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International Legal Finance Association – CJC Review of Litigation Funding

Set out below is the joint response from the International Legal Finance Association ('ILFA') and the Association of Litigation Funders of England and Wales ('ALF') to the CJC litigation funding consultation questions.

ILFA is the independent non-profit global association of commercial legal finance companies. Its mission is to engage and educate political, regulatory and judicial groups to ensure that the role of litigation funding and its members are properly understood. While ILFA is a global association, its members include many of the largest and most experienced funders active in England and Wales who have contributed to these responses.

The ALF is a separate association which is the self-regulatory body for litigation funders in England and Wales whose members agree to comply with the ALF Code of Conduct in respect of third party funding of litigation in this jurisdiction. ALF members comprise the majority of the funders active in England and Wales, many of whom are also members of ILFA.

In this Response we adopt the abbreviations in the Interim Report and Consultation (page 86). Where additional abbreviations and acronyms are used these are defined in the table at the end of the Response.

In summary, the views of ILFA and ALF are as follows:

(i) Litigation funding plays a critical role in enabling access to justice. For many claimants, including consumers and SMEs, it provides the only route to redress. For others, litigation funding allows businesses to use their capital to grow their core business and create jobs instead of tying up budgets for litigation costs.

(i) Litigation funding has worked well in England and Wales. As well as providing access to justice, litigation funding promotes equality of arms between parties. Funding also brings other benefits such as promoting the public interest through exposing corporate wrongdoing, driving good litigation behaviour and supporting the development of English jurisprudence. Commonly stated concerns about litigation funding supporting frivolous or vexatious claims are not supported by evidence; in fact, the evidence is that funders are highly selective in the cases they fund, providing a reality check which benefits parties beyond the funded client and helping direct resources towards meritorious claims.

(ii) As well as enabling access to justice, litigation funding has developed into a crucial pillar supporting the UK's leading global role as a legal and financial centre. To ensure this continues, urgent legislation is needed to address the uncertainty caused by the PACCAR judgment.

(iii) In the absence of evidence of harm that needs to be addressed and given the detriment that would be caused by additional regulatory burdens, the current self-regulatory approach strikes the right balance. It will continue to evolve by, for example, potential updates to the ALF Code of Conduct in consultation with the CJC.

(iv) Funders' returns should not be capped. The existing, competitive funding market is best placed to assess and price the many risks involved and the practical effect of an (inflexible) cap would be to make fewer meritorious cases fundable and have a negative effect on access to justice.

(v) Litigation funding helps to control costs (via funder scrutiny and oversight of budgets) but costs are subject to many factors including the defendant's conduct of the case. Arbitrators have discretion to order that the cost of litigation funding should be recoverable as a cost in proceedings. The courts should have the same discretion.

(vi) Recoverability of adverse costs and security for costs applications increase the costs of litigation, costs that are ultimately borne by successful claimants. These costs restrict access to justice and diminish claimants' net recovery. Permitting flexibility in how adverse cost risk is addressed is beneficial for access to justice.

(vii) Funders have less control over proceedings than other third parties that provide economic support for litigation. Concerns relating to control by litigation funders are unfounded.

(viii) Beyond representative proceedings in the CAT, there is no need to incur the cost, delay and uncertainty of having the court approve settlements of funded proceedings.

(ix) Claimants in funded cases are always represented by lawyers, who owe duties to their client alone, which provides protection for claimants when entering a litigation funding arrangement and throughout their litigation. Measures to address conflicts are adequately reflected in best practices and professional regulation.

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?

At the Civil Justice Council's 2024 National Forum focussing on access to justice, Heidi Alexander, then Minister of State for Courts and Legal Services, said "*We believe that third-party litigation funding plays a critical role in enabling access to justice*". In arguing this, she echoed the previous (Conservative) Lord Chancellor, who wrote just months earlier that "*for many claimants, litigation funding agreements are not just an important pathway to justice — they are the only route to redress*".[1]

Third party funding has been vital for providing access to justice for some of the victims of the UK's most serious miscarriages of justice, most notably the sub-postmasters wrongly convicted as a result of the Horizon scandal. Campaigner Lord Arbuthnot has been clear that without litigation funding, the sub-postmasters would not have been able to bring their case before the courts at all. To use his memorable phrase: *"the bloody doors would not have been blown off, had it not been for the availability of litigation funding"*.[2]

Consumers and small businesses accessing third party funding recognise this. Sir Alan Bates himself, the lead claimant for the sub-postmasters, has said that "*litigation funding enables consumers and small business owners like us to fight our corner*", being clear that third party litigation funding gave him and his fellow victims the route to "*securing justice, exposing the truth and clearing our names and reputations*".[3] He later stated "*there would have been no justice for sub-postmasters without it*".[4] Other victims groups have said the same, with the Road Haulage Association (RHA) (largely representing small businesses) arguing they "*wouldn't have stood a chance of bringing their cases to court without the help of this funding*".[5]

Third party analysis has also come to the same view, with the European Law Institute recently stating that funding is a "*vital driver of access to justice in a world where state funded legal aid is*

[1] Rt Hon Alex Chalk KC, '*Cases like Mr Bates vs the Post Office must be funded*', Financial Times, 3 March 2024 - https://www.ft.com/content/39eeb4a6-d5bc-4189-a098-5b55a80876ec

[2] Rt Hon Lord Arbuthnot, House of Lords debate 29 April 2024 - https://hansard.parliament.uk/lords/2024-04-29/debates/BD150A5C-0081-4F1D-91D0-79D8600E3DDF/LitigationFundingAgreements(Enforceability)Bill(HL)#

[3] Sir Alan Bates, *Why I wouldn't beat the Post Office today*, Financial Times, 12 January 2024 - https://www.ft.com/content/1b11f96d-b96d-4ced-9dee-98c40008b172

[4] Sir Alan Bates, *Our Post Office victory is being twisted by those who don't want to see its like again*, Guardian, 10 May 2024 - https://www.theguardian.com/commentisfree/article/2024/may/10/post-office-litigation-funders-subpostmasters-corporate-interests

[5] Richard Smith, *Who wins from PACCAR? Cartelists and corporate wrongdoers*, Law Society Gazette, 16 February 2024 - https://www.lawgazette.co.uk/commentary-and-opinion/who-wins-from-paccar-cartelists-and-corporate-wrongdoers/5118754.article

often not available".[6] Similarly, consumer groups are clear that the substantial cost of litigation is often the largest single impediment to launching litigation to enforce consumer rights. BEUC recently commented that "*consumer organisations across Europe face significant financial challenges when starting collective redress actions*", most notably that "*initiating a collective action is complex, risky, and expensive, often involving lengthy proceedings that require significant resources*". They are clear that this burden "*creates a significant imbalance, making it difficult for consumer organisations to take on powerful, well-funded corporations*" and so note that without "*robust funding mechanisms*" such as those provided by third party funding, "*consumer organisations are unable to fulfil their critical role*".[7]

Whilst litigation funding alone cannot replace legal aid to provide a solution every case, for many claimants it is a crucial (and often the only) route to securing it by helping them take on the otherwise prohibitive costs of litigation. The experience reported by a sample of ALF members is that, save in a small minority of cases, the claimants do not have the funds to proceed with the claim and, without funding, they would not be able to take the case forward by other means. But for the availability of funding, those claimants would not have access to justice.

