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:	Chris
Last name:	Armistead
Location:	London
Role:	Legal Counsel
Job title:	Assistant Director, Head of Legal Services
Organisation:	The Association of British Insurers (ABI)
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.

The full list of consultation questions is below:

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

About the ABI

The ABI is the voice of the UK's world-leading insurance and long-term savings industry, which is the largest sector in Europe and the third largest in the world. We represent more than 300 firms within our membership, including most household names and specialist providers, providing peace of mind to customers across the UK.

We are a purpose-led organisation: Together, driving change to protect and build a thriving society. On behalf of our members, we work closely with the UK's governments, HM Treasury, regulators, consumer organisations and NGOs, to help ensure that our industry is trusted by customers, is invested in people and planet, and can drive growth and innovation through an effective market.

A productive and inclusive sector, our industry supports towns and cities across Britain in building a balanced and innovative economy, employing over 300,000 individuals in high-skilled, lifelong careers, two-thirds of whom are outside of London. Our members manage investments of £1.4 trillion, contribute £18.5 billion in taxes to the Government and support communities and businesses across the UK.

Executive Summary

We are grateful for the opportunity to feed into the CJC's review of third party litigation funding. It's a timely review, and not just because of the debate that followed the Supreme Court judgment in *PACCAR*[1] about whether and how government should deal with the consequences of the judgment. It has been over 10 years since the last thorough review of third party litigation funding. In that time, what was once a nascent market has evolved considerably. So too has the complexity and scale of the types of litigation that may be subject to third party funding.

What's clear is that the current regulatory framework is not fit for purpose. It remains voluntary and despite the light touch regime (when compared with other forms of lending), only a minority of funders operating in England and Wales are subject to it. Even then, the Association of Litigation Funders – which acts as both membership body for funders and arbiter of the Code of Conduct – is, at best, constrained in its ability to monitor and enforce good conduct.

The lack of transparency around third party funding arrangements creates a real risk of harm to both claimants and defendants. Claimants (or prospective claimants) may not fully

[1]R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28 ("PACCAR").

understand the terms of the agreement. As a result, they may unknowingly be exposing themselves to personal costs liabilities or entering into agreements with narrow or even no termination rights. For defendants, this lack of transparency materialises in an inability to accurately quantify their potential costs liability. As a result, there should be a requirement for the funding agreement to be disclosed to all parties to the litigation at an early stage.

More robust, compulsory regulation is needed. It should take the form of co-regulation by both an independent regulator and the courts. An independent regulator should oversee the funding elements, which should come with a requirement for firms who carry out third party litigation funding services in England and Wales to be licenced. Rules should be introduced (and monitored and enforced) that have the objective of leading to good outcomes, including ensuring funders are adequately capitalised to fund claims and that claimants receive a fair return of any compensation. The courts should also have greater case management powers – both at pre-litigation stage and throughout the course of the proceedings – to scrutinise the funding agreement, control costs and, in certain cases, approve a proposed settlement.

Finally, we support centring any recommendations to government around the important principle of access to justice. However, this should not be defined narrowly as enabling entry into litigation. Litigation should remain a last resort and there should be recognition that other routes, such as ombudsmen or redress schemes, may be less costly and less adversarial, and even offer forms of redress that litigation cannot provide (such as an apology). Access to justice should be about ensuring good outcomes for both claimants and defendants on matters of redress.

Questions concerning '*whether and how, and if required, by whom, third party funding should be regulated*' and the relationship between third party funding and litigation costs.

1. To what extent, if any, does third party funding currently secure effective access to justice?
2. To what extent does third party funding promote equality of arms between parties to litigation?
3. Are there other benefits of third party funding? If so, what are they?
4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding? If not, what improvements could be made to it?

No, the current regulatory framework surrounding third party funding is not sufficient.

The only regulatory framework currently in place for third party funders in England and Wales is a voluntary Code of Conduct produced by a Working Party of the Civil Justice Council in 2011 and administered (and occasionally updated) by the Association of Litigation Funders (ALF). The Code of Conduct was prepared by a Working Party of experts in civil litigation and litigation funding and sought to address concerns raised by Lord Justice Jackson about (unregulated) litigation funding in his Review of Civil Litigation Costs in 2009; namely, that funders should have adequate financial resources to fund the disputes that they have agreed to fund, and that the funder's ability to influence the litigation and any settlement negotiations are limited.

The Code of Conduct was produced following extensive consultation with a group of distinguished experts. It is clear and straightforward. It rightly drew praise, including from Sir Rupert Jackson.[2] During a period of relative nascency in litigation funding, and with a much smaller number of litigation funders operating in England and Wales at the time, the Code of Conduct (and self-regulation generally) was, understandably, seen as proportionate and sufficient.

