

Litigation Funding Consultation Questions

Your response is (public/anonymous/confidential):	Public
First name:	James
Last name:	Morgan
Location:	Bristol UK
Role:	Management of the underwriting of After the Event Legal Expenses Insurance, operational and technical
Job title:	Head of ATE Underwriting
Organisation:	ARAG UK
Are you responding on behalf of your organisation?	Yes
Your email address:	[REDACTED]

ARAG UK are a Legal Expenses Insurer providing Before The Event and After The Event Legal Expenses Insurance (LEI) to a wide range of customers. ARAG entered the UK market in 2006 with a vision to follow the principle expressed by ARAG's founder Heinrich Faßbender in 1935 "To enable everybody, not just those who can afford it, to assert their legal rights. We remain committed to equal opportunities for all."

Following the acquisition of DAS Legal Expenses UK by our parent company ARAG SE, headquartered in Germany, ARAG UK has grown to writing in excess of 10m LEI policies per annum.

ARAG UK's After The Event (ATE) LEI business is focused on claimants in Clinical Negligence and Personal Injury matters. Most of our policyholders are individuals which meet the FCA's definition of a consumer. Our responses below are with a particular focus on these customers and how to ensure continued access to justice for them.

The interim report of the CJC's Review of Litigation funding defines Third party litigation funding (TPF) as "*one way in which parties to proceedings can pay for the cost they are liable to incur. It specifically involves funds being advanced by organisations (third party funders) either directly or indirectly to litigants on the basis that, if the funded party's claim is successful, they will repay the funds advanced plus a specified additional amount.*" LEI is considered in the report as an alternative to TPF but does meet some of the criteria of the above definition. As such, we have answered the questions below considering LEI as an alternative to TPF.

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?

Third party funding in the broadest sense is fundamental to access to justice. Many claimants, particularly those with Personal Injury (PI) or Clinical Negligence claims (CN), are impecunious or of limited means, whilst having limited or no access to Legal Aid. These claimants are unable to afford legal representation or bear the cost of the disbursements required in such claims.

The same applies for many non-injury claims pursued by private individuals, such as professional negligence, claims against landlords in respect of housing disrepair or financial mis-selling.

In the areas mentioned above CFAs/DBAs and Legal Expenses Insurance (LEI) are prevalent as a method of funding for claimants. It is important to note the practical links between CFAs/DBAs and After the Event (ATE) LEI. Whilst a CFA/DBA will provide for the claimant solicitor's costs, an ATE policy is required to cover the defendants' costs, where they become payable by the claimant. Either due to an unsuccessful outcome, or the claimant's failure to beat an earlier Part 36 offer. An ATE policy will also cover the claimant's disbursements where they are not recoverable from the defendant in the same circumstances.

Legal Expenses Insurance (LEI), whether BTE or ATE, allows claimants to pursue meritorious claims, with BTE LEI covering both disbursements and own sides costs. ATE LEI provides access to justice by covering disbursements, whilst own sides costs are dealt with by way of a CFA/DBA (a CFA/DBA is generally a requirement for ATE LEI to be purchased for PI/CN matters). Since the introduction of QOCS as part of LASPOA 2012 a claimant's liability for adverse costs in PI and CN matters has been reduced, with an impact on the cost of LEI insurance. ATE LEI Premiums for PI and CN matters are fully deferred and contingent on success, making for an effective method of risk transfer for impecunious claimants or those of limited means. In addition, the removal of ATE premium recovery from defendants (or limited recover in respect of CN matters) as part of LASPOA 2012, requires the cost of ATE LEI to be proportionate (to damages received) and affordable to claimants. The cost of ATE insurance is also regulated by competition within the ATE LEI market.

Alongside the protection against liabilities for disbursements and adverse costs provided by ATE LEI, providers of ATE LEI have also developed products that allow for the payment of disbursements as they are incurred by their insured, rather than at the conclusion of the claim. This further reduces the financial burden on claimants and/or their solicitor during the life of a claim and increases access to justice.

