

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:

Your response is (public/anonymous/confidential):	Public
First name:	Andrew
Last name:	Mills
Location:	Nottingham
Role:	Legal
Job title:	Legal Director UK&I
Organisation:	Experian Limited
Are you responding on behalf of your organisation?	Yes
Your email address:	

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.

The full list of consultation questions is below:

- Please give reasons for your answers. Please do so by reference, where applicable, to the guidance given in the footnotes.
- All answers should be supported by evidence where possible to enable evidence-based conclusions to be drawn.
- It is not necessary to answer all the questions.

Introduction to Experian

Experian is a leading global information services company, providing data and analytical tools to clients in more than 80 countries. The company helps businesses to manage credit risk, prevent fraud and automate decision making. Experian also helps individuals to check their credit report and credit score and protect against identity theft.

Experian plc is listed on the London Stock Exchange (EXPN) and is a constituent of the FTSE 100 index. Experian employs more than 20,000 people in over 30 countries and has its corporate headquarters in Dublin, Ireland, with operational headquarters in Nottingham, UK; California, US; and São Paulo, Brazil.

Experian Limited is one of three main UK consumer credit reference agencies whose regulated activities are governed by the FCA. In the rest of this document, references to “Experian” are the Experian Limited.

As part of our core business, Experian helps people, businesses and organisations to:

- **Lend and borrow responsibly:** by gathering information on past and present credit commitments, such as loans, mortgages and credit cards, Experian helps lenders to understand whether people and businesses can manage their debt repayments affordably, so they can borrow and lend responsibly.
- **Treat people and business fairly:** because Experian helps organisations make decisions on data, they can treat people and businesses fairly and consistently, which in turn helps people to access credit.
- **Access vital information more easily:** easily available and understandable information allows people and businesses to prove their financial track record to organisations, so they can get the best deals.
- **Make better, more efficient decisions to create better business outcomes:** by gathering and analysing information supplied by people and businesses, organisations can make quicker decisions, now taking seconds and minutes instead of days. Organisations need to make fewer manual checks which means less administration and fewer bad debts. This means the cost of extending credit is lower.

Alongside these core services, Experian has wider capabilities in smart insights, intelligent decisions, advanced analytics and trusted identity. Through our advanced data analysis, research and development, we put our over 30 years of experience to good use. Experian’s data and analytics help

people, businesses and organisations protect, manage and make the most their data, creating better business and consumer outcomes and building stronger customer relationships.

Through our services we are:

- **Supporting business growth:** Through identifying economic trends, providing credit market insights and portfolio benchmarking to help drive future opportunities.
- **Improving decision making:** Through providing real-time access to data and decision-making tools, utilising innovative data and analytics tools, alongside the application of artificial intelligence and machine learning meaning businesses can implement the most predictive models and insight to inform business strategies.
- **Creating unique insight:** Creating intelligent analytical environment and modelling tools – including the application of artificial intelligence and machine learning – to let businesses test the impact of scenarios before rolling them out alongside combining business and external data with Experian data to co-create unique, business-changing insight.
- **Preventing against fraud:** Through allowing validation and verification of a customer’s personal information quickly using multiple capabilities all through one platform, connecting devices, mobile, bank account and email addresses to validate and authenticate a person; without inconveniencing customers and using machine learning to understand the behaviour of customers. Credit reference agencies (CRAs) play an important role in not only providing insightful data, but also enabling socio-economic change through financial inclusion, access to goods and services and supporting the vulnerable when needed.

The evolution in the services Experian provides has come as a direct result of the ability for businesses like Experian to operate in a competitive and innovative manner. In the UK, we seek to constantly evolve, bringing in new data sources that provide more insight and understanding. Our activity is controlled not only by a data protection framework governed by the ICO but many activities are also FCA regulated to ensure that activities are consumer centric, fair and transparent. There is also an element of self-regulation, for example, where credit data is shared on a reciprocal basis under industry agreed rules. By creating this competitive environment, the UK has been at the forefront of stimulating highly predictive credit scoring activities, helping consumers to build credit files and attain access to more goods and services.

Executive Summary of Experian’s response

Access to Justice

Third-Party Litigation Funding (TPLF) *may* enhance access to justice by providing financial resources to claimants who might otherwise be unable to afford litigation. Proponents argue that TPLF enables claimants to pursue their claims on an equal footing with well-resourced defendants, potentially promoting fairness and ensuring that justice is not denied due to a lack of financial resources. However, access to justice encompasses more than just access to a court, judgment and enforcement. It also includes access to non-court-based forms of dispute resolution, such as negotiation, mediation, complaints, regulatory redress schemes and Ombudsman schemes. Access to justice is also a right for defendants.

While TPLF can facilitate access to justice, it is important to consider whether it delivers complete redress to claimants. Alternative dispute resolution mechanisms, such as Ombudsman schemes, can provide a straightforward and no-cost way for individuals to resolve disputes without the need for legal representation. However, TPLF-driven cases can take many years to resolve and may deliver less benefit to claimants than to the TPLF provider and the legal representatives.

Equality of Arms

TPLF is often promoted as a means to enhance access to justice and promote equality of arms. By providing financial resources to claimants who might otherwise be unable to afford litigation, TPLF can appear to level the playing field, particularly in cases where there is a significant disparity in resources between the parties. However, it is important to critically examine whether TPLF truly delivers on the promise of access to justice and equality of arms. While TPLF can provide the necessary financial support for litigation, it is fundamentally a for-profit business model. A real concern is that TPLF organizations may prioritize cases with a high likelihood of success and substantial financial returns, potentially leaving out cases that are meritorious but less financially attractive. Even in successful cases, a significant portion of the compensation awarded often goes to the funders and lawyers, leaving claimants with a relatively small share.

Limited Benefits of TPLF beyond the Funders

There are no significant additional benefits for claimants, the justice system or defendants in the use of TPLF. For claimants, the primary benefit of TPLF is the financial support to pursue litigation, but this comes at a cost, as a significant portion of any awarded compensation often goes to the funders and lawyers, leaving claimants with a smaller share. For the justice system, TPLF introduces profit-driven motives that can distort the primary purpose of resolving disputes and providing redress. For defendants, TPLF can expose them to the risk of vexatious claims and claims designed to secure settlements.

Regulatory Reforms

The current regulatory framework for TPLF in the UK is primarily self-regulatory, with the Association of Litigation Funders (ALF) providing a voluntary code of conduct. While this framework has some merits, it is insufficient to address the complexities and risks associated with the growing TPLF market. We recommend the establishment of a mandatory regulatory system for all TPLF providers, ensuring that only registered and vetted funders can operate in the market. Additionally, there is a significant lack of transparency, with no mandatory disclosure of funding agreements. We propose mandatory disclosure of all funding agreements to the court (and in other dispute resolution procedures) and all parties involved. To prevent excessive profiteering and ensure claimants receive a fair share of any settlement or award, we recommend implementing caps on funders' returns. The self-regulatory nature of the current framework is insufficient to ensure accountability and compliance, so we recommend establishing an independent regulatory body to oversee TPLF activities. This body should be responsible for monitoring funders' conduct, ensuring compliance with regulations and capital adequacy and addressing any breaches of ethical standards.

Risks and Harms

One of the most significant risks associated with TPLF is the potential for conflicts of interest. Funders may prioritize their financial returns over the interests of claimants, leading to decisions

that are not in the best interests of the claimants. The current self-regulatory framework does not mandate full disclosure of funding agreements, resulting in a lack of transparency. The profit-driven nature of TPLF can incentivize funders to support frivolous or predatory litigation. TPLF often involves funders taking a significant portion of any settlement or award, sometimes as much as 40% or higher. There is a risk that foreign entities, including sovereign wealth funds and adversarial governments, could use TPLF to exert influence over domestic litigation. Additionally, it creates potential conflict risks for lawyers and legal representatives.

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

Third-party funding (TPLF) can play a role in enhancing access to justice by providing financial resources to claimants who might otherwise be unable to afford litigation. This is particularly relevant in complex or high-value cases where the costs can be prohibitive. TPLF enables claimants to pursue their claims on an equal footing with well-resourced defendants, potentially promoting fairness and ensuring that justice is not denied due to a lack of financial resources.

However, access to justice encompasses more than just access to a court, judgment and enforcement. It also includes access to non-court-based forms of dispute resolution, such as negotiation, mediation, complaints, regulatory redress schemes and Ombudsman schemes. These alternative mechanisms often allow concerned individuals to bring their cases at little or no cost and without the need for intermediaries who may be driven by profit motives. This can make them more accessible and less intimidating for individuals seeking redress.

Measuring “access to justice” by assessing the volume of litigation is no measure of that outcome at all and so we must be wary of thinking that more litigation means that there is more access to justice.

While TPLF can facilitate access to justice, it is important to consider whether it delivers complete redress to claimants. One significant challenge is the requirement for claimants to “opt-in” to claim their share of any settlement or judgment amount. Evidence from various jurisdictions suggests that only a fraction of claimants actually take this step, which can limit the overall effectiveness of TPLF in delivering complete redress. For instance, empirical legal research indicates that in many cases, only a small percentage of eligible claimants take the necessary steps to claim their share of the settlement. This can result in a significant portion of the settlement funds remaining undistributed, ultimately benefiting the funders and lawyers more than the claimants themselves.

Alternative dispute resolution mechanisms, such as Ombudsman schemes, provide a straightforward and cost-free way for individuals to resolve disputes without the need for legal representation. These schemes are designed to be user-friendly and accessible, ensuring that individuals can seek redress without the barriers associated with formal litigation.

Arguments about access to justice are often framed with presumptions of wrongdoing by defendants. Access to justice is a two-way street.

Completely different mechanisms, such as redress activities mandated by regulators, can also be an effective mechanism to get compensation into the hands of (typically) consumers without the need for any action on the part of the consumer at all.

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.

Lastly, some advocates for TPLF suggest that this can help secure wider “justice” by “not letting big organisations get away with it”². However, our civil justice system has always been a system for resolving disputes of law and fact and, where appropriate, ensuring compensation for damage suffered. It has never been about punishment, which is the remit of regulators and the criminal justice system.

In conclusion, while TPLF can enhance access to justice by providing financial support for litigation, it does not always guarantee complete redress for all affected individuals. The requirement for claimants to opt-in to claim their share of settlements or judgments in mass claim cases can limit the overall effectiveness of TPLF. Alternative mechanisms, such as ADR and Ombudsman schemes, offer accessible and cost-effective means of resolving disputes without the involvement of profit-driven intermediaries. A balanced approach that includes effective regulation of TPLF and support for alternative mechanisms can help ensure that access to justice is achieved in a fair and equitable manner.

It is also important to remember that the very nature of TPLF funding is to generate a profit. The civil justice system was never created as and has not been updated to operate as, a profit-creating machinery.