However, there are now significant shortcomings with the Code of Conduct. We mean no discourtesy to the ALF or the Working Party of experts of the CJC who developed the Code in describing these. The majority are due to developments in the litigation market and in litigation generally, and other circumstances that are outside of the ALF's control.

i. The Conduct of Conduct is voluntary. While adherence to the Code of Conduct is a condition of membership of the ALF, membership of the ALF is entirely voluntary and the majority of funders now operating in England and Wales are not members.

ii. Only around a third of litigation funders operating in England and Wales comply with the Code of Conduct in full.[3] While funders who are not members of the ALF may say they adhere to (parts of) the Code of Conduct, they are not required to provide any evidence to substantiate this and they may easily choose to follow aspects of the Code of Conduct that suit them (giving them what some funders have previously referred to as a 'badge of honour') and not others (including those aspects of the Code that should afford greater protection to claimants). This creates an uneven playing field in the market and there is a risk that if a significant majority of funders continue to choose not to follow the Code of Conduct (as has been the case in recent years), others that currently follow the Code of Conduct feel at a disadvantage and become less inclined to do so. Effective self-regulation relies on compliance by all (or at least the vast majority) in a market. Indeed, this reflects the view of Sir Rupert Jackson when he called for a code "to which ***all*** litigation funders subscribe" (emphasis added).[4] Therefore, the current position – where only a minority of funders comply with the ALF Code of Conduct – cannot be said to address Sir Rupert Jackson's concerns about the risks of harm with litigation funding.

iii. Notwithstanding the above, even if all litigation funders operating in England and Wales complied with the current version of the ALF Code of Conduct, aspects of it no longer go far enough to address the concerns of Sir Rupert Jackson. For example, on capital adequacy, the Code of Conduct provides that funders should "maintain access to a minimum of £5m of capital". Even funders themselves recognise that this sum is low against a

[2] https://associationoflitigationfunders.com/wp-content/uploads/2014/02/Sixth-Lecture-by-Lord-Justice-Jackson-in-the-Civil-Litigation-Costs-Review-.pdf.
[3] CJC Review of Litigation Funding Interim Report and Consultation, at paragraph 3.1, page 19. An estimated 44 funders operate in England and Wales. 16 funders are members of the ALF, of which 8 are also members of the International Litigation Funders Association (ILFA).
[4] Review of Civil Litigation Costs: Final Report by the Right Honourable Lord Justice Jackson, at paragraph 2.4, page 119.

backdrop of increasing numbers of costly collective actions,[5] with some suggesting that the figure should be many multiples of this.[6]

iv. The consequences for breaching the Code of Conduct are not severe enough to act as an effective deterrent. Part 25 of the ALF's Complaints Procedure provides for sanctions in respect of breaches of the Code of Conduct. Firstly, Part 25 sets out the sanctions that "*may*" be imposed against an ALF member if it breaches the Code. The use of the word 'may' indicates that the imposition of sanctions is entirely at the ALF's discretion. The only financial sanction is a fine of £500. This is an extremely low figure and may not adequately reflect the harm caused by the funder's breach of the Code of Conduct. Compare this with the Financial Conduct Authority, who may impose unlimited fines on the firms it regulates. As of 3 December 2024, it had imposed £176,045,385 of fines in 2024.[7]

In addition, an effective deterrent may be the risk of being publicly named if there has been a finding of wrongdoing due to the fear of reputational – and consequential financial – harm. While the list of sanctions at Part 25 of ALF's Complaints Procedure includes a public warning, we have not been able to find any evidence of such warnings being given during the 13 years of the Code of Conduct's existence. While there may be a range of sanctions available to the ALF, it is unclear whether and how regularly these have been exercised.

Some funders who are not members of the ALF but say that they comply with the Code of Conduct are not subject to any sanctions for breaching the code.

v. The ALF is not sufficiently independent to regulate third party litigation funders. The Code of Conduct was originally produced by a Working Group of the Civil Justice Council, ensuring independence in its creation. However, since its creation in 2011 the administration of the Code of Conduct – including monitoring, enforcement, and occasionally updates – is managed by the ALF (albeit with some involvement by third parties). The Association of Litigation Funders is principally a trade association for litigation funders. Its income – and therefore its existence – is entirely dependent upon funders being members. As noted above, membership is voluntary. This creates a tension in monitoring and enforcing the Code of Conduct. The difficulties for a membership body to act effectively as a regulator has been recognised in other contexts and action taken to detach the two functions. For example, the Law Society (membership body for solicitors) and Solicitors Regulation Authority (regulatory body) are now run entirely separately and independently from one another.

