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Civil Justice Council Review of Litigation Funding: consultation response

Consultation from 31 October 2024 to 31 January 2025 (subsequently extended to 3 March 2025)

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

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

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

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

Your response is (public/anonymous/confidential):	Public
First name:	Alistair
Last name:	Kinley
Location:	England & Wales
Role:	Clyde& Co is a firm of solicitors specialising in insurance-related litigation, dispute resolution and arbitration.
Job title:	Head of Policy Development
Organisation:	Clyde & Co
Are you responding on behalf of your organisation?	Yes. Although we are instructed by a wide range of clients who will each have their own views on third party litigation funding and on its regulation, our response represents a synthesis of views from throughout our practice on the issues raised in the interim report.
Your e-mail address:	[redacted]

Introduction

Clyde & Co is grateful for the opportunity to take part in the consultation process commenced by the interim report. In our response, which follows, we have not answered all the questions raised but have provided responses to those on which we are most able to comment.

Five main points guide the detail of the answers we have submitted.

1. **A refreshed approach to the regulation of litigation funding is necessary and appropriate**. In our view the factors leading to this conclusion include: the evolution and expansion of the funding market since the first self-regulatory code, the uncertainties resulting from the decision in *PACCAR*, and the need to provide, in clear terms, for adequate security for adverse costs and for managing the risks of conflict of interest. We should make it clear that in advocating a refreshed approach to regulation we are recommending additions and improvements to regulation, whatever form it may ultimately take. We are not expressing a preference between self-regulation and a more formal approach. Refreshed regulation should, regardless of its form, address the Principles identified by the European Law Institute's report published in the final quarter of 2024.The ELI report will be of great assistance in considering the detail of future regulation in this field.

2. **Protection of consumers**. There is a need for additional safeguards for consumers using litigation funding. We suggest that a refreshed regulatory regime could include core provision covering all funders / funded claims and additional protections for consumer disputes. There also seems to be a strong case for more robust use of existing regulatory powers where portfolio funding is used by law firms to pursue mass claims on behalf of consumers.

3. **Transparency of terms and disclosure**. It is critical that potential funded parties are provided with proper information about the terms of litigation funding agreements and given the opportunity to take independent advice. It is also key that the fact that the claim is supported by funding and the identity of the funder(s) are disclosed to the defendant and to the court. This should be done as early as possible in the pre-action stages, which may require amendments to protocols. The disclosure of particular commercial terms of any agreement is a controversial topic.

4. **Control of the claim**. We suggest that it will generally not be appropriate for a funder to exercise any control over funded claims. The terms of such a restriction and of any qualifications to it (which should be narrow) will require careful drafting.

5. **'Default on' costs settings**. We propose that costs management and security for costs should be 'default on' in funded claims. The former will assist in controlling the costs of funded disputes and the second provides access to justice for successful defendants. Regulatory provisions on capital adequacy and the more widespread use of Anti-Avoidance Endorsements in After-the-Event insurance policies are likely to be adequate grounds for removing the default setting for security.

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?

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

3 Are there other benefits of third party funding? If so, what are they?

Combined response to 1 - 3.

Third Party Funding has been found to promote access to justice, both in England & Wales and in Europe. There are very clear conclusions to this effect in Mulheron [2024][1], section 26 *Conclusions* at page 147 in particular and in ELI [2024][2] at its section II. *Objectives, 1. Facilitating and Increasing Access to Justice* at its page 17.

That said, it is clear that third party funding is not a universal solution for access, for the reasons given in the executive summary to Mulheron [2024]:

> *However, 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.*

In order to obtain funding, a claim needs to fit into a narrow set of criteria that are of interest to a litigation funder. As explained above by Mulheron, the vast majority of claims presented to funders fail to secure funding. This is not necessarily because they are 'bad' claims, as there are a large number of criteria that funders will apply, over and above the prospects of success[3]. Part 3 of the section1 of ELI [2024] is headed '*Levelling the Playing Field Internationally and Between Parties*'. Its first few paragraphs are worth setting out in full given that they summarise both the underlying themes of this current consultation in England & Wales and the tension between the polarised approaches of loose or limited regulation and more formal approaches (including statutory intervention).

> *The concerns which have been expressed are magnified by the fact that, in recent years, the TPLF industry has seen significant growth worldwide, while its development and regulatory framework has remained, to a great extent, incoherent across borders.*
>
> *The Voss Report suggested that while TPLF is virtually non-existent in most parts of Europe, it is well developed in the US, Canada, the UK, the Netherlands, and Australia. That is not perhaps a fair summary of the position in 2024. The*

[1] A Review Of Litigation Funding In England And Wales, Legal Service Board, March 2024. A-review-of-litigation-funding.pdf

[2] Principles Governing the Third Party Funding of Litigation, European Law Institute, December 2024 (final draft): ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf

[3] Other criteria might Include, for example: the type of claim and whether it is a 'test' case, the particular funder's risk appetite, the financial standing of the proposed opponent(s) and the ease of enforcement of a judgment, the likely amount of recovery, the likely costs involved on both sides (and how these might develop over time), and the expected duration of the claim.

state of TPLF in Europe is best described as patchy and developing. At least 45 funders are known to operate in the EU alone, as of 2022. Estimates of the amount of money involved in funded claims vary wildly but are routinely placed in the billions of dollars. TPLF is also a booming phenomenon in investment arbitration (claims of private investors against States). TPLF is also developing fast in India and China.