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

TPLF is often promoted by claimant law firms and TPLF organisations as a means to enhance access to justice and promote equality of arms. The idea is that by providing financial resources to claimants who might otherwise be unable to afford litigation, TPLF can level the playing field, particularly in cases where there is a significant disparity in resources between the parties. This can be especially relevant in David versus Goliath scenarios, where individuals or small businesses are litigating against large corporations. However, context must also be considered and it is a common tactic for claimants and their lawyers to apply additional pressure to bear on defendants, such as provoking mass media coverage (particularly claiming large amounts of redress available to individuals), social media postings or event activities such as boycotts.

It is important to critically examine whether TPLF truly delivers on its promises. While TPLF can provide the necessary financial support for litigation, it is fundamentally a for-profit business model. Private financiers, investment firms and hedge funds invest in lawsuits or arbitration in exchange for a significant portion of any compensation that may be awarded, sometimes as much as 40% or even higher. This profit motive can influence the dynamics of litigation in several ways.

Profit motives and claimant outcomes

One of the key concerns is that TPLF organisations may prioritise cases with a high likelihood of success and substantial financial returns, potentially leaving out cases that are meritorious but less financially attractive. This selective approach can result in an unequal distribution of funding, where only certain types of cases receive support. Moreover, the financial incentives of TPLF can encourage frivolous and predatory litigation, which can

² For example, see <https://www.leighday.co.uk/our-services/group-claims/vehicle-emissions/>

burden the legal system, divert resources away from genuine claims and limit the growth opportunities for British businesses.

Even in successful cases, the reality is that a significant portion of the compensation awarded often goes to the funders and lawyers, leaving claimants with a relatively small share even if they actually bothered to claim it. This can undermine the notion of equality of arms, as the ultimate beneficiaries of TPLF are often the funders themselves rather than the claimants. For example, in mass litigation cases, claimants may end up with little or no redress after the funders take their cut of the settlement or award.

Alternative mechanisms

Alternative dispute resolution (ADR) mechanisms, such as mediation and arbitration, offer accessible and cost-effective means of resolving disputes. These mechanisms often allow concerned individuals to bring their cases at little or no cost and without the need for intermediaries who may be driven by profit motives. This can make them more accessible and less intimidating for individuals seeking redress. Ombudsman schemes, for instance, provide a straightforward and cost-free way for individuals to resolve disputes without the need for legal representation.

Evidence and examples

- **Empirical Research:** Studies have shown that while TPLF can help level the playing field in litigation, the financial incentives of funders can lead to outcomes where claimants receive a smaller share of the compensation. This is particularly evident in class action lawsuits, where only a fraction of claimants may opt-in to claim their share of the settlement. The same “opt-in problem” that claimant law firms and funders cite as the reason for representative or class action claims is the same problem that affects distribution of damages. However, whatever the “opt-in” for damages, the lawyers and funders will have got their fees and returns. We urge the CJC to look at the European Class Action report series published by CMS³.
- **Case Studies:** Examples from various jurisdictions demonstrate the impact of TPLF on claimant outcomes. In the UK, TPLF has been used to support claimants in high-profile cases, but the financial arrangements often result in claimants receiving a limited portion of the compensation as the CJC recognises when it cites the sub-postmasters case against the Post Office.
- **Regulatory Frameworks:** Effective regulation of TPLF is crucial to ensure that it promotes equality of arms without compromising the interests of claimants. Regulatory frameworks should aim to enhance transparency, accountability and fairness in TPLF arrangements.

Conclusion

In conclusion, while TPLF has the potential to promote equality of arms by providing financial resources for litigation, it is important to recognise the profit motives of TPLF organisations and the actual outcomes for claimants. The financial incentives of TPLF can result in claimants receiving a smaller share of the compensation, undermining the notion of equality of arms. Alternative mechanisms, such as ADR and Ombudsman schemes, offer accessible and cost-effective means of resolving disputes without the involvement of profit-

³ See <https://cms.law/en/int/publication/cms-european-class-action-report-2024>

driven intermediaries. A balanced approach that includes effective regulation of TPLF and support for alternative mechanisms can help ensure that access to justice is achieved in a fair and equitable manner.

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

TPLF is often promoted as offering several benefits, but a critical examination reveals that beyond the purported benefits of access to justice and equality of arms, there are no significant additional advantages for claimants, the justice system or defendants.

- For claimants, the primary benefit of TPLF is the financial support to pursue litigation. However, this comes at a cost, as a significant portion of any awarded compensation often goes to the funders and lawyers, leaving claimants with a relatively small share. This undermines the notion of complete redress and can result in claimants receiving limited compensation.
- For the justice system, TPLF introduces profit-driven motives that can distort the primary purpose of resolving disputes and providing redress. The involvement of private financiers can lead to selective funding of cases with high financial returns, potentially encouraging frivolous and predatory litigation. This can burden the legal system and divert resources away from genuine claims.
- For defendants, TPLF can expose them to the risk of vexatious claims and claims designed to secure "blackmail" settlements. This can result in defendants facing increased costs and pressure to settle claims, even when they believe the claims are unfounded, to avoid the expense and uncertainty of prolonged litigation. Coupled with high publicity tactics from claimants or their lawyers, the pressure to settle even unmeritorious claims can be significant.

In conclusion, while TPLF is promoted for its role in enhancing access to justice and promoting equality of arms, there are no significant additional benefits for claimants, the justice system or defendants. The profit-driven nature of TPLF can result in limited compensation for claimants, distort the purpose of the justice system and increase the burden on defendants by exposing them to vexatious claims and "blackmail" settlements. Effective regulation and oversight are essential to ensure that TPLF serves the interests of justice in a fair and equitable manner.

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

The current regulatory framework for TPLF in the UK is primarily self-regulatory, with ALF providing a voluntary code of conduct. While this framework has some merits, it is insufficient to address the complexities and risks associated with the growing TPLF market. As a UK business, we have several concerns and recommendations for improving the regulatory framework:

INSUFFICIENT OVERSIGHT AND TRANSPARENCY

⁴ This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

- **Lack of mandatory registration & regulation:** The current framework does not require mandatory registration and regulation of all third-party funders. This gap allows funders to operate without sufficient scrutiny or any capital adequacy, increasing the risk of unethical practices and conflicts of interest. We recommend the establishment of a mandatory registration system and regulation for all TPLF providers, ensuring that only registered and vetted funders can operate in the market.
- **Inadequate disclosure requirements:** There is a significant lack of transparency in the current framework, with no mandatory disclosure of funding agreements. This opacity can lead to conflicts of interest and undermine the fairness of the litigation process. We propose mandatory disclosure of all funding agreements to the court and all parties involved, including the identity of the funder, the terms of the funding arrangement, the source of funds and any financial interests the funder has in the outcome of the case. The identity of the funder, or the beneficial owner(s), is an important consideration in the context of sanctions anti-avoidance.

POTENTIAL FOR ABUSE AND CONFLICTS OF INTEREST

- **Profit-driven motives:** TPLF is a for-profit business model, which can lead to funders prioritizing their financial returns over the interests of claimants. This profit motive can result in the selective funding of cases with high financial returns, potentially encouraging frivolous and predatory litigation. We recommend the implementation of caps on funders' returns to prevent excessive profiteering and ensure that claimants receive a fair share of any settlement or award. We can see this very publicly play out in the *Merricks -v- Mastercard* case before the Competition Appeal Tribunal (CAT) and the disagreement between the class representative and the funders over the settlement reached.
- The returns for providers of TPLF can be considerably greater than many other forms of “investing”. For example:
 - For a well-known funder, Burford Capital:
 - It disclosed in its annual report of 2010⁵, that in its first period of operation it had “*produced a return in excess of 50% on invested capital in those matters to date*” and that for one case it said, “*The jury verdict reported in July 2010 has been settled above our expectation producing anticipated returns approaching or in excess of 200%*”
 - By 2022, its annual report⁶ revealed that its Return on Invested Capital for 2020 was 92%, for 2021 was 93% and for 2022 was 88%
 - In its third quarter results published on 7 November 2024, it said, “*Net realized gains in YTD24 reflect a ROIC of 94% on realizations*”.
 - Further in the *Merricks* case, information revealed in the hearing on 23 January 2025 suggests that around £45.57m would be paid to litigation funder Innsworth Capital, which financed the proceedings, to cover incurred and future costs. A further £54.43m could be paid to Innsworth as a return on the funds it provided, depending on the number of people who come forward to make a claim. This makes a potential return on investment of about 119%, which the funder appears to suggest is not enough.

⁵ https://s201.q4cdn.com/169052615/files/doc_financials/2010/AR/fy-2010_report.pdf

⁶ https://s201.q4cdn.com/169052615/files/doc_financials/2022/q4/bur-Current-Folio-20F-Taxonomy-2022.pdf

- Research from the US Government Accountability Office in December 2022⁷, established that TPLF offer investors:
 - High returns and quoted returns on investment from Burford and Omni Bridgway of 93% and 91% respectively; and
 - Returns that are uncorrelated to price movements of other investments such as stocks, bonds or commodities. The TPLF market is not one where litigation returns are driven by macroeconomic factors.

- **Conflicts of interest:** The current framework does not adequately address conflicts of interest between funders, claimants and legal representatives. Funders may exert undue influence over the litigation process, compromising the independence of legal counsel and the interests of claimants. We propose the development of strict conflict of interest policies and ethical guidelines for funders, including mandatory disclosure of any potential conflicts to the court and all parties involved.

NEED FOR ENHANCED REGULATORY OVERSIGHT

- **Independent regulatory body:** The self-regulatory nature of the current framework is insufficient to ensure accountability and compliance. We recommend the establishment of an independent regulatory body to oversee TPLF activities. This body should be responsible for monitoring funders' conduct, ensuring compliance with regulations and capital adequacy and addressing any breaches of ethical standards. The logical body that already exists is the Financial Conduct Authority (FCA), which could ensure that litigation funders are also bound to the same standards as other organisation in the “investment” space, including on topics such as sanctions compliance.

- Despite the financial success of some funders (as mentioned elsewhere in this response), other UK funders been dissolved, wound up or gone into administration including 1st Class Legal Ltd⁸, Affiniti Finance Ltd⁹ and Colosseum Consulting Ltd¹⁰. There are risks associated with the financial instability of litigation funders and the potential impact on claimants. When a funder faces financial difficulties or goes bust, claimants may be left without the necessary financial support to continue their litigation, potentially jeopardising their ability to achieve a fair outcome or leaving them exposed to costs risks of which they were unaware.

- **Regular audits and reporting:** To enhance accountability, we propose regular audits and reporting requirements for all registered funders. These audits should include detailed information about the funder's activities, compliance with regulatory standards and any issues or concerns that have arisen. This oversight will help ensure that funders operate transparently and ethically. Again, the FCA is an obvious regulator here and could easily apply the same oversight as it does to financial services firms.

⁷ See <https://www.gao.gov/assets/gao-23-105210.pdf>

⁸ Dissolved, see <https://find-and-update.company-information.service.gov.uk/company/05181649>. This company was mentioned in the Preliminary Report of the Rt. Hon. Lord Justice Jackson of May 2009, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf>

⁹ In administration, see <https://find-and-update.company-information.service.gov.uk/company/09205014>

¹⁰ As mentioned in *Laser Trust -v- CFL Finance Ltd & Colosseum Consulting* [2021] EWHC 1404 (Ch) available at <https://www.bailii.org/ew/cases/EWHC/Ch/2021/1404.html>. Liquidation details at <https://find-and-update.company-information.service.gov.uk/company/09688809>.

