

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:	Joanna
Last name:	Manthorpe
Location:	London
Role:	-
Job title:	Senior Corporate Affairs Lawyer
Organisation:	Kennedys Law
Are you responding on behalf of your organisation?	Yes
Your email address:	

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.

Civil Justice Council Review of Litigation Funding

Kennedys response

March 2025

About Kennedys

Kennedys is a global law firm with expertise in dispute resolution and advisory services. With over 2,750 people and 75 offices around the world, we are a fresh-thinking firm willing to bring new ideas to the table beyond the traditional realm of legal services.

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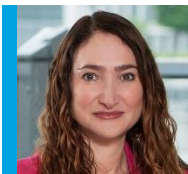
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Questions concerning ‘*whether and how, and if required, by whom, third party funding should be regulated*’ and the relationship between third party funding and litigation costs.

1. To what extent, if any, does third party funding currently secure effective access to justice?¹

As identified in the Civil Justice Council’s (CJC) report, third party funding (TPF) may be available together with other funding mechanisms in civil litigation, such as Conditional Fee Agreements (CFAs) and Damages Based Agreements (DBAs).

Lord Jackson’s December 2009 report, ‘Review of Civil Litigation Costs’, addressed the benefits of TPF as then understood. He suggested that TPF was beneficial and should be supported as it “*provides an additional means of funding litigation and, for some parties, the only means of funding litigation*”.

Lord Jackson reported that “*third party funding will become even more important as a means of financing litigation if success fees under Conditional Fee Agreements (CFAs) become irrecoverable*”. Reforms made to the civil litigation costs regime in April 2013 as a result of Lord Jackson’s review (which included making success fees under CFAs and After the Event insurance premiums irrecoverable as well as the introduction of DBAs) are likely to have contributed to TPF becoming an increasingly popular method of funding over the last decade, particularly in high-value, complex cases.

The report predated a growth in TPF for a range of types of dispute and prior to the availability of proceedings in the Competition Appeals Tribunal (CAT) the Consumer Protection Act 2014. It was contemplated at the time of the report that pro-active costs-management by the courts would develop (which it has) and that this would be effective to control costs and costs exposures in most types of litigation.

Whether the current deployment of TPF and its consequences were fully foreseen or intended at the time of the Jackson Report is unclear to us. Cases attracting TPF are very often large-scale group

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.

actions, which often involve modest claims for damages on an individual basis, though require the incurring of significant costs for both claimants, and for defendants.

Sceptics of TPF suggest that in group actions this may also involve the bundling of claims of dubious merit with better claims. A concern is that the resulting inflated legal costs give all the claims a higher commercial negotiating value, while the volume of claims and risk of generating further such claims mean defendants may view themselves as having little choice but to defend all claims vigorously, delaying resolution for even meritorious claims.

There have been instances where TPF has funded meritorious claims that the claimants might otherwise not have been able to bring. The recent case of *Mr Bates & ors v The Post Office* (the Post Office litigation) - a long-standing action which was only able to proceed to trial with financing from third party funders - is presented as a paradigm example of this by those in favour of TPF (notwithstanding the huge proportion of the claimant's damages that went to the funders).

In an article published in *The Guardian* in May 2024, the lead claimant, Mr Bates, made it clear that he and the other sub-postmasters were fully aware of the terms of the litigation funding stating *"the arrangement worked very well for us. In fact, there would have been no justice for subpostmasters without it, given the exorbitant costs of the legal system in England and Wales"*.

There are, however, concerns about whether the interests of claimants in pursuing their claims are properly protected. Access to justice in cases financed by TPF is not without risk to the claimant. Litigation that is backed by TPF is often complex, high risk and costly and usually involves the funder making a substantial financial investment to reflect the high level of risk. With funders seeking to make a return on their investment, there are inevitably questions about whether funders have control over the litigation contrary to the interests of claimants, as well as how substantial the percentage of the damages allocated to them should be. The current litigation by funders in the Mastercard litigation illustrates (in an opt-out group claim context) how the interests of claimants and funders may not be aligned.

This is exacerbated by the fact that the UK currently has a self-regulatory regime for funders and that applies only to those who are members of the Association of Litigation Funders (ALF).

