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:	Camelia
Last name:	Thomas
Location:	United Kingdom
Role:	Support to GC100
Job title:	GC100 Secretary
Organisation:	GC100 – the association of general counsel and company secretaries in the FTSE 100
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.

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.

Civil Justice Council Funding Working Group

Sent by email: CJCLitigationFundingReview@judiciary.uk
Reference: GC100 - CJC Review of Litigation Funding

Dear CJC Working Group,

4 March 2025

Civil Justice Council Review of Litigation Funding Interim Report and Consultation (the Consultation)

Introduction

The GC100 welcomes the opportunity to respond to this consultation. As you may be aware, the GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 140 members of the group, representing over 90 companies.

Our member companies typically represent around 90% of the market capitalisation of the FTSE 100. We employ around 6% of the UK workforce and have, for over a decade, consistently delivered more than 10% of the total UK Government receipts through UK taxes paid and generated by our business activities. Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

The Response to this Consultation was drawn up by the Litigation and Disputes Working Group of GC100. This is made up of senior litigation lawyers working for FTSE 100 companies who have extensive experience with claims supported by third party funding, on both claimant and defendant sides.

Summary of GC100 position

GC100 members are keenly committed to access to justice. This commitment is evident not least through financial and legal resource support for numerous pro bono initiatives and charities such as Justice. The GC100 believes that effective access to justice should not be measured by reference simply to the number of claims brought. The better test is whether injured parties are enabled to receive proper compensation for their loss.

The GC100 considers that third party litigation funding and the litigation it drives are important issues that need to be addressed in the interests of consumers, justice and the UK economy. The recommendations the CJC makes, if implemented, are likely to have a lasting impact and determine the landscape for years to come. Because of the lack of transparency in the litigation funding market, there is a risk that decisions will be made on the basis of partial evidence provided by a self-selected group of interested parties. We believe that robust evidence is needed and urge the CJC to consider a formal market study to ensure that reliable data on crucial points (including the extent of the market, harms to consumers, the sources of funds, destination of funds, impact on the Court service) are available to inform the CJC's conclusions.

The experience of the GC100 membership is that there are significant structural issues with the funding regime (explained in our responses below) which mean that, as currently constituted, the funding market does not deliver access to justice, in particular for consumers. Instead, it siphons funds from the UK economy to overseas entities with little benefit to UK consumer claimants. Our members' experience indicates that third party funding is a significant driver of litigation costs inflation, encourages unmeritorious litigation, promotes excessive and/or disproportionate litigation strategies, and consumes a disproportionate amount of court time to the detriment of other court users. GC100 considers the growth of this type of litigation fuelled by an opaque funding market is a barrier to growth in, and competitiveness of, the UK.

Self-regulation is not sufficient to protect consumers or achieve fairness. This has been highlighted by recent cases but in the experience of our members, these cases are by no means isolated instances of the risks to consumers and the integrity of the system. The issues they highlight are inherent in the relationship between the parties involved in funded claims.

The funder's relationship to the funded party is concealed behind law firms and class representatives but in fact it is clear that funders are speculative commercial investors who provide financial services to consumers. They should therefore be regulated as financial service providers. Regulation should address:

1. licensing;
2. capital adequacy;
3. transparency to consumers and the court;
4. AML;
5. caps on returns; and
6. duties to funded parties.

Similarly, the funder's role in relation to litigation they fund is veiled. The funder's financial stake in the litigation inevitably leads to an interest in influencing the course of that litigation and provides the funder with levers to steer lawyers and claimants. To ensure that this risk is mitigated, the Civil Procedure Rules should be amended.

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We consider that:

1. the pre-action protocols should be amended to include an express requirement that a prospective claimant state whether any alternative, out-of-court mechanism for redress is available to them, whether it has been pursued, and if not why;
2. funded claimants should be required to disclose to the court and to their opponents the fact that they are funded and the name of the funder(s);
3. there should be a presumption that security for costs will be ordered in a funded claim; and
4. consideration should be given to extending the prospective costs management provisions in section II of CPR Part 3 to funded claims.

Finally, the GC100 notes that the voice of the wider UK business community does not appear to be well represented on the CJC's wider consultation group for this review. The GC100 would be pleased to offer the experience and expertise of its membership to help ensure that the review has the benefit of a holistic view from a wide range of court users.

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Responses to consultation questions

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]

1.1. The central place of effective access to justice in the CJC's terms of reference makes it important to define that term clearly at the outset. The GC100 understands it to mean straightforward access to mechanisms that: (A) secure the resolution of *bona fide* disputes fairly and at proportionate cost; and (B) return to injured parties the greatest possible share of any award of damages or compensation. The second element of this definition should not be overlooked: in any given case, the starting point for an assessment of whether a process or mechanism provides effective access to justice should be the outcomes it produces or is likely to produce for injured parties.

1.2. Of all the mechanisms that might secure effective access to justice, particularly in a consumer context, litigation is one of the least attractive. In the ordinary course, it is a last resort. This is because non-litigious recourse – such as alternative remedies through the courts, an ombudsman service or the relevant sectoral regulator – is expressly designed to provide more cost effective, less stressful and more timely outcomes for claimants (in particular consumers) while imposing less burden on the civil court system.

1.3. Because the primary focus of TPF is on litigation, which is necessarily at the expense of alternative mechanisms for redress, it follows that – unchecked and in isolation – TPF cannot consistently secure effective access to justice. As we discuss in this submission, the outcomes it achieves for injured parties are, or are likely to be, inferior to other avenues of redress. An approach focussed on outcomes can be contrasted with the approach adopted by advocates of TPF who point to the volume of litigation that TPF produces as evidence of effective access to justice. It is not coincidental that those who advance this view often have a direct financial interest in the generation of litigation. Left unchallenged, this approach distorts the proper role of litigation. It relegates the interests of injured persons – those in whose name the litigation is brought – below those of third party businesses whose primary interest is the pursuit of profit, not justice.

1.4. Even limiting the question to access to litigation, the GC100 considers that while TPF is, in principle, capable of facilitating effective access to justice, the absence of adequate safeguards and controls in the current scheme of self-regulation actively impedes the achievement of this

[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.*

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goal. Further, from the perspective of the wider economy, litigation supported by TPF is not an efficient way of providing access to justice.

1.5. Against this background, we make the following observations, which are where relevant developed further in this submission in the context of specific questions. It draws on the experience of GC100 members as both claimants and defendants in funded claims.

Funders seek profit, not justice, and claimant outcomes are often suboptimal

1.6. TPF is a commercial enterprise: profit, not "access to justice" is the primary goal of litigation funders and many claimant law firms; access to justice is "an incidental by-product"[2]. Funders view litigation as an asset class and accordingly seek to invest in those assets that offer the greatest potential returns.[3] In practice, this incentivises funders, and claimant law firms working on the basis of conditional fee agreements, to devise expansive claims that encompass the largest possible class of claimants in order to inflate the alleged value of the claim.

1.7. To the extent that reliable information is available (see paragraph 1.8 below), the result of this approach is that a substantial portion of the returns on funded claims typically accrue to funders and law firms, not claimants. Even in Bates v Post Office, an example cited by funders of a claim funded in the interests of justice, the funders and lawyers took almost 80% of the settlement sum- some £46 million- leaving the claimants to seek alternative routes to obtain adequate compensation.

1.8. The lack of empirical data on funder returns is problematic. We address this lack of transparency further below, including in response to question 27. However, we caution against accepting, at face value and in the absence of data, assertions that returns are reasonable or proportionate to risk. We understand that the CJC is seeking to build data through this consultation exercise and its wider review. This is commendable. GC100 members have a wealth of experience of funded litigation and interactions with funders both as claimants and defendants and will be pleased to respond to specific requests for data in a manner that protects commercial confidentiality. However, we remain concerned that a data set dependent on voluntary submissions from interested parties will not deliver data of sufficient independence or completeness to allow fully informed recommendations on this issue of significant importance to UK consumers, businesses and the wider economy. We urge the CJC to consider commissioning a comprehensive market study to address the lack of reliable evidence on the funding market.

1.9. Given this absence of data, we have considered evidence from Australia, a comparable common law jurisdiction which has a highly developed litigation finance market. A review undertaken by

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[2] *Excalibur Ventures LLC v Texas Keystone Inc and others [2016] EWCA Civ 1144, at para 1 per Tomlinson LJ.*

[3] See as one example the Katch Investment Group which advertises a "*Target Return of 8% to 16% annualized (For the USD Institutional Share Class)" for its Katch Litigation Finance Fund which "offers exposure to litigation funding with a focus on individual claims and investment schemes in the United Kingdom … Focusing on the latest stages of litigation funding, Katch identifies fairly safe cases with double-digit returns.*"

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the Australian Law Reform Commission[4] confirms that TPF results in substantial diminutions in the amounts recovered by claimants. The review found that, in the period 2013 to 2018, the claimant class in a median federal class action in Australia received only half of the value of settlements obtained, once legal fees and funder returns were deducted. This compares to 85% of settlements received by unfunded claimants in analogous cases. The median return for litigation funders in settled claims was 30% of the settlement sum obtained. Returns for funders ranged from 17% to 62% of settlements; with legal fees ranging from 2% to 50% of settlement sums. The returns to the class ranged from as low as 29% to a high of 69% of settlement sums.

1.10. The substantial upside available to funders is not adequately counteracted by appropriate downside risk. In England, there is no formal requirement for ATE insurance, security for costs requirements for funders, or direct liability of funders for adverse costs awards against funded parties. This encourages the pursuit of claims without a proper evaluation of the merits and risk.