PROTECTION OF CLAIMANTS AND DEFENDANTS

- **Security for costs orders:** To protect defendants from the financial burden of defending against frivolous claims, we recommend empowering courts to order claimants to provide security for costs. This measure will ensure that defendants are not unfairly burdened by the costs of litigation and encourage claimants to carefully consider the merits of their case before proceeding.
- **Judicial scrutiny of funding agreements:** We propose that courts should have the authority to scrutinize and approve litigation funding agreements, particularly in cases involving group claims or class actions. This judicial oversight will help ensure that funding arrangements are fair and do not incentivize vexatious litigation. We would suggest that the Civil Procedure Rules are amended to require the Court to undertake such scrutiny.
- **Controls on rights of funders to withdraw funding:** the withdrawal of TPLF can seriously prejudice funded claimants. Firstly, this might mean that they cannot continue their case. Secondly, withdrawal (once litigation has commenced) risks exposing claimants to adverse costs awards – something for which they might not have appreciated, particularly in group actions or where they were signed up on the basis of a “no win fee” case. Thirdly, the mere threat of withdrawal can be used a control lever in the conduct of the litigation. We propose that at least the following core control is needed: where a funder has accepted a case on the basis of its own “merits” assessment, it should not be able to withdraw funding on the basis of its own investment return considerations or on any other financial viability basis;

In conclusion, while the current regulatory framework for TPLF has some merits, it is insufficient to address the complexities and risks associated with the growing TPLF market. By implementing these recommendations, we can create a more transparent, accountable and fair TPLF market that protects the interests of claimants, defendants and the broader justice system.

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;

Conflicts of interest: One of the most significant risks associated with TPLF is the potential for conflicts of interest. Funders may prioritise their financial returns over the interests of claimants, leading to decisions that are not in the best interests of the claimants. This can undermine the integrity of the legal process and result in unfair outcomes. As can be seen from the proposed settlement in the *Merricks -v- MasterCard* case, the funder has criticised the class representative for settling too early and for too little; the class representative’s lawyers has accused the funder of greed.

Lack of transparency: The current self-regulatory framework does not mandate full disclosure of funding agreements, leading to a lack of transparency. This opacity can obscure the true nature of the funding arrangements and prevent parties from understanding the financial interests at play. It can also hinder the ability of the court to assess the fairness of the funding arrangements.

Encouragement of frivolous and predatory litigation: The profit-driven nature of TPLF can incentivise funders to support frivolous or predatory litigation. This can burden the legal system, divert resources away from genuine claims and increase the costs and risks for businesses. Frivolous claims can also lead to reputational damage and financial strain for defendants (including “blackmail” settlements).

Even in the *Merricks* case, the claimed amount is around £10b¹¹ yet purports to have settled for £200m; Mr Merricks’ lawyer has said, “...we are confident that this settlement represents the best possible outcome for UK consumers. One interpretation could be that the value of this claim was over-inflated in the first place.

The latest press coverage suggests that if every class member obtained “their share”, it would amount to just over £2 each¹². If the CAT approves the settlement, it has to be doubted how many individuals will actually opt-in to receive their compensation, leaving the inevitable conclusion that this has been a case about fees for lawyers and investment returns for funders.

Excessive costs and reduced compensation for claimants: TPLF often involves funders taking a significant portion of any settlement or award, sometimes as much as 40% or higher (almost 80% in the Post Office sub-postmasters case). This can result in claimants receiving a reduced share of the compensation, undermining the nature of redress. The high costs associated with TPLF can also increase the overall cost of litigation.

Potential for abuse by foreign entities: There is a risk that foreign entities, including sovereign wealth funds and adversarial governments, could use TPLF to exert influence over domestic litigation. This can pose national security concerns and allow foreign actors to advance their strategic interests at the expense of domestic businesses and the legal system. We have already mentioned the risk of sanctions avoidance in TPLF funds in the absence of a mandatory disclosure regime.

Risks to consumer claimants in TPLF cases: we have already discussed this in our answers above.

- 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;¹³

Current framework limitations: The current self-regulatory framework, primarily governed by the ALF, is insufficient to address the identified risks. The voluntary nature of the code of conduct means that compliance is not mandatory and there is

¹¹ See “How much money does the claim ask for” at <https://www.mastercardconsumerclaim.co.uk/Home/Faq>.

¹² See <https://www.lawgazette.co.uk/news/mastercard-litigation-2-for-each-claimant-up-to-100m-for-funder/5122116.article>

¹³ 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.

limited oversight and enforcement. Not all providers of TPLF are members of the ALF.

We suggest at least the following approaches, all of which we have set out in detail above:

- Mandatory registration and authorisation with an independent regulatory body
 - Full disclosure requirements
 - Caps on funders' returns
 - Judicial scrutiny with the ability for the Court to make security for costs orders
- 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.

MANDATORY REGISTRATION AND AUTHORISATION:

- **Advantages:** Provides a clear and enforceable framework for oversight and accountability. Ensures that only reputable and vetted funders can operate in the market. Piggybacking on an existing regulator, such as the FCA, would mean only incremental costs in setting up the regulatory oversight mechanism.
- Provides an impartial and authoritative oversight mechanism. Enhances accountability and ensures compliance with regulatory standards
- **Disadvantages:** May increase administrative costs for funders and require additional resources for regulatory enforcement.
- May increase regulatory complexity

FULL DISCLOSURE REQUIREMENTS:

- **Advantages:** Enhances transparency and allows parties and the court to assess the fairness of funding arrangements. Reduces the risk of conflicts of interest and unethical practices.
- **Disadvantages:** May increase administrative burdens for funders and require careful management of confidential information.

CAPS ON FUNDERS' RETURNS:

- **Advantages:** Prevents excessive profiteering and ensures that claimants receive a fair share of the compensation. Reduces the financial burden on claimants.
- **Disadvantages:** May reduce the attractiveness of the TPLF market for funders, potentially limiting the availability of funding for some cases.

JUDICIAL SCRUTINY WITH THE ABILITY FOR THE COURT TO MAKE SECURITY FOR COSTS ORDERS

- **Advantages:** Protects defendants from the financial burden of defending against frivolous claims. Encourages claimants to carefully consider the merits of their case.
- **Disadvantages:** May increase the financial burden on claimants, particularly in cases with limited resources.

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

Given the inherent risks and potential hazards associated with TPLF, it is crucial to implement stringent regulatory mechanisms across all types of litigation and English-seated arbitration as well other forms of dispute resolution, such as in ombudsman schemes. The fundamental concerns surrounding TPLF, such as conflicts of interest, lack of transparency and the encouragement of frivolous litigation, necessitate a robust and minimum-standard regulatory framework to protect the integrity of the legal system and the interests of all parties involved.

a. If not, why not?

While different types of disputes and proceedings may have unique characteristics, the core risks associated with TPLF remain consistent across various forums. Therefore, a minimum-standard regulatory mechanism is essential to ensure comprehensive oversight and control. However, specific regulatory measures can be tailored to address the nuances of different types of disputes and proceedings without compromising the overall regulatory framework.

b. If so, which types of dispute and/or form of proceedings¹⁴ should be subject to a different regulatory approaches and which approach should be applied to which type of dispute and/or form of proceedings?¹⁵

A minimum core set of stringent regulatory principles should apply uniformly to all types of litigation and arbitration. However, additional tailored measures can be implemented to address specific challenges associated with different types of disputes:

Commercial claims: Allow for more flexible funding arrangements but require detailed disclosure of funding agreements and regular audits to reduce the risk of conflicts of interest and ensure accountability. This approach will help maintain the integrity of commercial litigation while providing necessary oversight.

Arbitration: Adapt the regulatory framework to account for the confidentiality and procedural differences in arbitration. Require disclosure of funding agreements to the arbitrators and parties involved and implement safeguards to prevent undue

¹⁴ Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.

¹⁵ Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

influence by funders. This will ensure that arbitration proceedings remain fair and funding transparent to those involved.

- 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?

The common issues related to different types of funding relationships are fundamentally the same: we need transparency and controls to reduce the risk of conflicts of interest. Therefore, the regulatory framework should include all of the features that we have already described above.

Regarding the types of funded parties, SMEs should be regarded as needing the same level of protection as individual litigants. Therefore:

- **Individual litigants and SMEs:** the full range of protections that we have already called for should apply.
- **Sophisticated commercial litigants:** The regulatory system ought to allow for more flexible funding arrangements given the different nature of this type of litigant.

In conclusion, while a core set of stringent regulatory principles should apply uniformly to all types of litigation and arbitration, tailored measures might be needed to address the specific challenges associated with different types of dispute resolution mechanisms or sophisticated commercial litigants.

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

We have already suggested the following approaches, all of which we have set out in detail above:

- Mandatory registration and authorisation with an independent regulatory body
- Full disclosure requirements
- Caps on funders' returns
- Judicial scrutiny with the ability for the Court to make security for costs orders

Other best practices should also address:

- Ethical guidelines for providers of TPLF to include provisions to prevent funders from encouraging or supporting frivolous litigation and ensure that funders act in the best interests of claimants; and
- Training and education for funders, lawyers and other stakeholders on the ethical and regulatory standards governing TPLF. Training for the judiciary should also be considered. This will help ensure that all parties are aware of their responsibilities and obligations.

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?

The high level of litigation costs has significantly contributed to the development of TPLF. As litigation becomes increasingly expensive, many claimants, particularly individuals and small businesses, find it challenging to afford the costs associated with pursuing legal action. TPLF has emerged as a purported solution to this problem by providing the necessary financial resources to cover legal fees and expense. However, a free-market response has meant that TPLF operates, as we have said, in a regulatory vacuum. But not only that, lawyers running TPLF funded cases in the mass claim sphere operate in what amounts to a “client vacuum”. This is because representative claimants are often figureheads selected by the lawyers¹⁶ and they are not in a position to exert any costs pressures on the lawyers at all¹⁷.

b. What impact, if any, does third party funding have on the level of litigation costs?

It can increase litigation costs overall by encouraging more claims, including potentially frivolous or speculative ones, as funders seek to maximize their returns. This can lead to a higher volume of litigation and increased pressure on the legal system.

c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?

The current self-regulatory regime, primarily governed by the ALF, has limited (if any) impact on controlling the relationship between litigation funding and litigation costs. The voluntary nature of the code of conduct means that compliance is not mandatory and there is limited oversight and enforcement. This lack of stringent regulation can result in funders prioritizing their financial interests over the interests of claimants, potentially leading to higher litigation costs and conflicts of interest

d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?¹⁸

Introducing a robust regulatory mechanism could significantly and positively impact the relationship between litigation funding and litigation costs. One specific regulatory mechanism that could be introduced is the establishment of an independent regulatory body, such as the FCA, to oversee TPLF. This body would be responsible for monitoring funders' conduct, capital adequacy, ensuring compliance with regulations and addressing any breaches of ethical standards.