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

The argument made is that TPF, once secured, enables parties without financial means to bring meritorious claims against well-funded, resourced opponents such as large corporations or the state. As part of this it is argued that:

- TPF removes financial barriers; it enables a claimant to have access to a legal team which otherwise may not have otherwise been possible, as well as provide funding for legal expenses such as court fees and expert witnesses. It enables a claimant to bring complex claims through to trial as well as empowering them to negotiate from a position of strength.
- TPF shifts the burden of financial risk from the claimant to the funder and, subject to the terms of funding, usually means that the claimant will not pay their opponent party's damages and legal fees if they lose. This second point is, however, subject to the precise arrangements made and what protection from adverse costs is purchased or agreed.

- The opacity of TPF arrangements and the potential limits on funders' obligations to meet adverse costs against claimants is a concern for defendants. Defendants may be forced to defend substantial claims, and incur significant expense in seeking security for costs or enforcing costs awards, before learning relatively basic information about the extent of the interests and obligations of those funding the claims against them.
- Third party funders will argue that they carefully select cases that are meritorious and therefore likely to offer them a high return on their investment. Professor Mulheron's report "Review of Litigation Funding" published in March 2023 reports that litigation funders choose a minority of cases (between 3% and 5% of funding opportunities). The question of whether it is entirely the merit of a claim and not, at least in part, the likely aggregate claims value that drives such selection is perhaps debatable. In any event not all claimants will have access to TPF, particularly individual claims which cannot be grouped with others and which are not of high monetary value.

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

TPF is an enabler of group litigation. TPF particularly benefits claimants who wish to bring a class action where the damages sought by each individual claimant are of relatively low (or in the case of competition claims actions almost entirely nominal) value, but collectively, the aggregate sum is substantial. This is exemplified in two recent landmark cases:

- The competition class action brought by Walter Merricks against Mastercard (the Mastercard litigation) where the claimant class comprising approximately 44 million individuals, sought damages totalling £10bn for excessive credit card interchange fees, equating to approximately £2.27 per claimant); and
- The unsuccessful data privacy class action of *Lloyd v Google* [2021] where individual losses claimed arising from a data breach were nominal, but the collective impact of the action had the potential to be significant.

Whether TPF greatly benefits claimants in opt-out competition claims must be open to question. The reported likely compensation to the individual claimant in the Mastercard settlement is approximately £2.27.

A suggested benefit of TPF is that funders may specialise in funding certain types of litigation, such that they are better able strategically to manage the risks associated with particular types of cases.

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?

TPF in England and Wales is currently self-regulated by the ALF through its Code of Conduct (the ALF Code of Conduct) for funder members. The CJC's Interim Report states that an estimated 44 funders operate in England and Wales, of which only 16 are members of the ALF. As membership of the ALF is not compulsory, there are many funders in operation that are not subject to the Code.

There is some judicial oversight over TPF arrangements by the courts, tribunals and arbitrators who may use their procedural powers to exercise control over how the TPF arrangements could impact the action. However, such oversight depends on the forum in which the case is brought and/or the individual circumstances of the case.

The rules governing opt-out competition actions brought in the CAT require the party applying for a Collective Proceedings Order (CPO) to provide information about their litigation funding arrangements as part of the CAT's certification process of the CPO so that it can determine whether the proposed class representative will be able to pay their own costs and those of the proposed defendant if required to do so. The extent of the information to be disclosed as part of a CPO application was considered in the CAT's rulings in *Kent v Apple* [2022] and *Elizabeth Helen Coll v Alphabet Inc. & Ors* [2022]. In both of those cases, the CAT denied the defendant's request to disclose redacted portions of the TPF agreement and the after the event (ATE) policy.

More recently, following the UK Supreme Court's landmark ruling in July 2023 in *R (on the application of PACCAR Inc & ors) v Competition Appeal Tribunal & ors* [2023] - which rendered the majority of litigation funding agreements unenforceable - TPF arrangements in several cases have come under scrutiny by the CAT to determine the status of the funding arrangements in those cases. The wider impact of *PACCAR* remains to be seen - it appears that agreements calculating the funders' return as a percentage of damages have been replaced by agreements which provide for a multiple of initial investment. Whether such agreements are DBAs is currently before the appeal court.

Group Litigation Orders (GLOs), and informal court managed group claims, which are under the remit of the High Court, are governed by the Civil Procedure Rules (CPR). However, unlike in the CAT, there is no duty on a claimant to disclose funding arrangements to the opposing party or the court at the outset of a claim except in certain circumstances, for example, if the claimant is seeking to recover an additional liability such as a success fee or ATE insurance premium. Such instances are now significantly limited in scope. The CPR does give the court power to order third party funding arrangements to be disclosed if the defendant makes an application for security for costs pursuant to CPR 25, and where any arrangement to meet an adverse costs liability would be a defence to such an application.