1.11. These issues are accentuated in the context of opt-out collective actions in the Competition Appeal Tribunal. First, they involve claims being brought without the express consent of the persons on whose behalf the claims are made (and in circumstances where their rights can be compromised without their knowledge or consent). Second, opt-out actions encourage claims where the economics or merits would not have been sufficient to found an opt-in or individual action – in other words, absent the presence of a funder, the prospects of the claim would not be sufficient to justify it being pursued. Absent exceptional circumstances, the value of such claims (other than to lawyers and funders) from an access to justice perspective is highly questionable.

1.12. By way of illustration, in opt-out consumer claims in the CAT, we estimate that the median damages claim for each class member is c. £55. In some cases the per claimant claimed return is as low as £18[5]. Conversely, we understand from the available data that litigation funders in CAT cases generally contract to obtain at least 2 – 4 times their invested cost of capital. In cases where funding commitments are typically in excess of £10 million, and the quantum of claims often numbers in the hundreds of millions of pounds, the potential profits for funders are orders of magnitude greater than the actual benefits obtained by individual consumers.

1.13. Further, the take-up rate for claimants in opt-out claims, even where settlement or judgment is achieved, is minimal. The experience in the United States is that the take-up by claimants of damages in opt-out claims is, on average, only 9% of the class[6]. In a recent decision approving a settlement in a collective action against Stagecoach South Western Trains, the CAT considered

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[4] *Australian Law Reform Commission, "Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders", ALRC report 134, December 2018, at Chapter 3.*

[5] *Hunter v Amazon Inc 1568/7/7/22. The class representative's solicitors, Hausfeld, assert a claim value of £900 million and a class of more than 50 million people (https://www.hausfeld.com/en-gb/news/a-900-million-uk-consumer-action-filed-against-amazon-at-the-competition-appeal-tribunal/)*

[6] *See "Consumer and Class Actions: A Retrospective and Analysis of Settlement Campaigns", Federal Trade Commission, September 2019, page 11 (https://www.ftc.gov/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns).*

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the 10-20% take-up rate estimated by the class representative to be over-optimistic and noted that "*it is obvious to the Tribunal that the majority of potential claimants will not claim*"[7]. We consider that access to justice is not achieved by generating litigation on behalf of individuals who do not in fact benefit from it.

1.14. The lucrative returns available to funders, claimant lawyers and professional class representatives through promoting opt out collective actions can lead to litigation without any consideration of the wider public good. One illustration of this is the current motor finance litigation where a collective action was constructed and issued in the CAT even though potential class members had available (and in many cases were already pursuing) alternative remedies through the courts or the Financial Ombudsman Service and the relevant sectoral regulator was contemplating intervention to address the same issues.

1.15. None of the points made above is intended to diminish the significance of any harms suffered by consumers, or the importance of proper redress for affected individuals: where unjust losses are suffered, they should be compensated. But funded litigation is rarely the most effective mechanism by which to deliver that redress.

TPF drowns out alternative avenues of redress, to the detriment of injured parties

1.16. In many cases, particularly in a consumer setting, existing systems of redress may better serve the interests of injured parties and provide effective access to justice. TPF, and its high-profile marketing by funders and claimant lawyers, operates in practice to crowd out these alternative, potentially more effective avenues of redress.

1.17. By way of illustration, the Financial Ombudsman Service ("FOS") provides an effective means of redress for individual consumers, micro-enterprises and small businesses who have a complaint in relation to financial services. The FOS has the capability to handle large volumes of complaints. It reports that over 1 million people a year contact them in relation to financial services complaints, and it also handles complaints which affect large groups of consumers, such as PPI.[8]

1.18. In terms of process, the FOS assigns a case handler to each complaint, who reviews the information provided to them by the consumer and the relevant financial services business, and may discuss the matter with the parties individually, over the phone or in writing. The FOS focuses on making decisions that are fair and reasonable in all the circumstances. The FOS can request that a financial business pay compensation to a consumer, and they have the power to decide that a business should also pay costs and interest. There is a limit to how much the FOS can request that a business pay, but this limit is relatively high (up to £430,000 depending on when the complaint is brought to the FOS and what date range it relates to) and the FOS can

[7] *Justin Gutmann v First MTR South Western Trains Limited and Another [2024] CAT 32 at para 89 and see further at para 77: "even 10 per cent may turn out to be an overestimate".*

[8] See Financial Ombudsman Service website, "Who we are": https://www.financial-ombudsman.org.uk/who-we-are#:~:text=Our%20service%20is%20free%20for,and%20other%20types%20of%20insurance.

recommend that more than this is paid. The FOS can also direct businesses to take steps with regard to the consumer that are non-financial.

1.19. We summarise below the ways in which the FOS process can provide effective access to justice, in contrast to funded litigation:

(A) The consumer has control over their case. It has the right to reject the first-level decision of the case handler, and (if either party appeals) the ombudsman. The process favours the consumer: they are free to reject decisions of the FOS and retain their right to pursue litigation. The financial services business, however, is bound to accept the appellate decision of the ombudsman. By comparison, consumers involved in funded group litigation have little or no say over whether to accept decisions that are being made on their behalf. It is instructive to consider again Bates v Post Office in this context. In evidence to a parliamentary select committee, sub-postmasters said that in practice they "*had no other option but to accept*"[9] a settlement from the Post Office, despite this not being their preferred option.

(B) The FOS provides its services for free and does not extract any of the value of redress that is paid to the consumer. The FOS is funded by a levy collected from financial services businesses. The contrast with the returns paid to funders in litigation is stark.

(C) The FOS is efficient, delivering prompt solutions, with a goal of resolving complaints within 90 days. Funded group litigation is frequently novel and/or complex and it is not unusual for many years to elapse between the issue of proceedings and a final resolution. It is not appropriate for consumers who individually have relatively low value, straightforward claims, to wait years for redress.

(D) The FOS process is designed to be informal and accessible, placing as few barriers as possible between consumers and a just resolution of their complaint. There is no need for individuals to obtain legal representation, make their case in person, or be subjected to cross-examination.

(E) The FOS can also drive improvements for society at large through its facilitation and participation in forums, steering groups and regular meetings, with an overarching goal of sharing insight to help prevent future complaints. It thereby benefits consumers in general, in addition to those consumers who receive redress in relation to individual complaints. Litigation funders, by contrast, are essentially parasitic: they depend on litigation for their success and have no incentive to recommend improvements that would tend to lead to the avoidance of future disputes.

1.20. The GC100 notes that members of the CJC working group will be well informed on the options available to the Financial Conduct Authority to direct redress for consumers. We do not therefore propose to set out these in detail. We do however consider that the review should

[9] *Oral evidence of Alan Bates to the Business, Energy and Industrial Strategy Committee, 14 December 2021 (https://committees.parliament.uk/oralevidence/3200/html/).*

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take note of the FCA's powers in relation to industry-wide consumer redress schemes (as set out in section 404, FSMA, with further FCA Guidance contained in its Consumer Redress Sourcebook).

1.21. Section 404, FSMA empowers the FCA to make rules to ensure that redress is made to consumers by firms, if it appears to the FCA that:

(A) there may have been a widespread or regular failure by relevant firms to comply with requirements;

(B) as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and

(C) it considers that it is desirable to make rules for the purpose of securing that redress is made to the consumers in respect of the failure (having regard to other ways in which consumers may obtain redress).

1.22. The FCA's rule-making powers under section 404 are broad and extend to requiring a firm to take specified steps, including to undertake a proactive file review of all cases falling within the period covered by the scheme to investigate whether it failed to comply with specified requirements, determining whether failure had caused (or might cause) loss or damage to consumers and the basis on which redress would be paid in relation to such loss or damage.

1.23. A firm is required to take the above steps in relation to any particular consumer even if, after the rules are made, a defence of limitation becomes available to the firm in respect of the loss or damage in question.

1.24. To date, the FCA has implemented two industry-wide redress schemes under section 404, FSMA:

(A) a scheme for investors who were mis-sold investments in the CF Arch cru funds (the "Arch-cru Redress Scheme"); and

(B) a scheme for members of the British Steel Pension Scheme who were advised to transfer out of the scheme (the "BSP Redress Scheme").

1.25. Both schemes allow in-scope customers to access redress at no cost and place strict deadlines on firms to identify relevant individuals, determine their cases, and pay redress.

1.26. The BSP Redress Scheme is structured as an opt-out scheme, meaning that advisers must review the advice given to relevant individuals unless those individuals opt out. While the Arch-cru Redress Scheme is an opt-in scheme, firms were required to write to their customers to ask if they wanted their investments reviewed.

1.27. The FCA could also require one or more specified firms (i.e. as opposed to the industry as a whole) to implement a redress scheme. This would be done by the variation of a firm's permissions, if it appeared to the FCA that this was necessary to advance one or more of the FCA's operational objectives, for example, its consumer protection objective of securing an appropriate degree of protection for consumers. As such it would not be limited to consumers who have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings.

1.28. The FCA may informally propose to firms that a voluntary redress scheme be established.

1.29. The FCA also has the power to introduce changes to its Dispute Resolution: Complaints Handbook and/or its Fees Manual to include specific rules for particular commission complaints, as well as introduce supporting measures such as a firm-funded public awareness campaign.

