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:	James
Last name:	Brady-Banzet
Location:	London
Role:	Lawyer
Job title:	Partner
Organisation:	Cleary Gottlieb Steen & Hamilton LLP
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:

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Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

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

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]

   To a limited extent. Litigation funding has proved useful in a small number of cases where it has enabled victims of serious wrongdoing to pursue legal proceedings. The most high-profile example is the Sub-Postmasters case, which is widely touted by the litigation funding industry as an example of the benefits of litigation funding.

   However, it has been widely reported that the original settlement was forced on the claimants by the risk of the funder withdrawing its support, and various compensation schemes have been implemented because the original settlement terms became recognised as inadequate.

   In our experience, litigation funding is more often used to support speculative and weak cases, or cases that simply should never have been brought. This is particularly the case in group and collective action litigation, where there has been a staggering growth in claims seeking very small amounts of damages for very large group or class members. One example is the wave of data breach claims targeting technology companies, including Lloyd v Google, where the Supreme Court held that a representative claim for a group estimated at 4 million people should not proceed including because there was no basis to allege losses on a groupwide basis: "*if no individual circumstances are taken into account, the facts alleged are insufficient to establish that any individual member of the represented class is entitled to damages*" (*Lloyd v Google* [2021] UKSC 50 at [147]). Funding of speculative and weak litigation is not a means of promoting effective access to justice.

   We suggest in the responses that follow that the litigation funding market requires urgent reform and regulation so that it can function to promote effective access to justice and not abusive, unnecessary or wasteful litigation.

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

   In our experience, third party funding often results in the funded party being far better armed than the non-funded party. There is a misconception that large corporates have unlimited resources to dedicate to litigation. In fact, large corporates operate with limited legal budgets, and exercise diligent costs control over their outside counsel. Litigation and litigation tactics are subject to cost-benefit analysis and careful oversight, usually by skilled in-house lawyers who have good visibility of the market cost of legal services.

   By contrast, funded parties have no incentive to manage and limit litigation costs. Rather, the funded party is litigating at someone else's expense and will take every available point – good or bad. Oftentimes this is calculated to attack the resources of the non-funded party, and to make litigation as burdensome and expensive as possible in the hope of forcing a settlement.

[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.

This is a consequence of several features of the litigation funding landscape:

- Funder returns are correlated to the amount of capital they deploy. So funders, seeking returns that are based on a multiple of their initial investment, are incentivised to deploy the funds they have allocated to the case.
- Claims are often originated by funders and/or other professionals looking to be involved in the proceedings. In the case of *Riefa Class Representative Limited v Apple Inc. & Others* for example, the claim originated from an approach by economist Dr Chris Pike of Fideres Partners LLP to the law firm Hausfeld & Co., further to which Hausfeld arranged funding for the claim and subsequently identified the proposed class representative (who the CAT ultimately found exercised inadequate control in protecting the interests of class members).There is no meaningful day-to-day oversight of the funded party's expenditure. The funded party is indifferent as they are not litigating with their own funds, the funder will exercise general oversight tied to case milestones, but does not (or should not) oversee the day-to-day decision making, and the lawyers are not constrained by "*the traditional downward pressure imposed by a client on their lawyers is lacking in the overall funding model*" (Pan-NOx Emissions Litigations [2024] EWHC 1728 (KB) at [36]). In that case, various claimant firms (largely backed by litigation funders) presented costs budgets of almost £400 million for around two years' work. The court estimated that this would cover the first one third of the litigation and made critical comments about the claimant firms' approach to incurring costs.
- Litigation funding is not restricted to the funding of legal costs. Litigation funding arrangements will often come with PR and media budgets, and a funded party may pursue a strategy of attempting to inflict reputational damage on the opposing party in the hope of forcing a settlement. This is often driven by an erroneous perception that corporate defendants will settle claims that they consider unjustified in order to avoid the hassle of dealing with the claim. In our experience this is not how sophisticated corporates behave.
- The costs budgeting regime does not provide any protection against excessive expenditure by a funded party. While it regulates what is recoverable inter partes, it does not regulate the solicitor-client relationship. Particularly in group actions and collective actions, there is no realistic prospect of a group member seeking a detailed assessment of the funded party's costs. Thus, even in cases where costs budgeting is applied (which should be a requirement in all group or collective litigation), there is insufficient disincentive to prevent the funded party deploying vast resources in the pursuit of their case.

