The consultation closes on **Monday 3 March 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: | Julian |
| Last name: | Chamberlayne |
| Location: | London |
| Role: | Partner |
| Job title: | Risk and Funding Partner. |
| Organisation: | Stewarts |
| Are you responding on behalf of your organisation? | Yes |
| Your email address: | [redacted] |

**Information provided to the Civil Justice Council:**

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

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

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

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

STEWARTS

February 2025

**STEWARTS' RESPONSE TO CIVIL JUSTICE COUNCIL'S REVIEW OF LITIGATION FUNDING CONSULTATION**

## ABOUT STEWARTS

Stewarts is the UK's largest litigation-only law firm and specialises in high-value and complex disputes. The firm acts for both corporate and individual clients and has leading and specialist departments in a wide range of areas of commercial litigation, international arbitration, private client disputes including divorce and family matters, and claims for personal injuries of the utmost severity.

Stewarts has strategic partnerships in place with other specialist law firms across the world, enabling its clients to take a global approach to litigation. The firm is top ranked in both the Legal 500 and Chambers and Partners, the leading guides to the legal profession in the United Kingdom.

## EXECUTIVE SUMMARY

a. We welcome the Civil Justice Council's (**CJC**) review of third-party litigation funding (**TPF**), including alternative forms of fee, funding and insurance arrangements. Our response recognises that the CJC's review raises numerous important themes to be addressed in the coming years. However, we urge the CJC and the Ministry of Justice not to allow the exploration of those broader themes to further delay taking immediate action to resolve the two most pressing issues:

   i. Corrective legislation similar to the Litigation Funding Agreements (Enforceability) Bill to reverse and end the uncertainty and ongoing satellite litigation caused by *PACCAR*[1]; and

   ii. The long overdue amendments to the damages-based agreements (**DBA**) regime, as proposed by the DBA Reform Project in 2019.

b. TPF can provide effective access to justice, including equality of arms for claimants who/which would not otherwise get redress to which they are entitled.

c. Availability of TPF also encourages good corporate behaviour through the availability of funded mass redress for breach of the law.

d. The legal services sector is a key player in the British economy generating £74.4 billion in turnover and £57.8 billion in gross value added in 2021.[2] The availability of TPF plays an important role in this contribution by enhancing the attractiveness of England and Wales as a jurisdiction for disputes. The CJC ought to be looking to make recommendations that maintains England and Wales as the jurisdiction and law of choice for companies to nominate in their contracts and turn to for their disputes when they arrive.

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

[2] As detailed in Mark Spilsbury's report '*The economic contribution of the legal services sector to the UK economy*' on behalf of The Law Society, p.3.

e. TPF is also a business-friendly option for some corporate clients to enable them to apply their finances to maintain or develop their core business rather than facing the difficult choice of whether to divert those funds to pursue litigation or arbitration.

f. TPF has assisted over 1,350 of our commercial disputes clients to secure over £200 million of funding to pursue claims for damages totalling in excess of £9.5 billion.

g. The *PACCAR* judgment has been hugely disruptive to the TPF market and does not reflect the legislative intent behind the DBA Regulations nor the preceding reports of Lord Justice Jackson.

h. As to whether the current self-regulatory framework for TPF operates sufficiently and whether it could be improved, there are a number of relevant issues to consider, including:

    i. Whether conditions should be placed around funders offering TPF and, if so, who should administer or regulate this and how (including the suitability of the current Association of Litigation Funders (**ALF**) Code of Conduct);

    ii. Whether any regulation of TPF should be limited to funding of claims for consumers, similar to the authorisation required from the Financial Conduct Authority (**FCA**) under the Financial Services and Markets Act 2000 for making regulated mortgage loans and for consumer credit lending, as otherwise no banking licence or regulatory approval is required for lending in England & Wales; and

    iii. Monitoring and enforcement of either or both of the above, and who should perform this and how.

    iv. However, as a starting point, we endorse the adoption of the European Law Institute's Principles Governing the Third Party Funding of Litigation (**ELI Principles**) in the TPF sector, subject to some exceptions and observations. We also agree with the authors of the ELI Principles that in most respects there is far more talk about the risks or harms that may arise from TPF than there is evidence of actual harm.

i. An alternative or enhancement to the present regime could involve a licensing model, to ensure all commercial funders operating in the English jurisdiction are subject to the applicable regulatory framework.

j. Restrictive regulation of English seated arbitration must be avoided as it would risk diminishing the attraction of England as the jurisdiction of choice for many parties concluding contracts with arbitration provisions. In any event the rules relating to English seated arbitration are much better prescribed by each arbitral institution. Any attempt for wider regulation of TPF ought not to overlap or interfere with arbitral rules.

k. Any such regulation of TPF ought not to include caps on funders' returns, as that would inevitably result in more cases being viewed as economically unattractive to funders and may produce perverse outcomes. Caps would also drive some funders away from certain classes of case or even the entire UK market. If, notwithstanding our primary stance, caps on TPF were introduced, we think these should be in relation to consumer actions only – and then with 'soft caps'[3] (caps capable of being lifted in specified meritorious scenarios) on the level of the funder's actual return/premium (i.e. on the amount that the funder would receive that is *in excess* of the amount that they have funded).

l. The control of funders' fees, in ways that reflects the risk profile of individual claims, is better achieved by requiring the lawyers advising funded parties to fully engage in the provision of that advice, including considering whether to approach multiple funders for rival quotes.

m. An alternative route for funded parties to be advised on funding terms is via funding brokers. However, for funded parties to place fuller reliance on the services of funding brokers, it would be necessary for those brokers to become subject to professional obligations including a fiduciary duty to their clients, to carry sufficient professional indemnity insurance and to be subject to some form of regulation of funding brokerage.

n. In consumer class actions, notably Competition Appeal Tribunal (**CAT**) opt-out collective proceedings and CPR 19.8 representative actions, the control of funder returns is better achieved by the courts applying suitable procedural rules to the specifics of the cases in question, rather than the blunt tool of caps. The Competition Appeal Tribunal Rules 2015 (**CAT Rules**) already provide for this, although there should be clarification of certain rules (for example, can funders, insurers and lawyers be paid prior to the distribution of damages to class members). Similar rules should be developed for CPR 19.8 representative actions.

o. To enhance consumer protection in relation to TPF and to align with existing regulatory requirements for after-the-event (**ATE**) insurance for consumers, we propose there should be an obligation prior to the client entering into a funding agreement:

    i. On the funder, to provide a "Funding Product Information Document (**FPID**)", that is similar in concept to an Insurance Product Information Document (**IPID**). In advance of funding being put in place the FPID would clearly and concisely set out all the key terms of the proposed funding to the funded consumers or representatives; and/or

    ii. On the client's solicitors to provide a funding related document that is similar in concept and content to an ATE insurance demands and needs statement.

p. The provision of TPF more generally is already safeguarded to an extent by the rules governing legal professionals. However, the approach of solicitors to advising their clients on the availability and terms of TPF and other alternative forms of litigation funding is highly variable. The Solicitors Regulation Authority (**SRA**) should consider whether the current SRA Code of Conduct for Solicitors, RELs and RFLs (**SRA Code**) could be enhanced or clarified in this regard. It would

[3] For further explanation of the term 'soft caps' please refer to our response to question 13.

in our view be helpful for the SRA to at the least issue guidance on the standards expected of solicitors when arranging TPF for clients or otherwise involved in representing clients on cases that are reliant on TPF. For instance, this guidance should require solicitors, when providing an explanation of DBAs, conditional fee agreements (**CFAs**) and TPF to clients, to include a worked example(s) to realistically illustrate the level of net recovery the client may make.

q. Any regulation of TPF must also carefully consider who and what it is intending to regulate including, but not limited to, how TPF should be defined and what constitutes a funder and a funding agreement. In this regard, we agree with the ELI Principles that any definition of a funding agreement should exclude concepts such as CFAs and DBAs, which are already separately regulated.

r. CFAs and DBAs enhance access to justice for much wider classes of case than attract TPF, but DBAs remain under-utilised due to the poorly worded DBA Regulations, the draconian consequence (unenforceability) for breach of those regulations, and the caps imposed.

s. The long overdue amendments to the DBA regime, as proposed by the DBA Reform Project in 2019, should take place without further delay, but also codify aspects of the subsequent judgment in *Zuberi v Lexlaw Limited* [2021] EWCA Civ 16. However, numerous issues remain with the proposed regulations and we believe that in the longer term there is merit in starting anew with a single regulatory regime for all forms of contingent funding agreement, unencumbered by the DBA Regulations or the Courts and Legal Services Act 1990. This would bring clarity and potentially make DBAs a more viable option for many types of cases. Ideally it would be undertaken as part of the CJC's review of the Solicitors Act 1974.

t. We think that the current limit of 100% that applies to CFA success fees should be capable of being lifted in specified meritorious scenarios, such that it operates as a 'soft cap'. For injury claims the additional cap related to the damages ought to relate to all damages (removing the exclusion of future losses).

u. DBAs for non-consumer clients should not be subject to caps or other restrictions on how the law firm structures the DBA fee. For consumers, we see the merit in 'soft caps' on DBA fees whereby the cap could be exceeded in specified meritorious scenarios.

v. DBAs should adopt a success fee model, with the parties free to contract for part or all of time-based fees to also be payable in a win, loss or on termination. In so far as caps on DBAs are retained, these should be VAT exclusive.

w. We recommend that the prohibition on the use of DBAs in opt-out proceedings before the CAT be removed to align with the position in CPR 19.8 representative actions. This would increase the options for redress available for breaches of competition law, including enabling some claims to proceed that may not otherwise be economically viable if relying solely on TPF and solicitor/barrister CFAs.

x. We believe that an order for a cross-undertaking in damages from a defendant seeking security for costs should be available in much wider circumstances than the 'rare and exceptional' circumstances stated by the Court of Appeal in *Rowe v*

*Ingenious Holdings Plc* [2021] EWCA Civ 29. It is the defendants choice whether to seek security of costs, if they do but are ultimately found to have caused a civil wrong to the claimant, then it is they rather than the claimants who ought to bear the cost of providing that security. We would therefore recommend that this legacy of *Rowe* is removed in revised procedural rules.

y. In order to encourage early settlement of cases, reduce the erosion of claimant compensation in claims in which the defendant runs a strategy of attrition, and improve litigant behaviour more generally, we propose that, in certain circumstances, winning funded parties be able to claim from the opponent an additional sum of up to 100% of the funded party's total recovered base legal costs, unless the court concludes that would be unjust.

z. Litigation costs and any related funding costs would be significantly reduced if the courts were better resourced and hence able to list hearings more swiftly, more actively and robustly case manage cases, and consistently deliver timely judgments. That would also enhance the reputation of the English courts and help maintain the significant contribution of the legal services sector to the economy.

## RESPONSES TO QUESTIONS

***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. **<u>To what extent, if any, does third party funding currently secure effective access to justice?</u>**

TPF serves an important role in enabling litigants to bring claims they might not otherwise be able to bring and extends the choice of legal representation for those with limited financial resources.

Notably, it enhances access to justice for claims relating to high-value and complex litigation and is particularly important for consumer group actions, which are either difficult or impossible to bring without TPF.

The availability of TPF also assists in securing effective access to justice for corporate claimants by enabling them to litigate 'off balance sheet' which is the only way some companies can practically access legal redress, given limited resources necessarily being focussed on other aspects of the business. Furthermore, such funding is often essential for insolvent companies which might not otherwise have sufficient assets to fund recoveries for the insolvent estate and for the benefit of the creditors.

TPF enhances a party's ability to pursue alternative dispute resolution (**ADR**) routes. It can give impecunious parties a credible threat of enforcement through either court proceedings or arbitration and without which they likely would not secure fair terms during any settlement negotiations. As discussed further in our response to question 2, it also helps enable parties to have equality of arms.

By way of illustration, the Stewarts commercial group has secured over £660 million in either damages or settlement sums for over 1350 clients whose cases were funded by TPF. It is doubtful that those sums would have been secured without such funding.

TPF does, however, have its limitations. It is rarely available for lower value claims or claims in which the ratio between costs and damages is insufficient to enable funders to secure a sufficient return. It is difficult to secure and more expensive in cases with a likely long duration. In our experience, funded cases typically have a claim value of greater than £40 million with a ratio of 1:10 between investment by the funder and the claim value. Whilst TPF is in theory available to defendants, it is rarely utilised because of the challenge of identifying accessible funds from which the funders' return could readily and reliably be paid in a 'successful outcome' (e.g. defeating the claim or a settlement or judgment that is £X below a predefined threshold).

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

For the limited classes of case in which it is available, TPF greatly promotes equality of arms. This is one of its key benefits. Legal aid is rarely available for civil claims in England and Wales – and even if a base-level scheme was introduced - it is implausible that it would be able to provide equality of arms in high cost and complex claims against well-funded corporates or states.

TPF helps enable financially weaker and/or impecunious parties to litigate against well-resourced parties with equality of arms by allowing the funded party to match the opponent's representation by:

- Instructing a law firm, barrister and/or experts with equivalent skill, expertise and experience;
- Instructing their legal team to spend an equivalent amount of time in preparing the case and/or on work streams that would not otherwise have been affordable (for example, pursuing meritorious ancillary issues or applications, that they might not otherwise have been able to pursue (or contest)); and
- Incurring disbursements that give the case the best chance of succeeding, for example, instructing litigation support service providers (such as e-disclosure providers and document reviewers), additional expert advisors, or procuring specialist litigation technology.

In many of our larger funded cases we have faced opponent budgets of tens of millions of pounds - these claims would not be able to be contested with equality of arms without TPF.

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

The legal services sector is a key player in the British economy generating £74.4 billion in turnover and £57.8 billion in gross value added in 2021.[4] Furthermore, in 2021 the UK exported £6.5 billion in legal services and imported £0.9 billion.[5] The availability of TPF plays an important role in this contribution by enhancing the attractiveness of England and Wales as a jurisdiction for disputes. Many jurisdictions around the world are reviewing their approach to TPF because they can see that it promotes the influx of high-value legal work and therefore adds value and growth to the economy.[6] The CJC ought to be looking to make recommendations that enable the law of England and Wales to thrive and maintains England and Wales as the jurisdiction and law of choice for companies to nominate in their contracts and turn to for their disputes when they arrive.

The availability of TPF materially assists in holding corporates to account for illegal actions, including in relation to competition law infringements. We believe this is already

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[4] As detailed in Mark Spilsbury's report 'The economic contribution of the legal services sector to the UK economy' on behalf of The Law Society, p.3.

[5] Ibid, p.4.

[6] As noted in the London International Disputes Week panel discussion '*How are attitudes towards third-party litigation funding shifting around the world?*' on 5 June 2024. The discussion of which was summarised by Stewarts Risk & Funding Partner Julian Chamberlayne and Partner Fiona Gillett in the article, *'How are attitudes towards third-party litigation funding shifting around the world? - Stewarts'* (11 June 2024).

promoting improved corporate behaviour (including for the benefit of consumers) and will do so even more as settlements and awards involving corporate wrongdoing gain publicity. For instance, we suspect many corporates will have taken note of major funded actions including the Post Office Horizon scandal and 'Dieselgate'.

TPF enables the representation of institutions such as pension funds which, according to their constitutions, may not be permitted to apply funds to litigation. Furthermore, funders may, in addition to funding litigation, provide capital funding to help keep a business alive during litigation. In some circumstances, funders will take an assignment of the case in which they might provide consideration to a financially distressed corporate claimant upfront and/or agree to split any recovery.

TPF allows corporate claimants to litigate 'off balance sheet', thus freeing up capital resource that would otherwise be required for the litigation and instead deploy that capital resource in their core business to help generate growth for the company.

TPF can provide benefits to the legal team's risk management of the case. Funders usually employ a mixture of experienced legal and financial professionals whose insights and analysis will often assist the legal team in refining their own assessment of the merits and economics of the case, as well as refining the case strategy.

TPF can enable the provision of security for costs or indemnities against adverse costs, without provision for which many claimants would be unable or unwilling to bring their claims. This is particularly the case for parties which may find it difficult to obtain similar protections under ATE insurance because they may be resident in countries in which there either is not a market for ATE insurance or there are licensing issues, such that it is difficult or impossible to obtain ATE insurance.

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?**

Regulation of funders

Some funders are currently self-regulated by the Association of Litigation Funders of England and Wales. ALF is a private company limited by guarantee. All funders which are members of ALF must agree to observe the standards of practice and behaviour set out in the ALF Code of Conduct (the **ALF Code**).[7] Funders not adhering to the ALF Code may have their membership of ALF suspended or terminated.[8]

ALF also operates a complaints procedure by which a funded litigant may make a complaint that a funder with which they have entered into a funding agreement has breached the ALF Code.

[7] Rule 6.1, ALF Rules of the Association: "*Every Member and Associate Member shall abide by the Code of Conduct*."

[8] Article 30 (Suspension and termination of membership), ALF Articles of Association: "*(4) A member's membership may be immediately suspended if the board of directors reasonably determine at a meeting of the board of directors, at their discretion and in accordance with clause 10 hereof, that in their reasonable opinion the member has:* […] *(b) failed to comply with the prevailing Code of Conduct of Litigation Funders or other rules of the company as have been notified to members from time to time;* […] *(5) A person's membership may be terminated by the directors if they determine at a meeting of the board of directors, at their discretion in accordance with clause 9 hereof, that that person has: […] (c) failed to comply with the prevailing Code of Conduct of Litigation Funders or other rules of the company as have been notified to members from time to time* […]."

The ALF Code could be improved. In our view, its provisions relating to capital adequacy[9] do not go far enough, it does not contain provisions on transparency of the source of funds and it does not contain any provisions on funders' conflict of interests. In this regard, we agree with the general approach taken by the ELI Principles, in particular, in relation to transparency (Principle 5), conflicts of interest (Principle 6) and capital adequacy requirements (Principle 7).

However, even if the ALF Code was revised in line with the above ELI Principles, it's effectiveness as a regulatory mechanism is still limited, notably because the ALF Code is only binding on its members, and not all funders are members of ALF. Currently, ALF has 16 'funder members' and eight 'associate members' (which include law firms and insurers), whereas ELI believe there are circa 67 funders active in this jurisdiction.[10]

As to whether the current self-regulatory framework operates sufficiently or whether improvements could be made to achieve an appropriate and effective regulatory framework, it strikes us that there are a number of issues to consider:

1. Whether conditions should be placed around funders offering TPF, who should administer or regulate this, how, and how the regulated activity is defined;

2. Funders' conduct generally (including the suitability of the current ALF Code), who should administer or regulate this and how; and

3. Monitoring and enforcement of the above and who should perform this and how.

Our thoughts on the above issues are as set out below:

- As a general point, we would endorse the adoption by ALF of the ELI Principles, subject to the comments and observations we make on the ELI Principles further above and more fully in our response to question 7. If the industry continues to be self-regulated and ALF continues to be the industry's representative body then, as a private company, revising the ALF Code would be a matter for ALF.[11]

- As noted above, under the current ALF framework, funders are not required to be members of ALF and many are not. Additionally, it may be that ALF does not yet have effective means of incentivising members' compliance with the ALF Code because, even in the hypothetical 'worst-case' scenario in which ALF terminated a funder's membership, funders can still continue to provide TPF in this jurisdiction.

- If further regulation is considered necessary, careful thought should be given to what and who should be regulated, including but not limited to, how TPF should be defined and what constitutes a funder and a funding agreement. For example, altruistic (or 'pure') funding of a piece of litigation[12], or scenarios in which a third party provides one-time funding to a litigant with no or minimal conditions attached[13], and secured loans to law firms would, in our view, not require

[9] Clause 9.4, ALF Code.

[10] 'A. Introduction – III. The Specific Approach Adopted' in ELI Principles, p.23.

[11] In this regard, we note that Article 9(1) of the ALF Articles of Association provide that any revisions to the ALF Code must be made by a two-thirds majority of members at an annual general meeting or extraordinary general meeting.

[12] Paragraph 7.30 of the CJC's report '*Review of Litigation Funding: Interim Report and Consultation'* (31 October 2024) (**CJC Interim Report**), p.78.

[13] E.g. simply seeking a return of the funding in a win or modest return below a low threshold of say 1x.

regulation. Likewise, if law firms (who are already regulated entities) provide disbursement funding as an ancillary to providing legal services pursuant to a CFA or DBA then that also ought to be excluded from any regulation of third party funding.[14] We agree with the position taken in the ELI Principles that any concept or definition of a funding agreement should not encompass overlapping concepts such as CFAs and DBAs.[15]

- Any regulation of funders ought to avoid repeating the mistake that precipitated the CFA costs wars and has been a major impediment to the adoption of DBAs; that is rendering agreements wholly unenforceable if they are non-compliant with the regulations.

