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:	Natasha
Last name:	Pearman
Location:	London
Role:	Treasurer
Job title:	Head of Competition Litigation (Milberg London LLP)
Organisation:	Collective Redress Lawyers Association (CORLA)
Are you responding on behalf of your organisation?	Yes, on behalf of CORLA
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.

CORLA

CORLA's response to the Civil Justice Council's Review of Litigation Funding Consultation (the "CJC Consultation")

About The Collective Redress Lawyers Association (CORLA)

The Collective Redress Lawyers Association (CORLA) was established in 2021 by leading collective redress law firms; Edwin Coe, Hausfeld, KP Law, Leigh Day, Milberg London LLP and Pogust Goodhead. CORLA members now include a cross section of the key stakeholders working in the collective actions space, including law firms, academics, class representatives, litigation funders, brokers, insurers and claims administrators and other legal support service providers.

CORLA's primary aim is to promote and facilitate reforms and practice that provide effective and ever-improving access to justice for claimants by way of collective redress. In recent years there has been a focus on furthering collective redress in both the UK and the EU by lawmakers, the judiciary, legal practitioners, academics and funders. These stakeholders have tried to find ways to bring about more effective and efficient mechanisms to facilitate collective redress with varying degrees of success. CORLA aims to support this work and add to it through its collective extensive experience of the various forms of collective redress in the UK.

CORLA considers that a better understanding of the challenges faced by groups of claimants seeking to access the justice process, and the further development and expansion of collective redress in the UK, are not only desirable, but essential to the interests of justice. In this respect, CORLA's approach to advocating for changes and improvements for collective redress are threefold:

First, to improve the existing structures for collective redress:

- There are features of each of the current procedural mechanisms for collective redress (Group Litigation Order, Competition Appeal Tribunal and CPR 19.6 representative actions) that can and should be improved.

- In consultation with key stakeholders CORLA will develop proposals in relation to each of the mechanisms for collective redress that it considers should be improved or modified.

- CORLA will offer a collective voice with regard to reforms of practice, legislation and regulations affecting collective redress. One example being the anticipated reforms to the much-criticised Damages Based Agreements (DBA) Regulations 2013.

Secondly, given the considerable advantages which opt-out redress offers to claimants, in particular in facilitating access to justice, CORLA will look at routes to expand the specific regime for opt-out redress currently applicable only to competition law, to additional areas of UK law and practice.

Thirdly, CORLA will look to other jurisdictions to make sure that the UK is aware of best practice elsewhere and is able to reflect that. CORLA will work to ensure that the UK's collective redress regime sets the highest international standards.

CORLA's aims very much overlap with a number of the central issues and themes covered by the CJC Consultation and CORLA welcomes the opportunity to contribute to the CJC Consultation.

This submission was prepared by the CORLA Committee alone (i.e. the law firm representatives) and is based on consultation with our law firm members only. The CORLA Committee is at the disposal of the Consultation Working Group in the event of further questions or discussion.

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

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

Third party funding plays a significant role in securing access to justice, particularly in collective proceedings.

The availability of such funding is essential for enabling legal actions to commence which may otherwise be financially unviable or financially prohibitive for many claimants. Litigation funding is particularly important in consumer litigation, where the costs of individual claims may be prohibitive. Even where law firms are willing and able to act on Damages Based Agreements or Conditional Fee Agreements, there will often still be a need for third party funding to be secured to pay for disbursements which can (and frequently do), dwarf the costs of the lawyers in these types of actions.

For collective actions in the Competition Appeal Tribunal (the "CAT"), the legislative framework has been designed with third party litigation funding in mind[1].

The Supreme Court in *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent*) [2020] UKSC 51, has also highlighted the importance of the regime being applied in a manner that encourages compliance with the law, acknowledging that the creation of strong enforcement powers "...serves to act as a disincentive to unlawful anti-competitive behaviour of a type likely to harm consumers generally" [paragraph 2] and that anticompetitive conduct would not be "effectively restrained" if wrongdoers could not be "brought to book" by mass claims [paragraph 53]. It is within this framework, i.e. the deterrence effect of group litigation, that the notion of "access to justice" should also be measured.

[1] See Section 113 of the Competition Appeal tribunal rules

The Court of Appeal decision in *BT Group plc v Justin Le Patourel* [2022] EWCA Civ 593, neatly summarises the overall position at paragraph 29:

"Pulling the threads together, the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase ex ante incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims."

Currently before the CAT there are over 40 claims, they have been estimated to affect tens of millions of consumers and small businesses and have an estimated value of £100 billion. CORLA law firm members acting for the Class Representatives or Proposed Class Representatives leading these cases and are involved in over 20 of these cases.

Overwhelmingly, when asked what would have happened if litigation funding was not available for these claims, law firms that are members of CORLA stated that the claims would not have gone ahead. There are exceptions to this general rule, but the conclusion reached by CORLA is that without third party funding, group litigation would be unlikely to take place.

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

Third party funding plays a significant role in promoting equality of arms by providing financial resources to parties who might otherwise be unable to pursue legal action due to cost constraints. This funding mechanism is particularly important in group litigation, where the financial burden of litigation (including the risk of adverse costs) can be substantial and where the companies being litigated against are some of the world's biggest multinationals with access to significant finances. In addition to financial equality, litigation funding empowers victims to overcome other barriers, such as social or psychological by providing them with access to legal advisors who can aid them in navigating the legal system and seek redress.