Third party funding's contribution to access to justice is reflected in the breadth of the types of cases in England and Wales that are funded. As Professor Rachael Mulheron observes in the LSB Review, following an in-depth examination of the collective actions filed in the CAT, *"none of these consumer class actions would have been possible to institute without the use of litigation funding"*[8]. Litigation finance also supports the majority of representative proceedings in the High Court and group litigation claims managed pursuant to Group Litigation Orders in the High Court.[9] Litigation funders do not however only fund claims in the collective action sector. Litigation finance is, for instance, routinely used to fund claims for officeholders who do not have the funds to litigate on behalf of the company that they are managing (see, for example, the recent successful case against *London Capital and Finance plc*[10]). Funders also support claims of businesses that have been the victims of prejudicial behaviour in countries where their assets have been expropriated. Victims of

[6] European Law Institute, '*ELI Publishes Principles Governing the Third Party Funding of Litigation (TPFL)*', 9 October 2024 - https://www.europeanlawinstitute.eu/news-events/news-contd/news/eli-publishes-principles-governing-the-third-party-funding-of-litigation-tpfl/
[7] BEUC report, 4
[8] LSB Review, 38
[9] The LSB Review identified over 40 cases which have used litigation funding since 2019. Most of these have been in the collective actions space, whether under the collective proceedings regime in which exclusive jurisdiction is vested in the Competition Appeal Tribunal; or under the group litigation order regime in the High Court; or under the representative action, also the province of High Court jurisdiction. The most common types of defendants have been large consumer technology companies, utility providers, car and truck manufacturers, and banks and financial institutions.
[10] https://www.gov.uk/sfo-cases/london-capital-and-finance

fraud can be supported by litigation funders to bring proceedings against the fraudster. And funders will support the holder of IP rights against corporate infringers.

While in many such cases the claimant may otherwise lack the means to bring the claim, third party funding enables access to justice in a broader range of circumstances as well. For instance, some claimants (such as investment managers) may be well resourced overall but be structurally constrained in the use of those resources to support litigation. Others may have sufficient resources to run their business but have budgetary constraints restricting their ability to divert those resources for litigation. Yet more may in principle be able to pay for their own costs but may prefer to allocate their resources to growing their core business (and potentially creating jobs) and use third part funding to finance their litigation. Some may prefer third party funding as a means of limiting the financial risk of litigation to their wider business. Further, as discussed in response to question 15 below, claimants may use third party funding as part of a package of solutions alongside CFA or DBA fee arrangements with their legal team and ATE insurance. Whatever their circumstances and the alternatives available to them, the common theme is that claimants use third party funding because it is the most attractive option available to them to secure access to justice.

Whilst third party funding promotes access to justice, it is not a replacement for legal aid or, as the LSB Review found, a panacea for consumer grievances[11]. This in part reflects the economic realities of the cases that can be funded, given the high cost of litigation in England and Wales, but it also reflects the degree of risk that funders take in funding the cases that they back as, if a case is lost, the funder loses its entire investment. As a result, funders are highly selective, funding only 3-5% of cases that are pitched to them[12]. The LSB review points out that *"the implicit benefit for a defendant is that highly-experienced litigators will only give the 'green light' to cases that they consider to have good prospects of success, rendering it unlikely that the case will be frivolous or unmeritorious"* and this conclusion is borne out in the findings of the ELI and BEUC[13]. As the LSB Review puts it, the funder's *"investment committee is an important 'reality check', which benefits parties other than the funded client."* The Courts have in fact said that a "*rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals*"[14] is what is to be expected of a responsible funder. By being highly selective as to which cases they fund, funders help direct resources of all parties towards meritorious claims.

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[11] LSB Review, 34
[12] Ibid., 33
[13] ELI report, 18-19, and BEUC Report, 1
[14] http://www.bailii.org/ew/cases/EWCA/Civ/2016/1144.html

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

Following the jurisprudence of the ECtHR, the concept of equality of arms has been interpreted as ensuring that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.

It is the nature of litigation finance that it promotes equality of arms between parties by providing claimants with the resources to fund their claim. The defendant, on the other hand, is typically better resourced than the claimant in funded cases because funders would not knowingly fund a case against a defendant that does not have the resources to pay both the costs of defending the case and also the damages sought in the claim.

The roots of the litigation finance industry were in the 'David v Goliath' types of case and litigation funding is sometimes of most visible benefit when it addresses an obvious imbalance in resources between the parties. Justice Lee, overseeing the Williamtown Contamination Class Action in Australia, observed that *"without funding, the claims of group members would not have been litigated in an adversarial way, but rather the group members would likely have been placed in a situation of being supplicants requesting compensation in circumstances where they would have been the subject of a significant inequality of arms"*.[15] This is the reality for most funded group actions, but it is equally relevant to a myriad of other funded cases involving individuals – whether they be officeholders, spouses or victims of civil fraud or corporate misbehaviour.

A review of the case load of the CAT, or a consideration of the GLO register, shows the role that litigation funding plays in enabling consumers and SMEs to bring complex litigation against some of the largest and best-resourced corporations to hold them to account for corporate wrongdoing and breaches of the law that have caused those consumers and SMEs damages and losses, where they would otherwise have no route to redress. None of this would have been possible without funding.[16]

Defendants have adapted their litigation strategies to respond to the levelling of the playing field made possible by the availability of litigation funding. Defendants routinely pursue a strategy that seeks to target the litigation funders (for example, by seeking to drive up costs, or challenge funding

[15] Reported in Omni Bridgeway, '*Australian Parliamentary inquiry into litigation funding and class actions – getting the balance right*', 14 July 2020 - https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2020/07/14/australian-parliamentary-inquiry-into-litigation-funding-and-class-actions-getting-the-balance-right

[16] "Group actions and large commercial disputes are an obvious target for litigation funding given the often very large sums involved. This has supported the increase in group actions in the UK with pretty much every such case having a litigation funder sitting behind it." Chartered Insurance Institute - https://www.cii.co.uk/learning/learning-content-hub/articles/litigation-funding/109406

arrangements) and so destabilise the relationship between funder, funded party and lawyer, and therefore the claim.

This can be seen clearly in the case of the sub-postmasters, where the Post Office's lawyers laid out its strategy as follows: –

> *"We believe the better solution is to try to force the Claimants into a collective position where they will either abandon the claims or seek a reasonable settlement. It should be remembered that the claims are financially supported by Freeths (whose fees are at least partially conditional on winning), a third-party funder and insurers. Without this support these proceedings would not have been possible. All three entities will likely have the power to pull their support if the merits of the case drop below a certain level. Our target audience is therefore Freeths, the funder and the insurers who will adopt a cold, logical assessment of whether they will get a pay-out, rather than the Claimants who may wish to fight on principle regardless of merit."*[17]

The strategy was not lost on the judge who said *"The Post Office has appeared determined to make this litigation, and therefore resolution of this intractable dispute, as difficult and expensive as it can."*[18]

Nor was it lost on Sir Alan Bates, who later wrote that third party funding provided *"the funds to challenge the Post Office as they tried every trick in the book to bog us down with procedure and legal costs"*.[19]

Litigation funders are now well used to being the target of attempts by defendants to prevent claimants pursuing ultimately meritorious claims by challenging the funding arrangements or seeking to put up procedural roadblocks. For example, it is a strategy that is increasingly being adopted by defendants in the CAT with a prominent example being the PACCAR Judgment in the UK Trucks litigation[20] where a defendant sought to prevent certification of the claim as a collective proceeding by challenging the funding arrangements as being unlawful. The fact that well-resourced defendants adopt such strategies is evidence that litigation finance has the effect of promoting equality of arms. It also underscores what claimants are up against in general. Whether or not claims are funded, well-resourced defendants run up legal costs in the expectation that their inefficiency will be tactically advantageous under the loser-pays system.

