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:	Arabella
Last name:	Ramage
Location:	London
Role:	Legal Counsel
Job title:	Legal Director
Organisation:	Lloyd's Market Association (LMA)
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:
We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.
Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.
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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 Lloyd's Market Association (LMA) represents the fifty-two managing agents at Lloyd's, with ninety-four active syndicates (including SPVs) underwriting in the market, and four members' agents acting for third-party capital. Managing agent members are "dual regulated" firms under the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA), while members' agents are solo regulated by the FCA.

In 2023, the Lloyd's market earned total gross premiums of £52.1 billion, serving as a critical component of the London and UK economy. This reach extends through both UK distribution and access to over 200 countries globally. In addition to PRA and FCA oversight, Lloyd's managing agents operate within a framework of bye-laws and regulations established by the Corporation of Lloyd's, a statutory regulator. They are further governed by the Lloyd's complaints process and DISP 1.11.1 R under FCA rules.

The LMA represents Lloyd's insurers in this consultation, which we believe is particularly timely given the growing prominence of litigation funders in the UK and the increasing recognition of litigation funding as an asset class. Our members acknowledge the role that litigation funding can play in facilitating access to justice, providing crucial resources for individuals and entities that might otherwise lack the financial means to pursue valid claims. However, insurers often bear the ultimate cost of claims brought against defendant companies. As such, our members have a strong interest in ensuring that funded cases are conducted fairly and appropriately. We welcome the opportunity to contribute to this consultation to help ensure that litigation funding operates as part of a balanced and properly managed litigation system.

Our members accept and plan for the costs of litigation through claim payments—this is a fundamental function of liability insurance. However, the lack of regulation in litigation funding gives rise to significant concerns, particularly where funding models incentivise litigation based on financial returns rather than the intrinsic merits of claims. This misalignment can lead to excessive costs, which, in turn, affect insurance premiums, as premiums are inherently tied to underlying risks. If litigation risks become disproportionately high, this could undermine access to insurance for key sectors that depend on it. Historical precedents, such as the liability insurance crisis in the US during the 1980s, illustrate the potential consequences—where soaring premiums and limited coverage availability severely disrupted the market. More recently, states like Florida have enacted tort reforms in response to similar challenges, reinforcing the need for a well-regulated litigation landscape. Our members are keen to ensure that the UK litigation environment does not follow a comparable trajectory.

To ensure that litigation funding operates within a fair and transparent framework, we believe several key measures should be implemented. These would help balance the interests of all parties while safeguarding consumers and maintaining the integrity of the litigation process. Specifically, we propose:

- A stronger emphasis on consumer protection, including a requirement for clear, plain English explanations of the terms contained in litigation funding agreements.
- Regulation of litigation funders by the FCA, whose focus on "conduct" would place greater emphasis on consumer protection. Bringing litigation funders within the scope of the Consumer Duty would further enhance safeguards for claimants.
- Mandatory disclosure of the fact that there is a litigation funding agreement in place and the identity of the funder to both the courts and opposing parties to ensure greater transparency in proceedings.

- Improved education for legal professionals, particularly judges, regarding the potential risks and harms associated with poor practices in litigation funding.

These measures would contribute to a more balanced and responsible approach to litigation funding, ensuring that it serves its intended purpose—enhancing access to justice—without encouraging disproportionate costs or unfair outcomes.

Answers to questions

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

   Third party funding can play a part in allowing parties, who would not otherwise have the means, to pursue litigation. However, litigation does not necessarily mean justice. The question equates justice with a remedy obtained through litigation. Whilst that is undoubtedly the case for some, it will not be the case for others.

   We recently replied to a Law Commission consultation on the law of apologies. The consultation was in relation to amendments to the law to make it easier for organisations to apologise without fear of that apology being used against them in subsequent litigation. The aim of the proposed amendments was partly to reduce litigation, as for some claimants, an apology would be enough to feel that justice has been served. This illustrates the point well – litigation is not always the answer and people underestimate the emotional toll that litigation takes and the time commitment involved in litigating a case, even with lawyers instructed.

   The availability of third party funding could mean that there is a rush to litigate – where people jump straight to litigation instead of pursuing other means of resolving their disputes. If there is competition for cases and then advertising through, for example, social media campaigns, as has been seen in the US, we may create the litigious society in the UK that we have so far largely managed to avoid.