These issues have serious consequences on the conduct of litigation, on defendants and on public resources:

- Settlement becomes extremely challenging, because funders are expecting multiples of their investment as a return, typically before any funds are paid to the claimant. This is compounded by the involvement of other parties seeking success fees, usually ATE insurers, own side's costs insurers, and solicitors and barristers on success fees. This can result in settlement becoming impossible, because the true value of the case is swamped by the funder's demands. We have seen this dynamic in cases, where claimants have been forced to take unrealistic settlement positions because there are too many pockets to fill.
- The lack of oversight and cost-benefit analysis causes litigation to become more aggressive and confrontational. Often, the cooperation that may exist in privately funded cases is considerably more difficult to foster where litigation funding is being

deployed because litigation funding is often accompanied by associated aggressive litigation tactics that undermine that cooperation.

- Funded cases will often place a greater strain on the court's resources because the lack of cost-benefit analysis and the tactics deployed by funded parties tends to encourage a higher volume of hearings and applications. For example, the Pan NOx Emissions Litigation generated 14 judgments involving at least 18 days of court time, plus one trial of a substantive issue, in 2024 alone. The court has responded in that case by asking the parties to fund additional administrative support to address the burden that the litigation has imposed on the court.

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

No.

We are aware that litigation funders have, in the past, suggested that the fact that a claim attracts funding assists defendants in recognising that the claim has merit. We do not agree with that. In our experience, funders are prepared to back weak and speculative litigation, especially against large corporates who are thought to be willing to settle for reputational reasons. Often in these cases, it should be apparent at an early stage that the claim is likely to fail. Examples include cases such as The ECU Group v HSBC [2021] EWHC 2875 (Comm), where a funded claim against a bank was dismissed with indemnity costs awarded against the claimant. That was a case where there was an obvious limitation defence, which should have been apparent to any funder or any lawyer advising a funder.

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?

No. There is virtually no current regulatory framework surrounding third party funding.

The only existing frameworks are: (i) case law governing the liabilities of litigation funders and especially their liability for adverse costs, and (ii) the Association of Litigation Funders Code of Conduct.

Existing framework: case law

The policy that underpins existing case law is broadly appropriate in relation to the liability of litigation funders for adverse costs. A funder should be required to follow the fortunes of the funded party, and indemnify the other party in full if costs orders are made against the funded party. However, funders routinely seek to avoid liability, and attempt to structure investments in a way that facilitates them doing so. The nature of case law based regulation is that it develops incrementally, and offers opportunities for funders to attempt to manoeuvre around the principles.

This should be addressed by legislation that imposing joint and several liability on those who directly or indirectly fund litigation.

Legislation should be astute to litigation funders seeking to structure their activities to avoid such liabilities. For example:

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

- In *The ECU Group v HSBC* [2022] EWHC 1616 (Comm), the claimant was unable to meet an adverse costs order of $11 million, and the successful defendant claimed the shortfall from the funder. The funder had agreed in the litigation funding agreement to pay costs incurred before the date of the litigation funding agreement, and then argued that it should not be liable for adverse costs incurred before the date of the agreement. This argument was rejected by the High Court, but it illustrates an attempt by the funder to limit its liabilities through the structuring of its investment (here with pre-litigation funding agreement costs being funded, then the funder relying on the date of the agreement) while leaving the successful defendant unable to recover adverse costs.
- In the Pan-NOx Emissions Litigation, a hedge fund that has invested at least £450 million in a solicitors' firm has argued that it is not a litigation funder in order to avoid providing security for costs. The investment was described by the solicitors' firm itself as "*the largest litigation funder deal in legal history*" (https://pogustgoodhead.com/largest-litigation-funding-deal-in-history/). The High Court expressed scepticism about this argument: "*if the arrangement should more properly be objectively regarded as, in substance, a vehicle through which commercial lenders are seeking to fund litigation from which they take a share of the recovery, this is precisely the type of non-party against whom rule 25.14(2)(b) was intended to bite, in support of the general policy that it would be unjust for a funder who purchases a stake in an action for a commercial motive to be protected from all liability for the costs of the opposing party if the funded party fails in the action*" [2024] EWHC 695 (KB) at [54].

The very fact that litigation funders feel able to make these types of arguments demonstrates the need for legislative intervention to ensure that funders follow the fortunes of their chosen investments. There should be no ambiguity or opportunity for clever structuring to avoid these liabilities.