1.30. Consumer redress schemes are not confined to the financial services sector. By way of illustration:

(A) the Energy Ombudsman adjudicates consumer complaints related to gas and electricity providers, such as billing errors, poor service, and contract disputes;

(B) the Consumer Council for Water handles complaints about the service provided by water companies;

(C) the Communications Ombudsman deals with complaints about phone and internet services, including billing disputes and service quality;

(D) the Rail Ombudsman resolves disputes between passengers and train companies, covering delays under its Delays Compensation Schemes or handling broader issues through its general complaints process;

(E) the Motor Ombudsman addresses complaints regarding vehicle sales, servicing, and repairs that are carried out by businesses accredited to its scheme.

1.31. All of the services listed above (and the list is by no means exhaustive) are free at the point of use for consumers and follow a similar process which echoes that adopted by the FOS: the consumer must first raise their complaint with the relevant business and wait a prescribed period before contacting the ombudsman. Once involved, the ombudsman investigates the matter and issues a decision. If the consumer declines to accept the decision, they retain the option to begin litigation against the relevant supplier. If the consumer takes no further action, the supplier is required to implement the remedy decided by the ombudsman within a set timeframe. Remedies include an apology, taking practical action (e.g. cancelling an account or fixing a problem with a service), or making financial redress, subject to specified limits.

1.32. Thus, across a range of different sectors mechanisms exist to safeguard the collective interests of consumers and individual consumers have access to redress through efficient and cost-effective independent processes that are designed to serve the public good.

<u>The TPF market is opaque and does not adequately serve (potential) litigants</u>

1.33. Many potential claimants first come to learn of the existence of a potential claim through marketing material produced by a funder and/or a claimant-focused law firm. That material will usually solicit the involvement of the targeted party and give certain details of the potential cause of action, and the terms of funding. But the party, particularly where they are an individual, will generally have no or limited visibility of the broader funding marketplace and the possibility that they could obtain better terms from an entity other than that which approached

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them. By bundling causes of action with a funding package, potential claimants are deprived of the ability to make an informed choice on whether to litigate, and with the assistance of whom.

1.34. We acknowledge that solicitors owe duties to their clients to advise on the most appropriate funding arrangements, but we are concerned that inherent conflicts and the increasing breadth and sophistication of funders' involvement in the litigation market risk undermining those duties. We note, for example, the recent creation of Legatus Holdings, a group formed following the acquisition of two class action law firms by Asertis, a private equity-backed funder. Companies under the Legatus umbrella also offer insurance and book-building services in what is billed as "*a unique and compelling vertically-integrated group*" intended to "*provide the full suite of services critical for launching, managing, underwriting and litigating legal claims*".[10] It is not clear how such "one-stop shops" can contribute to the development of a transparent market that operates to the benefit of consumers.

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

2.1. See our response to question 1 above. The GC100 acknowledges that an imbalance in the financial resources of claimants and defendants to litigation is not uncommon, and that measures that seek to redress the consequences of any imbalance by promoting a level playing field are legitimate policy objectives. We also recognise that TPF can in certain circumstances play a role in promoting equality of arms between litigants. But this is not the purpose of TPF or even a consideration for most funders: rather, it is – like access to justice more broadly – merely an accidentally beneficial by-product of a commercial transaction.

2.2. Seen in this light, the consequences of TPF for equality of arms are more complicated and, in many cases, concerning. For every case in which TPF promotes equality of arms between claimants and defendants, there are more in which the presence of TPF and the negative litigation behaviours that we consider it encourages will massively tip the balance against defendants. By its nature, litigation entails significant cost, distraction from core activities and stress for the individuals involved. Small and medium sized companies that are defendants to funded claims risk being significantly outspent and may be forced into settling even claims which they consider have no sound basis. Larger corporates may be able to meet the financial demands of such litigation but the costs will ultimately be borne by consumers and shareholders. The growth of this type of litigation is a barrier to growth in the UK. See our response to question 8 below for further discussion of the linkage between TPF and litigation costs.

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

3.1. No. The GC100 has no further observations in relation to this question.

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[10] *"Group brings together law firm, funder, insurer and client builder", Legal Futures, 31 January 2025 (https://www.legalfutures.co.uk/latest-news/group-brings-together-law-firm-funder-insurer-and-client-builder).*

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4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[11] If not, what improvements could be made to it?

4.1. The GC100 considers that the current system of self-regulation is outdated and ineffective. It applies only to a fraction of funders in the market and is, in any event, inadequate in its terms and incapable of effective enforcement in practice. We elaborate on these criticisms below before going on to propose a new system of mandatory regulation. This response should be read alongside our response to question 5, which deals further with the harms of TPF and potential mitigants.

<u>The current system of self-regulation is inadequate</u>

4.2. The Association of Litigation Funders ("ALF") was established to promote best practice in TPF, including through a Code of Conduct developed by the ALF and the CJC. In summary, the Code requires members of the ALF to seek to ensure that funded parties receive independent advice before entering into funding agreements, to refrain from seeking to control or influence funded litigation, to maintain adequate financial resources and not to terminate funding agreements without cause.

4.3. Membership of the ALF is voluntary. Of the 44 specialist funders estimated to be active in England, only 17 (little more than a third) are members of the ALF. As noted in the CJC interim report, these figures do not capture the full extent of the funding market. Organisations which do not specialise in TPF participate in the market, often by the acquisition of debt on the secondary market. The GC100 considers that a voluntary scheme which omits the majority of those in the business of litigation finance fatally undermines the rationale for self-regulation. As discussed below, it places would-be users of TPF at risk, places those funders who are members of the ALF and comply with its Code at a competitive disadvantage, and risks the integrity of the broader market.

4.4. Funder-members of the ALF are deemed to have adopted the Code, but their obligation to comply with it is *prima facie* owed only to the ALF and not to funded parties. In the event that a member of the ALF breaches the Code, a funded party's only recourse (save to the extent the alleged conduct also breaches the terms of any applicable litigation funding agreement) is to complain to the ALF. The Association's bespoke, confidential complaints process provides for a maximum fine of £500 for a proven breach (as well as expulsion from the ALF). There is no mechanism for an aggrieved complainant to appeal a decision by the ALF and no evidence that sanctions are ever imposed. The status of the Code and the procedure for its enforcement are wholly inadequate. The ALF is plainly not independent and has no powers to monitor the activities of its members. While the Code is ostensibly directed at potential and actual funded

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

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parties, its operation and the weak sanctions for its breach show that funded parties can place no reliance on it and funders have little incentive to maximise compliance with it.

4.5. As to the content of the Code, its provisions are skeletal and inadequate. It specifies no minimum content for litigation funding agreements, places no obligation on funders to use clear and unambiguous language in funding agreements, is silent on the conflicts of interest which may arise in a funding relationship and on the establishment of systems to monitor and mitigate those conflicts, and places no obligation on funders to act honestly and transparently.

4.6. The dysfunctional and ineffective nature of the current regime is evident from a number of recent judgments which have been critical of the role played by funders, notwithstanding their membership of the ALF and purported adherence to the Code of Conduct. We return to several of these decisions later in this submission.

(A) In Wirral Council v Indivior plc and another,[12] the Court of Appeal agreed that the High Court was entitled to conclude that an attempt to bring a securities law claim as representative proceedings had "*been engineered by the funders [Woodsford]*" who were "*gaming the system*" by asserting on the basis of no proper evidence that the litigation could not be funded unless it was brought as a representative action.

(B) In Riefa v Apple and another,[13] the CAT noted that the proposed class representative's funder, Asertis, had sought to keep the terms of its funding agreement with the PCR confidential from even potential class members, something for which the Tribunal could see no justification.

(C) In Merricks v Mastercard, the class representative's own solicitor accuses the funder, Innsworth, of inappropriately pressuring and seeking to influence Merricks' decision-making in order to take control of the litigation. He alleges that Innsworth's opposition to a proposed settlement of the case "*has nothing to do with advancing the interests of UK consumers, and is all about funder greed*".[14]

(D) In Re Ingenious,[15] the High Court said of the claimants' funder, Therium, in the context of a security for costs application that it could not be "*confident that [Therium's] membership of the ALF, and the obvious pressure which that puts on it to comply with the ALF rules, is sufficient to give one enough confidence that if it were facing a large liability for costs at the end of the day, that the money would be forthcoming*".

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[12] Wirral Council v Indivior plc and another [2025] EWCA Civ 40, at para 136. See also paragraphs 5.14 to 5.17 of this submission.

[13] Christine Riefa Class Representative Ltd v Apple Inc and others [2025] CAT 5. See also paragraphs 5.5, 5.6 and 5.13 of this submission.

[14] The Law Society Gazette, 'Mastercard settlement: Merricks' solicitor condemns funder's 'greed'', 5 December 2024 (https://www.lawgazette.co.uk/news/mastercard-settlement-merricks-solicitor-condemns-funders-greed/5121729.article). See also paragraph 34.2 of this submission.

[15] Re Ingenious Litigation [2020] EWHC 235 (Ch), at para 106.

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(E) In BIRA Trading v Amazon[16], a decision on a carriage dispute in proposed collective proceedings, the CAT noted that the funding agreement entered into by one of the proposed class representatives with Innsworth included a right for the funder to terminate funding that was contrary to the ALF Code. The CAT commented that "*We did not regard this provision as satisfactory and consider that it gives disproportionate power over the proceedings to the funder*".

