The consultation closes on **Friday 31 January 2025 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to **CJCLitigationFundingReview@judiciary.uk**. If you have any questions about the consultation or submission process, please contact **CJC@judiciary.uk**.

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

You must fill in the following and submit this sheet with your response:

Your response is (public/anonymous/confidential):	Public
First name:	Matthew
Last name:	Lo
Location:	London
Role:	Director
Job title:	(as above)
Organisation:	Exton Advisors Limited
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.

The full list of consultation questions is below:

- **Please give reasons for your answers. Please do so by reference, where applicable, to the guidance given in the footnotes.**
- **All answers should be supported by evidence where possible to enable evidence-based conclusions to be drawn.**
- **It is not necessary to answer all the 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. To what extent, if any, does third party funding currently secure effective access to justice?[1]
2. To what extent does third party funding promote equality of arms between parties to litigation?
3. Are there other benefits of third party funding? If so, what are they?
4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[2] If not, what improvements could be made to it?
5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:
    a. The nature and seriousness of the risk and harm that occurs or might occur;
    b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;[3]
    c. For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.
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[4] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[5]
    c. Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what

[1] When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.
[2] This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.
[3] Please give full details of each possible mechanism and explain how each would work (including who any potential 'regulator' or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.
[4] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.
[5] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

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?

7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?
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?[6]
    e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?
        i. If so, why?
        ii. If not, why not?
9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.
10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?

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

11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?
12. Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?
    a. If so, why?
    b. If not, why not?
13. If a cap should be applied to a funder's return:
    a. What level should it be set at and why?
    b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?
    c. At which stage in proceedings should the cap be set?
    d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?
    e. Should there be differential caps and, if so, in what context and on what basis?

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

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

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

15. What are the alternatives to third party funding?
    a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?
    Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.
    b. Can other forms of litigation funding complement third party funding?
    Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.
    c. If so, when and how?
16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?
17. Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?
18. Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?
19. What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?
20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?
21. Are there any reforms to portfolio that you consider necessary? If so, what are they and why?
22. Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?

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

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?
24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?
25. Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?

26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?
27. To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?

Questions concerning provision to protect claimants.

28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?
29. What effect do different funding mechanisms have on the settlement of proceedings?
30. Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?
31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?
32. What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?
33. To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?
34. To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?
35. Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.

Questions concerning the encouragement of litigation.

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? 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.
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.
38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?

General Issues

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

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

EXTON ADVISORS

CJC REVIEW OF LITIGATION FUNDING

No.	Questions	Response
Questions concerning 'whether and how, and if required, by whom, third party funding should be regulated' and the relationship between third party funding and litigation costs.		
1.	To what extent, if any, does third party funding currently secure effective access to justice?	By definition, TPF secures access to justice for those funded claimants (both commercial and consumer parties) who are unable or unwilling to self-fund. The clearest examples of this that we see are consumer collective actions in the CAT, High Court group claims and claims on behalf of insolvent estates. Indirectly, access to justice may also be furthered by lending to other parties such as law firms.
2.	To what extent does third party funding promote equality of arms between parties to litigation?	Whilst TPF may help to "level the playing field" between an otherwise impecunious claimant and a defendant, deep-pocketed defendants nevertheless retain the ability to 'go long' and put financial pressure on a claimant/group and their funder.
3.	Are there other benefits of third party funding? If so, what are they?	Beyond access to justice, we see TPF providing benefits and solutions in a variety of scenarios including (for example) well-capitalised claimants who nevertheless see the advantages of securing TPF and law firms acting on Damages-Based Agreements who seek working capital. As regards the former, TPF can create cashflow and balance sheet efficiencies for corporates looking to manage their finances more effectively, as well as minimise risk. That being said, our experience is that situations where well-capitalised corporates or claimants seek financing are relatively rare. What is more, where such claimants do seek financing, they will often consider the terms to be expensive and ultimately opt to self-fund.