- An alternative to the present regime could include a licensing model, whereby any funder wishing to provide TPF in England and Wales must be licensed to do so. We anticipate that this would require legislation. If such a model were considered:

  - As set out above, careful thought should be given to what and who should be regulated, including but not limited to, how TPF should be defined and what constitutes a funder and a funding agreement, and whether or not it should be limited to TPF to consumers only, or to any funded party.

  - Conditions for licensing may include, for example, funders having a certain level of capital adequacy, maintaining transparency over their source of funds, the extent to which funders can exercise a level of control in proceedings and any requirements as to the terms of funding agreements. The ELI Principles provide a useful blueprint for the issues that ought to be addressed.

  - An appropriate body could be given the responsibility of issuing, monitoring and enforcing licensees' compliance with the conditions of the licence. This could be through: (i) a model of self-regulation by ALF or another representative body; (ii) an independent third party to assure a measure of objectivity and independence in granting or withdrawing licences; or (iii) a hybrid arrangement between a representative body and an independent third party, pursuant to which defined priority issues would be referred to the independent third party to deal with on behalf of the representative body (e.g. issues that are material to the licence obligations and may warrant suspension/termination).

  - Other funder conduct related issues that are not considered to amount to a licensing issue could continue to be monitored and enforced by the funders' representative body in order to maintain an element of proportionate self-regulation.

  - The decisions of the relevant body should be subject to an appeals process.

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[14] See the judgment of Lord Neuberger in *Sibthorpe & Anor v London Borough of Southwark* [2011] EWCA Civ 25.

[15] 'B. Principles – Part 1: General Provisions - Principle 3: Definitions' in ELI Principles, p.30.

- There should be a sufficient degree of public transparency in the enforcement of licences – for example, decisions by the relevant body and any appeal decisions being made publicly available, with enough detail provided for the general public to understand why the charge was being brought and the basis for the decision that was reached.

- If the government considered that the relevant body was not performing its functions satisfactorily, it may wish to have the ability to intervene (for example, by stepping into the shoes of the relevant body and/or imposing more prescriptive regulations).

Professional duties of solicitors

The provision of TPF more generally is already safeguarded to an extent by the rules governing legal professionals, being: (i) the SRA Code of Conduct, applying across solicitors' practice generally; and (ii) the FCA's Insurance Conduct of Business Sourcebook (**ICOBS**) (contained within the FCA Handbook), insofar as legal professionals are carrying out activities as authorised persons for the purposes of insurance intermediary activities associated with TPF.

Solicitors are obliged under the SRA Principles and SRA Code of Conduct to:

- Establish clients' circumstances and needs and act in the client's best interests (and hence always prioritise their duties to their clients over any relationship or financial dependency on the funders);[16]

- Inform clients of any financial interests the solicitor has in referring the client to a funder, or where the funder refers the client to the solicitor;[17]

- Stop acting where there is an own interest conflict of interest, or significant risk of an own interest conflict, in respect of their relationship with the funder and their retainer with the client;[18]

- Advise clients on the pricing and legal cost and funding options potentially applicable to their claim. Whilst not explicitly set out, we take this as including a duty to advise clients in outline on the full range of funding/retainer options (for example, ATE insurance and any relevant BTE insurance policy and conditional fee arrangements such as CFAs and DBAs) even if the solicitors firm does not offer all of those options.[19] Then to advise on which of those options might be in the client's best interests for the claim in question; and

[16] Principle 7, SRA Principles: "*You act in the best interests of each client"*; Paragraph 3.4 SRA Code of Conduct*: "You consider and take account of your client's attributes, needs and circumstances"*.

[17] Paragraph 5.1, SRA Code of Conduct: "*In respect of any referral of a client by you to another person, or of any third party who introduces business to you or with whom you share your fees, you ensure that: clients are informed of any financial or other interest which you or your business or employer has in referring the client to another person or which an introducer has in referring the client to you"*.

[18] Paragraph 6.1, SRA Code of Conduct: "*You do not act if there is an own interest conflict or a significant risk of such a conflict"*.

[19] Paragraph 8.6, SRA Code of Conduct: "*You give clients information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them"*; 8.7 "*You ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred"*.

- Where ATE is arranged, the firm is also required to produce a demands and needs statement prior to the conclusion of the insurance contract[20] and certain individual litigants must be given an IPID in advance of the conclusion of the policy.[21]

We note that a previous incarnation of the SRA rules did have explicit mention of how the client would fund their claim, including via insurance[22]:

> Chapter 1 of the SRA Code of Conduct 2011 required the outcome that:
>
> *O(1.6) you only enter into fee agreements with your clients that are legal, and which you consider are suitable for the client's needs and take account of the client's best interests;*
>
> The following indicative behaviours showed compliance with this:
>
> *IB(1.13) discussing whether the potential outcomes of the client's matter are likely to justify the expense or risk involved, including any risk of having to pay someone else's legal fees;*
>
> *IB(1.14) clearly explaining your fees and if and when they are likely to change;*
>
> *IB(1.15) warning about any other payments for which the client may be responsible;*
>
> *IB(1.16) discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees, and whether the fees may be paid by someone else such as a trade union;*
>
> *IB(1.17) where you are acting for a client under a fee arrangement governed by statute, such as a conditional fee agreement, giving the client all relevant information relating to that arrangement;*

Our understanding of the removal of the above was that it simply reflected the SRA shifting away from providing indicative behaviours and was not intended to alter the underlying expectations of solicitors. In practice, Stewarts' approach to advising clients about the funding arrangements open to them remains in accordance with the outcomes and indicative behaviours set out above.

It is particularly important to fully advise the client on their funding options where they are more likely to be an unsophisticated user of legal services (e.g. in consumer or personal injury claims) and are therefore less likely to be familiar with those options than a sophisticated user of legal services (e.g. corporates or funds). Where advised properly, any litigant in any proceedings should therefore be making an informed

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[20] Paragraph 12.1, SRA Financial Services (Conduct of Business) Rules (**SRA COB Rules**): "*Prior to the conclusion of a contract of insurance, you must specify on the basis of information obtained from the client, the demands and needs of that client.*"; 12.3: "*You must give the client a statement of the client's demands and needs prior to the conclusion of a contract of insurance*".

[21] Paragraph 21.1, SRA COB Rules: "*You must ensure that the client is given objective and relevant information about a policy in good time prior to the conclusion of the policy, so that the client can make an informed decision*".; 21.4: "*When dealing with a client who is an individual and who is acting for purposes which are outside his trade or profession the information provided under rule 21.1 must include an Insurance Product Information Document*".

[22] SRA Code of Conduct 2011 is available in version 21 of the SRA Handbook.

decision on what any fees and/or funding arrangement would involve, the advantages, the disadvantages and what is most suitable for them. Failure to advise a client properly on fees and funding options may risk one or more of the following:

- A complaint from the client to the firm;
- A complaint from the client to the Legal Ombudsman;
- Investigation and resultant disciplinary action by the SRA;
- Proceedings (and the time and potentially the associated costs of defending those proceedings) for an assessment by the Senior Courts Costs Office of a solicitor client bill of costs, resulting in potential reduction or disallowance;[23] and
- In extreme cases, a non-party costs order being made against the solicitors firm[24] or a potential claim for professional negligence.

When policymakers are considering whether the regulation of funders requires change, the existing regulation of the solicitors' profession as regards TPF should be borne in mind.

The SRA should consider whether the current SRA rules that are engaged when solicitors are providing advice on funding and/or are instructed on funded cases could be enhanced or at least clarified. For example, whether:

- Outcome 1.6 of the SRA Code of Conduct 2011 (see further above) should be reintroduced and refined to expressly include related funding agreements to which the solicitor may not be a contracting party;
- There should be an obligation on law firms providing advice on funding agreements to provide, prior to the client entering into a funding agreement:
    - To all clients, a document that is similar in concept and content to an ATE insurance demands and needs statement (see below at question 7 in relation to ELI Principle 8); and/or
    - To consumer clients, a FPID (see Executive Summary) setting out, in advance of funding being put in place, all the key terms of the proposed funding (which we think should be produced by the funder);
- It may be efficient to align the registration for law firms that provide advice on ATE insurance (on the register of firms carrying out financial services activities) with the equivalent for those providing advice on funding agreements in consumer cases;

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[23] See, for example, *McDaniel & Co (a firm) v Clarke* [2014] EWHC 3826 (QB).

[24] See *Adris v Royal Bank of Scotland plc* [2010] EWHC 941 (QB) which concerned non-compliance with the Solicitor's Code of Conduct 2007, which provided at Rule 2.03(1) as far as relevant that: "*You must give your client the best information possible about the likely overall costs of a matter both at the outset and, when appropriate, as the matter progresses. In particular, you must: (d) discuss with the client how the client will pay, in particular (i) […] (ii) whether the client's own costs are covered by insurances or may be paid by someone else, such as an employer or trade union […]*".

- Solicitors should be required to confirm to clients whose cases are potentially suitable for TPF:
    - What experience they have in advising on TPF and acting in cases funded by TPF;
    - Whether they have material connection with a proposed funder and if so whether or not that creates an own-interest conflict;
    - Whether they will advise the client on some or all aspects of the funding; and
    - If they will not or cannot advise the client on all aspects of the funding, recommending that the client seeks separate legal advice from a solicitor with experience in advising on TPF and litigating cases backed by TPF.

Even if the SRA determines that no changes are necessary to the SRA Code of Conduct, we believe that a drive to educate solicitors on their existing professional duties and how best to comply with them would be beneficial. We think that this would be most effective if supported by SRA guidance on TPF – including on how the existing SRA obligations would be expected to apply to litigation funding. In this regard, we would urge the SRA and/or the Law Society to promote the ELI Principles and use them to educate and equip the legal profession to better advise clients on TPF, or at least identify whether their clients ought to have separate, specialist advice. If the ELI Principles are followed, they will provide invaluable help to solicitors advising funded parties to select the most appropriate funder for their client and negotiate fair funding agreements in the best interests of their clients.

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;**

    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 agree with the authors of the ELI Principles that in most respects there is far more talk about the risks or harms that may arise from TPF than there is evidence of actual harm. However, we acknowledge that there are some areas of risk with the current regime of self-regulation by ALF, including the fact that it is non-compulsory and many funders are not members of ALF.

Lack of transparency

As noted in our response to question 4, one of the major risks posed by TPF is the lack of transparency over the source of funds. An example of the problems this can cause was the rapid collapse in 2014 of litigation funder Argentum Capital Ltd after it was alleged that the fund was financed by a Ponzi scheme.[25]

It ought to be made clear to funded parties, before they enter into a funding agreement (or any CFA or DBA that is reliant on TPF to the law firm) whether the funding commitment is truly ring-fenced, or in what, if any, circumstances beyond termination rights, the funder or their underlying investors could cease funding the case in question.[26]

Stewarts poses extensive financial due diligence questions to all funders that it recommends to clients. In doing so, we have frequently been told by funders that we are either the only, or one of just two, solicitors firms in England and Wales to routinely undertake such due diligence on them. We have received a positive response and answers to these due diligence questions from all of the select group of funders that we have put through this process.

[25] As noted in Professor Rachael Mulheron KC's report '*A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study*' (28 March 2024) commissioned by the Legal Services Board (the **LSB Report**), p.67 and detailed in David Marchant's article for Offshore Alert: '*Argentum Capital litigation fund financed by £90M Ponzi scheme - OffshoreAlert*' (18 February 2014).

[26] See below in relation to portfolio funding/finance and the example of the collapse of SSB law.

Instances of funders exerting control

In our experience most funders are much more sensitive to the issue of controlling the litigation than is sometimes portrayed in the media and do not appear to us to intentionally seek to control the claim, or any aspect of it.

We are aware of the recent coverage of the proposed settlement in the *Merricks v Mastercard*[27] CAT proceedings being openly opposed and criticised by the claimants' funder. Please see our response to question 28 in this regard.

There are instances of funders refusing budget variations, or only offering them on enhanced terms. This scenario most commonly arises in cases that are quite advanced in the litigation process and for which costs have increased for a variety of good reasons. In such cases it is relatively common for the funder to respond saying that they either cannot or will not provide a budget variation. This may be because: (i) the funds have already been or are being deployed by the funder elsewhere; (ii) the current stage of the funder's investment/funding cycle cannot allow such extra funding; or (iii) the funder is concerned that the ratio of costs to likely recoverable damages is dropping below their usual thresholds set to reduce the risk of them being unable to recover their funding premium in full in a 'low win' scenario (e.g. settlements heavily discounted for litigation and/or enforcement risk).

Whilst it may not be the intention, the effect of doing so can be that the funder exerts a degree of control, as refusing to vary the budget may make it difficult or impossible for the client to continue with their case. This is especially so in cases where a low settlement offer has been made which the client feels practically compelled to accept, because they do not have funding to pursue the case further without the budget variation sought. To counterbalance this risk to the funded party, we propose that any regulatory code for funders requires them to include a provision in their funding agreements which provides that, if the funder refuses to vary the budget (including in scenarios where the funder has reached its contractually agreed funding limit)[28], or will only do so if the funded party agrees enhanced terms for the funder, the funded party has the right to procure the additional funding from an alternative funder. For that right to be effective the original funder would have to agree for the co-funder to have an equal position to their own in the priorities agreement. To put it another way, the original funder ought to have the first option to provide any additional funding requirement for the case in question, but if they are not willing to do so on the original funding terms then the funded party ought to be able to go back to the wider funding market.

Where a budget variation is agreed, it is in our experience often coupled with a requirement that the solicitors also take more risk by increasing the level of CFA discount. Whether the solicitors are able and willing to undertake extensive work at greater discount will vary from firm to firm, but should not be assumed.

Reduction of net proceeds available to claimant

TPF is much more costly than borrowing from a bank to finance the litigation costs. In large part this is due to the higher risk to the funder because of the non-recourse nature

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[27] *Walter Hugh Merricks CBE Class Representative v. (1) Mastercard incorporated (2) Mastercard International Incorporated; (3) Mastercard Europe S.A.* – Competition Appeal Tribunal - Case Number: 1266/7/7/16.

[28] See ELI Principle 8(2)(c).

of the funding. In contrast if a litigant funded their claims through a loan then, if the case is lost, they must still pay back the loan along with regular interest payments. Consequently, it is inevitable that the cost of the risks inherent in TPF will substantially reduce the net proceeds left for the funded claimant. This risk cannot be avoided but it can be mitigated by ensuring that funded parties are receiving comprehensive advice that will both secure the best funding terms available and also help manage their expectations as to the likely net returns they might actually achieve.

Furthermore, in our experience reputable funders tend to take a pragmatic approach and, where the expected damages have reduced during the proceedings below what was expected, they will usually negotiate a reduction in their funding premium to reflect the risks and ensure claimants are left with a reasonable sum (see further on 'haircuts' in answer to question 29).

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

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

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

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

Our thoughts on regulation are explained in our responses to question 4 above and question 7 below.

Litigation

*Should the same regulatory mechanism apply to all types of litigation?*

1. Collective proceedings in the CAT

The CAT Rules already provide the CAT with the ability to regulate certain aspects of how TPF agreements impact the parties and the proceedings.[29] At present, it seems to us that the CAT is imposing checks and balances on TPF effectively, without the need for further regulation. In any event, those rules are still relatively new, and we think require more time to be applied in relevant proceedings before any further regulation should be considered. If further regulation of the impact of TPF on proceedings in the CAT is considered necessary – see in particular our response to questions 11 and 12 below in respect of restrictions on funder returns in the context of CAT claims – it is important

[29] Rule 78 of the CAT Rules sets out the criteria to be applied by the Tribunal in assessing whether to authorise an applicant to act as a class representative in collective proceedings. A class representative's funding arrangements may be relevant to whether they will be able to pay the defendant's recoverable costs if ordered to do so (Rule 78(2)(d)).

that there is consistency with the CAT Rules and may therefore be best made by amendment to those rules.

In this regard, we note that DBAs are prohibited in opt-out collective proceedings in the CAT by section 47C(8) Competition Act 1998 but there is no such equivalent prohibition for representative proceedings under CPR 19.8. In our view, there should be no such distinction and the prohibition on DBAs in the CAT should be removed. Doing so would open up more choices on how to fund collective proceedings in the CAT and thereby help reduce the cost of funding for such claims and provide greater access to justice.

2. Group claims before the civil courts

For opt-in group litigation, in our experience, such claims are already difficult to fund and further regulation would therefore make it even more difficult and likely further restrict access to justice.

For representative proceedings under CPR 19.8, we can see that, whilst the representative party will have had legal advice on the funding options and any funding agreement, ordinarily[30] those they represent will not. In this regard, please see our response to questions 11 and 12 below in respect of controls on funder returns in the context of representative proceedings, our response to question 23 in the context of potential revisions to the CPR and question 30 in respect of court approval of settlements.

*Are different approaches required where cases involve different types of funding relationship between the third party funder and the funded party?*

Issues can arise in relation to 'portfolio funding'. See further our response to question 21 below.

*Are different approaches required where cases involve different types of funded party?*

We repeat our suggestion in response to question 4, that in consumer cases funders should be required to provide funded clients with a FPID. Further mirroring the ATE insurance regime, we have suggested that the solicitors be required to provide a demands and needs statement to all funded clients, but that is particularly relevant to clients in consumer cases.

As explained in our answer to question 23 we suggest that the court control of the certification of claims and distributions from damages under the CAT Rules be extended to representative actions under CPR 19.8.

If policymakers did not agree with this and felt a different approach should be taken based on the type of funded party then, in our view, the sensible distinction to be made would be that TPF to consumers should be subject to enhanced regulation whereas TPF to non-consumers (who are usually sophisticated users of legal services, e.g. corporates, funds and other businesses) should be subject to less regulation (if any at all). These parties should be free to take funding (and legal advice) from whomever they choose and on whatever terms they choose, without restriction.

[30] Where a CPR 19.8 representative action is brought on an opt-in basis, the represented parties are much more likely to have had legal advice on any funding agreement.

English seated arbitration

By way of background, London is a global seat for some of the largest international arbitrations in the world. In our experience, the choice of London is often driven by an intention to benefit from the supervisory powers of the English courts.

Arbitral tribunals should be empowered with significant discretion to decide themselves the impact of TPF upon cost recoverability on a case-by-case basis. Accordingly, there is a danger that any wide-ranging new rules introduced to regulate TPF in England and Wales could potentially limit the attractiveness of England and Wales for arbitration. If new rules made it harder to secure funding, or limited funder budgets, then that might mean the claimants in question are not able to bring their claims at all. Restrictions on TPF such as caps may well be unexpected 'blockers' not within contemplations or expectations of international parties to commercial contracts. Consequently, there is a real risk of harm to the arbitration industry in this jurisdiction. By way of comparison, we note that Singapore[31] and Hong Kong[32] (our competitors as arbitration centres) have introduced laws to promote rather than restrict TPF in arbitration in those jurisdictions and we understand that some countries in the Middle East[33] may be considering introducing similar regulation.

Of course, institutional rules can provide further guidance on TPF-related issues. It is for each arbitration institution to determine its own rules on TPF, subject to: (i) the parties to the arbitration being able to depart from those rules in the relevant arbitration agreement; and (ii) for arbitrations seated in England, the need for any such rules and any party agreement to be consistent with mandatory English law in order to be enforceable.

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

Regulation of solicitors

As noted in our answer to question 4 above:

- The provision of TPF is regulated by the rules governing legal professionals, so when policymakers are considering whether the regulation of funders requires change, the existing regulation of the solicitors' profession should be borne in mind.

- Notwithstanding this: (i) the SRA may wish to consider whether the current SRA rules that are engaged when solicitors are providing advice on funding and/or are instructed on funded cases could be enhanced or clarified; (ii) we believe that SRA guidance and a drive to educate solicitors on their existing professional duties and how best to comply with them would be beneficial.

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[31] Civil Law (Third-Party Funding) Regulations 2017, and section 5B (Validity of certain contracts for funding of claims) Civil Law Act 1909, as summarised at paragraphs 5.20-5.21 of the CJC Interim Report, p.44.

[32] Division 3 - Third Party Funding of Arbitration Not Prohibited by Particular Common Law Offences or Tort, Arbitration Ordinance, as summarised at paragraphs 5.16-5.17 of the CJC Interim Report, p.42-43.

[33] As noted by one panellist in the London International Disputes Week panel discussion '*How are attitudes towards third-party litigation funding shifting around the world?*' on 5 June 2024. The discussion of which was summarised by Stewarts Risk & Funding Partner Julian Chamberlayne and Partner Fiona Gillett in the article, '*How are attitudes towards third-party litigation funding shifting around the world? - Stewarts'* (11 June 2024).

Regulation of funders

As noted in our answer to question 4: (i) we would endorse the adoption of the ELI Principles in the TPF sector; and (ii) if policymakers were minded to consider a regulatory model whereby any funder wishing to provide TPF in England and Wales must be licensed to do so, the ELI Principles provide a useful blueprint for the issues that ought to be addressed. Our thoughts on these principles are set out in more detail below.