[5] 'A Review of Litigation Funding' by Professor Rachael Mulheron KC (Hon), at page 58.
[6] Ibid, feedback by 'Funder #2613', at page 58.
[7] https://www.fca.org.uk/news/news-stories/2024-fines.

vi. The ALF does not have powers to (legally) compel disclosure of evidence to monitor compliance. Independent regulators are typically given powers to compel disclosure of information by the firms they regulate. For example, the Financial Conduct Authority is given such powers by the Financial Services and Markets Act. These powers are critical for effective monitoring because firms may not wish – or be contractually permitted – to provide information if they are not legally compelled to do so. The ALF's lack of such powers undermines its effectiveness in monitoring compliance with the Code of Conduct.

vii. There is no route to appeal a decision of the ALF to an independent third party (e.g. an ombudsman, courts, or equivalent). While the ALF's complaints procedure[8] involves independent Counsel, there is no recourse to a separate, independent body if the complainant is not satisfied with the outcome. Typically, regulated firms will have internal complaints processes (that are subject to regulatory oversight) and, if consumers are not satisfied with the outcome of that internal process, will have recourse to another, independent body to pursue their complaint. For example, customers of financial services firms regulated by the FCA have recourse to the Financial Ombudsman Service who have powers to make binding determinations on the basis of what it considers 'fair and reasonable'. There is a route of appeal to the courts for both consumers and firms. There are many benefits of a service like an independent ombudsman. It provides an additional layer of protection for consumers by offering a free, straightforward, and (critically) independent route to challenge the decisions or conduct of firms. Also, and unlike the ALF's complaints procedure which is confidential,[9] an ombudsman will typically publish its decision allowing both consumers and firms to understand the standards of conduct expected of the industry.

viii. The ALF Code of Conduct was developed at a time when litigation funding was still relatively nascent. Since its publication in 2011, the litigation funding environment has evolved considerably. There are now an estimated 44 funders operating in England and Wales. That number is likely to continue to grow. Only around a third of funders operating in England and Wales are members of the ALF and therefore subject to its Code of Conduct. If this trajectory continues then an increasingly small proportion of funders will be subject to the Code of Conduct. In his 2009 review of civil litigation costs, Lord Justice Jackson was also of the view that the expansion of third party funding may prompt the need for full statutory regulation – particularly so if funders are supporting group actions brought by consumers on any scale.[10] Both of those developments have occurred. Therefore, self-regulation is no longer fit for purpose and changes – as set out below – are needed.

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[8] https://associationoflitigationfunders.com/wp-content/uploads/2018/03/ALF-Complaints-Procedure-October-2017.pdf.
[9] Ibid, at paragraph 35.
[10] Review of Civil Litigation Costs: Final Report by the Right Honourable Lord Justice Jackson, at page 121, paragraph 2.12.

ix. The number and value of complex claims has considerably increased since the ALF Code of Conduct was published in 2011.[11] For example, there was a 170% increase in class actions in 2023 compared with the year before. According to data collected on cases that were initiated or conducted between 2019 and March 2024 from publicly available sources, 27 collective proceedings in the Competition Appeal Tribunal, 10 group litigation cases under Group Litigation Orders in the High Court, 3 representative actions in the High Court and 15 other cases in High Court and specialist courts and tribunals were funded by third party litigation funding.[12] These numbers may well be higher, given the lack of transparency around third party funding. The exponential growth of litigation funding in the UK (coupled with a minority – and seemingly decreasing – proportion of funders that are members of the ALF and therefore subject to its Code of Conduct) further supports the case for the introduction of more robust regulation.

Litigation funders play an important role in civil litigation. In some ways, their role is similar to that of 'after the event' (ATE) insurance in that they cover legal fees associated with civil litigation. A funder may even be as critical to a claimant as an independent legal adviser, particularly where third party funding is necessary to advance a claim. Yet, unlike insurers, law firms, solicitors, or barristers, litigation funders are not subject to any compulsory regulation or oversight by an independent regulator. Given the importance of their role and the potential for consumer detriment (as set out in response to question 5, below) if they engage in poor conduct or have insufficient funds for the dispute they agreed to fund, a more rigorous, compulsory regulatory framework with oversight by an independent regulator to monitor and enforce compliance is needed.

These potential risks or harms could be addressed by:

- **Licensing.** Third party litigation funders should be required to hold a licence issued by an independent regulator in order to operate in England and Wales. For the reasons set out above, the current form of self-regulation via the Association of Litigation Funders and its voluntary Code of Conduct is insufficient. Third party litigation funders should be regulated by an independent regulator with the powers to issue licences to authorise funders to engage in litigation funding. That regulator should also have enforcement powers to suspend or even withdraw licences from funders who engaged in misconduct.

- **Standardisation of litigation funding agreements (LFAs).** Standardisation of LFAs, or at least a degree of consistency like in conditional fee agreements (CFAs), as well as guidance to support consumers considering entering into LFAs, would reduce the risk of claimants not (fully) understanding the terms and better enable the comparability of LFAs across different providers.