Both forms of LEI are an essential part of ensuring access to justice as an alternative to TPF.

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

Financial means is a key inequality in litigation. TPF allows those without access to significant funds to retain equally skilled legal representation as their opponents. In respect of PI and CN claims, the required instruction of medical experts is expensive and unaffordable for most claimants. TPF allows claimants to not only instruct these experts but also ensure they are of the highest quality, regardless of cost - in line with the instruction of experts by their opponents.

Despite the limitations on adverse costs liabilities for claimants in PI and CN claims (QOCS) without TPF that also provides the protection against these liabilities, claimants would be unable to afford the risk of challenging P36 offers made by defendants. This would result in increased under-settlement of claims. Defendants do not have such limitations, creating an inequality in settlement negotiations.

In respect of minors, parties lacking capacity and/or any party requiring a litigation friend, the protections regularly provided by LEI (both ATE and BTE) as an alternative to TPF, are of vital

importance for litigation friends who may find themselves with liabilities whilst not being a beneficiary of the litigation.

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

As an alternative to TPF, prospects clauses within LEI (ATE and BTE) policy wordings ensure the cases they support are with merit and function as a form of self-regulation to protect the reputation of the industry and the legal profession. In addition the stakeholders within an insurance company require target performance to be met, which would be at risk were un-meritorious claims regularly supported.

The ability for TPF and alternatives to reduce the immediate impact on solicitor's cashflow, by funding the cost of disbursements creates stability in the market. Attention should be paid to the impact on a solicitor's balance sheet however. Where TPF creates additional liabilities for the solicitor, the risk of insolvency is increased.

In general terms, TPF and alternatives which allow solicitors to pursue the claims of those without the means to fund them is a necessity for access to justice. Recent examples, such as the claims of sub-postmasters against the Post Office and those of military personnel who have suffered noise induced hearing loss, could not have been pursued without both funding and protection against adverse costs.

As well as consumers without the means to fund their own claims, insolvency practitioners are also without the means to fund litigation, or cover potential adverse costs liabilities, as such they have a similar need for funding and protection, from TPF or alternatives such as ATE LEI.

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

The lack of regulation of TPF is disproportionate in comparison to the regulation of alternatives such as LEI. Measures in place to safe-guard consumers when purchasing and utilising insurance products offer peace of mind and valuable protection should an insurer fail. Regulation of TPF should follow a similar outcome based approach, particularly for unsophisticated parties (e.g. FCA Consumer Duty) and seek to protect consumers from harm caused by the behaviour of linked parties such as their solicitors as well as the funder. For example, the requirement of insurance cover for capital/interest to limit liabilities for claimants in unsuccessful cases or where their solicitor has ceased practicing. Collaboration between insolvency practitioners, the SRA and other involved parties would limit the impact on consumers following a solicitor being put into administration for example. How a TPF reacts to such a situation should be regulated to protect consumers.

TPF is currently has a voluntary scheme of self-regulation. The Code of Conduct is limited in scope. These limitations and the fact the market has expanded considerably, suggests it is time it was regulated formally to protect claimants. This should include the level of deductions from damages and restricting the practice of funders taking over litigation or having undue influence of the instructions to their solicitors made by the claimants. By comparison, solicitors and insurers are both regulated with a focus on acting in the best interest of their client or to deliver good outcomes for retail customers respectively. TPF in comparison is not, creating a disparity and should be regulated in a compulsory manner, whether by statute or otherwise.