**Principle 4 – Promotional Materials**

*(1) A Third Party Funder must ensure that any promotional materials it provides are comprehensive, clear and not misleading.*

*(2) A Third Party Funder must, as a minimum, include in any promotional materials provided publicly or to an individual a prominent statement that any party considering entering into any Third Party Funding Agreement should seek independent legal advice (ie legal advice from a lawyer with no connection to the Third Party Funder) prior to doing so.*

*(3) A Third Party Funder should also include in its promotional materials a list of sources of information (such as these principles) regarding the issues involved in a third party funding agreement.*

We agree with Principle 4, save for that we would emphasise that:

- A solicitor should not be deemed to have a connection with a funder (such that they cannot provide independent legal advice) merely by reason of the solicitor being instructed (or proposed to be instructed) to have conduct of the funded party's case.[34] As is explained in the commentary to Principle 4(2), what matters is whether there is a 'material connection' between the funder and the solicitor that would result in a financial conflict of interest or otherwise make it inappropriate for the solicitors to advise on the funding agreement.[35]

- If it *were* assumed that a solicitor who is instructed (or is proposed to be instructed) to have conduct of the funded party's case cannot provide independent legal advice, then there would be an expectation that in all cases the funded party should seek separate legal advice on the funding arrangements.[36] That would force all funded claimants to find and retain a second firm of solicitors. It also raises the challenging question of who would pay for that advice (which, due to the length of funding agreements and the complexity of the issues involved, can be very costly). The reality is that prospective funder(s) would not agree to pay for that advice unless and until the funding agreement was signed. It is also doubtful that separate lawyers would understand enough about the evidence, risks and likely timeline in the claim to provide what we consider to be

[34] Note that we understand the residual aspect of the introduction that suggests otherwise is a legacy reference that was inadvertently overlooked when the commentary on Principle 4(2) was updated.

[35] For further on this issue see the article, '*Illuminating research*', by Stewarts Risk & Funding Partner, Julian Chamberlayne, in issue 154 (Dec 2024) of the Law Society's Litigation Funding magazine.

[36] Notwithstanding this, in CAT opt-out collective proceedings it is in our view essential to ensure that the proposed class representative receives separate legal advice on any alternative funding arrangements, for example, a CFA or funding agreement, before any such arrangements are entered into, in order to demonstrate evidence of independent, detailed consideration of funding terms.

one of the key components of the advice to the funded party: financial modelling of the likely net outcomes of the case were it to settle at various key stages, when contrasted with a likely trial outcome.

- If the funded party is a corporate or other business that has been advised by in-house legal counsel then there should be no requirement for independent legal advice. Indeed, many businesses may prefer this option in order to reduce the transactional costs associated with the funding.

**Principle 5 – Transparency**

*(1) The Third Party Funder should provide the following information to the Funded Party prior to execution of the Third Party Funding Agreement:*

*a. The identity (including the address of the registered office) of the Third Party Funder;*

*b. The identity of the person or legal entity that is intended to be the source of the funds to be provided;*

*c. Any details as to actual or potential conflicts of interest which are required by the law of the Third Party Funding Agreement or the law of the forum or pursuant to the draft contract.*

*(2) The Funded Party should provide the following information to all other parties to the litigation and to the court:*

*a. The fact that the litigation is being funded by a third party;*

*b. The identity (including the address of the registered office) of the Third Party Funder.*

*(3) The information in subsection (2) should be provided by the following date:*

*a. If the Third Party Funding Agreement is made prior to the commencement of the litigation, at the earliest available opportunity after commencement of the litigation.*

*b. If the Third Party Funding Agreement is made after the commencement of the litigation, within 14 days of the execution of the Third Party Funding Agreement.*

*(4) Where a Third Party Funding Agreement is subject to any law which requires disclosure of information regarding the Third Party Funding Agreement, the terms of the funding agreement should (i) refer to the relevant provision of law and (ii) set out the extent of disclosure required by that law.*

*(5) In all cases, the Third Party Funding Agreement should clearly set out the nature and extent of the Funded Party's disclosure obligations under the terms of the agreement and the applicable law of the Third Party Funding Agreement and (where known) the lex fori.*

Save as set out below, we agree with Principle 5 and would wish to make the following additional points.

- We contend that there should be a positive requirement for funders to confirm to the prospective funded party and their solicitors the identity of any investors, or their ultimate beneficial owners, who have a stake in the funding of the case, or the relevant funding vehicle, of 25% or more. In our experience, disclosure of the funding vehicle (if a separate but related entity to the funder's UK trading entity) occasionally occurs later in the process of finalising the funding terms. In our view, it should be provided as part of the initial information a funder provides to a prospective funded party. Additional transparency obligations on funders provide parties and their lawyers with the opportunity to complete better due diligence on the source of funding, both in terms of whether the funder has sufficient funds for the duration of the case and if there are any ethical considerations to be aware of regarding the source of financing. As part of Stewarts' due diligence of funders, we ask funders to confirm details on matters including corporate structures (including ownership and control), policies on funding levels and conflicts systems. However, as mentioned in our response to question 5 above, we understand that is it very rare for law firms to carry out detailed due diligence on funders.

- There is no adequate reason why the funded party should be required, as standard, to disclose to the court and the other parties the fact that they are being funded and to identify the funder (Principle 5(2)). We observe that parties (including defendants) funded by BTE insurance (including the many types of liability/indemnity insurance) or ATE insurance are not subject to equivalent requirements.[37] Treating parties differently in this regard based on how they are funded or insured would be unjustified. If, however, policymakers were minded to propose requirements on disclosure that would apply to funded parties and insured parties equally, and notwithstanding that the courts already have powers to make non-party disclosure orders, we would also make the following points:

    - Any regulation would need to carefully define what information must be disclosed. For example, if a law firm had a portfolio financing arrangement in place with a funder and offers its clients DBAs, would those claimants and/or the law firm be required to disclose the borrowing arrangements? If a law firm borrowed from a bank and then used the proceeds from that loan to fund litigation, again by way of DBAs, would the law firm have to disclose that loan? Would it make a difference if that loan was secured from a hedge fund which had priority over fees received from the litigation? What if, instead, the hedge fund took an equity stake in the law firm with an agreement that dividends would be paid out of fees received from litigation? Or the funding was provided to the funded party by a friend or family member, who was not in the business of providing litigation funding. Would that last example vary depending on whether or not the friend or family member sought any form of premium or interest on the funding provided? The primary point here is that any contemplated regulation of funding would have to very clearly define what types of funding are within scope.

[37] Unless the policy was taken out before 1 April 2013 and in the excepted cases, in which the old CPR 44.15 that was in place before the Jackson reforms took effect still applies, CPR Part 48: Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Relating to Civil Litigation Funding and Costs: Transitional Provision in Relation to Pre-commencement Funding Arrangements and its accompanying Practice Direction.

- The commercial terms that are agreed between a funder and a funded party are private, based on privileged information and should therefore be treated as confidential and, most likely, privileged[38]; the courts should not seek to examine those terms unless there is clear reason to do so that overrides the confidentiality of the terms.[39]

- Where disclosure is considered necessary within the funded proceedings, it should be as limited as possible and the court ought to consider whether it is necessary to do so in open court. In this regard, it is difficult to envisage a scenario in which the court or another party would ever need to see the entire funding agreement as part of a prescribed disclosure.

- There may be an argument for a funded party to disclose to the opponent the fact they are being funded if the funded party wishes the additional costs of that funding to be potentially recoverable from the opponent – please see our response to question 8(e) for more details of this proposal.

- The courts should not try to play a role in monitoring the prevalence and nature of TPF more generally (and we would doubt whether they have the resource to do so in any event);[40] any TPF arrangements which are disclosed to the court will be highly fact specific (e.g. influenced by factors specific to the funded case, the funded party or the funder) and are unlikely to reliably reveal themes or principles that are applicable to the TPF market more generally. In any event, we doubt that the court has the resources to systematically gather and monitor data relating to TPF. By way of analogy the last review of the Guideline Hourly Rates revealed that the courts have been unable to systematically collate data relating to the cost management regime and so had to rely on a short period of data collection that was not fully representative of the types of heavyweight litigation that may be subject to TPF. Caution needs to be applied here as there is a danger of 'WYSIATI' (what you see is all there is)[41], with the risk that judges will form preconceptions about the nature of all TPF based on their exposure to a small number of cases in which difficult issues arose, hence requiring court hearings. The issue in question on those difficult cases may not arise in the vast majority of funded cases. If an attempt were to be made to systematically capture data relating to TPF we suggest that might best be outsourced to a litigation analytics provider, such as Solomonic.

[38] See *Edwardian Group Ltd and another v Singh and others* [2017] EWHC 2805 (Ch) at [32] and [38] – [39].

[39] For example, in CAT opt-out collective proceedings, the CAT Rules require that the funding arrangements be included as part of the class representative's litigation plan and is a factor in the CAT determining certification. See CAT Rules 78(2)(d)-(e) and 78(3)(c)(iii).

[40] Comments to Principle 5, ELI Principles: "*Finally, one problem which afflicts funded cases (outside of the regulated consumer context such as the RAD) is the lack of robust information about the prevalence of funding. Disclosure to the court ensures that there is a basis for the courts to monitor this*.", p.34.

[41] A cognitive bias described by Daniel Kahneman in his book, *Thinking, Fast and Slow,* (3 November 2011).

**Principle 6: Avoidance and Management of Conflicts of Interest**

*1) Third Party Funders should take appropriate measures to ensure that conflicts of interest do not arise. In particular, the Funder should ensure that it has in place procedures which cover:*

> *a. The detection of potential conflicts of interest;*
>
> *b. How any conflicts of interest will be managed pending resolution;*
>
> *c. The avoidance of conflicts of interest on the part of the Funded Party's legal practitioner(s).*

*(2) The Third Party Funding Agreement should set out in clear terms the steps which the Funder is taking to avoid actual or potential conflicts of interest. In particular:*

> *a. The Third Party Funding Agreement should set out the steps which the Third Party Funder is taking to avoid any direct or indirect financial or other conflict of interest;*
>
> *b. The Third Party Funding Agreement should set out the steps which the Third Party Funder is taking to avoid any conflict of interest arising on the part of the Funded Party's legal practitioner(s).*

*(3) The Third Party Funding Agreement should also clearly set out:*

> *a. The nature and extent of any disclosure requirements in respect of actual or potential conflicts of interest;*
>
> *b. The procedure by which any actual or potential conflicts of interest which do arise are to be managed;*
>
> *c. Whether specified courts, administrative authorities or arbitration bodies (i) are empowered as a matter of law or (ii) are empowered by the agreement of the parties to assess compliance with the requirements of the Third Party Funding Agreement as to conflicts in cases where any justified doubts arise with respect to such compliance.*

We agree with Principle 6, but would wish to make the following points:

- Solicitors with conduct of the claim should already always be clear in their interactions with the funded party and the funder that they are acting for the former and not the latter. However, this is a point that should be reinforced by the additional guidance from the SRA which we propose (see question 4 above).

- Tripartite funding agreements whereby the solicitor is also a party to the agreement present an increased risk of conflict of interests and should therefore be avoided.

- Whichever party is advising the funded party on the terms of the funding (which will ordinarily be a solicitor but may also sometimes be, for example, a funding broker) should be required to disclose to the funded party any related agreement or terms that they have in place with the funder. As noted in our answer to question 4, solicitors are obliged under the SRA Code of Conduct to inform clients of any financial interests the solicitor has in referring the client to a funder, or where the funder refers the client to the solicitor.[42]

- We have doubts over whether all funders have a sufficiently robust process in place to manage potential conflicts of interests, for instance where two of their funded parties may wish to enforce against the same assets. Information barriers, for example, may deal with risks around confidential information being potentially accessible by two different funding 'teams' within one funder, but are not a solution as the risk of a financial conflict of interest vis-a-vis the funder remains.

- Any differences between the funded party and the funder on how to deal with settlement offers[43] are best dealt with by having an express procedure set out in the funding agreement. Whilst funders must not seek to exert control on a funded party regarding the claim they should, subject to appropriate checks and balances, be entitled to make legitimate commercial decisions as it is the funder's capital that is at risk.

- Where a conflict of interest arises between the litigant and the funder, the fact that a solicitor may have advised on the funding agreement should not in of itself prevent the solicitor from continuing to act for the litigant. In our experience, 'repeat business'[44] introduced by funders to solicitors is, in practice, very rare. However, where this does occur, this may be one of the few occasions where it should be *required* that the funded party receive separate legal advice on the terms of any funding agreement that is offered to them.

**Principle 7: Capital Adequacy of Funders**

*(1) Third Party Funders have a responsibility to plan and manage their finances effectively so that they are able to meet their financial commitments when they become due and payable.*

*(2) A Third Party Funding Agreement should make provision for capital adequacy by reference to:*

> *a. Whether capital adequacy is to be maintained for the funded dispute only or for aggregate liabilities over a particular period;*
>
> *b. The extent to which such liabilities cover: (i) appeal costs; (ii) adverse costs orders; and (iii) enforcement (including the extent to which such cover is limited for example by reference to the amount of the funding provided);*

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[42] Paragraph 5.1, SRA Code of Conduct: "*In respect of any referral of a client by you to another person, or of any third party who introduces business to you or with whom you share your fees, you ensure that: clients are informed of any financial or other interest which you or your business or employer has in referring the client to another person or which an introducer has in referring the client to you*".

[43] Comments to Principle 6, ELI Principles: "*[…] issues arise as to: Whether a solicitor/barrister can have an interest in a funder; Whether the structure of the agreement motivates the funder or lawyer to prioritise settlement ahead of fighting to the end*;", p.36.

[44] Comments to Principle 6, ELI Principles: "*Conflicts created by repeat business: where lawyers are repeat instructees with funders there is a risk that the lawyer might favour the funder's interests over those of the client in any situation where there is a tension between the two*;", p.36.

*c. The period of time for which aggregate liabilities are to be covered;*

*d. If capital adequacy is to be demonstrated prior to entry into the agreement, and if so how;*

*e. When and how the funder must disclose its own concerns or the concerns of any auditor, regulator or bank as to capital adequacy and the steps to be taken thereafter;*

*f. When and how concerns on the part of the funded party as to capital adequacy are to be: (i) notified; and (ii) satisfied;*

*g. The records required to be maintained by the funder for the purposes of any request;*

*h. How any dispute about capital adequacy is to be resolved;*

*i. Any agreed consequences of breach of the capital adequacy requirement.*

*(3) No Third Party Funding Agreement should fail to contain at least a provision that the Third Party Funder must at all times maintain the capacity to fund the sum or stages specified in the agreement.*

We agree with Principle 7 and make the following related points.

- Funders should file independent audits annually.[45] This requirement should be encompassed within any new regulatory regime for funders that policymakers consider effective and appropriate.

- The funding agreement sample wording provided by ELI in respect of aggregate liability provides that funders should be required to maintain sufficient financial capability to meet the aggregate funding liabilities arising under all of their funding agreements in either the next 24 or 36 months. Complex, high-value litigation often runs on for longer than 36 months. We believe that this obligation, if introduced, should therefore be extended to cover a period of five years.[46]

- Principle 7(3) is crucial and the funds in question must not be capable of being withdrawn or withheld by any underlying investor in the funder, aside from in circumstances in which the funder has a clear right to terminate the LFA.

- Most funders insure against the risk of being subject to a non-party costs order, or an order for adverse costs or security for costs, rather than actually holding the capital to meet such liabilities. In our view, this is both sensible and acceptable way to address the requirement of Principle 7(2)(b), provided that the funder is able to confirm to the funded party that the policy does not contain terms that could result in the insurer declining to provide cover even though the funded party has not breached the funding agreement. As noted in our response to question 5, the funded party ought to have the right to seek co-funding if the

[45] Under the current ALF Code, each funder member must undertake that it will be audited annually by a recognised national or international audit firm – see paragraph 9.4.4 ALF Code.

[46] If there is a class of funded cases that reliably resolves in less than 3 years then a sub-category could be considered with a lower capital adequacy requirement.

original funder cannot continue to fund or will not extend the budget on the original terms.

**Principle 8: Funders' Fees**

*(1) It is essential that the Funded Party is aware, prior to entry into a Third Party Funding Agreement, of:*

*a. The fees that the Funded Party is likely to be charged (in whatever form those fees are charged and including, for the avoidance of doubt, a summary of the basis on which the fees are to be calculated, including any relevant factual/legal context); and*

*b. The costs and fees in relation to the funded proceedings that the Funded Party will or is likely to bear itself.*

*(2) The Third Party Funder should accordingly explain the following matters in clear and simple language to the Funded Party prior to entry into the Third Party Funding Agreement:*

*a. The nature of the funding to be provided, ie whether it will take the form of a lump-sum payment, drawdowns and/or direct payment by the Third Party Funder of costs and expenses;*

*b. The expenditures which the Third Party Funder agrees to fund (whichever of the methods of funding is employed), including whether the Third Party Funder agrees to bear the costs of any appeal or the enforcement of any award;*

*c. Whether there is any cap on the Third Party Funder's total financial commitment;*

*d. The reasonably foreseeable expenditures relating to the funded proceedings which the Funded Party will have to bear;*

*e. Whether the Third Party Funder agrees to make any payment that is ordered in respect of security for costs;*

*f. Whether the Third Party Funder agrees to make any payment ordered in respect of adverse costs;*

*g. Whether there is any limitation on the circumstances in which the Third Party Funder will make any of the above payments, including, for example, where the Funded Party has not made proper disclosure in respect of any aspect of the funded proceedings or where the order for adverse costs is related to the Funded Party's conduct of the proceedings;*

*h. The fees that the Third Party Funder will charge and/or the proportion of any successful recovery that the Third Party Funder will claim as well as the priority of payments in the event of success.*

*i. This may be expressed as a figure or a proportion of recoveries (including on a per-claim or per-issue basis) or a multiple of costs basis or combination thereof (eg, the greater of x% or multiple);*

*ii. The information may also be expressed with reference to the range of realistic outcomes based on facts known about the claim at the time of entering into the agreement.*

*(3) The Third Party Funder should be capable of providing evidence of its explanation of these matters to the Funded Party or of such matters having been explained to the funded party by an independent lawyer.*

*(4) It is not sufficient that these matters are included in the Third Party Funder's standard terms or conditions: they must specifically be explained to the Funded Party. The Third Party Funder should seek the Funded Party's express confirmation that it has understood these matters and wishes to proceed with the funding notwithstanding.*

*(5) The relevant factors which inform the agreed basis for the Third Party Funders' fees should be set out in the Third Party Funding Agreement.*

We agree with Principle 8 but make the following points:

- Principle 8(3) provides that the funder should be capable of providing evidence of its explanation of the relevant matters set out in Principle 8(2) to the funded party, or of such matters having been explained to the funded party by an independent lawyer. As explained in our point on Principle 4, absent a material connection, that solicitor should be deemed to be 'independent' as they are independent from the funder.[47] The funder should, at the earliest stage possible in the negotiation of the funding agreement, ascertain that the funded party is receiving legal advice on the funding and confirm who is providing that advice. We also reiterate our comment that corporate claimants with an inhouse legal function should be allowed to self-advise.

- As set out in our response to question 4, we propose a requirement for funders to provide a FPID to all funded consumers, so that they receive a concise summary of the key terms of the proposed funding, prior to entering into the funding agreement.

- In the unusual scenario in which a funded party has not taken legal advice on the proposed funding, we agree that the funder should be obliged to explain these matters to the funded party in clear terms and keep a record of having done so. However, we disagree that the funder would always have to have specifically explained those matters to the funded party verbally (which seems to us to be what is suggested by Principle 8(4)).[48] Provided that these issues are set out prominently in the documentation that is provided to the funded party and written in plain English, we do not think these require further verbal explanation, unless the funded party is unrepresented.

- A blanket cap applied to funders fees would be a blunt instrument that would disincentivize investment in novel or high-risk disputes and would, more

[47] Principle 8(3), ELI Principles: "*The Third Party Funder should be capable of providing evidence of its explanation of these matters to the Funded Party or of such matters having been explained to the funded party by an independent lawyer*".

[48] Principle 8(4), ELI Principles: "*It is not sufficient that these matters are included in the Third Party Funder's standard terms or conditions: they must specifically be explained to the Funded Party. The Third Party Funder should seek the Funded Party's express confirmation that it has understood these matters and wishes to proceed with the funding notwithstanding*".

generally, result in some cases only receiving limited funding or no funding at all. The effect of such a cap would therefore create a risk of preventing equality of arms between litigating parties and, for some parties, preventing access to justice entirely – our views on this are set out more fully in our responses to questions 12 and 13 below.

**Principle 9: Confidentiality**

*(1) The Third Party Funder shall maintain the confidentiality of all information and documentation relating to the dispute to the extent permitted by law and subject to the terms of any confidentiality or non-disclosure agreement between the Third Party Funder and the Funded Party.*

*(2) Where the ultimate source of funding is not party to the Third Party Funding Agreement and it is agreed that the person or entity in question should have access to confidential information, the Third Party Funder should as part of the Third Party Funding Agreement agree to be responsible for ensuring that such subsidiary, person or associated entity preserves such confidentiality.*

We agree with Principle 9 and have no further material comments.