		We were recently instructed in just such a scenario where a well-capitalised corporate was considering TPF and adverse costs insurance for its claim. Whilst multiple funding offers were forthcoming, it ultimately considered them to be commercially unacceptable. By contrast, adverse costs insurance was seen as relatively affordable and was purchased. As regards law firms acting on DBAs, obtaining TPF can allow law firms to build a practice based on offering attractive percentage-based pricing to clients (e.g. in securities actions in the High Court), whilst also being funded up to a certain proportion of their work in progress, alleviating some of the cashflow pressures of a full DBA arrangement.
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?	We do not consider that the current regulatory framework surrounding TPF to be operating so poorly as to necessitate a complete overhaul. However, in view of the risks and harms we identify at question 5 below, we make a number of observations regarding the potential for improvements as follows: • The ALF Code is voluntary, meaning that funders in this jurisdiction can operate without direct regulatory oversight. Contrast this with the position in Singapore or Hong Kong, for example, where compulsory frameworks have recently been laid down. • The provisions of the Code should be reviewed for updates and improvements, for example in view of the ELI's recently published Principles. See also at question 5 below our views on specific harms which can be addressed in any enhanced Code. • There is no independent oversight of the Code, nor any ability to enforce meaningful remedies or punishments in the event of breaches of the Code.

		Overall, in giving its recommendations, we believe that the CJC should consider implementing an enhanced version of the Code as a mandatory standard for all TPF in this jurisdiction. In doing so, it may see fit to draw a distinction between "consumer" and "commercial" TPF, with greater protections being warranted in the case of consumer TPF. The CJC should consider whether it is appropriate to leave the Code within the remit of ALF, or if a new independent regulatory body with appropriate powers should be established to oversee and enforce it. Further or alternatively, the Courts may be considered well placed to 'police' the Code by way of established procedural rules.
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.	In our position as an independent advisor in the TPF space, we have visibility over a number of harms which can (or at least have the potential to) arise as between the various stakeholders in the market. The key harms as we see them are as follows. **Appropriate advice for claimants regarding TPF** We consider that there is a real risk for harm arising from the current approach to the advice that is given to claimants (both legal and commercial) in relation to the procurement and negotiation of TPF. Most obviously, this risk arises where (as we have often seen), a claimant relies on the advice of its prospective lawyers in the dispute. The issue here is two-fold: first, the instructed lawyers have an inherent conflict of interest when advising on the funding arrangements from which they stand to benefit and secondly, there may (or may not) be a question as to their competence as disputes specialists to advise on the appropriateness of the financing terms on offer and the availability, for example, of more competitive terms from elsewhere in the market. Disputes lawyers often have ongoing relationships with litigation funders and this feeds into the potential for conflicts and the risk of

		suboptimal outcomes for claimants during the process of procuring funding. Ideally, claimants (particularly consumer claimants) should benefit from the protection of independent legal advice on the funding agreement. Whilst this leads to some additional cost, this can often be included in the funding facility and we consider it to be an important safeguard. We also see the potential for conflicts between claimants and their instructed solicitors arising in a number of particular scenarios as part of the funding negotiations. For example, in relation to the negotiation of a case budget and the instructed solicitors' retainer, law firms will inevitably have regard to their own position as a profit-making entity. In circumstances where these arrangements are in practice often agreed directly between the funder and the law firm, there is a risk that (especially in the absence of proper advice) the interests of the claimant are not adequately represented. Similar issues can arise in the context of (a) the negotiation of the commercial terms and waterfall and (b) settlement discussions, where the interests of the lawyers and their claimant may be opposing. Much like in the insurance context, intermediaries can (and we say should) play an important role in giving impartial commercial (as opposed to legal) advice to claimants, including deep access to the TPF market and visibility as to market standard pricing and terms. The involvement of an advisor owing duties directly to the claimant can help not only to improve the quality and breadth of the advice they receive, but can also alleviate some of the conflict concerns identified

		above where the instructed solicitors are playing the leading role in procuring and negotiating TPF on behalf of their client. To address these issues, we believe the CJC should consider implementing as part of any enhanced Code a mandatory requirement for claimants (at least "consumer" claimants) to be provided with independent legal/commercial advice in relation to the TPF sought. We note that lawyers are subject to separate regulation by the SRA, but nevertheless consider that this additional protection would help to mitigate the risk of conflicts. **Sources of capital** Claimants and their law firms can be prejudiced by a failure to conduct thorough financial due diligence (including AML/KYC and conflicts checks) on a prospective funder and any related entities providing capital before executing the funding agreement. In our position as intermediary, we as standard ask a series of "funder due diligence" questions wherever terms are offered by a particular funder. However, our experience is that such questions are often not asked by the instructed solicitors where they are leading the funding procurement process. To address this, rather than relying on the parties to carry out appropriate checks themselves, funders could be required by any enhanced Code to answer a series of standard questions. Relatedly, in our experience litigation funding agreements often grant the funder broad rights of assignment, which creates the risk that the claimant's capital provider may change during the course of the dispute. During negotiations regarding the funding agreement, we will typically seek to agree sensible limits to the funder's right of