   There are also other impediments to justice caused by third party funding:

- **Conflicts of interest and prolonged litigation**: Litigation funders' interests lie in obtaining high returns, which can create a conflict of interest with claimants whose motives may be less about compensation and more about vindication or an apology. Funders could exert control over the litigation process in order to prioritise financial gains over the clients' best interests. Whilst the recent Mastercard litigation does not appear to demonstrate the client's best interests having been ignored thanks to the efforts of the lead claimant's lawyers, the comments and actions of the third party funder post settlement seem to lay bare the nature of the conflict of interest, in that the funder, Innsworth Advisors, is challenging the settlement reached[1]. This is despite the former Financial Ombudsman and class representative stating that the settlement would "deliver meaningful compensation to class members". This illustrates how funders' profit motives may clash with claimants' objectives, such as achieving closure or mitigating the stress and time commitment of protracted litigation. These conflicts are exacerbated by the lack of transparency in funding arrangements and the absence of mechanisms to ensure that funders' interests do not override those of claimants. Whilst it is true in that case, the client's wishes and the lawyers' judgment won out in terms of the

[1] Law Gazette, 16th January 2025 [Association of Litigation Funders 'monitoring' Mastercard row but has not been asked to investigate | Law Gazette]

settlement of the case, it is possible that a different kind of litigation funding agreement would have meant that the client was unable to settle. It is also conceivable that funders will be more adept at preventing this type of settlement (without their consent) in the future.

This stands in contrast to situations where a litigation funder wishes to settle while the claimant prefers to continue litigation—circumstances that may present a fair and justifiable conflict of interest, and therefore one that does not require any intervention.

- **High Levels of Deductions**: Claimants can face significant deductions from damages to meet funder returns, leaving them under-compensated. Whilst vindication is sometimes a feature of the justice sought (for example, in the Post Office litigation), more often there is also a financial element to that justice, such as recovering medical expenses, lost income, damage to property etc. The awarded damages, however, can be significantly reduced by the returns paid to third party funders. Another example is, the Mastercard litigation. Mastercard has agreed to pay £200m by way of settlement without any admission of liability. The Law Gazette calculated that if all claimants in the class came forward, they would each get £2.27 damages, whilst Innsworth Capital will receive £45.57m to cover costs, and £54.43m, by way of profit, depending on how many people come forward. Is £2.27 per claimant justice or just a diversion of resources from the defendant to the third party funder and the lawyers?

- **Lack of Transparency from a Claimant Perspective**: Unclear or complex funding terms can result in claimants unknowingly agreeing to unfavourable conditions, especially when they do not have the means to obtain independent legal advice. This is especially true where claimants are unsophisticated or vulnerable. We go into more detail on this in question 5.

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

Third party funding can promote equality of arms between parties by enabling access to legal advice for under-resourced parties, particularly individuals. This assists in levelling the playing field, especially in cases where absent that funding, the claimant would be a litigant in person or not be able to start litigation at all. However, litigation funders can also implement strategic measures to exhaust the defendant, potentially creating an imbalance in the process as we outline in our answer to question 5. To that end, a scorched earth approach adopted by claimant lawyers can go beyond promoting equality of arms and result in an arms race.

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

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

The current regulatory framework is a voluntary Association of Litigation Funders' (ALF) Code of Conduct. We preface our comments with the observations of Jackson LJ in his review of litigation costs in 2009:

"I support the approach of the CJC in trying to establish, in the first instance, a voluntary code for third party funding. Provided that a satisfactory code is established and that all funders subscribe to that code, then at this stage, subject to my concern about capital adequacy requirements, I see no need for statutory regulation. However, if the use of third party funding expands, there may well be a need for full statutory regulation…"

The question whether there should be statutory regulation of third party funders by the FSA ought to be re-visited if and when the third party funding market expands"[2]

The current voluntary code to which all litigation funders subscribe was originally accepted in Jackson LJ's 2009 Review of Litigation Costs as a first step, with the understanding that the question of whether statutory regulation should be introduced could be revisited if the market expanded significantly.

Since that time, the litigation funding market has grown substantially. Despite this growth, only 36% of active funders are members of the ALF, meaning the majority of funders remain outside any regulatory framework. The voluntary nature of the current Code of Conduct therefore has been insufficient to ensure comprehensive adherence to minimum standards. Furthermore, the original concept of this framework is now outdated, as it was developed for a nascent market with fewer risks to claimants and the justice system.

Litigation has changed substantially since the Code was introduced in 2011 and the types of claims financially supported by these funders has equally evolved. The development of the market in litigation funding has meant that the amount invested by these funders has increased substantially too. Therefore, requirements such as maintaining "access to a minimum of £5m of capital" does not provide sufficient protection for claimants, who are at risk of costs orders should a costs order be made against them if the funding party standing behind them is no longer there.

The voluntary framework is further undermined by the absence of monitoring mechanisms. For example, the collapse of SSB Law left claimants in a precarious position, exposing the inadequate safeguards in place for capital adequacy. The absence of a mandatory requirement for funders to demonstrate sufficient financial resources creates systemic risk, particularly in group litigation cases.