**Principle 10: Case Management (Control)**

*(1) The Funded Party shall – save in exceptional cases – be the ultimate decision-maker in relation to the funded proceedings. Any derogation from that principle must be clearly stated within the Third Party Funding Agreement.*

*(2) The Third Party Funder shall not seek to influence or control decisions regarding the relevant proceedings except insofar as expressly provided for by the Third Party Funding Agreement.*

*(3) The Third Party Funding Agreement should set out the nature and the scope of the Third Party Funder's involvement in the proceedings and any appeals. The Third Party Funding Agreement should specifically:*

*a. Set out whether and if so how, the Third Party Funder is to be involved in or have control of litigation decisions;*

*b. Set out whether, and if so how, the Third Party Funder is to be involved in making decisions in relation to settlements;*

*c. Include a dispute resolution clause setting out how any disputes in respect: of (i) the Third Party Funder's rights to be involved; and (ii) the acceptability of settlement offers are to be resolved.*

*(4) Where the Third Party Funding Agreement expressly confers on the Third Party Funder the right to control one or more material aspects of the funded litigation, the Funded Party must be expressly informed of this prior to entering into the Third Party Funding Agreement.*

*(5) The Third Party Funder shall be regularly informed as the litigation progresses of:*

*a. The progress of the proceedings;*

*b. Any reports/statements of factual or expert witnesses;*

*c. The way in which the funds provided under the Third Party Funding Agreement are being spent;*

*d. The level of costs liability or potential costs liability under the Third Party Funding Agreement as soon as reasonably practicable after these costs have been identified.*

We agree with Principle 10.

**Principle 11: Termination of Third Party Funding Agreements**

*(1) Termination of a Third Party Funding Agreement may have a significant prejudicial effect on the parties and on any funded proceedings. It is accordingly important that the parties' termination rights are clearly recorded in the Third Party Funding Agreement and that the Funded Party is advised specifically both in respect of its right to terminate (and any restrictions or conditions affecting such withdrawal) and the circumstances in which the Third Party Funder will become entitled to terminate the agreement.*

*(2) To the extent that the Third Party Funding Agreement sets out the parties' contractual termination rights, the Third Party Funding Agreement should also be clear as to:*

- *a. The extent to which those contractual rights oust or exclude rights which arise by operation of law;*
- *b. Any objective criteria by reference to which entitlement to terminate is to be judged (eg. in relation to how reasonableness of belief in, or assessment of, the merits is to be judged).*

*(3) The Third Party Funding Agreement should also clearly set out the consequences of the exercise of contractual termination rights, including the extent to which obligations survive or are created by the termination.*

*(4) In particular, the Third Party Funding Agreement should set out clearly the extent to which the Third Party Funder will remain liable for commitments made in respect of:*

*a. Phases of the proceedings which have completed but in respect of which payment has not yet been made (eg in circumstances where a costs order has not yet been made against the Funded Party in respect of an unsuccessful phase);*

*b. Phases of the proceedings which are in progress;*

*c. Phases of the proceedings which have not yet commenced.*

*(5) Third Party Funding Agreements should not confer on Third Party Funders broad discretionary rights to terminate the Agreement. Where a discretion is conferred, or where a right to terminate for particular conduct on the part of the Funded Party is conferred, it is essential that this is clearly set out in the Third Party Funding Agreement and that the consequences of the same are explained to the Funded Party prior to entry into the Agreement.*

We agree with Principle 11, in particular, the commentary at pages 59-60 about Article 15 of the Draft European Parliament Directive.[49]

In scenarios where the funder has terminated the funding agreement, consideration should also be given as to whether:

- The funder should only be entitled to preserve its right to be repaid the amount that it has funded, or whether this should extend to its actual return/premium (i.e. the amount that the funder would receive in excess of the amount that they have funded); and

- Whether such rights should be preserved in all funder termination scenarios or whether they should be limited to scenarios where, for example, the funder has terminated due to the funded party's breach of the funding agreement (and if so, whether such rights should depend on the type of breach committed).

In our view, any termination scenario (i.e. by either the funder or the funded party) should be subject to an adequate ADR mechanism pursuant to which any dispute arising from the termination can be resolved quickly. This is particularly important in scenarios where the funder maintains that they are entitled to their return/premium in full, and/or in priority to the position of any new funders which agree to take over the funding of the case. Such restrictions may act as a barrier to the claimant obtaining alternative funding to continue the claim.

We would however observe that, in our experience, terminations by funders are extremely rare. Despite acting regularly on cases which receive TPF, and over many years, we cannot recall any scenarios where the funder has terminated the funding agreement whilst we were still acting.

**Principle 12: Dispute Resolution and Review by Courts or other Authorities**

*(1) A Third Party Funding Agreement should specify a dispute resolution mechanism for any dispute arising out of the Third Party Funding Agreement. In particular, the Third Party Funding Agreement should:*

> *a. Specify an appropriate (fair, independent and transparent) resolution mechanism in respect of any conflict of interest or potential conflict of interest that may arise;*
>
> *b. Specify any issues in respect of which an expedited dispute resolution mechanism is required, and the appropriate expedited procedure, including timeline.*

*(2) A Third Party Funding Agreement should specify:*

> *a. Any aspects of the Third Party Funding Agreement which, by reason of its governing law or the jurisdiction in which the funded dispute is conducted, are*

[49] 'Annex to the resolution: Proposal for a Directive of the European Parliament and of the Council on the regulation of third-party litigation funding', European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)).

*subject to review by the courts or other administrative authorities, either on their initiative or by reason of a challenge by the other party to the proceedings;*

*b. Any information which, by reason of that review, either party must prepare or provide to the other party/the court or other administrative authority.*

We agree with Principle 12, in particular, Principle 12(1)(b) regarding expedited dispute resolution mechanisms and procedures. Disputes relating to budget variation, termination and key litigation decisions, including offers to settle, have to be resolved quickly and confidentially to minimise disruption to the progress of the litigation of the underlying funded claim. Consideration should also be given as to whether certain disputes arising from the funding agreement should always be subject to final determination by the courts. For example, for consumers (particularly, in consumer class actions) it may be considered that it is important to be able to challenge in court the ultimate distribution, to ensure that their rights are adequately protected.

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?**

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

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

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

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

        i. **If so, why?**

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

a)

The higher the potential cost of litigation the more there is a need for TPF. Therefore, TPF is especially important in high-value, complex litigation in which proceedings can run for many years and the issues involved result in much higher legal costs. Whilst the industry wide statistics show that most claims for which funding is sought do not receive it, the rigorous due diligence we undertake (on legal and economic viability of the claim) prior to offering a Stewarts client alternative fee terms, then professionally presenting the claims to funders, has always resulted in our alternative funding arrangement (**AFA**) clients seeking funding receiving an offer for funding that meets their needs. In that respect therefore, the increase in the level of litigation costs has led to the development of a market for TPF that, in our experience, normally meets the needs of parties with high-value meritorious claims.

However, the higher the projected costs of a claim, the fewer funders there are with the resources and risk appetite to fund it. This has been apparent in recent years from the difficulty in securing funding for the large budgets required for very high-value claims in opt-out collective proceedings in the CAT, notably when faced with defendants with very deep pockets (e.g. 'big tech' corporations). In our experience, even some of the largest funders operating in the England and Wales market are reluctant to simultaneously fund many of these claims, not least because there have yet to be substantial recoveries from claims of this type to justify the level of risk involved.

In addition, the inherent uncertainty of how *long* a case will take to proceed to trial and, if successful, receive a money judgment (or, if settled, a settlement sum) that can then be successfully enforced has an effect on both the pricing and availability of TPF because the funder's capital deployed in this case cannot be invested elsewhere ('duration risk').

By way of an extreme example, between 2013 and 2016 Stewarts acted in proceedings which were funded pursuant to a litigation funding agreement and entered into by the claimant and the funder in 2013. Stewarts acted pursuant to the terms of a CFA. By early 2016, months before the trial date and with considerable work still pending, the case budget had been exceeded (by a sizeable amount) and securing additional funds became problematic. The case settled in May 2016, by which time Stewarts had significant outstanding fees yet to be paid. However, before any payments could be made in consequence of the settlement, the settlement agreement was breached by the funded party leading to several new claims being issued, both in England and foreign jurisdictions. Ultimately, all the English claims were consolidated into one and judgment was handed down in favour of Stewarts and the funder in 2021, approximately eight years after the CFA and LFA were signed. Despite this judgment, various further applications and claims were issued, most recently to challenge the enforceability of the funding agreement following the Supreme Court's decision in *PACCAR*.

The above circumstances have resulted in no distribution of proceeds to the funder or Stewarts to date, despite the contractual entitlements. Nearly 12 years have passed since the litigation funding agreement was signed and nine years since the underlying claim was settled. It is unlikely that any *PACCAR* challenge will be resolved until the end of 2025. Meanwhile, the underlying recovered assets that are the subject of the historic claims have been significantly depleted by legal and other fees, meaning that neither the funder nor Stewarts expect to recover the full value of their contractual entitlements. This example illustrates the potentially extreme and unpredictable nature of 'duration risk' and the adverse impact it can have on the viability of TPF. It also highlights the reality of how long the enforcement process can take, especially when recalcitrant counterparties are involved.

b)

We repeat our comments made in our response to question 2 regarding the ability of TPF to promote equality of arms in litigation. Enabling equality of arms will inevitably increase the total costs incurred in the litigation.

In this regard, we would note that many courts could do more to further the overriding objective by actively managing cases from an early stage and that each of the case management tools set out at CPR 1.4(2) has the potential to decrease the costs incurred by the parties. The court should also be more willing to costs manage proceedings so as to further the overriding objective, including for example, requiring the parties to file and exchange costs budgets (CPR 3.13), issuing costs management orders (CPR 3.15) and consider costs capping orders (CPR 3.19) in exceptional cases. As such, whilst allowing equality of arms will increase costs, the courts have the powers to impose limits on both the incidence and the recoverability of such costs. However, for active case management and cost management to be fair and effective more court resources than currently exist are required. Done inadequately, they can cause more harm than good.

We would also note that, in our experience, funders themselves take a very active and conservative approach to cost budgeting. Funders will generally impose a level of budget control on the funded party much earlier in the case than the court can, because they will almost always require a detailed phase-by-phase budget from the outset of a claim and will challenge any costs in that budget if they think that they are unrealistic. Funders will often encourage various contingencies to be built into cost budgets that may not otherwise be considered and/or included, based on their experience that most high stakes litigation ends up involving issues or applications that were not foreseen at the outset. This is a realistic approach that the courts should consider adopting. Funders also generally require monthly reporting on the costs incurred and how these are tracking against budgeted costs. Where incurred costs are likely to exceed budgeted costs, they will usually require an explanation and for any proposed increase in the budget to be justified. Funders are inherently interested in proportionality of costs as they do not wish to find themselves funding a case in which the damages are unlikely to exceed the costs by many multiples. In our experience, this all places a healthy emphasis on costs management from the outset and has a moderating effect on costs.

As such, in our view, the availability of TPF does necessarily increase the costs of litigation, as a by-product of giving financially weaker parties the chance to run their cases properly. However, that is already moderated by appropriate checks and balances set by the funders in all funded cases, and by the court in the small number of funded cases that are also subject to cost management directions or orders.

c)

We do not think that the current self-regulatory regime for funders impacts on the relationship between TPF and litigation costs. In our experience, the points made in response to question 8(b) apply to all reputable funders, regardless of whether they are ALF members or not.

d)

We doubt whether the introduction of a different regulatory mechanism would affect the relationship between TPF and litigation costs, unless such regime provided for caps on funders' fees. As explained in our response to question 12 below, one of the likely effects of introducing caps on funders fees would be that some parties that need or desire funding either could not obtain funding at all because it would be uneconomic for the funder (thereby preventing access to justice), or would only be able to obtain limited funding for their case. In the latter scenario, a cap would have the effect of artificially suppressing the litigant's budget and therefore likely reduce the costs that they actually incur. However, this would have negative consequences for equality of arms, as it would likely result in:

- The funded party being prevented from instructing the legal team that they would have wished to instruct (unless the law firm and/or barrister were willing to risk all or a significant portion of their fees under a CFA or DBA), or at least reducing the pool of law firms and/or barristers that they can select from; and/or

- The funded party's legal team being unable to spend the amount of time preparing the case (or incur the type or level of disbursements) that may be reasonably required or would otherwise be advantageous to the case.

e)

For litigants needing TPF in order to bring or defend a claim, there is an argument that in order to properly compensate such parties for the losses that they have incurred in connection with the claim, the costs of TPF should be recoverable. Without that, for successful claimants these costs come out of the damages that they are awarded, thereby reducing the sum that they actually receive.

Making the costs of TPF potentially recoverable is also particularly important to counteract the current regime which, in our view, encourages (or at least enables) defendants to run a strategy of attrition. Under such a strategy, the defendant will deliberately pursue an unmeritorious defence and/or applications and generally be unnecessarily obstructive during the course of the litigation in order to drive up the claimant's costs. This, in turn, has the consequence of increasing the claimant's funding costs, thereby reducing the potential pot of damages available to the claimant if they are successful. This, in turn, can force the claimant to the settlement table to accept a suboptimal settlement offer in order to effectively 'cut their losses' and ensure that they are left with something. In our experience, this is a common strategy deployed by defendants, but their conduct rarely reaches the level where it is egregious or obvious enough for the court to make an indemnity costs order.

The push for the introduction of restrictions on recovery of CFA success fees and ATE premiums by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (**LASPO 2012**) shows that the recoverability of any additional fees should not be cast too wide, or else it may risk a backlash against such fees being recoverable at all.

In our view, there is scope for a middle ground whereby funders' fees, ATE premiums and solicitor/barrister success fees could be recoverable in meritorious scenarios, for instance:

- Where a funded party has made a Part 36 offer that:

    - Was not accepted and, following determination of their claim at trial, the result for the funded party equals or betters their offer; or

    - Was accepted, but only after the 'relevant period' for acceptance had expired,

    subject to the court's overriding discretion under CPR 36 not to award the cost of such additional fees if it considers that it would be unjust to do so.

- Where a funded party has made a Calderbank offer that:

    - Was not accepted and, following determination of their claim at trial, the result for the funded party equals or betters their offer; or

    - Was accepted, but only a reasonable period after the offer was made (such period to be determined by the court), subject to the court's overriding discretion under CPR 44.2 as to whether costs are payable by one party to another and the amount of those costs, upon considering all the circumstances.

- Where the court is considering applications for an indemnity costs order, and the opposing party's conduct has resulted in the costs incurred by the funded party increasing unreasonably or unnecessarily (e.g. by dealing with applications that should not have been necessary, or dealing with arguments that should not have been made, or any ATE premiums payable by the funded party increasing as a result of the risk of such increased costs increasing).

In our experience, Part 36 offers are far less prevalent in complex, high-value commercial litigation than, for example, in personal injury litigation. However, if the Part 36 regime were revised in accordance with the above suggestions, we believe that this would provide a compelling incentive for more Part 36 offers to be made, thereby further encouraging parties to settle (and settle earlier). Settling earlier would reduce the cost of funding to the funded party and would benefit the justice system more broadly by reducing the burden on the courts.[50]

However, we think it would be sensible to moderate the potential impact of the above on the opposing party's liability for funding costs (which could be very significant) by capping the recoverability of funding costs to 100% of the funded party's total recovered base legal costs (i.e. the (basic) time-based fees of their solicitor and barrister plus disbursements - not including any applicable success fees that the court orders to be paid to the funded party). This limitation would also obviate the need for any disclosure between the parties of the terms of funding (which would in our experience always exceed this '1x' sum). All that would be required would be advance disclosure of the *fact* of funding. Then, if and when this inter partes funding liability arises, the funded party's claim for costs could include a statement of truth to confirm that the actual funding costs exceeded this 1x cap. For the avoidance of doubt this recoverability cap is proposed purely to moderate and provide predictability of the potential exposure a defendant to a funded case may face. It is not intended to act as any limitation of the contractual funding terms agreed between the funded party and funder.

We acknowledge that under the previous costs regime set out in the Access to Justice Act 1999, the European Court of Human Rights (**ECHR**) found in *Coventry v United Kingdom* 6016/16 that the full recoverability of the CFA success fee and ATE premium in any successful claim was disproportionate and that it breached the defendant's right to a fair trial (Article 6 European Convention on Human Rights) as the risk of an excessive cost burden placed pressure on a defendant (especially an uninsured defendant) to settle even if they had good prospects of a successful defence. We would distinguish the ECHR's findings from the above proposed recoverability scheme on the basis that the proposal (i) only applies in the meritorious scenarios detailed above where the defendant's conduct has increased the claimant's funding costs (ii) the defendant's additional costs exposure is limited to 100%/1x of the funded party's total recovered

[50] There are potentially some complicated issues relating to Part 36 offers when made in group litigation scenarios which might be best addressed in another consultation. We would also note that the automatic costs consequences of Rule 45 settlement offers in the CAT, which are the equivalent to CPR Part 36, are prevented in opt-out collective proceedings and in collective settlement scenarios where no collective settlement order has been made because, for such settlements to be valid they must be approved by the CAT as "*just and reasonable*" – see CAT Rules 94(9) and 97(7).

base legal costs rather than the entirety of the claimants additional funding liabilities, and (iii) it is subject to judicial discretion.

To give the above proposal the best chance of success, the judiciary would need to be more alert to defendants pursuing strategies of attrition and more proactively case manage proceedings with such defendants, including making indemnity costs orders in suitable situations.

We have included with our response a worked example (marked as **Appendix 1**) to show how this proposal would work in different scenarios where a litigant has an AFA in place. This worked example also serves to show how those differing AFAs can moderate the costs liability of a claimant in a loss, and their additional cost to the claimant in a win.

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 threat of being ordered to pay adverse costs presents an impediment to claimants who do not have deep pockets seeking to bring their claims. They will often not have sufficient funds of their own to meet adverse costs. When a claimant is funded, the funder takes on some risk of bearing the claimants' adverse costs risk. This is because either the funder agrees to meet adverse costs in the funding agreement (with the risk factored into the costs of funding) or because the defendants can look directly to the funder to pay adverse costs under the non-party costs order rules. In either case, the practical reality is that the claimants and/or the funder will usually obtain ATE insurance to cover the anticipated adverse costs exposure and the claimants will ultimately bear the cost of that insurance from their proceeds if the case is successful. Whether it is the funder or the claimant who enters into the ATE policy, the deposit premium will be added to the litigation budget to be paid by the funder with the funder's return payable on that cost. These arrangements partially[51] resolve the issue that many funded claimants generally cannot afford to risk exposure to any adverse costs liability (and therefore, absent such arrangements would never be able to bring their claims). However, the arrangements create a secondary set of problems which can have a detrimental impact on funded claimants and therefore access to justice.

The deposit premium for the ATE becomes an additional cost to add to the funding which will need to be factored in when considering if the claim is commercially viable for funding. This means that some cases (particularly those against well-resourced defendants where the risk of material adverse costs is high) are more difficult to fund and may not be fundable at all as a result of the costs of insurance. There is also the real possibility that the insurance market will not have sufficient capacity to meet the demand or that there will be limited capacity such that the insurance cost is prohibitively high. The dynamics of insurance capacity are driven by commercial factors removed from the legal world, and the current model of funding claims is dependent on that market. This dependence creates a vulnerability which can affect access to justice.

[51] Most funding agreements include a provision that the funder can recover any uninsured adverse costs paid by the funder from the claimants. Funders may ultimately decide not to enforce this clause, but it does mean that the claimants often still retain some adverse costs risk in these arrangements.

Furthermore, the reality is that the combined effect of (i) the recoverability of adverse costs, (ii) the reality that funders will not fund cases without the claimants taking out insurance, and (iii) the non-recoverability of insurance premiums, positively encourages defendants to adopt a strategy of attrition, where they seek to 'outspend' the claimants' funding resources. This means that the very fact that a defendant has incurred or threatens to incur significant costs in defence (regardless of the merits of that defence) can effectively prevent a case from being funded, or collapse a case which is funded part way through. These funding dynamics make funded claimants vulnerable, and this is actively exploited by well-resourced defendants. This detrimentally affects access to justice.