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;

- i) Funding of emerging or highly speculative claims can encourage solicitors to seek claimants in these areas where otherwise they would not look to practice in these areas. This can lead to unrealistic expectations for claimants and unsustainable growth of law firms with a higher risk of insolvency.
- ii) The risks of packaged arrangements of marketing leads, funding and ATE LEI are not often fully understood by claimants who are enticed by “no-win no-fee” marketing to believe their claim is with no risk to themselves. The impact of their solicitor or ATE insurer ceasing to trade, or the conditions of their ATE insurance not being met may not be explained properly by their solicitor. There are also conflicts of interest when the marketing company and funder take no risk, removing an incentive to properly advise claimants or ATE insurers of the merits and potential adverse performance of the claim type.
- iii) TPF which also provides the same protection as ATE insurance (adverse costs cover and/or cover for disbursements incurred), does so without the same regulation under which an insurer must operate. Potentially the risks and harms of “quasi-insurance” product providing the risk transfer of an ATE LEI product, without the same level of regulation, occur in this situation.

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;

- i) Insurers following best practice will limit their exposure to new risk areas where data on potential outcomes is limited. Internal policies will dictate how much risk they can take in these areas and a similar practice would be desirable for funders and solicitors. Rating of the financial stability of a funder (in line with the rating of insurers) would help solicitors/claimants decide on how to fund their claim. Disclosure of a funder’s exposure to risk and diversification across risk types would also assist, for example by issuing a public document similar to an Own Risk and Solvency Assessment (ORSA) and ensuring all TPFs are subject to regulation in line with that of the PRA.
- ii) The relationships between the referral of a potential client, the funding offered and the ATE insurance relied upon should be explained fully by solicitors to their clients. The use of the term “no-win no-fee” should be limited to where there is adequate protection for consumers – i.e. ATE insurance from an A rated, UK/EU based provider with a proven record of paying claims. The terms of the ATE insurance and circumstances where a claim against it would be rejected should be explained.
- iii) Where TPF provides not just funding but also protection for claimants against payment of the sums funded and adverse costs, this product/service should be

subject to the same outcome based regulatory approach as comparable insurance products.

- 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.**

The above mechanisms/suggestions relate to transparency and the disclosure of information to consumers to help them make informed decisions. There are already strict rules and further guidelines on how solicitors must explain potential funding to their clients. Reinforcing these rules/guidelines and ensuring that there is alignment of the information available on various sources of funding will improve consumer knowledge. Aligning the information available about funding entities will allow for more informed decision-making, for example ensuring that the solvency of a solicitor or funder is known in the same way it is known for an insurer. Examples in the market show that consumer claimants, despite existing requirements, still do not understand all the risks of litigation and the funding of their claim.

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

- a. If not, why not?**

The same regulatory mechanism should not apply to all types of litigation. Differences already exist (CPR/Legislation) in respect of PI and CN claims (e.g. application of QOCS) and the parties involved in PI/CN litigation, and the requirements for TPF of those parties are significantly different from commercial litigation, for example consumers/private individuals compared to companies/institutions and any regulation should align with the sophistication of the claimant (or purchaser of a funding product/service).

Group Litigation, in particular within the Competition Appeal Tribunal, is significantly different to claimant PI/CN litigation and the majority of consumer law. As such, a regulatory mechanism which applies to one will not be suitable for the other.

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

See above, consumers require a focus on ensuring access to justice whilst maintaining security and protection for those claimants. Consumers should also be able to make informed decisions on how their case is funded using information provided to them by their solicitor.

- 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?

Yes, different approaches are required.

LEI (and insurance as a whole) is regulated by FCA/PRA and existing legislation with established differentiation between individual litigants, small and medium-sized businesses; sophisticated commercial litigants. The requirements of different types of funded party and their understanding of the TPF varies so different approaches would be required.

LEI is already regulated as are other alternatives to TPF, so the existing regulation of each alternative should be considered and where sufficient, relied upon.

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

The existing regulation of financial services is well established and already applies to insurers, and other financial services. There is also the Financial Ombudsman Service (FOS) which provides independent arbitration in relation to financial services. Referral to the FOS is already available for many recipients of TPF but generally restricted to consumers with individual/personal credit agreements. A similar service for non-consumers and those whose TPF arrangements would not allow for a referral to the FOS (e.g. funding arrangements not directly with the claimant, or insurance products not designated as such) would be beneficial.