- **Mandatory registration and authorisation:** Implementing mandatory registration and authorisation for all TPLF providers would ensure that only reputable and vetted funders can operate in the market. This would

¹⁶ See, for example, *Christine Riefa Class Representative Limited -v- Apple Inc. et al* [2025] CAT 5

¹⁷ See *Pan NOx Emissions Litigations* [2024] EWHC 1728 (KB) (05 July 2024)

¹⁸ Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

enhance oversight and accountability, reducing the risk of unethical practices and conflicts of interest. By requiring funders to be registered and licensed, the regulatory body can maintain a comprehensive database of funders, track their activities and enforce compliance with regulatory standards. This ought to reduce speculative and predatory litigation and hence reduce the costs burden overall.

- **Full disclosure requirements:** Requiring full disclosure of funding agreements (including sources of funds) to the court and all parties involved would enhance transparency and allow for better assessment of the fairness of funding arrangements. This would help reduce the risk of conflicts of interest and ensure that the financial interests of funders do not undermine the interests of claimants. Full disclosure would also enable the court to scrutinize funding agreements and make informed decisions regarding the appropriateness of the funding arrangements. This would put the court in much better position to control potential abuses and associated wasted costs.
- **Caps on funders' returns:** Implementing caps on funders' returns would prevent excessive profiteering and ensure that claimants receive a fair share of any settlement or award. This would reduce the financial burden on claimants and promote fairness in the distribution of compensation. Caps on returns would also discourage funders from pursuing frivolous or speculative claims solely for financial gain.
- **Judicial scrutiny and security for costs orders:** Empowering courts to scrutinize and approve litigation funding agreements, particularly in cases involving group claims or class actions, would provide an additional layer of oversight. Courts could also be given the authority to order claimants to provide security for costs, protecting defendants from the financial burden of defending against frivolous claims. This judicial oversight would help ensure that funding arrangements are fair and do not incentivize vexatious litigation.

By implementing these regulatory mechanisms, the relationship between litigation funding and litigation costs could be better managed, promoting transparency, accountability and fairness in the TPLF market. This would ultimately lead to more balanced and controlled litigation costs, benefiting both claimants and defendants.

- e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?
- i. If so, why?

While some may argue that allowing the costs of litigation funding to be recoverable as a litigation cost could provide claimants with greater financial certainty and encourage the use of TPLF to pursue meritorious claims, Experian does not support this position.

- ii. If not, why not?

Experian believes that making litigation funding costs recoverable as a litigation cost could incentivize funders to support more speculative or high-risk claims, potentially leading to an increase in frivolous litigation.

This could place an additional financial burden on defendants, who may be required to cover these costs if they lose the case. The practice is likely to make “blackmail” settlements more likely, even for frivolous or unmeritorious claims, because claimant lawyers will be able to paint the “downside” to claimants as so much worse.

Such a practice would undermine the principle of fairness and equality in the legal system, as it would disproportionately benefit funders and fuel more profit-driven litigation rather than genuine claims.

Additionally, allowing TPLF costs to be recoverable could distort the primary purpose of the civil justice system, which is to resolve disputes and provide redress, not to generate profits for third-party funders.

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.

The recoverability of adverse costs and the requirement for security of costs do play roles in the dynamics of access to justice and the availability of TPLF. However, it is crucial to emphasise that access to justice should not be used as a justification to allow unmeritorious or frivolous claims to proceed through the court system. Such claims waste the time of the court system, defendants and even claimants, if the profit motive of law firms or litigation funders is the primary driver behind the case.

Impact on Access to Justice

Experian believes that the arguments about adverse costs and/or security for costs impacting access to justice are talked up by those organisations with a vested interest in litigation funding. Funders are not, in our view, motivated by “access to justice” or “holding those to account”. Profit is their motivating factor. Access to justice will always be a barrier for non-profitable case.

The maintenance of the loser-pays rule and the ability for the Court to order for security of costs ought to be part of the package of measures associated with TPLF to provide a safeguard from abuses of the court system for profit-driven purposes.

Impact on the availability of third-party funding

The recoverability of adverse costs and the requirement for security of costs can influence the availability and attractiveness of TPLF. Funders are more likely to invest in cases where there is a clear mechanism for recovering adverse costs, as this reduces their financial risk and increases the potential for a return on investment. The requirement for security of costs could also increase the financial burden on funders, as they may need to provide additional financial support to cover these costs. This might make TPLF less attractive for funders because it either reduces the profit margin or increases the risks for the funder.

Fundamental principles of the English legal system

The English legal system is based upon the fundamental principles of compensatory damages and the "loser pays" rule. These principles are essential cornerstones of our system and should be treated with the utmost respect. The "loser pays" rule ensures that the party who loses the case bears the costs of the litigation, which helps to deter frivolous and unmeritorious claims. It is important that these principles are upheld to maintain the integrity and fairness of the legal system.

Current self-regulatory regime

The current self-regulatory regime, primarily governed by the ALF, has limited impact on addressing the challenges posed by the recoverability of adverse costs and the requirement for security of costs. The voluntary nature of the code of conduct means that compliance is not mandatory and there is limited oversight and enforcement. This lack of stringent regulation can result in funders prioritizing their financial interests over the interests of claimants, potentially leading to higher litigation costs and conflicts of interest.

Introduction of Different Regulatory Mechanisms

We have already dealt with this in some detail above.

Conclusion

In conclusion, the recoverability of adverse costs and the ability for the court to order security of costs are unlikely to have a genuine impact on the availability of TLPF. It is essential to recognize that access to justice should not be used as a justification for allowing unmeritorious or frivolous claims to proceed. Upholding the fundamental principles of the English legal system and implementing a robust regulatory framework can help address these challenges and ensure that TPLF serves the interests of justice in a fair and equitable manner.

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

Third-party funders should indeed remain exposed to paying the costs of proceedings they have funded and this liability should be unlimited. This is an important safeguard to ensure fairness and accountability within the legal system. The principle that funders should be liable for adverse costs is essential for several reasons:

- **Ensuring accountability and fairness:** Third-party funders, by providing financial support for litigation, effectively become key players in the legal process. They stand to gain significant financial returns if the case is successful. Therefore, it is only fair that they also bear the financial risks associated with the litigation, including the costs of proceedings if the case is unsuccessful. This ensures that funders are accountable for their involvement and do not engage in speculative or frivolous litigation without considering the potential consequences.
- **Deterring frivolous and unmeritorious claims:** Exposing funders to the costs of proceedings they have funded acts as a deterrent against frivolous and unmeritorious claims. If funders know that they will be liable for adverse costs, they are more likely to carefully assess the merits of a case before providing funding. This helps to prevent the court system from being clogged with baseless claims driven by

the profit motives of funders and law firms, thereby preserving the integrity of the legal system.

- **Upholding the fundamental principles of the English legal system:** The English legal system is based on the fundamental principles of compensatory damages and the "loser pays" rule. These principles are essential cornerstones of our system and should be treated with the utmost respect. The "loser pays" rule ensures that the party who loses the case bears the costs of the litigation, which helps to deter frivolous and unmeritorious claims. It is important that these principles are upheld to maintain the integrity and fairness of the legal system.
- **Legal precedents supporting funders' liability:** Several legal precedents support the position that funders should be liable for the costs of proceedings they have funded. For instance, in the case of *Laser Trust v CFL Finance Ltd* EWHC 1404 (Ch), the High Court refused to apply the so-called Arkin "cap" to limit the funder's liability for adverse costs. The court held that the nature of the funder's interest in the proceedings was so great that the cap should not apply. Similarly, in *Davey v Money* EWHC 997 (Ch), the High Court found that a commercial funder was liable for all of the defendants' costs incurred in successfully defending a funded claim, from the date on which the funding agreement was entered into. The Court of Appeal in *ChapelGate Credit Opportunity Master Fund Ltd v Money* EWCA Civ 246 confirmed that the Arkin cap is not a binding rule and that the court retains broad discretion as to the extent to which a funder should be liable for adverse costs.
- **Impact on the availability of third-party funding:** While some may argue that exposing funders to adverse costs could discourage the provision of third-party funding and thereby limit access to justice, it is important to recognize that unregulated TPLF leads to numerous issues and potential problems. The CJC should not approach the issue of "the availability of TPLF" in a way that means any reduction is automatically seen as a restriction on access to justice and hence a problem. Instead, a balanced approach that includes effective regulation and oversight of TPLF can help ensure that access to justice is achieved in a fair and equitable manner without compromising the integrity of the legal system.

Conclusion

In conclusion, third-party funders should remain exposed to paying the costs of proceedings they have funded. This is an important safeguard to ensure accountability, deter frivolous and unmeritorious claims, uphold the fundamental principles of the English legal system and maintain the integrity and fairness of the legal process. Legal precedents support this position.

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?

Market forces

In the TPLF market, pricing is primarily driven by the perceived risk of the case and the potential return on investment. Funders assess the merits of a case, the likelihood of success and the potential recovery before deciding on the terms of the funding arrangement.

It is hard to see a competitive market between funders developing in the current environment. However, in theory, competition among funders can help to control pricing to some extent.

As we have pointed out already, the ALF Code of Conduct is the only form of self-regulation yet not all providers of TPLF are members of the ALF and it does not have the weight or oversight of regulation.

Judicial oversight

The courts also play a role in controlling the pricing of TPLF arrangements, although this role is more limited and reactive. Courts can scrutinize funding agreements in certain circumstances, particularly in cases involving group claims or class actions. For example, in the case of *Laser Trust v CFL Finance Ltd* 2021 EWHC 1404 (Ch), the Court refused to apply the so-called Arkin "cap" to limit the funder's liability for adverse costs, highlighting the court's willingness to scrutinize and potentially override funding agreements.

Courts may also consider the fairness of funding arrangements when making decisions about costs. For instance, in *Davey v Money* 2019 EWHC 997 (Ch), the Court found that a commercial funder was liable for all of the defendants' costs incurred in successfully defending a funded claim, from the date on which the funding agreement was entered into. This demonstrates the court's ability to hold funders accountable for the financial implications of their involvement in litigation. This case is a good example of a funder pursuing its return on investment, which was the driver rather than the claimant's access to justice.

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

As we have mentioned already, we believe that a cap on a funders' returns is key part of the safeguards that are essential for TPLF and would serve to prevent excessive profiteering and ensure that claimants receive a fair share of any settlement or award. It would serve to put a brake on frivolous and speculative claims. In addition, it enhances transparency and accountability in the TPLF market and ensure that TPLF funders are more likely to operate on a more level playing field. True transparency and competition between providers of TPLF ought to drive down "prices" for TPLF.

- 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?

The level of the cap on a funder's return should be set at a reasonable percentage that balances the interests of claimants, funders and the integrity of the legal system. A cap of around 20-30% of the total recovery might be appropriate. This level ensures that claimants receive a fair share of any settlement or award, while still providing funders with a sufficient return to justify their investment. Setting the cap within this range helps prevent excessive profiteering and ensures that the

primary focus of litigation remains on achieving justice rather than generating profits for funders.

Having said that, a cap set as a percentage of damages awarded or settlement amount risks acting as an incentive to TPLF providers to invest only in high-value litigation which, might, have the effect of restricting access to justice.