[17] *Confidential and Legally Privileged Post Office Group Litigation Steering Group Meeting: 11 September 2017, POL00006380*
[18] *Bates et al v Post Office Limited (No. 3)* [2019] EWHC 606 (QB) per Fraser J, para 544
[19] Bates, *Why I wouldn't beat the Post Office today*, 12 January 2024
[20] *Road Haulage Association Limited v Man SE and Others*, 1289/7/7/18

The expansion of collective redress mechanisms, which work symbiotically with funding to facilitate access to justice, provide procedures through which cases can be funded and pursued. In the CAT it is the combination of funding and the statutory framework that has led to the radical change of consumer representation. However, without litigation funding it would not be possible to achieve what clearly was envisaged by the lawmakers.

As noted above, funding is not viable for all cases because of the high cost of litigation generally, exacerbated by the fact that there are no current case management powers available to the judiciary to order defendants to contribute to the costs of funding in appropriate cases. Funders are constrained by the economics of cases – the size of the claims and the budget required to pursue them. As funders are repaid their investment and generate a return on their investment solely out of the proceeds of the case, the funding that can be made available for a case is limited by the ultimate value of the claim at trial or on settlement and it is common for funders to see cases that are uneconomic to fund or which become so as a result of budget overruns out of the funder's control. This means that it tends to be only the larger cases, typically with damages running into the millions of pounds, where funding is possible on an individual case basis.

Funding in England and Wales is invariably provided subject to a cap on funders' commitment. Funding is not therefore a blank cheque to the claimant and so claimants may remain at a financial disadvantage to a well-resourced defendant that may, for example, be able to spend the equivalent of the entire settlement value of the claim in its defence. Until there is an ability, where the defendant's conduct has been unreasonable and has resulted in disproportionate costs for the claimant, to order a defendant to bear some of the costs of funding, there remains no incentive on a well-resourced defendant to act proportionately and, indeed, an incentive on such defendants to do the opposite.

Another way in which litigation finance promotes equality of arms is in funding the insurance premium, thereby allowing a claimant to seek ATE insurance for adverse costs, to comply with a security for costs order or even to fortify a cross undertaking in damages. The use of ATE insurance with the funder funding the insurance premium is commonplace in funding arrangements. Claimants ultimately pay for the premium on successful cases out of the proceeds of the claim as part of the funding return, but funding for the upfront premium by the funder enables claimants to contemplate litigation in circumstances where they would otherwise not be able or willing to shoulder the risk of paying the defendant's costs if they were to lose.

Finally, litigation funding assists defendants by putting in place and funding appropriate arrangements to meet the defendant's costs if the case is lost. The presence of such arrangements enables defendants to recover their costs where they are successful in cases where impecunious claimants may otherwise be unable to meet such an order. To this extent, the equality of arms is also to the advantage of defendants.

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

Third party litigation funding provides significant benefits to consumers. In the BEUC Report, three key benefits of third party funding for consumers are listed:[21]

> *"Levelling the playing field: If a consumer group gets its case financed by a private funder, the defendant corporation is aware they are against a financially strong opponent.*
>
> *Risk transfer: If a case is unsuccessful, the funder covers the costs, allowing consumer organisations to take on cases they might otherwise avoid. They no longer fear incurring crippling financial liabilities.*
>
> *Deterrence of corporate misconduct: Companies are more likely to comply with laws when they know consumer organisations have the means to bring well-supported claims against them."*

The BEUC Report also finds that the arguments against litigation funding, often advocated for by the US Chamber of Commerce, namely the risk of frivolous litigation, undue influence by funders or targeting competitors, are not well-substantiated and insufficiently evidenced by specific cases.

These benefits for consumers apply as much to litigation in England and Wales as they do to litigation in the European Union, and indeed UK consumer groups often seek third party funding in their efforts to protect consumers, for example the recently launched claim by Which? against Apple.[22] The benefits of third party funding are not confined to consumers and SMEs; funding is used increasingly by well-resourced entities as a valuable risk management and financing tool.

Third party funding has also been identified as supporting the delivery of many of the UK's regulatory objectives. In the LSB Review[23], it is noted that litigation funding engages with many of the Legal Services Board's regulatory objectives in a significant manner:

- Protecting and promoting the public interest;
- Improving access to justice;

[21] BEUC Report, 7
[22] Which?, *Which? launches £3 billion action against Apple over competition law breaches*, 14 November 2024 - https://www.which.co.uk/policy-and-insight/article/which-launches-3-billion-action-against-apple-over-competition-law-breaches-acY7c0t4g3Gu
[23] LSB Review, 17.

- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of legal services;
- Encouraging a strong and effective legal profession which consistently improves its budgeting skills;
- Increasing the public understanding of citizens' rights and duties; and
- Promoting the prevention and detection of economic crime.

Third party funding can also support the public interest. Litigation funding provides not only the means to support cases that would otherwise not be litigated but also promotes the public interest by exposing corporate wrongdoing (such as with the Post Office scandal which led to a statutory enquiry) or by laying the groundwork for investigations by regulators like the SFO as looks to be the case in respect of London Capital and Finance plc and some of the investigations into the accountancy profession.

Litigation funders tend to drive and incentivise good litigant behaviour in funded actions. Funders are selective in the cases that they fund and apply rigorous due diligence processes, as described above. Since litigation funders have a genuine commercial interest, once invested, in ensuring that their cases are pursued efficiently, timeously and proportionately, litigation funding also tends to further the overriding objective set out in Part 1.1 of the Civil Procedure Rules to deal with cases justly and at proportionate cost. A review of (a) to (g) of CPR 1.1 would suggest that the interests of litigation funders align more closely than those of many other participants in the litigation process with all the critical components that make up the overriding objective, being:

(i) seeing cases managed justly and at proportionate cost (CPR 1.1(2));
(ii) aiding the parties being on an equal footing (CPR 1.1(2)(a));
(iii) saving expense (CPR 1.1(2)(b));
(iv) dealing with cases in a proportionate way (CPR 1.1(2)(c));
(v) proceeding with cases in an expeditious and fair manner (CPR 1.1(2)(d));
(vi) seeking to ensure that the appropriate use of Court time was devoted to the case because of the costs and the potential for delay (CPR 1.1(2)(e));
(vii) encouraging the use of mediation or other methods of resolving the dispute (CPR 1.1(2)(f)); and
(viii) demanding compliance with the rules because of the funded party's responsibilities under the funding agreement (CPR 1.1(2)(g)).

