

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:	Henrietta
Last name:	Phillips
Location:	London
Role:	Solicitor
Job title:	Head of Legal Services
Organisation:	Thompsons Solicitors
Are you responding on behalf of your organisation?	Yes
Your email address:	<div style="background-color: black; width: 200px; height: 1.2em;"></div>

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We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

INTRODUCTION - THOMPSONS

Thompsons Solicitors is the UK's largest and most experienced trade union and personal injury law firm.

We are the sole solicitors to or on the panel for most of the country's largest trade unions, acting for their members and family members in bringing personal injury claims, generally funded by collective conditional fee agreements. In addition a significant percentage of our business involves acting for injured people who are not trade union members – these claims are funded by conditional fee agreements and after-the-event insurance. As well as pursuing all types of personal injury claim we have a large clinical negligence department.

At any one time, Thompsons, as a firm, will be handling over 20,000 personal injury and clinical negligence cases in England and Wales.

We advise and act for trade unions and their members in employment law claims, judicial reviews and civil litigation, and carry out some criminal and professional regulatory work.

The firm participates regularly in government consultations on various issues relevant to our clients.

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

TPF provides a mechanism for parties to fund litigation which may not otherwise be possible to pursue. This includes expensive multi claimant claims against large, well resourced, entities (such as the Post Office) which are not backed by a trade union for example.

However as noted at 2.17 of the report only 3-5% of potential claims pitched to funders are funded so funding only secures access to justice for a very small proportion of cases. TPF is also generally only available in high value claims and not, for example, to 'ordinary' personal injury claims for individuals or small groups of injured people, where access to justice is becoming more limited (see answers below) particularly for those who are not trade union members.

In addition, although TPF may enable claims to be brought and a favourable outcome obtained, a successful outcome may not necessarily result in what most people would recognise as justice i.e. receipt of reasonable compensation - as significant sums must inevitably be paid from compensation to the funder as evidenced in the Post Office litigation referenced in the report and also the Mastercard litigation where it has been reported that from the proposed settlement of £200m the funder will receive half i.e. a return of up to £54.43m in addition to repayment of its outlay of £45.57m, with the claimants sharing about £100m (equating to perhaps £2 each) www.lawgazette.co.uk/news/mastercard-litigation-2-for-each-claimant-up-to-100m-for-funder/5122116.article.

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.

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

As above – in a limited number of cases it enables parties to fund claims which they would not otherwise be able to bring or defend. However in addition to the cost of the funding as referenced above, the concern is that the funder, whose motivation is profit for itself, has a degree of control of the litigation. This could include withdrawing funding thereby forcing settlement or discontinuance, or potentially intervening in the litigation as has been seen in the Mastercard litigation where the funder has sought to challenge the settlement agreement. Obviously the desired outcome for the funder may not align with the best outcome for the funded party.

A party funded in this way does not therefore have equality of arms with a well resourced opponent who can choose to apply their funds to achieve the best outcome in the litigation for themselves.

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

No comment

4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?² If not, what improvements could be made to it?

A significant risk is that the funder's main goal is their own financial return. This potentially puts the funder in conflict with the party and their lawyers.

The present system of self regulation only for those funders which choose to be a member of ALF (only 16 of an estimated 44 funders operating in the jurisdiction are members of the ALF) does not adequately address the risks - primarily because funders do not have to join the ALF and sign up to the Code of Conduct but also because compliance with the Code is self regulated. There is also no transparency about where litigation funders' funds come from and as a result there could be ethical concerns and/or conflict issues.

We make the point here that in personal injury claims funded by conditional fee agreements 'CFAs' there is significant protection for the litigant: The Courts and Legal Services Act 1990 and The Conditional Fee Agreements Order 2013 provide conditions that must be satisfied including information that must be provided to the litigant by the legal representative and a cap of 25% of relevant compensation on the amount that can be charged as a success fee. In addition The Solicitors Act provides a statutory process for contesting solicitors' fees.

While the claims funded by TPF are often larger and potentially more complex than that funded by a CFA alone, the actual parties to the claim may well be the same. For example a collective consumer claim is likely to involve exactly the same type of individual who it is considered should be protected in relation to a CFA for a personal injury claim - and yet there is no similar regulation or control of TPF.