We recommend that the CJC carefully considers the position set out in the resolution of European Parliament's recommendations to the European Commission on responsible private funding in litigation 2020/2130(INL) in addition.

We also refer to the cap on solicitor's fees under a damages based agreement, which is limited to 50% of the sums recovered (by virtue of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In other words, legislation curbs the incentives of solicitors in order to protect litigants. Solicitors are, of course, subject to statutory regulation, a mandatory code of conduct and answerable to a regulator. Litigation funders have no such limits and this makes no sense.

However, what this shows is that a combination of solicitors' fees and funders' costs might still mean that litigants recover less what the combination of lawyer and funders receive.

Any cap on funders' returns needs to be viewed in that light.

- 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?

The cap on funders' returns should be set by legislation to provide a clear and consistent framework for all parties involved. Legislation ensures that the cap is uniformly applied and not subject to varying interpretations. However, the court should be given the power to set the cap within the legislative framework and have the authority to revise the cap during the course of proceedings if circumstances change. This judicial oversight allows for flexibility and ensures that the cap is fair and appropriate for the specific case.

- c. At which stage in proceedings should the cap be set?

The cap should be set at the outset of the proceedings when the funding agreement is approved by the court. This provides clarity and certainty for all parties involved and ensures that the terms of the funding arrangement are transparent from the beginning. If necessary, the court should have the authority to revisit and revise the cap during the proceedings to account for any significant changes in circumstances.

- 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?

Whilst TPLF provider might argue that higher caps are necessary for cases that are complex, riskier, might take longer or require more funding it would almost certainly be the case that a funder would always argue that such circumstances apply.

- e. Should there be differential caps and, if so, in what context and on what basis?

In order to ensure consistency, fairness and simplicity in the regulatory framework for TPLF we do not think there should be differential caps.

- **Consistency and predictability:** Implementing a uniform cap on funders' returns ensures consistency and predictability in the TPLF market. This helps all parties involved—claimants, defendants and funders—understand the rules and expectations from the outset. A uniform cap eliminates the uncertainty and complexity that could arise from having different caps for different types of cases or claimants.
- **Fairness and equity:** A single cap ensures that all claimants are treated equally, regardless of the nature of their case or their financial standing. Differential caps could create disparities and perceptions of unfairness, where some claimants might feel disadvantaged compared to others. A uniform cap promotes a level playing field and ensures that all claimants have equal access to justice where they need TPLF for that access.
- **Simplicity and administrative efficiency:** A uniform cap simplifies the regulatory framework, making it easier to implement and enforce. Differential caps would require additional administrative resources to determine and monitor the appropriate cap for each case, leading to increased complexity and potential delays. A single cap streamlines the process and reduces the administrative burden on the regulatory body and the courts.
- **Preventing arbitrary decisions:** Differential caps could lead to arbitrary or inconsistent decisions, where the cap is set based on subjective factors or varying interpretations. A uniform cap provides a clear and objective standard that applies to all cases, reducing the risk of arbitrary decisions and ensuring that the cap is applied fairly and consistently.
- **Focus on justice, not profit:** The primary focus of the civil justice system should be on achieving justice, not generating profits for funders. A uniform cap helps to ensure that the financial incentives of funders do not overshadow the pursuit of justice and that funders have limited opportunities to game the system. By capping funders' returns at a reasonable level, we can prevent excessive profiteering and ensure that the interests of claimants remain at the forefront.

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.

For Claimants

One of the primary drawbacks for claimants in the context of TPLF is the significant portion of any damages or recovery that goes to lawyers and funders. While TPLF can provide the necessary financial resources to pursue litigation, it often comes at a high cost. Funders

typically take a substantial share of any settlement or award, sometimes as much as 40% or higher, as already discussed. This can leave claimants with a relatively small portion of the compensation, undermining the principle of complete redress. Additionally, the profit-driven nature of TPLF can lead to situations where the interests of claimants are secondary to the financial interests of funders and lawyers, potentially resulting in unfair outcomes.

For Defendants:

Defendants face several risks associated with TPLF, including the potential for abusive, frivolous or vexatious claims. The profit motive of funders can incentivise the pursuit of claims that lack merit, leading to increased litigation costs and the potential for "blackmail" settlements, where defendants feel pressured to settle to avoid the expense and uncertainty of prolonged litigation. This can operate as a brake on economic growth, as businesses may be deterred from investing or expanding due to the threat of costly litigation. Furthermore, there are national security risks associated with foreign entities using TPLF to exert influence over domestic litigation, potentially advancing their strategic interests at the expense of domestic businesses and the legal system.

The Nature and/or Type of Litigation:

TPLF can impact various types of litigation differently. In consumer claims, TPLF can provide individuals with the financial means to pursue redress against larger corporations. However, the high costs associated with TPLF can limit the overall compensation received by claimants. In commercial claims, TPLF can level the playing field between small businesses and well-resourced defendants, but it can also lead to an increase in speculative litigation driven by profit motives. Group litigation, collective or representative proceedings can benefit from TPLF by enabling the aggregation of claims, but the distribution of any settlement or award is inevitably complicated by the involvement of funders who want returns on investment exceeding those normally available to a prudent investor.

The fundamental problem with group actions is that, at some point, individual claimants need to put their hands up and join the claim. TPLF funders argue that opt-in mechanisms don't allow for economies of scale to bring claims and so opt-out mechanisms are the answer to this problem. However, the reality is and experience from other jurisdictions is that the same low number of claimants seek their share of the "pot" if there is a successful claim and would sign-up in the first place. The "economy of scale" argument is really just a euphemism for a profit-making opportunity for funders and lawyers.

For Society:

The approach of TPLF and the involvement of lawyers in profit-driven litigation is affecting the culture in the UK, driving a more selfish and litigious approach. This "Americanisation" of the legal system has questionable benefits for society, as it can lead to an increase in litigation for financial gain rather than the pursuit of justice. Growing a litigation culture can hardly be helpful when society is already being riven by hatred and an extremity of views on almost any topic.

For the Legal Profession:

The focus on profit can undermine the ethical standards of the legal profession and erode public trust in the legal system. Lawyers may be incentivized to prioritize cases with high financial returns, potentially neglecting meritorious cases that lack significant financial incentives. It creates the risk of real conflicts of interest. See our comments in answer to question 32 below.

For the Courts:

The operation of the civil courts is challenged by the increasing workload associated with cases driven by TPLF providers. The pursuit of profit-driven litigation can lead to an influx of cases, straining court resources and potentially delaying the resolution of genuine claims. The abuse of the legal system for profit can undermine the integrity of the courts and detract from their primary purpose of delivering justice. Additionally, there are alternatives to litigation, such as negotiation, mediation and regulatory redress schemes, which can provide more accessible and cost-effective means of resolving disputes. Encouraging the use of these alternative mechanisms can help alleviate the burden on the courts and ensure that access to justice is achieved in a fair and equitable manner. These alternative mechanisms can allow for a much more efficient and quicker resolution of disputes between claimants and defendants with more of any redress ending up in the pockets of claimants.

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.

There are several alternatives to TPLF, each with its own advantages and drawbacks. These alternatives include trade union funding, legal expenses insurance, conditional fee agreements, damages-based agreements, pure funding and crowdfunding.

Trade Union Funding: Trade union funding is available to members of trade unions and can provide financial support for legal claims related to employment disputes. This type of funding is advantageous for claimants as it often comes with no cost to the individual and includes legal representation. However, it is limited to specific types of claims and is only available to union members. For defendants, trade union funding can lead to well-supported claims, but it does not typically result in frivolous litigation.

Legal Expenses Insurance: Legal expenses insurance (LEI) covers the cost of legal representation and court fees. It can be purchased as a standalone policy or as an add-on to other insurance policies. LEI provides claimants with financial security and access to legal representation without the need for upfront costs. However, it may not cover all types of claims and policyholders must pay premiums. For defendants, LEI-funded claims are generally legitimate, but the insurance company may influence the litigation strategy.

Conditional Fee Agreements (CFAs): CFAs, also known as "no win, no fee" agreements, allow claimants to pursue legal action without paying upfront legal fees. Instead, the lawyer receives a percentage of the damages if the case is successful. CFAs provide access to justice for claimants who cannot afford legal fees, but the success fee can be substantial. For defendants, CFAs can lead to an increase in litigation, but the risk of frivolous claims is mitigated by the lawyer's interest in winning the case.

Damages-Based Agreements (DBAs): DBAs are similar to CFAs, but the lawyer's fee is a percentage of the damages awarded. DBAs provide claimants with access to legal representation without upfront costs, but the lawyer's fee can be significant. For defendants, DBAs can lead to an increase in litigation, but the lawyer's financial interest in the case's success helps ensure that only meritorious claims are pursued. Of course, following PACCAR case, TPLF can also amount to a form of DBA.

Pure Funding: Pure funding involves financial support from friends, family or other private sources. This type of funding is flexible and can be tailored to the claimant's needs, but it relies on the availability of willing and able supporters. For defendants, pure funding does not typically result in frivolous claims, as the financial support is usually based on the merits of the case.

Crowdfunding: Similar to pure funding, Crowdfunding allows claimants to raise funds for legal action from a large number of people, typically through online platforms. This method might help support access to justice for claimants who lack financial resources, but it can be time-consuming and uncertain. Essentially, it requires donations from contributors so that claimants have funds to pay for their legal fees. They might then enter a CFA or DBA with their lawyers. For defendants, crowdfunding can lead to well-supported claims, but the public nature of the funding campaign can generate negative publicity for defendants. It is questionable whether donors to crowdfunding would expect or could have any meaningful say or interest (beyond an academic sense) in the outcome of any litigation to which they contribute.

We recommend consideration of the 2022 research by Simon Guy about crowdfunding for judicial reviews¹⁹.

There is a fraud risk associated with crowdfunding if claimants do not use the funds in accordance with the nature of the statements made in connection with the crowdfunding.

Comparison to TPLF: Compared to TPLF, these alternatives offer varying levels of financial support and accessibility. TPLF provides substantial financial resources and can level the playing field in complex or high-value cases, but it often comes with high costs and profit-driven motives. The alternatives generally offer more affordable and accessible options, but they may have limitations in terms of the types of claims covered and the availability of funding.

¹⁹ https://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12770?_ga=2.93345885.1917538153.1737050301-1184985020.1735578323

- 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.

Yes, other forms of litigation funding can complement third-party funding. For example, legal expenses insurance can provide initial coverage for legal costs, while TPLF can be used to cover additional expenses in complex or high-value cases. Conditional fee agreements and damages-based agreements can be combined with TPLF to share the financial risk between the claimant, lawyer and funder. Crowdfunding can be used to raise initial funds, with TPLF providing additional support if needed.

- c. If so, when and how?

See our answer to b) 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?

Yes, several alternatives to TPLF should be encouraged in preference to TPLF.