The focus of regulation (self or otherwise) should be to ensure a consistent approach (in line with FCA regulation) of all sources of funding. Existing regulation/legislation should be relied upon where possible but new legislation is needed to ensure the differences in claimants (consumer/non-consumer) and types of litigation (Civil, PI/CN, CAT, Group, Commercial), and the needs of the parties involved are allowed for.

8) What is the relationship, if any, between third party funding and litigation costs?

Further in this context:

a. What impact, if any, have the level of litigation costs had on the development of third party funding?

The increasing operational costs of solicitors, the limitations on CFA success fees (LASPOA 2012) and reduced access to bank lending has increased the need for TPF generally, as solicitors' ability to self-fund the costs of litigation has decreased.

The increasing cost of disbursements in PI and CN matters has increased the demand for ATE LEI products which provides payment of disbursements as incurred (see 1 above). Solicitors have increasing demands on overdrafts or other forms of practice funding and where unable to bear the cost of disbursements incurred on behalf of their clients, ATE LEI has developed to assist.

In respect of CN particularly, with its reliance on expensive medico-legal opinion, lack of availability of other funding has increased the use of Medico-legal agencies who as well as sourcing and liaising with medico-legal experts, also provide a credit facility to assist with the funding of disbursements.

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

The use of medico-legal agencies (see above) has increased litigation costs, due to the additional fees charged by medico-legal agencies. These charges increase the cost to the paying party in successful claims, whereas had they been funded by other means, the additional cost is carried by the successful claimant (e.g. from deductions from damages).

Where TPF or alternatives provide additional prospect assessments, or further checks and balances to reduce the pursuit of unmeritorious claims, this will have a positive impact on the whole legal system, reducing costs incurred without merit. Attention should be paid to the alignment of risk in any claimant side relationships, to avoid a TPF (for example) benefiting from the pursuit of unmeritorious claims, to the detriment of others in the system.

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

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

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

i. If so, why?

In respect of ATE LEI for CN claims, the premium associated with the risk of incurring Liability and Causation medical reports is recoverable from the defendant in successful claims (see LASPOA 2012). It is accepted that incurring these is a key necessity for CN claims, hence the different treatment of ATE LEI premiums for CN claims. The cost of “funding” these costs, either by the insurer paying them as incurred, or by insuring the cost of a TPF in respect of these disbursements) should also be included as a recoverable part of the ATE LEI premium.

In more general terms, where inability to access particular costs of litigation (for example expert medical opinion) is inherently linked to access to justice, the associated litigation funding costs should be recoverable as costs in the case. (see above re: medico-legal agency fees, this is an example of where this is already happening, albeit with some current dispute over the level of fees etc – see Northampton General Hospital NHS Trust v Hoskin 2023 unreported, and similar costs disputes.)

ii. If not, why not?

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.

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

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?

In respect of ATE LEI, competition and the market have a significant impact on pricing. Where the premium for ATE LEI is not recoverable from the defendant, the price must be acceptable to the solicitor and their client, whilst remaining competitive for the product/service provided.

Where the ATE LEI premium remains recoverable from the defendant in part (CN – see LASPOA 2012) the court has control over the price by way of detailed assessment. There are significant precedents in this regard. Specifically *West v Stockport NHS Foundation Trust [2019] EWCA Civ 1220*. West confirms the recoverability of ATE LEI premiums, are not to be determined on a case-by-case basis. The reasonableness of a premium level are to be settled at a macro level by reference to the general run of cases and the macro-economics of the ATE insurance market, and assessment of the reasonableness of the premiums will require expert underwriting evidence, rather than a reliance on District and Costs Judges expertise.