² This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

Regulation of TPF was envisaged in the Access to Justice Act 1999. We believe the areas which should be controlled by compulsory regulation are those set out in the ALF voluntary code as set out at paragraph 3.9 of the report. In addition regulation should ensure that conflicts of interest are identified and there should also be an adequate complaints procedure including the potential for sanctions, fines (significantly in excess of the ALF's complaint procedure's maximum of £500) and compensation to be paid. In relation to the TFP's return on funding we also believe there should be some control such as a cap on the percentage of compensation that can be recovered from each litigant.

5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:

- a. The nature and seriousness of the risk and harm that occurs or might occur;**
- b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;³**
- 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.**

There are significant risks that funders can control the litigation by, for example, withdrawing funding or even intervening in a settlement.

The risks include the party not having control of their case, not being adequately compensated once the funder has claimed its share, and/or potentially becoming liable for litigation costs if funding is withdrawn before the claim concludes – including adverse costs if the claim has to be discontinued.

Another risk is the funder failing or not having sufficient capital to continue funding a claim meaning it has to be discontinued, again with costs consequences to the litigant and legal representative.

There are also risks related to the source of the funders' funds which could lead to ethical concerns and/or conflicts of interests.

Some but not all of these risks are only addressed by the current framework if the relevant funder is a member of the ALF. Even then it is not clear that the Code can or would be enforced.

Compulsory regulation, by an independent regulator funded by the industry in the same way as, for example, financial services and legal services are currently regulated, which would include the information to be provided to litigants, a cap on deductions from compensation, and an effective complaints procedure would reduce the risks.

³ 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.

Obviously formal regulation and complaints processes may cause funders to reassess their involvement in the legal system, however we consider this unlikely given the number of funders and the sums involved and that it is clear from the ALF that some funders at least recognise that some regulation and a Code of Conduct is required.

- 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 proceedings⁴ should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?⁵
 - c. Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?

We have answered the questions based on our experience of individual and group personal injury and similar claims brought in the UK courts. We do not have sufficient experience of other case types to comment.

While we believe protections are necessary for claims involving individual litigants, and small and medium sized businesses, who cannot otherwise fund their litigation, some of the protections we have suggested may not be necessary for sophisticated corporate litigants.

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

There should be clear rules on, for example, the information to be provided to litigants by or on behalf of funders, in relation to the charges to litigants there should be a cap on the amount of their compensation that can be charged by the funder as a return on funding, and there should be clear complaints and dispute mechanisms.

The rules should be enforced externally and there should be external accountability i.e. not self-regulation.

The independent regulation should be funded by the funders (e.g. in the way that solicitors fund the Solicitors Regulation Authority) and should be proportionate.

As mentioned above it may be appropriate for the rules to be less stringent where the litigant is a sophisticated commercial entity.

- 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?

⁴ Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.

⁵ Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

- 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?⁶
- 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?

Litigation funding does not itself affect the level of litigation costs recoverable in individual proceedings. However the cost of litigation, including lawyers' costs, expert fees and court fees have all increased significantly in recent years. Some of these costs reflect inflation but there have been other increases including a significant increase in court fees 10 years ago (for example a court issue fee for a case with a value of £200,000 was £1,315 in 2015 and is now £10,000) and an increase in the costs charged by experts. In personal injury claims the lawyers are often not paid until the end of the case which affects cashflow. Also other costs, including court fees and other disbursements, have to be paid when they are incurred which may result in the non-recoverable costs of loans or funding being incurred by the litigant. As cases become less affordable for litigants and lawyers it is more likely that TPF will be used, which then increases the risks set out in the questions above and the final costs payable by the litigant.

As this TPF becomes more prevalent it is important for the costs charged to litigants to be controlled by way of a cap or otherwise. There is no evidence that competition in the market is controlling the costs particularly given the very small number of cases which are funded.

As set out below we consider that part or all of the cost to successful litigants of funding litigation (not only through TPF) should be recoverable. In relation to personal injury and other claims, the primary purpose of tort law is to restore the claimant to the position s/he would have been in had the tort not occurred. However inevitably that is no longer the case as a significant percentage of the compensation is required to meet unrecoverable legal costs and disbursements and funding costs such as the success fee, ATE insurance premium, the costs of funding disbursements and/or the litigation funders' charges.

We believe there should be a review of the recoverability of the costs of litigation and that some or all of these charges should be recoverable from the paying party so as to ensure successful claimants are properly compensated.