[11] CMS 2024 European Class Action Report. The UK had 540 million claimants in class actions in 2023, which is a 170% increase from 2022, and the total value of claims was more than €78.68 billion, with competition class actions accounting for more than half of the total value.
[12] See 'A Review of Litigation Funding' by Professor Rachael Mulheron KC (Hon), at pages 154-175, Appendix B.

- **Court approval of LFAs.** The courts could have a role in ensuring the appropriateness of the LFA for the ensuing litigation. This could also provide a space for consideration of any deviation from a standardised agreement where a standardised process would not work.

- **Capital adequacy requirements that are regulated and reflect the significant costs involved in large, complex claims.** The current requirement in the Code of Conduct for funders to maintain access to a minimum of £5m of capital will, for many funders, not be sufficient. That figure is a fraction of the costs involved in large, complex cases (e.g. large opt-out claims) and therefore should be increased. The £5m figure will also be an even smaller fraction of the aggregation of a funder's committed capital across its portfolio of litigation at any one time. For larger funders, the risk is that a capital shortfall might result in detriment to class members across a number of claims, not just one case. Monitoring and enforcing compliance with capital adequacy requirements should also fall within the remit of an independent regulator.

- **Anti-Money Laundering obligations.** There are currently no provisions in the Code of Conduct to address the risk of money laundering. Third party litigation funders should be subject to the same anti-money laundering rules and regulations as other finance providers, such as banks and insurance companies, mirroring the regulation already in place. To the extent not covered by the proposed regulation, due diligence obligations should be introduced to protect against money laundering (e.g., to check the origin of funds that third party funders use to finance litigation, which may include the use of offshore structures).[13]

- **Transparency/disclosure requirements around the funding agreement.** The transparency and disclosure requirements for collective proceedings in the CAT should be extended to all claims subject to third party litigation funding. This should include transparency of funding positions to all parties to the litigation and provision of LFAs to the court, unless the court directs otherwise. The current lack of transparency can lead to a number of risks, including:
    - Limited consumer understanding of the terms of the funding.
    - A greater risk of undue control and influence by the third party funder, including settlement decisions that may not be in the best interests of the claimant.
    - Potential adverse costs exposure for the claimant.
    - Restrictions on termination rights, with claimants potentially locked into finding agreements and limited control over the management of the litigation.
    - Inability for the defendant to assess its exposure to costs and make considered decisions on how it managed the litigation.
    - Difficulties around early settlement or the pursuance of alternative forms of redress, where there is no knowledge of who is funding the litigation and what that funding looks like.
    - Wasted costs in satellite litigation attempting to determine each party's costs position.

There are additional measures that could be introduced to protect claimants that are private individuals or small and medium sized enterprises (SMEs), who may be less sophisticated than larger corporate claimants. Some may even be vulnerable – either due to circumstances such as their health or life events, and/or financially – or otherwise lack knowledge about how litigation and litigation funding works. There could be a distinction in regulation between individual (and possibly

[13] 'A Review of Litigation Funding' by Professor Rachael Mulheron KC (Hon), at page 77.

small and medium sized) businesses, who may require greater protection, and larger corporates. There is precedent for such a distinction in other regulatory contexts, including financial services regulation (e.g. the Consumer Duty, a regulatory framework introduced by the Financial Conduct Authority in 2023 to ensure good outcomes for customers of financial services firms, extends only to 'retail' customers which encompasses individuals and SMEs). These additional measures could include:

- **Ensuring a fair return to claimants.** An important aspect of access to justice is for claimants to be compensated appropriately. Compensation may be necessary to meet future needs and can be a meaningful acknowledgement of the harm experienced by the claimant. Therefore, while it may be appropriate and even necessary for a funder to recoup some of the recoveries to reflect the litigation risk they are taking on in agreeing to fund the case, there should be a mechanism to ensure that the claimant receives a fair proportion of the compensation awarded. If such a process was established, consideration should still be given to whether there is a need for a level of transparency with the court, or other suitable body, to oversee or in the very least, be made aware of, such a decision to ensure the claimant is not acting under undue pressure and remains protected, at least to the extent that there is visibility over the actions of the TPLF.

  This concept of 'fairness' is not unusual in the regulation of financial services. Indeed, the above mentioned 'Consumer Duty' framework for financial services firms requires them to undertake 'fair value' assessments as a way of demonstrating that the price the customer pays for a product or service is reasonable compared to the overall benefits the customer can expect to receive in return. A similar principle could apply to litigation funding. This could be achieved in a number of ways. It could take the form of a cap on the amount the funder can recoup from the compensation award. Other forms of litigation financing are subject to caps, such as 'no win, no fee' Conditional Fee Agreements (under which success fees are capped at 100% of base fees) and Damages Based Agreements (capped at 50% of damages). Alternatively, there could be a minimum return for the claimant. Or a further alternative, which acknowledges that the complexity and risk involved in litigation varies from case to case, is to set guideline rates of return to a claimant and a requirement for court approval if the funder considers there is good reason why these cannot be met. This would involve the funder evidencing why the claimant would still receive a fair share of the compensation (e.g. in particularly novel cases, because the litigation risk is unusually high) notwithstanding a return to the claimant that fell short of the guideline rates. Another option would be a required form of disclosure to class members explaining where and why the claimants' expected rate of return is below guideline rates. Such disclosures would be intended to give class representatives/members sufficient information to 'shop around' and consider alternative options.