In addition to the specific points above in relation to ATE LEI as an alternative to TPF, all insurance products/insurers are subject to consumer duty regulation and a requirement to provide fair value to the insured. Submissions to the FCA in relation to fair value are required which include the loss ratios being incurred by the insurer on a gross premium basis. The pricing of TPF should also be subject to this approach, to ensure fair value is provided.

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

a. If so, why?

Any amount payable by the funded party as a deduction from damages should be capped to protected from losing the majority of their damages and making the litigation more beneficial to the funder than the funded party. Payments outside of a deduction from damages, such as the element of an CN ATE LEI premium recoverable from the defendant are already regulated by the court (see above 11)

In respect of ATE LEI premiums, see earlier comments on competition/market determining acceptable premiums. It should be noted that in respect of ATE LEI premiums, these are known to the insured prior to inception of the policy and do not vary significantly depending on the progress of the litigation. Unlike, for example, a requirement of payment of interest on sums funded as a deduction from damages.

The cost of TPF to a consumer claimant should be subject to the same limitations as insurance products with a focus on fair value and good outcomes (consumer duty).

b. If not, why not?

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

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

Capping any deduction from the funded party's damages at 25% seems reasonable and is in line with other deductions (e.g. CFA Success Fees). Where the funder receives payment from other parties – for example if the costs of litigation funding are to be recoverable as a litigation

cost – this should be subject to assessment by the court if not agreed inter partes (see 8e above)

- 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?**

Any limit or cap to what can be deducted from damages in respect of TPF should be set by legislation. See above for when a funder's return is not wholly a deduction from damages.

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

Right at the start to give certainty to those funded and to ensure they are aware of the minimum amount they may receive from any settlement or award.

- 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?**

Reference/alignment to the setting of CFA success fees would be appropriate when considering a cap to deductions from damages for consumer claimants. Where a funder's return is contingent on success, the risks of the litigation should be considered. Also the expected length of the litigation should be taken into account.

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

Providing the funder's return is subject to regulation/legislation ensuring fair value then differential caps should not be needed. If no regulation or legislation exists in relation to the cost of funding/return to funders a differential cap would need to be in place to ensure fair value. In this situation, caps based on whether the return is contingent on success, the risk of an unsuccessful outcome and the expected length of litigation would be appropriate. Differential caps may be complex to determine though so preference should be given to an underlying requirement for fair value.

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.'

NOTE: The above suggests that LEI is not considered "Third Party Funding". It is important to ensure this distinction is made in any regulation/legislation if that is the intention. The linked nature of ATE LEI and CFAs/DBAs in many areas of law should also be noted. As should the potential for ATE LEI to support CFAs/DBAs in conjunction with TPF.

- 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.**

Third party funding is necessary, particularly for consumer claims (see above re: impecunious claimants or those of limited means). The provision of funding and risk transfer for potential

liabilities allows greater access to justice. However the complexity of many TPF arrangements and the financial security/stability of those providing such arrangements leave consumers at a disadvantage compared to more well established arrangements – such as CFA/DBAs in conjunction with ATE LEI from UK/EU based A rated insurers. There is still a recognised gap in how traditional CFA/DBA and ATE LEI funding serves claimants though, with their solicitors tasked with funding the cost of disbursements as incurred.

As detailed in the CJC's interim report, Portfolio Funding is becoming more common place as a method meeting the gap in funding requirement left in a CFA/DBA and ATE LEI arrangement. Alternatives such as funding of disbursements by way of a consumer credit agreements between the claimant and a third party are available but not preferred by solicitors/claimants due to the uncertainty of the amount repayable by the claimant at the conclusion of the case. In some cases the amount repayable may be completely disproportionate to the damages agreed/awarded.

Reference is made in the CJC's interim report to the collapse of SSB Law. Whilst Portfolio Funding may have had an impact, by allowing SSB to take on more claims, of lower merits expanding their business unsustainably, the greater impact for their former clients arises from the ATE LEI purchased and how limitations of the specific insurance purchased are explained to the claimant. The handling of such claims has also had an impact, as insurers will expect competent handling of claims by the instructed solicitor, but the terms of any policy and the provisions for poor handling or insolvency on the part of the solicitor should be clear and understood by the claimant.