- 9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.**

The risk of adverse costs are a significant consideration to any party involved in litigation and for many would be sufficient to deny access to justice. Often after-the-event 'ATE' insurance is available but the premium is usually not recoverable even if the claim succeeds and so this is another cost to the litigant. Further if a claim is funded by TPF and ATE insurance, that has the effect of adding another entity who is financially invested in the outcome (litigant,

⁶ Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

lawyer, insurer and funder). However if litigation funders were always responsible for adverse costs it may reduce the prospects of them offering funding at all and may increase the cost of providing funding.

We will comment in relation to issues in personal injury claims funded by conditional fee agreements 'CFAs' and ATE insurance specifically:

In personal injury claims ATE insurance is often taken out to cover the risk of losing the case and adverse costs being payable. Provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2013 removed the ability of a successful claimant to recover a success fee and ATE premium from the defendant. At the same time and to encourage access to justice, qualified one way costs shifting 'QOCS' was introduced to limit the claimant's liability for the defendant's costs in personal injury claims. There were some exceptions to this, including where the claimant was found to be fundamentally dishonest but also where the claimant did not beat a defendant's offer. The amount the claimant would have to pay was capped at the compensation that had or would have been awarded.

The market adjusted to this and claimants could pay for ATE insurance to cover the risks of not recovering their costs and, where QOCS did not apply, paying adverse costs if they did not beat an offer.

However as a result a significant part of the compensation for injury and for loss (calculated to put the injured party in the position as they would have been in if the tort had not occurred) is often deducted to pay the lawyer's success fee and the ATE insurance premium - and in addition the claimant may also be liable to pay 'unrecovered costs' i.e. costs the lawyer had not been able to recover from the unsuccessful party (as costs are not awarded on an indemnity basis and are, increasingly, fixed).

However in April 2023 the position changed again and CPR rule changes now provide that where adverse costs are payable by the claimant because an offer had not been beaten, those costs can be enforced both against the compensation awarded and also against the claimant's recoverable costs. This means that there is a risk that even though a claim is successful in that compensation are awarded, all of the costs and compensation could be repayable to the defendant.

The above changes are likely to affect access to justice in that risks to claimants and their lawyers are higher, the risks to be covered by ATE insurance are greater, and there may also be a reduced appetite to provide TPF given the risk of costs not being recovered. There is also a greater risk of a conflict of interest between the litigant and the litigation funder as ultimately being successful but being awarded less than the defendant's offer could mean that no compensation or costs would be recoverable.

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

If funding is withdrawn by the funder, it is likely to mean the claim cannot proceed which may then result in costs consequences.

Regulation should clarify when litigation funding agreements may be terminated and make it clear in what situations funders should remain responsible for any costs incurred up until the date of termination together with adverse costs payable as a consequence.

Litigation funders should also continue to be potentially liable for adverse costs if they have been responsible for costs being incurred i.e. by exercising control over the litigation.

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

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

We do not have sufficient experience to comment on the extent to which the courts (the civil courts and the Competition Appeals Tribunal) or the market controls pricing but in terms of the market, the pricing does not appear to be transparent or regulated making it difficult for litigants to compare options.

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?

There is a statutory cap on damages in relation to the success fee in conditional fee agreements and in damages based agreements. The position should be aligned in order to protect individual litigants (who may be part of a collective action) and avoid situations where the litigation succeeds and the lawyers and funder recover their costs and the funder also recovers significant sums as a return on funding, but with the final sums remaining to be paid to the litigants being negligible.

The position may be different for corporate litigants who may be willing to sacrifice most of the return to the funder in order to succeed on a reputational point or point of principle.

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?

A cap would be appropriate for claims involving individual claimants. The cap should be set by legislation similar to that for success fees in conditional fee agreements i.e. based on a % of compensation, with any specific exclusions or exceptions e.g. for particular case types set out clearly. We do not believe it would be desirable or practical for a regulator or court to be required to determine the cap in specific cases.

Certainty is key – for example it was reported in the Association of Personal Injury Lawyers’ UK Personal Injury Market Briefing January 2025 that 42% of people surveyed in an opinion

poll said that they would be more likely to bring a claim if the PI lawyer clearly explained how much their services would cost. Therefore although the calculation of the charges may vary depending on, for example, case type or the stage of proceedings, to ensure certainty the overall cap on the percentage of compensation to be deducted to reflect the success should not vary.

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.

The advantage is providing increased access to justice for litigants, particularly for high cost cases such as consumer claims, group litigation, and collective or representative proceedings.