The availability of investment into the legal system in England and Wales has benefits for the development of English jurisprudence. By virtue of being sufficiently funded and as a result of tending to support larger claims, funded cases regularly appear in the law reports and feature in the work of the appeal courts, promoting the development of English law. Established requirements for leave to appeal, certification requirements in the CAT and for GLOs and interim remedies of summary judgment and strike out provide checks and balances to ensure appropriate use of Court resources. Funded cases also tend to be legally and procedurally complex, often engaging issues with broad ramifications for marketplace function and/or consumers, as illustrated by the fact that more than 25% of The Lawyer's "Top 20 Cases of 2025" are funded matters.

Following from this, third party litigation finance supports the UK's role as a global legal centre. Litigation finance supports the legal sector, which in 2023 contributed £37 billion to the UK economy and employed 368,000 people, of which litigation is the third largest segment by revenue at 14%.[24]

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?

Self-regulation provides an effective form of regulation, which has seen the sector grow in the UK, expanding access to justice, attracting inward investment and growth, and supporting the UK's role as a global legal centre. This success has been recognised in international imitation and is further buttressed by effective judicial oversight. It is also a more economical form of regulation than would be the case with an external regulator, for example the FCA. Indeed, it is not clear at this stage where regulatory oversight would sit within the UK's current ecosystem of regulators, potentially meaning regulation would require the establishment of a new regulator, with substantial additional cost and likely a chilling effect on the market – and therefore fewer meritorious cases funded - due to increased burden of dealing with a new regulator.

For its part, the FCA has not identified an interest in, or need for, intervention. The self-regulatory regime that prevails for litigation finance is consistent with the call by FCA Chief Executive Nikhil Rathi for "*an enabling and proportionate regulatory approach*" with regard to the private markets as a whole.[25] In Australia, probably the most mature third party funding market, this was also the view of the Australian Securities and Investments Commission (ASIC) when a comprehensive review of whether regulation was needed was undertaken by Justice Sarah Derrington in 2018.[26]

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[24] TheCityUK, *UK Legal Services*, December 2024
[25] FCA Chief Executive Nikhil Rathi: *Rising to the occasion on private markets*, at https://www.fca.org.uk/news/speeches/rising-occasion-private-markets
[26] *Justice Sarah Derrington, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders,* ALRC Report 134, 2018.

The current state of regulation of litigation finance is described in the LSB Review as follows[27]:

> *"Litigation funding in England and Wales is presently self-regulated via membership of [ALF] and via the members' compliance with the ALF's Code of Conduct for Litigation Funders. Some funders whose activities include the management of investments are FCA-authorised; but such authorisation is not required in respect of funding activities alone. The Code has been revised several times since its promulgation in 2011, most recently in 2018. Self-regulation includes a complaints procedure (introduced in 2011) which has been invoked only four times. Notably, there are a number of litigation funders operative in England and Wales who are not ALF members – and law firms, and funded clients, are perfectly content to enter into litigation funding agreements (LFAs) with these non-ALF members. The ALF-related membership procures a number of advantages for each of the parties to 'the funding triangle', viz, funded client, the funder, and the law firm – but that membership is not the 'badge of honour' that was envisaged when the Code was promulgated in 2011."*

This system of voluntary regulation was proposed by Lord Justice Jackson in his final report,[28] and has been followed successfully elsewhere. Other jurisdictions, notably Australia, have looked to the Code as well and the Association of Litigation Funders of Australia (ALFA), prescribes best practice Guidelines for its members that are broadly analogous to those of the ALF's Code of Conduct. In Hong Kong the Code of Practice for Third-Party Funding of Arbitration issued by the Justice Minister is broadly comparable to the ALF Code of Conduct.[29] Singapore has also developed a Guidance Note as well as Guidelines for funders intended to provide funding to parties in Singapore-seated international arbitrations.[30]

A similar approach is followed in other jurisdictions. As noted by the ELI[31]:

> *"Other codes of conduct exist in Australia, Hong Kong, the Netherlands and, since 2022, Europe. Singapore has developed a Guidance Note as well as Guidelines for funders intended to provide funding to parties in Singapore-seated international arbitrations."*

In the 14 years of self-regulation by ALF, there have only been four complaints filed. Of these, one was about a non-ALF member where there was no jurisdiction. The second did not name the funder member about whom the complaint was made. The third involved the wrongful termination of a funding agreement, but the complainant admitted that it had forged evidence which it had

[27] LSB Review, 9
[28] Jackson Final Report, 124
[29] The Arbitration Ordinance, Section 98.
[30] Guidelines of the Singapore Institute of Arbitrators (SIArb) of May 18, 2017.
[31] ELI Report, 22

supplied to the funder member. The fourth concerned another complaint about termination (that the funder member had not followed its own process for terminating funding), but, after review by independent legal counsel, the complaint was dismissed. Relative to the volume of claims funded by litigation funders, this is a remarkably small number of complaints reflecting the efficacy of the current system of self-regulation in promoting good conduct and protecting all parties from harm. The fact that there are no known examples of complaints or abuses in the European funding market is yet more evidence of the wider impact of the Code and self-regulation in general.

To date, the most recent visible challenges have, by and large, resulted from decisions of the Courts – the PACCAR judgment being the most important. The lack of historic challenges is not surprising, reflecting the commercial alignment of funders and claimants and the positive impact of the Code.

In the last 18 months, challenges in the Courts have arisen in large part because claimants have seen a route to use the PACCAR judgment to seek to rewrite their original agreements, causing significant uncertainty for the sector and causing large funders to consider other jurisdictions as a result.[32]

On top of self-regulation, the role of judicial oversight plays a significant and important role. Indeed, much of the development of the law in respect of litigation funding has resulted from Court judgments. As the litigation funding market has grown and developed in sophistication, so has judicial oversight adjusted.

The Court has made rulings in respect of the disclosure of funding arrangements, has rendered several important judgments in respect of funders' agreements - and the funders' liability to pay costs - and has tackled head on the suggestion that some funding agreements have been champertous (often from defendants or those wishing to destabilise the funding arrangements). The Court also exercises its ongoing duty of case management and in funded litigation will take a keen interest in the funding arrangements, as seen by the Court's approach in the current "Dieselgate" litigation.

In the CAT, matters are taken to a further level since judicial oversight (and indeed review of the funding agreement) is compulsory to ensure the CAT is satisfied that the class representative would be able to meet any adverse costs award and run the case through to trial, and that class member interests are protected. A further oversight exists because of the CAT's role in approving settlements for fairness. The robust approach of the CAT recognises the commercial reality which is that there would be no litigation in the CAT were it not for the presence of litigation funding. Importantly, all the oversight of the CAT, and the ultimate jurisdiction of the Court, would have to

[32] CityAM, *Burford Capital turning its back on London after Government delays*, 5 December 2024 - https://www.cityam.com/burford-capital-turning-its-back-on-london-over-government-delays/

exist even if there was another level of regulatory oversight – so the process could become unwieldy and increase costs if there was further scrutiny. Many funding agreements provide for dispute resolution either by way of mediation, arbitration or High Court proceedings, and so judicial involvement is provided for from the very start. The ALF Code of Conduct also provides resolution procedures in relation to settlement and termination of funding agreements.

Beyond this, litigation funders, like other financial services providers such as banks, investment firms and private investors, are subject to generally applicable laws and rules such as the Foreign Corrupt Practices Act 1977, the UK Bribery Act 2010, Anti-Money Laundering and Sanctions rules,[33] Data Privacy and General Data Protection Regulation, state privacy laws, and other general corporate regulations in various jurisdictions. Many employees of litigation funders remain solicitors and are regulated by the SRA.