Civil legal aid

Civil legal aid plays a crucial role in providing access to justice for the most vulnerable individuals. It offers financial support for legal representation and advice, ensuring that those who cannot afford legal fees can still pursue their claims. The recent increase in civil legal aid funding by the UK government is a positive step towards rebuilding the legal aid sector and ensuring that vulnerable people have access to justice. Encouraging the use of civil legal aid can help ensure that individuals facing unfair eviction, homelessness and other critical issues receive the legal support they need. However, many of the situations to which civil legal aid might apply are not ones involving monetary claims so TPLF is unlikely to be relevant (housing, immigration, domestic abuse, family law, welfare benefits or community care).

Trade Union Funding:

Trade union funding is particularly beneficial for employment-related disputes. It provides claimants with financial support and legal representation at no cost, ensuring that individuals can pursue their claims without the burden of legal fees. This type of funding is advantageous because it is not driven by profit motives and focuses on achieving justice for union members. Encouraging trade union funding can help ensure that employment disputes are resolved fairly and equitably.

Legal Expenses Insurance (LEI):

Legal expenses insurance offers claimants financial security and access to legal representation without the need for upfront costs. LEI can cover a wide range of legal disputes, including consumer claims, commercial claims and group litigation. It provides a more predictable and transparent funding mechanism compared to TPLF. Encouraging the

use of LEI can help claimants manage the financial risks associated with litigation and ensure that they receive fair compensation. Reforms may include increasing public awareness of LEI and making it more accessible and affordable for individuals and businesses.

Crowdfunding:

Crowdfunding allows claimants to raise funds for legal action from a large number of people, typically through online platforms. This method provides access to justice for claimants who lack financial resources and can generate public support for their cause. Crowdfunding is advantageous because it is not driven by profit motives and can help level the playing field in legal disputes. Encouraging the use of crowdfunding can provide claimants with an alternative funding mechanism that is transparent and community-driven. Reforms may include establishing guidelines for crowdfunding platforms to ensure transparency and accountability.

Loans

Whilst claimants may be able to secure a loan to cover litigation costs, this will depend upon the creditworthiness of the claimant and whether they could afford to repay the loan. Loans are repayable irrespective of the outcome of the litigation.

Reforms Necessary:

Improving Accessibility: Making legal expenses insurance and other funding mechanisms more accessible and affordable for individuals and businesses can help ensure that claimants have viable alternatives to TPLF.

Establishing Guidelines: Establishing guidelines for crowdfunding platforms and other funding mechanisms can ensure transparency, accountability and fairness in the funding process.

Government-backed loans

Introducing government-backed loan schemes for litigation funding could provide claimants with access to low-interest loans to cover legal costs. These loans could be repaid from the proceeds of a successful claim.

By encouraging these alternatives and implementing necessary reforms, we can create a more balanced and equitable litigation funding landscape that prioritizes access to justice and fairness for all parties involved.

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?

We suggest reforms to both the CFA and DBA regimes.

Reforms

Despite the existing regulations, there are still further changes that could enhance the regulatory regime, including:

Advertising practices: Advertising strategies used by law firms and CMCs often understate the risks and overstate the potential benefits for consumers. This misleading advertising can put consumers in a perilous position, as they may be encouraged to join claims without fully understanding the financial and legal implications. FCJ's research²⁰, conducted with the support of CMS Cameron McKenna, found that consumers are increasingly exposed to widespread and targeted advertisements from claimant firms. These advertisements often promote "no win, no fee" claims, but fail to highlight the risks associated with litigation, such as the potential for adverse costs if the claim is unsuccessful. This can lead to consumers facing unexpected legal bills further down the line.

Legal advertising should be accurate and transparent, ensuring that consumers are fully informed about the risks and benefits of joining a claim. This approach aims to protect consumers from opportunistic claimant law firms and promote a balanced legal environment.

Cooling off period: We support a 60-day "cooling off" period and the right for claimants signed up to group claims to terminate the retainer without penalty. We also propose a ban on targeted social media adverts for claims and emphasize that consumers should not be prevented from talking publicly about the conduct of litigation and the level of compensation recovered.

Enhanced Disclosure Requirements: While transparency is already mandated, the disclosure requirements could be further enhanced to ensure that claimants fully understand the financial implications of entering into a CFA or DBA. This could include providing clear, plain-language explanations of the potential costs, success fees and any other financial obligations. Additionally, requiring a standardized disclosure form could help ensure consistency and clarity across all CFAs & DBAs.

Better monitoring and enforcement: Legal regulators ought to carry out more random auditing and enforcement action. The legal professional bodies should up the standards on best practices in this space. There is already an identified problem

Monitoring and Reporting: Introducing requirements for law firms to report on the outcomes of cases funded by CFAs/DBAs, including the success fees charged and the overall costs to claimants, could provide valuable data for monitoring the effectiveness of CFAs and DBAs. This data could be used to identify trends, assess the impact of CFAs/DBAs on access to justice and inform future regulatory changes.

Addressing Potential Conflicts of Interest: Ensuring that there are clear guidelines and safeguards to address potential conflicts of interest between lawyers and claimants is crucial. This could include requirements for independent advice or oversight in cases where there is a significant financial interest for the lawyer.

There is merit in considering the replacement of the separate regulatory regimes for CFAs and DBAs with a single, unified regulatory regime applicable to all forms of contingent funding agreements. A single regulatory regime would offer several advantages:

²⁰ See <https://fairciviljustice.org/wp-content/uploads/2024/12/BROC-Claimant-law-firm-advertising.pdf>

Consistency and Uniformity: A unified regulatory regime would ensure consistency and uniformity in the rules governing all contingent funding agreements. This would make it easier for claimants and lawyers to understand and comply with the regulations.

Simplification and Efficiency: A single regulatory regime would simplify the regulatory landscape, reducing administrative burdens and increasing efficiency. This would benefit both claimants and the legal profession by streamlining the process and reducing complexity.

Enhanced Transparency and Accountability: A unified regulatory regime would enhance transparency and accountability by providing clear and consistent rules for all contingent funding agreements. This would help ensure that claimants are fully informed about their funding options and that lawyers adhere to high ethical standards.

Flexibility and Adaptability: A single regulatory regime would provide the flexibility to adapt to changes in the legal landscape and address emerging issues in litigation funding. This would help ensure that the regulatory framework remains relevant and effective in promoting access to justice.

In conclusion, reforms to CFAs and DBAs are necessary to promote more certain and effective litigation funding and to protect consumers. Simplifying and clarifying the regulatory frameworks, enhancing transparency and disclosure and capping fees are essential steps to ensure fairness and accessibility for claimants. Additionally, replacing the separate regulatory regimes for CFAs and DBAs with a single, unified regulatory regime would offer significant benefits in terms of consistency, efficiency, transparency and adaptability.

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?

Reforms to LEI, both BTE and ATE insurance, are indeed necessary to promote more effective litigation funding. These reforms should aim to enhance accessibility, affordability and transparency, ensuring that claimants have viable alternatives to TPLF.

BTE Insurance:

BTE insurance provides coverage for legal costs incurred before a dispute arises. To promote more effective litigation funding, the following reforms could be considered:

- **Increased Public Awareness and Education:** Many individuals and businesses are unaware of the availability and benefits of BTE insurance. Public awareness campaigns and educational initiatives could help inform potential policyholders about the advantages of BTE insurance and encourage its uptake.
- **Standardized Policies and Coverage:** Introducing standardized BTE insurance policies with clear and consistent coverage terms could help simplify the market and make it easier for policyholders to understand their options. This would also

enhance transparency and reduce the risk of disputes over coverage. Most individuals, for example, are able to add LEI to their home insurance policies. Making this a mandatory part of home insurance could be a step that would provide extensive coverage for a large part of the population at modest cost and potentially provide much readier access to justice opportunities.

ATE Insurance:

ATE insurance provides coverage for legal costs incurred after a dispute has arisen. To promote more effective litigation funding, the following reforms could be considered:

- **Enhanced Disclosure Requirements:** ATE insurers should be required to provide clear and comprehensive information about the terms and conditions of their policies, including the potential costs and coverage limits. This should go beyond the current disclosure requirements to specifically address the nature of LEI rather than just insurance per se. This transparency would help claimants make informed decisions about their funding options.
- **Regulation of Premiums:** The cost of ATE insurance premiums can be prohibitively high, particularly for complex or high-value cases. Introducing regulations to cap or control ATE insurance premiums could help make this type of insurance more affordable and accessible.

Promotion of a Public Mandatory Legal Expenses Insurance Scheme:

The promotion of a public mandatory legal expenses insurance scheme should be considered as a means to ensure that all individuals and businesses have access to legal representation and coverage for legal costs. Such a scheme could offer several benefits:

- **Universal Coverage:** A mandatory scheme would ensure that all individuals and businesses are covered for legal expenses, reducing the financial barriers to accessing justice.
- **Risk Pooling and Cost Sharing:** By pooling risks and sharing costs across a large number of policyholders, a public mandatory scheme could help reduce the overall cost of legal expenses insurance and make it more affordable for everyone.
- **Enhanced Access to Justice:** A mandatory scheme would provide a safety net for individuals and businesses, ensuring that they have the financial resources to pursue meritorious claims and defend against unjust claims.
- **Regulation and Oversight:** A public mandatory scheme would need to be subject to government regulation and oversight, ensuring that it operates transparently and fairly. This would be essential to protect policyholders and maintain public trust in the legal system.

However, in reality, we doubt that there will be any appetite for such a scheme as it is likely to be perceived as another form of taxation or privatisation.

In conclusion, reforms to BTE and ATE insurance are necessary to promote more effective litigation funding. Increasing public awareness, enhancing affordability and accessibility, standardizing policies and regulating premiums are key steps to achieving this goal. Additionally, the promotion of a public mandatory legal expenses insurance scheme should be considered to ensure universal coverage and enhanced access to justice for all individuals and businesses.

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?

Please see our answers above

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

Please see our answers above

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

Portfolio funding, while offering several advantages, also presents unique challenges and risks that necessitate specific reforms to ensure fairness, transparency and accountability. The following reforms are necessary to provide adequate safeguards.

1. Enhanced Transparency and Disclosure:

We have already described our views on this topic earlier. Portfolio funding is a situation where the concerns are even greater.

2. Regulation of Funders' Influence:

Portfolio funding can lead to situations where funders exert significant influence over the litigation strategy and decisions of the law firms they are financing. This can create conflicts of interest and potentially compromise the interests of the claimants. To mitigate this risk, there should be clear regulations limiting the extent of funders' influence over the litigation process. This includes ensuring that funders do not have control over key decisions, such as settlement negotiations and that the independence of legal advice is maintained.

Particular care is needed where there is a close relationship between funder and law firm, such as ownership or control beyond the funding arrangements themselves.

3. Caps on Funders' Returns:

We have already described this in detail earlier in our response.

4. Regulation, Audits and Reporting:

We have already described this in detail earlier in our response..

5. Protection of Claimants' Interests:

Given the potential for conflicts of interest and the prioritization of funders' financial interests, it is essential to implement safeguards to protect the interests of claimants. This includes ensuring that claimants have access to independent legal advice and that their interests are not subordinated to those of the funders. Additionally, there should be mechanisms in place to address any disputes or grievances that may arise between claimants and funders.