		assignment, but our sense is that these clauses are often seen as "boilerplate" and not given the attention that in our view they merit. The CJC may wish to include some limitations around funders' rights to assign as part of any enhanced Code. For example, a funder may be permitted to assign only where: • such assignment relates in substance to an "internal" reorganisation within the relevant funder (i.e. not a true transfer of the legal rights and obligations to a new funder); • the original funder continues to be primarily liable for its obligations under the funding agreement (i.e. the funder is not prevented from entering into a sub-funding arrangement in the background, but it remains liable to fund as the primary contracting party); or • with the consent of the borrower.
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?	As above, we believe that the CJC should consider drawing a distinction between "consumer" and "commercial" TPF, with greater protections being warranted in the case of consumer TPF. We note that the FCA adopts a similar distinction. In our view, the level of protection that is needed in relation to different categories can vary widely. Consider on the one hand individual consumers who directly or indirectly benefit from litigation finance arrangements (and who, in the case of collective actions, and some 'opt-in' claims, will have no involvement in negotiating the TPF arrangements) and on the other well-advised corporate claimants or indeed law firms. The level of regulatory protection should ultimately be driven by the extent to which the relevant users of TPF require protection in order to strike a more equitable balance of power. Where properly advised

		parties freely enter into commercial arrangements, the government should be slower to intervene. With respect to English seated arbitrations, our view is that there is little need to bring such proceedings within the remit of any domestic regulatory landscape. First, because TPF is steadily being addressed within the arbitral forum by way, for example, of specific arbitral rules, treaties, and so on; and secondly, because, for instance, any challenge made to an English-seated arbitration, or enforcement of an award, before the English courts, would automatically bring the litigating parties within the ambit of any domestic TPF regulation. At the same time, consideration should be given to where regulation already exists, such as the SRA's oversight of solicitors, but the relevant regulations may need to be reviewed or improved considering the developments in TPF.
7.	What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?	As above.
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?	TPF commitments are inextricably linked to the level of litigation costs. Accordingly, as litigation costs have increased at an alarming rate, so too have funding commitments. In the absence of percentage-based pricing following *PACCAR*, this may also have a negative knock-on impact on the cost of funding (from a claimant perspective). The only impact the current self-regulatory funding regime has on litigation costs is via termination rights, where the continued funding of a case becomes uncommercial i.e., the funding costs are disproportionate to the size of the claim. This may of course play into opening conversations as to whether a case is viable economically, and will feature (at least implicitly) where upsizing is required and/or there are settlement discussions.

	ii. If not, why not?	Critical to this debate is the current absence of any serious costs management/capping on parties in the heavy litigation in which funding is deployed. That lack of costs control has direct consequences for funded claimants – witness the return to the sub-postmasters in the *Post Office* case. That could be solved by lawyers' budgets being capped. **Recoverability of TPF costs** We consider that the CJC should strongly consider recommending that funding costs should be brought within the scope of the court's wide discretion to make costs orders such that, in cases where it is just and proper to do so, a claimant's funding costs can be recovered from the defendant. As things stand under English law, a curious divergence has emerged between litigation (where funding costs are not recoverable) and English-seated arbitrations, where these costs have been held to fall within the ambit of recoverable costs under the Arbitration Act 1996. There is no obvious principled reason for this difference. We refer to the following: • *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd*, where the High Court upheld an ICC tribunal's award requiring the respondent to pay funding costs amounting to three times the claimant's costs, which the court confirmed fell within the ambit of "other costs" under section 59(1) (c) of the Arbitration Act 1996. Here, the award was based on the unusual facts of the case, in particular, the respondent's *"reprehensible conduct going far beyond technical breaches of contract"*. Essar had *"set out to cripple Norscot financially"*, effectively forcing Norscot to resort to third-party funding.