Various jurisdictions have adopted - or are in the process of adopting - different approaches to the rapidly expanding TPLF market. The more fragmented, weak or non-existent the regulatory or guidance landscape for TPLF, the greater the potential for abuses. It is, therefore, necessary to find balanced solutions that, on the one hand, can minimise the potential risks of TPLF arrangements and unfair practices in their operation, but, on the other hand, do not impose overly restrictive measures that could compromise the TPLF market's viability. Too strict an approach will only deprive potential litigants of financial resources for accessing justice and enforcing their rights, in the absence of alternatives.

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

TPF in England & Wales has developed significantly since Sir Rupert Jackson's Final Report[4] in 2009 and his conclusion then that the self-regulatory approach, via what was at the time a yet-to-be-finalised self-regulatory code sponsored by the Association of Litigation Funders (ALF), was fit for purpose.

He added, however, that "*the question whether there should be statutory regulation of third party funders …. ought to be re-visited if and when the third party funding market expands*"[5].

We would submit that the current review represents the opportunity to revisit that question comprehensively[6].

First, there are uncertainties in the market as a result of the well-known decision of the Supreme Court in *PACCAR*[7]. Second, a significant number of funders operate in England & Wales who are not members of the ALF. Third, section 58B of the Courts and Legal Services Act 1990 has not been commenced[8] and in any event if it were it would deal only with certain types of Litigation Funding Agreements – but not those that fall foul of PACCAR[9].

These factors lead us to conclude that the breadth and depth of the existing regulatory arrangements could be refreshed and extended: to adopt the words of the question, the current framework is not operating sufficiently to regulate the activity of third party funding and the conduct of funded claims.

Ultimately, the choice of between retaining the existing self-regulatory approach (with or without revisions) and a wholly new regulatory model will be one for the government, having considered the recommendations in the

[4] Review of Civil Litigation Costs: Final Report
[5] Ibid, recommendation 12.
[6] In our view this is clear from Lord Ponsonby's written answer of 17 December 2024: 2024-12-03/hl3170
[7] *PACCAR Inc & Ors, R (on the application of) v Competition Appeal Tribunal & Ors* [2023] UKSC 28 (26 July 2023)
[8] We would point out, in passing, that in Scotland there is a limited statutory provision regarding litigation funding, at section 10 of the: Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. However, as with s58B in England & Wales, this also has yet to be commenced.
[9] Paragraph 2.14 of the Interim Report explains that s58B applies to "*funding where the cost is linked to the amount of the funding, not a percentage of damages.*"

Final Report of this review. The key will be to achieve a balanced approach to regulation that adequately protects the parties to a Litigation Funding Agreement (LFA), the civil justice system more widely, and which does not operate unnecessarily either as a barrier to entry[10] to the market or to increase the cost of litigation.

Taking all the above into account, there is an overarching threshold issue which will need to be addressed. If litigation funding is to be regulated to a greater extent than at present, in whatever form, it would seem inevitable that there will need to be greater transparency about whether or not a matter is being funded, by whom, and about the terms of the funding arrangements. The latter is particularly sensitive when it comes to the commercial terms of funding agreements. It will be important to listen to views, of funders in particular, as to how increased disclosure of funding arrangements might affect competition in the market.

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

The potential risks and benefits associated with TPF have been examined in many recent publications, including the Interim Report, and we do not propose to repeat or paraphrase them. We would merely highlight the following material.

- Part 2(B) of the Interim Report describes the development of self-regulation and how the risks of TPF (from paragraph 3.10) have been addressed during this period.
- Mulheron [2024] examines risks and experiences of TPF from the perspective of the statutory objectives of the Legal Services Board.
- From time-to-time stakeholders have published or commissioned various reports which offer their own particular perspectives. Some of these are all too easily characterised as highly polarised[11], such as reports released in 2024 by BEUC (The European Consumer

[10] Which would not only be detrimental to access to justice but also to competition and innovation among providers of TPF.
[11] An over-simplification of the respective positions is that providers of TPF and consumer groups - those bringing and facilitating funded claims - are in favour of a flexible approach to regulation whereas business groups - those facing claims - lean more towards a stricter regime.

Organisation)[12], by the Adam Smith Institute[13] and by business groups, including the European Justice Forum[14].

- ELI [2024] also considers the risks and benefits of TPF and, in proposing a detailed set of principles, seeks to steer an "*alternative*", a middle path[15] between calls for a free market / self-regulatory approach and a push for the introduction of more rigid legal frameworks.

At the level of principle, the involvement of litigation funding in a case introduces a new stakeholder (or stakeholders), into any piece of litigation. It also changes the balance of power and control between the different stakeholders, each of which will have quite different levels of experience of litigation. Recent developments in reported cases suggest that the current system does not balance the interests of all these stakeholders as well as it might. One indicator of the success of the CJC review, and of measures put in place as a result of it, might be the extent to which more appropriate checks and balances can be put in place to balance the interests of all stakeholders fairly.

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

(a) If not, why not?

(b) If so, which types of dispute and/or form of proceedings 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?

We recognise that there may be some debate over whether English-seated arbitration falls within the remit of this review. In our view it should not, such that any recommendations made in the final report should apply only to conventional civil proceedings.[16]

[Supplementary points regarding arbitration.