Security for costs creates an additional layer of problems for claimants which can exacerbate the issues noted above. First, it is not usually viable for a funder to put up cash as security. In order to deploy capital, funders will require a return on that capital in order to provide a return to their investors for the time the money is tied up and the risk the money will be lost. The cost of dealing with security for costs obligations by putting up cash (particularly for long cases) is usually prohibitively expensive and is a last resort. Security for costs is therefore often provided through the use of ATE insurance products. However, standard ATE insurance products are usually insufficient to meet the requirements of security for costs. In order for ATE insurance policies to stand as security, it is necessary to include a suitable anti-avoidance endorsement (or **AAE**). Many insurers will charge an additional premium for upgrading their ATE to include AAE wording. This cost again needs to be factored into the funder's due diligence (meaning it can be a tipping point that makes some borderline cases economically unviable for funding) and, if cases can be funded, the additional cost is passed on to the claimants on success. As noted above, the funding market relies heavily on the insurance market, and this is also the case for solutions to security for costs. There may not be sufficient capacity available at the time the insurance is needed, and these dynamics are actively exploited by well-resourced defendants to seek to apply costs pressure on funded claimants and either leverage a favourable settlement or, in extreme cases, collapse the claims before they reach trial.

In our view, it is unfortunate that the court in *Rowe* restricted the availability of a cross-undertaking in damages from a defendant that seeks security for costs to rare and exceptional cases, and only in even rarer and more exceptional cases where the cross-undertaking would be in favour of a commercial litigation funder.[52] We believe that an order for such a cross undertaking in damages should, in principle, be available in much wider circumstances than suggested by the court. The policy reason for the security for costs regime is to protect a defendant in the counterfactual that their defence is successful and they are unable to recover their legal costs. However, the current regime and lack of protection from cross-undertakings in damages does not fairly address the scenario of the claimants winning. If the claimants do win, then the costs of putting up security for costs to a defendant which has been found liable are still borne by the claimants, diminishing their net recovery and hence weakening the full compensation principle. Defendants ultimately have a choice as to whether to seek security for costs - where they have chosen to do so, and the claimant is ultimately successful in the claim, the defendant should be required to pay for the additional costs that the security caused for the claimant. Cross-undertakings would act as a counterbalance to prevent defendants from seeking security for costs for the alternative purpose of placing

[52] Stewarts acted for certain claimants in these proceedings.

inappropriate costs pressure on funded claimants and seeking to collapse their funding arrangements before the claims reach trial.

As noted in our response to question 8(b), in our view the courts should be more willing to costs manage proceedings so as to further the overriding objective, which would enable claimants to purchase appropriate levels of ATE cover and enable the court to make more accurate orders for security for costs

To reduce the access to justice gap for claims that have insufficient value to make TPF or ATE insurance economically viable consideration could be given to extending the Qualified One-Way Cost Shifting (**QOCS**) regime. An alternative would be to allow, once proceedings are afoot, for the parties to apply for an order that the case be subject to QOCS. However, this may not be a solution if, in practice, claimants are never able to get their case off the ground in the first place due to the inability to pay their legal fees and/or the threat of adverse costs and/or security for costs.

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

In our experience, most funding agreements do not provide for a scenario where the funder accepts that they are liable to pay the costs of the proceedings. Whilst it is well known that the courts can make a non-party costs order against a funder, the funders understandably do all they can in advance to protect themselves from that type of additional exposure. In practice, funders will require funded parties to take out a comprehensive ATE policy and/or provide an indemnification back to the funder for any costs that the funder is ordered to pay. This ultimately lowers the risk to the funder of providing the funding and therefore lowers the cost of funding to the funded party.

If funders did not shift their liability risk in this way then this would inevitably increase the costs of funding for the funded party because it would require funders to have to 'price in' the worst-case possible outcome (i.e. the funded party is unsuccessful and the funder is ordered to pay the costs of the proceedings) into the funding terms offered. It would also likely have the effect of restricting the funding market because of the potential exposure that funders would face, and the impact that would have on the funders robustly maintaining adequate capital adequacy.

We do not think that the adverse costs exposure of funders requires additional rules or regulations being introduced. Determining the level of funder exposure to adverse costs often requires consideration of case specific factors that would be difficult to legislate for and should, in our view, continue to be determined by the courts on a case-by-case basis.

***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 our experience, the courts do not commonly control the pricing of TPF arrangements. The arguable exception to this is the opt-out collective proceedings regime in the CAT, as described in our response to question 6 above. Pricing could be said to be affected, to a degree, via the certification regime through the rules on distribution of proceeds.[53] The CAT could exercise more of a control on pricing if it required that claim representatives must always go through a tender process for any funding needed, in order for the claim to be certified. However, see our comments further below in this regard.

The more obvious example of the courts being able to control the pricing of TPF arrangements is where the courts determine a dispute between a funder and the funded party about the funding agreement. However, in our experience, this scenario is very rare.

The TPF market itself can and does control pricing. Properly advised parties will be advised that they will generally receive the most competitive terms possible (including on pricing) by approaching the market and engaging in a form of a tender process, but that such processes can be lengthy and expensive due to: (i) the due diligence required by funders on the claim, the instructed solicitors, and the party seeking the funding; and (ii) the complex nature of the terms being negotiated. Stewarts usually advises clients that are content to incur such costs to approach three funders. Occasionally (as our firm does), funded parties will also carry out due diligence on the funder (for example, on the source of their funding and their capital adequacy) which can also extend the process.

In some cases, however, parties seeking funding will only negotiate with a single funder. This may be because they cannot afford the cost and time of going through a tender process (for example, if up against an urgent limitation deadline), or because they have already been offered terms which they consider to be reasonable. Some corporates or institutions may have a preferred funder based on their own past dealings in other funded claims, or they may have a portfolio funding arrangement with a funder.

Due to the additional time and costs of running a tender process, we do not believe that funded parties should be required to engage in such a process, as to do so would potentially restrict access to justice. Even if a tendering process was successful and the litigants received funding as a result, the cost of that process would either have to be met by the litigant themselves or taken out of the funds advanced by the funder (thereby reducing the amount available to actually litigate the claim and, potentially, the ability to litigate with equality of arms).

Co-funding, whereby a party is funded by more than one funder, is relatively common. In our experience it has not affected the overall pricing of the funding. It does however enable funders to spread their basket of risk, which may assist new entrants to the market and improve the financial stability of funders. It is also a useful option to address late stage budget variations if the existing funders is unable or unwilling to provide the further funding required.

[53] See CAT Rule 93.

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?**

We are strongly opposed to blanket caps on funders returns.

Our views on the introduction of a cap are set out in part in our responses to questions 7 (regarding Principle 8 of the ELI Principles) and question 8.d). For ease, we set out our full views below.

- One of the likely effects of introducing caps on funders fees would be that parties that need or desire funding either could not obtain funding at all because it would be uneconomic for the funder (thereby preventing access to justice) or would only be able to obtain limited funding for their case. In the latter scenario, a cap would have the effect of artificially suppressing the litigant's budget and therefore limiting what costs that they can actually incur. This would have negative consequences for equality of arms, as it would likely result in the funded party:

    - Having to choose the cheapest legal team(s) rather than the best legal team(s) with the highest level of expertise in their type of claim (unless the law firm and/or barrister were willing to risk all or a significant portion of their fees under a CFA or DBA), or at least reducing the pool of law firms and/or barristers that they can select from;

    - Having to instruct their legal and expert team to suppress the amount of time preparing the case (or incur the type or level of disbursements) that may be reasonably required, or would otherwise be most advantageous to the case; and/or

    - Having to abandon secondary heads of claim or arguments, notably if (i) below applies to them.

- The imposition of a cap would disproportionately affect funding for: (i) disputes in uncertain and evolving areas of the law (which are seen as higher risk already) thereby impeding the development of the law; and (ii) disputes which are seen as high risk for reasons other than the merits of the claim (e.g. the solvency of the claimant, or the location of assets that judgment would be enforced over) thereby impeding access to justice.

- Caps have been in place under the DBA regime[54] and, in our view, have significantly restricted both the number of law firms willing to offer DBAs at all and, for those few firms that have been willing to take on the risk of a DBA, the range and scale of cases that they are offered in. The DBA Regulations have acted as an impediment to the market due to their draconian unenforceability provisions (including linked to termination clauses) and their caps on sums recovered. A prime example of this relates to injury claims, where the 25% cap

[54] Regulations 4(2) and 4(3) of the Damages-Based Agreements Regulations 2013.

on DBAs means they are very rarely contemplated, thereby reducing access to justice for those would-be litigants.

- A cap is a blunt instrument that fails to take account of the complex multitude of factors that are considered by funders when determining the cost of funding. In this regard, we agree with the factors listed on p.47 of the ELI Principles that feed into the level of funders fees. It would be impossible to come up with a cap regime which is fair and would work for all cases, even within particular types of claims or proceedings.

- It could operate unfairly against a funder in the very common scenarios where, after agreeing the funder's fee at the outset of the case, either the funding budget has to be adjusted upwards and therefore the funding provided has to be increased, the duration materially increases (including through court delays, applications or appeals) or the expected damages return falls (unless such a scenario was adequately catered for in the implementing legislation). Over time, this would have the effect of narrowing the TPF market as some funders would cease to fund certain cases, or cease to fund cases in England and Wales entirely. In this regard, we note that Chris Bogart (CEO, Burford Capital) was recently quoted in The Times as saying that "*Third-party litigation funding— worth about £20 billion globally — saw a 75 per cent drop inactivity in the UK after the Paccar ruling. New claims in the commercial court are at their lowest for more than a decade. Last year, group claims dropped by 23 per cent owing to uncertainty in the market.".*[55] In our view, caps would only further diminish the attractiveness of England and Wales for funders.

- Caps could discourage settlements by claimants as once the funded costs had reached the capped level the claimants would have limited 'skin in the game' for the further costs of pursuing the claim. They could attempt to force the funder to keep funding even if the scope for improving on existing offers to settle was less than the additional funding costs of doing so.

Ultimately, we are of the view the freedom of contract should be respected and the substance of commercial terms should be left to the parties to negotiate themselves. Regulatory controls on the pricing of funding agreements, including caps, should therefore be avoided.

[55] '*Inaction on litigation funding is pushing firms to look elsewhere*' (13 February 2025).

**13. <u>If a cap should be applied to a funder's return:</u>**

a. **<u>What level should it be set at and why?</u>**

b. **<u>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?</u>**

c. **<u>At which stage in proceedings should the cap be set?</u>**

d. **<u>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?</u>**

e. **<u>Should there be differential caps and, if so, in what context and on what basis?</u>**

We are opposed to caps - see our response to question 12 above.

<u>If</u>, however, policymakers were determined to introduce caps, our views are that these should only be applicable to consumer claims:

- Where the funded party is a consumer, we see an argument to impose a 'soft cap' on the level of the funder's actual <u>return/premium</u> (i.e. the amount that the funder would receive in excess of the amount that they have funded) whereby the cap could only be exceeded if the funded party has received legal advice from the outset of the claim (or was at least offered it) and subject to the consumer retaining the right to challenge the amount of the funder's return in a suitable dispute resolution forum (e.g. the courts of England and Wales).

- In CAT opt-out claims, the CAT already considers the funding arrangements at the certification and distribution stage. In particular, where the funder will only be paid *after* damages have been distributed to the class members/represented claimants, a cap would serve no logical purpose because the claimant group will have already received their appropriate share in any event.

- If and where introduced, any cap should only be on the funder's actual return/premium. The return of capital to the funder must remain uncapped. To do otherwise would seriously discourage funding and in any costs-only discontinuance could present a windfall to the claimant.

- Non-consumers are usually sophisticated users of legal services and will almost certainly have had the benefit of legal advice (or at least the awareness of the possibility to get such advice if they require it) - see our related comments at question 4 on the value of additional guidance being given to solicitors' on their duties regarding the provision of funding advice. Consequently, there is no need for any form of cap to protect their interests.

- Any further controls on funder returns are better set by the (specialist) courts than by legislation. Returns can then reflect the specific circumstances of the case. In these circumstances, it would be preferable for the court to set the restrictions at the outset of the claim so that the claimant can manage their claim and their funding budget accordingly. In no circumstances should the opposing party/parties be made aware of the cap or the pricing terms more generally, as to do so may reveal aspects of the risk profile of the case.

- There may however be specific circumstances, which would justify the cap being increased, akin to varying a cost management order (for example, a significant change in the funded party's costs budget resulting from unanticipated evidence or additional court hearings/trial days or extended duration).

- Setting and varying any cap would involve the court considering a complex multitude of factors on the funder's risk (which is why the imposition of a blanket cap would be a crude measure). Taking one example factor, the duration of the claim is a significant factor for the funder as it goes directly to the internal rate of return (or 'IRR') they deliver to their investors. Recovering a 2x net return on high-risk litigation may be acceptable to some over, say, a two-year time frame, but wholly inadequate if the litigation becomes protracted with applications/appeals and ends up taking four or even six years. Whatever cap is set, the court would have to ensure that it does not make the case so uneconomic for the funder that the funder declines to continue to fund it, or that serves as a deterrent for the funding of future cases.

We reiterate that the pricing of litigation funding is an extremely sophisticated exercise. In the vast majority of cases, funded parties should have received legal advice on the terms of that funding and, where so advised, the solicitors in question will have had professional obligations to act in their client's best interests and ensure that they are in a position to make informed decisions about the funding they require. In our view, the courts should be slow to interfere with that process. We suspect the courts will accept that proposition as they have taken a similar approach to not attempting to second guess the pricing of ATE insurance by underwriters.[56]

***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. <u>What are the advantages or drawbacks of third party funding?</u>**

**<u>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.</u>**

TPF has assisted over 1,300 of our commercial disputes clients to secure over £200 million of funding to pursue claims for damages totalling in excess of £9.5 billion.

We broadly agree with the advantages of TPF as set out in the LSB Report[57] and refer to our responses to questions 1-3 above regarding the benefits of TPF in enhancing access

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[56] See for example, *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134 at [117]; *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220 at [51] – [69].

[57] Part II, Sections 4 – 6: the promotion of public interest and the support of the rule of law (p.147), the provision of financial resilience to law firms and financial protection for the other side in relation to adverse costs and security for costs (executive summary and p.149), the encouragement of effective costs-budgeting (executive summary), the furtherance of the court's overring objective to ensure that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence (p.30), the assurance the court is not used as a

to justice, promoting equality of arms, assisting the legal team's management of the case, and enhancing the attractiveness of England and Wales as a jurisdiction for disputes. We also refer to our response to question 1 regarding the limitations of TPF in relation to lower value claims and our response to question 5 regarding the risks of TPF.

There are however specific issues and risks raised by portfolio funding and law firm finance. These issues and risks are more fully addressed in our responses to questions 6 and 21.

**15. <u>What are the alternatives to third party funding?</u>**

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

  **<u>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.</u>**

- **b. <u>Can other forms of litigation funding complement third party funding?</u>**

  **<u>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.</u>**

- **c. <u>If so, when and how?</u>**

The CJC Interim Report notes the funding options available to litigants: self-funding, civil legal aid, trade union funding, legal expenses insurance, CFAs, DBAs, pure funding, crowdfunding, and portfolio funding and law firm finance.[58] The options listed are not necessarily alternatives to TPF. An alternative that is not noted in the CJC Interim Report is a traditional loan taken out by the litigant whereby they are provided with the anticipated costs of the litigation but must pay back those funds, plus interest. However, in our experience such funding is only appropriate for certain types of claims (such as divorce ancillary relief proceedings).

Stewarts acts on high-value, complex claims. In our experience trade union funding, BTE legal expenses insurance or crowdfunding are not true alternatives to TPF, due to the narrow financial limits of these sources of funding.

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vehicle for inappropriate litigation through the funder's due diligence on the merits of the case and facilitating the prompt payment of legal fees (p.30) and – indirectly - enhancing the public's awareness of their legal rights (p.32).

[58] Law firm finance can also include finance that resembles more of a traditional loan than TPF. See for example, Fenchurch Legal's WIP funding product under which it appears that: (i) the loan is conditional on ATE insurance being in place (which Fenchurch arranges); (ii) the loan has a set, upfront rate of interest on the funds provided; and (iii) regardless of the outcome of the claim, the law firm repays the loan (which is secured against any proceeds from the claim or the ATE policy plus a charge over the firm's assets and personal guarantees from the firm's members/shareholders (as applicable); (iii) if the claim is unsuccessful then the ATE insurance covers the costs. See WIP Funding and Watch Our Latest Video: Litigation Funding Loan Notes Explained.

CFAs and DBAs are not simply alternatives to TPF, but rather are complementary and are often used in combination with TPF and/or other funding options. CFAs in combination with ATE are the most common alternative funding package for disputes with six figure budgets, because they tend to be lower value claims that struggle to attract TPF. However, that still requires either the client or the law firm to fund the disbursements.

A small cohort of progressive law firms, including Stewarts, can devise fee structures, including DBAs, that enable the funding of limited classes of claim with seven or even eight figure budgets *without TPF*, but that is rare.

In our experience, the most common alternative funding structure for commercial litigation is discounted rate CFAs and part paid ATE (i.e. as opposed to fully deferred and contingent ATE). In high value disputes these may be coupled with TPF, but otherwise typically require part payment by the client.

For commercial arbitration, we see a mixture of standalone TPF or TPF with a CFA. ATE insurance is also increasingly common, but still less so than in commercial litigation. This may be because, in arbitration, funders do not require the claimant to take out ATE insurance as a condition of funding the claim because the funder is not a party to the arbitration agreement and, as a consequence, the arbitral tribunal has no jurisdiction to order the funder to pay any costs.

For injury claims, BTE and fully deferred and contingent ATE insurance are frequently used in combination with full CFAs. TPF is never used aside from a few, rare large group actions. Some firms have disbursement loan arrangements to assist their clients to fund that element, with the underlying disbursements insured by the ATE.

Conditional fee agreements

For many types of high-cost cases, CFAs can be complementary to TPF but will rarely operate as a true alternative due to the need to finance the significant expenses that are additional to the law firm's fees, such as court fees, experts' fees and other disbursements. As a general rule, law firms do not hold a lot of capital and although some firms will agree with clients to put some or all of their fees at risk, or defer payment of those fees until the case has reached a particular outcome, it is very rare for a firm to be the sole financer of the entire litigation in cases with budgets running into the millions or tens of millions.

In this regard, a discounted-rate CFA for which the litigant obtains TPF offers advantages to:

- Litigants - by reducing the scale of costs for which they require funding and consequently reducing the overall cost to them, as the conditional and success fees will virtually always be materially lower than any funders multiple return on the discounted fees;[59]

[59] See examples (5) and (6) in Appendix 1. On the assumptions in the worked example, the claimant saves £2.16 million net when under a funded discounted-rate CFA retainer compared to a full funded retainer.

- The funder - by further demonstrating the legal team's belief in the case and in some cases ensuring that the ratio of potential recoveries to funded costs remains within the funder's criteria; and
- The law firm's cash flow - because, without this funding, if the firm were to otherwise agree to work on a full CFA they would not then receive any payment in relation to the case for a long period of time (often 3-6 years for a significant piece of litigation – and only then if the case wins). The firm may be unable or unwilling to carry that risk.

In some circumstances, barristers may be prepared to work under a CFA alongside the law firm's CFA. This is less common for high-value commercial litigation, as such cases are more likely to form a higher proportion of the barrister's total income across the cases on which they are acting and – as self-employed individuals – they may not be able to carry that risk. Full CFAs are very rarely offered by those barristers at the commercial bar who have already developed a reputation that keeps them busy with standard paying work.

Both solicitors and barristers are much more willing to act on a full CFA basis in the context of injury claims, where the risk may be spread across a higher number of mid-range value claims on which they are acting and where the value of each case makes standalone TPF unviable.

Despite such complementary funding arrangements now being well established in the legal industry, it is important to stress that there should be no expectation that law firms and/or barristers will take on the significant risk associated with offering CFA (or DBA, as discussed below) terms to clients. In many firms, financial management is premised on monthly billing. Even if a firm has a substantial litigation offering, the overall expectations of management and partners in non-contentious departments will often limit the extent to which litigation departments can and will undertake high cost and long running litigation with payment postponed and contingent on the outcome.

The anticipation of the complications that can flow from a CFA (or DBA) client dis-instructing the firm mid-proceedings is another dynamic that limits law firm appetite for wide-scale CFA offerings. This factor requires risk assessment of the client, in addition to the more obvious risks relating to the merits and economics of the case and the enforceability of any judgment obtained.

Nor do CFAs (or DBAs) of themselves resolve the claimants need to be able to fund their disbursements, which in major disputes will likely run to six or even seven figures. There should be no expectation that the legal profession can and will bank-roll these expenses at the same time as risking their own fees.

<u>Damages-based agreements</u>

As noted in our response to question 13, the DBA Regulations have significantly suppressed the market (in particular, for injury claims) due to the draconian unenforceability provisions and the caps on sums recovered. We further discuss the DBA Regulations in our response to question 17.

It is a matter of choice for law firms offering their clients DBA terms in high-value claims whether to fortify the DBA with a separate funding agreement between the law firm and a funder (whether a case-specific funder hybrid DBA, or portfolio funding or law firm finance[60]), or by way of loan/overdraft from their bank, and/or with insurance.