- **Requiring claimants to be paid first if the claim succeeds.** Claimants should be prioritised under the payment waterfalls in third party LFAs, so that they are paid first in the event that the claim succeeds.

- **Courts should be empowered to impose adverse costs orders on third party litigation funders without limitation.** Currently, a third party litigation funder's adverse costs liability is limited to the amount of funding provided to the claimant. This was determined by the

Arkin case.[14] The rationale for and merit of this so-called 'Arkin' cap has been questioned in subsequent judgments and by Sir Rupert Jackson.[15] Exposure to unlimited adverse costs liability would enhance protection for both claimants (who may be exposed to cost liabilities themselves if their claim is unsuccessful, which they are unlikely to be able to meet) and defendants, who may be left with significant unrecoverable costs in defeated claims. It would also act as a deterrent to unmeritorious claims.

It is important to keep in mind that access to justice does not necessarily mean entry into litigation. Litigation should always be a last resort and other mechanisms for redress, such as ombudsmen and redress schemes, will typically be quicker, less costly and less adversarial than litigation. Therefore, third party litigation funding should not encourage litigation where there are more straightforward forms of redress available.

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;

The risks are described in detail in our answer to question 4, above.

Principally, our focus is on the risk of harm to consumers. Those risks can be summarised as follows:

- Claimants may not fully understand the terms of the funding agreement. They may (unknowingly) be exposing themselves to adverse costs or entering into an agreement with very narrow and limited termination rights.
- Claimants may have limited visibility of the progress of litigation and/or key information such as the long timescales involved before settlement.
- Without adequate capital, a funder may fail or otherwise be unable to meet its funding obligations, leaving claimants exposed. The capital adequacy requirements in the ALF Code of Conduct are too low given the volume and value of funded claims.
- A funder may exert inappropriate control over the litigation or settlement negotiations.
- Claimants may only receive a very small proportion of the damages (and, linked to the first point, may not have been aware of this possibility at the outset).

There are also risks to individuals and businesses who may be subject to claims that are funded by third parties. Principally, there is the potential for unmeritorious claims to be pursued, where the objective is to place financial pressure on the defendant to offer or agree a settlement even where they may have a robust defence. The risk of this may be higher for collective actions, where the global damages sought may be considerable (even if unrealistic) and the legal costs equally so. A defendant may not have insurance or receive legal aid and may therefore have to meet the costs itself.

    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;

[14] Arkin v Borchard Lines Ltd (Nos 2 and 3) [2005] EWCA Civ 655 [2005] 1 WLR 3055.
[15] Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report (December 2009), at Chapter 11, paragraph 4.5: "*In my view, the criticisms of Arkin are sound. There is no evidence that full liability for adverse costs would stifle third party funding or inhibit access to justice.*"

- The ALF Code of Conduct includes provisions intended to address the majority of the risks set out at 5a. However, due to the scale and pace of developments in the litigation funding market over the last decade or so, coupled with the fact that a minority (and a decreasing one at that) of funders are members of the ALF and therefore subject to its Code of Conduct, self-regulation is no longer fit for purpose and does not protect consumers against the risks identified above and below.

- The ways in which these risks could be prevented, controlled or rectified are described in detail in our answer to question 4, above. They can be summarised as follows:
    i. Full regulation of third party litigation funders affectively as a consumer lender, is required.
    ii. Third party litigation funders should be required to hold a licence issued by an independent regulator in order to operate in England and Wales.
    iii. There should be regulated capital adequacy requirements that reflect the significant costs involved in large, complex claims.
    iv. There should be transparency/disclosure requirements around the funding agreement.
    v. There should be additional pre-action and case management powers given to the courts to ensure the consumer remains protected throughout the course of the litigation.
    vi. Claimants should receive a fair return of compensation.
    vii. Claimants should be paid first if the claim succeeds.
    viii. The Court should be empowered to impose adverse costs orders on third party litigation funders without limitation.

    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.

- Please see our answer to question 4, above.

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

All funders should be licensed to operate in England and Wales, regardless of the types of disputes or forms of proceedings they are funding. Regulated capital adequacy standards, requirements of transparency and disclosure of funding agreements, as well as measures to prevent undue influence and control over litigation and settlements, should also apply to all funders.