As highlighted above, an important component of the competition collective actions regime is also the deterrence effect that this type of litigation leads to. In that regard, the use of third-party funding facilitates the ability for millions of consumers to collectively act and enforce their legal rights against some of the biggest companies in the world. Actions like these should increase these companies' compliance with competition and consumer protection laws, meaning that ultimately consumers will be treated fairer.

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

The enforcement of rights before the court plays an important role in the regulatory process either as a follow on process seeking compensation for the regulatory wrong or in an originating process without any prior binding regulatory finding. Briggs LJ commented in *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51 "The prospect that the rights of consumers can be vindicated in that way also serves to act as a disincentive to unlawful anti-competitive behaviour of a type likely to harm consumers generally.

Enforcement of rights before a court or tribunal assists to fill gaps in the resources of a regulator, such as the Competition and Markets Authority, to investigate, complete the process and award compensation. The ability of those suffering harm to fill the regulatory gap is likely to be dependent upon some form of funding and particularly third-party funding. The greater the resource restrictions for the regulator and the gap in those resources between the national regulator and, potentially, a multi-national company, the more that access to court process, supported by litigation funding, is needed.

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?**

CORLA law firm members' views: Out of the 17 CORLA members surveyed, a slim simple majority were of the view that the current self-regulation arrangements regarding funders are working. The same positive view was expressed in a similar proportion with regard to the voluntary code of conduct subscribed to by ALF funders, which a simple majority of CORLA members surveyed believe works well. CORLA members on the other side of the divide were of the view that third party funding would benefit from regulation, which would introduce certainty and consumer confidence. Some of the improvements advocated include model funding agreements and an independent body for complaints.

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.**

<u>Improper influence over proceedings</u>

- Funders have a direct financial interest in the outcome of disputes which they fund. There is therefore a risk that they might seek to interfere with the conduct of proceedings (for example, pressuring a party to agree to settlement even if it is not in the party's best interests, or withdrawing or withholding funding if the funder believes such conduct to be in its own commercial interest). Given that funders hold the proverbial purse strings, funders hold significant direct and indirect bargaining power.
- The Association of Litigation Funders ("ALF") Code of Conduct provides that members should not seek to influence the funded party's legal teams to cede control or conduct of the dispute to the funder. However, membership of ALF is voluntary and in reality the ALF code has little bite.

- In principle, making funders subject to regulation and requiring funders to abide by an overarching code of conduct could help to curtail such egregious behaviour. However, there is a question as to what extent an overarching body would be able to enforce compliance with any code of conduct that it oversees. Furthermore, it is not clear what would happen to proceedings being funded should a dispute arises – if funding is withheld then that might deter funded parties from raising complaints out of concern that they may not be able to conduct the relevant litigation.

Concerns over a funder's financial resources and/or its capital adequacy

- In collective proceedings before the CAT, those bringing claims need to be able to demonstrate that they have adequate financial resources available to them in order to fund their own costs and pay any adverse costs orders that may be made against them. This means that claimants' legal teams need to undertake due diligence of funders, and often face challenges from defendants seeking to protect their position with regards to recovery of costs. These additional burdens come at a time when parties are often under significant pressures – time, financial and business.
- The ALF Code provides that its members should maintain access to a minimum of £5m of capital or such other amount as stipulated by ALF. However, we understand that ALF members interpret this requirement in different ways (with the requirement potentially applying to disputes individually or all disputes which a member funds).
- If there was a clear overarching requirement that funders active in this jurisdiction maintain a certain level of capital adequacy (on a case-by-case basis), then that could help to reduce costs for both claimants and defendants by promoting certainty as in which funders are 'accredited' to operate in this jurisdiction and that such funders have the funds available to meet their liabilities and obligations. However, there is a risk that such a measure could be seen as overly prescriptive and deter funders from funding cases if they are concerned that they may at some point not satisfy the capital adequacy requirement.

High cost of funding / funder's return

- There can be significant upfront costs of putting third-party funding in place (including conducting due diligence, putting in place confidentiality agreements, and drafting bespoke funding agreements). Parties that have obtained third-party funding are also vulnerable to security for costs applications. Furthermore, if a party is successful, most funders will expect to recoup the sum funded plus a substantial fee.
- Given the voluntary and unclear nature of the current system of self-regulation, it does little to help reduce the cost of funding. Funders are essentially able to set terms that serve their own commercial interests first and, given the limited alternatives available, those seeking funding have little bargaining power to level the playing field.
- Making funders subject to regulation could help to reduce the up-front costs of obtaining funding – for example, there could be less due diligence for those seeking funding to do and standard terms for litigation funding agreements could be set out. Furthermore, placing a cap on a funders' return could also help to reduce costs (and potentially increase the amounts that flow to classes on whose behalf proceedings are brought). However, there is a significant risk that mandating a cap could deter some funders from investing.

Compliance with obligations regarding making funding available / reimbursing legal teams

- During the course of litigation, funders may be incentivised to delay providing committed funding until the last possible minute so as to minimise the amount of time that the funder has to borrow money from its investors.
- The current regulatory arrangement is insufficient to protect funded parties and those who do work for them. In practice, legal teams may have to operate unfunded and be exposed to claims from / disputes with third parties where funders do not make funding readily available. If a funder does not provide funding, then alternative sources of funding would need to be sought – however, such sources are generally not available.
- Issues such as the above would be greatly reduced if law firms were allowed to self-fund and take returns similar to those of a funder. If law firms are in effect partially funding litigation through Work in Progress ("WIP") and paying disbursements, then there are very good reasons for this to be formally recognised and for law firms to take funder style returns. Other changes could be to prohibit funders from excluding third party rights in litigation funding agreements, and/or making their returns dependent upon capital actually deployed (rather than committed).