Existing framework: ALF Code of Conduct

The Association of Litigation Funders should not be considered to have any part of the regulatory framework. It is an industry body set up by litigation funders with a board comprised exclusively of senior employees of litigation funders. It has no enforcement powers, membership and compliance with its Code of Conduct is not required for participants in the industry and we are unaware of it ever taking any steps adverse to any of its members. It was notable that, following the recent dispute between the class representative and funder in the *Merricks v Mastercard* case regarding the settlement of the matter, both Mr Merricks and its funder (Innsworth, a member of the ALF) declined to engage with the ALF on grounds of confidentiality[3].

We are also aware of the litigation funding sector dedicating significant efforts to lobbying. We have experienced a litigation funder asking our firm to revise a Knowhow publication on the PACCAR case, though the request was not pursued when we noted to the funder that the text it objected to was a direct quote from the Supreme Court's judgment.

We believe there is an inherent conflict of interest in self-regulation that would not be tolerated in other industries.

[3] https://www.associationoflitigationfunders.com/wp-content/uploads/2025/01/Merricks-v-Mastercard-ALF-Board-Statement-January-2025.pdf

What improvements could be made?

Primary legislation should be introduced to regulate the activities of litigation funders. This should include:

- Specifying that litigation funding including indirect funding via funding of law firms. This should exclude loans provided by regulated financial institutions at interest rates associated with ordinary commercial borrowing, but it should include any kind of portfolio financing or speculative investment however it is structured;
- Capping the fees and returns that litigation funders can charge;
- Requiring disclosure of litigation funding agreements to all parties to litigation, the court and class members in group or collective proceedings. The CAT has recently echoed this sentiment, finding that there was "*no justification in withholding any of the terms of the LFA from the scrutiny of the public and in particular the potential class members*"[4]
- Imposing joint and several liability on litigation funders for adverse costs liabilities; and
- Preventing funding of costs other than legal fees, experts, barristers and court costs without court approval. Specifically, litigation funders should not be permitted to fund PR and media costs without court approval (this may be appropriate, for example, in a collective action to make balanced information about the case 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;**
   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;[5]**
   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.**

   Promotion of unmeritorious and speculative litigation: as identified above, litigation funders are prepared to fund weak and speculative litigation, especially against large corporates who are perceived as potentially likely to settle for reputational reasons. This a serious risk, and adversely impacts defendants, the courts, the reputation of the UK as a litigation forum, and the attractiveness of the UK as a business destination.

   These risks are not mitigated by the "self-regulatory framework" (which term we believe is inappropriate for the reasons given in response to question 4 above), and indeed these risks have already crystalised.

   They can be mitigated by legislation that limits the activities of litigation funders, restricts their fees, and that holds litigation funders jointly and severally liable for adverse costs. In our view, such legislation would force litigation funders to take far

[4] Christine Riefa Class Representative Limited v Apple Inc. & Others [2025] CAT 5

[5] 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.

greater care in their selection of cases and deter the funding of unmeritorious and speculative claims.

Unfair consumption of court resources: as identified above, funded cases occupy more court time than they should. This creates a risk to other court users who suffer from long lead times for hearings and lack of judicial availability. This is a moderate risk: it can be addressed either by increasing court resources, or reducing the demands of funded cases on the courts.

One option would be to impose a levy on funded cases, where a fee is charged when litigation funding arrangements are entered into, and the proceeds are used to fund the support and infrastructure required in court. Additionally, parties should pay filing fees in the CAT, as in the High Court.

Claims run for the benefit of funders: some funded claims, especially collective actions, are run largely for the benefit of the funder.

In *Merricks v Mastercard*, the funder is seeking to block an agreed settlement and has reportedly commenced arbitration against the class representative. The joint settlement application proposes that half of the £200 million settlement is "ringfenced" for members of the 44 million members of the class (£4.50 per person, although it is expected that the take-up rate will be low and that larger payments will be possible). The class representative has proposed that the remaining £100 million is paid to the funder, comprising £45 million in reimbursement of costs and a £55 million return. We understand that in the *Mark McLaren v MOL & Others* proceedings, the class representative has already incurred liabilities to the funder of over £40 million - more than it has been able to recover from defendants to date.

In the Waterside collective action about farmed Atlantic salmon which seeks from £71 million to 382 million in compensation for a class of 44 million consumers, or £1.61 to £8.68 per consumer. The claim is supported by a litigation funder.