4.7. The current regulatory framework is anomalous and unjustified. TPF as presently constituted is an unregulated form of lending, often to a consumer audience. Its status is at odds with the regulatory framework for all other significant financial services. The status of TPF as a regulatory outlier is made even starker by the contrast with claims management companies, which share important characteristics with funders and have been subject to FCA authorisation and regulation since 2019. There is no principled reason why TPF should be exempt from the regulation and safeguards imposed on other providers of financial services. The continuation of the current system of self-regulation does not serve consumers and risks broader market stability and integrity.[17]

4.8. The GC100 acknowledges that the current system of self-regulation was supported by Sir Rupert Jackson in his final report on litigation costs in 2009. But that support was qualified and provisional. It was premised on all funders subscribing to the Code of Conduct (which, as set out above, has not happened). And it noted that, while self-regulation was appropriate given the market's then embryonic state, "*if the use of third party funding expands, there may well be a need for full statutory regulation*".[18] As the CJC interim report notes, the size of the TPF market in England increased in size ten-fold over the course of a decade, with assets under management worth at least £2.2 billion in 2021. There is no reason to believe that this exponential rate of growth has slowed. Whatever system of regulation may have been considered appropriate in 2009, it is abundantly clear that it is no longer fit for purpose.

A new system of mandatory regulation for TPF is required

[16] *BIRA Trading Ltd v Amazon [2025] CAT 6, at para 65.*

[17] *We note in this regard a 2019 article by the director of business development at TheJudge Global, a broker of legal expenses insurance and litigation funding: "The past few years has seen several market entrants purporting to be funders or experienced brokers entering the market, but scratch below the surface and it quickly becomes apparent that some of these entities are little more than one-man bands operating using city postbox addresses, potentially unlicensed (if a broker) or under-capitalised (if a funder) and with limited direct experience, yet holding themselves out to be credible parties for international law firms to introduce to their clients. […] Over the years, TheJudge has seen numerous market casualties of what we will call "rogue players", companies that have entered the market offering products and services built on sand. For example, entities that lack technical knowledge of the products they sell, are under-capitalised, or are using risk assessment processes and pricing models that are doomed to fail from the outset. These players mistakenly see the market as a route to a quick buck, with little personal downside. They surface for a short period and then disappear into the night and it's easy to think that no harm has been done. Yet this is far from the case. The downside is very real and often it is the client that is left holding the baby or their lawyers whose reputation is damaged when things go wrong." (http://disputeresolutionblog.practicallaw.com/litigation-funding-and-insurance-avoiding-rogue-players/).*

[18] *Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report, December 2009, at page 119.*

4.9. Constructing a balanced and effective system of regulation requires the careful examination of risks and harms and the allocation of responsibility among different regulators or authorities. In the GC100's view, any new regulatory framework should have two core branches: the regulation of TPF as a financial service by the FCA, and rules of court to regulate the deployment of TPF in individual cases. We expand on these proposals below.

Regulation as a financial service

4.10. TPF should be subject to external regulation. Although the GC100 is agnostic on the identity of the relevant regulator, it may be most appropriate for the role to be taken on by the FCA, as the UK's existing specialist financial services regulator and, since 2019, the regulator with responsibility for claims management companies. The regulator's role should mirror the FCA's approach to other financial products and services. In particular:

(A) Funders should be required to obtain and maintain a licence as a condition of offering TPF. The provision of TPF by unlicensed funders would become unlawful. We propose that the minimum requirements for the grant of a licence would broadly mirror, subject to any necessary modification, the threshold conditions which apply to regulated firms. In summary, these focus on (i) ensuring that regulated firms have adequate financial resources, (ii) are fit and proper, (iii) operate a business model that is sound and prudent in the relevant circumstances, (iv) are located in the UK and (v) are capable of being effectively supervised by the regulator. The purpose of this proposal is to bring funders into line with other financial services firms and end the current, anomalous position of funders. The objectives of the threshold conditions are well-established and uncontroversial: they seek to protect users of financial services and maintain a fair and stable market by requiring firms to satisfy the regulator that they are competently run and financially stable.

(B) Funders' capital adequacy should be supervised. Funders should be required to maintain sufficient resources to meet their liabilities to funded parties and in respect of potential adverse costs liability in all their funded cases. Compliance should be monitored by the regulator. This proposal is intended to replace in strengthened form the current, skeletal provisions of the ALF Code of Conduct and extend them to all funders in order to give assurance to market participants of their financial integrity.

(C) As the CAT has noted, "*a regime built around access to justice ought to be as open as possible, including in particular as to the price that is paid (admittedly indirectly) by the class on whose behalf these claims are ultimately brought.*"[19] Marketing must be fair, clear and not misleading. Funders should be subject to the rules on financial promotions which apply to other regulated providers of financial services. This proposal is intended to provide, for the first time, a comprehensive framework for controlling the nature and

[19] *Gormsen v Meta [2024] CAT 11 at para 37.*

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content of materials produced by funders that are intended to attract or induce customers to enter into litigation funding agreements.

(D) There should be a requirement that funders take reasonable steps to ensure prospective funded claimants have access to independent legal advice concerning their proposed TPF arrangements before entering into funding agreements.

(E) Funders should be brought within the scope of anti-money laundering regulations. Funders should be subject to the requirement to put in place appropriate measures to detect and prevent money laundering. This proposal is intended to correct another anomaly in the current regime by bringing funders within the scope of regulations which, in practice, already apply to other actors in the financial and professional services space.

(F) Supervision by the FCA or other appropriate external regulator would also carry with it well-established obligations on funders in respect of the categorisation of clients and on-boarding procedures, the handling of complaints and appropriate redress mechanisms. Moreover, we would anticipate the FCA's Consumer Duty applying to funders, as with other financial services firms. We anticipate that the proposals set out above, including those relating to communications from funders and the requirement to ensure clients understand the terms of proposed funding arrangements, are a non-exhaustive reflection of the Consumer Duty.

Regulation by the court[20]

4.11. As well as being a financial service, TPF is an important shadow actor in the civil justice system. Decisions taken by funders inform the nature, conduct and volume of litigation, but the Civil Procedure Rules, according to which the court regulates proceedings before it, are in important respects inapt and inadequate to control funders' behaviour. The GC100 proposes the following changes.

(A) At a minimum, the pre-action protocols should be amended to include an express requirement that a prospective claimant state whether any alternative, out-of-court mechanism for redress is available to them, whether it has been pursued, and if not why. Failure to make such a disclosure, or unreasonably to pursue any available alternative mechanism should be penalised in costs. This proposal is intended to reduce the incidence of inappropriate and/or duplicative litigation. We refer to our discussion of alternative redress mechanisms at paragraphs 1.16 to 1.32 above.

(B) Funded claimants should be required to disclose to the court and to their opponents the fact that they are funded and the name of the funder(s). To the extent the CJC is minded to adopt our proposal for the mandatory licensing and supervision of funders, funded parties should be required to confirm that their funder is so licensed. The

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[20] *Please note that these proposals are expressed to apply to the courts subject to the Civil Procedure Rules. They are not intended to extend to other courts or tribunals (including the CAT) unless stated.*

requirement to disclose should arise at the outset of the case, potentially at the time of service of the claim form. This proposal is intended to address the multiple issues that arise from lack of transparency in the TPF market and which we discuss further in our response to question 27 below. In summary, the current absence of a requirement to disclose funding creates unfairness for defendants, who are prevented from assessing accurately whether their own costs will be recovered in the event the claim against them fails. At present, defendants' only recourse is to consider an application for security for costs, which in itself becomes a multi-stage process because a defendant is generally first compelled to seek relevant disclosure. The resulting costs, delay and uncertainty are undesirable for all parties and create an unnecessary burden for the courts and other court users.

(C) The disclosure requirement should be coupled with a presumption that security for costs will be ordered in a funded claim, including where the claimant is an individual. That presumption would be rebuttable by the disclosure, by the claimant(s), of materials which indicate that provision has been made on satisfactory terms for the payment of adverse costs. The GC100 recognises that it would be advantageous in this context to adopt a common template for disclosure that addressed legitimate concerns relating to privilege and confidentiality in funding documents.

(D) Consideration should be given to extending the prospective costs management provisions in section II of CPR Part 3 to funded claims. This suggestion seeks to address the issue, discussed elsewhere in this submission, of excessive and unnecessary costs in funded litigation. The GC100 suggests that the introduction of court-supervised prospective costs control, in combination with our other proposals, would provide a means of seeking to discourage litigation behaviours that are disproportionate and/or unnecessary and/or strategic rather than substantive in character.

4.12. It may in addition be necessary to amend the rules which govern the conduct of solicitors and barristers to seek to manage and mitigate conflicts of interest that could arise between litigants, lawyers and clients. In addition, the SRA and the Legal Services Board should consider whether new measures are required to scrutinise funder investments in regulated law firms. Our overriding concern is to ensure that closer relationships between law firms and funders (including through the use of portfolio funding or equity investments by funders in law firms) do not undermine any new system of regulation by allowing funders to argue that they are investors in firms, not specific claims. We discuss this issue further in response to questions 21 and 33 below.

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;**

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(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;[21]**

(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.**

5.1. We set out below the key categories of harm that, in the view and experience of the GC100, arise with TPF and propose suggested mitigants. These should be considered alongside our observations and proposals in response to question 4 above.

Failure to protect consumers adequately

5.2. In the experience of members of the GC100 in the context of funded actions, the position of funded parties – in particular consumers – is not adequately protected by the current system of self-regulation.