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?

- Given that CORLA's focus is on the mechanisms for collective redress (collective proceedings in the CAT, Group Litigation Orders ("GLOs"), and CPR 19.6 representative actions), CORLA does not provide commentary on whether the same regulatory mechanism should apply across all types of litigation and arbitration. However, insofar as the aforementioned mechanisms for collective redress are concerned, there does not appear to be a compelling basis for having significantly different regulatory mechanisms.
- It may be beneficial to differentiate between different types of funded parties. For example, requirements against unfairness control should be stronger if the funded party is an individual (as opposed to a sophisticated business litigant). This would be in line with a principle against imposing unfair terms in consumer contracts. However, it may be that contextual changes should be introduced into individual agreements, rather than having generalised requirements imposed at an overarching level.

a. No. We agree with the approach of the European Law Institute ("ELI") in its Principles Governing the Third Party Funding of Litigation, published in its final form in December 2024.

(i) This is a young industry in its more widespread application and post the 2015 Consumer Rights Act reforms. We are starting to see consideration by the Courts and by the CAT of issues that arise in the funding relationship with the Court, the recipient of the funding and the other litigation parties. These often turn on subjective circumstances and in CORLA's view it is too early to apply

prescriptive regulation. As the courts deal with these issues whether or not there are structural problems that need addressing by regulation should become clear.

(ii) Prescriptive regulation may create barriers to entry reducing competition in the market making funding potentially more expensive.

(iii) There may be two methods of regulation, simply by prescriptive statutory provision and/or by an appointed regulator. The former, as above, is likely too prescriptive at this stage. The second would require the creation of a designated structure for a new regulator or the FCA. There may be two methods of regulation, simply by prescriptive statutory provision and/or by an appointed regulator. The former, as above, is too prescriptive at this stage. The second would require the creation of a designated structure for a new regulator or the FCA. In CORLA's view either is likely to create some years of uncertainty which would be highly damaging to the sector.

If there is to be some form of regulation then it should be applied to those situations in which it may be seen that the recipient is likely to be in an unequal bargaining position or, as in Collective Proceedings in the CAT, the recipient is distant from the decision-making process in the litigation. In our view the regulation is best provided by the Court as in Collective Proceedings in the CAT and at the Court's discretion. The CAT has recently considered not only the terms of the Litigation Funding Agreement but also the circumstances in which it was agreed, in *Gutmann v Meta* [2023] CAT 35 and *Riefa v Apple Inc and Others* [2025] CAT 5. This allows the Court the opportunity to consider the funding arrangements in context.

Whether the regulation is undertaken by the Court or by statutory provision or a regulator, CORLA members have concerns in five particular areas of the funding agreement:

- Capital adequacy
- Control and influence of the litigation
- Returns or the share of proceeds
- Linking return to deployed capital
- The circumstances in which the funder can terminate the agreement or withhold payment

b. If it were decided that there should be some regulation it should be limited to particular types of claims brought by or on behalf of consumers, perhaps litigation that can be identified as Consumer to Business or Micro-business to large Business and not broadly to all proceedings which would include those involving sophisticated parties. CORLA makes no comment on the question of the application of regulation to arbitration save that 1. The arbitral tribunal regulates its own procedure 2. Arbitration is often conducted cross border and potentially different non-UK regulations may apply and the parties may be subject to different national laws depending on their nationality, the applicable law and the law of the seat.

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

CORLA has set out above particular areas of concern about litigation funding and however regulation is affected it is these areas that CORLA members would want addressed. Addressing those issues:

Capital adequacy

The ability of the funder to meet all liabilities through the whole process of litigation is essential. Transparency is needed as to that adequacy and any conditionality applying to the funders own funding. One funder, Affiniti, which was not a member of the ALF, went into liquidation, as a result of a dispute with one of its own investors/funders, leaving those relying upon it high and dry, often mid-litigation.

The ALF guide to the ALF Code of Conduct provides:

> *The Code requires funders to maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months.*

Control and influence of the litigation

This is generally regulated by the principles of champerty and maintenance but, perhaps unsurprisingly, funders may seek to influence the running of the litigation and particularly the settlement process – the recent Merricks settlement being an example of this but also an example of the Court's ability to engage with these issues. Control over the conduct of a litigation might be done, for instance, by budgetary and further funding controls. Whilst it is obviously acceptable for a funder to want to ensure that budgets are adhered to and that is provided with appropriate and advance warning of any potential overspend, it is important that the class representatives/clients remain in the driving seat and that lawyers are able to fulfil their role in advising their clients on the litigation process and resolution.

It is to be noted that the Code of Conduct of the ALF specifically requires funder members:

"*not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder"*

Returns or the share of proceeds/Linking return to deployed capital

Unsurprisingly litigation funding is a very expensive way to finance litigation reflecting the risks that funders take. Litigation funding is an alternative investment and the risk and reward matrix is dictated often by external economic pressures such as interest rates and rates of return on other investments with which litigation funding competes. Some members of CORLA have concerns that returns might be set at the outset on a take it or leave it basis and might be excessive compared to the risk. Further returns can be measured not against deployed capital but against the funding total budget whether or not that is cash that has been deployed.