Both of these claims involve the funder anticipating returns that are very substantial, while the class members are each anticipated to receive just a few pounds each. We do not consider that this type of litigation should be encouraged or facilitated.

In our view, claims that are originated by lawyers and funders and then packaged up for a (remunerated) class representative to figurehead are deeply unattractive and present risks to the credibility of the UK litigation system. One example is the recent Riefa v Apple case [2025] CAT 5, where the case was originated by an economist and a law firm who then found a person who was willing to act as class representative. However, the class representative did not demonstrate sufficient independence or robustness to act fairly and adequately in the interests of the class and was instead "*merely a figurehead*".

These risks have already crystallised and are not mitigated by any existing regulatory framework. They could be mitigated by requiring transparency of funding arrangements and limiting funders' fees.

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

   Yes. We do not see any meaningful distinction between different types of litigation or between litigation and English-seated arbitration.

   a. **If not, why not?**

      N/A

   b. **If so, which types of dispute and/or form of proceedings[6] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[7]**

      All types of dispute should be subject to primary legislation that regulates the activities of litigation funders. It would be a mistake to over-complicate a regulatory regime, to allow opportunities for funders to seek to structure funding arrangements to avoid regulation, or to apply such legislation inconsistently as between the CAT and the High Court

   c. **Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?**

      The only case we can see where a different approach may be required is where a law firm borrows money from a financial institution on normal commercial terms that are unrelated to and uncorrelated with the outcome of litigation. This would address the argument made in the Pan-NOx Emissions Litigation that the £450 million investment made in a solicitors' firm is "*merely the provision of working capital to a solicitors' firm, akin to a secured bank overdraft*" [2024] EWHC 695 (KB) at [54].

      This can be addressed by legislation that does not treat as litigation funding a loan by a regulated financial institution on ordinary commercial terms (including at an ordinary commercial interest rate) that is unrelated to and uncorrelated with the outcome of litigation. However, arrangements such as the one at issue in the Pan-NOx Emissions Litigation should be treated as litigation funding.

      We do not believe that there is any need to distinguish between different types of funded party. Rather, transparency and regulation across all litigation funding arrangements will bring benefits for all funded parties, the courts and other parties to litigation. There is no need, for example, to allow a sophisticated commercial party to agree higher fees with a litigation funder, because restrictions on fees benefit the courts, the reputation of the legal system and the administration of justice by avoiding situations where the funder's interests subsume those of the claimant. Indeed, we

[6] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.
[7] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

suggest that legislation should be careful to ensure that parties cannot circumvent regulation by side-agreements or additional undisclosed arrangements.

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

We suggest the following principles:

- Funders must follow the fortunes of the funded party and defendants should not be left exposed in relation to adverse costs;
- Litigation funding is a question of substance not form, and funders should not be able to structure investments to avoid regulation;
- Regulation should deter excessively aggressive litigation tactics; and
- Regulation should deter unmeritorious, speculative and weak litigation.

We do not believe self-regulation is appropriate.

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?

We do not believe the level of litigation costs has significantly affected the development of third party funding. On the contrary, it perversely incentivises funders, who are frequently paid by reference to a multiple of the funds committed.

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

Third party funding increases litigation costs by encouraging tactics and strategies that would not be adopted in a case where the funded party was meeting their own costs. There is no "downwards pressure" on the funded party where a funder is meeting the costs.

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

We do not believe the current "self-regulatory regime" (which term we consider inaccurate) impacts this relationship.

d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[8]

Legislative intervention to restrict the activities of litigation funders should reduce levels of legal costs by reducing aggressive and wasteful litigation tactics.

e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?

No.

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

i. **If so, why?**

N/A

ii. **If not, why not?**

It is unjust to assign these costs to defendants. They do not represent either losses incurred by a claimant or costs that it is reasonable and proportionate to impose on defendants. Where a litigation funder is charging a multiple of their investment (as is typically the case post-PACCAR), this would result in adverse costs risks for defendants similarly being multiplied.

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.**

Recoverability of adverse costs and security for costs are two of the only protections available to defendants against unmeritorious litigation. We do not believe that they have any impact on access to justice in commercial cases and large scale litigation.