(i) Arbitration, particularly international arbitration, has its own complexities concerning regulation. The parties and, in contrast to litigation, their advisors, may have no connection at all with the jurisdiction. Moreover, arbitration institutions around the world

[12] *Justice Unchained,* BEUC-X-2024-091_Third_Party_Litigation_Funding.pdf
[13] *Judge Dread: How Lawfare Undermines Business Confidence in the UK*
[14] European Justice Forum signs joint business statement on TPLF - European Justice Forum (EJF)
[15] ELI [2024], at page 11.
The Suggested Approach.
The Principles offer an alternative to both main approaches of codes of conduct and prescriptive regulation. They identify and provide guidance on key issues necessary to ensuring that the TPLF market operates fairly and to the benefit of both funders and funded parties and that TPLF agreements are drafted in a manner consistent with this purpose.
[16] Which is not to deny either that there may be experiences of the use of TPF in arbitration that the review may wish to consider or that those active in the arbitration sector will be uninterested in the issues raised in this review.

are addressing themselves to the regulation of 'arbitration' funding. Anecdotally, it appears as though arbitration is far less attractive to litigation funders than civil litigation.

(ii) An inherent feature of arbitration is that determinations do not create any form of civil law precedent and as such do not enable the development of jurisprudence on the issues(s) involved. This is not 'a bad thing' per se and can often be a factor in parties preferring arbitration to litigation. However, given that many individual LFAs will include arbitration clauses, we suggest this effect may already be operating to some extent. It may be something that the review might wish to reflect upon, even if arbitration does not fall within its strict terms of reference.]

We would suggest that the same regulatory regime - whatever its form, whether self-regulatory or more formal - for TPF should apply to all **funded claims** before the courts in England & Wales and subject to the Civil Procedure Rules and Practice Directions.

This is not to advocate a blunt 'one size fits all' regime for all funded claims, given the need for particular additional protections for consumers[17] when compared to those which should apply to non-consumer claims.

Regardless of the form or status of the applicable regulatory framework (whether self-regulated or more legally prescriptive), we suggest it should be possible to design a set of core principles for all funded claims, complemented by additional measures and protections applicable to consumers and consumer claims.

A further issue that needs to be addressed is whether, and if so how, the **providers of funding** should be regulated? This form of regulation would be of a different nature to the regulation of the terms and content of individual Litigation Funding Agreements in funded claims and could be much closer to formal authorisation or licensing of the provider by an independent body. Conceptually, such a body could, conceivably, be a relevant trade association (such as the ALF), an existing regulator given an extended remit (the FCA, for example), or an entirely new regulator specifically tasked with oversight of providers and of the sector more widely[18].

The table one the following page draws the ideas above together by way of a summary (for illustrative purposes only).

[17] This term would obviously need to be defined. The definition of 'consumer' adopted for FOS and FCA purposes might be suitable in this context. We can see that this would be superficially appealing, particularly if the FCA were to be in any way involved in a revised regulatory regime for TPF.
In any event, however, the practical implications of doing so would need to be explored in full.

[18] The difficulties experienced in the claims management sector in the early 2000s are very far removed from current issues in the TPF sector and should not in any way be regarded as a precedent. Nevertheless, it may be instructive to note that initial attempts at self-regulation did not last. A first wave of statutory regulation of claims management activity, which designated the Ministry of Justice as the new regulator, was then introduced by the Compensation Act 2006. Subsequently, the Financial Guidance and Claims Act 2018.reinforced the statutory regime and transferred regulatory oversight to the FCA.

		Scope / object of regulation	
		TFP provider	**Terms of the LFA & conduct of the claim**
Type of claim	- non-consumer	- self-regulated code / guidance	- core provisions
	- consumer	- authorised / licensed	- core provisions - plus enhanced protections
Principal source(s) of regulation		- self-regulated code / guidance - statute	- self-regulated code / guidance - regulations - rules of court

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

At the risk of extreme brevity, we refer again to the principles identified and set out in extensive detail in ELI [2024].

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?

There may be an element of circularity in the relationship between litigation costs and TPF. It might be asserted that the development of TPF is a response to the high level of civil litigation costs in England & Wales that enables parties without other resources or routes to justice to pursue claims (or to defend them). Equally, it might also be asserted that the greater availability of TPF acts as a driver of high(er) levels of costs in funded claims and the civil justice system more widely.

In our view, there is undoubtedly a particular concern with both the reality and the optics of (very) high costs in the Competition Appeal Tribunal (CAT) for, in many cases, mass consumer redress claims. Because very few cases in the CAT have reached a final trial[19], there is little precedent as to how the tribunal will exercise its inherent jurisdiction to manage costs proactively (and indeed proportionately). Should the exercise of this jurisdiction lead to perceived imbalances in the interests and returns of the various stakeholders, particularly in relation to the high-profile disputes exemplified by *Merricks v Mastercard*, there would be a real risk of serious damage to the reputation of the justice system in the eyes of the public. We would suggest this is something that perhaps needs particular attention when the review is formulating its recommendations.

We are unaware of the expense incurred by the ALF in setting up and continuing to monitor its self-regulatory code. Nor do we have any data about the cost to funders of joining ALF and of complying with the code.

We have concluded at 4 above that "the current framework is not operating sufficiently to regulate the activity of third party funding and of those who provide it" and that it - the current framework - should be refreshed and extended. Should that happen at the conclusion of the review (regardless of whatever form it might take), it would be unavoidable that the aggregate cost of regulation would, to some extent, be higher than before. The benefits of extended regulation would be the justification for any such increase. These costs and benefits should, if regulation is to be extended, investigated comprehensively[20] by the Ministry of Justice.

With regard to (e), we note the current lively, and somewhat polarised, debate about the recoverability[21] of the costs of third party funding. Although not entirely on all fours, this topic may to some extent be analogous with the ending of the recovery of *"additional liabilities"* (success fee uplifts and ATE premiums) brought about in 2013 and stemming from the Jackson Review[22]. In so far as it now appears to be settled policy that the cost of funding claims is not generally recoverable in civil litigation, we would tentatively suggest it is difficult to see the basis for an exception to be made for TPF.