The circumstances in which the funder can terminate the agreement or withhold payment will be covered in the Litigation Funding Agreement. It is important that any termination provisions ensure that the circumstances that may lead to termination are in the control of the client as advised by the legal team and not by external circumstances beyond their control.

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?**

CORLA submits that the Court should have discretion to order that the costs of funding or some part of it should be recovered whether as part of the damages or as part of the cost recovery. This may be a rarely exercised discretion but if the Defendant's behaviour is particularly egregious the Court is best placed to consider that.

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.**

It is assumed the paper is referring to access to justice of the Claimants. Competing rights of access to justice for claimants and defendants was an area pf process considered by Lord Justice Jackson.

The expense of ATE for adverse costs and/or security can be a substantial part of the cost of the litigation. The premium will likely be part up front payment and part contingency. The funder will pay the costs of the premium payable up-front, the payment of which will be subject to the multiplier under the terms of the LFA. The amount of the contingent premium will be subject to the stage at which the proceedings settle but it can be a significant expense.

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

Yes, to the full extent of their contractual obligation subject to the discretion/oversight of the Court.

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?**

The CAT Rules together with the practice and case law that is developing around them give rise to the CAT performing a qualitative analysis of funding terms, arrangements and pricing in relation to Opt-Out Collective Proceedings. There are two points in the procedure where this happens: 1 during the application for a Collective Proceedings Order ("CPO") where the CAT will scrutinise and approve the funding recent examples include *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited; Sony Interactive Entertainment Network Europe Limited; and Sony Interactive Entertainment UK Limited* 2023 CAT 73; 2 and *Dr Sean Ennis v Apple Inc and Others* 2024 CAT 58. 2) At the point of approving the costs and disbursements and distribution of proceeds at the conclusion of a successful or settled claim.

At the CPO stage the CAT's role in certification is binary, it either certifies the proceedings or it does not. Whilst it cannot impose alternative funding terms on the funder or the proposed class representative ("PCR"), it makes use of the certification process to highlight issues that it would require addressing if it were to certify. However, the CAT has recognised that generally it is not possible at the start of proceedings to assess the reasonableness of a funders return (or indeed a CFA uplift) and therefore the Tribunal has made it clear that certification should not be interpreted as an endorsement of the funding terms. However, it can and will call out "sufficiently extreme" funder returns and has overridden claimed confidentiality to ensure there is sufficient public scrutiny when doing so (see *Dr Liza Lovdhal Gormsen v Meta Platforms, Inc and Others* 2024 CAT 11). The level of transparency of CAT proceedings and the terms of funding, assist in setting a pricing framework by which the market can price and where outliers can be readily identified.

By contrast, in High Court proceedings, a litigation funder's fee is not determined or approved by the court. Unless there are concerns surrounding champerty or the funding is relevant in relation to a security for costs issue, the court will have little visibility or cause to look into the funding arrangements. They are viewed as a private commercial matter much as would a litigant's normal funding arrangements with its bank.

Pricing outside of the purview of the CAT is therefore set by market forces. This is not an entirely objectional state of affairs. The CAT oversight exists due to the special nature of opt-out collective actions and the CAT having an important pastoral role in ensuring that consumer's interests are being advanced and protected. Funding of unitary cases on behalf of businesses or being conducted by law firms shouldn't require such oversight and protection. And the market, with the continuation of new funding entrants, is capable of setting prices that fairly reflect the funder's risk and repayment timescale. The risks vary considerably from case to case. Questions of factual and legal liability, questions over the assessment of damages, the recoverability of costs, the defendant's solvency, the risk of appeal, procedural risks, limitation to mention but a few. A court may not be best placed to assess all of these factors and the act of doing so at an early stage in the litigation would reveal a lot to the defendant in terms of strategy and perceived frailties in the claim. It would be incredibly uncomfortable if a funder was required to justify its high pricing because of the multitude of risks and unknowns it was facing in bringing the claim. Also, we should be wary before inviting too much intervention into the commercial arrangements of litigants particularly given the need for litigation to be highly flexible to deal with an infinite set of potential circumstances.

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?

The scrutiny and approach adopted by the CAT in the context of the collective actions' regime currently provides a robust mechanism for the review and control of third-party funding arrangements. Whilst the regime is still in its infancy, in that no distribution from an aggregate award of damages has yet been made, the CAT has taken a pro-active approach in the review of third-party funding terms (as described at question 11).

In settlement scenarios we have also seen the CAT take a very proactive role. In a recent settlement [Mark McLaren], where the CAT was asked to consider payment of Stakeholder Entitlements from a partial settlement, it declined to do so. In the same judgment [paragraph 17], the CAT acknowledged that:

> "*Collective proceeding are subject to the close supervision of the Tribunal, not just because of their complexity, but also because of the inherent potential conflicts of interests between the class members and those who work together to make such proceedings possible in a practical sense. The CR cannot realistically bring these proceedings without lawyers, funders and insurers. The lawyers all need to be paid and funders must have a good chance of recovering their outlay, plus interest and any funders fees for it to be worthwhile for them to put their capital at stake. Funders work on a portfolio basis recognising that they may lose some actions, but in others they may do well such that as a minimum they make a reasonable rate of return. Lawyers and funders may agree terms with the CR, but at the end of the day the payment of costs and expenses is subject to the approval of the Tribunal, which must balance the interests of not just the class members and the stakeholders, but in doing so must bear in mind the importance of having a workable collective proceedings regime*." (emphasis added)

Given the oversight of the CAT, introducing controls or caps at this stage would therefore appear to be premature and may adversely impact on "workable collective proceedings regime"

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?**

    CORLA does not support a cap on funder's return at this stage.