In our view, the existing security for costs regime is inadequate for large scale group litigation and funded litigation. Where the members of the group are individuals, claimants will generally contend that they are not liable for security for costs as the conditions in CPR 25.13 are not met, and claimants are also typically reluctant to provide information on their funders to enable an application under CPR 25.14.

This should be addressed by amending the CPR to ensure that security for costs is available in group litigation irrespective of the make-up of the claimant group, and to require transparency about the existence of litigation funding and the identity of the funder.

We do not consider that the recoverability of adverse costs and security for costs has any impact on the availability of litigation funding for meritorious cases, and they provide important disincentives for the funding of unmeritorious and speculative litigation.

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

Yes. Litigation funders should be jointly and severally liable with the funded party. We note that in the case of *Le Patourel v BT*, the CAT has recently held that the funder behind that claim would (even without the unlimited indemnity it provided to the class representative in respect of adverse costs) be "*a prime candidate for a third party costs order if it became necessary, as it is the funder of the litigation*"[9].

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?**

[9] *Le Patourel v BT Group & Others* [2024] CAT 10

Other than via the limitations placed on funding returns as a percentage of damages in PACCAR, we do not believe there is any real control on pricing via the courts.

We also do not think that the litigation funding market is competitive on pricing, especially in group and collective proceedings where the claims are originated by funders and law firms. Law firms in this position have little incentive to negotiate attractive pricing terms, and cases such as *Riefa* demonstrate that class representatives are not well placed to do so. Lawyers advising on such proceedings are also conflicted as they will be on success fees.

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

Yes.

a. If so, why?

Third party funding costs are a major barrier to settlement in cases. Further, litigation funders see litigation as an extremely attractive asset class that can generate outsized returns. This has led to litigation becoming an implement for speculation and a perception that it should generate massive payouts for funders. For example, one hedge fund has described litigation funding as an "*uncorrelated alpha opportunity*" and the funder behind the Merricks v Mastercard case is attempting to block a settlement despite a proposal from the class representative that it receives a return of more than double its investment.

b. If not, why not?

N/A.

13. If a cap should be applied to a funder's return:

a. What level should it be set at and why?

The level should be set by reference to the time-weighted amount of the investment, and allow a return of no more than around 25% per annum. This is sufficiently attractive to enable funders to generate a return by investing in meritorious cases, but not so high that it would encourage litigation that primarily benefits funders.

Any cap should certainly ensure that funders are not able to seek "jackpot" payouts by taking a percentage of the recoveries in large collective or group actions. Similarly, large multiples (such as those described in paragraph 6.12 of the Consultation Paper) are inappropriate and fuel speculation on litigation rather than diligent and informed funding decisions. In our view, this type of funding arrangement has contributed to a growth in weak and speculative claims, and it also impedes settlement of claims. This is damaging to defendants who are forced to spend time and money defending such claims and to England's reputation as a dispute resolution centre.

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?

It should be set by legislation, and not by the court.

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

As above it should be set by legislation.

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?

The only relevant factor is whether the level of the cap allows well-managed and diligent funders to generate a fair and not excessive financial return.

It would not be appropriate to determine the level of the cap on a case-by-case basis as this will inevitably involve an assessment of the merits of the case and the possibility of creating perverse incentives for funders to fund less meritorious cases if the greater risk translates to greater reward.

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

Not in commercial litigation or large scale group and collective actions.

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

14. What are the advantages or drawbacks of third party funding?
Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

For claimants, the advantage of litigation funding is that it may enable a claim to be brought that otherwise could not or would not be brought. The drawbacks are: (i) it is a very expensive product, and the funder is likely to take a significant portion of any recoveries, (ii) it makes settlement much more difficult and may lock the claimant into a longer and more aggressive litigation than would otherwise be the case, and (iii) it risks claimants having unrealistic expectations about their case because of the perception of validation from a third party.

For defendants, litigation funding does not have any advantages. Rather, it encourages claims to be brought including weak and speculative claims. It increases legal costs by promoting aggressive litigation tactics. It also impedes the settlement of litigation because the funder will expect a return from any settlement.

In consumer claims, group litigation and collective proceedings, litigation funding allows claims to be brought that would be unlikely to be brought on an individual basis. However, this should not be perceived as having no downsides. Litigation funding has supported a growth in weak, speculative and low-value claims that are originated by funders, lawyers and economists, and that serve no real consumer protection function. One possibility here would be to limit group and collective proceedings to claims seeking to recover for material per-class member losses, and limit them to opt-in actions only.