5.3. First, the terms and conditions on which funding is advanced are not adequately explained. Funders typically sell TPF to potential claimants on the express basis that there will be no financial cost to participation in any event, and a potential financial gain in the event the claim succeeds. While the elements typically present in a funded claim – TPF, lawyers working on a contingent basis, and ATE insurance cover – are designed to produce this outcome, it does not always achieve it. Funders may default on their obligations, ATE cover may be overtopped by adverse liabilities, the costs incurred by lawyers, in combination with a funder's return and ATE premia, may significantly reduce any amount ultimately payable to claimants. The recent collapse of two law firms specialising in volume claim work, SSB Law and Pure Legal, illustrates these risks. Both firms brought claims, purportedly on a no-win, no-fee basis, on behalf of customers complaining of defective cavity wall insulation. When those claims were discontinued, the ATE insurance the firms had arranged declined to cover adverse costs and defendants pursued the firms' clients directly. The Solicitors Regulation Authority is investigating the firms' collapse and has recently expressed concerns about "*whether the bulk litigation market is working as well for the public as it should be, and whether there are appropriate protections in place.*"[22] We consider the failure of SSB Law further in response to question 21 below, in the context of portfolio funding.

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[21] 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.

[22] SRA statement dated 1 November 2024 "Cavity wall insulation claims handled by SSB Group (SSB) and Pure Legal Limited (Pure Legal)" (https://www.sra.org.uk/sra/news/ssb-group/).

5.4. The current regulatory regime is wholly ineffective in ensuring that these risks are clearly and comprehensively explained to – and understood by – prospective claimants. As noted in response to question 4 above, the ALF Code of Conduct imposes no obligation on funders to use clear and unambiguous language, is silent on the conflicts of interest that may arise, and places no express requirement on funders to act honestly and transparently. This manifests most notably in: (A) a failure to explain adequately the basis on which a claimant's entitlement to any damages would be calculated and the claimant's position in the payments waterfall (typically set out in an agreement to which the potential quantum and timings of deductions from any award or settlement sum to repay legal fees and the funder's return; and (B) a failure to explain in clear terms the risk of a claimant's potential liability for adverse costs in the event that any ATE insurance cover is insufficient to meet any costs order, has been terminated or otherwise does not respond.

5.5. These risks are illustrated in a recent ruling by the CAT[23]. The Tribunal declined to grant a collective proceedings order because it was not satisfied that it was just and reasonable for the Proposed Class Representative ("PCR") to act as representative in the proceedings. The Tribunal's judgment focussed on criticisms of the PCR's understanding of the funding agreement and, importantly, questioned whether the PCR had satisfied herself that the terms of the funding agreement were negotiated in the best interests of the class members. Notably, the PCR had initially agreed with the funder that it would keep the terms of funding – including the identity of the funder – confidential, even from potential class members.

5.6. This case provides a clear example of the risks to class members where a litigation funding agreement is concluded without sufficient checks and balances. In this case, the funder (Asertis) was a member of the ALF. This was evidently not sufficient to prevent potential harm to class members. It was only after scrutiny from the court and the proposed defendants that various issues in the funding arrangements were identified and addressed. A regime that relies on investigations by defendants to protect consumer claimants is (i) unlikely to be effective in every case and therefore inadequate to protect consumer claimants, and (ii) unfair to the defendant who is required to incur significant costs to establish the facts. The permissive certification regime in the CAT is a disincentive to undertake this work.

5.7. Second, funded parties are frequently not afforded visibility of the conduct of litigation or the means to express a view or seek to exercise control. It is acknowledged that the effective and timely management of large-scale group litigation will necessitate the establishment of co-ordinating structures through which instructions can be given and advice received, but the nature of those structures and the extent to which they represent relevant classes of claimant, is opaque and inconsistent.

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[23] *Christine Riefa Class Representative Limited v Apple Inc. and others [2025] CAT 5.*

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5.8. Third, funded parties are frequently subject to contractual terms which restrict their ability to withdraw from a funding arrangement unless they agree to surrender to the funder a proportion of any damages award they ultimately go on to obtain. Such terms effectively lock parties into arrangements that may run contrary to their interests.

5.9. Fourth, unacknowledged or inadequately managed conflicts of interest place funded parties at risk, and funded parties in any event find themselves structurally subjugated to the financial interests of funders and law firms. By its nature, TPF introduces into a claim a number of stakeholders whose interest in that claim is purely financial and unrelated to its substance. All of these stakeholders – including litigants – have a direct financial interest in the outcome of a funded claim, but the duties which regulate the scope and pursuit of those interests vary. This gives rise to clear potential for conflicts of interest as between these stakeholders[24].

<u>Encouragement of weak or speculative claims</u>

5.10. Where potential rewards for the funder outweigh the potential downsides, there is a risk that this will incentivise the funder to back weak or speculative claims. This risk is exacerbated if funding is provided on a portfolio basis where claims of varying quality may be bundled together. Funders will respond that it is not in their interests to back meritless claims. This has a superficial logic but is not supported by the evidence.[25] There are instances of cases which have been found to be "*speculative and opportunistic*" and "*based on no sound foundation in fact or law*" but have nevertheless received substantial funding from multiple funders.[26]

5.11. Furthermore, a claim does not have to succeed at trial for the funder to realise a return on its investment. When confronted with litigation, a potential defendant will have to weigh a number of considerations in addition to the merits of the case. Even where the defendant considers a claim to be baseless, the costs of years of litigation, the distraction from a core business, and management time diverted into consideration of potential disclosure requirements, collateral impacts on business objectives and engagement with investors, customers and regulators may lead some companies to consider early settlement as a "least worst" option. Funders and claimant lawyers are well aware of this. This is a common feature of the US class action market. The growth of collective actions here risks importing this feature into the UK.

<u>Commoditisation of litigation</u>

5.12. The dynamics of the funding market encourage funders and claimant lawyers to engineer mass claimant claims where there is in fact no evidence that consumers feel aggrieved. This may be

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[24] *The conflicting interests between class members, the legal team and the funders have been recognised by the CAT - see <u>Gutmann v First MTR South Western Trains Limited</u> [2024] CAT 32, at para 36.*

[25] *See for example the insurance company QBE quoted in a BBC report entitled "Homeowners face huge legal bills after SSB law firm collapses" dated 24 January 2024: "Unfortunately, as is reported, some legal firms have been encouraging homeowners to bring unsubstantiated claims relating to cavity wall installation with the unrealistic promise of financial recompense. Encouraging individuals to take cases to court that have no merit can have serious consequences for those involved, a fact that is often not made clear to them at the outset."*

[26] *See <u>Excalibur Ventures LLC v Texas Keystone Inc and others</u> [2013] EWHC 4278 (Comm), at paras 8 and 9.*

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paired with "dressing up" claims as purported breaches of competition law in order to take advantage of the opt out regime in the CAT and thereby maximise potential returns for the funder.

5.13. The CAT noted in a recent judgment[27] in a claim purportedly brought on behalf of all those who had purchased Apple electronic products at the retail level in the United Kingdom during a specified period, that "[*i*]*t appears that the genesis of this case lies in an approach by Dr Chris Pike, an economist at Fideres Partners LLP, to Hausfeld & Co. LLP (Hausfeld). Hausfeld in turn appears to have instructed finance brokers and signed heads of terms with a litigation funder, Asertis Limited (Asertis), before it approached Prof Riefa to suggest that she, or a corporate vehicle under her control, should act as the PCR. Her agreement led to the incorporation of the PCR on 24 January 2023. The claim form was then filed on 25 July 2023*." It is significant that no prospective claimants with grievances to address were apparently involved in this process. The claim was concocted as a business proposition, not as an attempt to right a perceived wrong. Our members are aware that this approach is by no means confined to the instance described in this case.

5.14. Similarly, in another recent judgment[28] the Court of Appeal rejected an attempt by a funded claimant to turn a long-established procedural mechanism into a vehicle for bringing mass claims in a way that sought to insulate claimants (and their funders) from costs by transferring the litigation burden to defendants. The claim, which was funded by Woodsford (a member of the ALF), was a novel attempt to bring a securities law claim under section 90A, FSMA as a representative action.

5.15. The representative procedure, set out in CPR 19.8, provides that where more than one person has the same interest in a claim, one such person may bring the litigation as a representative of all the others. Because only the representative is an actual party to the litigation, the procedure is akin to an opt-out class action in the modern sense. But there is a requirement that each class member ultimately come forward to plead and prove their individual loss. In this case, the claimant said that it should be permitted to seek only a declaration that the defendants – two UK listed companies – had made misleading statements in market announcements. Had such a declaration been made, individual class members would have been at liberty to emerge and bring their own follow-on claims for damages.

5.16. The net effect of this stratagem would have been to allow the claimant to minimise its own burden by deferring examination of any questions of standing or reliance or causation, and instead force the defendants to plead and disclose their defence without any understanding of the size of the class, the strength of the claim, or its potential quantum.

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[27] *Christine Riefa Class Representative Limited v Apple Inc and others [2025] CAT 5, at para 5.*

[28] *Wirral Council v Indivior plc and another [2025] EWCA Civ 40, including at paras 131 to 137.*

5.17. Agreeing with the High Court that the representative claim should be struck out, the Court of Appeal noted the role of the funder. They were "*gaming the system*" by asserting on the basis of no proper evidence that the litigation could not be funded unless it was brought as a representative action. There had been "*a complete lack of transparency*" as to the funding of retail investors. The claimant's approach to the litigation enabled them "*and [their] funders to engage in the sort of 'book-building' which gets as many claimants as possible joined up to the representative proceedings without having to engage in any work relating to their individual claims in relation to the claimant-sided issues such as reliance and causation unless and until the common issues are decided in the claimants' favour […] Such book-building has been discouraged by the Courts*".