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.

We would suggest that the impact of both concepts is relevant to any funding mechanism. It is a trite observation that liability for adverse costs may act as a deterrent to bringing proceedings and that security for (adverse) costs may have a similar effect.

On the other hand, these concepts serve access to justice from the perspective of the party facing the funded claim, in that they provide mechanisms for recovery of their costs should the claim fail. Furthermore, we would suggest that when there is TPF, security for costs should be 'default on' (for claims outside the scope of Qualified One-way Costs Shifting) as this would avoid

[19] At the time of writing, ie 7 February 2025.
[20] Via a formal impact assessment, for example.
[21] In this paragraph the words recoverability and recovery refer to transferring costs between the parties following the normal 'loser pays' principle.
[22] A link to which is provided at footnote 4 above.

wasted legal costs and skirmishes about relevance and ensure equality of arms.

After The Event insurance (ATE) may be in place in respect of adverse costs in funded claims. We note the recent development in that market of Anti-Avoidance Endorsements[23] (AAE). Depending on its precise terms, an AAE may serve as adequate security for costs[24] and we suggest this approach could usefully be further explored by the review in its post-consultation phase.

We note that some funders indicate that in relation to matters where there is a choice of jurisdiction, the high level of costs and concern about adverse costs liability in civil litigation in England & Wales[25] are making other jurisdictions which are

(i) cheaper in which to litigate, and/or

(ii) do not feature 'loser pays' costs shifting, and/or

(iii) in which costs are more predictable,

more attractive in which to pursue funded claims (e.g. the Netherlands and Portugal). It is important that the issue of costs does not reduce the attractiveness of the Courts of England & Wales for the resolution of important cross border disputes.

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

It seems to us that the so-called *Arkin* 'cap' has been overtaken[26] by subsequent developments both in case law, illustrated by the *Chapelgate* case mentioned at 3.4 of the interim report, and in the market. It may well be that matters have now evolved such that the working assumption is that a funder should be liable in full for adverse costs, albeit that the overall discretion of the court in respect of costs matters remains of critical importance[27].

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

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

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

(a) If so, why?

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[23] Which we understand may be offered subject to an additional premium being charged.
[24] One such example is *Saxton Woods Investments Limited v Francesco Costa and Ors* [2023] EWHC 850(Ch).
[25] The point is well made at paragraph 7.3 of the review:
…[the] *cost of litigation, which, despite serial attempts to reform and reduce it, remains disproportionately high in many cases and at too high a level for many individuals and businesses to afford. That litigants face the risk that they may have to pay their own litigation costs, and a proportion of those of the other party to litigation if their claim or defence is unsuccessful, compounds this problem, as does the historic general unpredictability of the level of such costs.*
[26] Other than where a funder provides discrete sums, say for disbursement funding.
[27] The position described in this sentence is very close to that proposed by Recommendation 13 of the Jackson review, ie *"Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge."*

(b) If not, why not?

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

(a) What level should it be set at and why?

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

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

(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?

We endorse the description in ELI [2024] of funder's fees as *"a particularly contentious and intractable issue"*. The approach set out in the five sub-paragraphs of ELI Principle 8 in our view covers all the salient matters to be considered when addressing how fees might be controlled.

For the avoidance of doubt, we are not expressing a preference between a version, suitably adapted to England & Wales, of ELI Principles 8(1) - 8(5) being taken forward either in self-regulation or in a more formalised framework[28].

On the particular question of caps on funders' fees, while we understand the arguments for and against 'hard' caps based on percentages[29] of sums recovered, there does not yet appear to us to be a sufficient evidence base in England & Wales that would support a particular figure or range of figures.

In the absence of such evidence - which this review may be able to gather - we agree with the conclusion in ELI [2024][30] that given *"the very different factors which apply in relation to different types of proceedings and litigants... it has not been considered appropriate in these Principles to adopt a prescriptive approach."*

In the event that the court was to scrutinise the levels of funder's fees, a flexible test might be more appropriate than a fixed cap. If so, an appropriate provision might be to require the court to be satisfied that the return represents a reasonable and proportionate reward for the funder in all the circumstances, including but not limited to the risks, the costs involved, the conduct of the parties and the actual settlement achieved. [For the avoidance of doubt, 'reasonable' in this context should not necessarily mean less than 50% of the recoveries.]

We would make two final comments on funder's fees.

- First, that the issue might be **treated differently in consumer and non-consumer claims**.

[28] The tensions between the different approaches to controlling fees is set out under the heading "Comments" at page 44.
[29] It should be borne in mind that the decision of the Supreme Cout in *PACCAR* means that such agreements are, if used to pursue 'opt out' competition claims in the CAT, currently unenforceable.
[30] At the foot of column 1 of page 46.

- Second, that the review should consider what the effect of a funded party taking **independent legal advice on the terms of the LFA** *before* entering into it should be as regards post factum scrutiny of the level of fees agreed to in the LFA.

We noted in our response to question 8 that there is as yet very little experience of costs decisions in the CAT. We can envisage that it might become standard practice[31] for funded claimants to take independent advice[32] on the terms of any LFA, including the commercial terms and the funder's fee. Although a requirement to do so could perhaps go towards better balancing the interests of stakeholders[33], there are, of course, the very real issues of who would pay for such advice and what duties would be owed to whom.

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

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

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

15 What are the alternatives to third party funding?

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

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

(b) Can other forms of litigation funding complement third party funding?

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

(c) If so, when and how?

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[31] Such an approach might emerge following decisions in cases such as Merricks v Mastercard or, perhaps, as a recommendation made by this review.