Even if monitoring was introduced against the ALF Code, it lacks effective enforcement mechanisms. The ALF Code lists potential sanctions that may be enforced against non-complying members, however, it is in the ALF's discretion to exercise such power. Financial sanctions, which could be a strong deterrent for funders not to breach the Code, are limited to £500, a negligible amount for funders which are backed by cash rich investors and hardly a deterrent against poor conduct.

Finally, the ALF is not fully independent, since as a trade association it derives its income from its members' contributions.

To address these issues, the regulatory framework for third-party funding must evolve to reflect the current state of the market. A move to statutory regulation under the Financial Conduct Authority (FCA) (as was considered by Jackson LJ) is necessary to ensure that all funders adhere to minimum standards, in particular with respect to financial security. Statutory oversight would make compliance mandatory and enforceable by an independent body, providing greater accountability and transparency.

[2] Review of Civil Litigation Costs: Final Report - 860_00_Cover_35mm.indd

Claimants must have complete clarity on the terms of the funding agreements, ensuring that they fully understand the risks and terms of the arrangements they enter into. For many years, there has been a regulatory obligation on our members, as insurers, to provide additional documentation on insurance products sold to consumers, pointing out what the key terms of the policy are. This should be replicated in the litigation funding space for what is, in essence, a financial product. Regulation by the FCA would fix this with its focus on conduct, especially if litigation funders were brought within the scope of the FCA's Consumer Duty.

In addition, regulatory reform should be backed by the introduction of caps on funders' returns, tailored to different types of litigation. Such caps would strike a balance between maintaining the viability of litigation funding as an industry and protecting claimants from excessive financial exploitation, thus depriving them of "justice" (see our answer to question 1 above). This could be done in many ways and we set out some suggestions in our answer to question 13.

The voluntary ALF Code may have been appropriate for the early stages of the litigation funding market, but it no longer provides the necessary protections for claimants or the justice system. The substantial growth of the market and the increasing complexity of funding arrangements make statutory regulation essential to safeguard the integrity and fairness of the litigation process. Regulation by an independent regulator such as the Financial Conduct Authority (FCA) would provide consistent independent oversight and enforceability, including capital adequacy requirements. It also has a vast amount of experience in protecting consumers and the integrity of financial markets. Consideration should also be given to the fact that third party funders are currently not subject to anti-money laundering obligations. Given the potential for high-net-worth individuals or international parties to participate as a funder, extra vigilance ought to be part of the equation. In our answer to question 5, we refer to the case of A1, backed by a Russian financial group both before and after its founders were sanctioned following the invasion of Ukraine[3].

At the end of the day, what is being sold by the litigation funders to claimants is a financial product and it needs to be regulated as such.

5. **Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:**
    a. **The nature and seriousness of the risk and harm that occurs or might occur;**
    b. **The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;**
    c. **For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.**

Poor practices by litigation funders will have an effect on insurers, with the increased costs leading to higher premiums initially, and ultimately, potential uninsurability of certain types of industry. In a recent Congressional Hearing at the House Committee on Oversight and

[3] Putin's Billionaires Dodge Sanctions by Financing Lawsuits (1)

Accountability, in relation to litigation funding, Mr. Erik Milito, President of the National Ocean Industries Association (NOIA) said in evidence that *"Litigation can serve as an important tool to hold federal agencies accountable to their statutory obligations, but the continued abuse of litigation to disrupt federal energy leasing ultimately penalizes the American consumer more than anyone."* The same is true in relation to insurance – an unchecked litigation funding industry could lead to increased costs for all, and place a dampener on innovation.

Strengthening rules around and introducing mandatory regulation on funders should be the opportunity to provide safeguards to ensure that the funded party's interest is protected and the integrity of the litigation process is preserved. Furthermore, a duty of disclosure owed to the Court and the ability of judges to order disclosure will also allow for proper management of mass litigation, should it occur.

We have already addressed many of the harms in the questions above but summarise them below with thoughts as to how these harms could be mitigated.

Complexity of litigation funding agreements

Litigation funding agreements can be complex. Accordingly, vulnerable claimants might not be able to make an informed decision due to the complexity of the terms. Certainly, it is conceivable that claimants might not fully understand the control that funders may have over the litigation and potential settlement. They may have little understanding of the deductions that will be made by the litigation funder.

A step that could be considered is the replication of the current requirement in the ALF Code of Conduct for litigation funders to take reasonable steps to ensure that funded parties receive independent legal advice prior to entering into the litigation funding agreement. However, we believe this could also be a step too far, as there is no equivalent requirement in place for other finance related contracts entered into by consumers.

We think the better solution would be for litigation funders to have an obligation to produce contracts which are simple to understand, especially where consumers are involved. At the very least, funders should be required to produce documents in plain English and also summarise the key terms of the contract. Insurers currently do this through the provision of summaries of cover, or IPIDs and these are mandated in FCA rules. This would likely be picked up by the FCA were the FCA to be charged with regulating third party funders.