Negative impacts on the conduct of litigation and the administration of justice

5.18. For the reasons set out above, and more fully explored later in this submission (in particular in response to question 8), the GC100 considers that TPF is a significant driver of litigation costs inflation, encourages unmeritorious litigation, promotes excessive and/or disproportionate litigation strategies, and consumes a disproportionate amount of court time to the detriment of other court users.

5.19. These concerns are particularly acute where litigation is brought at the expense of alternative avenues of redress, as discussed above at paragraphs 1.16 to 1.32.

Lack of transparency impedes development of competitive market

5.20. The third party litigation market is characterised by a lack of transparency. There is little information available to claimants, defendants or the courts about the source of funds, adequacy of capital or the ultimate destination of any recoveries obtained through funded claims.

5.21. It may also be difficult for claimant law firms to identify the provenance of the funds used for litigation funding: that gives rise to potential money laundering risks. The SRA currently provides no guidance to law firms on AML or KYC checks that should be carried out with respect to funders.

5.22. We further note that there is little to no transparency in relation to the terms upon which funding is being provided. This prevents the courts and defendants challenging terms that could breach principles of champerty- for example, that the funder has excessive control over the funded party's litigation. Nor is there transparency in relation whether a funder has adequate funds to see a claim through to trial (and possibly appeal) and to meet any adverse costs order or security for costs: that gives rise to a risk that a funder withdraws funding leaving the funded party with liability to continue the litigation.

Negative impact on UK business and investment climate

5.23. We have noted above the lack of comprehensive data which would allow an objective assessment of this question. However, in broad terms the litigation funding market operates to the detriment of the wider UK economy by extracting money from UK corporates and

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Government for the benefit of principally overseas investors. Ownership structures for litigation funders vary but, from the experience of GC100 members, it is clear that many major funders operating in England and Wales are owned and/or controlled by entities incorporated overseas with capital provided by non-UK investors. Similarly, many of the claimant law firms now operating in the funded market are arms of US law firms. The result is that, for funded claims brought in England and Wales which result in a payment by way of award or settlement, a significant proportion of those funds will exit the UK economy. Again, data is regrettably incomplete due to the opaque nature of the funding business, but it seems evident from known cases that the sums extracted are significant and, looking at the headline quantum (where specified) in issued claims, potentially very substantial indeed. While some of this money will end up in the hands of UK residents, most is lost to the UK economy. This necessarily impacts growth.

5.24. For the corporates involved, paying away significant sums to resolve claims will impact returns to shareholders, prices for consumers, pay to employees and donations to the charitable causes to which major UK corporates are substantial donors. But as well as the direct adverse financial impact, a business environment where mass claimant actions are encouraged is a disincentive to investment. Investors that are able to do so will invest in businesses in jurisdictions that do not impose such risks. A litigation culture also impacts business risk appetite, disincentivising innovation and responsible risk taking. This again is likely to slow the UK's path to growth.

5.25. Major class action litigation against Government has so far been limited,[29] but as a deep-pocketed defendant, it is an attractive target for funded claims. In any event the increase in the volume of litigation imposes costs on the court system which flow to the UK taxpayer.

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[30] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[31]

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[29] *Although we note that the HM Courts & Tribunals Service list of Group Litigation Orders contains a number of claims that appear likely to have been against various government departments, including the Contaminated Blood Products GLO, the Iraqi Civilian Employees GLO and the Stamp Taxes GLO.*

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

[31] *Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.*

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(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?**

6.1. In response to sub-question (a), the GC100 considers that any new requirement for mandatory regulation of TPF by the FCA or other external regulator should extend to all types of litigation, including in the CAT, and to English-seated arbitrations. For the avoidance of doubt, we do not suggest that any changes to court procedure should be incorporated into the CAT Rules or legislation governing English-seated arbitrations.

6.2. As to sub-question (c), we consider that the existing scheme of client categorisation in UK financial services regulation as well as the Consumer Duty in relevant cases, which afford higher protections to less sophisticated investors, are apt to apply in the case of TPF regulation. In the GC100's view, proposals for new or amended rules of court should, save where indicated in our response to question 5 above, be framed broadly and not by reference to particular types of litigation. In the absence of a thoroughgoing overhaul of English civil litigation procedure – which we do not consider proportionate or desirable, certainly in the context of this consultation – it is preferable to allow judges to exercise their case management powers in the way that appears to them most appropriate to the case before them.

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

7.1. As set out in our response to question 4 above, the GC100 considers that a new system of mandatory regulation should replace the current self-regulatory framework.

7.2. The GC100 shares the view of the CJC, as set out in the interim report, that the core purpose of any regulation is to provide protection from harm or unfairness. We consider that the principles that already underpin the regulation of financial services and the conduct of civil litigation should inform the approach to be taken to TPF.

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?**

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(d) **How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?**[32]

(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?**

8.1. The GC100 notes the CJC's useful discussion of this issue in the interim report and starts from the premise that TPF and litigation costs are inextricably linked. The interim report raises the question of whether TPF increases litigation costs more broadly, simply because it facilitates litigation that might not otherwise be brought, thus driving up demand for (and the cost of) legal services, or whether there are aspects of funded litigation that promote "excess" costs inflation. We consider that both propositions are correct and indeed connected.

8.2. It is clear that TPF has increased the volume of litigation in the English courts: it is arguably its *raison d'être*, as discussed in response to questions 1 and 5 above. The consequent increase in demand for legal services necessarily increases its costs. But that increase is aggravated by the nature, as well as the volume, of funded litigation. In particular:

(A) We observe that it is the practice of funders and claimant law firms in group claims to take an expansive, undiscriminating approach to class constitution, recruiting as broad as possible a constituency of potential claimants. The aim is to ramp up the alleged quantum of claims, with a view to generating negative publicity for defendants in an attempt to force settlements. The Court of Appeal's judgment in Wirral v Indivior (discussed separately at paragraphs 5.14 to 5.17 above) is a recent example of a funder-backed claim which sought to use the representative action procedure to create an opt-out class. Rejecting that attempt, the Court said "*It would also not be just or in accordance with the overriding objective for the claimants to be able, through deploying the representative procedure, to pressurise the defendants into an overall settlement, if in reality some of the claimants (how many of them remains completely opaque because of the refusal to provide information) do not have a claim at all*".[33]

(B) Interlocutory applications are a feature of all complex litigation, but the way in which funded group claims are often conducted generates a disproportionate number of contested applications. Some of these applications may be brought by defendants, but often in response to the actions of funded claimants. For example, applications that seek to verify and validate the standing of claimants, assert limitation, strike-out

[32] *Please explain your answer by reference to a specified regulatory mechanism or mechanisms.*

[33] *Wirral Council v Indivior plc and another [2025] EWCA Civ 40, at para 132.*

unparticularised allegations or challenge jurisdiction may often be necessitated by the way in which funded claims have been constructed and presented.

8.3. On sub-question (e) specifically, the GC100 does not consider that the costs of litigation funding should be recoverable in court proceedings. In our view, any such reform would go against the logic of the recommendations (subsequently adopted) of Sir Rupert Jackson in his 2009 report on litigation costs, that success fees under CFAs and ATE insurance premia should cease to be recoverable from the losing party. Sir Rupert considered that this would "*lead to significant costs savings, whilst still enabling those who need access to justice to obtain it. It will be open to clients to enter into 'no win, no fee' (or similar) agreements with their lawyers, but any success fee will be borne by the client, not the opponent*".[34] We consider that Sir Rupert's reasoning applies equally to litigation funding costs. His point on costs savings is particularly apposite: were funding costs to be recoverable, it would remove an important incentive on funders and their clients to seek to control their costs.

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.

9.1. We consider that current rules on recoverability of adverse costs provide a salutary check on the conduct and tactics of parties to litigation, as explained further below.

9.2. Similarly, the ability to secure security for costs in appropriate cases is an essential tool to ensure the fairness of the litigation process. Claimants are protected by the limitations on the discretion of the Court to grant security set out in CPR Part 25.

9.3. However, the requirement for the applicant to give evidence that there is "*reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so*" is a significant hurdle for defendants who are hampered by a general reluctance on the part of claimants, their lawyers and funders to be open about funding and insurance cover. Funders who promote litigation should not be able to hide behind impecunious representative claimants. For that reason, the GC100 has proposed mandatory disclosure of funding arrangements and a rebuttable presumption that security for costs should be awarded in funded litigation (see paragraph 4.11(B) and 4.11(C) above).

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

10.1. The GC100 does not consider that there is any basis for amending the current law to reduce the potential exposure of funders to adverse costs orders. As set out below, it considers that the

[34] *Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report, December 2009, at page xvi.*

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current law constitutes a flexible and effective framework for the control of funders' costs liability.

10.2. Statute currently gives the court jurisdiction to make costs orders against funders and other non-parties to litigation. The court has a broad discretion in the exercise of this jurisdiction. This represents a vital tool for the proper and efficient control of litigation and its costs, in accordance with the overriding objective. An extensive body of case law provides litigants, their advisers and funders with clear illustrations of the exercise of this jurisdiction. This can play an important role in promoting a proportionate approach to the incurring of costs, and in policing the role of funders.

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?

11.1. Outside the sphere of competition collective proceedings in the CAT, we are not aware that courts control (or seek to control) the pricing of third party funding agreements. Nor is it clear to us that the court has the necessary tools at its disposal to seek to exercise such control were it minded to do so.