In commercial claims, litigation funding allows claims to be brought by claimants who would otherwise lack the financial capability to pursue a claim. Provided claims are funded

responsibly, and funder returns are not excessive, commercial cases are a reasonable use case for litigation funding. However, defendants should not be exposed to the risk of costs orders being unpaid by the funded party and the funder. As identified above, there are currently opportunities for funders to seek to structure investments to avoid costs liabilities. While these attempts have so far have been unsuccessful, they remain a risk for defendants.

For the legal profession, litigation funding has created new business by generating cases that would not otherwise be brought. However, this comes with substantial downsides, particularly on the claimant side. Because funded cases are often originated by lawyers and funders, and lawyers are often working on a contingency fee or CFA, there is an inherent conflict of interest where lawyers have a vested interest in the outcome of the case. We do not consider that this is effectively mitigated by funders removing themselves from the day-to-day conduct of the case. This conflict impedes effective settlements, and also fosters aggressive litigation tactics. This could be addressed by limiting lawyers' financial exposure to the outcome of the case.

For the civil courts (including the Competition Appeal Tribunal), the litigation funded backed growth in group litigation in particular has imposed a significant burden. The current court estate is unable to accommodate hearings in large multi-party group litigations as court rooms are not large enough to accommodate the parties, and the court's remote screening service is poor. As an example, in the NOx Emissions Litigation, solicitors representing parties to the case have been asked to leave court due to insufficient space. These types of cases also place a heavy burden on court staff and require a large amount of judicial attention.

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.

For claimants, paying privately and CFA/DBA[10] arrangements are the most common alternatives. Claimants may also have ATE insurance to mitigate costs exposure. In some areas, claimants may also have insurance coverage that meets their ongoing legal costs.

In our practice, defendants tend to either pay privately or have the benefit of insurance coverage. The main benefits are that these arrangements create downwards pressure on legal expenditure, and tend to result in litigation being carefully managed and responsibly conducted. Occasionally, defendants will agree success fees, though these tend to be modest compared with claimant-side success arrangements.

In commercial practice, these options are consistent across different types of litigation.

We see few drawbacks with private payment and insurance funded types of arrangements, and they tend to be workable options for corporate litigants.

[10] DBAs are not available in opt-out collective proceedings.

There are drawbacks associated with arrangements where lawyers are heavily exposed to the outcome of the case. These arrangements tend to incentivise aggressive litigation tactics, ancillary strategies like PR campaigns, and unrealistic approaches to settlement.

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

Yes, we believe that all of these options provide alternatives to litigation funding. Other alternatives include ATE insurance and own side's costs insurance, both of which allow litigants to defray some of their risk.

c. If so, when and how?

These are options that are available in many cases.

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?

We consider that insurance based solutions may offer a suitable balance between the interests of claimants in being able to pursue meritorious litigation, and the interests of defendants and the court system in deterring weak and speculative claims. This is because insurers will generally manage expenditure in a commercial way and will not allow the insured to incur unnecessary costs at the insurer's expense.

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?

In our experience, the market for legal services on CFA and DBA terms is not sufficiently competitive. There is little competition on price, and many claimant law firms will seek the maximum possible uplift on a CFA and the highest possible share of recoveries on a DBA. Hourly rates are included in CFAs and DBAs solely for the purpose of claiming costs from the defendant, but these costs are entirely notional because no claimant will ever pay them.

We would support reforms that limit success fees under CFAs and DBAs and that promote greater competition between claimant firms. In the group litigation sector in particular, there are often multiple firms seeking claimants but this does not appear to translate into downwards pressure on pricing.

CFAs also expose defendants to risks in recovering adverse costs. Law firms are not currently treated as funders if they are acting on a CFA, security for costs is not available if the claimant is an individual resident in the jurisdiction and it will often be unrealistic for a defendant to pursue thousands of individual group members for individually small amounts. Yet, in a CFA arrangement, we consider that the law firm is clearly funding the case by making its resources available without upfront payment and by funding disbursements.

We would support a single regulatory regime that treats CFAs and DBAs as a single unit. We suggest that this should aim to:

- Promote price competition;
- Protect defendants from the risk of being unable to collect adverse costs by either requiring ATE insurance where a contingent arrangement is entered into, or making the law firm directly liable for adverse costs; and
- Limit recoverable costs under contingent arrangements to some objectively fair measure rather than link them to notional hourly rates included in the retainer that claimants do not actually pay.