A drawback to claimants is limited availability i.e. only 3-5% of cases which are submitted are funded, and it is only available for higher value cases – for that reason it would not be available to the majority of personal injury claims despite the increased litigation costs in those cases, but it does enable expensive group litigation to be brought.

Obviously another significant drawback to claimants is the cost and that the litigation funders require a significant return meaning the final compensation is limited. The litigant is likely also to have to pay an after-the-event insurance premium, assuming the funder will not be liable for adverse costs, and may also be responsible for a success fee payable to the lawyer together with a payment towards unrecovered costs. None of these costs are recoverable from the paying party – we believe reform is required to change that.

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; compensation-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.

- c. If so, when and how?**

Trade union legal funding for personal injury claims is provided to litigants by virtue of their (or their family member's) membership of the trade union and is part of the wide range of support provided by trade unions to their members. Unlike TPF almost all trade union members can benefit from this funding providing their claim has sufficient prospects of success. The claims are dealt with by specialist panel solicitors selected by the trade union. There is no charge for providing funding to the member, whether or not the claim succeeds. The trade union is not seeking to make profit by funding the claim and is acting solely in the interests of its members both in assisting the individual to recover compensation and,

particularly, in relation to employment related claims, to have an impact on health and safety practices. However as with other forms of funding, the increasing litigation costs, regulatory changes such as in relation to QOCS – see Q9 above, and the extension of fixed recoverable costs (limiting the costs which can be recovered in successful cases) all add challenges to this form of funding.

In our experience BTE insurance is not the solution that is sometimes suggested. This is a low cost legal service funded by insurers usually with limited cover available e.g. a limit of indemnity of £50,000 or £100,000 will not be sufficient for a multi-track personal injury claim (bearing in mind the increase in litigation costs discussed in Q8). We do not know the exact arrangements but there is no obvious incentive for the insurer to ensure the legal service, provided by a panel solicitor, is of good quality, unlike with trade union legal services where the trade union's purpose is to act in the best interests of its members. There is an inevitable potential conflict of interest in BTE cases in that a legal service funded by an insurer will be funding a claim being pursued against potentially the same insurer.

If BTE insurance was made compulsory it would be an additional cost to everyone, sometimes in circumstances where they already have cover through a trade union or otherwise, with no guarantee of quality of legal service or of sufficient cover.

Conditional fee agreements are a tried and tested method of funding litigation, often accompanied by after-the-event insurance in relation to any costs risk. There is legislation in place to protect litigants and to ensure they are fully informed and a cap on compensation applies to the success fee that can be charged by the lawyer.

However, given the rising costs of litigation and costs which need to be paid through the claim (see answers above), TPF may be required to complement other forms of funding, but without a mechanism to recover funding costs from the paying party this will serve to reduce the amount of compensation available to the litigant and mean that claimants – including seriously injured victims – are not put back into the position that they would have been but for the breach of duty. In particular if part of their compensation must be used to pay legal and funding charges, the victim may not then have sufficient funds remaining for suitable housing or care required.

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?

Given the cost to litigants of TPF and other disadvantages such as the funder's interest being profit and the risk of the funder seeking to control the litigation and the uncapped deductions from compensation, other forms of funding are preferable.

17. Are there any reforms to conditional fee agreements or compensation-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?

We do not believe a single regulatory regime is required or that, aside from success fees being recoverable from the losing party as mentioned in the answers to questions 8, 14 and 15 above, any reforms are required to the existing conditional fee agreement regime.

The DBA Regulations 2013 are poorly drafted and, as a result, are, in our experience, used in very few cases. The particular risks are the uncertainty about whether or not an agreement can include an element of traditional funding alongside the success based compensation element and also how the lawyer would be paid if the client terminates the agreement before the litigation has concluded. Proposals to amend the 2013 Regulations were put forward in 2019 but never put in place. We would urge that this is done to enable this form of funding to be used.

18. Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?

See our answer in relation to before-the event 'BTE' insurance above. We believe the advantages of BTE are limited.

We believe the cost of after-the-event insurance should be recoverable from the unsuccessful party. In personal injury claims, with reference to our answer to question 9 above, the position could be improved if there was full, rather than qualified, one way costs shifting i.e. reducing the risks that would need to be insured.

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 'ATE' insurance complements conditional fee agreements 'CFAs' in providing cover to the claimant for unrecovered and adverse costs. However as the ATE premium and the success fee under the CFA cannot be recovered from the losing party this results in a reduction in the claimant's compensation. If TPF is involved as well, there will be an additional charge for that.

