

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		If funders' returns were based upon an interest rate on capital deployed, there would be a number of significant benefits: • The returns would correlate to costs and risks. • Interim costs awards would reduce the amount of capital deployed and the overall return making more money available for the class. • Monthly statements could be produced enabling class representatives and the courts to understand the costs of the litigation more easily. • Funders would not be able to game the system by making other stakeholders carry costs through WIP or unpaid invoices. <u>Set by legislation</u>: • A cap set by legislation would provide clarity and help address the issue of unequal bargaining power when it comes to negotiating a funder's return. However, there is a risk that mandating a standard cap would cool interest in litigation funding and leave those seeking to obtain funding with even fewer options (which, in turn, may promote unfair conditions in other aspects of funding arrangements). A legislative cap could reduce the breadth of cases that can be funded and claimants' access to capital. Equally, providing certainty over the level of the funder's return at the start of any litigation may give the ultimate investors (i.e. the money behind the funders), more confidence to invest. <u>Stage of proceedings</u>: • The cap could be determined in two stages similar to the approach that the CAT is currently taking. As set out about the applicable interest rate could be approved at the CPO stage and then the level of the funder's return determined after settlement or judgment when all relevant considerations including the amount of capital that has been deployed from time to time will be known. <u>Factors</u>: See above.
Questions concerning how third party funding 'should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.'		
14.	How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?	See Q13 above.
15.	Should a funder's return on any third party funding arrangement be subject to controls, such as a cap? a) How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have? Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts. b) Can other forms of litigation funding complement third party funding? Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant. c) If so, when and how?	See Q13 above.

16.	Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?	• Conditional Fee Agreements ("**CFAs**")
		  ○ A key advantage of CFAs is that the legal team's interests will be aligned with those of the client in that they both want a claim to be successful. However, the funded party will still face potential liability for adverse costs awards (unless they are covered by ATE insurance).
		• Law-firm funding
		  ○ Solicitors currently carry a significant amount of risk in working on funded proceedings, covering costs and work in progress fees. However, they are often near the bottom of priorities waterfalls. Given the

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		risks, solicitors should arguably be entitled to receive a return in the same manner as a funder, but subject to the oversight of the forum in which proceedings are brought.
17.	Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?	• Regarding CFAs, caps on lawyer success fees should be raised to account for the risk taken on in acting in complex cases. • Lawyers should be able to fund and take funder level returns in all group actions, including collective proceedings.
18.	Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?	• Steps should be taken to promote awareness of legal expenses insurance and encourage claimant autonomy in selecting representation.
19.	What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?	• Funders have contractual freedom as to which potential liabilities they will fund (e.g. adverse costs, any ATE premium taken out to purchase insurance against those adverse costs, any security for costs ordered, or any other financial liability to which the funded client may become subject). • It is understood that funders decide whether to cover adverse costs themselves on a case-by-case basis, having regard to the availability of ATE insurance and the funder's own risk assessment. However, if this is the case, funders should be willing to provide funding for an appropriate level of insurance (i.e. they do not under-insure) and with an ATE insurer that is not at risk of becoming insolvent or who is unlikely to refuse to pay out under an ATE policy unjustifiably.
20.	Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?	• N/A
21.	Are there any reforms to portfolio that you consider necessary? If so, what are they and why?	• N/A
22.	Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?	• N/A
Questions concerning the role that should be played by 'rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.'		

23.	Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?	• The CAT Rules should not be overly prescriptive about the role that litigation funding should play in the conduct of litigation. Instead, funding arrangements should be considered on a case-by-case basis. However, the CAT Rules should require as follows:
		  ○ Disclosure of funding arrangements, such that it is clear to all what the financial underpinnings of a claim are;
		  ○ Clarify the evidentiary burden on claimants and funders to demonstrate the adequacy and enforceability of funding arrangements, including ATE coverage.
		• It is noted that, under Rule 53(2)(n), the CAT already has the power to give directions for the award of costs or expenses, including any allowances payable to persons in connection with their attendance before the CAT.

24.	Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?	• The CAT Rules should be amended to allow for law firms to self-fund collective proceedings.
25.	Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?	• N/A
26.	What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?	• The negotiation of funding arrangements is a commercial affair, and the CAT should be reluctant to venture into mandating what terms funders and potential funded parties should agree to. However, it would be helpful if the CAT could provide clarity on what (if any) steps are expected of a funded party prior to commencing proceedings. For example, is it a requirement that their funding arrangements be reviewed independently, or not?
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?	• The CAT favours transparency in respect of a funded party's funding arrangements. The only aspects of such arrangements that are regularly withheld are those that give insight into the assessed merits of the proceedings