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.**

Advantages of Third-Party Funding (TPF):

- **For Claimants:** TPF provides access to justice for claimants who lack resources to pursue valid claims, particularly in costly cases like group litigation or complex commercial disputes. It enables them to share financial risk with funders and also to group cases.
- **Group Litigation/Collective Actions:** TPF is crucial for enabling such claims, especially where individual claims might not be economically viable.
- **For the Legal Profession:** TPF supports law firms in handling large cases without upfront costs, fostering innovation in fee arrangements like conditional or contingent fee structures.
- **For Civil Courts:** It can facilitate the resolution of meritorious claims, reducing frivolous litigation as funders typically rigorously assess merits and back viable cases.

Drawbacks of TPF:

- **For Defendants:** It may incentivise more claims against well-resourced parties, including speculative ones, potentially increasing litigation pressure.
- **For Claimants:** Claimants may have to surrender a significant portion of their recovery to funders, raising fairness concerns.
- **For the Legal Profession:** TPF could create conflicts of interest if funders attempt to influence litigation strategy.
- **For the Civil Courts:** There's a risk of courts being overburdened by an influx of funded claims, particularly in areas like consumer class actions and group litigation.

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?

Alternatives to Third-Party Funding (TPF):

- **Trade Union Funding:**
  - **Advantages:** Provides access to justice for members, especially in employment or personal injury claims, often at no cost.
  - **Drawbacks:** Limited to specific types of cases and claimants; excludes commercial disputes.
- **Legal Expenses Insurance (LEI):**
  - **Advantages:** Enables individuals and businesses to cover litigation costs without sacrificing a portion of recovery. Pre-existing policies can reduce upfront financial pressure.
  - **Drawbacks:** Coverage may be narrow, with restrictions on claim type and sometimes choice of representation. Insurers may attempt to exert control over litigation strategy.
- **Conditional Fee Agreements (CFAs):**
  - **Advantages:** Align lawyer-client interests by tying fees to success; suitable for diverse claims.
  - **Drawbacks:** Claimants still face potential liability for opponent's costs, unless covered by after-the-event insurance.
- **Damages-Based Agreements (DBAs):**
  - **Advantages:** Lawyers share in the risk and reward, making them accessible for claimants with strong cases.
  - **Drawbacks:** High contingency fees may reduce claimant recovery significantly.
- **Crowdfunding:**
  - **Advantages:** Opens funding to a broad audience, potentially generating public support for certain types of claims, such as consumer and collective litigation.
  - **Drawbacks:** Success is uncertain; limited to cases with broad public interest, not normally suitable for expensive costly group litigation.
- **Pure Funding (Self-Funding):**
  - **Advantages:** Offers maximum control and retention of recovery for claimants with sufficient resources.
  - **Drawbacks:** Prohibitively expensive for most, particularly in complex commercial or group litigation.

Comparison to TPF:

- **Claimants:** TPF is more accessible than self-funding or LEI but may involve greater recovery sacrifices compared to CFAs or DBAs.
- **Defendants:** TPF-backed claims may increase litigation risks for defendants compared to cases funded by narrower alternatives like trade unions or crowdfunding.

- **Legal Profession:** TPF allows law firms to take on large cases without immediate fee payments, but CFAs and DBAs may foster deeper lawyer-client alignment.
- **Civil Courts:** Alternatives like crowdfunding can concentrate cases with strong public interest, whereas TPF can amplify claims volume across a broader spectrum.

Complementary Use of Alternatives:

- LEI can complement TPF by covering adverse costs or smaller claims.
- CFAs or DBAs typically combine with TPF for hybrid funding structures, spreading risk between funders and lawyers.
- Crowdfunding can supplement initial costs before transitioning to TPF for larger litigation.

When and How:

- **Consumer and Group Litigation:** Crowdfunding or trade union funding can raise awareness and public engagement before transitioning to TPF for scalability.
- **Commercial Claims:** CFAs or DBAs can work alongside TPF to balance financial and strategic interests.
- **Legal Profession:** LEI or crowdfunding can bridge the gap for smaller claims or less attractive cases for TPF funders.

Each alternative has its place, but they must align with the case type, claimant resources, and strategic goals to complement TPF effectively.

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?**

Some alternatives to TPF may be encouraged in certain contexts because they provide cost-effective, equitable, or context-specific solutions for claimants. Their applicability depends on the nature of the case, the resources available, and the strategic objectives of the litigation. It is very unlikely in the typical group litigation that are occurring that any of the alternatives could be used instead of TPF, due to the sheer size and costs involved in large scale collective actions.

Alternatives:

- **Legal Expenses Insurance (LEI):**
  - **Advantages:** LEI offers a cost-effective solution for individuals or businesses, covering legal costs upfront without reducing damages recovery.
  - **Preferred For:** Consumer claims, personal injury, or smaller commercial disputes where pre-existing policies are in place.
  - **Necessary Reforms:**
    - Expand awareness and availability of LEI, particularly for SMEs and individuals.