Particular attention should be given to the provision of ATE LEI from insurers who are not subject to the Financial Ombudsman Service or the Financial Services Compensation Scheme. Without the protection of both independent arbitration (should there be a dispute between the insured/insurer) and compensation should the insurer become insolvent, claimants may find their ATE LEI to not meet their needs. Equally, where the protections of ATE LEI are provided by a TPF, they do so without the same regulation under which an insurer must operate. Potentially the risks and harms of unregulated insurance products occurs in this situation.

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.

LEI whether BTE or ATE LEI provides a well-established route for consumer claimants to pursue meritorious claims. As described above the payment of disbursements in some claims can require TPF although the ATE LEI is responding to this need by developing products where potential claims against the ATE LEI policy can be advanced to allow solicitors/claimants to pay for these disbursements as incurred.

LEI is already regulated (see above) and in respect of ATE LEI, solicitors can make informed decisions on who they use as an ATE LEI provider based on price to their clients, the financial standing of the insurer and the quality of both products and services.

The self-funding of litigation by litigants in person should be discouraged as it creates significantly more risk to claimants than many other forms of funding, with the potential for poor outcomes.

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

Historically PI and CN (and other consumer claims) have used CFA/DBA alongside LEI to ensure claimants are protected against the risks of litigation. TPF for the cost of disbursements either on portfolio basis (Funder/Solicitor arrangement) or a case by case basis (Funder/Claimant arrangement) are common and not intrinsically problematic subject to existing regulation (self-regulation or by legislation, official bodies) and potential improvements around how these arrangements are explained to lay-person parties (e.g. consumers). See earlier comments on disclosure of information on funding and advice/explanation of funding options by solicitors.

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?

ATE LEI should be encouraged and preferred to Third Party Funding (where Trade Union/Legal Aid/BTE LEI is not available/suitable). Because (i) the potential premium payable is known at the point the insurance is incepted. (ii) for most ATE policies the premium is only payable if the claim is successful (market standard for injury and consumer claims) (iii) the LEI provider does not steer or take over the litigation, relying on the expertise of the solicitor and the claimant's compliance with the terms of their CFA/DBA and ATE LEI policy.

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?

The current regulation of DBAs (The Damages-Based Agreements Regulations 2013) and its reliance on the broad definition of "claims management services" within section 4(2)(b) of the Compensation Act 2006, has resulted in previously unforeseen consequences (see *PACCAR v CAT*). It is imperative that only the intended activity/services fall under this regulation to avoid undesirable impact on access to justice, such as limiting the funding options for impecunious claimants or those of limited means. The Litigation Funding Agreements (Enforceability) Bill goes some way to address this issue.

CFAs predominantly address own sides costs whereas DBAs are used more broadly (own sides costs, disbursements, adverse costs cover) and as such a single regulatory regime would not be appropriate.

As commented above, the funding arrangements which support CFAs (ATE LEI or other forms of TPF) need to be explained properly to consumers so they can make informed decisions. The use of the term “no-win no-fee” in relation to a CFA without the support of adequate ATE LEI (or other protection against the cost of disbursements/adverse costs) should be avoided.

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?

BTE and ATE LEI, as provided by regulated insurers are already heavily regulated by the FCA/PRA and have a regulatory requirement to evidence provision of fair value for consumers, however the quality of cover, service provided, and financial stability of the insurers is varied. Promotion of LEI from UK/EU based A rated insurers should be encouraged to build consumer’s trust in BTE/ATE LEI (ATE alongside solicitor CFAs) as a source of funding.

A public mandatory legal insurance scheme is not needed due to the existing LEI market and current regulation of insurers. A mandatory scheme would be unable to consider the specific needs of a broad range of claimants and areas of litigation. In respect of CN and PI matters, legal reforms (LASPOA 2012) have ensured the cost of BTE/ATE LEI for these matters are affordable.