In our experience, when clients are given the option, they tend to favour having a single DBA just with the law firm, rather than having both a CFA with the law firm and a separate funding agreement with a funder. We assume this is due to the simplicity of terms and of pricing. It is plausible that some clients prefer to contract with law firms which are heavily regulated and carry compulsory insurance, rather than with funders, which are not. However, that is not a point that has been expressly put to us by our clients, so we suspect it is not a significant factor for them.

DBAs expose law firms to a significant risk because they require the law firm to price in the cost of one or more barristers, which is very difficult to predict at the outset of high-value and complex litigation and can be significantly influenced by the actions of the opponent and decisions of the court. In addition, unlike CFAs, there is legal uncertainty about whether discounted rate DBAs[61] are enforceable. Even if risks are hedged by the involvement of a funder, funder hybrid DBAs still have a higher risk profile than any other funding arrangement. This is commonly because funders seek a return of their funding as a priority, so that when the legal costs escalate beyond what is expected, or the recovered damages are lower than anticipated, the law firm may only receive a discounted rate cash flow from the funder.

Due to the serious risks associated with DBAs, partly attributable to the widely reported but as yet unresolved issues with the DBA Regulations, many law firms are not prepared to offer DBA terms to their clients in any given scenario.

<u>Crowdfunding</u>

Crowdfunding serves a niche role in the funding of a very limited cohort of disputes which are largely non-monetary, such as those in which the claimants are seeking to pursue a legal issue on a point of principle (with a modest budget), and which are perceived as being of sufficient public interest to attract the general public to financially contribute to the claim.

In the 2015 article '*Litigation: crowdfunding*'[62], which is referenced in the consultation paper, Stewarts' Senior Associate Harry Spendlove examined the use of crowdfunding in commercial litigation and noted that the main obstacles are how it should be regulated (including around provision of information to investors) and the issue of costs – the latter including the risk to the investors that they will incur a liability under an adverse costs order and the question of how a case is to be funded should the funds raised be depleted. In the nine years that have followed, we have not had a single commercial litigation case in which crowdfunding has been a realistic route to funding. We have had just a handful of potential cases for individuals, including employment disputes, in which it has been briefly considered but not actually utilised.

<u>Legal expenses insurance</u>

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[60] See our response to question 21 for, when discussing portfolio funding and law firm finance, the distinctions we make between 'Portfolio Finance', 'Portfolio Client Funding' and 'Portfolio Firm Funding'.

[61] By which we mean a DBA under which the client (rather than a funder) agrees to pays for regular/monthly billing at a discount to standard hourly rates plus a DBA fee as a percentage of damages if and when the case is won.

[62] '*Litigation: crowdfunding | Feature | Law Gazette*' (27 April 2015).

In our experience, BTE legal expenses insurance only ever works as the primary source of funding for more modest value, less complex claims due to the restrictions imposed by insurers' terms and conditions in relation to choice of solicitor, particularly at the crucial time of investigating the claim pre-proceedings, as well as in relation to hourly rates. We cannot recall any examples of commercial litigation cases that we have undertaken in the last decade that have been funded by BTE insurance.

In relation to our injury practice, BTE very rarely[63] provides a complete funding solution for the serious and fatal injury claims in which we specialise. It is, on occasion, utilised in combination with us and a barrister acting on CFA terms, but even then we usually advise our client to additionally purchase ATE insurance because the indemnity and policy terms of BTE insurance are insufficiently comprehensive for very serious injury claims.

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?**

As noted above, the other available funding options should not necessarily be viewed as alternatives to TPF. However, if these options were improved and incentives were provided to encourage their use, they may be helpful for cases which are too small in value to attract TPF, thereby providing a greater choice for litigants and enhancing access to justice.

Please refer to our response to question 17 regarding reform to the relevant rules on DBAs and CFAs.

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?**

Conditional fee agreements

We also believe that the current cap of 100% that applies to CFA success fees should be capable of being lifted in meritorious scenarios, so that it becomes a 'soft cap'. In class actions, law firms can often incur six figure costs in the claims development stage alone. For example, in CAT opt-out proceedings, such costs include but are not limited to: (i) early identification and appointment of a robust and experienced proposed class representative; (ii) early appointment of an experienced consultative committee; (iii) a competitive tender with multiple funders, associated negotiation and advice; and (iv) advising on the funding and CFA terms.[64] The risks taken by the law firm with respect to their fees can also be very significant and include: (i) failing to establish sufficient evidence for the claim; (ii) failing to secure a funder; (iii) failing to have the claim

[63] Such a rare example would be if a client has multiple BTE policies and the claim settles pre-proceedings.

[64] It is however, in our view, essential to ensure that the proposed class representative receives separate legal advice on any funding and CFA terms before any such arrangements are entered into, in order to demonstrate evidence of independent, detailed consideration of funding terms.

certified by the CAT; and/or (iv) losing a carriage dispute. All of these risks precede the inherent risk of losing and duration risks associated with then proceeding with the claim to trial and appeal(s) if necessary. These CAT opt-out claims also expose law firms to a distribution risk and potential further postponement of payment. The 100% cap does not adequately reward law firms for carrying these risks, particularly in circumstances where very few cases actually receive funding.[65] The consequence of this is that these very significant costs will, in the vast majority of cases, have to be written off by the law firm.

Whilst we above give the example of a CAT opt-out claim, aside from the certification risk, the other claims development, litigation and duration risks all apply in any complex or otherwise high-risk claim.

For an example from another jurisdiction of the 'soft cap' approach see the Private Funding of Legal Services Act 2020 (the **Cayman Act**) and the Private Funding of Legal Services Regulations 2021 (the **Cayman Regulations**) which work in tandem to regulate third party litigation funding and '"*contingency fee agreements*" in the Cayman Islands. "*Contingency fee agreements*" as defined in the Cayman Act incorporate both conditional fee agreements and damages-based agreements. Clauses 4.1 of the Cayman Act deals with conditional fee agreements and sets the maximum success fee at 100% of normal fees. Clause 4.2 then sets out a capping provision that the total of any success fee "*shall not exceed the prescribed percentage of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for the purposes of calculating any excess, include any costs*". Clauses 8(1) (in relation to CFA success fees) and 8(2) (in relation to contingency fees) of the Cayman Regulations specifies the "*prescribed percentage*" is 33.3%. However, clause 4(4)(b) of the Cayman Act permits a higher percentage (albeit hard capped at 40% pursuant to clause 4(6)) if an application is made to the Grand Court within 90 days of execution of the agreement and it is ultimately approved by the Grand Court. According to clause 4(5) of the Cayman Act, the Grand Court will consider (a) the nature and complexity of the proceedings, (b) the expense or risk involved in the proceedings, and (c) any other factors considered relevant as part of the application. In exceptional circumstances under clause 4(7) the solicitor can also apply for an award of costs or costs obtained as part of a settlement to be payable to them in addition to the success fee. Whilst we contend the Cayman 40% hard cap is set too low, meaning some clients will not be able to secure contingent representation for their claims, the principle is helpful as it sets a framework under which the majority of contingent cases will be below the soft cap level, but there is a mechanism to seek court approval for difficult claims that warrant a higher level of fee to provide adequate reward for the risk the lawyers would be taking on a contingency basis.

The postponement and financing element of CFAs should not be minimised or overlooked. In the era prior to the recoverability of success fees (1996-2000), figures of 10%-20% were routine to recompense the delay in payment and funding of the case in very low value RTA based personal injury claims.[66] Most of those cases would settle without proceedings, involving the solicitor funding the claim for a matter of months and the costs (fees plus disbursements) would amount to a few thousand pounds per claim.

[65] The LSB Report notes that only between 3% and 5% of all funding opportunities are accepted, p.33.

[66] See for example *Halloran v Delaney* [2002] EWCA Civ 1258 at [3] and *Callery v Gray* [2001] EWCA Civ 1117 at [119].

However, in catastrophic injury it is common for the size of the expert team to run into double digits, that result in solicitors paying for disbursements over the course of many years[67] to the tune of hundreds of thousands of pounds. These are high value claims (we have in the last year concluded several very serious injury claims for in excess of £30m or even £40m), involving complex issues. This includes claims for vulnerable claimants including children and protected parties.[68] Many firms which specialise in serious injury claims will have debt running into the millions as a result of paying disbursements for years while cases are ongoing. This is in addition to postponing their own fees whilst carrying the related cost of overheads including salaries.

These clients have life-changing injuries that often end their career and cause very significant financial losses, which means that very few of these clients could bring their claims if they were required to fund any aspects. Stewarts has historically carried these significant costs[69] so that our clients involved in catastrophic injury or negligence claims can have access to justice. But this comes at a significant cost for the firm and that is a cost which it is permissible to reflect as part of the CFA success fee uplift. However, the operation of the caps limit (and in some cases effectively eliminates) our ability to recoup these financing costs. Had the client gone out to the litigation loans market they would have incurred interest rates equivalent to those charged for credit card debt. An alternative way of considering the point is to ask what return Stewarts could have made had they applied the costs incurred during the many years of the claim duration to develop other parts of the business (or alternatively for some firms this question would be framed as what they would have saved by not having to service their debt).

The 100% maximum on CFA success fees was set in order to provide for an adequate return on cases which at the time of signing the CFA had prospects of success of 51%. It did not make any allowance for the financing element for those cases. Likewise, we do not believe there was any consideration of this important point when the cap of 25% of past losses and general damages was introduced for injury claims in 2013. We submit that the maximum cap on success fees ought to be recalibrated to allow for the combination of the delay in being paid and the payment of disbursements.

Furthermore, we propose that the 25% cap on injury claims ought to apply to all damages not just general damages and past losses for both CFAs[70] and DBAs (detailed below). In most complex injury claims future losses comprise the majority of the damages and it is excruciatingly rare for claims to settle with an agreed breakdown of damages thus causing uncertainty as to how much of the agreed damages are attributable to general damages and past losses and therefore subject to the cap. We note that the regime in Scotland applicable to both CFAs and DBAs, drafted with the

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[67] In the 3-year period up to y/e 2023 the average duration of Stewarts serious injury case was 37 months, with the longest lasting 125 months (over 10 years).

[68] In relation to which the solicitors face the further economic hurdle and delay of having to seek a CPR 46.4 assessment for the deduction from damages of any base costs that are irrecoverable from the defendant and any success fee. Unusually the courts do not allow the solicitors to recover their further costs in complying with this compulsory detailed process.

[69] In the 3 year period ending 30/4/24 Stewarts paid but unbilled disbursements for injury claims have been between £6.4 - £6.8m, as a subset of firm-wide figures of £9.3m - £11.4m.

[70] Sections 58(4), (4A), and (4B) of the Courts and Legal Services Act 1990, and section 4 and section 5 of The Conditional Fee Agreements Order 2013.

benefit of the experience and failure of the DBA regime for injury claims in England and Wales, does not make a distinction between past and future losses.[71]

As part of the proposal to include future losses, it should not be forgotten that (i) any client can under the Solicitors Act 1974 seek a court assessment of the charges by their solicitors, including CFA success fees and DBA fees (detailed below); and (ii) an additional layer of protection exists for children and protected parties under CPR 46.4, which requires court approval of any cost deduction from their damages.

Whilst at the time of Lord Justice Jackson's reports his perception was that firms were making too much money from injury claims, following the era of fully recoverable success fees and prior to the introduction of fixed recoverable costs, the pendulum has swung too far in the opposite direction. As recently reported by Legal Futures, the number of personal injury law firms has shrunk by more than a third in just five years, according to research which also found a "*significant untapped market*" of potential claimants.[72]

As noted in our response to question 8(e), we believe that, if there is to be limited recoverability of TPF fees in the context of Part 36 offers, Calderbank offers or indemnity costs orders, then CFA success fees and DBA payments also ought to fall within the scope of any such provision.

Damages-based agreements

We broadly agree with the DBA reforms proposed by Professor Rachael Mulheron KC and Nicholas Bacon KC under the proposed Damages-Based Agreements Regulations 2019 and consider that these reforms would have better promoted certainty and encouraged their adoption by law firms.[73] We set out below where we suggest refinements to these proposed reforms or wish to add further comments.

- We agree that there should be an express exclusion of all TPF agreements from the scope of the DBA Regulations, as was provided for under proposed paragraph 1(4). The interpretation of the DBA Regulations by the Supreme Court in *PACCAR* is unquestionably inconsistent with the recommendations of Lord Justice Jackson and the legislative intent behand LASPO 2012. If the Litigation Funding Agreements (Enforceability) Bill was to be reintroduced it should expressly provide that all funding agreements, whether between a funded party and a funder or between a law firm and a funder, should be excluded from the DBA Regulations.[74]

- We agree with the 2019 DBA reforms that DBAs should switch from the Ontario model to the success fee model. If the regulations are allowed we suspect that for simplicity many firms would adopt a structure in which the client will be told that they will receive the damages less x%, with the only other deduction being any

[71] Section 6(4)(a) Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

[72] Neil Rose, '*Number of PI law firms drops a third in five years - Legal Futures*', (21 February 2025).

[73] See also the accompanying explanatory memorandum. At the time we set out our detailed responses and suggestions to Professor Mulheron in a letter of 15 November 2019.

[74] For further thoughts, see Stewarts Partner Marc Jones and Risk & Funding Partner Julian Chamberlayne's article '*Reflecting on PACCAR: what did the Litigation Funding Bill need to address? - Stewarts'* (7 August 2024).

expenses not paid by the opponent. The lawyer then receives the DBA fee of x%, plus any costs actually paid by the opponent.

- Under the current Ontario model, costs that are recoverable for the client from the opposing party (even if never paid) are effectively credited against the DBA fee because costs cannot be claimed by the law firm from the client as part of the DBA fee.[75] This can incentivise the client to pursue a strategy whereby it unnecessarily and disproportionately increases the work to be carried out by the law firm in order to increase the law firm's own costs in the hope that this increases the potential sum that may be recovered for the client from the opposing party. This operates unfairly against the law firm (thereby acting as a disincentive for law firms to use DBAs) and does not promote the overriding objective of enabling the court to deal with cases justly and at proportionate cost. In addition, the requirement to give credit for inter partes costs that are recoverable but not actually paid is patently unfair to law firms and compounds the reasons why most firms rarely if ever offer DBAs to their clients.

- The current requirement to give the client credit for recoverable costs against the DBA payment also creates a potential for conflicts, as the client will be better off making and receiving damages plus costs-based offers, whereas the law firm would be better off if the case settled for a global offer, without any overt costs recovery. Global offers are, in our experience, more prevalent in high value commercial litigation; hence this scenario is likely to arise with some frequency. This potential for conflict would be avoided if the DBA Regulations adopted a success fee model for DBAs under which the law firm could charge some or all of time-based costs, irrespective of whether they were recoverable. Alternatively, the DBA Regulations ought to make express provision to neutralise this potential for conflict by some mechanism to apportion an objectively reasonable element of global offers to costs.

- For consumers, we see the merit in soft caps on DBA fees whereby the cap could be exceeded in specified meritorious scenarios, provided that the client had received separate legal advice on the terms of the DBA before entering into it and subject to the client retaining the right to challenge the reasonableness of the DBA fee by way of a court assessment pursuant to the Solicitors Act 1974. As detailed in our above response relating to CFAs, an example from another jurisdiction of the 'soft cap' approach can be found in the Private Funding of Legal Services Act 2020 and the Private Funding of Legal Services Regulations 2021 which work in tandem to regulate third party litigation funding and "*contingency fee agreements*" in the Cayman Islands.

- When dealing with non-consumer clients, we do not think that there should be caps on DBAs fees or any restrictions on how the law firm structures the DBA fee. For non-consumer clients the revised DBA Regulations ought to allow the contracting parties full flexibility to structure the fee terms as they see fit.

- We agree with the proposed reforms expressly permitting law firms and barristers to be able to contract with the client to be paid time-based fees in circumstances where the client does <u>not</u> achieve a 'win' for the purposes of the DBA (per paragraphs 4(1)(b)(i)-(v)), save that we do not think that these fees should be

[75] Regulation 4(1) Damages Based Regulations 2013.

subject to a 30% or any cap – see our comments on caps above. At the DBA Reform Project conference on 17 October 2019, Professor Mulheron acknowledged that there was no particular science behind the 30% figure and it should be subject to further consultation. We agree with that observation. 30% is far below the level commonly used for discounted-rate CFAs in commercial litigation. In our experience, under such discounted-rate CFAs, the solicitors (and sometimes barristers) are usually paid somewhere between 50%-80% of their standard rates. We also agree with the observation of Maura McIntosh of Herbert Smith, in her blog for Practical Law[76], that it is illogical and may create perverse incentives if in a case heading for a low financial benefit the lawyers would actually be able to charge more if the case were lost. We also agree with her suggestion that the parties should be able to agree that the client would ultimately be liable for the higher of the hybrid fee or the DBA payment.

- In a similar fashion to the point we made in answer to question 17 on CFAs, we contend that the all-encompassing nature of the current DBA payments and their caps, can involve insufficient reward for case development costs. In comparison in complex commercial claims both funders and insurers will require the available evidence to have been gathered, assessed and often supported by KC opinion before they will agree to back a case and confirm their funding terms. The DBA Regulations ought to provide flexibility for law firms to agree differing (uncapped) terms with their clients for any such high risk and uncertain claims development work. Notably sequential retainers should not be inhibited by the DBA Regulations, in order to enable law firms to start on a standard retainer (or discounted-rate CFA) then offer to switch to a DBA (after early evidence gathering enables risk assessment and informed scoping of the likely cost and duration of the litigation).

- We also agree with the principle of the proposed reforms permitting law firms to recover payment of law firm costs, expenses and barrister's fees when the DBA is terminated early (proposed paragraph 6). We note this position regarding the enforceability of DBAs with early termination clauses is reflected in *Zuberi v Lexlaw Limited* [2021] EWCA Civ 16[77] but we think this should be made more certain[78] by being set out in legislation. However, we propose that the wording of proposed paragraph 6(1) be amended to expressly allow the law firm to terminate on economic grounds, perhaps benchmarked to scenarios in which an ordinary fee paying client would not risk their own funds to continue the claim. For good reason all TPF agreements include a clause of this type. We also suggest that proposed paragraph 6(2)(b) be amended to remove the scope for a client to terminate the DBA at a late stage, for instance when many of the risks have been overcome and settlement is likely, and only be liable for time-based fees of the legal team. On a client termination, the legal team ought to be entitled to elect (at or shortly after the point of termination) between either: (i) immediate

[76] '*Redrafted DBA Regulations: a promising basis for reform | Dispute Resolution blog*' (11 November 2019).

[77] At [35]-[46].

[78] *PACCAR* demonstrates the uncertainty of first instance and even Court of Appeal decisions on such important points of principle.

payment of time-based fees or (ii) maintaining their entitlement to the DBA fee (% of damages) once a 'win' has been obtained for the purposes of the DBA.

- We agree that in circumstances where the law firm acts for a consumer under a DBA and a barrister acts under a separate DBA, the combined DBA payment fee of both agreements should not cumulatively exceed the (soft) DBA cap in order to prevent the risk of double charging (paragraph 5).

- As noted in our response to question 6, we disagree with the proposed reform in regulation 1(5) to extend the prohibition of DBAs in opt-out collective proceedings in the CAT to representative claims under CPR 19.8.[79] Instead, we contend that DBAs ought to be allowed in both of these types of representative claim, subject to claim certification and distribution controls from the court. We hope this may facilitate access to justice for claims that are insufficiently large to attract TPF (or leave the class with a sufficiently large net distribution). If the costs of the claim are paid post distribution, allowing DBAs would have no impact on the class members' return. If the costs of the claim are paid pre-distribution, a DBA may also reduce the costs to the class as compared to other alternatives. We are unaware of any evidence to suggest DBAs in CPR 19.8 representative actions (or other types of claim) have been detrimental to consumers. The lawyers acting under DBAs are of course subject to stringent regulation by the SRA, and CAT opt-out cases would still be subject to the CAT claim certification process.

- As noted in our response to question 12, the DBA caps have hindered the utilisation of DBAs. The compulsory requirement to account for barrister fees within the DBA payment disincentivises many law firms from offering DBAs. In our experience, a commercial barrister would very rarely be prepared to accept the degree of risk that goes with a fee based share of damages. They are usually less able than law firms to attempt to assess and control those risks plus, as they are sole practitioners, they will have a much smaller 'basket' of cases to spread the risk. This leaves a funding burden with the law firm which consequently will often result in the need for TPF. The proposed reforms would go some way to ameliorating this issue by creating the ability to have discounted-rate DBAs (because, even where the client does not recover a financial benefit, the law firm can be paid any of their recoverable costs or incurred expenses and up to 30% of their irrecoverable costs)[80] and by codifying the entitlement to recover the barrister's fees from the client in a termination scenario. However, as above we propose the reforms go further than envisaged in 2019, notably for non-consumers.