The self-regulatory regime, as provided for under the ALF Code of Conduct, is in our view, insufficient adequately to manage a fast-growing industry which, in 2023, was on one estimate thought to have a market value of between £1.5 billion and £4.5 billion. The growth of TPLF in England and Wales, coupled with the increasing prevalence of specialist US class action law firms

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

establishing a presence in the UK, as well as the growing trend of consumer rights litigation, requires more robust regulatory oversight to ensure greater transparency and accountability over TPF arrangements to protect the interests of consumers and businesses alike.

We set out below what we consider to be the main deficiencies with the ALF Code of Conduct:

- While the ALF Code of Conduct provides for some oversight through annual auditing of funders by recognised auditors and a complaints procedure, funders are essentially operating in a regulatory vacuum where there is no proper accountability or material consequences for violations of the rules, leaving it open to abusive practices by funders. The sanctions provided for under the complaints procedure, which include expulsion from membership of the ALF and the imposition of a fine of up to £500 are not adequate deterrents, particularly for large, established litigation funders. Notably, they do not preclude the sanctioned funder from continuing to provide funding.
- The ALF Code of Conduct does not include any rules on the percentage that funders can take from any damages settlement or award. Claimants often receive just a small fraction of a settlement or damages award - a price for having access to justice. This is exemplified in the Post Office litigation where funders received £46m (almost 80%) of a £58m damages settlement, leaving just £12m to the claimants. More recently, it has been reported that the funders who financed the Mastercard litigation will be paid around £45.57m of the £200m settlement, with funders potentially receiving a further £54.43m as a return on the funds it provided, depending on the number of eligible people who come forward to make a claim. By comparison, eligible claimants are expected to receive £2.27 each in compensation.
- A lack of transparency over funding arrangements can leave the funded party vulnerable to funders exerting control over the litigation to prioritise maximising the financial return on their investment, potentially at the expense of the interests of the claimant. In the Mastercard litigation, funders released a statement in December 2024 opposing the settlement, calling it *“too low and premature”*, with the claimant’s lawyers accusing the funders of *“trying to take control of the litigation”*. This led to a dispute between Mr Merricks and his funders, which has culminated in the funders launching arbitral proceedings against Mr Merricks.

In its report, *Establishing Fairness in Litigation Funding*, published in June 2024, civil justice campaign group, Fair Civil Justice (FCJ), caution that *“the current regulatory landscape leaves the door open to abusive practices such as excessive profit-taking by funders, funders exerting inappropriate control over the conduct of litigation, and funders being used as a conduit for foreign states to bring vexatious claims”*.

FCJ advocates reasonable and proportionate regulation to protect funded parties fully, in particular consumers and SMEs, from exploitation, and to preserve the integrity of the civil justice system in England and Wales. FCJ's report sets out several recommendations to improve the current regulatory framework to enable it to operate more effectively and better to protect consumers and businesses alike. These include:

- An independent regulator for TPF;
- A requirement for funders to act in the funded party’s best interests;
- Transparency over funding arrangements between the funder and funded parties and for such arrangements to be disclosed to the court and, as necessary, to opposing parties;

- A clear prohibition to prevent funders from influencing or exercising control over cases, including any settlement terms;
- Disclosure of relevant relationships, such as partnerships between private equity firms and law firms, which risks compromising the instructing law firm's impartiality and its duty to act in the best interests of its/the client;
- The implementation of safeguards to prevent funders unreasonably withdrawing funding during the course of litigation;
- Responsibility for a funder to cover the risk of adverse costs; and
- A cap on funders' returns to align with the approach taken in respect of the capping of success fees and contingency fees for CFAs and DBAs, with such cap to be set by legislation.

It is our view that, without proper regulation in place, there is a risk that TPF could undermine the integrity of our civil justice system by (i) leaving it vulnerable to abusive practices that could lead the claimant's representatives and/or funders making strategic decisions that are not in the best interests of the claimant; (ii) failing to secure adequate redress/compensation for claimants; and (iii) driving up litigation costs and placing undue pressure on businesses to settle claims regardless of the merits.