        - Ensure policies provide broad coverage and greater claimant autonomy in selecting representation.
- **Conditional Fee Agreements (CFAs) and Damages-Based Agreements (DBAs):**
    - **Advantages:** CFAs and DBAs align lawyer incentives with claimant outcomes, and ensuring cost proportionality. They avoid funder profits but still enable claimants to access justice.
    - **Preferred For:** Smaller or medium-sized cases, such as personal injury, consumer disputes, or manageable commercial claims.
    - **Necessary Reforms:**
        - Clarify DBA regulations to encourage their use by resolving ambiguities in current rules.
        - Increase caps on lawyer success fees to balance risk-taking in complex cases.
- **Trade Union Funding:**
    - **Advantages:** Provides free or low-cost legal assistance to members, fostering access to justice without external funder influence.
    - **Preferred For:** Employment disputes or personal injury claims involving unionised workers.
    - **Necessary Reforms:**
        - Broaden union support beyond traditional areas to include collective or group claims where members are affected.
- **Crowdfunding:**
    - **Advantages:** Mobilises public interest and democratises funding for litigation with significant societal impact.
    - **Preferred For:** Public interest cases, environmental disputes, or consumer group actions with strong public engagement.
    - **Necessary Reforms:**
        - Introduce regulatory oversight to ensure transparency and accountability in the use of funds.
        - Develop platforms that specialise in legal crowdfunding to enhance accessibility and effectiveness.

Why These Alternatives May Be Preferred Over TPF:

- TPF often reduces claimants' net recovery due to funder returns, while LEI, CFAs, and DBAs may allow claimants to retain a greater share of damages.
- Alternatives like LEI and trade union funding provide more predictable costs and are less likely to prioritise funder profits over the claimant's best interests.
- Crowdfunding fosters public involvement and mitigates dependency on private funders, especially for claims of public significance.

While TPF remains crucial in high-value or complex litigation, reforms can encourage alternatives that are more equitable and claimant-friendly, reducing dependence on funders while ensuring access to justice.

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

The Damages-Based Agreements Regulations 2013 are a substantial hinderance to the use of DBAs and need amendments in accordance with the two studies that have considered the regulatory regime (The Damages-Based Agreements Reform Project: Drafting and Policy Issues September 2015 (CJC) and the Damages-Based Agreements Reform Project 2019

There is, for instance, no reason why DBAs should not follow the hybrid form that is allowed in CFAs. Thus, for instance, a reduced fee if the claim fails. Some guidance as to how flexible DBAs may be used can be found in tribunal practice, such as the tax tribunal, which is not subject to the regulations and is not defined as 'contentious business'. Here we see both sequential and concurrent DBAs; the former where a standard fee agreement is followed by a DBA and the latter where in the event of loss a fixed or lower fee is payable by the client.

DBAs may be tied to the financial benefit secured by the claim rather than simply being cash based.

Recovered costs should be in addition to the success fee and not, as now, deducted from it.

Termination provisions need to be clarified.

A light-handed approach to the prescribed contents of the DBA will avoid introducing unnecessary complexity for the client in what should be a simple arrangement for payment of a percentage of damages on success.

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?**

Legal expenses insurance can assist parties particularly for some base funding but;

a. the insured is often restricted in their choice of solicitor
b. the types of cases covered is often limited and does not, for instance cover, multi-party actions
c. funds tend to be limited e.g. to £25,000
d. the process to secure cover and funding can be slow and combative

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?**

Not responded.

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

N/A – not a viable option for large scale cases.

21. 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?

In addition to the reforms to DBAs there needs to be statutory entitlement for solicitors to present interim bills where the funding arrangement includes a CFA reversing the decision in *Ivanishvili v Signature Litigation LLP* [2024] EWCA Civ 901.

Immediate corrective legislation to reverse the effects of the PACCAR judgment is needed. It is unfortunate that the Litigation Funding Agreements (Enforceability Bill) was not passed in the wash-up. The ongoing uncertainty which exists as a result of the PACCAR judgment is impacting on both the availability of suitable funding and the price of funding. The recent announcement of the stay in the appeals in *Neill v Sony* (and others), has caused further concern around the uncertainty that exists as regard contractual terms for funding and is impacting on funders perceived risks of CAT claims, leading to delays in funding being secured and/or terms being revised. CORLA is concerned that the urgent need for the reversal of PACCAR should not be lost in the equally important but less urgent reforms to the funding issues.

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?

The Tribunal is currently relying on its general case management powers under Rule 53(2)(n) to consider whether make an order relating to the use of settlement sums to return Stakeholder Entitlements, including payments to funders. The Tribunal has said that it will need to address how these payments are made with a revision to the rules (see Mark McLaren at 23 – 57).

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?

Not responded.

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?

Not responded.

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

The court already has a role in pre-action conduct to encourage resolution through the costs regime and management of the process once in front of the court.

We do not see any greater role for the Court in the event that the Claimant 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?

A high degree of transparency as to the existence and nature of the specific terms of litigation funding already exists in the CAT, though there is no standardised approach to the level of information that should be provided by the PCR at the certification stage.

In Coll v Google [2022] CAT 6, the CAT highlighted that there is a presumption of transparency applied to funding documents in collective proceedings, and any redactions "must be properly justified", paragraph 22(2)). The Tribunal may also make an order refusing disclosure of funding documents where "another party to the proceedings might gain an unfair tactical advantage in relation to the litigation in issue" (paragraph 22(4)). [not much to say on what amounts to unfair tactical advantage]

In Kent v Apple [2021] CAT 37, ATE policy to be disclosed, but premia can be redacted because this might "disclose the assessment of risk and in that way confer tactical advantage" (paragraph 28).