Conclusion:

In conclusion, while portfolio funding offers several advantages, including the efficient spreading of risk and access to larger amounts of capital, it also presents unique challenges that necessitate specific reforms. Enhanced transparency and disclosure, regulation of funders' influence, caps on funders' returns, regular audits and reporting and protection of claimants' interests are essential reforms to ensure fairness, transparency and accountability in portfolio funding arrangements. These measures will help maintain the integrity of the civil justice system and ensure that it serves the interests of justice in a fair and equitable manner.

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?

See our answers above.

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?

There is indeed a need to amend the CPR and the CAT rules to better accommodate the role that TPLF might play in the conduct of litigation. These amendments should aim to enhance transparency, accountability and fairness in proceedings involving TPLF. Depending upon the extent to which regulating legislation might be implemented will, of course, determine the necessity of rules changes. However, absent specific legislation, we set out our views below.

Firstly, the CPR should be amended to include specific provisions that address the disclosure of funding arrangements. This would ensure that all parties, as well as the court, are aware of the existence and terms of any TPLF agreements. Such transparency is crucial to reduce the risk of conflicts of interest and to ensure that the funder's influence on the litigation process is appropriately managed.

Secondly, the rules should include safeguards to protect the interests of claimants. This could involve setting limits on the control that funders can exert over the litigation strategy and decisions. For example, the rules could stipulate that funders cannot dictate the terms of settlement or interfere with the claimant's legal representation.

Additionally, the CAT rules should be updated to reflect the unique challenges posed by collective proceedings. Given the complexity and scale of such cases, it is essential to have clear guidelines on how TPLF should be managed. This could include requirements for funders to demonstrate their financial stability and to provide security for costs, ensuring that they can meet any adverse costs orders.

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?

Yes, there is a need to amend the CPR and the CAT rules to cater for these other forms of funding. As outlined in our response to question 23, the amendments should focus on enhancing transparency, accountability and fairness in proceedings involving these funding mechanisms.

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?

Yes, there is a need to amend the Civil Procedure Rules (CPR) in light of the *Rowe* case. That case highlighted several key issues about TPLF, particularly the allocation of costs and the responsibilities of funders. Our comments built upon our response to question 23.

Firstly, the CPR should be amended to include specific provisions that address the disclosure of TPLF arrangements. This would ensure that all parties and the court are aware of the existence and terms of any funding agreements, promoting transparency and reducing the risk of conflicts of interest.

Secondly, the rules should include safeguards to protect the interests of claimants. This could involve setting limits on the control that funders can exert over the litigation strategy and decisions, ensuring that funders cannot dictate the terms of settlement or interfere with the claimant's legal representation.

Additionally, the rules should provide clear guidelines on the responsibilities and liabilities of third-party funders, particularly concerning security for costs. This could include requirements for funders to demonstrate their financial stability and to provide security for costs, ensuring that they can meet any adverse costs orders.

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 court should play a significant role in controlling both the pre-action conduct of litigation and the conduct of litigation after proceedings have commenced, especially when supported by TPLF. This oversight is essential to ensure that the litigation process remains fair, transparent and accountable.

The pre-action protocols should be updated to address the issues to which we have referred already, namely requiring the disclosure of funding arrangements to ensure transparency and reduce the risk of conflicts of interest.

Given that these protocols are designed to encourage the exchange of information, promote settlement and reduce the costs of litigation, the court should have the authority to enforce compliance with these protocols in cases involving TPLF, to prevent funders from using pre-action conduct as a tactical device to secure an unfair advantage and to reduce the risk of frivolous or speculative claims.

Once proceedings have commenced, the court should have the power to oversee the conduct of litigation involving TPLF as we have already described.

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?

As outlined in our previous responses, the existence and terms of TPLF arrangements should be disclosed to both the court and the funded party's opponents. This disclosure is essential for ensuring transparency, reducing the risks of conflicts of interest, and promoting ethical conduct among funders.

Disclosure allows the court to assess the motivations behind the litigation and make informed decisions about security for costs. It also helps the opposing party evaluate the financial stability and credibility of the funder. By ensuring that all parties are aware of the funding arrangements, the litigation process remains fair and accountable.

In conclusion, the principles of transparency and accountability, as discussed in our previous responses, should guide the disclosure of funding arrangements to maintain the integrity of the legal system.

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?

Funders can exercise significant control over litigation and this has already played out in the courts and media.

We have already referred to the public dispute between the claimant and the funder in the *Merricks v Mastercard* case. This case highlights the potential for funders to exert undue influence over litigation outcomes, which can undermine the claimant's autonomy and the fairness of the process.

There are also, of course, a series of cases about the "Arkin cap" which highlight the issues that can arise from TPLF and the lack of binding rules on the responsibilities and liabilities of funders, particularly concerning their control over litigation strategy and decisions.

To protect claimants and ensure the integrity of the legal system, it is essential to implement safeguards that limit the extent of control that funders can exert over litigation. Funders should not be allowed to dictate the terms of settlement or interfere with the claimant's legal representation. Instead, their role should be limited to providing financial support while respecting the claimant's autonomy and the professional judgment of the claimant's legal representatives.

As we have said, it is crucial to establish a regulatory framework that balances the benefits of funding with the need to maintain the integrity and fairness of the legal system.

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

Different funding mechanisms can influence the settlement of proceedings, affecting both the strategies and outcomes of litigation.

Common Issues Across All Funding Mechanisms

- **Transparency and Disclosure:** Regardless of the funding mechanism, transparency in funding arrangements is crucial. Disclosure of funding agreements to the court and opposing parties helps reduce the risk of conflicts of interests and ensures that all parties are aware of the financial dynamics influencing the litigation. This transparency can facilitate more informed and fair settlement negotiations.
- **Control and Influence:** Funders, whether they are trade unions, insurers or private entities, may seek to exert control over the litigation strategy and decisions. This control can impact settlement discussions, as funders may push for higher settlements to maximize their return on investment, potentially prolonging litigation and complicating negotiations.

Specific Issues for Each Funding Type

Trade Union Funding:

- **Alignment of Interests:** Trade union funding is typically aligned with the interests of union members, focusing on achieving justice in employment-related disputes. This alignment can lead to more cooperative settlement negotiations, as the union's primary goal is to secure fair outcomes for its members.

LEI:

- **Policy Limitations:** LEI policies may have specific limitations and exclusions, which could affect the scope of coverage and the claimant's ability to pursue certain types of claims. This can influence settlement negotiations, as parties may need to consider the extent of coverage and potential out-of-pocket costs.
- **Choice of Solicitors:** Insurers often have a panel of solicitors and policyholders may not have the freedom to choose their own legal representation. This can impact the dynamics of settlement discussions, as the insurer's preferred solicitors may have different approaches to negotiation and there is a risk of a conflict of interest between the firm's relationship with their insurer clients and that of the claimant in the case.

Contingency Fee Arrangements (Conditional Fee Agreements and Damages-Based Agreements)

Incentives and Risks: Lawyers working on a contingency fee basis are incentivized to achieve the best possible outcome for their clients. This can lead to more aggressive litigation strategies and higher settlement amounts. However, this can also result in prolonged litigation if lawyers believe that a higher settlement is achievable. This risk conflicts between the lawyer's desire for the maximum financial return and the interest of their client.

Borrowed funds

- **Financial Risk:** This places the financial risk on the claimant, who must repay the loan regardless of the litigation outcome. This financial pressure can influence claimants to settle more quickly to avoid accumulating interest and debt.

Crowdfunding

- **Public Support and Pressure:** Crowdfunding can generate public support for a claimant's cause, but it also brings the pressure to maintain that support. This can influence the claimant's litigation strategy and decisions, potentially leading to more aggressive tactics and impacting settlement negotiations.
- **Transparency and Accountability:** Establishing guidelines for crowdfunding platforms is essential to ensure transparency and accountability in the funding process. This can affect settlement discussions, as parties may need to consider the expectations and interests of a large number of small contributors.

In conclusion, different funding mechanisms can have varied effects on the settlement of proceedings, influencing both the strategies adopted by claimants and defendants and the overall dynamics of litigation. It is essential to consider these effects when evaluating the role of funding mechanisms in the legal system.

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?

Yes, the court should be required to approve the settlement of proceedings where they are funded by TPLF or other providers of litigation funding. This requirement should apply to all types of court proceedings to ensure transparency, accountability and fairness in the settlement process.

Court approval of settlements in funded cases is essential for several reasons. Firstly, it helps to reduce the risk of conflicts of interests between the funder and the claimant. Funders may have a financial incentive to push for a settlement that maximises their return on investment, potentially at the expense of the claimant's best interests. Court oversight ensures that the settlement is fair and reasonable for all parties involved.

Secondly, court approval provides an additional layer of protection for claimants, particularly in cases where there may be power imbalances between the funder and the claimant. This is especially important in collective or representative actions, where the interests of a large number of claimants need to be safeguarded. The public dispute in the *Merricks v*

Mastercard case illustrates the potential for funders to exert undue influence over settlement decisions. Court approval of settlements can help prevent such disputes and ensure that the settlement is in the best interests of the claimants rather than being an investment decision (as a funder might see the issue).

Additionally, court approval can enhance public confidence in the legal system by ensuring that settlements are reached transparently and ethically. This is particularly important in high-profile cases or cases involving significant public interest, where the integrity of the settlement process is crucial.

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?

If the court is to approve the settlement of proceedings, it should apply a set of criteria to ensure that the settlement is fair, reasonable and in the best interests of all parties involved. The following criteria should be considered:

- **Fairness and reasonableness:** The court should assess whether the settlement terms are fair and reasonable for all parties: obviously, the claimants but also ensuring that defendants have also had fair access to justice. This involves evaluating the adequacy of the compensation offered and ensuring that it reflects the merits of the case and the potential outcomes if the case were to proceed to trial.
- **Transparency and disclosure:** The court should ensure that all relevant information regarding the settlement and the funding arrangements has been disclosed. This includes the terms of the TPLF agreement, any potential conflicts of interests and the financial interests of the funder. Transparency is crucial to reduce the risk of conflicts of interests and to ensure that the settlement is reached ethically.
- **Protection of claimants' interests:** The court should consider whether the settlement adequately protects the interests of the claimants, particularly in cases involving collective or representative actions. This includes ensuring that the claimants receive a fair share of the settlement proceeds and that their legal representation has acted in their best interests.
- **Influence of the funder:** The court should evaluate the extent of the funder's influence over the litigation strategy and settlement decisions. It is important to ensure that the funder has not exerted undue influence to push for a settlement that maximises their return on investment at the expense of the claimants' best interests.
- **Public interest and ethical considerations:** The court should consider the broader public interest and ethical implications of the settlement. This is particularly important in high-profile cases or cases involving significant public interest, where the integrity of the settlement process is crucial to maintaining public confidence in the legal system.
- **Compliance with legal and regulatory requirements:** The court should ensure that the settlement complies with all relevant legal and regulatory requirements. This includes any specific rules or guidelines related to TPLF and the conduct of litigation.

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?