- What harm would there be in allowing for the parties to contractually provide for the barrister's fee to be paid in full in a loss? There is little, if any, real risk of any inappropriate dumping of work onto the barrister by the solicitor, to the client's detriment; as there would be a financial dis-incentive for the solicitor to do so because they would still be liable to pay those higher fees for the barrister in the event of the win out of their DBA percentage. Solicitors are of course also subject to the SRA Code notably to act in the client's best interests. A further advantage of enabling the parties to contract for the barrister's fees to be paid in full in a

[79] CPR 19.6 is referred to in the proposed Damages Based Agreements Regulations 2019. CPR 19.6 is now CPR 19.8.
[80] Paragraph 4(1)(b) Damages-Based Agreements Regulations 2019.

loss is that they could then be covered by any ATE policy which the client takes out for adverse costs and disbursements.

- The concept of requiring solicitors to take the financial risk regarding the barrister's fees was completely alien prior to the DBA Regulations. Conversely there are long standing good reasons why a client, who has contractually agreed to do so, should bear the financial risks of the barrister's fees but with the option of taking out insurance for that risk.

- In the event that caps are retained in some form, we propose that they should be VAT exclusive (paragraph 4(1)(a)(ii)(C)), especially in the context of commercial litigation. In practice, the inclusion of VAT within caps further disincentivise law firms from offering DBAs, as the net fee they are left with may be insufficient reward for the risks posed by the case and the postponement of payment. It also exposes the legal team to the risk that VAT rates may be increased during the life span of the case. For many commercial disputes clients, VAT is not in any event an issue, as they can either make a reclaim, or if they are overseas they may not be liable to VAT in the first place. There is no sound policy reason that we can see for allowing differential charging based on a client's VAT status. The key policy point is that law firms must be transparent with their clients over all aspects of the charges, including VAT. We reiterate our proposal that lawyers offering clients any form of alternative fee agreement ought to provide clients with a worked example.

- We do not understand the logic behind the DBA Reform Project 2019 proposals (paragraphs 4(3) and (4)) for reducing the caps on the DBA fee to 20% (for PI) and 40% (for other claims), down from the existing levels of 25% and 50% respectively. The existing caps will continue to apply to success fees for CFAs for injury claims, which are paid in addition to base costs (not just limited to recoverable base costs). So why under a success fee model of DBAs, should the success fee cap be set at a lower level?

- We agree that the rules on DBA payments should be by reference to whether the litigant has recovered "*money or money's worth*" (per the definition of 'financial benefit' at Regulation 1(2) of the proposed DBA Regulations 2019) rather than the approach under the DBA Regulations 2013, which defines the DBA payment as "*that part of the sum recovered in respect of the claim or damages awarded*". The term 'money or money's worth' would allow DBAs to be used for the recovery or preservation of assets, thus expanding the possible use of DBAs to claimants and defendants. We note that this issue arose in the recent case of *Reeves v Frain & Ors* [2025] EWHC 185 (SCCO) in which the defendants were successful in challenging a will, but the court held that there was no "*sum recovered*" and consequently the DBAs in place with the defendants were not enforceable and costs could not be recovered. In that decision, the judge expressed concerns about valuing the relevant asset,[81] but that is only an issue between the parties in so far as the indemnity principle applies and if the DBA fee continues to be for the entirety of that party's costs. If a DBA regime were adopted that was based on a success fee model, in which a solicitor's time-based fees could be claimed inter partes and retained by the solicitor, in addition to the DBA success fee, then there would be no need for *the court* to value the relevant asset (or other

[81] *Reeves v Frain & Ors* [2025] EWHC 185 (SCCO) at [68]-[69].

'financial benefit') in order to enable inter partes cost liability to be determined. That liability should be calculated by a mechanism within the DBA, with an appropriate ADR provision to resolve any disputes in this regard. A related important point is that DBAs ought to be available to defendants.

- As similarly noted above in regard to the cap on CFA success fees for personal injury claims, we propose removing the current exclusion of future losses from the amount attracting the DBA payment (paragraph 4(3)(a)(i)). We act in many catastrophic personal injury cases; in these cases the vast majority of damages are future losses. The general damages and past losses element of our serious injury claims over the last 5 years was on average less than 25% of the total value of the damages in those claims.[82]

- If these caps are set too low then there will be a class of claims that will be economically unviable under a DBA, and thereby restricting access to justice for certain claimants. If we took the example of a small business dispute, with finely balanced prospects (just greater than 50%) worth say £100,000, if the costs were also likely to be £100,000 then a 40% DBA fee of £40,000 would be an insufficient reward for the risk to be taken by the law firm, especially if they were at risk for most or all of counsel's fees in a loss. That would be heightened if VAT had to be accounted for reducing the net DBA fee received by the law firm, if the stars align and the case is won to £33,333, just one third of what they risked and before we even factor in the impact of having deferred payment for the years it takes to investigate the case and then bring the proceedings through to trial if necessary. We believe that many clients with this type of case would prefer to pay a 50% DBA fee rather than either be unable to secure reputable skilled representation or have to take the considerable risk and bear the cost of paying £100,000 costs in the hope of recovering the same sum.

Given the issues highlighted above, we believe that there is merit in starting anew with a single regulatory regime for all forms of contingent funding agreement, unencumbered by the current DBA Regulations or the Courts and Legal Services Act 1990. This would bring clarity and potentially make DBAs a more viable option for many types of cases. Ideally it would be undertaken as part of the CJC's review of the Solicitors Act 1974.

However, we are conscious that widescale and careful reform and replacement of the Solicitors Act 1974 and the Courts and Legal Services Act 1990 is a project that would likely take many years. It is essential in our view that in the meantime the most pressing immediate problems are addressed by rapidly refining and passing both the Damages-Based Agreements Regulations 2019 and the Litigation Funding Agreements (Enforceability) Bill.

[82] For claims in excess of £500,000 over the past 5-year period.

**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?**

Before-the-event insurance

As noted in our response to question 15, the main issue with the suitability of BTE insurance is the lack of freedom of choice of legal representation for the pre-proceeding preparation of the claim. In many claims the pre-proceedings gathering of evidence, framing of the case in the letter of claim and related ADR are all fundamental to the outcome of the claim. Claimants (notably those with intermediate or multi-track claims) ought not to have their freedom of choice of lawyer limited. Requiring the use of a panel solicitor pre-proceedings may result in most or all of the available indemnity under the insurance being used before the client can change representation at the point of proceedings to a more affordable firm or a firm willing to offer alternative fee arrangements.

In this regard, we support Lord Justice Jackson's view that such concerns would be alleviated by amending Regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 to provide that the insured's right to choose legal representation ought to arise when a letter of claim is sent to the opposing party.[83]

We do not believe that a public mandatory legal expenses insurance scheme should be considered. We assume it would be funded as an additional form of national insurance or tax and conceptually would be little different from legal aid. Even if the amount collected from each individual were set high enough for such a scheme to be effective, we would query whether the government would have the appetite and resources to administer and enforce it effectively.

After-the-event insurance

ATE insurance is already heavily regulated. Such regulation includes, for example, obligations on the law firm to provide a demands and needs statement[84], and for the insurer to provide an IPID[85], which help to bring transparency of the insurance terms to consumer clients. We are therefore of the view that there is no requirement for further regulation of ATE insurance.

**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?**

We refer to our response to question 15 regarding the close interplay between CFAs, ATE insurance and TPF, as well as our response to question 9 regarding the use of ATE insurance with AAE to provide security for costs in funded cases.

[83] *Review of Civil Litigation Costs: Final Report* (December 2009), pp. 77-78.

[84] ICOBS 5.2 Demands and needs, FCA Handbook.

[85] ICOBS 6.1 Providing product information to customers: general, FCA Handbook.

We do not consider there is a need to reform the *relationship* between ATE insurance and either CFAs or TPF.

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

We refer to our response to question 15. However, we are unaware of any evidence to suggest that crowdfunding (as it currently exists) is having a harmful effect on access to justice.

### 21. <u>Are there any reforms to portfolio funding that you consider necessary? If so, what are they and why?</u>

Portfolio funding and law firm finance raise issues that engage key SRA principles and standards including acting in the best interest of the client[86], own interest conflicts[87], and the need to advise clients about the available funding options beyond the options offered by the law firm.

There are three main types of portfolio funding or finance, as described below:

1. Funding is provided to a particular client in respect of multiple claims that meet a predefined criteria (as to type of claim, court and/or value); '**Portfolio Client Funding**';

2. Funding to a law firm to provide funding to multiple clients in respect of multiple claims that meet a predefined criteria (as to type of claim, court and/or value). We refer to this type of portfolio funding as '**Portfolio Firm Funding**'; and

3. Funding is provided directly to a law firm to provide operational cash flow to cover the firm's overhead expenses. The funder's return is based on the fees that the firm ultimately generates. It is commonly used where a law firm is running multiple cases on conditional or contingency fee agreements and wishes to hedge the attendant risk of such agreements. In these scenarios, the funder will pay up to a 100% of the value of the legal fees deferred by the law firm under its contingency fee agreement in exchange for a pre-agreed share of the firm's success fee. The collapse of SSB Law would be the most recent example of this kind of arrangement causing significant problems. We refer to this type of portfolio funding as '**Portfolio Finance**'.

Portfolio Client Funding does not, in our view, present additional regulatory requirements. It is only suited to large corporates or institutions with multiple claims. These parties will usually have their own in-house legal function and will often also seek specialist external advice on the funding terms.

In our view, Portfolio Finance[88] presents a greater risk to clients because it has the potential to jeopardise the financial stability of the law firm by the firm becoming over exposed to conditional/contingent litigation with uncertain outcome and timescale. In

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[86] SRA Principle 7.

[87] Paragraph 6.1: Conflicts of interest, SRA Code of Conduct.

[88] See Elena Ray's article, '*Following the trend*', in the December 2024 edition of the Law Society's Litigation Funding magazine analysing the funding market's growing fashion for Portfolio Finance and the associated advantages and disadvantages of such funding.

circumstances in which the funder ceases funding it could cause the collapse of the law firm, detriment to their clients, and reputational damage to the solicitors profession. There may be an additional audit requirement or other financial threshold (for example, linked to the amount of indebtedness that the firm has to a funder) at which there ought to be an intervention to ensure that the firm is financially stable enough to continue to represent the funded party (and its other clients).

Portfolio Firm Funding is also potentially problematic because, as highlighted by ELI Principle 4(2), it might call into question the ability of the law firm to provide independent advice to the funded party on their funding options and any funding terms that are offered. In such scenarios, we would consider it an important part of ensuring the integrity of the process of advising the client for solicitors to inform clients about that arrangement and recommend that the client should seek separate legal advice on the proposed funding and/or retainer – albeit, it would be for the client to decide whether to do so. It may also restrict the freedom of the solicitor working for the funded law firm to choose what is the best funding option for their individual case or cases.

The recent SSB scandal demonstrates the risk that portfolio funding or law firm finance creates an environment in which an unscrupulous or poorly managed law firm may extract funds from the portfolio which is not in the best interests of their clients, does not further access to justice, leads to adverse claims on professional indemnity insurance, and ultimately brings the legal profession into disrepute.

A secondary risk with portfolio funding is that it will often be in the law firm's own interest, or even a contractual obligation or at least expectation, to drive a certain volume of cases through the facility. Consequently, cases under a portfolio do not necessarily undergo the same level of scrutiny and due diligence as cases which are individually funded. However, this is ultimately a commercial risk for funders which they must weigh up, rather than anything that necessarily requires reform. It also creates a risk of some clients being recommended to use the funding facility when there may have been other ways of funding their case that would have been better aligned to their best interests.

A further risk with cross-collateralised portfolio funding is of solicitor own-interest conflicts. For example, situations could develop in which it is in the firm's interest to reduce the scope of its work and the expenses it incurs on cases it sees as risky, even if the merits of the case are still more than 50%, because if the claim fails they would have to pay the funder back from the proceeds of future successful cases, thereby suppressing the profitability of those future cases.

As explained in our response to question 4, the SRA ought to consider: (i) whether the current SRA Code is sufficiently clear as to the solicitors profession duties when they are providing advice on funding and/or are instructed on funded cases; and (ii) whether there should be an obligation on law firms giving advice on funding agreements to provide to the client, prior to any client entering into a funding agreement, a document similar to an ATE insurance demands and needs statement and/or, for consumer clients, to provide a FPID (with such document being produced by the funder). At the least, we believe that the SRA should provide more guidance to lawyers and law firms on TPF. This guidance ought to cover the discrete additional risks relating to portfolio funding and law firm finance, including own-interest conflicts.

The SRA might consider imposing a self-reporting threshold (based on the ratio of law firm finance/borrowing to turnover) after which they would more closely meet/monitor law firms that were heavily on finance.

Notwithstanding the above, we would note that in our understanding, Portfolio Finance and Portfolio Firm Funding are relatively rare in terms of the number of firms and cases actually funded. In addition, there are also benefits to some clients as without the existence of the portfolio funding or law firm finance, that law firm may have felt unable to offer any CFA or DBA terms, or arrange TPF, for the clients in question. We are unaware of any evidence to suggest portfolio funding or law firm finance enables law firms to offer better terms to most or all of their clients than are offered by firms who are able to offer CFA or DBA terms without reliance on such funding/financing.

22. **<u>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?</u>**

We refer to our responses to questions 16, 17 and 18.

***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. **<u>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?</u>**

<u>CPR 19.8 representative actions</u>

CPR 19.8 does not currently address many of the issues which commonly present themselves in funded group litigation. For example, it does not address how and when distributions of damages to the represented parties should be made, how and when the represented parties' legal representatives should be paid and how carriage disputes should be dealt with. We are of the view that CPR 19.8 should be revised to deal with such issues and that the certification and distribution rules that apply in CAT opt-out collective proceedings would be a good model to follow, with the related reforms that we propose in answer to question 17.

<u>Opt-out collective proceedings in the CAT</u>

As explained in our response to question 6, DBAs are prohibited in opt-out collective proceedings in the CAT but there is no such equivalent prohibition for representative proceedings under CPR 19.8. In our view, there should be no such distinction and the prohibition on DBAs in the CAT should be removed. Doing so would open up more choices on how to fund collective proceedings in the CAT and thereby reduce the cost of funding for such claims and provide greater access to justice.

It would also be preferable for there to be clarity on whether and in what circumstances the CAT will allow payment to a funder (or a law firm's success fee) prior to attempts to distribute damages.

**24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?**

We do not consider there is a need to amend the CPR or CAT Rules to cater for other forms of funding, save as described in our response to question 23 in respect of DBAs.

**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?**

Providing security for costs is for the defendant's benefit and, in funded cases, providing such security incurs additional costs for the claimant. As explained in our response to question 9, these additional costs arise because either: (i) the funder will require an enhanced return out of any recoveries by the claimant to compensate it for the time the security is tied up and the risk that it will be lost; or (ii) the claimant's ATE insurance policy will be upgraded to one with an AAE endorsement.

Defendants have a choice as to whether to seek security for costs. However, whilst the current regime provides costs protection for the defendant in the event that the defendant wins, it comes at a cost to the claimant in the event that the claimant wins.

It seems to us that the most appropriate way of remedying this would be by revising CPR 25 to provide that, where the defendant seeks security for costs, that the claimant has a right to seek a cross-undertaking in damages from the defendant, set out the circumstances in which it would be available (which as explained in our response to question 9, should be available in much wider circumstances than the 'rare and exceptional' circumstances suggested by the court in *Rowe*) and provide that, where the claimant is successful, the defendant be required to pay for the additional costs that providing the security has caused for the claimant.

**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 various pre-action protocols are fit for purpose and do not require any changes relating to litigation supported by TPF.

We also refer to our response to question 27 below.

**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?**

As a general rule, the existence of funding arrangements should not be disclosed to the court or the other party in circumstances where defendants that are funded by defendant liability/indemnity insurance are not subject to similar requirements. An exception to this would be for opt-out proceedings in the CAT, as the CAT Rules require that the funding arrangements be included as part of the class representative's litigation plan and is a factor in the CAT determining certification.[89] However, even in these circumstances, the class representatives should apply to the CAT for permission to appropriately redact the funding documents.[90]

As explained in our response to question 8(e), exceptions could be justified where a party was seeking the recovery of funding costs in meritorious scenarios. If policymakers were minded to propose the introduction of rules around disclosure of funding arrangements, then equivalent provisions ought to be introduced for disclosure of defendant liability/indemnity insurance as there is no good reason to treat them differently in this regard.

In any event, we do not believe that it would be appropriate (or, indeed, necessary) to – save for in CAT opt-out proceedings, as explained above - disclose the identity of the funder and/or the funding terms, which should remain confidential and privileged.

***Questions concerning provision to protect claimants.***

28. **<u>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?</u>**

Funders should not directly control the litigation, but they do have a significant financial stake in the litigation and should be entitled to take reasonable steps to safeguard their investment. However, the circumstances in which they can do so need to be very clearly stated in the funding agreement, as proposed by ELI Principle 10. Such circumstances should also be stated within any proposed IPID equivalent that is produced for funded consumer parties.

Properly advised funded parties will ensure that the terms of the funding agreement do not cross the line of control in which the funder becomes the actual decision maker of the litigation. However, funders will often have ways in which they can exert passive control over the litigation due to their significant financial interest in the case. Despite this potential to exert control, in our experience, funders rarely seek to exercise excessive or otherwise undue control over the litigation.

<u>Settlement offers</u>

One way in which funders can exert indirect control on the litigation is in relation to settlement offers, with the terms of the funding agreement commonly providing at the very least for the funder to be consulted when an offer is made or received. Funding agreements may also entitle the funder to terminate the agreement early if the funded party is going to reject or refuse to make a reasonable offer. Settlement disputes between the funded party and the funder are often subject to appropriate ADR controls, with the ALF Code requiring a KC determination of any dispute in relation to settlement (as well as in relation to the early termination of the funding agreement).[91]

It is common for there to be a provision in funding agreements which preserves the funder's entitlement to be repaid in this scenario of termination relating to offers to

[89] CAT Rules 78(2)(d)-(e) and 78(3)(c)(iii).

[90] CAT Rules 101.

[91] Paragraph 13.2 ALF Code.

settle. However, such rights should only crystallise upon settlement. Requiring immediate repayment would usually require the client to secure alternative funding to not only fund the future of the case but also to reimburse the original funder for the funds advanced before this point. Obtaining such funding may be very difficult (if possible at all). As such, provisions that require immediate repayment to the funder in the settlement scenarios described can give the funder the right to exercise *de facto* control. Such immediate repayment clauses ought to be limited to scenarios of wrongdoing by the funded party (e.g. non-disclosure of damaging evidence) in material breach of the funding agreement (which are, in our experience, rare), rather than differing opinions over the terms and timing of settlement.

There has been extensive recent coverage of the proposed settlement in the *Merricks v Mastercard* CAT proceedings being openly opposed and criticised by the claimants' funder. However, we would wish to stress that a scenario such as this is highly unusual. As far as we are aware, this is the only overt example in modern England and Wales litigation funding history of a funder seeking to prevent a settlement that is recommended by the claimant legal team. None of the many funded cases that we have undertaken for our clients have resulted in a court challenge. We can only recall one example where we considered the funder to be attempting to exert excessive control in a settlement scenario. In this instance, our client, in accordance with our advice, elected to invoke the ADR procedures pursuant to the funding agreement but the disagreement with the funder was ultimately resolved in our client's favour following the conclusion of that ADR procedure which was binding on all parties.

Budget variation

We refer to our response to question 5 regarding indirect control exerted by funders in relation to variations of budgets in many complex, high-value claims.

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

The presence of funding and the accumulated funding cost becomes a bigger issue the longer the case goes on and can make it harder to settle claims close to trial. The same could of course be said about unfunded litigation costs, although the issue patently becomes more pronounced if those costs are subject to a funder's multiple.

We refer to our response to question 1 regarding TPF giving impecunious claimants a credible threat without which they likely would not secure fair settlement terms. We also refer to our response to question 8(e) in which we propose the recovery of ATE premiums, funders fees, and CFA/DBA success fees for scenarios in which defendant conduct has driven up the funded costs, including failure to accept reasonable Part 36 or Calderbank offers. Such proposals would provide more of an incentive for offers to be made and at earlier stages, promoting early settlement and in accordance with the overriding objective of the CPR. They would also moderate the impact of the additional funding costs on the claimants, improving their net recovery and so providing something closer to full compensation.

Funders will not, in our experience, seek to interfere directly in claimants' decisions regarding settlement and funders will not usually be present during settlement discussions themselves. However, in practice, circumstances often mean that the funder will be asked to take a reduction (or 'haircut') against their contractual entitlements in order to facilitate agreement between the parties as to a settlement figure such that the claimant is left with an acceptable net figure. These types of negotiations are commonplace and, in our experience, are invariably approached in a commercial and constructive way. For this reason it is important, as part of the initial advice to the client, to provide outcomes modelling including realistic settlement outcomes and the mechanism by which the money is shared between the different stakeholders. It is therefore important for those advising the claimants to focus carefully on the terms of the priorities or 'waterfall' agreement.