11.2. In the CAT, the tribunal has stated that it "*will be astute to ensure that a system intended to further access to justice does exactly that, and does not become a "cash cow" either for lawyers or for funders*"[35]. However, it is apparent from the rare instances where light has been shone upon funding arrangements, that returns on investment sought and obtained by funders are very generous indeed.

11.3. We have noted above our concern that there is not an efficient market for TPF. The problems we identified will all tend to undermine the market's ability to effectively regulate costs and promote positive client outcomes. While we acknowledge the relative paucity of useful data in this area – an issue that as we have noted is exacerbated by the market's opacity – the GC100 does not consider that users of TPF can have any confidence that the market as currently constituted is effectively controlling prices.

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?

12.1. The GC100 considers that funders' returns should be subject to controls where the funded party is a consumer or class of consumers. It is axiomatic that consumers are in a structurally weaker position in any funding relationship. Not only are funders well-resourced professionals with the benefit of advice, consumers will – in a *bona fide* case – tend to be reliant on funding in order to bring litigation. We accordingly propose a mandatory floor on the return from funded proceedings that is paid to consumer claimants. We would suggest that this floor be calculated as a percentage of recoveries.

12.2. We recognise that controls of this kind, if adopted and of course subject to the precise mechanism by which they are set, might have the effect of causing funders to decline to fund certain claims. In our view, it does not follow that this is automatically a negative development: as set out in our response to question 1 above, the GC100 considers that effective access to

[35] *Gormsen v Meta [2024] CAT 11, at para 35.*

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justice should not be measured by reference simply to the number of claims brought. The better test is whether injured parties are enabled to receive proper compensation for their loss. Where the presence of controls led a funder to decline to participate, that is an indicator that the recoveries funded claimants could ultimately expect to make would be disproportionately small, and/or that the case is insufficiently strong. Viewed in the context of a wider package of regulation, controls on funder returns function as a reminder that litigation is brought and defended for the benefit of the parties, not as a vehicle for speculative investment.

12.3. Furthermore, we note that the concept of a limit on the returns non-parties can derive from litigation is already embedded in the CFA and DBA regimes, and in the FCA's regime in respect of claims management companies:

(A) In most commercial cases brought on the basis of a CFA, the success fee a solicitor can charge in the event of success is capped at 100% of its base costs.

(B) Similarly, and even more pertinently in the context of TPF, the DBA Regulations impose a cap on the share of any damages award that can be claimed by a solicitor. That cap was among the safeguards proposed by Sir Rupert Jackson when he recommended the legalisation of DBAs in his report on litigation costs; it was intended expressly to prevent lawyers being over-compensated at the expense of claimants.[36]

(C) Following the FCA's assumption of regulatory responsibility for claims management companies in April 2019, it introduced caps on the fees which such companies could charge for their services in order to ensure that consumers get fair value for money. These fees are calculated on a sliding scale such that larger claims are subject to a smaller percentage cap. The FCA calculated that the introduction of fee caps was expected to save consumers some £9.6 million every year.[37] In its latest statement on the market, the FCA noted improved regulatory compliance on the part of claims management companies, while warning that negative behaviours persisted in certain areas and would be a focus for renewed scrutiny and enforcement.[38]

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?

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36 Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report, December 2009, at page 132.

37 FCA press release, "FCA launches claims management companies fees cap", 1 March 2022 (https://www.fca.org.uk/news/press-releases/fca-launches-claims-management-companies-fees-cap).

38 FCA letter to firms, 30 January 2025 (https://www.fca.org.uk/publication/correspondence/claims-management-companies-portfolio-letter-2025.pdf).

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(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?

13.1. The GC100 recognises that the level at which our proposed floor on consumer recoveries should be set is a question that will benefit from the input of a variety of market participants and should in any event be informed by empirical data. Accordingly we do not at this stage suggest a level. If the CJC were minded to accept our proposal that the FCA (or other external regulator) assume responsibility for the regulation of TPF, we consider that regulator would be best placed to set, supervise and enforce our proposed mandatory floor on consumer recoveries.

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.

14.1. We refer to our responses to earlier questions.

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?

15.1. The GC100 has no response to this question beyond the observations already set out, in particular, in relation to alternative redress mechanisms at paragraphs 1.16 to 1.32 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?

16.1. We refer to our response to question 15 above and the cross-references set out there.

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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?

17.1. The GC100 notes the breadth and potential significance of the issues raised by this question. In our view, material amendments to the framework for CFAs and/or DBAs should be the subject of a separate consultation.

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?

18.1. The GC100 has no specific observations in response to this question.

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?

19.1. The GC100 has no specific observations in response to this question.

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

20.1. The GC100 has no specific observations in response to this question.

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

21.1. To the extent that portfolio funding refers to arrangements where the contracting parties are, on the one hand, funders and, on the other, law firms (as opposed to their clients), the GC100 considers that these arrangements raise the same concerns as those which involve litigants directly. Indeed, the indirect funding of claims, including via portfolio arrangements, or funder investments in law firms, amplify those concerns. In circumstances where funded litigants themselves may be unaware of funder involvement, or the terms of their involvement, the potential for unacknowledged and unmitigated conflicts of interest to arise is acute.

21.2. An illustration of the way in which portfolio funding magnifies the risks to consumers, is provided by the recent case of SSB Law which received portfolio funding. The funding was used to fund a portfolio of claims covering cavity wall insulation; alleged medical malpractice; personal injury; and alleged breaches of data security.

21.3. When SSB Law went into administration in January 2024 as a result of a series of failed claims it reportedly had c.43,000 claims on its books. According to a BBC investigation, the consumers

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were told that their claims would be claim on a "no-win, no-fee" basis and that SSB had in place ATE policies which would insulate them from any adverse costs orders. However, since SSB's collapse, various claimants in unsuccessful claims have received demands for payment of adverse costs. It is estimated that more than 1,400 consumer claimants may be affected, causing Parliamentary concern.[39]

21.4. The focus of the media commentary has been on the failings of the law firm. It is notable that the funder has so far escaped scrutiny but is not presently expected to fund or be liable for the adverse costs orders which instead fall on the consumer. While a principal failing lies with SSB Law for failing to put in place sufficient ATE cover, it is probable that, had the funder felt more exposed to the risk of adverse costs, it would have taken more robust steps to ensure appropriate ATE cover was in place.

21.5. The question also arises of the extent to which a funder that invests in a law firm may be liable to provide security for costs to a defendant in a claim that is pursued by the law firm. This issue was discussed in a judgment[40] in the so-called dieselgate group litigation in 2024. Pogust Goodhead, a claimant firm, acted for a majority of the claimants in that litigation. In 2023, Pogust Goodhead had entered into a £450 million "investment partnership" with Gramercy, a US alternative investment manager. Certain defendants applied to court for disclosure of information relating to Pogust Goodhead's funding arrangements with Gramercy. They were considering making an application for security for costs against Gramercy. In resisting the application, Pogust Goodhead explained that Gramercy's funding provided "*working capital which is used for all aspects of Pogust Goodhead's work, including use across its entire portfolio of cases*". But it noted that none of its clients were a party to any agreement with Gramercy: "*Pogust Goodhead's clients have no obligation to pay Gramercy UK, nor does Gramercy UK have any obligation to pay Pogust Goodhead's clients' costs*".

21.6. The court did not ultimately order disclosure of Gramercy and Pogust Goodhead's funding arrangements. But it did not consider that the provision of finance to a firm, as opposed to a client, could in every circumstance insulate a funder from a security for costs application: "*if the arrangement should more properly be objectively regarded as, in substance, a vehicle through which commercial lenders are seeking to fund litigation from which they take a share of the recovery, this is precisely the type of non-party against whom rule 25.14(2)(b) was intended to bite, in support of the general policy that it would be unjust for a funder who purchases a stake*

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[39] *An Early Day Motion, EDM 423, was tabled on 23 February 2024: "That this House notes with concern the collapse of SSB Law that has left hundreds across the country facing demands for payment stretching into thousands of pounds; stresses that a number of those affected by SSB Law's collapse cannot meet the large demands for payment and will face significant consequences, including the repossession of their home;" and subsequently in Prime Minister's Questions on 18 April 2024.*

[40] *Various claimants v Mercedes-Benz Group AG and others [2024] EWHC 695 (KB).*

in an action for a commercial motive to be protected from all liability for the costs of the opposing party if the funded party fails in the action".[41]

21.7. To avoid uncertainty, expensive satellite litigation and unfairness to claimants and defendants alike, it is vital that indirect funding of litigation be subject to regulation in the same way as traditional, direct funding. It would undermine any system of mandatory regulation if funders were able effectively to sidestep it by making their investments on a portfolio basis or by investing in a law firm rather than a claim.

21.8. The GC100 is agnostic on the precise means by which indirect funder involvement in litigation is brought within the scope of regulation, but we consider it likely that the SRA will have a role to play. In this regard, we note the recent report prepared for the Legal Services Board into the SRA's intervention into the practice of Axiom Ince, a law firm.[42] Although not related to TPF, the report for the LSB identifies alleged inadequacies in the way the SRA supervises firms, particularly in the context of law firm acquisitions. In circumstances where funders have recently taken equity stakes in law firms, we note the importance of active, ongoing supervision of law firms to ensure the interests of clients are protected.

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?

22.1. The GC100 has no specific observations in response to this question.

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?

23.1. We refer to our response to question 4 above.

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?