However, certain additional measures – such as those set out at iv – vi in answer to question 5b above – could be introduced to protect claimants who may be less sophisticated and potentially even vulnerable, and therefore require greater protection from harm. There could be a distinction between individual claimants (and possibly small and medium sized businesses), and larger corporate claimants. There is precedent for such a distinction in other regulatory contexts, including financial services regulation (e.g. the Consumer Duty, a regulatory framework introduced by the Financial Conduct Authority in 2023 to ensure good outcomes for customers of financial services firms, extends only to 'retail' customers which encompasses individuals and SMEs).

7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?
8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:
    a. What impact, if any, have the level of litigation costs had on the development of third party funding?

The level of litigation costs and the need for third party funding may be self-fuelling, in that as litigation costs rise, so then does the need to secure third party litigation funding as claims become prohibitively expensive to pursue otherwise. In turn, there is a risk of inflation in both the costs and damages to ensure a sufficient return for the funder.

Costs budgeting is not required in all cases, including claims settled before a CCMC and claims worth more than £10m. As the majority of claims pursued do not reach CCMC stage, the current costs budgeting rules are only of limited effectiveness. Courts should continue to play a role in ensuring costs are proportionate.

    b. What impact, if any, does third party funding have on the level of litigation costs?
    c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?
    d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?
    e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?

No, the costs of litigation funding should not be recoverable as a litigation cost in court proceedings.

        i. If so, why?
        ii. If not, why not?

Reforms to the civil justice system in England and Wales over the last 20 years or so have removed claimants' ability to recover conditional fee agreement (CFA) success fees and the after the event (ATE) insurance premia. This was to achieve fairness between both claimants and defendants, recognising that access to justice is as much about ensuring defendants are not required to meet disproportionately high costs as it is providing an accessible route to redress for claimants. It would be a backward step to allow the recoverability of the costs of litigation funding from the defendant.

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.

It is important to consider and balance the interests of both claimants and defendants to litigation in order to achieve access to justice. Justice requires that defendants should be protected from unmeritorious or vexatious claims. Two important mechanisms in this regard are a defendant's ability to recover its costs if it successfully defends a claim and/or seek security of costs. The removal of either or both could in turn remove important filters of unmeritorious or vexatious claims, leaving defendants unfairly exposed to considerable costs and wasted management time.

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

Yes, third party funders should bear the costs of proceedings they have funded.

The Court should also be able to impose adverse costs orders on third party funders without limitation. Currently, a funder's adverse costs liability is limited to the amount of funding provided to the claimant as determined by the Court of Appeal's judgment in *Arkin.* The rationale for and merit of this so-called 'Arkin' cap has been questioned in subsequent judgments and by Sir Rupert Jackson. Funders' exposure to unlimited adverse costs liability would enhance protection for both claimants (who may be exposed to cost liabilities themselves if their claim is unsuccessful, which they may not be able to meet) and defendants, who may be left with significant, unrecoverable costs in defeated claims. It would also act as a deterrent to unmeritorious claims.

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?

The unregulated nature of third party funding and lack of transparency around LFAs means there is currently no visibility on this. We understand that the CJC does not have the powers to compel funders to provide information about their pricing and other aspects of their business. If this information is not forthcoming as part of this review, consideration should be given to whether another form of inquiry – with powers to compel the provision of certain information – should be established.

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

An important aspect of access to justice is for claimants to be compensated appropriately. Compensation may be necessary to meet future needs and can be a meaningful acknowledgement of the harm experienced by the claimant. Therefore, while it may be appropriate and even necessary

for a funder to recoup some of the recoveries to reflect the litigation risk, they are taking on in agreeing to fund the case, there should be a mechanism to ensure that the claimant receives a fair proportion of the compensation awarded.

This concept of 'fairness' is not unusual in the regulation of financial services. Financial services firms regulated by the Financial Conduct Authority must conduct 'fair value' assessments as a way of demonstrating that the price the customer pays for a product or service is reasonable compared to the overall benefits the customer can expect to receive in return. A similar principle could apply to litigation funding. This could be achieved in a number of ways. It could take the form of a cap on the amount the funder can recoup from the compensation award. Other forms of litigation financing are subject to caps, such as 'no win, no fee' Conditional Fee Agreements (under which success fees are capped at 100% of base fees) and Damages Based Agreements (capped at 50% of damages). Alternatively, there could be a minimum return for the claimant. A further alternative, which acknowledges that the complexity and risk involved in litigation varies from case to case, is to set guideline rates of return to the claimants and a requirement for court approval if the funder considers there is good reason why these cannot be met. This would involve the funder evidencing why the claimant would still receive a fair share of the compensation (e.g. in particularly novel cases, because the litigation risk is unusually high) notwithstanding a return to the claimant that falls short of the guideline rates. Another option would be a required form of disclosure to class members explaining where and why the claimants' expected rate of return is below guideline rates. Such disclosures would be intended to give class representatives/members sufficient information to 'shop around' and consider alternative options.