The erosion of claimant's net compensation

High funder returns can significantly erode claimants' net compensation. Our answers in the question above have already given examples of this harm. The mitigation could take the form of caps, a topic on which we expand upon later (please refer to question 13).

Unnecessary litigation

We have already set out in our answer to question 1 how litigation funding can lead to prolonged litigation and could result in a rush to litigate. Inevitably, it leads to more litigation, not all of it good. This is an issue which has been raised with us by many of our members. They say that the impact of litigation funders is most keenly felt in relation to claims with high potential quantum but low probability of success for the third party suing their insureds. Our member insurers say that when litigation funders become involved, it is more difficult to settle these cases - notwithstanding poor prospects of success, litigation funders will proceed to trial because of the potential recovery. We understand that this may be a result of an investment strategy approach to funding – invest in enough cases and the return from one that hits will outweigh the losses. Whilst the insured (whose costs are indemnified by the insurer) ultimately prevails and, if the case is brought in the UK, costs follow the event, there will inevitably be an element of irrecoverable defence costs and also a waste of management and court time.

Conflicts of interest

Litigation funders' interests lie in high returns, which may create conflicts of interest with the clients' best interests especially where funders exert control over settlements. If funders insist on higher returns, this can extend the period of litigation and increase costs. It can also reduce the likelihood of reasonable settlements even where the client might wish to settle. The result is at the least increased costs from what they would have been had funding not been involved. We have also already referred to the Mastercard settlement in our answer to question 1, an illustration of this conflict laid bare.

There are similar examples in the US. For instance, Burford Capital invested over $140 million in Sysco's antitrust claims against its food suppliers. Whilst Sysco wanted to settle to maintain good relations with its suppliers, Burford objected to the settlement, deeming it too low, as their primary interest was in maximising returns. Consequently, Burford obtained an interim arbitral award which prevented Sysco from entering into the settlement. Whilst Sysco and Burford have settled, part of that settlement involved Sysco transferring the rights to litigate over to a Burford entity who are now in charge of the litigation. Thus, something which could have been resolved against defendants relatively quickly and cheaply is now set for increased costs and protracted litigation – costs which are likely to be covered by the defendant companies' insurers.

In the US, in some states, litigation funders are now able to own law firms. In the UK, we have seen significant investment by investment houses into law firms where the purpose is to seek returns through litigation funding. Even though the solicitor, being regulated and owing their highest duties to the Court and their client, the solicitor must also have an eye on its paymaster, the litigation funder, and thus the risks of conflicts of interest arising and not being adequately or fairly addressed become higher. This matter also arose in the above referenced Sysco case, whereby Sysco terminated its legal representative's engagement for breaching its fiduciary responsibilities towards Sysco by helping Burford obstruct the settlements.

In terms of mitigation of this particular head of harm, there should be requirements for litigation funding agreements to explicitly preserve the claimant's autonomy in key decision-making areas, particularly regarding settlement offers. Funding agreements should be made to include clauses stipulating that funders cannot veto settlements or exert undue influence over the claimant's decisions where that claimant is acting reasonably. Funders could be required to defer to the advice of independent legal counsel where disputes about settlements arise. This would ensure that the claimant's best interests remain paramount and would reduce the risk of funders overriding reasonable settlements for financial gain.

We would suggest that regulators could prohibit funders from owning law firms or creating financial arrangements that could compromise a solicitor's independence. This would minimise the risk of lawyers prioritising funders' interests over their client's interest. This would require the help of the Solicitors Regulation Authority and a possible updating of the SRA Standards and Regulations to include explicit provisions addressing the unique risks posed by litigation funding. Lawyers must remain bound by their fiduciary duties to their clients and their overriding duty to the court, even when litigation funding is involved. Clearer guidance from professional regulators, coupled with active enforcement, would help address situations where funders might pressure lawyers into breaching their duties.

Capital Adequacy

Instances like the SSB Law collapse reveal systemic risks when funders lack sufficient capital, leaving claimants exposed to substantial liabilities in the event costs orders are made against them (bearing in mind that even discontinuance has costs consequences). Regulation by the FCA should include a system of registration, perhaps as part of the existing FCA register. As part of this regime, funders should be required to provide annual evidence of their financial stability, including audited accounts and proof of capital reserves. Permissions should be revoked or suspended if funders fail to meet financial or operational standards, providing an enforcement mechanism to ensure compliance. This would help ensure that funders can cover all liabilities, including adverse costs orders.