Some legal finance providers are also publicly traded companies and/or registered investment advisors in the US and must therefore comply with global financial market regulations, including those promulgated by the US Securities and Exchange Commission, the FCA, the New York Stock Exchange, and/or the London Stock Exchange. Likewise, private legal finance providers that operate as funds by raising capital from external investors are similarly subject to a host of laws and regulations applicable to private funds in the UK, EU, US and elsewhere.

The ELI adopted a balanced approach in respect of the need for further regulation, recognising that there is little point holding funders responsible for problems that they cannot control (such as the high cost of litigation or the behaviour of litigants or their counsel):

> *"A growing number of commentators (most significantly the authors of the Voss Report/Draft EP Directive within the EU) advocate for a scheme of comprehensive regulation. Generally, however, the development of such regulation remains at an early stage. Even so, concerns have been expressed about the effect of prescriptive regulation. Such regulation significantly affects the risk/reward balance for funders and may well lead to funders ceasing to offer funding in the regulated territory – with a consequent impact on access to justice issues. Those risks are sufficiently important that ELI suggests that such regulation is only appropriate where there is an identifiable problem or market failure."*[34]

[33] For example, the Sanctions and Anti-Money Laundering Act 2018.
[34] ELI Report, 10

> *"…if regulation is to be considered in any given jurisdiction, it should either be to address an identifiable - and fixable – problem or to ensure consistency of best practice, ie 'light touch' regulation."*[35]

<u>We endorse the ELI Report's conclusions on regulation and consider that the current approach to regulation should be maintained.</u>

Within the framework of self-regulation, the litigation funding industry has proved itself to operate well. Equally, the market has grown and evolved in the 14 years since the ALF Code first came into force, in large part due to the benefits third-party funding offers, as set out above. With that in mind, the litigation funding industry welcome reviews such as this one, and those undertaken by ELI, LSB and others. We are open to consulting with the CJC, in the light of the evidence from this review and the recommendations the CJC make, in considering whether any updates might be required to reflect the learnings in the market since the ALF Code of Conduct was last revised in 2018.

We address the current application of the Damages-Based Agreements Regulations 2013 to litigation funding agreements as a result of the PACCAR Judgment in our answers to questions 17 and 22 below. The PACCAR Judgment has had a significant negative impact on the availability of litigation funding and the terms that can be offered by funders to claimants. It has also created an uncertain environment for litigation funding, spawned satellite litigation in ongoing cases and on concluded cases, has led funders to look to other jurisdictions rather than England and Wales. The PACCAR Judgment continues to present a threat to the industry as a whole, through the challenge to even multiple-only based funding agreements in the case of *Alex Neill Class Representative Limited v Sony Interactive* case which will be heard by the Court of Appeal in the summer of this year. That case risks causing irreparable harm to the funding industry and the availability of funding in this jurisdiction. The decision in that case may well be handed down before the CJC produces its final report and certainly will be before any recommendations in that report are implemented. We urge the CJC to make recommendations to Government to remove litigation funding agreements from the ambit of the DBA regulations at the earliest possible opportunity.

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;

[35] Ibid., 24

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.**

Following a review of the papers of external commentators, a number of areas have been highlighted which could be relevant discussion points.

<u>(a) Concerns around the funder's level of control of litigation</u>

Nature and seriousness of risk

The proposition is that a funder is too involved in various aspects of the litigation, either by way of direct interference with strategy or indirect interference through seeking to manage budgets.

A key function of any litigation funder (as an investment manager) is to oversee and manage its investments prudently, (including, in particular, overseeing the budget and capital spend on a case, and the operation of the funding arrangements). The way a funder is able to oversee and manage its investment depends on interaction with the legal team acting on the case, who have their own duties to manage the case to be best of their abilities, and to act in the best interests of their clients (their clients being the claimants, not the funder). In that sense, the legal team hold a gatekeeper role during the proceedings, in the interaction with the funder as investment manager.

The funding agreement should acknowledge that the funder that will not control the litigation. The funder will be well aware of the existing rules against champerty and maintenance and will not wish the funding agreement to be held to be unlawful on the basis that these rules are breached. Existing protections around champerty are clear and taken heed of in this regard (as indicated by the fact that there have been no recorded findings of champerty since 1967). An ALF funder will also have regard to the obligations contained within the ALF Code of Conduct.

On the seriousness of this risk, whilst established practice in England and Wales is that funders do not exercise control over cases, it is notable that this constraint is not mirrored in other jurisdictions, including all of Europe and most of the United States, where for instance funders and can buy and control claims. This subject is addressed further in answer to question 28.

How risk is mitigated now and in the future

The self-regulatory framework, the current law in respect of champerty and maintenance, and the possibility of challenge to the funding agreement if existing rules is not complied with, all operate to mitigate this risk. A funder will not wish to prejudice its investment and risk not being paid if it is found to have overstepped the mark by exerting control in the litigation.

Advantages/disadvantages

N/A

(b) Concerns around funders' input on settlement

Nature and seriousness of risk

There is a potential for conflicts of interest to arise between parties involved on the claimant side when it comes to a settlement – including any funder as well as solicitors, barristers and insurers. To some extent there will be overlapping interests in achieving a successful settlement in a case, but in other ways a party may have a differing interest / incentive with regards to the timing and amount of any settlement (taking into account their outcomes from the matter, including any contingent fees or payments due on a settlement), or their desire to see a case progress to a full trial. A funder is incentivised to hope for a successful and reasonable settlement outcome of a case it is backing, and part of its investment management role will be to keep abreast of any settlement process to ensure the terms of the funding arrangement are adhered to through that process and in any outcome. Funding agreements provide various mechanisms for the funder to be involved in the settlement process, and the ALF Code of Conduct has provisions to manage this risk. In this way, and with the role played by lawyers and client in the settlement, risks arising from a funder's conflicting interest with regards to a settlement are managed.

How risk is mitigated now and in the future

Currently the funder's involvement in a settlement process is regulated by the terms of the relevant funding agreement which should take into account the provisions of the ALF Code of Conduct, with a check and balance via the role played by the lawyers acting for the claimants in the matter. The funding agreement will have a specific mechanism regarding the process to be followed should the funder and funded party (or its representatives) disagree on the details of a settlement. In the CAT, there is a further check and balance to the extent that a settlement must be approved by the Tribunal for fairness to ensure that the settlement is in the best interests of class members.

If a question was raised as to whether any risk in this area could be addressed by having an external regulator oversee funder roles in settlements, it is difficult to see how an external regulator could provide any useful input in a timely manner in respect of this issue. A regulator could look backwards and conduct a review of a funder's involvement in a settlement process by reference to set criteria, but it is unclear whether this would achieve any more than is currently possible via the mechanism in the funding arrangements under which the parties can seek a binding determination by an independent KC on any dispute around a settlement under a strict and rapid timetable.

Advantages/disadvantages

N/A

<u>(c) Termination of funding agreements</u>

Nature and seriousness of risk

There is a potential for parties involved to have conflicting interests in respect of the termination of a funding agreement However the termination of a funding agreements risk is a step that involves serious consequences for the funder (in particular, the likelihood of the loss of its invested capital up to date of termination), as well as for the other parties to a funding agreement, and it is not a step that a funder takes lightly. Indeed, termination is typically the consequence of considerable analysis around the commercial position and case prospects and/or the contractual rights/obligations under the funding agreements. Data from a sample of ALF members suggests that, across 1,353 investments, funders have terminated funding arrangements in less than 2% of cases, suggesting that termination is rare.