[32] The question of obtaining independent advice before entering into a type of funding agreement to pursue a claim surfaced in 2009 in the Jackson Review (a link to which is provided at footnote 4 above) in respect of Damages-Based Agreements (which, at the time, were referred to as contingency fee agreements). Recommendation 15 of the review was that:
"Contingency fee agreements should be properly regulated and they should not be valid unless the client has received independent advice."
Despite this clear recommendation, we are not aware that such independent advice has been provided to any great extent in consumer cases. It seems reasonable to suggest that the issues of cost and duty that we identified above would be factors that prevented the recommendation being taken forward. The question from that experience in the DBA context is whether a similar recommendation in relation to LFAs - were it to be made by this review - would have any better prospects of success?

[33] Please note our response to question 5.

We can only comment generally on these issues as we rarely use BTE insurance and Trade Union funding is not relevant to how we are instructed. Plainly, given the ultimate cost of TPF, it should be considered a last resort. In our view, solicitors properly discharging their duty to their client are required to advise on all applicable forms of funding in any event and that must include whether there is any commercial relationship with a funder.

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?

Please see above.

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?

In our view, The Solicitors Act 1974 is outdated and needs wholesale reform to account for modern legal practice and we would strongly suggest a separate contingent funding regulation which would, ideally, apply to the widest variety of funding models/options and could bring together (or replace entirely) the current different statutory approaches.

Bluntly put, it is difficult enough for lawyers to understand the existing CFA and DBA[34] regimes - *PACCAR* being a clear illustration - let alone lay consumers[35]. Simplification is long overdue.

We were therefore encouraged to read the comments of Sir Geoffrey Vos MR that accompanied the publication of the interim report. He noted that the CJC is:

> *"…also conducting a review of the Solicitors Act 1974, through a working group chaired by Mr Justice Adam Johnson. The CJC understands that there will be areas of overlap between the work of that group and the Litigation Funding Group. It will create valuable consistency and coherence for the Solicitors Act Working Group to be able to take account of the responses to this Consultation by the Litigation Funding Group as they take forward their work in the New Year."*

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?

See comments above and below.

19 What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and

[34] To say nothing here of the flaws in the DBA regime identified first by Mulheron et al for the CJC in 2015 (The Damages-Based Agreements Reform Project: Drafting and Policy Issues) and re-examined by Mulheron and Bacon in 2019 (The Damages-Based Agreements Reform Project - School of Law). As far as we are aware, none of the proposals in either report has been taken forward by the Ministry of Justice.
[35] A statement which may also apply to a proportion of proposed class representatives.

third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?

This can be dealt with by suitable security for costs, including a 'default on' approach (outlined in our response to question 23). Reform of this nature should reduce the prospect of ATE policies being avoiding ab initio and/or could lead to a more widespread adoption of Anti-Avoidance Endorsements.

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

No response.

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

Portfolio funding can and, unless there is sufficient regulation that is properly enforced, will continue to cause harm to unsophisticated litigants. However, we do not consider that any specific reform is required as such, but there does need to be effective regulation and enforcement by the SRA.

We would submit that law firms who use portfolio funding should be subject to enhanced scrutiny by the regulator, which should include: reviews of the commercial terms agreed between solicitor / funder / claimant, whether the associated ATE insurance will respond effectively and, crucially, stress tests of the viability of the portfolio of claims at regular intervals.

Many of the claims funded on a portfolio basis are of modest value individually, but the potential number and scale of claims creates an investable proposition for the funder. This however creates extreme risk, as in our view there is an almost inevitable incentive to keep adding new claims, regardless of prospects, as was seen in the collapse of SSB Law[36]. Ultimately however, effective and robust regulation using existing powers should be able to contain these behaviours.

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?

We have commented, in prior consultation responses and above, but we would strongly advocate effective costs management of funded claims and lifting the £10m cap on costs management.

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?

Yes.

[36] Coverage of which includes the following: SSB Law: Families left with huge legal bills challenge MPs - BBC News and SRA | Cavity wall insulation claims handled by SSB Group (SSB) and Pure Legal Limited (Pure Legal) | Solicitors Regulation Authority

The relevant rules need to be developed further to deal with the matters we have raised above. In particular, we would suggest that in funded claims:

(i) there should be mandatory disclosure (to other parties and to the court) that the claim has been brought using TPF, and of the identity of the funder(s) involved, which we suggest should happen at the pre-action stage (see 26 below), and

(ii) there should be a 'default on' procedural settings for (a) for costs budgeting & management and (b) for security for costs.

We recognise the finely balanced arguments for and against disclosure of the terms of the LFA, which are summarised in the commentary in ELI [2024] at its Principle 5[37].

> *"Disclosure of the agreement itself to the defendant is more hotly contested due to the alleged risk of strategic benefit to the defendant and the costs of disclosure, which could potentially be very high. A further related concern (which may well be justifiable) is the scope for satellite litigation taking up court time and resources. One can readily imagine that this might occur if a defendant, who is not receiving third party funding, was unhappy about the level of funding available to the plaintiff. This could be due to concerns about creating an imbalance in resources, the potential for prolonged litigation, or the funder's aggressive litigation strategy. Additionally, the defendant might be concerned about the level of information as to the capital adequacy of the funder. Those scholars who see disclosure as a means to reduce inefficiencies or to encourage competition in funder fees do not address the kinds of litigation consequences which may well occur in high stakes litigation."*

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?

Please refer to our response at 23 above.

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?

The decision in *Rowe* related to security for costs in the context of that claim in particular and to the funding arrangements that were in place.

We have already recommended a default 'on' setting for security for costs in funded claims, which could be achieved by amending parts of the CPR.