As noted above, the ALF Code contains a capital adequacy threshold of £5 million but our members' view on this is that this is now woefully inadequate. We do not propose an alternative number but consider that thresholds could be calibrated based on the scale and nature of the funding activities, with higher thresholds for funders engaging in larger or higher-risk cases, such as group actions or complex commercial disputes. This would ensure proportionality while safeguarding against systemic risk

Another measure could be the requirement for funders to hold insurance or other financial instruments, such as bank guarantees, to cover potential liabilities arising from adverse costs orders. This would act as a safety net for claimants and the wider legal system, ensuring that liabilities are met even in cases of funder insolvency. Insurance-backed schemes could also provide an additional layer of protection, particularly for claimants who might otherwise be left exposed to substantial costs.

The use of litigation as a strategic tool

Our members are concerned about the trend of strategic litigation witnessed in the US and the possibility that such might occur in the UK, resulting in increased litigation spend. In his paper, The Alchemists Inversion, Professor Samir Parikh found that in the US, funders often backed claims with questionable merit to bundle them with stronger cases, creating disproportionate settlement pressure on defendants. This also has the effect of increasing the payout to the funder (because of the number of claims individually settled). This approach was observed in the 3M Combat Arms litigation, where over 275,000 claims were filed, many allegedly lacking substantive evidence. This placed significant strain on judicial resources but was part of a strategic measure to exhaust the defendant. This strategy was also seen in the Johnson and Johnson mass tort where tens of thousands of claims, many of which had little evidentiary support, were aggregated. Johnson and Johnson argued that many of the claims lacked scientific proof of causation, yet the volume of litigation and associated costs forced the company to settle.

Our members have alerted us to the Black Diamond case in the US as yet another example of strategic litigation – Black Diamond is a litigation funder which set up a law firm, Zaiger. Zaiger conceived a mass arbitration strategy against Valve, a computer game company, recruiting tens of thousands of clients via a social media campaign and seeking funding from Black Diamond, which agreed to provide seed funding but later imposed new terms including control over litigation. Valve have brought proceedings against the funders alleging that the defendants abused the arbitration process by signing up tens of thousands of clients, with no intention of actually arbitrating their claims, in order to force Valve into a settlement.

The harm of strategic litigation could be addressed through the Courts taking a more activist approach, and we set out more detail in our answer to question 23.

Sanctions and money laundering

There is also potential for abuse and manipulation by foreign funders with geopolitical motives. Due to the lack of reporting requirements and minimal regulations, wealthy investors can inject vast sums into legal cases without their involvement being publicly recorded. This has created a new avenue for cross-border financial flows, enabling the circumvention of international laws and undermining the purpose of imposed sanctions.[4] As an example, an investment firm founded by Russian billionaires, A1, has been financing lawsuits globally to evade international sanctions. In a UK High Court case, Vneshprombank LLC v Bedzhamov [2024] EWHC 1048 (Ch), A1 funded Vneshprombank's case to recover assets from individuals accused of embezzling over $2 billion. After three A1 directors were sanctioned, they sold the company for $900 to another director apparently to circumvent sanctions. UK courts found that A1's manoeuvres were attempts to evade sanctions, with Cockerill J and Lady Justice Falk expressing concerns about the genuineness of the transaction and A1's control by sanctioned individuals.

The mitigation here, we believe would be twofold. Funders could be brought under the scope of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR). Under the MLR, certain entities, financial institutions and legal professionals, are required to conduct customer due diligence (CDD) to identify and verify the identity of their clients and the source of their funds. If litigation funders were brought explicitly within the scope of these regulations, they would be required to verify the identity of the ultimate beneficial owners of the funds they deploy, conduct enhanced due diligence for clients or funds originating from high-risk countries or individuals subject to sanctions and monitor ongoing relationships to ensure compliance with anti-money laundering and sanctions laws.

Regulators should then ensure that funders conduct thorough checks on the sources of their funds, preventing sanctioned individuals or entities from participating in UK litigation financing. This would also help address scenarios like the A1 case, where funders with suspect ownership structures circumvented sanctions by transferring ownership to avoid scrutiny. Failure to comply could result in penalties, including the revocation of their ability to operate in the UK. Courts could also request evidence of compliance with the MLRs as part of their

[4] Putin's Billionaires Dodge Sanctions by Financing Lawsuits (1)

scrutiny of funding arrangements in cases involving international funders or high-risk jurisdictions.

The professional obligations of solicitors and barristers already encompass the making of Suspicious Activity Reports where money laundering is suspected. Additional training should be given to ensure that lawyers are vigilant in identifying red flags in funding arrangements and verifying that their clients and funders comply with anti-money laundering laws.

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

  a. **If not, why not?**
  b. **If so, which types of dispute and/or form of proceedings should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?**
  c. **Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?**

We do not think that any distinction should be made between litigation and arbitration in terms of regulation, although we accept that adjustments may need to be made to account for the fact that whilst judges can exercise their powers to protect claimants and prevent abuses of process, this is somewhat harder for arbitrators.