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		(for example, the ATE premiums). Funded parties should not be expected to disclose aspects of their funding arrangements which are sensitive in this regard. • However, issues regarding disclosing / not-disclosing aspects of funding arrangements could largely be overcome if there was regulation (including recommended minimum contents and terms) regarding the terms of funding arrangements. It could also help to reduce costs by discouraging defendants from seeking disclosure and/or making applications for security of costs.
Questions concerning provision to protect claimants.		
28.	To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?	• In principle, funders should not seek to influence a funded party's legal teams to cede control or conduct of a dispute to the funder. However, in practice, funders seek to prioritise their own commercial interests and encourage litigation to proceed in a manner that substantially aligns with those interests. The most powerful tools they have in this regard are withholding (or threatening to withhold) funding and/or refusing to make additional funding available on terms other than those which prioritise the interests of the funder. While legal teams should actively work to check the influence of a funder and protect their clients, they cannot themselves make funding available. Dispute resolution mechanisms set out in litigation funding agreements may not provide adequate recourse, particularly where there is a need for imminent funding and/or swift decision-making that is dependent upon readily available funding. o If funders turn off the proverbial tap, solicitors and counsel are often unable to 'down pens' simply because funding has not been provided. Solicitors, in particular, are exposed where third party fees are not paid, as such third parties do not have a direct right of recourse against a funder. This risk may be partially addressed by limiting the ability of funders to exclude third parties to claim against them under the Contracts (Rights of Third Parties) Act 1999. o The exclusion of the Contracts (Rights of Third Parties) Act 1999 is a concern, particularly if there is a security for costs application (even more so where the insured is not a litigant). There is a risk that a defendant could become an unsecured creditor in respect of its outstanding costs. • Funders should not be allowed to dictate the course of proceedings. However, it is recognised that they do not fund litigation as a charity and need to protect their own commercial interests. Including appropriate provisions in litigation funding agreements, such that funded parties should not unreasonably deviate from the advice of their legal teams and/or making clear the points on which funders may provide input (and the permissible extent of such input), may provide adequate protection for funders. Where the terms of such agreements have also been reviewed and approved by independent advisers, this may help reduce the scope of challenges against the funded party's funding arrangements.
29.	What effect do different funding mechanisms have on the settlement of proceedings?	• When it comes to settlement, the primary driver for funders is ensuring that any settlement is adequate to meet the funder's desired return. This may be at odds with the class representative's goals of acting in the best interests of the class that they represent. Given that control of proceedings should remain with the class representative, funders should not be allowed to derail reasonable settlements.
30.	Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?	• One of the primary purposes of collective proceedings is to promote access to justice for the represented class. The class representative is tasked with acting in the interests of the class, and it should be expected that those representing them are able to advise the class representative on whether the terms of any prospective settlement are in the interests of the class. However, early judicial guidance in relation to the terms of settlements is welcomed.
31.	If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?	• Primarily, the CAT should have regard to whether the settlement is in the interests of the represented class and, given the inequality of bargaining power between the funder and other stakeholders, whether the outcome provided for in the settlement is fair and balanced.
32.	What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?	• Claimants should be entitled to (and encouraged) to seek independent advice on the terms of any funding arrangements they are asked to enter into.

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33.	To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?	• There is limited transparency regarding the funding options available, as those seeking to bring cases typically have to approach the few funders active on the market. It would be difficult to set up any mechanism for comparison, given the complexities and variabilities of any litigation. However, this can lead to funders seeking to exploit the lack of transparency. A possible partial solution is to make use of funding brokers.

34.	To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?	• The most obvious source of conflicts which may arise is the relationship between the funded party and the funder.
		  ○ Funders seek to maximise their own returns, which may lead them to oppose / influence settlement negotiations, contest invoices, and/or refuse to approve engagement with third party service providers if they perceive that such steps may limit the amount of their return.
		  ○ To help avoid any challenges due to such conflicts, it would be prudent for the funded party and funder to have the terms of their funding arrangements reviewed and/or approved by independent legal advisers (i.e. not those acting on behalf of the funded party in the actual litigation).
		  ○ It may be argued that another source of conflict is the relationship between a funded party and their legal team (who are ultimately paid by a funder). However, lawyers owe professional and fiduciary duties to their clients and, in the event of a conflict of interest between the litigants and the funder, should prioritise their client's own interests (even if adverse to those of the funder).
		• There may also be a conflict regarding where the funder and other stakeholders fall in the order of priority of payments made out of any damages award or settlement amount.
		• It is not uncommon for litigation funding agreements to require that a class representative in collective proceedings make an application to the CAT for stakeholder entitlements to be paid ahead of any distribution to class members.
		  ○ However, if stakeholders are to be paid prior to distribution, but there is thereafter low recovery or a high uptake of damages, then there is a risk that insufficient damages / settlement amount will remain to provide adequate compensation to the class on whose behalf the proceedings were brought. In such circumstances, it would arguably not have been appropriate for a class representative to seek full recovery of stakeholder entitlements.
		  ○ On the other hand, if stakeholders are to be paid from undistributed damages / settlement amount, but there is low recovery or a high uptake of damages at the distribution stage, then there may be little left over from which stakeholders could be paid. This may prejudice those stakeholders whose entitlements are lower down in the so-called 'priorities waterfall'.
		  ○ Rather than stipulating how a class representative should approach distribution / payment of stakeholder entitlements at the outset of proceedings, it may be better for the default position to be that class representatives are afforded discretion in how to approach distribution / payment of stakeholder entitlements once a positive judgment has been handed down / a settlement has been concluded; with the CAT having oversight to ensure that the result is fair and balanced in all the circumstances.
		  ○ At the outset of proceedings, it will likely not be clear what means of distribution may be available or the level of uptake by class members. Furthermore, it is possible that, during the course of proceedings (and in particular following disclosure), estimates of quantum may change substantially.
		  ○ If a class representative commits to approach distribution / payment of stakeholder entitlements in a particular way, they are arguably limiting their ability to maintain control of the proceedings in which they are active and/or respond to relevant developments in the proceedings.
		  ○ Affording a discretion to the class representative would allow them to decide what approach to distribution / payment of stakeholder entitlements is appropriate, having regard to all of the circumstances of the case (as well as their duties towards the class that they represent and contractual duties towards stakeholders). For example, if it is apparent that the uptake of damages will be high due to the availability of direct credit as a mechanism of distribution, the class representative may consider it appropriate to seek to prioritise at least some payment to stakeholders ahead of