As TPF is a type of financial investment product, it is our view that it should be subject to a robust regulatory framework akin to those governing other financial investment products. In this regard, a report by Sam Bidwell of the Adam Smith Institute titled "Judge Dread - How lawfare undermines business confidence in the UK", published in October 2024, recommends that a competent regulatory (most likely the Financial Conduct Authority) should be given statutory oversight of the UK's litigation funding industry to ensure legitimate regulatory accountability for litigation funders. The report proposes that, once regulatory competence has been established, the FCA should proceed to design an appropriate regulatory regime for litigation funding agreements with a view towards improving access to information and strengthening public trust in the integrity of the UK's legal system.

Overall, we support the implementation of a regulatory framework that accounts for the recommendations proposed by FCJ which align with the interests of our clients across the corporate sector.

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

- a. The nature and seriousness of the risk and harm that occurs or might occur;
- b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;³
- c. For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.

We consider the major risks or harms that may arise, or have arisen with TPF are:

- The potential for TPF to give rise to an increased risk of frivolous and opportunistic claims. Although Professor Mulheron's report "Review of Litigation Funding" published in March 2023 reports that litigation funders carefully choose a minority of cases (between 3% and 5% of funding opportunities), there may be other incentives for funders to pursue cases. For example, where a claim is so large and expensive to defend that it is more likely to generate a return through settlement notwithstanding that it might be deemed to be opportunistic.
- There is a risk that claimant lawyers work in partnership with funders to bring speculative class actions purely for profit making. Law firms are obliged to abide by the Solicitors Regulation Authority's Standards and Regulations which provide that fee sharing arrangements or referral arrangements should not compromise the solicitors' independence or professional judgment. The nature of this type of relationship between the funder and law firm, which has financial incentives, risks the lawyer potentially prioritising the funder's interests over that of the claimant to ensure that the funder makes a return on its investment.
- Further, as funders tend to gravitate towards financing class actions which have the potential to generate the largest returns, TPF has the potential to scale up the size of an action, with lawyers potentially grouping meritorious claims with less meritorious claims, which, in turn, can make it harder for the courts properly to assess the merits of each individual claim. On 7 June 2024 the US Chamber of Commerce reported that, for some funded class actions in the US, the funding agreements are structured so that the fewer the number of people who claim their award, the more money the funder gets.
- The cost of defending such claims can be substantial. A longer-term concern is that the litigation environment could discourage businesses from selling products on the UK market and investing in the UK if it does not balance the interests of both consumers and businesses if TPF remains unregulated. Although the litigation environment in the US has plainly not, in overall terms,

³ Please give full details of each possible mechanism and explain how each would work (including who any potential 'regulator' or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.

destroyed the competitiveness of the US economy, it is far from clear that the UK enjoys many of the advantages that offset the impacts on business of mass tort litigation and ‘nuclear verdicts’ in the case of the US.

- The potential for TPF to fund litigation that is for the sole purpose of advancing the interests of another party and to allow them to gain access to sensitive information through disclosure. This is not a risk that is addressed or mitigated by the current self-regulatory framework. This risk could be prevented through a regulatory framework that provides for mandatory registration of funders, transparency over funding arrangements from the outset of a case, and the ability for the court to intervene to prevent abuses to protect the interests of all parties.
- Critics of the current self-regulatory framework consider that TPF increases the risk of foreign influence in litigation and illegal activity. The report by Sam Bidwell of the Adam Institute considers that *“The risk of malicious foreign influence in the UK’s class action system is considerable; as such, legislators should introduce new primary legislation, modelled on the [United States] proposed Protecting Our Courts From Foreign Manipulation Act of 2023”*. The report underscores the importance of introducing provisions to mandate transparency and early disclosure of the primary source(s) of funding of a case, including transparency over any foreign investments.
- It may be argued that such risks are/would be at least partly mitigated by the willingness of the courts to impose orders tightly restricting the dissemination of disclosed materials during litigation. This would, however, be a largely unsatisfactory fallback position given the ad hoc nature of these decisions and the expense of the disclosure stage of litigation generally, even in the absence of such important arguments, such that regulation should be the preferred route.
- The potential for funders to exert control over a claim, and conduct the litigation, including any settlement negotiations, in a manner which is not in the best interests of the claimant(s). While law firms are required to abide by Solicitors Regulation Authority’s Standards and Regulations, the exertion of control by funders threatens the professional integrity and independence of the instructed law firms and the professional relationship between them and the claimant(s).
- The aforementioned risks are not addressed or mitigated by the current self-regulatory framework. The voluntary nature of the current framework means that funders can either choose not to join the ALF or opt-out if they are members. This risk could be prevented through a regulatory framework that provides for mandatory registration of funders, transparency over funding arrangements, and the ability for the court to intervene to prevent abuses to protect the interests of all parties. We do not consider that guidance or industry standards is robust enough to safeguard against the potentially severe consequences that could arise from the risks and harms discussed above.
- As discussed earlier in response to question 2, whilst the court has some level of judicial scrutiny, this should be broadened to ensure that all litigation funding agreements are subject to the scrutiny of the court at the outset of a case, as well as mandatory disclosure of funding arrangements. This will also help identify any potential conflict of interests between claimants, funders and the instructed law firm.