We think that the real distinction comes in to play when considering the type of client benefitting from the litigation funding. While all funders should be subject to a mandatory regulatory system that addresses capital, fairness and transparency requirements, a one-size-fits-all approach may not address the varying risks across litigation types. Collective and consumer actions require stricter oversight to protect vulnerable claimants and ensure funder accountability. In commercial disputes, however, there are usually more sophisticated and experienced parties who may require a lighter regulatory touch. As we have highlighted before, the FCA's consumer duty would provide an established way to differentiate between the parties and thus the regime to be applied.

We would add that the importance of disclosure of the existence of litigation funding agreement and the party(ies) providing the funding is heightened in arbitration because of the potential for conflict between the funder and the tribunal presiding over a dispute. Arbitrators need to be aware of any financial interests that could affect their own impartiality. This particular concern was acknowledged in an ICSID matter, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic.* The facts disclosed to the three-member arbitral tribunal revealed that the claimants obtained funding by selling rights in potential arbitral awards. The tribunal rightly ordered the claimants to reveal the identity of its third-party funder for the purposes of checking arbitrators' conflicts of interest.

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

Effective regulation should be guided by the following principles:

- **Transparency**: disclosure of the existence of the funding agreement and the identity of the funder to courts, opposing parties, and clear, plain English funding contracts, with explanations to claimants of the main provisions of funding agreements
- **Accountability**: formal Regulation by the FCA with regular audits and mandatory adherence to rules, enforceable through regulatory sanctions.
- **Conflict Management**: Clear rules to prevent funders from controlling litigation or creating conflicts of interest
- **Fairness**: Claimants should be treated fairly by litigation funders. Per our answers to question 5 above, we believe that consumers and SMEs may need rules to ensure that they understand what they are getting into when they sign up for litigation funding, just like with any other financial product. The question of deductions can be dealt with either through the Courts or regulations as we set out in our response to question 13.

8. **What is the relationship, if any, between third party funding and litigation costs? Further in this context:**
    a. **What impact, if any, have the level of litigation costs had on the development of third party funding?**
    b. **What impact, if any, does third party funding have on the level of litigation costs?**
    c. **To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?**
    d. **How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?**
    e. **Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?**
        i. **If so, why?**
        ii. **If not, why not?**

We have already explained what we think it the effect of litigation funding on the level of litigation costs. Our members see that third party funding tends to increase litigation costs on a case by case basis, and on an aggregate basis due to:

(a) increased amounts of litigation;
(b) potential conflicts of interest between litigation funder and claimant resulting in:
    a. Settlements becoming harder to achieve;
    b. Prolonged litigation; and
(c) the potential for litigation to be used as a strategic tool, resulting in quantity of litigation over quality.

All of the above points have been dealt with in our response to question 5 above.

Our members understand that in theory, some of the issues witnessed in the US are ameliorated in the UK by the fact that costs follow the event, and Part 36. However, it should be remembered that the costs consequences do not apply if a case is ultimately settled outside of Part 36 – our members say that there is every possibility that cases run for longer than is necessary in order to achieve higher settlements. Furthermore, as we point out above, if litigation funders view cases on a portfolio basis, the risk of losing and the costs consequences that follow on an individual case may not be sufficient deterrent.

As to whether the costs of litigation funding should be recoverable, we believe they should not. Permitting recovery of these costs as part of litigation expenses would shift the financial burden of funders' profit margins onto defendants, further incentivising aggressive and speculative litigation strategies. This would not only increase costs for defendants but increase the risks which we detail in our response to question 5.

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?

Our comments on this question relate to the obvious:

(i) the possibility of a judge making an adverse cost order can act as a deterrent to claimants (and by extension, litigation funders) from pursuing unmeritorious or vexatious claims. Knowing they might have to bear the defendant's legal costs if they lose, claimants are more likely to carefully consider the merits of their case before proceeding; and

(ii) Security for costs protects defendants from the risk of not being able to recover costs if the claimant loses. There should be consideration to increasing the circumstances in which security can be ordered against the funder i.e. where the litigation funder cannot/ will not produce evidence of assets within the jurisdiction.

Our members believe that these two features of English Court procedure are important brakes which can be applied by judges to prevent some of the harms identified in this response arising from poor practices from litigation funders. However, as we have previously noted, litigation funders often assess cases collectively, treating them as part of a broader portfolio. In such instances, the risk of adverse costs in individual cases may not provide a strong enough disincentive, as the potential returns from a single substantial victory could far outweigh the financial downside of losing other cases

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

Yes, third-party funders should remain liable for the costs of proceedings they have financed. This obligation serves as a safeguard, discouraging funders from backing weak or speculative claims. By bearing the risk of adverse costs, funders are incentivized to conduct thorough due diligence and focus on cases with strong legal merit, thereby reducing the incidence of frivolous or unmeritorious litigation.