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

14. What are the advantages or drawbacks of third party funding?
    Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.
15. What are the alternatives to third party funding?
    a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?
       Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.
    b. Can other forms of litigation funding complement third party funding?
       Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.
    c. If so, when and how?
16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?
17. Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs

and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?

Insurers support the removal of the recoverability of CFA success fee in those classes of personal injury claim where it is still permitted. There isn't a persuasive case to retain it given the operation of qualified one-way cost shifting, which more than makes up for the potential to incur unrecovered costs if an action fails.

Otherwise, the operation of CFAs and DBAs in principle is effective and consideration should be given to introducing a single regulatory regime for all forms of contingency funding arrangements.

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?

Based on feedback from a few of our members, there isn't support for a public mandatory legal expense insurance scheme on the basis such a scheme would not be feasible, given the need for considerable public funding through taxation or some other levy in order to establish such a scheme versus the potential for it to be used sparingly.

If there is appetite from other stakeholders for such a scheme, then further, detailed analysis should be undertaken to determine the likely benefits against the costs (and any other impacts that such a scheme may have). That analysis should consider the characteristics of the legal system in England & Wales rather than simply look to other jurisdictions that may have successfully implemented such a scheme (where, for example, legal costs may be lower and more certain than in England and Wales).

Alternatively, there would be benefits for individuals and businesses in encouraging greater take up of legal expenses insurance of some kind, particularly if promoted alongside reform to the litigation costs system to bring greater certainty and costs reduction to litigants.

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?

After-the-event insurance is beneficial for individuals and businesses where it meets adverse costs orders.

20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?
21. Are there any reforms to portfolio that you consider necessary? If so, what are they and why?
22. Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?

Questions concerning the role that should be played by 'rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.'

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?

Any regulation of third party funding is likely to require the support and input of the court if it is going to have the intended effect. Therefore, co-regulation – whereby an independent regulator oversees the funding element and the court is granted greater case management powers to manage the litigation element – is needed.

The Civil Procedure Rules should be amended to provide courts with greater case management powers in the pre-action stages of litigation and during the course of litigation, to ensure the consumer is protected throughout the litigation process.

The Civil Procedure Rules should provide for the existence of third party funding arrangements to be disclosed as soon as they are entered into, so that other parties to the litigation are aware of these and can consider them as part of their approach to the litigation. Such changes should form part of an updated Pre-Action Protocol. The disclosure should include the key features of the funding arrangement. This is particularly important in collective or group proceedings, so that the opposing party can understand their potential exposure and have a greater opportunity to identify and challenge any apparent conflicts of interest.

Greater case management powers in the pre-action stages for claims brought by individuals or SMEs (and particularly for group litigation involving these types of claimants) could also include provision for the court to approve the funding position, ensuring fairness, before a claim is issued.

Throughout the course of litigation, the courts should be given case management powers that meet the objective of ensuring that all parties remain protected. A key area should be control over costs, specifically in relation to group litigation. There is currently a costs budgeting regime for individual claims falling within the multi-track. A similar regime could be used in group litigation, whereby parties are required to consider and estimate costs for each stage of the litigation. Whilst time-consuming, such a process would focus parties' minds on what is being spent at each stage and gives the court the ability to step in and assist. This process could be mandatory for all funded group litigation unless the court directs otherwise.

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?

Any funding arrangement should have to be disclosed to the other party or parties, so that the fullest background to the case and issues associated with it are fully understood. The court should be able to have different degrees of input depending on the risk to the claimant on the funding option used.

25. Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?
26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?

The courts have a vitally important role in controlling pre-action conduct. It is key to the effective and appropriate management of cases and should work toward the aims of reducing issued legal proceedings and facilitating dispute resolution between parties as early and cost effectively as possible. There is a case for the court taking more of an interventionist role in proceedings funded by third parties, particularly in prospective collective proceedings. This could include:

- Confirming that the parties have considered other forms of redress before proceeding to litigation.
- Approval of the funding arrangement and its appropriateness for the litigation that is presented.
- In group litigation, higher requirements on third party funders to show the court the basis for which they have determined the claimant pool to avoid inflated claims and wasted costs in defending unevidenced claims.

The courts should also have greater case management powers throughout the course of the litigation, including:

- Introduction of costs budgeting for all high value litigation, including class actions.
- Court approval of out of court settlements where TPF is being used.

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?

Yes, the existence of third party funding arrangements should be disclosed as soon as they are entered into, so that other parties to the litigation are aware of these and can consider them as part of their approach to the litigation. Such changes should form part of an updated Pre-Action Protocol. The disclosure should include the key features of the funding arrangement. This is particularly important in collective or group proceedings, so that the opposing party can understand their potential exposure and have a greater opportunity to identify and challenge any apparent conflicts of interest.