How risk is mitigated now and in the future

The termination mechanism and dispute provisions set out in the funding agreement, as applied in accordance with the ALF Code of Conduct, together with the involvement and oversight of the funded parties' legal team. Under the ALF Code of Conduct, where a funded client has a dispute with the funder about termination of the funding agreement, then it is necessary that an independent KC shall provide a binding opinion about the basis for termination..

It is unclear what role an external regulator could add here, beyond observing the enforcement of the funding agreement's contractual provisions (which can already be done via the dispute mechanism in the funding agreement, or the courts). There could also be considerable disadvantages to a regulator seeking to regulate this issue in real time and, with all other matters, it would have to be a retrospective review.

Advantages/disadvantages

N/A

<u>(d) Excessive returns</u>

Nature and seriousness of risk

Funders sometimes face accusations of taking unreasonably high proportions of recoveries from damages awards / settlements.

The funder's return is a function typically of the amount of the investment. Funders are usually reluctant to see budgets increase because this strains the economics of the case and increase the risk to the funder. Where legal budgets do go up over the life of a case, the impact can be dramatic, especially if the value of the claim turns out to be materially lower than anticipated. As cases proceed, higher than expected costs and lower than expected quantum can squeeze the economics of the claim and also make further investment harder to justify. However, this dynamic is not unique to funded cases nor may it even be the result of any failing on the claimant side but may be the result of a deliberate defence strategy, which was the situation in the Post Office case as Sir Alan Bates himself has said.[36]

The solution in most markets to high prices is to increase competition to ensure the market drives down pricing. Adding an additional regulatory burden will tend to increase barriers to entry in the market, which will tend to support incumbents and limit competition, resulting in higher prices.

How risk is mitigated now and in the future

Currently the parties contractually agree how to deal with the funder's return. Each case will depend on its own facts and a funder will have a range of financial metrics in mind when it sets the parameters to that return. A prudent approach will assume the worst and a litigation funder has to assume that the case will proceed all the way to trial. There may be additional contingencies built in, and there may be arrangements negotiated with the lawyers as to what happens if the budget is required to be increased.

Crucially, the funder is reliant on the lawyer running the case to set the correct budget to run the case through the end of trial. Unfortunately lawyers are not always accomplished at setting the correct budgets for their cases because of a lack of analysis of historic budgets versus actual outcomes to learn where they might improve. It is very difficult for a funder to refuse to accept a budget increase at certain times of the litigation, and doing so merely endangers the funder's investment and brings into play the possibility of adverse costs as well given that ATE does not pay out if a case has to be discontinued because of a lack of funding. So the contract is the proper place

[36] Bates, *Our Post Office victory is being twisted by those who don't want to see its like again*, Guardian, 10 May 2024

for the negotiation to occur when all parties are aligned, and where there is least prospect of misaligned interests.

The suggestion that caps are placed on the funder's return is addressed in more detail in the response to Question 12. That said, it is our strong belief that imposing caps will only act as a brake on a significant portion of the funding market in England and Wales. This jurisdiction can be a challenging one in which to fund in any event, and imposing caps will negatively impact the risk / return profile of investing here and make it more likely that funders will look to fund in other jurisdictions, reducing access to justice here for claimants, and investment in the UK's legal services industry. It is also our strong belief that the disadvantages of regulation on returns to the entire funding industry outweigh any plausible benefit to those claimants with viable claims which could still be brought following the introduction of a cap (noting that some claims would no longer be viable).

Advantages/disadvantages

There are real disadvantages to seeking to regulate how the industry charges for its funding. Capping returns to funders does nothing to address the cause of high funding costs which is not excessive returns to funders but high legal costs and overestimated claim values. The Post Office example that has been used to highlight the current challenge does not provide a basis for capping funder returns (which would have prevented the claimants in that case getting justice at all) but demonstrates the need for funding cost to be recoverable from the defendant in appropriate cases, as discussed in more detail at Question 8(e) below.

<u>(e) Failure to pay</u>

Nature and seriousness of risk

A funder that does not discharge its obligations to pay the claimant's lawyers would mean a breach by the funding of its funding agreement that would endanger the progress of the relevant litigation. We are not aware of evidence of cases in which funders have breached their funding agreements by ceasing to fund a case where the matter is ongoing and the funding agreements have not been terminated: there have not been complaints about funders doing this.

How risk is mitigated now and in the future

The ALF Code of Conduct has requirements around funders' financial capacity to support cases they agree to fund, specifically requiring that funders:

- '*maintain access to a minimum of £5 million of capital or such other amount as stipulated by the ALF'*; and

- maintain the capacity to cover aggregate financial liabilities under all of its funding agreements for a minimum period of 36 months.

The requirement for funders to maintain capital adequacy is a continuing obligation under the ALF Code of Conduct.

A funder that failed to comply with its obligations to fund a case would likely face reputational repercussions as a result of such failure, and the possibility of a legal dispute regarding its breach of funding arrangement, as well as the prospect of a complaint to the ALF if the funder is an ALF funder.

Advantages/disadvantages

N/A. There are advantages to the current arrangement, and no evidence to suggest a need for heavier handed capital adequacy requirements which would be onerous to administer.

(f) Concerns around AML / source of capital

Nature and seriousness of risk

Critics of litigation finance in other jurisdictions sometimes cite concern around the sources of capital used to finance litigation and money laundering risks.

How risk is mitigated now and in the future

In reality, this risk is mitigated by two existing regulatory measures. First, source of funds and anti-money laundering duties apply to the solicitors running the third party funded case as part of their professional conduct rules, as set out in the guidance issued by the SRA and as defined by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The solicitors must reasonably satisfy themselves that money coming into the client account is clean.

Second, many professional funders are also regulated by financial services regulators such as the UK's FCA and as such are subject to AML/KYC duties as a regulated entity under those regimes.

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?**

From a third party litigation funding perspective, we do not see any reason to depart from the current approach to regulation that has applied in England and Wales across all types of third party funded litigation. The response in Question 7 below details the appropriate self-regulatory regime that we consider should continue to apply to commercial litigation finance in England and Wales.

There is a considerable variety of types of commercial litigation, for instance on behalf of small and medium sized businesses and consumers, but also large businesses and corporate enterprises, who seek to optimise the use of resources by using litigation finance for specific litigation needs. Some of these cases are in the CAT and some in the commercial and other courts. Law firms also increasingly use litigation finance, either for specific cases or in 'portfolios' to enable them to pursue growth strategies across commercial cases or targeted on areas, such as competition cases.

The great variety of uses, and the evolution of litigation finance through innovative products such as portfolio financing or 'hybrid DBAs',[37] show the benefits of a flexible approach so that overly prescriptive or ad hoc regulation does not unintentionally distort the availability of litigation finance and the ability of the industry to innovate. Third party funding provided to claimants on a portfolio basis does not raise any distinct issues from a regulatory perspective than single case third party funding.

[37] LSB Review, chapter 7, 39

Further, where specialist areas have developed, such as competition cases before the CAT and in the provision of consumer credit,[38] the legislature and courts have already reacted by granting and applying specific powers to third party funding arrangements without the need for a specific approach to regulation of third party funding.