However, as pointed out above, if funders operate on a portfolio basis, assessing the viability of cases collectively rather than individually, the deterrent effect is diminished. Nevertheless, ensuring that funders remain exposed to costs fosters greater alignment between their interests and those of claimants, as both parties share in the financial risks and rewards of the litigation.

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

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

12. Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?
   a. If so, why?
   b. If not, why not?

Introducing caps on funders' returns is essential to maintain a fair system whereby claimants' interests are in balance with funders' economic viability. As we have pointed out previously, high funder returns can erode the possibility of reaching a commercially viable settlement as well as the claimants' compensation.

13. If a cap should be applied to a funder's return:
   a. What level should it be set at and why?
   b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?
   c. At which stage in proceedings should the cap be set?
   d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?
   e. Should there be differential caps and, if so, in what context and on what basis?

We suggest that caps should vary by case type.

The setting of caps could be achieved through different methods.

1. As the PACCAR case has not been overturned by legislation as was originally proposed, there could simply be reconsideration of the caps imposed by the Damages-Based Agreements Regulations 2013), although we understand that further work may also need to be done to refine the regime in addition.

2. Another method could be through the active participation of the Courts. The CJC Interim Report highlights that courts already have some control over CFAs, particularly in assessing whether legal fees are proportionate and ensuring fairness in fee arrangements. This could be extended to third-party funding agreements, where judges review such agreements at key stages of litigation, such as Costs and Case Management Conferences, to assess whether funders' returns are proportionate to the risks they assume.

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.

Please see the answers to the questions above.

15. What are the alternatives to third party funding?
   a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?

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

b. Can other forms of litigation funding complement third party funding?
Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.

c. If so, when and how?

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?
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?
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?**

As noted in question 1, it is important to recognise that justice is multifaceted and is not solely dependent on litigation. There is a risk in conflating justice with outcomes achieved through legal proceedings and we believe that litigation funding brings with it a risk of making the UK ever more litigious by encouraging individuals to pursue legal action. Therefore, our members would not support the promotion of a public mandatory legal expenses insurance scheme.

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?**

Our members' primary concern is balancing the need to offer access to justice with maintaining a sustainable and fair litigation environment. After-the-event (ATE) insurance, conditional fee agreements (CFAs), and third-party funding can help in achieving this balance but should be used responsibly, without encouraging frivolous or excessive litigation designed to eke out profits for investors.

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

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?

Judges must be equipped to assess the implications of litigation funding on litigation in the application of their discretion. Structured guidance for judicial decision-making in this area should be introduced. In addition to ensuring that the CPR is updated to cater for the exercise of judicial discretion in relation to cases where litigation funding is involved, the Civil Justice Council or the CPR Committee could issue best practice guidance on how courts should assess the proportionality of funding arrangements, their impact on claimants' net recoveries, and their influence on case management. Such guidance would also assist judges in handling applications related to the involvement of litigation funders by defendants, to which end, judges should also have the power to require disclosure of other related cases funded by the same litigation funder where there are concerns about abuse of process. Courts need to assess whether litigation forms part of a broader coordinated strategy rather than a legitimate standalone claim. The Competition Appeal Tribunal already exercises this scrutiny in collective proceedings, requiring disclosure of funding arrangements as part of certification. Expanding this principle to other forms of litigation would help ensure that the courts retain control over the use of third-party funding and prevent its misuse to exert undue settlement pressure. With sufficient disclosure powers, and armed with knowledge of the funding agreement and the identity of the funder, strategic or abusive claims can be addressed within existing judicial mechanisms.

Judicial training will be crucial in ensuring that courts can effectively scrutinise funding arrangements, assess proportionality, and address any strategic use of litigation funding to prolong disputes or increase costs. The increasing complexity of funding structures necessitates a more informed judiciary, capable of understanding the risks and implications of different funding models. The Judicial College could be tasked with developing specialist training programs and best practice recommendations for the judiciary to ensure that issues relating to funding agreements are assessed consistently and fairly.

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?**
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?
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?**

We set out above our thoughts on the disclosure requirements and the powers that In the pre-action conduct of litigation phase, the parties are already obliged, in the form of pre-action protocols, to engage in genuine attempts to resolve disputes before resorting to litigation. The profit motive of litigation funders means that this less likely to happen than without third party funding. The Court's role could therefore be to ensure that any pre action conduct and requests remain proportionate. In this regard, the tools that the Court could use to do this lie in the areas of pre action disclosure and costs control.