However, a similar end might also be achieved by addressing security for costs and the wider topic of capital adequacy / solvency of funders in any new regulatory framework that emerges following this review. Adding the concept of regulation into paragraph 78 of *Rowe* helps to illustrate this point (our insertions are shown in **bold**):

> *"…it is a critical feature of the business of commercial litigation funding that funders should ensure that they have adequate resources to meet their potential liabilities arising out of the litigation that they choose to fund. It follows that a*

[37] At the top of the second column of page 33 of the report.

> *properly run [**and effectively regulated**] commercial funder should rarely if ever need to be ordered to put up security. A funder should be [**regulated**,] 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."*

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?

In our view it would be appropriate for the disclosure arrangements described above to apply at the pre-action stage. The implication of this may be that such a requirement should feature in Pre-Action Protocols and/or in equivalent provisions in the CAT.

Should such a requirement be introduced, careful consideration will be needed in designing appropriate and proportionate sanctions in the event of breach.

A much more general proposal about 'mass' claims was made in the Phase 2 Final Report of the CJC's Review of Pre-Action Protocols and is set out below[38]. It may be something to be explored further during the next phase of this review.

> *"An additional recommendation has recently been put forward by the King's Bench Masters who handle multi-party litigation and Group Litigation Orders on a regular basis. It has become apparent that Practice Direction 19 B of the CPR is not working well and that what is required is a new specialist Pre-Action Protocol. This was not consulted upon but seems worthy of further consideration in conjunction with those who manage such work in practice and in the courts".*

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?

Such a requirement would be superfluous if disclosure is to be required at the pre-action stage (see question 26) but there may nevertheless be merit in introducing it as a form of reminder and check when, or if, proceedings are issued.

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?

As preliminary comment, during the consultation period there has been extensive and ongoing coverage in the specialist legal media of issues arising following the settlement of the long-running funded claim of *Merricks v Mastercard* which was pursued in the CAT. We would draw this coverage to the review team's attention.

We would advocate a strict 'no control' regime in principle. The rights allegedly infringed in any claim are those of the party/claimant (funded

[38] See paragraph 3.46 of https://www.judiciary.uk/wp-content/uploads/2025/01/CJC-Review-of-Pre-Action-Protocols-Phase-Two-Report.pdf

party/parties). The fact that litigation is possible only because of the backing of a funder does not change this.

As with many of the topics above, ELI [2024] ventilates the debate on control comprehensively, in this case at Principe 10 *"Case Management (Control)"*.

The commentary there recognises the core importance of a 'no control' approach overall, but adopts a pragmatic solution at Principle 10(1) in putting forward a *"save in exceptional cases"* qualification and in making the important point in subsequent commentary[39] that *"An experienced funder may well have valuable litigation experience which can assist in running a case well and tactically astutely."*

While this sort of assistance could prove beneficial, we would suggest that he goal of any regulatory principle, rule or other provision should be to prevent a level of control by a funder that - in consumer claims in particular - would operate either significantly to the detriment of the funded party (or class) or in the sole interests of the funder.

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

No response.

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?

It seems implicit in the question that the existence of funding will be known to the court. We say this should be as a result of the disclosure obligations we suggest at questions 23, 26 & 27 rather than of any late 'reveal' of funding at the proposed settlement stage.

We have reached a tentative conclusion that settlement approval should always be required in 'consumer' claims pursued by TPF. There could also be a presumption against it in other claims (ie non-consumer matters) albeit subject to the court's discretion.

Where the claimant (and any individual claimant in a group or class) is a child or protected party the usual approval process for those claims should also apply.

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?

It appears to follow from the question that the court would need to scrutinise the terms of the LFA as part of the settlement approval process.

It is not clear to us that there is a need for a special test for approving the settlement of funded claims. We would suggest that a broad approach that considers whether the proposed settlement 'represents a fair, just and reasonable settlement for the claimant(s) in light of all the circumstances/features of the claim' could be satisfactory. It might also be

[39] At the middle of the first column of page 49.

helpful if a non-exhaustive list of the most relevant circumstances/features of a claim was provided by way of illustration.

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?

The range and possible scope of measures to protect funded claimants is, as with many of the questions in this consultation, well addressed by ELI [2024].

We accept the force of the proposal that prospective funded parties should be informed of the need to take independent advice on the terms of a LFA. We are, however, concerned about how such advice would be in practice be delivered and paid for, in consumer claims in particular (sophisticated businesses exploring using TPF might be expected to source and fund such advice more readily).

A similar proposal was made in the Jackson review[40] in respect of independent advice before entering into contingency fee agreements. We are unaware of the extent to which such advice may have been commissioned in practice, although we suspect it may extremely limited, other than in large commercial matters[41].

Turning to the protection of those facing funded claims, the defendants, we also accept the force of the argument that in funded claims clear provision should be made for liability for adverse costs - whether in the LFA, via ATE insurance or otherwise - including (as noted above) the removal of the *Arkin 'cap'*[42].

Please refer also to our response to question 17 with regard to portfolio funding.

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

No response.

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?

Conflicts arise in practice. ELI [2024] summarises[43] the main areas of concern.

- ***Conflicts of interest:*** *Certain funding agreements may create or exacerbate conflicts of interest between the funder and the funded party. This is an issue which is particularly obvious when the question of control of (or influence over) the litigation is considered (a question considered further below). But there are other less avoidable conflicts, such as common interests developing between funders and lawyers engaged in particular types of funded claims, or a right of advice or input on the part of the funder becoming a de facto control in circumstances where a funder has expertise which the funder party lacks. Such*

[40] A link to which is provided at footnote 4.
[41] The points in this paragraph have already been made at footnote 32 above.
[42] *Arkin* is covered in the response to question 10.
[43] In the second column of page 18.

issues arise too out of the developing concepts of portfolio and law firm funding, where clients or firms are dependent on funders for a wide range of business.