In relation to English-seated arbitration, this should remain distinct from any regulatory mechanisms imposed on domestic litigation. Arbitration and domestic litigation serve different purposes, are governed by different rules, and cater to different needs. Arbitration operates under a separate framework designed to uphold key principles, particularly party autonomy, flexibility, confidentiality, and international enforceability.

Expanding the scope of state-imposed procedural rules, designed to address public policy concerns in the domestic litigation process, as made clear by the CJC Interim Report, risks infringing on this autonomy, among other consequences of such an expansion. Such interference would dilute the flexibility and efficiency that arbitration offers, diminishing the attractiveness of English-seated arbitration.

For instance, much of what the CJC Interim Report considers should inform its approach to litigation finance hinges on an assessment of the costs of English litigation. However, there are different costs considerations in English-seated arbitration, where costs are not subject to the English courts' assessment regime, among the many other differences between English litigation and English-seated arbitration. Imposing common regulations would disregard these differences.

Arbitration operates on a transnational level, governed by international conventions like the New York Convention, which ensures the enforceability of arbitral awards across jurisdictions. This is fundamentally different from the territorial jurisdiction of domestic courts, which focus on public policy concerns specific to a single legal system.

To conflate arbitration with domestic court rules would undermine these principles, creating practical and reputational risks for English-seated arbitration.

If England imposes inappropriate regulatory mechanisms on its arbitration framework, it risks losing its position as a leading arbitration hub and driving businesses away from English law-governed agreements. Businesses may increasingly look to jurisdictions that respect the distinctiveness of arbitration, thereby jeopardizing England's long-standing reputation as a pro-arbitration jurisdiction. Instead of choosing England as the seat of arbitration, businesses may turn to alternative venues like Paris or New York, where party autonomy is more robustly

[38] Consumer Credit Act 1974 (as amended)

protected. This has already been seen as a result of the PACCAR judgment. To preserve its competitive edge, English-seated arbitration must remain independent of regulatory mechanisms designed for domestic litigation. English law is currently estimated to govern 40% of corporate arbitrations globally, and any changes to this regime risk this advantage.[39]

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

As discussed in our answer to Question 4, the current regime for regulation of litigation finance in England and Wales has clearly been successful. There are a number of principles or best practices that have emerged from this experience and have been tested by it now for more than a decade.

Third party funding is already subject to a number of regulatory requirements under various financial services, corporate, and other regimes. That said, the most comprehensive element of the current regime is the ALF Code of Conduct, which was sponsored by a CJC working group. This followed the review of civil litigation costs by Sir Rupert Jackson which concluded that England and Wales would set the standard for voluntary self-regulation by developing a code of conduct, or best practice guidance.

Well over a decade after its implementation, the ALF Code of Conduct has shown itself to be an important point of continuing reference that has encouraged high standards, and yet also allowed a nascent market to develop with commercial flexibility as well as contributing to a framework for access to justice.

The ALF Code of Conduct has been widely regarded by the judiciary for setting and maintaining standards across the industry. For example, in the *UK Trucks Claim* the Tribunal noted:

> *"The basis of the ALF Code is to provide a satisfactory means of self-regulation of the litigation funding industry for the protection of those in receipt of TPF"*.[40]

The importance of the ALF Code of Conduct has been referred to by courts in not only England and Wales, but across many common law jurisdictions as the recognised best practice. For example, see the 2019 Cayman case per Segal J: *A Company and A Funder*.[41]

The ELI Report noted that promoting best practices such as the ALF Code of Conduct protects the interests of all parties involved (litigants, beneficiaries, and third parties). The promotion of best practices within the third party litigation funding industry not only benefits the users of these

[39] TheCityUK, *UK Legal Services*, December 2024
[40] *UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. and Others* [2019] CAT 26 at [65].
[41] FSD 68 of 2017; unreported judgment of Mr Justice Segal dated 23 November 2017.

services, the ELI Report noted, but also the industry itself by establishing and adhering to high standards of ethical and responsible behaviour.[42] The ELI Report said:

> *"An acknowledged step towards achieving a desirable balance between access to justice and risk mitigation is the development of principles derived from best practices, established through research and collaboration between all stakeholders (including industry experts, suppliers, or users of TPLF services, regulators, and other governing bodies). The promotion of such best practices aims to offer guidelines, standards, and safeguards for ethical and responsible behaviour and, hence, to facilitate the use of TPLF arrangements by litigants, funders, and professional advisers."*

The ELI Report concluded that "light touch" over prescriptive regulation was preferable,[43] as *"this approach offers a balance between flexibility and control which is attractive to funders and is likely to encourage them to participate in a nascent market."*[44] An advantage of the existing ALF Code of Conduct is that it is flexible enough to accommodate diverse business structures within a simple regime, facilitating inflows of capital and maximising competition within the market without compromising its regulatory effectiveness.

While the existing regulatory framework is far reaching, as it is currently formulated, it retains a proportionate level of flexibility which does not unduly stifle freedom of contract. It is crucial to remember that many funded cases are private matters between commercial entities who ought to be given the freedom to negotiate commercial matters for themselves. Just as other capital transactions between commercial entities, parties should be free to negotiate and to agree to whatever terms they determine to be beneficial to them.

Suggestions in the CJC Interim Report, for example in Paragraph 3.10, that the ALF Code of Conduct could require funding *to "only to be provided where it can facilitate access to justice and/or equality of arms"*, would risk the benefits the current approach has delivered, and the principle of flexibility which underpins it. It would introduce a principle of arbitrariness inimicable to justice, paradoxically, because it would put courts in the intensely difficult position of trying to determine how *"access to justice"* or *"equality of arms"* applied for each individual case, risking satellite litigation, challenge, and costly and lengthy delays.

Looking forward, we would advocate that the sector should continue to operate under the ALF Code of Conduct, with the following principles at the heart of any future reforms:

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[42] Ibid., 25
[43] Ibid., 28
[44] Ibid., 26

i. Encourage Market Participation and Promote Competition: Maintain proportionate regulation to attract diverse capital sources.

ii. Preserve Contractual Freedom and Flexibility: Allow commercial parties to freely negotiate agreements without undue interference.

iii. Focus on Transparency: Ensure clear terms in funding agreements, balancing flexibility with client protection.

iv. Leverage Judicial Oversight: Continue relying on court and tribunal scrutiny for case-specific issues.

v. Promote Global Competitiveness: Avoid regulations that isolate the UK market or increase funding costs.

These principles ensure a robust, adaptable framework that supports industry growth while safeguarding consumer and judicial interests and most critically recognises litigation funding as finance that *enables* claimants to pursue rights and claims.

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?