Defendants generally consider that where there is a gap between the budget and the amount of funding available and that the only explanation for that gap is that solicitors and/or counsel are on CFAs, they are entitled to see those CFAs. In In Kent v Apple [2021] CAT 37, the Tribunal declined to order disclosure of the contingent aspects of the CFAs on the basis that (i) Apple failed to demonstrate that they were relevant to certification; and (ii) doing so might disclose legal advice on the merits [35]-[37].

The concern on the part of PCRs is that Defendants may try to take advantage of the disclosure if they know whether, for example, solicitors and counsel are on capped CFAs for particular stages of the proceedings and are required to work on a 100% CFA if expenditure exceeds a certain level. There is also a fear that the market may coalesce at a certain level of CFA if it is know that these fee agreements have to be disclosed.

Solicitors and counsel who are party to the CFA arrangements are likely to wish to keep these confidential as being part of their engagement package with their client.

Outside of the CAT, CORLA does not believe that a similar level of scrutiny and oversight is required. This is particularly the case where individual businesses have engaged with a litigation funder to secure funding. In this scenario revealing the terms of the funding early in a case could provide the other party with significant strategic insight.

Questions concerning provision to protect claimants.

28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?

In principle, funders should not seek to influence a funded party's legal teams to cede control or conduct of a dispute to the funder. However, in practice, funders seek to prioritise their own commercial interests and encourage litigation to proceed in a manner that substantially aligns with those interests. The most powerful tools which they have in this regard are withholding (or threatening to withhold) funding and/or refusing to make additional funding available on terms other than those which prioritise the interests of the funder. While legal teams should actively work to check the influence of a funder and protect their clients, they cannot themselves make funding available. Dispute resolution mechanisms set out in litigation funding agreements may not provide adequate recourse, particularly where there is a need for imminent funding and/or swift decision-making that is dependent upon readily available funding.

Funders should not be allowed to dictate the course of proceedings. However, it is recognised that they do not fund litigation as a charity, and do themselves need to protect their own commercial interests. Including appropriate provisions in litigation funding agreements, such that funded parties should not unreasonably deviate from the advice of their legal teams and/or making clear the points on which funders may provide input (and the permissible extent of such input), may provide adequate protection for funders. Where the terms of such agreements have also been reviewed and approved by independent advisers, this may help to reduce the scope of challenges against the funded party's funding arrangements.

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

In our experience, the primary driver in any interplay between a funder and a settlement is the adequacy of the settlement to meet the funder's desired return. Generally speaking, the funder is a highly commercial operator and unlike a client who may have a point to prove, a score to settle or a point of principal at stake, is purely focused on extracting financial value from the settlement. This usually means that the funder will listen to

the advice and recommendations of the legal team as to whether the settlement reflects fair value. In any settlement, the parties have a choice of accepting the offer, rejecting it and fighting on or renegotiating. The funder is usually pretty clear eyed about which option to is best. But disagreements can arise in these circumstances funding agreement need to have a swift and fair dispute mechanism to determine the best course. Deferring to a court in such circumstances would be cumbersome, expensive and risk losing the settlement momentum. Also, how does one avoid the defendant having visibility of such a reference to the court?

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?**

This is common practice in US class actions. Primarily this is a feature of their regime's procedure and the fact the class is not effectively represented. UK procedure differs considerably. In the CAT there is a professional class representative legally obliged to act in the best interests of the class. In opt in actions, there are the clients themselves, or a committee of representative clients appointed by the lay clients. In each case these instructing individuals are well placed to assess the terms of any settlement. In my experience working with such instructing individuals, they better understand the needs and preferences of the claimants than the lawyers or judges who can be somewhat out of touch with the common man. Of course all judges and lawyers think of themselves as well placed to read the minds of the instructing individuals, the reality is, they are far removed from the economic situations of most UK consumers. I think court inviting oversight risks judicial condescension and mission creep into the views and affairs of litigants.

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?**

Where courts, for example the CAT, do determine whether a settlement is appropriate, this should to be done on a case by case basis. It would be inappropriate at this stage to attempt to identify relevant criteria beyond the framework provided in the Tribunal Rules.

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

The existing regulation of solicitors and the professional obligations that arise provide sufficient protection of clients.

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

There is no effective market or exchange for funding terms. This concept has been often mooted or attempted but the difficulty tends to be that the cases are not commoditised sufficiently for multiple funders to quickly and easily offer pricing. A comparison website (like there is for car

insurance) is not possible due to the complexities and variabilities of any litigation. Indeed, in all but the most straightforward cases it is very difficult in practice to obtain comparable funding terms from multiple funders. The funding will be bespoke to the funder's preferred structure and legal strategy. That is not to say that the funder is directing strategy, but they are sophisticated lenders with considerable litigation experience and will push legal teams to enhance and adjust legal strategy to address certain risks or opportunities. In any complex litigation there are multiple, equally viable, ways to execute the case and very early on in the engagement with funders their input will influence strategy such that multiple alternative strategies are being evaluated by the clients. In many respects this is an advantage of not standardising funding terms and structures. The clients and legal teams get the benefits of the funder's experience and expertise and visibility across many more cases than a solicitor will have.

The downside of this bespoke process is that pricing comparison is very difficult and can be exploited by funders to maintain high prices. The increased use of funding brokers is a partial antidote to this as they get to see far more funding deals and terms allowing a degree of pricing comparison and scrutiny.