**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?**

No, the court should not be required to approve the settlement of funded proceedings except for: (i) as is already required in the context of protected parties and children[92] or opt-out collective proceedings in the CAT[93]; and (ii) CPR 19.8 representative action proceedings, which in our view should be treated in the same way as opt-out collective proceedings because, in the same way, the represented parties will ordinarily[94] not have had the opportunity to negotiate and approve the terms of the funding in the first instance or any settlement offer that is made.

**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?**

In opt-out proceedings in the CAT, the CAT must be satisfied that the "*terms of the collective settlement are just and reasonable*" for the class members and, in doing so, shall take account of all relevant circumstances, including those set out in CAT Rule 94(9). If the court were to approve the settlement of representative proceedings under CPR 19.8, we think that this test (or a similar one) would be appropriate (in particular, where the proceedings have not been brought on an opt-in basis).

**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?**

We refer to our response to question 4 in which we explain the current SRA framework and potential improvements to that framework. Even if the SRA determines that no changes are necessary to the SRA Code, we believe there would be real benefits of a drive to educate solicitors on their existing professional duties and how best to comply with them.

We also refer to our response to question 21 regarding the need for specific guidance from the SRA on the potential regulatory issues and risks posed by portfolio funding and law firm finance.

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92 CPR 21.10(1).

93 CAT Rule 94(1).

94 Where a CPR 19.8 representative action is brought on an opt-in basis, the represented parties are usually opting in to funding terms that have already been agreed, but more sophisticated parties with larger claims may, in some cases, be able to negotiate their own funding agreement. The represented parties are however more likely to have the opportunity to negotiate and approve the terms of any settlement offer that is made.

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

Before explaining the challenges of how litigants can effectively compare different funding options from funders it is important to stress how difficult (and costly) it can be to receive a single offer of funding, let alone multiple options to compare. TPF, particularly in complex commercial litigation, is a high-risk market and funders are naturally conservative. They inevitably require claims to be extremely well presented (with all merits and weaknesses in the claim clearly set out). Often, they have to be supported by a favourable opinion from a leading barrister and/or experts and for the ratio of realistic claim value to funding budget to meet their fund criteria (typically 10:1). The vast majority of claims that seek funding are rejected (indeed, the LSB Report notes that only between 3% and 5% of all funding opportunities pitched are accepted)[95].

As explained in our response to question 11, we typically recommend to our clients seeking funding that they instruct us to conduct a tender process whereby funding quotes are simultaneously sought from multiple funders. However, such processes are lengthy and expensive to run, due to: (i) the due diligence on the claim required by funders, the instructed solicitors and the party seeking the funding; and (ii) the complex nature of the terms being sought then being negotiated and (iii) due diligence on the funders (for example, on the source of their funding and their capital adequacy).

In our experience, the process of simply exploring funding options with multiple funders (which almost always includes simultaneously exploring ATE insurance) takes at least three to six months. It is rare for the costs of that process to be less than a six-figure sum. We repeat our comments in response to question 17 that the current regime for CFAs and DBAs does not allow the funded party's law firm to agree terms as to their fees which adequately compensates the firm for the enhanced risks that they face in truly high-risk claims, notably those that require significant claim development before the merits can be properly established.

Even when funding is offered by more than one funder, it can be very difficult for parties to effectively compare the terms offered because funding agreements are detailed, complex documents without a common structure. Being able to review the nuances of funding agreements and compare terms effectively therefore requires the litigant's instructed solicitors to be experienced and skilled advisors on TPF, in addition to having a thorough understanding of the merits and weaknesses of the claim. In this regard, we would repeat our comments at question 4 to urge the SRA and/or the Law Society to promote the ELI Principles and use them to educate and equip the legal profession to better advise clients on TPF, or at least identify whether their clients ought to have separate, specialist advice

As also explained in our response to question 4, the SRA may wish to consider whether there should be an obligation on law firms that provide advice on funding agreements to provide, prior to the client entering into a funding agreement:

- To all clients, a document that is similar to a demands and needs statement (law firms that are advising clients on ATE insurance contracts are required to provide

[95] See LSB report, p.33.

the client with a statement of their demands and needs, prior to the conclusion of the contract); and/or

- To consumer clients, a FPID (produced by the funder) concisely setting out all the key terms of the proposed funding.

An FPID would provide a further safeguard for consumers to ensure the complex funding terms (with funding agreements being dense contracts frequently running to 30-50 pages) are understandable to them. For non-consumer claims there is no need for this to be mandatory.

Parties seeking funding can either directly, or via their instructed law firm, commission a funding broker to assist them to review the funding market and attempt to secure competitive funding quotes. This is useful, notably for law firms that do not have significant experience in advising clients in procuring funding terms. However, in our experience those offering funding broking services expressly contract on the basis that they are not providing advice to the funded party on the terms of funding. Nor have we experienced brokers undertaking the type of due diligence on funders that Stewarts does for its clients. Consequently, in our view funded parties require legal advice on the full funding terms, not just the key financials like the funder multiples. This can either come from the instructed law firm[96] or, if they lack the experience or resources to provide that advice, then by the funded party instructing a separate firm to provide that funding advice on a discrete basis. Alternatively, for funded parties to be able to place fuller reliance on the services of funding brokers it would be necessary for those brokers to become subject to professional obligations including a fiduciary duty to their clients, requirement to carry sufficient professional indemnity insurance, and some form or regulation.

Different brokers have differing charging structures that could prove either more or less expensive than the instructed law firm conducting a funder tendering process themselves.

**34. <u>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?</u>**

We repeat our support for and comments on ELI Principle 6: Avoidance and Management of Conflicts of Interest, as set out in our answer to question 7.

One scenario where a conflict of interest could arise between funded claimants, their legal representatives and/or funder is where there is a material connection between the funder and the legal representative as a result of a financial arrangement between them. Examples would include portfolio funding or scenarios in which the legal representatives receive a fee or commission of some kind as a result of an introduction of a funder. However, these scenarios are - in our experience - relatively rare. Please also see our response to question 7 regarding ELI Principle 4.

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[96] Notwithstanding this, in CAT opt-out collective proceedings it is in our view essential to ensure that the proposed class representative receives separate legal advice on any alternative funding arrangements, for example, a CFA or funding agreement, before any such arrangements are entered into, in order to demonstrate evidence of independent, detailed consideration of funding terms.

We would nonetheless repeat our comments in our answer to question 4 that there would be value in a drive to educate solicitors on their existing professional duties and how best to comply with them.

Another example of a potential conflict of interest is if the funder were simultaneously funding another party which was pursuing a different claim but against the same opponent if that opponent had insufficient assets or insurance to enable both claims to be paid in full.

One further example of conflicts could arise at the conclusion of a successful claim where it is possible that the funded claimants may seek to challenge the entitlement of their lawyers, but this can of course arise in unfunded claims too. Another could be in a contested CFA or DBA termination scenario. In such retainer challenges there would patently be a conflict, and those claimants would require separate representation. However, if the claimant were not challenging their lawyers' retainers, but rather were challenging the funder's entitlement or right to terminate then there may well be no conflict for the law firm, and through their familiarity with the underlying issues the law firm would usually be best placed to continue to represent their clients.

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?**

Please see our response to question 34 and our response to question 4 in which we suggest that the SRA may wish to consider whether the current SRA Code should be enhanced, clarified or supplemented by SRA guidance.

***Questions concerning the encouragement of litigation.***

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

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

    b. **Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?**

    c. **Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?**

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

a)

Litigation - particularly high-value, complex litigation – is uncertain in both timescale and the costs that a litigant can incur in bringing (or indeed, defending) a claim. There are therefore many meritorious claims from individuals and businesses which never get off the ground because the claimant cannot afford:

- To fund the investigation of the viability of the claim (as explained in our response to question 17 in respect of CFAs - which is also applicable to DBAs - these investigation and claims development costs can be six figures and usually fall to the clients and/or their instructed lawyers because a funder will not normally agree to start funding the claim before such work has been carried out);
- Post investigation to fund the claims through to conclusion;
- The risk of an adverse costs order being made against it; and/or
- The risk of being ordered to pay security for costs.

The availability of TPF does therefore encourage individuals and businesses to bring meritorious claims because it provides the funding necessary to run the claim and the security to meet any orders to pay costs. Such encouragement extends beyond impecunious clients and applies to clients that are otherwise well funded. For example, claimants in securities actions often include pension funds and other institutional investors that cannot apply their funds towards litigation because to do so would either not be permitted by (or would at least be in conflict with) the provisions in their constitutional documents.

b)

No, in our experience TPF does not encourage vexatious or unmeritorious litigation. As explained in our response to question 33, funders are naturally conservative and the vast majority of claims that seek funding are rejected. Even highly meritorious claims will fail to attract funding if the claim value is not high enough to make it economic to fund. Funders also tend to be clinically focussed on the merits, economics and duration of claims. They tend to be reluctant to fund claims in which they perceive the funded party to be driven by emotion or simply wishing to have their day in court.

Whilst not always the case, there is often a correlation between vexatious claimants and unmeritorious claims. At the least, they usually carry a significant risk that the claimant will act unreasonably during the proceedings and incur unnecessary costs as a result and/or reject reasonable settlement offers. That would usually breach terms of funding and most CFAs/DBAs. ATE insurers are also very unlikely to insure such claims as they present too high a risk and, if they inadvertently did, would invoke policy exclusions the moment they discovered the issues in question.

From a law firm perspective, Stewarts has very rigorous risk management procedures in place for offering clients alternative fee arrangements, such as CFA and DBAs. In all practice areas that requires the lawyer proposing an alternative fee arrangement to present the claim to a committee of at least three senior partners, including partners from outside their own department. If we were asked to provide an alternative fee arrangement for a claim that is brought by a vexatious claimant and/or is otherwise clearly unmeritorious or uneconomic, then it would fail to pass our own internal procedures. This will not however be the case for all law firms and there will inevitably be some that are content to take the risk and offer alternative fee arrangements to such litigants.

c)

Yes, litigation funding and other forms of funding (including ATE insurance and alternative fee arrangements) support and hence encourage collective and/or representative actions to a great extent. The vast majority of such actions, and all CAT opt-out collective proceedings, are in receipt of TPF and it is difficult to see (given the size of such actions and the associated costs, and risk of adverse costs) how they would be litigated without TPF and other forms of alternative funding (e.g. CFAs and ATE insurance).

In our experience, the majority of group litigation also tends to be in receipt of TPF (and will almost certainly be subject to ATE insurance and/or alternative fee arrangements) but any TPF will depend on the litigants in the group and the dynamics of that group. We have acted in some group claims in which we have offered options that enabled some of the group to self-fund (at their choice) or agree DBA terms as an alternative to CFA plus 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.**

As noted in our response to question 6, we propose removal of the prohibition on DBAs in opt-out collective proceedings in the CAT. Permitting DBAs would open up more choices for litigants on how to fund these claims, thereby helping to reduce the cost of funding and provide access to justice. If DBAs were permitted, our response to question 23 sets out how we believe they should be treated in opt-out collective proceedings. We would, however, stress that we do not think that there should be any reforms more generally to the CAT Rules governing TPF agreements, as these are still relatively new and untested and require more time to be applied in relevant proceedings before any further reform should be considered.

We detail the reforms we believe are necessary to CFAs and DBAs to promote certain and effective litigation funding, more generally, in our response to question 17 (including, ensuring that law firms who take on very significant risks as to their fees in complex or high-risk claims are adequately compensated for carrying that risk). We also refer to our response to question 18 regarding the lack of freedom of choice of legal representation in BTE insurance. We do not consider that any major reforms are necessary to the regimes for CFAs (save for modification to the caps on success fees – see our response to question 17) nor to ATE insurance.

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

We refer to our response to question 33 setting out the difficulties litigants face in obtaining and comparing funding options and our response to question 4 regarding our proposals on educating the legal profession on their existing SRA obligations in this regard.

In addition, practical guidance for litigants on litigation funding could be produced and made publicly available. Such guidance could include a checklist, or a list of questions that the litigant could pose to their solicitor in order to help determine whether the solicitor has the necessary knowledge and experience to properly advise on funding. The guidance should emphasise the litigant's right to take legal advice about their funding options. The SRA and/or the Law Society may be best placed to produce the guidance with other public facing organisations also promoting it, for example, the Ministry of Justice/HM Courts & Tribunals Service, and the Citizens Advice Bureau. Together this could help to address the knowledge imbalance between funders and funded parties that is noted in the ELI Principles.

One of the issues litigants face is identifying the funders operating in the market. Similar to the SRA's register of qualified solicitors[97], and in line with the potential licencing regime referred to in our response to question 4, there could be an online register of licenced funders. This register would detail any complaints, investigations or action that has been taken against particular funders where that has resulted in a finding by the regulatory body of the funder having breached the applicable rules or principles.

**General issues**

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

Litigation costs and any related funding costs would be significantly reduced if the courts were better resourced and hence able to list hearings more swiftly, more actively and robustly case manage cases, and consistently deliver timely judgments. That would also enhance the reputation of the English courts and help maintain the significant contribution of the legal services sector to the economy.

[97] SRA | Solicitors Register | Solicitors Regulation Authority.

**APPENDIX 1**

**Worked example of claimant exposure (in a loss) and net recovery (in a win) under alternative fee and funding arrangements:**
- Claimant recovers £40 million (aside from row titled "Claimant exposure in loss")
- Total basic (time-based) fees for the claimant's solicitors are £2.8 million
- Total basic (time-based) fees for the claimant's barristers are £800,000
- Disbursements total £400,000

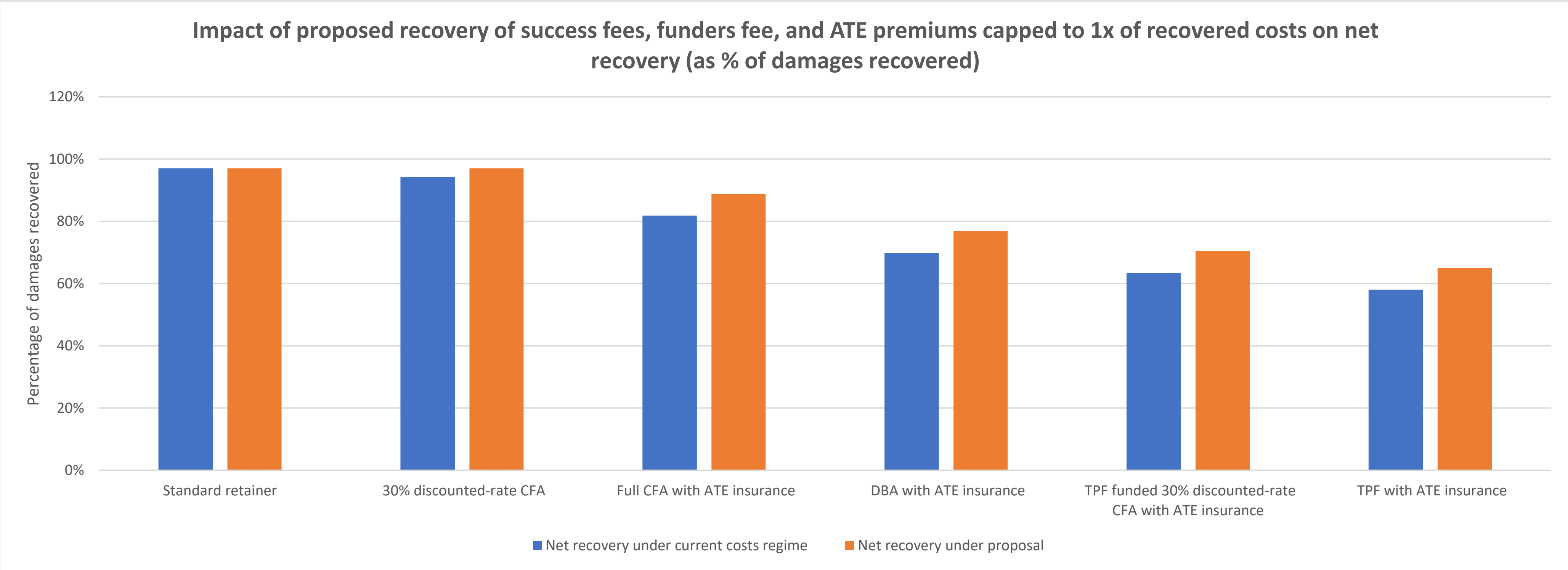
*The below worked example assumes (i) the claimant has won their claim (aside from the row titled "Claimant exposure in loss"), (ii) the claimant recovers 70% of their costs from the defendant (£2.8 million), (iii) the defendant's costs are equal to the claimant's base costs (£4 million), (iv) all sums are inclusive of VAT, (v) the ATE premium consists of 50% of the insured costs - 10% of which is paid with 40% deferred and contingent on the outcome of the claim, and (vi) the rate of insurance premium tax (IPT) applicable to the ATE premium is 12% (vii) the merits, economics and likely duration of the case are sufficiently strong to attract AFA.*

**Under current costs recovery regime**

| | **(1) Standard retainer for monthly payment of time based fees** | **(2) 30% discounted-rate CFAs (70% paid) with solicitor and counsel with 30% success fee** | **(3) Full CFAs with solicitor and counsel with 100% success fee, and ATE insurance insuring own disbursements and defendant costs** | **(4) DBA with 30% DBA fee (covering solicitor and counsel fees) and ATE insurance insuring own disbursements and defendant costs** | **(5) Third Party Litigation Funding funding (i) 30% discounted-rate CFAs (70% paid) solicitor and counsel fees with 30% success fee, (ii) own disbursements, and (iii) 10% of ATE insurance premium** | **(6) Third Party Litigation Funding funding (i) solicitor and counsel fees, (ii) disbursements, and (iii) 10% of ATE insurance premium** |
|---|---|---|---|---|---|---|
| Damages | £40,000,000 | £40,000,000 | £40,000,000 | £40,000,000 | £40,000,000 | £40,000,000 |
| Adverse costs received | £2,800,000 | £2,800,000 | £2,800,000 | £2,800,000 | £2,800,000 | £2,800,000 |
| **Total money received** | **£42,800,000** | **£42,800,000** | **£42,800,000** | **£42,800,000** | **£42,800,000** | **£42,800,000** |
| **<u>Costs</u>** | | | | | | |
| Solicitors | £2,800,000 | £2,800,000 | £2,800,000 | £12,000,000 | £2,800,000 | £2,800,000 |
| *CFA Success fee* | N/A | £840,000 | £2,800,000 | N/A | £840,000 | N/A |
| Barristers | £800,000 | £800,000 | £800,000 | (inc above) | £800,000 | £800,000 |
| *CFA Success fee* | N/A | £240,000 | £800,000 | N/A | £240,000 | N/A |
| Disbursements | £400,000 | £400,000 | £400,000 | £400,000 | £400,000 | £400,000 |
| Litigation funders fee (*at 3x of funding deployed*) | N/A | N/A | N/A | N/A | £10,104,000 | £13,344,000 |
| ATE premium (*50% of the indemnity, plus IPT at 12%*) | N/A | N/A | £2,464,000 | £2,464,000 | £2,240,000 | £2,240,000 |
| **Total Cost** | **£4,000,000** | **£5,080,000** | **£10,064,000** | **£14,864,000** | **£17,424,000** | **£19,584,000** |
| **Claimant exposure in loss** | **£8,000,000** | **£6,920,000** | **£492,800** | **£492,800** | **£0** | **£0** |
| **Net recovery** | **£38,800,000** | **£37,720,000** | **£32,736,000** | **£27,936,000** | **£25,376,000** | **£23,216,000** |
| **Net recovery (as % of damages recovered)** | **97%** | **94%** | **82%** | **70%** | **63%** | **58%** |

**Under proposal of recovery of success fees, funders fee, and ATE premiums in meritorious scenarios (i.e. see our response to question 8(e) on Part 36 offers, Calderbank offers, and indemnity costs orders)**

| | | | | | | |
|---|---|---|---|---|---|---|
| Success fees, funders fee, and ATE premium | N/A | £1,080,000 | £6,064,000 | £10,864,000 | £12,976,000 | £15,136,000 |
| Application of 1x of recovered costs cap | N/A | £1,080,000 | £2,800,000 | £2,800,000 | £2,800,000 | £2,800,000 |
| **Net recovery** | **£38,800,000** | **£38,800,000** | **£35,536,000** | **£30,736,000** | **£28,176,000** | **£26,016,000** |
| **Net recovery (as % of damages recovered)** | **97%** | **97%** | **89%** | **77%** | **70%** | **65%** |


Impact of proposed recovery of success fees, funders fee, and ATE premiums capped to 1x of recovered costs on net recovery (as % of damages recovered)
120%
100%
80%
60%
40%
20%
0%
Percentage of damages recovered
Standard retainer
30% discounted-rate CFA
Full CFA with ATE insurance
DBA with ATE insurance
TPF funded 30% discounted-rate CFA with ATE insurance
TPF with ATE insurance
Net recovery under current costs regime
Net recovery under proposal