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?

We do not think mandatory insurance for legal expenses should be considered. However, insurers could be encouraged to develop and promote such products, and consumers could be made more aware of what coverage they may already have.

We do think that some forms of mandatory ATE could be appropriate to protect defendants.

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?

ATE is usually entered into where there is litigation funding or a CFA, but not always and it is not required by the CPR in some obvious use cases. For example, in a group litigation, there is no formal requirement for ATE insurance to be in place.

We consider that in commercial matters, ATE insurance or equivalent costs protection should be compulsory in any funded case. For these purposes, a funded case would include any case where the claimant is not privately funding the legal costs.

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

We do not see significant numbers of crowdfunded cases.

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

We consider that it should be made clear that portfolio funding is litigation funding, and that all rules and regulations applicable to litigation funding apply whether the case is funded directly or indirectly. We do not believe that there should be opportunities for funders to structure their investments to avoid regulation.

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?

We believe that the existing options, including appropriately regulated and controlled litigation funding, are appropriate.

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?

We believe that changes to the CPR and CAT Rules to regulate the involvement of litigation funders in litigation are necessary. In our view, there should be obligations to disclose the use of litigation funding and the terms of the funding at an early stage.

Rules could also regulate the involvement of litigation funders in litigation. For example, the role of litigation funders in settlement, their access to information, and other topics could be considered. We consider that it would be helpful to ensure that litigation funders have the right to receive information and to attend settlement discussions, and that all confidentiality restrictions applicable to the parties apply to the litigation funder. This is because the litigation funder is a major stakeholder in the case, and should have sufficient information to make decisions about issues such as whether to continue funding.

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?

We do not significant amounts of these types of funding in our practice and therefore express no opinion.

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?

We agree with the issues identified by Nugee J in *Rowe* and consider that defendants should be properly protected in respect of legal costs, as addressed elsewhere in these responses. We do not consider that ALF "self-regulation" is an effective means of regulation.

We do support imposing capital requirements on funders, but this should be by legislation. For example, the ALF Code of Conduct provides that a funder should maintain access to a minimum of £5 million of capital. This is obviously insufficient in the context of the adverse costs risks faced by funders. Further, funders tend to organise their investments through special purpose vehicles that do not have access to the full capital resources of the funder.

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?

Other than in respect of requiring information to be provided and enforcing any regulatory and legislative obligations that are imposed, we do not think the court needs to have any particular additional role beyond the usual contacts with the court at CMCs, PTRs, applications, and in other case management contexts that may be appropriate in any particular case.

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?**

The existence of funding arrangements and the terms of the funding should be disclosed to both the court and the funded party's opponents.

This should improve transparency in litigation by ensuring that all stakeholders are visible to the court and all parties. In turn, this should promote settlement by ensuring that decisions can be made at appropriate stages about settlement in full knowledge of the financial interests at play. Claimants may also consider that disclosing the existence of funding will demonstrate the merits of their case.

We are aware that claimants and funders sometimes argue that the cost of funding is privileged as it may tend to reveal legal advice on the merits. We do not accept that. We consider that the cost of litigation funding is essentially a commercial negotiation. Regulation should make clear that pricing must be disclosed and is not privileged. It would not generally be necessary to require disclosure of documents about how the price was negotiated save where appropriate to assess the suitability of a proposed class representative in a CPO.

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?**

In our experience, litigation funders can exercise control over litigation because they hold the purse-strings. This enables them to permit or reject major strategic decisions.

Moreover, there have been claims (such as the £319 million claim in *Smith v British Airways plc and others* [2024] EWHC 2173 (KB)), in which the court has found the funder to be the "*dominus litis*, i.e. the person who was really running the litigation". Indeed, in this case, it was eventually revealed (over a year after proceedings were issued) that the representative claimant (a self-styled "consumer champion") was in fact closely connected with the funder, being his former yoga instructor and currently running his family office in London.

We believe that is appropriate and that it is also appropriate for litigation funders (subject to confidentiality restrictions) to have access to information about the case to assist them in making decisions. This may enable funders to exert "downwards pressure" on the legal costs of funded parties.

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

In our experience, litigation funding makes settlement more challenging. This is because of the litigation funder's expectation for a return. This becomes more challenging as the case proceeds, as funders' expectations increase with time and expenditure.

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?