To ensure the protection of claimants whose litigation is funded by TPLF, several provisions need to be made, including updating professional legal services regulation. These provisions aim to enhance transparency, accountability and fairness in the litigation process.

The damage caused by lawyers receiving outsized financial incentives for the outcome of cases was shown in *Federal Republic of Nigeria v Process & Industrial Developments Limited*²¹. In this case, the law firm and barrister acting for P&ID were offered sums of up to £3 billion and £850 million respectively, contingent upon success for their client. Their rewards were subsequently linked to corrupt and unprofessional conduct in the judgment in that case, handed down in October 2023.

Firstly, there should be mandatory disclosure of TPLF arrangements to the court and all parties involved in the litigation, as we have already described previously.

Secondly, regulatory oversight of TPLF providers is essential, as we have already described previously.

Thirdly, professional legal services regulation should ensure that lawyers representing claimants in TPLF-funded cases adhere to ethical standards and act in the best interests of their clients. This includes maintaining independence from funders and avoiding conflicts of interests, which should include consideration of what funding is available in the market. Lawyers should be required to disclose any financial arrangements with funders to their clients and obtain informed consent before entering into such agreements. We are concerned to see moves by funders to buy or set-up law firms, such as the vertically integrated group combining funding, law firm and insurance²².

Additionally, there should be provisions for the protection of claimants' financial interests. This includes ensuring that claimants receive a fair share of any settlement or judgment and that funders do not take a disproportionate share of the proceeds. Mechanisms such as caps on funders' fees and requirements for funders to provide security for costs can help protect claimants' financial interests.

Finally, strengthening the regulatory regime for solicitors and claims management companies (CMCs) can further protect claimants. This could involve collaboration between the FCA and SRA to ensure that there are comparable rules for both parts of the representative market. We have already talked about some of the measures previously, all suggested to help maintain ethical standards and protect claimants from excessive charges and undue influence but also to ensure that this group of professionals put their clients first.

In conclusion, a comprehensive regulatory framework that includes mandatory disclosure, regulatory oversight, professional legal services regulation, protection of claimants' financial interests and strengthened regulation of solicitors and CMCs is essential to ensure the protection of claimants whose litigation is funded by TPLF. These provisions will help

²¹ See the *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638, <https://www.judiciary.uk/wp-content/uploads/2023/10/Nigeria-v-PID-judgment.pdf>

²² See <https://news.bloomberglaw.com/business-and-practice/uk-funder-joins-with-law-firm-insurer-to-form-legal-behemoth>.

maintain the integrity and fairness of the legal system and promote public confidence in the litigation process.

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

The TPLF market is not one with active competition between lenders and the alarming development of fundings owning law firms suggested that this is not the direction of travel for the TPLF market. The nature of TPLF means that there is unlikely to develop any form of “price comparison website” that will allow any meaningful comparison.

In addition, the reality is that most mass claims are driven not by claimants but by law firms and funders. The most recent analysis by the Class Representatives Network in September 2024²³, in 71% of cases the lawyers had identified the funder before identifying a class representative.

One of the primary challenges is the lack of transparency and standardized information across different funders. Claimants often struggle to obtain clear and comparable data on the terms and conditions of funding agreements, such as rates of return, fees and control over litigation decisions. This lack of transparency makes it difficult for claimants to make informed decisions and select the most suitable funding option for their needs.

Additionally, the market is characterized by a wide variety of funding arrangements, ranging from commercial funding for corporate litigants to consumer funding for individual claimants. The diversity of funding options can be overwhelming for claimants, particularly those who are not familiar with the intricacies of TPLF. This complexity is further compounded by the fact that some funders may offer bespoke or highly tailored funding solutions, making direct comparisons even more challenging.

Moreover, there is a notable absence of centralized platforms or resources that provide comprehensive information on available funding options. While some claimants may rely on their legal representatives to navigate the funding market, this approach can be limited by the knowledge and experience of the solicitors involved and their effective freedom to search the market. In many cases, solicitors may have pre-existing relationships with certain funders, which could influence the options presented to claimants.

To address these issues, several measures could be implemented to enhance the ability of claimants to compare funding options effectively. These include:

- **Standardized disclosure requirements:** Introducing mandatory disclosure requirements for TPLF agreements, including standardized information on fees, rates of return and control provisions, would enable claimants to make more informed comparisons.
- **Centralized information platforms:** Establishing centralized platforms or databases that provide comprehensive information on available funding options and allow claimants to compare different funders based on standardized criteria.

²³ See <https://classrepresentativesnetwork.org/research-and-reports/>

- **Regulatory oversight:** Strengthening regulatory oversight of the TPLF market to ensure that funders adhere to transparency and disclosure requirements and that claimants are protected from unfair or exploitative practices.

In conclusion, while the TPLF market offers a range of funding options, the current lack of transparency and standardized information presents significant barriers for claimants seeking to compare these options effectively. Implementing measures to enhance transparency, provide centralized information and strengthen regulatory oversight would greatly improve claimants' ability to make informed decisions and select the most suitable funding arrangements for their needs.

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?

We have already discussed the public dispute in the *Merricks v Mastercard* case. Conflicts of interest can also arise in class actions, where the interests of individual class members may diverge from those of the funders and legal representatives. The attenuated nature of class member involvement in class proceedings can make these conflicts more complex and challenging to manage. We also refer to the *Federal Republic of Nigeria* case mentioned previously.

As was noted by the Competition Appeal Tribunal in *London and South Eastern Railway Ltd v Gutmann* [2022] EWCA Civ 1077, some class actions before it are, "...hugely expensive and overwhelmingly for the benefit of funders and lawyers". We urge the CJC to consider the paper entitled "*How to address the regulation of third-party litigation funding of class actions*" by Wayne, Chamberlain and Morabito²⁴.

That there is scope for conflicts of interest is beyond doubt.

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, there is a need to reform the current approach to conflicts of interest that may arise where litigation is funded via TPLF. The existing framework does not adequately address the complexities and potential risks associated with TPLF, particularly concerning the alignment of interests between funders, claimants and legal representatives.

One of the primary concerns is the potential for funders to exert undue influence over the litigation strategy and decisions. This can lead to situations where the funder's financial interests take precedence over the claimant's best interests, resulting in settlements that may not be fair or adequate. The public dispute in the *Merricks v Mastercard* case is a notable example that we have already discussed. It highlights the potential for funders to exert undue influence over settlement decisions, which can undermine the claimant's autonomy and the fairness of the process.

To address these concerns, several reforms are necessary:

²⁴ See (2025) 141 L.Q.R

Firstly, there should be mandatory disclosure of TPLF arrangements to the court and all parties involved in the litigation. We have already discussed this previously.

Secondly, regulatory oversight of TPLF providers is essential. We have already discussed this previously.

Thirdly, professional legal services regulation should ensure that lawyers representing claimants in TPLF-funded cases adhere to ethical standards and act in the best interests of their clients. We have already discussed this previously.

Additionally, there should be provisions for the protection of claimants' financial interests. This includes ensuring that claimants receive a fair share of any settlement or judgment and that funders do not take a disproportionate share of the proceeds. Mechanisms such as caps on funders' fees and requirements for funders to provide security for costs can help protect claimants' financial interests. We have already discussed these points previously.

In conclusion, reforming the current approach to conflicts of interest in TPLF is essential to ensure the protection of claimants and maintain the integrity and fairness of the legal system. Implementing mandatory disclosure, regulatory oversight, professional legal services regulation and protection of claimants' financial interests will help address the potential risks and complexities associated with TPLF.

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:
- Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?
 - 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?
 - 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.

The availability of TPLF and other forms of litigation funding can significantly influence the types of litigation pursued.

A. Encouragement of meritorious claims: TPLF and other funding mechanisms can encourage individuals and businesses to litigate meritorious claims by providing the necessary financial resources to pursue legal action. For example, in the Post Office Horizon litigation, TPLF enabled sub-postmasters to pursue their claims against the Post Office, although it failed to deliver for the sub-postmasters and provided a healthy return to the funders. Similarly, LEI, trade union funding and other forms of funding discussed already can provide financial support for claimants with valid claims, ensuring that they have access to justice.

B. Increase of vexatious litigation: While TPLF can facilitate access to justice, there is a real concern that it encourages an increase in vexatious or meritless litigation. Funders are likely be motivated by the potential for high returns, leading them to support speculative claims.

C. Encouragement of group litigation, collective and/or representative actions: TPLF is particularly effective in encouraging group litigation, collective and representative actions. This is because, for funders and lawyers, the need for claimants beyond a single representative does not arise unless and until a successful judgment or settlement. The lawyers and funders get their rewards leaving individuals to put their hands for any share of settlement. For example, if the *Merricks* case settles at the £200m proposed then individuals who seek their share of what's left are likely to about £2. One has to question how many will bother. After years of litigation and court time and the only real benefit will have been the lawyers and funders.

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.

TPLF is particularly effective in encouraging class actions, representative actions and other mass claims. A study of the caseload of the CAT readily demonstrates this.

However, to ensure that TPLF promotes fairness, transparency and accountability in these types of litigation, several reforms are necessary. As discussed in our responses to earlier questions, these reforms include mandatory disclosure of TPLF arrangements, regulatory oversight of funders, professional legal services regulation and protection of claimants' financial interests. Implementing these measures will help maintain the integrity of the legal system and promote access to justice.

In conclusion, while TPLF encourages class actions, representative actions and other mass claims, it is essential to implement the aforementioned reforms to ensure that these funding mechanisms operate transparently and ethically. Without such reforms, they risk continuing extractive and unfair for claimants and defendants and warping the civil justice system.

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?

Improving access to information concerning available options for litigation funding is crucial for ensuring that claimants can make informed decisions about pursuing claims. Several steps can be taken to enhance this access:

Firstly, creating centralized platforms or databases that provide comprehensive information on available funding options can significantly improve access. These platforms could include details on different types of funding mechanisms, such as TPLF, LEI, CFAs, DBAs and crowdfunding. By offering standardized information on fees, rates of return and control provisions, these platforms can help claimants compare funding options effectively.

Secondly, increasing transparency and disclosure requirements of funders can help claimants understand the terms and conditions of funding agreements. We have already talked about this topic in general terms.

Thirdly, enhancing regulatory oversight of TPLF providers can ensure that funders adhere to high standards of conduct. We have already discussed this in detail.

Additionally, providing educational resources and guidance on litigation funding can empower claimants to make informed decisions. This includes offering clear and accessible information on the benefits and risks of different funding mechanisms, as well as practical advice on how to navigate the funding market. For funders under a new regulatory regime, they could be required to disclose information to claimants in a consistent manner such as already happens in insurance or investment markets.

Finally, requiring legal professionals (solicitors and CMCs) to provide comprehensive advice on funding options can further improve access to information. Solicitors and CMCs should be required to disclose all funding arrangements and potential conflicts of interests to their clients, ensuring that claimants are fully informed about their options.

General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?²⁵

With a mandatory regulatory and authorisation scheme should also come a fiduciary duty on providers of TPLF so that they have an express obligation to act in the best interests of claimants.

²⁵ Please note that the Working Party is not considering civil legal aid.