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

a. If not, why not?

b. If so, which types of dispute and/or form of proceedings⁴ should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?⁵

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

It would appear undesirable to seek to apply separate regulation to different types of litigation, or within arbitration. It is pertinent that claimants, funders and defendants are subject to the same requirements in each case. This ensures consistency of approach.

The main concern at present is that the lack of disclosure as to the basis and nature of the arrangements in place mean that the parties (often including the claimants themselves), the courts and any defendants lack any or sufficient insight into the funding arrangements in place. To adopt a separate approach, for example by way of reference to the “knowledge” of the claimant(s) requires undue inference, and in our view would likely lead to complicated and unnecessary satellite litigation.

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

We consider that the following best practices and principles should underpin regulation:

- Transparency - all parties should have a genuine understanding of the funding relationship arising within any action. We would suggest that no real risk arises to claimants in providing disclosure on an agreed scale (contrary to suggestions that such disclosure would leave claimants at a disadvantage in terms of litigation practice/strategy).
- Accountability and enforceability - whilst it is recognised that TPF adopt a measure of risk as to the outlay incurred in pursuing claims, that outlay does not necessarily extend to protecting claimants from adverse costs should litigation be unsuccessful. Further, claimants require financial protection should TPF subsequently decide that funding will no longer continue.
- In the absence of insurance as to adverse costs, the court’s powers as to security should be expanded to ensure that defendants are not left in a position of defending substantial claims

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

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

without a real prospect of being able to recover the costs of the same. To do otherwise in our view unduly impacts on the balance of power between litigants.

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

TPF enables claimants to have the means to bring a claim without incurring costs upfront. Subject to the terms of the funding arrangement, a funder may cover the costs necessary to investigate the claim, such as expert witness evidence, and the cost of running the case to trial. If a case is lost, a funder may cover adverse costs depending on the terms of the funding arrangement, though transparency and security as to the same is required.

Further in this context:

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

Litigation costs can run to very high levels in complex actions, particularly class actions involving large numbers of claimants. For some individuals, this has meant that the costs of pursuing an action are often prohibitive. As TPF removes the financial burden from the claimant, is it increasingly becoming a favoured mechanism of litigation funding in complex, class action cases.

Similarly, TPF mitigates the risk of the “loser pays” principle under the civil litigation costs regime in England and Wales. An unsuccessful claimant is required to bear the cost of its own legal fees and expenses as well as those of its opponent. As discussed in response to question 1, with success fees and ATE premiums no longer recoverable from 1 April 2013, claimant law firms are more likely to take on meritorious cases. TPF can remove this financial barrier and provide a means of financing the claims of those claimants who have no other options of funding available.

To a large extent, the cost of litigation means there is a demand for third party funding in the first place. A concern for defendants however is that the management of funded claims, particularly in a group claim context, does not effectively deter funders from incurring substantial costs with the strategic rationale that the defendants’ exposure to these costs will drive a willingness to settle regardless of the merits of the claims.

It has been our experience of settlement of group actions that compromising the damages elements of even quite complex claims is much more straightforward than negotiating the costs of the claimant lawyers which have, in several cases, been claimed at levels a multiple higher than the damages sought. The impact of the funder’s interests in this dynamic is a matter of speculation in the absence of the right to see the details of the claimants’ funding arrangements.

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

TPF has the potential to influence the conduct of the litigation, such as intentionally taking procedural steps or implementing a strategy that aims to prolong the litigation to increase costs and maximise the return on the funder’s investment. We discuss this risk arising from the types of relationships and partnerships between funders and law firms in our response to question 5.