		• *Tenke Fungurume Mining S.A. v Katanga Contracting Services S.A.S.* where the Commercial Court upheld another ICC award of funding costs. In contrast, there was no suggestion in that either party had behaved improperly. Instead, the tribunal's focus was on whether the costs were *"reasonable"*, first as to the principle of the claimant having sought funding and secondly as to the amount. On the first issue, the tribunal held that there was no need for the claimant's financial difficulties to be caused exclusively by the respondent – the fact that it needed funding to pursue its claim was sufficient. As to the second issue, a return of 1 times the claimant's costs of US$1.3m plus a variable fee of c.US$214,000 was deemed reasonable. • The topic has also been addressed, albeit briefly, by arbitral institutions and other bodies. For example, it is clear from the ICC Commission's 2015 Report on Decisions on Costs in International Arbitration that the ICC considers there may be circumstances where it would be reasonable for the successful funded party to recover the costs of funding. Principle C3 of the final report of the ICCA Queen Mary Taskforce on TPF provided that the question of recoverability *"will depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules, but generally should be subject to the test of reasonableness and disclosure of details of such funding costs from the outset of or during the arbitration so that the other party can assess its exposure"*. The commercial implications of this issue may be obvious but they are also hard to overestimate – if a funded claimant is allowed to recover some or all of the funding fee from its opponent, that will mean it can retain all or more of the damages recovered. Since litigation funding is

		generally non-recourse, this claimant will have reaped these rewards without having taken any of the downside risk associated with its claim failing. In other words, funding in arbitration becomes a win/win scenario. The Post Office case would be the paradigm example where, if funding costs were recoverable under English law, the Post Office's tactics may have been different and the return to sub-postmasters ultimately greater. Note that in that case the Claimants had specifically pleaded their funding costs as a head of loss, and the Court would have addressed that issue had the case not settled.
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.	Costs shifting ought to prevent unmeritorious or frivolous claims being bought. Funders will not recklessly invest in claims where the merits are speculative. The issue is one of balance (see the comments on recoverability of funding costs above). Security for costs is a powerful tool often exploited by defendants in funded litigation, where late requests for further security are made in the absence of costs management/budgeting; the defendants know full-well the impact such late requests have on funded budgets, in addition to the difficulties claimants will have covering off that risk by ATE insurance or similar.
10.	Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?	We consider that the current state of the law is right. Exposure to the downside of an adverse costs order should go along with access to the upside potential in the form of a share of proceeds. The application of the *Arkin* cap has waned over time without materially impacting the funding market. The court will make an appropriate determination on the facts of each case. Note, however, that exposure to security for costs orders not only increases the risk for funders, but will ultimately increase the cost of funding for the borrower in the event of success (as the funder's capital deployment to which any multiple is applied will be increased). Issues can also arise where a funder has not accounted for such exposure

		and has insufficient capital available at the relevant time to meet any order. In practice, it is now common for funders to provide an adverse costs indemnity to the funded party in the LFA and to purchase an adverse costs insurance policy covering the risk (with the funder as the insured party). Funders are often well placed to access the insurance market on commercially attractive terms.
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?	Although in theory the Court may invoke the rules of maintenance and champerty on the basis that a funder is excessively profiteering from litigation, in practice the High Court does not control pricing of TPF. It seems clear that the CAT will seek to control pricing of TPF in collective actions, although the approach it will take beyond the certification stage remains to be seen. Competitive dynamics are the primary control on pricing. Inevitably, the greater the competition and the stronger the commercial position of the borrower, the greater the downward pressure on pricing. As an intermediary we see the maximising of competitive tension as a key part of our role.
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 do not consider that it would be appropriate to impose a cap on funding returns. Publicly available data regarding funding returns suggests that, although there may be outlier cases, funding returns on market-wide basis do not warrant such interference with freedom of contracting. Importantly, funders have no control over the two primary drivers of funding returns, namely litigation costs (which have been inflating at an

		alarming rate) and quantum. The imposition of a cap would inevitably give rise to strategic conduct to create pressure by driving budgets towards the cap. In practice, any cap would have a chilling effect on the funding market, particularly for cases with a tighter proportionality between the financing requirement and the likely recovery. On balance, we consider it better to keep open as much as possible the chance of such claims being funded (even if it comes with the risk of a sub-optimal end result for the claimant) than see such meritorious claims go unfunded.
13.	If a cap should be applied to a funder's return: a. What level should it be set at and why? b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings? c. At which stage in proceedings should the cap be set? d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor? e. Should there be differential caps and, if so, in what context and on what basis?	If the government is minded to consider a cap on funders' returns, the best place for this jurisdiction ought to be by amendment to the CPR costs rules, allowing the courts to impose some sort of limit on the funding costs in exceptional circumstances. Further thought would be required as to when this jurisdiction could be exercised e.g., at the beginning or end of a case (funders would prefer an early stage decision). Different caps might be deployed in different disputes/jurisdictions e.g., opt out consumer CAT claims etc.
Questions concerning how third party funding 'should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.'		
14.	What are the advantages or drawbacks of third party funding? Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.	As above.
15.	What are the alternatives to third party funding?	There are a number of alternatives to TPF. The key alternative that we see in practice is law firm DBAs, which have (as things stand, post