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 we have mentioned before, judicial oversight of litigation funding must be supported by mandatory disclosure of the existence of the funding agreements and the identity of the funding party (although only the content of the agreement in appropriate circumstances). Ensuring that parties and courts are aware of the involvement of third-party funders, their financial stability, and their influence on litigation strategy allows courts to make informed decisions on costs and case management and allows defendants to make applications where necessary.

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?

Please see our responses to questions 1 and 5 above.

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

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?

We do not agree that approval of settlements will achieve much. Our members' concern is that reasonable settlements are delayed or prevented by the funder. Approval of settlements will therefore achieve nothing. Usually, where the Court approves settlements, such as in infant settlements, the Court is ensuring that the compensation agreed in settlement is sufficient, and to that end, an infant settlement pack includes a barrister's opinion on the sufficiency of compensation. The only function which the Court could exercise in approving settlements is to ensure that the funder's deductions are not excessive. However, if the actions we suggest in relation to the jurisdiction of the Court in scrutinising the funding agreement are taken, the need for approval of settlements to protect claimants falls away.

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?

See our answer to question 30 above.

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?

We have set out our thoughts in the answers to the above questions as to how claimants could be protected. In summary, these are:

- Regulation by the FCA and bringing litigation funders within the scope of the Consumer Duty;
- Establishing clear guidelines for the content and structure of funding agreements;
- Professional legal services regulation - considering the potential overlap of litigation funding and provision of legal services, it is essential that legal professional involved in cases with third-party funding are reminded of their duties to the client. This includes maintaining independence from funders and ensuring that the claimant's best interests are always the primary consideration. Regulatory bodies can provide litigation funding-specific guidance and enforce compliance to uphold these standards.
- Court Oversight – as noted above, courts should play an increased role in supervising funded proceedings. This should include the stipulation of appropriate caps on funders' returns to

ensure proportionality. This would require mandatory disclosure of funding agreements to opposing parties and to the Court.

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

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?

Please refer to our answer question 5

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.

Although legal regulators are charged with scrutinising how these financial arrangements impact the day-to-day practice of law, the absence of direct regulation over litigation funders leaves client protection reliant solely on the vigilance of their legal representatives who may be navigating these potential conflicts and who may face pressure—whether explicit or implicit—to prioritise funders' commercial objectives over clients' best outcomes.

Questions concerning the encouragement of litigation.

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:

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

b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?

c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?
When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.

In theory, third-party capital providers conduct thorough due diligence before agreeing to fund a case, as the return on their investment is dependent on the success of the claim. This should act as an automatic check against vexatious claims. However, our members' experience is often different, as they suggest that if the potential return is high enough to justify the risk, some funders would be willing to encourage lawsuits whatever the merits, either as part of a coordinated strategy or the fact that they are making a profit when all claims are considered as part of a larger portfolio of cases in the aggregate.

Litigation funding is particularly present in supporting group litigation, collective and/or representative actions. Class actions often involve significant legal costs and risks, which is why individual claimants often do not have the resources to bring such claims without the help of a funder. As a result, it is our members' expectation that increased access to litigation funding will increase the number of class actions. Given the Mastercard experience and the tiny amounts which would be paid out to all members of the class should everyone make a claim, whether or not that remains a good or desirable outcome is open to debate.

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.

We summarise the points we have made above:

- **Caps on funder returns**: this should either be by way of regulation or more active participation by the court.

- **Strategic litigation**: Whilst we believe that the English Courts have the requisite powers to control abuses of process, we believe that Courts should have the explicit power to require disclosure of related proceedings where there is an allegation from a defendant that the current proceedings are a part of a strategic play against the defendant. We have also set out above our view that there needs to be education for judges as to how to spot, control and deal with such cases.

- **Allocation of Costs and Funders' Liability**: To further safeguard the interests of claimants and provide clarity for funders, the rules should be updated to more explicitly outline the extent of a funder's liability for adverse costs.

- **Anti-Money Laundering and Sanctions**: As third-party funders are currently not subject to anti-money laundering obligations or financial crime checks, reforms should address this issue to avoid risks associated with high-net-worth or international individuals funding litigation, especially in geo-politically sensitive cases.

- **Funder Involvement**: Strengthening rules concerning the level of involvement a funder can have in a case is essential. This would help ensure that the funded party's interests are fully protected and prevent funders from having undue influence over litigation strategies. While funding should remain an option for claimants who need financial support, safeguards around the funder's role can help ensure that decisions regarding the litigation process remain with the claimant and their legal team, rather than being influenced primarily by the funder's financial interests.

- **Conflicts of interest:** Given the potential for the conflicts of interest we have referred to repeatedly in this response, It is crucial regulatory bodies should offer specific guidance on litigation funding and ensure compliance to uphold professional standards. There should be scrutiny over investments made into law firms by litigation funders or persons connected with litigation funding. Finally, there should be rules put in place to restrict the extent to which litigation funders can control settlements.

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?

General Issues

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