An injured claimant's compensation is calculated to put them back in the position they would have been but for the defendant's breach of duty including past and future losses including lost earnings, the cost of care etc. They should be able to recover the majority of the legal and funding costs of bringing the claim so that they keep a larger proportion of their compensation. Please see our answers to questions 8, 14, and 15.

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

No comment

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

No comment

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?

No comment

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?**

No comment

- 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?**

No comment

- 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?**

No comment

- 26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?**

The court’s control of litigation should be the same as with all litigation i.e. the court should manage the litigation and costs to ensure that costs are proportionate and also that neither party is conducting the case in a way which will exhaust the other party’s funds.

- 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?**

We understand that this question relates in part to the question of security for costs and CPR 25.1.

In personal injury claims where QOCS applies and there is limited exposure to pay adverse costs it is rare that applications for security for costs are made. In personal injury claims the current situation should be maintained i.e the existence of funding should only be disclosed if some or all of the funding costs will be recoverable, so as to enable the other party to understand their potential exposure.

The risk of requiring disclosure of the details of funding in any case is that such information may enable a wealthy party to conduct the litigation (or indeed, avoid engaging in settlement discussions) such that the other party’s resources are depleted. While the court should control the costs at least to a degree, it cannot force either party to settle.

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?

We do not have direct experience of this but the funders' application to intervene in the Mastercard settlement illustrates what may happen. Generally speaking the funder may have a different interest than the litigant in that their aim is to maximise their return so they may exert financial pressure to force a settlement (or, as in the Mastercard case, to prevent a settlement).

The litigant should be able to make decisions in the litigation without the lawyer or ATE insurer or any other interested party exercising control in their own interest.

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

As mentioned above TPFs' primary motivation is profit and this may therefore affect their behaviour.

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?

This does not seem practical particularly with the current pressures on the court system – and this would inevitably lead to the finality of litigation being delayed. The regulation of funding and complaints mechanisms should provide the necessary oversight.

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?

n/a

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?

Solicitors are subject to strict regulation and there are sufficient mechanisms for clients to challenge their actions. However there should be regulation of the third party funding market.

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

Based on the information publicly available we suspect comparison is difficult because of the lack of information available from third party funders about the costs and conditions of funding.

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?

As above – often the funder will not have the same interest as the litigant.

The same point could be made about legal representatives but there are already sufficient safeguards in place including, for example, conditional fee agreement regulations and the Solicitors Regulation Authority Principles which include the duty to act in the best interest of the client.

- 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.**

There should be regulation to ensure conflicts of interest are identified and addressed.

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.**

Litigation funding enables individuals or businesses to litigate claims sometimes in circumstances when they would not otherwise be able to do so.

TPF is provided in order to generate profit and therefore it seems unlikely that funders would agree to fund vexatious litigation or litigation without merit. Equally lawyers are unlikely to offer to act under a conditional fee agreement in such cases as they will not be paid if there is not a win. Trade unions only support claims with sufficient merit.

Litigation costs are rising generally (see above) and group litigation and collective/representative claims in particular can be very expensive, with the necessity for the legal costs and disbursements to be funded through the claim, and therefore TPF do enable and encourage such claims to be brought in circumstances where otherwise it may not be possible to do so.

- 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.**

See above.

- 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?**

The Solicitors Regulation Authority Principles require solicitors to give clients information about the (funding) options available to them. Regulation of third party funding should include regulation of the information to be made available to litigants and also to the public generally by the funders.

General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?⁷

We urge that there is a review of Section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 under which success fees in conditional fee agreements and after-the-event insurance premiums ceased to be recoverable in most litigation.

Lawyers are required to take the risk of not being paid if a claim does not succeed and are therefore able to recover a success fee in successful cases to reflect that risk; in addition after-the-event insurance is required, as is a means of funding legal costs and disbursements through the claim. However the litigant is not able to recover these costs from the unsuccessful party and, with the extension of fixed costs reducing the legal costs that can be recovered, they are also having to pay unrecovered costs to their lawyers.

Personal injury litigants are not awarded a penny more than that it is deemed they require to compensate them for their injuries and past and future losses, but are actually receiving significantly less than that once the legal/funding costs have been deducted. We argue that reform is necessary to correct the situation and to ensure adequate compensation is received by victims.

⁷ Please note that the Working Party is not considering civil legal aid.