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?

Third party funders should exercise no control over litigation, but the reality may be different. The control may be indirect – for example, in group litigation claimants having little to no visibility of the progress of the litigation they are a party to and little to no decision-making powers.

However, it is reasonable for funders to require that they be informed by the funded party's legal advisors in order to decide the level of financial support to give, depending on developments in the case.

29. What effect do different funding mechanisms have on the settlement of proceedings?
30. Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?

The court approval of settlements already exists in the CAT and should be extended to other types of proceedings, namely group litigation, to provide further protection to the claimant.

By way of comparison to other jurisdictions, under the US Federal Rules of Civil Procedure, parties must obtain court approval of a class action settlement before resolving the dispute. The process affords the class members an opportunity to object or opt-out of the settlement and provides for an ability for the member to pursue their claims on an individual basis if preferred. A similar regime would act as a further protection mechanism for absent class members and would reduce the control of the funder to make decisions that may not be in the best interests of the claimant party.

This may add costs but would come with an additional safeguard for claimants to ensure that they are not disadvantaged by the settlement (in terms of the apportionment of the recovery between themselves and their funders).

There is likely to be a stronger case for court approval in group actions rather than in individual cases. Individual cases may be capable of being governed by clear rules with minimal or no need for court approval, although where a party lacks capacity then approval of the settlement in a claim subject to third party funding should be considered by the court to ensure fairness.

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?

A key consideration of the court should be the fair division of the recovery between funded and funding parties (rather than an assessment of the actual recovery achieved from the other parties to the litigation).

Other considerations could include the costs of litigation to date, projected costs going forward, and potentially the impact of the terms of the LFA.

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?

A compulsory regulatory framework, overseen by an independent regulator, is necessary to ensure that the objective of protection for claimants is met and to strike the right balance between claimants' and defendants' interests. Given the majority of third party funders currently operating in England and Wales have chosen not to be members of the ALF (and therefore have no obligation to follow its Conduct of Conduct), self-regulation is no longer fit for purpose to address the risk of harm caused to funded parties as a result of potentially poor practices by funders.

It is particularly important to ensure that claimants receive a fair return of compensation and that the terms of the LFA do not expose them to adverse costs or limited/no termination rights, without their awareness. The terms of the funding must be clear; litigants should know the degree of personal risk they are taking on.

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

There currently appear to be limited opportunities to compare funding options for the following reasons:

- There is limited information in the public domain signposting consumers to different third party funders.
- In group litigation, the organiser of the litigation may have chosen the funder before the class members are invited. If the class members are approached by multiple organisers, then there will be the opportunity to compare the terms of each provider. The individual member will have sight of the LFA to sign but may not have the opportunity to amend its terms and may not have independent advice on the impact of those terms.
- The terms and conditions are complex and with little information in the public domain that supports consumers' understanding of how third party funding operates, there is a real risk that a consumer will struggle to compare and contrast the options available.

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?

Greater visibility is needed into the relationship and agreements between the third party funder and the legal representative in order to adequately consider this question.

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.

Greater transparency of the terms of the LFA, as well as other controls discussed above and below, should mitigate the risk of conflicts arising.

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.

There is a potential risk that, with increased availability of third party funding, more claims may be litigated when they would otherwise have been better dealt with by non-litigious or pre-action access to justice, for example redress schemes or bodies such as the Financial Ombudsman Service, which is free and straightforward to use.

In the current unregulated landscape, there is a concern that the availability of third party funding and the way it's managed can encourage unmeritorious claims. Using claims under sections 90 and 90A of the Financial Services and Markets Act 2000 as an example, this law gives investors in listed companies a right to compensation for misleading statements or omissions in market announcements. In these claims, there tends to be large numbers of potential claimants approached to form the class members. These can be pooled on the basis of those members having held investments in the relevant entity at the relevant time, and the case built and costs and potential returns estimated on that basis. To adequately pursue these claims, each member needs to show that they have relied on the alleged misstatement or omission and has suffered a loss. However, the

experience of some firms is that often this distinction isn't made at the outset. This can lead to inflated claim numbers, inaccurate quantum, and can force defendants into settling due to the commerciality and risks of defending.

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.
38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?

General Issues

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

The interim report touched briefly on the potential for litigation funding to harm the national economy. The principal economic beneficiaries of funded claims, particularly collective actions, are law firms and funders. While third party funders can play an important role in civil litigation, it must also be recognised that funded claims (particularly vexatious or inflated claims encouraged by third party funding) risk harming parts of the UK economy and adding to the burden of the courts which, ultimately, will be borne by UK taxpayers. This risk may be exacerbated by other risks highlighted elsewhere in this response (for example, uncapped funder returns), and the measures suggested in this response may therefore mitigate the risk of harm.