It should be noted that TPF can introduce, in big enough cases, an incentive to defendants to extend the litigation process as long as possible until settlement to mitigate funders' expectations (and potentially in some cases potentially to ensure that more potential claimants' claims become time-barred).

- c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?**
- d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?⁶**
- e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?**
 - i. If so, why?**
 - ii. If not, why not?**

We are strongly of the view that the costs of litigation funding should not be recoverable from defendants within litigation. Costs of funding were previously payable by defendants (pre 2013, in the form of success fees and ATE premiums) and the potential liability for such costs applied undue pressures on defendants in cases where otherwise a meritorious defence was viable.

Costs of litigation funding are patently capable of being included within the relevant funder's business model. In our view, claimants utilising the same should not benefit from adopting TPF as opposed, for example, to using traditional CFA/private retainer methods.

If such funding costs were recoverable, questions would naturally arise as to what level of such costs are to be permitted. This again gives rise to the risk of satellite litigation. Requiring provision for such funding costs is also likely to impede settlement, given the likely uncertainty as to a defendant's liability.

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

The recoverability of adverse costs, and any security as to the same, form a vital part of ensuring access to justice for both claimants and defendants. This also promotes positive behaviours and ensures proportionality. TPF does not necessarily extend to providing cover for adverse costs, and would usually require claimants to engage separate insurance provision to cover adverse costs. Again, TPF, and any insurer, are both well capable of designing any business model to allow claims to be brought on a proportionate level, whilst protecting the interests of the claimants and defendants alike.

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

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

Yes. TPF, in enabling litigation, must accept that in so doing they accept a degree of exposure in relation to any adverse costs. In our view, it is insufficient to leave claimants (who may or may not have the litigation knowledge to understand potential liability for adverse costs) to make sufficient arrangements to meet any liability. This is particularly the case in light of the fact that TPF is often engaged in cases where claimants lack the means to fund the litigation themselves, and naturally therefore lack the means to meet any liability.

Whilst some discretion may be suitable in cases where TPF is limited (say to a stage of proceedings), such circumstances appear sufficiently rare so as to suggest that TPF must accept a potential liability in all cases where TPF arises.

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?

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

a. If so, why?

b. If not, why not?

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

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

b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?

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

d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?

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

Given the general lack of transparency as to the details of many TPF arrangements, it can be difficult accurately to ascertain the impact of current arrangements. Despite that, it appears that a balance must be struck between making TPF viable, and protecting the interests of claimants who, in many circumstances, appear to be left with only modest levels of compensation at conclusion.

The above would suggest that any TPF recovery should be directly linked to the level of investment, the level of award and any such levels should be proportionate to the remedy sought.

The most sensible approach would be by implementation of a cap, by reference to level of investment and recovery. That cap should be set at 100% of the investment incurred, an additional element to account for risk and any further element to account for providing protection against adverse costs. Such a cap should be applied by regulation.

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.

In our view, the main advantages of TPF are:

- Access to justice for claimants who would otherwise not have the means to finance their claim. We discuss this in our response to question 1.
- TPF can be advantageous for claimants seeking to bring complex, large-scale class actions which can be extremely costly to run, such as competition claims and shareholder disputes, without incurring the upfront costs to investigate the claim, and the costs of pursuing the claim to trial. If the claim is unsuccessful, subject to the terms of the TPF agreement, the funder will usually bear the costs of bringing the claim, including disbursements. Some funders also benefit from expertise and knowledge of a certain sector, which can enable the funder properly to assess the merits of the claim from the outset.
- TPF is particularly advantages for claimants seeking to bring a competition action under the collective proceedings regime which was established under the Consumer Rights Act 2015. Collective proceedings brought in the CAT are usually bought on an ‘opt-out’ basis, meaning that individuals that fall within scope of the relevant class will have access to any agreed settlement or the damages awarded by the CAT, unless they expressly opt-out of the proceedings. The advantage to those claimants is that the CAT tends to award damages on an aggregate basis without undertaking an individual assessment of the amount of damages recoverable in respect of each individual claim.
- As discussed above in response to question 3, TPF is particularly advantageous for claimants seeking to bring a class action for compensatory damages which they would have been unable to do on an individual basis if the damages sought were nominal. In those circumstances, the cost of litigating a low value individual claim would be prohibitively high and disproportionate to the damages claimed.
- We discuss the harms and risks (which can be said to be disadvantages) of TPF in our response to question 5 but we briefly set out below some addition comments:
 - Third party funders have no prior connection to, or interest in a case; their interest lies purely in making a return on their investment in the litigation. The funder’s appetite to maximise

returns may influence the conduct of the proceedings, including procedural decisions, as well as the terms of settlement, which may not be beneficial to the claimant. In this regard, the report by Sam Bidwell of the Adam Smith Institute notes that while TPF can facilitate access to justice, *“critics have observed that the sudden expansion of TPLF contributes to a vicious cycle of ever-more class action cases, while also giving litigation funders more control and protection than actual claimants”*.