Only in cases where there is a significant risk that the claimants are settling on poor terms because of pressure from a funder or legal advice that is not solely concerned with the claimants' interests. This could be the case in group proceedings, representative proceedings or collective proceedings. If funders' returns were limited by legislation as suggested in this response, we believe the risks of the court having to intervene at this stage would be significantly reduced.

The CAT currently has a supervisory role in respect of collective settlements and in determining how proceeds are to be distributed at the end of the proceedings. The CAT considers this an important safeguard that minimises the potential conflict between the interests of the funder and the interests of the class (see for example, *Gutmann v Apple Inc. and others* [2024] CAT 18). We suggest that legislation limiting the returns of funder would be a more transparent, timely and effective way of addressing this conflict.

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?

The court should consider whether the settlement represents a fair and reasonable outcome for the parties, without reference to the interests of the funder. This should take into account the fact that parties in commercial cases will be in receipt of sophisticated legal advice. It may be advisable to require lawyers to certify to the court that they have reached the view that the settlement is reasonable for their client, and they have advised their client accordingly.

The CAT seems to tolerate high returns for funders on the basis that generous returns on "winners" finance a funder's "losing" bets. We have not seen material evidence of the CAT seriously examining whether a funder's returns are reasonable beyond that general observation about funders investing in a portfolio of cases.

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?

The SRA and BSB should be alive to the risks caused by litigation funding, but we do not think specific further provisions are required.

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

In group and collective proceedings, the funder is often involved in the origination of the case. This means that there is little competition, as the funder is often involved in the case before the representative party (in a collective proceeding, such as *Riefa* for example) or the claimant has no option (such as a portfolio funding arrangement in a group action). Indeed, the CAT made clear in *Riefa* that it was not seeking to impose specific obligations on future proposed class representatives as to the manner in which funding arrangements are negotiated, but was only mindful that the manner in which a class representative

approaches the funding arrangements must give sufficient regard to the interests of the class members.

There may be greater competition in unitary cases.

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?

There is a significant risk of a conflict of interest. Lawyers may be dependent on the funder for much of their business, and in such circumstances the lawyer may be at risk of putting the interests of the funder above the interests of the claimant. This is particularly true in cases such as collective proceedings and group proceedings, where cases are largely run by lawyers.

35. **Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.**

Yes. It would be appropriate to consider requiring disclosure about the funder/lawyer relationship to the funded party and the court. This could include disclosure of other cases within the prior 5 years where the funder or its affiliates have funded the same law firm or lawyer.

The ALF Code of Conduct obligation to ensure that the funded party obtains independent advice has proved to be insufficient, as demonstrated by the *Riefa* case where the proposed class representative had apparently taken such advice. This type of obligation risks being a box-ticking requirement. If it is to be maintained, at a minimum independent legal advice should come from a law firm with no relationship with the funder or any other party involved in the claim, and the proposed class representative should be fully advised on their personal responsibilities and duties and the conflicts of interest that may arise.

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?

We consider that litigation funding is helpful in allowing meritorious claims to be brought where the claimant is not otherwise in a position to litigate the claim.

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?

Yes, we believe that litigation funding has encouraged an array of vexatious and unmeritorious claims. We have seen several such claims in our practice, and indeed there are a number of notorious cases supported by litigation funders that have turned out to be unmeritorious at trial.

We are sceptical of claims from funders that only a small number of cases pitched to them are funded. We believe that this may reflect the fact that some cases are "shopped around" and only one funder eventually concludes a funding agreement, with

the others counting it as a case that they did not fund. A better metric would be an assessment of the number of cases that seek third party funding but are unable to attract it at all, but we are not aware of any way of measuring this.

It is not, in our experience, correct that funders only take on claims with a reasonable prospect of success and we respectfully disagree with Professor Mulheron's analysis referenced at 2.17 of the Consultation Paper. Indeed we believe that litigation funders have substantial amounts of capital to deploy and are under pressure to find cases to invest in, and that factors like whether the defendant is judged to be likely to settle are at least as important as the merits of the case.

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.
Yes. Almost all of the group litigation, collective actions and representative actions in which we have been involved have used litigation funding. We believe that these types of claims are almost entirely dependent on litigation funding.

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.**

Please refer to our response to question 5.

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

We do not think further steps are necessary. Lawyers will already advise their clients on potential funding options.

General Issues

39. **Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?**[11]

No.

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