	a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have? Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts. b. Can other forms of litigation funding complement third party funding? Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant. c. If so, when and how?	*PACCAR*) the advantage over TPF of offering clients percentage-based pricing, which creates better alignment of risk and is simpler to understand. As above, DBAs can be supported by TPF and insurance arrangements in the background. However, there has been a generally due poor uptake of DBAs in the major litigation sphere, largely due to uncertainties around the interpretation of the DBA Regulations. We consider that the corrections to the DBA regime proposed in the draft 2019 Regulations should now be brought forward again (noting that, if implemented, they would also have dealt with the *PACCAR* issue).
16.	Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?	
17.	Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?	As above.
18.	Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?	
19.	What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-	

	the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?	
20.	Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?	
21.	Are there any reforms to portfolio that you consider necessary? If so, what are they and why?	
22.	Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?	
Questions concerning the role that should be played by 'rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.'		
23.	Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?	For the reasons set out above, consideration ought to be given in any reform proposals to procedural rule changes: a) enhancing and broadening costs management/capping in 'heavy' litigation in the Competition Appeal Tribunal and the High Court; b) addressing the security for costs regime as it applies to litigation funders under r. 25.14, in particular as to matters of timing; and c) to address the recoverability of funding costs.
24.	Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?	

25.	Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?	To the extent that the Court of Appeal in *Rowe* rejected the argument that a defendant seeking security for costs might be required, in certain circumstances, to provide a cross-undertaking in damages to the party (or its funder) providing such security, this facet of costs/adverse costs ought to be considered in the context of the recoverability of funding costs more generally; the jurisdiction to order a cross-undertaking where the circumstances justify it would be an aspect of the regime allowing for the recovery of funded costs.
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?	See above our comments regarding costs management of funded cases.
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?	In line with global trends, we consider it is appropriate for the fact of funding and the identity of the funder to be disclosed. Whilst this may lead to an increase in security for costs applications and potentially delay tactics by funders, these can be mitigated if the law is also changed regarding the recoverability of funding costs, which is crucial in our view.
Questions concerning provision to protect claimants.		
28.	To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?	Inevitably, different funders behave differently. Notionally, any "control" is typically exercised only through the budget (although variations are prevalent) and the provisions of the funding agreement regarding settlement and termination (as to which there are ALF Code standard provisions).
29.	What effect do different funding mechanisms have on the settlement of proceedings?	Funding agreements often provide that in the event the parties cannot agree whether to make/accept a settlement offer, the matter will be referred to an independent KC for a decision. Less commonly, we see contractual terms which provide for an increase in the success fee(s) payable to the funder in the event a reasonable settlement offer (as defined or agreed) is declined by the claimant.

		It is unclear how often such clauses have been invoked in practice.
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?	As above, we consider that it is important to distinguish between consumer and commercial claims. Broadly, we consider the current position, (whereby it is only the CAT in collective actions that must approve settlements, is appropriate. We consider it is right that commercial parties should generally be free to enter into financing arrangements on terms they see fit.
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?	Achieving a meaningful return for claimants, whilst having regard to the returns to those parties that have taken financial risk (e.g. funder, insurer, law firm on contingency fee arrangement et al).
32.	What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?	See our comments above at questions 4-5.
33.	To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?	See our comments above regarding conflicts of interest and the respective roles of lawyers and intermediaries in the procurement and negotiation of TPF (question 5).
34.	To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?	As above.
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.	As above.
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?	Self-evidently, funders seek to fund only claims with a good prospect of success. Only a very low percentage (c. 5%) of funding opportunities go on to be funded.

	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.	
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.	
38.	What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?	
General issues		
39.	Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?	Whilst this issue may not be expressly included within the Terms of Reference, we consider a solution to the ongoing issue created by the Supreme Court's decision in *PACCAR* to be one of the key challenges facing the UK TPF market currently. If the UK TPF market and the status of London as a premier centre for dispute resolution globally is to be maintained, this issue should ideally be addressed as quickly as possible.