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.

Yes.

We recommend that there should be clear provision about avoiding conflicts of interest in any regulatory regime that may be taken forward following this review. Proposals could be drawn from the points made at ELI [2024] *Principle 6: Avoidance and Management of Conflicts of Interest.*

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.

It is clear that funding enables group litigation, representative actions and collective proceedings to be pursued. Given the inequality of arms in consumer issues this is to be commended and encouraged (with suitable reform) as these cases would not be possible without TPF. We would refer the review to the tables of cases at Appendix B of Mulheron [2024] A-review-of-litigation-funding.pdf and to the details of collective claims in the CAT, since PACCAR, provided by MoJ on 20 January 2025 https://questions-statements.parliament.uk/written-questions/detail/2025-01-06/HL3729

However, we have expressed our concerns about portfolio funding and, as we have seen with Pure Legal & SSB's collapses, there needs to be greater control and firmer regulation in this area because of the very significant potential of vexatious and unmeritorious claims being pursued to satisfy a certain threshold or number of claims to make the proposed group or portfolio viable.

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.

No response, other than to say that the decision to bring a claim should always be that of the funded party.

If there is evidence of funders, advisers or others exerting pressure on certain claimants using particular funding models to bring claims they might not

otherwise have freely decided to pursue[44] then appropriate steps should be taken to control this. Measures to this effect might be included in transparency & disclosure provisions of the regulatory regime that is put in place following this review.

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?

Better provision of information about litigation funding generally and raising awareness of the breadth of options within the sector could form part of the appropriate regulatory regime for the sector (regardless of whether that might remain a self-regulatory approach or might move towards more formal, even statutory, regulation).

We would also suggest that there may be a role for consumer groups, proposed class representatives, legal advisers etc in raising awareness. Although this may not be possible in 'opt out' proceedings (because class members do not actively come forward before the claim is made), it may be worth exploring whether the certification process could include a requirement for the provision of clear and concise information for class members when identifying themselves in order to share in the proceeds of a successful 'opt out 'claim pursued with the benefit of litigation funding.

General Issues

39 Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions? [Please note that the Working Party is not considering civil legal aid.]

No response.

Clyde & Co

7th February 2025

[44] We would point out the difference between a potential claimant (i) wanting to pursue a claim and seeking funding in order to do so and (ii) being induced to bring a claim because of the availability of funding arrangements.

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Civil Justice Council Review of Litigation Funding: additional submission

[Consultation deadline extended to 3rd March 2025]

Introduction

This brief note is an additional submission from Clyde & Co to the Civil Justice Council's review of litigation funding.

Its focus is on what could be described as the 'threshold' for regulatory intervention identified in ELI [2024][1], namely *that "regulation is only appropriate where there is an* ***identifiable problem*** *or* ***market failure****.*[2]*"* [We have emphasised these two elements because they serve as the structure of this note.]

In the section of the report which includes that phase, ELI was referring to prescriptive, formal regulation of the litigation funding sector. For the purposes of this additional submission, we adopt that phrase with the qualification that *"regulation"* should be understood in the way explained below, which formed point 1 of our initial submission (dated 7th February 2025 and e-mailed to the CJC on 10th February).

1. ***A refreshed approach to the regulation of litigation funding is necessary and appropriate****. In our view the factors leading to this conclusion include: the evolution and expansion of the funding market since the first self-regulatory code, the uncertainties resulting from the decision in PACCAR, and the need to provide, in clear terms, for adequate security for adverse costs and for managing the risks of conflict of interest. We should make it clear that in advocating a refreshed approach to regulation we are recommending additions and improvements to regulation, whatever form it may ultimately take. We are not expressing a preference between self-regulation and a more formal approach. Refreshed regulation should, regardless of its form, address the Principles identified by the European Law Institute's report published in the final quarter of 2024.The ELI report will be of great assistance in considering the detail of future regulation in this field.*

Is there an "*identified problem*" in litigation funding in England & Wales?

We would submit that there is. The outcome of the *PACCAR* case, along with the complexities and deficiencies of the existing DBA regime, identified previously by Mulheron & Bacon[3], pose obvious difficulties for funders, clients, and lawyers.

What are the solutions?

The following may be among the regulatory solutions that the CJC's review could propose.

- Commencing section 58B of the Courts and Legal Services Act 1990. Doing so would, however, offer only a partial solution because of the narrow scope of the section. As noted in the interim report, it is limited to *"cases of funding where the cost is linked to the amount of the funding, not a percentage of damages*[4]*."* Bringing the

[1] Principles Governing the Third Party Funding of Litigation, European Law Institute, December 2024 (final draft): ELI Principles Governing the Third Party Funding of Litigation.pdf [We have added the bold emphasis.]
[2] Ibid, towards the end of the right column of page 10 and at the top of the left column of page 22.
[3] Set out at footnote 34 of our initial response.
[4] At paragraph 2.13.

section into force would rather beg the question whether similar regulation-making powers should be put in place for those litigation funding agreements not currently within the scope of s58B.

- Introducing focused legislation. This could be similar to the 2024 Litigation Funding Agreements (Enforceability) Bill. Although this may be an option, the significant passage of time since the *PACCAR* decision may now mean that fully retrospective reform, as proposed in the LFA(E) Bill[5], is no longer justifiable (which is not to comment on whether it was at the time of that Bill or of a precursor clause added to, but ultimately with drawn from, the Digital Markets, Competition and Consumers Bill).