24.1. The GC100 has no specific observations in response to this question.

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[41] *Ibid., at para 54.*

[42] *Independent Review of the Regulatory Events leading up to the Solicitors Regulation Authority's Intervention into Axiom Ince Limited, 21 October 2024 (https://legalservicesboard.org.uk/wp-content/uploads/2024/10/Independent-Review-of-the-Regulatory-Events-Leading-up-to-the-SRAs-Intervention-into-Axiom-Ince-Lim.pdf).*

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?

25.1. The GC100 notes that in Rowe, the defendants sought security for costs from the (funded) claimants; the claimants argued that it should be a condition of any order for security for costs that the defendants be required to pay the claimants' (or their funders') costs of funding the security in the event the claimants went on to win the claim. In the Court of Appeal, the argument centred on the extent to which a funder could be ordered to put up security for costs, and whether its financing costs were properly recoverable from a defendant. The Court decided that a well-capitalised funder should not ordinarily be required to give security for costs, but that in the event such an order was made, the costs incurred were simply a part of the normal costs of bringing litigation and should be borne by the claimant.

25.2. We agree with Court of Appeal that the costs of funding any ordered security should be borne by the claimant (in practice, the funder). We have proposed, in response to question 4 above and question 27 below, that funded claimants should be required to disclose the fact of funding at an early stage, and that there should be a rebuttable presumption that security for costs will be ordered in a funded claim. These changes would necessitate amendments to the CPR, including CPR 25 which deals with security for costs.

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?

26.1. We refer to our response to question 4 above, in particular our proposal for amendments to the pre-action protocols at paragraph 4.11(A).

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?

27.1. As set out in our response to question 4 above, the GC100 considers that it should be mandatory for funded claimants to disclose to their opponent(s) and the court the existence of any funding arrangement and/or legal expenses insurance available to meet any order for adverse costs orders, as well as the names of those providing the funding and/or insurance. To the extent the CJC is minded to recommend a system of mandatory licensing for funders, claimants should also provide confirmation that their funders are currently licensed.

27.2. We consider increased transparency a vital and urgent requirement. Many of the GC100's proposals for the regulation of TPF as set out in this submission, in particular its impact on the conduct of litigation, are predicated on all parties (including the court) being aware of the existence of funding in a given case.

27.3. Although CFA success fees and ATE premia are no longer recoverable costs, TPF (defined broadly to include contingent fee arrangements and legal expenses insurance) remains a factor directly relevant to a defendant's ability to understand the nature and implications of the case against it. For example, the financial interests of non-parties will inevitably inform a defendant's assessment of any settlement strategy.

27.4. The non-disclosure of funding is a key driver of expensive and wasteful satellite litigation: defendants wishing to understand their opponent's financial position – with a view to protecting their own costs position – are obliged to make applications for security for costs, a procedure which was not designed with TPF in mind and which accordingly risks distorting that procedure.

27.5. The experience of collective proceedings in the CAT shows that early disclosure of funding terms is not problematic in practice and in particular does not appear to affect the willingness of reputable funders to invest in claims.

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?

28.1. The GC100 notes that it is a fundamental tenet of public policy that third party funders should not exercise, or seek to exercise, control over the litigation they fund – to allow a financially-incentivised non-party to control litigation would fundamentally undermine the integrity of the justice system. The experiences of our members indicate that this does not seem to a principle that funders universally adhere to. The example in the Merricks litigation, discussed below in response to question 34, is illustrative. The GC100 considers that any departure from this established position would be highly undesirable. It would have far-reaching implications that would require separate, detailed consideration and, potentially, legislative intervention.

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

29.1. The GC100 has no specific observations in relation to this question.

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?

30.1. The GC100 expresses no view on the desirability of an express requirement that the court approve the settlement of funded proceedings. However, for the avoidance of doubt, we consider that the mandatory minimum return to funded consumer claimants proposed in response to question 12 above should also apply where a claim is settled.

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?

31.1. See our response 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?

32.1. We refer to our comments at paragraphs 5.2 to 5.9 above. The GC100 has no other specific observations in relation to this question.

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

33.1. We have noted in response to earlier questions the lack of transparency in the TPF market. One of its most significant effects is to seriously impede the ability of claimants to compare different funding options. In practice, many claimants will be dependent on their lawyers to advise them on this question and we note that solicitors are subject to a duty to advise on the availability, suitability and benefits of ATE insurance and TPF. Again, however, a lack of data makes it difficult to assess the extent to which solicitors are fulfilling this duty. We note in this regard that the increasing links between firms of solicitors and funders has, at a minimum, the potential to present conflicts of interest.

33.2. The GC100 considers that the package of reforms outlined in this submission should help to remedy this situation. In particular, the introduction of uniform rules on financial promotions and on the communication and explanation of funding terms should tend to promote easier comparisons between different funders and their products.

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?

34.1. The GC100 considers it self-evident that conflicts of interest can and do arise in funded claims. In principle, funded claimants, lawyers and funders share a common interest in the success of a claim. But the definition of success (including the timeframe for its achievement), in combination with the multiplicity of persons with a financial stake in litigation, introduces significant potential for divergence and conflict.

34.2. The recent example of a proposed settlement in collective proceedings against Mastercard is instructive.

(A) Walter Merricks is the class representative in a claim before the CAT against Mastercard relating to interchange fees charged by Mastercard. Mr Merricks lawyers are Willkie Farr. The proceedings have been funded by Innsworth Capital (a member of the ALF subject to the Code of Conduct).

(B) On 3 December 2024, Merricks announced a settlement in principle of the claim, reportedly for some £200m (the claim had originally been valued at £10bn). The following day, Innsworth said that they "*strongly oppose this reported settlement which was struck without our agreement … Both Walter Merricks and Boris Bronfentrincker [partner at Willkie Farr] have repeatedly claimed this is a multi-billion pound case, yet they seemed to have rushed to settle for a reported £200m raising serious questions*".[43]

(C) In response, Mr Bronfentrincker attacked Innsworth: "*The decision to oppose the settlement and to go public with that, attacking Mr Merricks, is the latest in a sustained campaign [Innsworth] has engaged in to inappropriately pressure and seek to influence Mr Merricks' decision making in order to take control of the litigation. […] Innsworth's opposition [to the proposed settlement] has nothing to do with advancing the interests of UK consumers, and is all about funder greed*".[44]

(D) On 16 January 2025, Mr Merricks filed a witness statement in support of an application to the CAT for a Collective Settlement Approval Order. In his statement, Merricks detailed the steps taken by Innsworth to, in Merricks' view, '*get more control and involvement in… the conduct of the* [litigation]'. This statement asserts that when Mr Merricks notified Innsworth that he was intending to agree a settlement with Mastercard with which Innsworth disagreed, Innsworth: (i) refused to engage in the contractual dispute resolution mechanism provided for in its Litigation Funding Agreement with Merricks, and (ii) threatened to commence arbitration proceedings against Merricks.[45]

(E) We understand that Innsworth has now begun arbitration proceedings against Merricks and that Mastercard has agreed to make available to Mr Merricks up to £10 million to defend them.[46] Meanwhile, the ALF – the body which purports to regulate TPF – has been an impotent bystander, noting that it has received no complaint from either Mr Merricks or Innsworth and that both parties have declined to engage with ALF citing the confidentiality of their arrangements.

34.3. The allegations made are serious and the GC100 expresses no view on them. But the episode illustrates the divergent interests between funder and claimant inherent in the funding relationship and the extent to which funders subject only to self-regulation feel able to ignore the presumption that the funder should not seek to control litigation.

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[43] The Law Society Gazette, 'Litigation funder to challenge 'premature' Mastercard case settlement', 4 December 2024 (https://www.lawgazette.co.uk/news/funder-to-challenge-premature-mastercard-case-settlement/5121721.article).

[44] The Law Society Gazette, 'Mastercard settlement: Merricks' solicitor condemns funder's 'greed'', 5 December 2024 (https://www.lawgazette.co.uk/news/mastercard-settlement-merricks-solicitor-condemns-funders-greed/5121729.article).

[45] Fourth Witness Statement of Mr Walter Merricks, paragraphs 40 to 58 https://www.mastercardconsumerclaim.co.uk/Content/Documents/Fourth%20Witness%20Statement%20of%20Walter%20Merricks.pdf

[46] Legal Futures, 'Mastercard backs Merricks with £10m for litigation funder dispute', 24 January 2025 (https://www.legalfutures.co.uk/latest-news/mastercard-backs-merricks-with-10m-for-litigation-funder-dispute).

34.4. Funders operate on a portfolio basis. They have a book of claims, some of which will make a loss which funders need to be able to make up for in other cases that are successful. It is hard to see how this kind of risk mitigation for the funder is fair to the individual claimant who is charged a higher funder return than would seem justified on facts of the individual case.

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.

35.1. We refer to our response to question 34 above.

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.

36.1. We refer to our response at paragraphs 5.10 and 5.11 above.

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.

37.1. We refer to answers to earlier questions, in particular questions 1, 4 and 5.

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?

38.1. The GC100 has no specific observations in relation to this question.

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General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?[47]

39.1. The GC100 has no further observations.

Thank you for the opportunity to share our views on the consultation. We would be happy to discuss our submission in more detail and invite the CJC working group to engage with GC100 further. Our Secretary, Camelia Thomas, will follow up this submission with the Secretariat.

Yours faithfully,

CThomas

Secretary, GC100

[47] *Please note that the Working Party is not considering civil legal aid.*

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