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 LEI and CFAs are linked and only when used in combination are consumers adequately protected. Many solicitors source ATE LEI at the point of agreeing a CFA with their client and this practice should be promoted. The absence of ATE LEI or an ATE LEI product/insurer that has unreasonable terms or limited financial stability is insufficient. A mandatory requirement for an adequate ATE LEI policy (from a reputable source, subject to FCA regulation and FOS/FSCS etc) for every CFA, with the ability for consumers to “opt out” with a statutory declaration would ensure adequate protections for consumers.

Also see comments above re: “no-win no-fee”

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

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

See above comments re: portfolio funding/SSB. Regulation to pricing of portfolio funding to make costs to consumers more transparent and predictable would be welcomed. Also see comments above (5) in relation to over exposure to risk, particularly impact on solicitor solvency.

- 22) Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?**

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

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

- 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 there is not. The market with regards to LEI has stabilised after many years of turbulence and further change here will upset the balance which has now been achieved.**

- 25) Is there a need to amend the Civil Procedure Rules in the light of the Rowe case? If so in what respects are rule changes required and why?**

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

The court should always ensure that the Third Party Funder is not involved in the litigation other than to providing funding.

- 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?**

There should be disclosure notification in line with current practice for CFAs/ATE LEI (N251).

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 cannot comment on this other than to say, Third Party Funders should not be allowed to be involved in the litigation process to trial.

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

In respect of ATE/BTE LEI provide cover for not beating P36 offers, such protections allow claimants to negotiate settlements with defendants with confidence. The risk to claimants without this protection (or similar from other sources) is inequality between the parties resulting in potential under-settlements.

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 where Minors or Protected Parties are involved. Current assessments, e.g. infant approval hearings are sufficient.

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? Is the settlement a reasonable one and in the Claimant's interests.

See above.

32) What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?

See above comments in relation to capping of deductions from damages, disclosure of information and advice on funding options provided by solicitors to their clients.

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

Comparison of funding options should be carried out with the claimant's solicitors. There are already requirements for solicitors to ensure all funding options are considered and presented to their clients, but these could be improved (see comments above around disclosure of information)

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?

The terms of any funding agreement should ensure alignment of risk between the parties above and should provide clarity on how a conflict of interest is managed should they arise. Potential conflicts which should be considered are primarily around pricing, and whether the terms of the funding allow the funder to control the litigation (e.g. force settlement) when they consider the risk/reward to not meet the assumptions in their pricing.

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 an arbitration scheme available paid for by a levy on all recognised Third Party Funders.

As per above comments, allowing funders to take control of litigation should be avoided. An arbitration scheme may be appropriate for funders who insist on agreements which allow them to take control of litigation. Agreement terms should be constructed to limit potential conflicts of interest and explain how these are to be resolved if arising.

Questions concerning the encouragement of litigation

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

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

Third party funding together with other forms of funding e.g. LEI allow access to justice for those who cannot otherwise afford it. Which type of funding is best will depend on a Claimant's particular circumstances. In general terms though, the provision of suitable funding options to a claimant will encourage them to pursue meritorious claims.

- 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?**

No. It is unlikely that Third Party Funders or any other type of funder e.g. LEI would support vexatious litigation as this does not make business sense. Care should be taken where the funding is provided at little/no risk to the funder or instructed solicitor though, as in these circumstances the "downside" of pursuing litigation without merit is reduced.

- 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.

Both Third Party Funding and other types of funding e.g. LEI will allow access to justice, and this may logically lead to some more group litigation where multiple Claimants have been affected in the same circumstances by the same Defendant.

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 earlier comments in relation to regulation, and the merits of LEI as an alternative to TPF.

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?

See above comments in relation to disclosure of information and advice on funding options provided by solicitors to their clients.

General Issues

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