- Introducing wider regulation[6] of providers, agreements, and conduct. In our initial response, the answer to question 6 identified some of the structural and substantive issues that would need to be addressed should this sort of approach be adopted.

Is there "*market failure*" in litigation funding in England & Wales?

Two assumptions are necessary in order to address this.

First, that the pursuit of civil claims for redress, by and on behalf of consumers and non-consumers, the funding options available, and the processes governing how these claims are resolved, can fairly be described as a 'market'. In our view it is far from controversial to suggest that they can.

Second that the status quo falls materially short of fostering an effective and efficient 'market' for funded claims in general, such that regulatory intervention would be warranted. In the current context, the measure of market efficiency and effectiveness appears to us to be *"to deal with cases justly and at proportionate cost*[7]*"* (or, in Sir Rupert Jackson's formulation, *"to promote access to justice at proportionate cost*[8]*"*). We would also suggest, for the reasons set out in our initial submission, that the second assumption is valid in the current funding environment.

The need for a refreshed approach to regulation[9] is, in our view, illustrated by the recent developments in the *Merricks v Mastercard litigation*. The dispute between the funder and the class representative over the approval of the terms of the proposed settlement[10] on behalf of the class touches on important principles recognised in ELI [2024] such as control (of litigation) and avoiding conflicts of interest.

The prospect in *Merricks* of arbitration proceedings between the funder and the class representative illustrates another point we made in our initial submission. That is that the triggering of arbitration provisions will mean that outcomes have no precedential

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[5] At clause 1(4): *"The amendments made by this section are treated as always having had effect."*
[6] To be understood in this context by referring to point 1 of our initial submission, set out at page 1 above.
[7] CPR 1.1(1)
[8] Final Report [2009], paragraph 1.1 of page xvi.
[9] See footnote 6 above.
[10] The news site legalfutures reported on 24 February 2025 that the Competition Appeal Tribunal approved the proposed settlement: Tribunal approves landmark £200m Mastercard settlement - Legal Futures

value, something which appears likely to restrict the oversight of the courts in respect of litigation funding agreements and related disputes. We suggest this is something the review may wish to consider carefully.

What are the solutions?

In her 2024 report to the Legal Services Board, Professor Mulheron found that commercial litigation funding, considered in isolation, *"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*[11]*."* It is merely one facet, among many others, of seeking to deliver the objective above.

The following may be among the regulatory solutions that the CJC's review could propose.

- A form of refreshed regulation[12] of the litigation funding sector that could improve - very possibly significantly - matters such as transparency, security/capital adequacy, avoiding conflicts and protecting clients. There is also an argument that competition and trust and confidence in the market could also be improved.

- Nevertheless, it (refreshed regulation[12]) would not necessarily address the underlying point of Mulheron's finding, i.e. that litigation funding is likely, in relation to consumer matters in particular, to remain an important solution only for a fairly narrow range of cases.

- Other funding options for funding legal professionals' fees such as CFAs, DBAs and BTE and ATE insurance will, in the ongoing absence of any comprehensive scheme of legal aid for civil claims[13], have a role to play towards the meeting the CPR & Jacksonian objective noted above.

- In this context we would repeat two points from our initial submission: (i) that the existing DBA regime should be reformed by adopting the previous

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[11] Mulheron [2024] at page 10, in the passage headed *Improving Access to Justice*. The passage is set out in full below, given that the remainder of it is also relevant to concerns about the sheer weight of costs in funded claims, i.e. consultation question 8, *What is the relationship, if any, between third party funding and litigation costs?*

> "Improving access to justice: *for those using litigation funding, their 'day in court' becomes a tangible prospect, a prospect which underlines that the substantive law means nothing if there is no means by which to test it. However, 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. Moreover, the costs of litigation may be considerable, thereby reducing the return-on-investment to litigation funders. Outward success occurs where funded clients have their 'day in court' and obtain a favourable judgement or obtain a settlement in their favour. But in reality, when the costs of pursuing the action are taken into account (and the funder will be entitled to reimbursement of those costs under the typical 'waterfall distribution clause' in an LFA), the ultimate compensation available to the funded client may be quite small, or even inadequate to address the detriment which they have suffered. Litigation funding offers consumers a hitherto unobtainable route to access to justice where there are more widespread but lower levels of detriment; but in all cases (whether in the collective actions space or in the individual litigant scenario), the economics of the case matter*".

[12] See footnote 6 above.

[13] We would suggest that the current political and economic reality is such that calls for the reintroduction of widespread civil legal aid will remain pipe dreams.

recommendations made by Mulheron & Bacon[14] and (ii) that there is a case for *"a single, regulatory regime for all forms contingent funding agreements"*[15].

- Building on (ii), and to paraphrase a remark made at the CJC's consultation event on 26th February 2025, the technical regulation of the current CFA regime may be satisfactory but the economics are not always attractive, whereas the economics of DBAs are clear and persuasive but the technical regulation is not fit for purpose[16].

- Finally, different mechanisms for providing redress, i.e. other than by way of litigation - for example: compensation schemes, ombudsmen, civil penalties imposed by regulators, even mechanisms for alternative dispute resolution - should also be regarded as important ways for consumers in particular to enforce their rights effectively and efficiently. We would however submit that these mechanisms are beyond the terms of reference of the current review.

Clyde & Co
3rd March 2025

[14] See footnote 3 above.
[15] This phrase appears in the final sentence of question 17 in the interim report.
[16] Largely for the reasons identified by Mulheron & Bacon; see footnote 3 above.

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