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		distribution. By contrast, if it is apparent that there will be a long distribution process where high uptake is not anticipated, the class representative may consider it appropriate to seek payment of all of the stakeholder entitlements. ○ Insofar as it may be argued that the class representative would need to balance conflicting interests (i.e. those of the class and those of stakeholders), it should be noted that it is not unusual for individuals holding fiduciary duties to have to balance conflicting interests. For example, the trustees of a charity or trust may need to balance the need to pay salaries and other operating expenses against the need to act in the interest of the charity's or trust's beneficiaries. ○ If the class representative does not believe they are able to make a decision regarding how to approach distribution / payment of stakeholders themselves (or stakeholders wish to challenge a decision by the class representative to have stakeholders paid from undistributed damages), provision should be made for the class representative to approach the CAT requesting that it order stakeholders to make separate representations. This would allow the class representative to focus on acting solely in the interests of the class. Stakeholders, in turn, could then address in their representations why they are entitled to the amounts they seek. For example, a funder could seek to justify its return based on its cost of borrowing and the time its capital was deployed. The CAT would consider each stakeholder's representations separately (i.e. if the CAT considered that a funder had not justified the return sought to the CAT's satisfaction, then the funder would not be permitted to make up any shortfall from amounts payable to other stakeholders). In essence, this default approach would do away with the so-called 'priorities waterfall'.
35.	Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.	• Funding agreements should set out in clear terms the steps funders take to avoid actual or potential conflicts of interests. In particular, the agreements should specify the steps taken to avoid financial conflicts of interest and any conflicts arising from the funded party's legal team. • Currently, the majority of funders are not regulated by ALF. In practice, this means that the only means of resolving conflicts of interests available to funded parties is the dispute resolution mechanism they agreed to in their funding arrangements. However, pursuing such disputes can be costly and time consuming, and a lack of personal financial resources may deter funded parties from seeking to institute such proceedings. • Tangible measures are required to facilitate the resolution of conflicts of interest. For example, litigation funding agreements should incorporate a practical dispute resolution mechanism involving oversight by an independent party, capable of determining what course of conduct would be reasonable and fair in the circumstances. Given the inequality of position between funded parties and funders, the former should also have access to a reporting mechanism whereby, if a funder is found to have acted in an unconscionable manner, such conduct can be referred to a disciplinary authority and/or be subject to judicial oversight.
Questions concerning the encouragement of litigation.		
36.	To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance: a) Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so? b) Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so? c) Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so? When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.	• In our experience, since third party litigation funders require positive solicitor and/or counsel opinions on the legal prospects of any claim before entering into negotiations regarding the funding thereof, it does not appear that such funding promotes unmeritorious claims. If anything, given that funders seek to promote their own commercial interests, it is probable that they largely fund only those claims with higher prospects of success.
37.	To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.	• Third party litigation funding encourages collective proceedings by providing essential financial resources for managing complex and high-cost litigation.

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38.	What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?	• A centralised, publicly accessible source of information on various funding options would be helpful. This would make it easier for potential litigants to understand the terms of any funding arrangements which they are asked to consider. Guidance materials should also be made available to assist prospective litigants in understanding their options. • It would also be helpful if an independent advisory service dedicated to litigation funding could be established, from which potential litigants could obtain impartial advice on funding arrangements appropriate to their needs.
General Issues		
39.	Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?	• N/A