- For the insurance industry, the increased use of TPF may potentially impact policyholders due to insurers increasing premiums in light of the increased claims risk arising from popularity of group litigation. In turn, increased litigation could lead to reduced access to insurance coverage in particular types of litigation.
- The current drawbacks also include the aforementioned lack of clarity as to the nature of the TPF agreement, the protections in place for the claimants themselves, control of the litigation and the ability of a defendant to be satisfied in relation to adverse costs. Such issues can be remedied by transparency and regulation.

15. What are the alternatives to third party funding?

- a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?

Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

- b. Can other forms of litigation funding complement third party funding?

Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.

- c. If so, when and how?

16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?

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

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

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

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

Only through disclosure and transparency can the issues surrounding transparency be resolved. As previously within the pre-LAPSO landscape, details of funding were required to be provided pre-action and at the point of issuing proceedings. Given the liabilities arising from TPF, a similar process appears to be required in cases supported by such funding.

Whilst complaints may arise as to the potential disclosure of litigation strategy, these can be negated by careful prescription of the information required, which needs only to satisfy the parties, and the court, as to the appropriate level of funding both to fund the claim to completion, and to satisfy any potential adverse costs award made against the claimants.

To enforce the above, provisions must be made within the rules, with suitable sanctions (pre-LAPSO, a lack of provision as to funding arrangements would leave the claimant, in principle, unable to recover Success Fee/ATE). It is important that such information be made available at the earliest opportunity to ensure parties remain on an equal footing.

The above, coupled with effective costs management, should ensure that parties are able to conduct litigation economically and proportionally, with undue influence.

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

Any party commencing litigation with the benefit of TPF should be fully aware of the ramifications of so doing, including the potential for adverse costs, control of the litigation and the impact of TPF on any award. Should that be the case, there appears little need for court approval of settlements. Should disputes arise as to the apportionment of any settlement, it would be for the claimants and their funder to reach an accord, which would be premised on the basis of the initial agreement reached. Should the claimants argue that any of the terms were unclear/unfair, such issues would need to be resolved by way of separate litigation between the respective parties.

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

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?
 - a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?
 - b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?
 - c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?

When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.

As discussed earlier in our response to question 5, TPF encourages group/collective actions. The growth of group/collective actions in the UK runs in tandem with the increasing availability of TPF. A report by Alix Partners reported in 2021 that 70% of the 54 class actions filed in UK courts (as of 30 June 2019) were financed by TPF.

Law firm CMS's Class Action Report 2024 reports that in 2023, the total value of opt-out class actions in the CAT reached £56.32 billion, representing a 48% increase from £38.09 billion in 2022. This increase is largely driven by third party funders seeking to invest in large scale group litigation in the UK. Opt-in actions pursued under a GLO are also increasingly funded by third party funders, as exemplified in the GLOs relating to diesel emissions claims, all of which are funded by TPF.

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.

We address this in our response to question 4 but in summary, we recommend that TPF is subject to a regulatory framework that provides for:

- An independent regulator for TPF;
- A requirement for funders to act in the funded party's best interests;
- Transparency over funding arrangements between the funder and funded parties and for such arrangements to be disclosed to the court, and as necessary to opposing parties;
- A clear prohibition to prevent funders from influencing or exercising control over cases, including any settlement terms;
- Disclosure of relevant relationships, such as partnerships between private equity firms and law firms, which risks compromising the instruct law firm's impartiality and its duty to act in the best interests of the client;
- The implementation of safeguards to prevent funders unreasonably withdrawing funding during the course of litigation;
- Responsibility for a funder to cover the risk of adverse costs; and
- A cap on funders' returns to align with the approach taken in respect of the capping of success fees and contingency fees for CFAs and DBAs, with such cap to be set by legislation.

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

General Issues

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

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