34. To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?

The most obvious sources of conflicts which may arise is the relationship between the funded party and the funder. Funders seek to maximise their own returns, which may see them seek to oppose / influence settlement negotiations, contesting invoices, and/or refuse to approve engagement with third party service providers where they perceive that such steps may limit the amount of their return. To help avoid any challenge by virtue of such conflicts, it would be prudent for the funded party and funder to have the terms of their funding arrangements reviewed and/or approved by independent legal advisers (i.e. not those who act on behalf of the funded party in the actual litigation).
It may be argued that another source of conflict is the relationship between a funded party and their legal team (who are ultimately paid by a funder). However, lawyers owe professional and fiduciary duties to their clients and, in the event of a conflict of interest between litigants and the funder, should prioritise their client's own interests (even if they are adverse to those of the funder).

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.

Funding agreements should set out in clear terms the steps which funders take to avoid actual or potential conflicts of interests. In particular, the agreements should set out the steps being taken to avoid financial conflicts of interest and any conflicts arising on the part of the funded party's legal team.

Currently, the majority of funders are not regulated by ALF. In practice, this means that the only means of resolving conflicts of interests available to funded parties is any dispute resolution mechanism which they agreed to in their funding arrangements. However, pursuing such disputes may be costly and time consuming, and a lack of personal financial resources may deter funded parties from seeking to institute such proceedings.

Tangible measures are required in order to facilitate the resolution of conflicts of interest. For example, litigation funding agreements should incorporate a practical dispute resolution mechanism involving oversight by an independent party that is able to determine what course of conduct would be reasonable and fair, having regard to the relevant circumstances. Given the inequality of position between funded parties and funders, the former should also have available to them a reporting mechanism whereby, if a funder is found to have acted in an unconscionable manner, such conduct can be referred to a disciplinary authority and/or be subject to judicial oversight.

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.**

To what extent, if any, does the availability of third-party funding (TPF) or other forms of litigation funding encourage specific forms of litigation?

From a claimant's perspective, litigation funding mechanisms play a significant role in shaping access to justice and the types of litigation pursued.

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

Yes, they encourage meritorious claims as without legal aid – unless a client is wealthy enough to pay privately for legal fees and disbursement one form of litigation funding is the only viable option when looking to bring a claim.

- **Third-Party Funding (TPF):**
    - **How:** TPF provides financial resources for claimants with strong cases but limited means, covering legal fees and associated costs including disbursements and expert fees.
    - **Extent:** Particularly effective in complex litigation where claimants would otherwise lack the resources to proceed. Funders conduct rigorous due diligence, investing only in cases with substantial merit and likelihood of success.
- **Conditional Fee Agreements (CFAs) and Damages-Based Agreements (DBAs):**
    - **How:** These arrangements incentivise lawyers to take on meritorious cases by aligning their fees with case outcomes.

- **Extent:** Common in consumer claims and personal injury cases, enabling claimants to seek redress without upfront costs. However there is limit to the upfront costs that law firms would be able to provide – only works on smaller cases.

Claimant Perspective:
These mechanisms empower individuals and businesses to pursue justice, especially in cases where power imbalances or resource disparities might otherwise deter action.

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?

They discourage vexatious or meritless litigation.

- **Third-Party Funding:**
  - **Why:** Funders conduct detailed assessments before providing financial support, as their returns depend on case success. This acts as a gatekeeping mechanism, reducing frivolous or weak claims.
  - **Extent:** Particularly discourages meritless cases in commercial and group litigation, where costs are high, and funders face reputational risks.
- **CFAs and DBAs:**
  - **Why:** Lawyers working under these agreements bear the financial risk of unsuccessful claims, deterring them from taking on cases without merit.
  - **Extent:** Strong deterrence in areas like personal injury and employment law, where these mechanisms are prevalent.

Claimant Perspective:
Litigation funding mechanisms typically enhance the quality of claims brought forward, protecting claimants from wasted costs and safeguarding judicial resources.

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

Yes, they significantly encourage group and collective litigation.

- **Third-Party Funding:**
  - **How:** Provides essential financial resources for managing the complexities and high costs of group actions, such as consumer protection cases, securities claims, or environmental litigation.
  - **Extent:** Often a prerequisite for such litigation, as individual claimants may lack the resources to fund collective proceedings.
- **ATE Insurance:**
  - **How:** Reduces the financial risk for claimants in group litigation by covering adverse costs.
  - **Extent:** Widely used in group claims to protect against the significant exposure inherent in collective proceedings.

- **Crowdfunding:**
  - **How:** Mobilises public support for representative actions involving social or environmental justice issues.
  - **Extent:** Effective for cases with broad public interest but limited traditional funding appeal.

These mechanisms democratise access to justice in group litigation, allowing claimants to pool resources and challenge well-funded defendants. Without such funding, many collective claims would be economically unviable.

Litigation funding mechanisms, particularly TPF, CFAs, and ATE insurance, play a crucial role in encouraging meritorious claims and collective actions while discouraging frivolous litigation. They empower claimants to seek justice and address power imbalances, ultimately enhancing the efficiency and fairness of the civil justice system.

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.

From a claimant's perspective, litigation funding mechanisms play a vital role in enabling access to justice, particularly in meritorious claims and group litigation.

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?

It is a lawyer's role to ensure the individuals and/or entities that they advise are suitably informed about the litigation funding options available to them. CORLA was established in part to bring together the wider collective redress community to provide a platform for lawyers and other third parties (ATE insurers, litigation funders, brokers, claims administrators and class representatives). CORLA provides its members with opportunities and information about the state of play of litigation funding and insurance and has produced guidance and regular training/updates on this topic.

General Issues

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