Litigation in the UK is becoming increasingly expensive, which acts to prohibit a large proportion of claimants from having the chance to access justice without external financial support. Litigation funders in England currently cover in the order of £500 million of legal costs per year[45], against a backdrop of legal costs being estimated to be rising 15% above inflation of the last decade.[46] As far back as 2009, Sir Rupert Jackson noted that since the civil justice reforms at the end of the 20th century there had been "mounting concern" of an inexorable rise in the costs of civil litigation.[47] Given litigation is invariably a long process, expenses mount and must be borne over an extended period of time. The growth of the litigation finance industry is a market response to these high litigation costs. Important recent trends in the UK legal industry, such as data proliferation, increasing complexity and rapid salary-inflation, are also likely to bleed through into the disputes process in the form of increased costs for litigants. In this context, third party funding provides access to justice for individuals and businesses through the provision of financing to enable

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[45] ELI Report,17.
[46] Law Society Gazette, *Top 10 UK law firms increase fees by 40% in five years*, 24 October 2024 - https://www.lawgazette.co.uk/news/top-10-uk-law-firms-increase-fees-by-40-in-five-years/5121258.article
[47] Jackson Preliminary Report, 2

claims to be pursued that have an expense barrier or an opportunity cost to bringing them. The expense barrier is at such a level that would otherwise make bringing a claim prohibitive or difficult to justify without litigation finance. The opportunity cost of paying for litigation means that money otherwise needed to pay for litigation may be deployed by the claimant elsewhere in a way that makes it economic to rely on litigation finance for the litigation instead. In other words in this latter case, companies and individuals may choose litigation finance as their best route to pursue their claims in courts or tribunals. Both those aspects of third-party funding as *'enabling finance'* mean that the more expensive litigation becomes, the greater need there is for litigation finance.

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

Litigation finance can constrain the costs of litigation through the funder's ability to exercise input into, and oversight of, legal budgets and spending.

Litigation funders cover spending that includes most aspects of taking a case to a hearing and sometimes also beyond to the enforcement of a successful judgment or award. These costs are extensive and include:

I. Court filing fees

II. Tribunal fees

III. Expert witness reports and attendance

IV. Class representative fees

V. Solicitors and barristers' fees

VI. Disclosure review platform costs

VII. ATE insurance premiums

VIII. Other incidentals such as travelling costs

IX. Enforcement costs.[48]

Across all these areas of spend, third party litigation funding helps maintain discipline of budgets, because funders allocate capital to cases and are incentivised to ensure that costs stay within the funding commitment. Funders will also wish to keep cases within budget in order to mitigate the impact of possible low settlement outcomes on returns (especially as funders do not control

[48] For example, legal fees, bond or security costs, counterclaims or challenges, registration and recognition fees, investigation fees, and court fees.

settlement). With the involvement of a litigation funder, there is additional review of spend by a third-party professional who is incentivised to manage spend closely, to the extent that the funder is permitted to do so by restrictions on control of the proceedings. Funders interests on this are aligned with claimants – namely to support cases to be successful while balancing that with keeping costs within budget.

In the collective proceedings that are brought in the CAT, budgets also have to be presented to the CAT and frequently the CAT comments on the way in which these budgets are broken down by categories of spend. The CAT may also comment on the level of legal fees incurred in making orders on costs and funder returns at the conclusion of the case.

Nevertheless, funders often find that budgets are overrun. According to reports from a sample of ALF members, budgets are exceeded in as often as one third of cases. But far from funding driving increased costs, the LSB Review found that management of own-side costs was a source of tension between funders and lawyers, noting that there are many causes of overspending against budgets[49].

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

As set out above funders do what they can to help manage costs — in alignment with the interests of claimants — but are ultimately reliant on working with lawyers who are not always able to (or are incentivised to) keep within budget, and other external factors may also increase costs.

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

There is significant risk that moving away from the current regulatory landscape based on the ALF Code of Conduct and self-regulation will negatively impact the supply and availability of litigation finance, given disproportionate regulation would inevitably impact even the type of funding structures made available.

Increasing regulation of funders could well make the cost of funding more expensive, as seen in Australia where poorly designed regulation led to a dramatic downturn in the availability of funding in that jurisdiction.

[49] LSB Review, 82-85

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?**

The courts should have a discretion to order that the cost of litigation funding be recoverable as a litigation cost in court proceedings. Recoverability of funding cost would reflect the fact that litigation funding is a part of the reasonable, and indeed often necessary, costs of pursuing a claim and by being able to treat funding cost as recoverable, the courts would be able to ensure a fairer allocation of financial burdens of disputes, consistent with the principle that costs should follow the event.

Such an approach would also reflect the position in English-seated arbitration under the English Arbitration Act 1996 as reflected in the cases of *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd (2016)* ("Essar") and *Tenke Fungurume Mining S.A. v. Katanga Contracting Services S.A.S.* (2021), according to which the tribunal has broad discretion to allocate the "*costs of the arbitration*" between parties.

An example of a paradigm case in which we suggest the Court should have been able to order the funding cost to be borne by the defendant is the case of *Bates v The Post Office*. The economics of that case are discussed in more detail later at Question 12 but it was an example in which:

a) the claimants had no way of bringing proceedings without litigation funding, and indeed in many if not all cases their impecuniosity was the result of the actions of the defendant;

b) the defendant's unreasonable "scorched earth" approach to the litigation resulting in the claimants' costs and funding costs increasing; and

c) the impact of this increase in the costs squeezed the economics of the case for the claimants, forcing the claimants to have to settle (to the advantage of the defendant).

This case demonstrates that the ability of the court to order the defendant to bear some or all of the funding cost of the claimant is not just desirable but is necessary in order to do justice in certain cases. The impact of the absence of such a discretion is demonstrated by the effect that such conduct had on the sub-postmasters' net recovery of damages in the *Bates* case, an effect that would not have happened but for the Post Office's litigation conduct and the costs which the sub-postmasters were forced to incur.

We do not propose that such a discretion should be exercised to order funding cost to be paid by the defendant in all cases. Examples where the discretion should be exercised would be where the defendant's conduct towards the claimant made it necessary or reasonable for the claimant to use funding in the first place, or where the defendant's unreasonable litigation conduct increased the claimant's costs and therefore their funding cost.

Giving the court the discretion to order the funding cost to be recoverable addresses any concern that recoverability of funding cost will be unfair to defendants as the court will have the flexibility to do justice on the facts of each case. Further, such an approach will also protect against any possibility that such recoverability could encourage claimants to incur higher costs or result in higher funding costs, as the court would have a wide discretion over the funding cost that it allows to be recoverable. The discretion addresses a similar potential objection namely that the defendant would not know the amount of the liability unless details of the funding are disclosed. This objection could be easily addressed by the court requiring a claimant to have put the defendant on notice of its intention to claim for recovery of its funding cost, providing such details as the court considers necessary.

Another potential objection might be that it would encourage more litigation, by analogy with the impact of (the subsequently reversed) recoverability of success fees and ATE premiums in personal injury litigation. We do not believe that such a comparison would be apt. A discretion to award the funding cost would not, except in a very clear case, change the way that funders look at the economics of a particular case. On this we note that funders making investment decisions typically do not currently place significant economic reliance on discretionary items such as recovery of costs or interest, so we do not anticipate that the existence of such a discretion would have a significant effect in encouraging more litigation generally. However, we do see a significant benefit to claimants in clearly deserving cases such as *Bates,* where recoverability could make the difference by neutralising (and so deterring) the defendant's strategy of outspending the claimants and in enabling claimants to continue rather than being forced to settle, and importantly where recoverability would protect their net recoveries from the litigation. We therefore think that such a rule would have a significant role to play in promoting access to justice in such deserving cases.

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

Recoverability of adverse costs increases the costs of litigation for claimants and thereby imposes an additional obstacle to access to justice. By increasing the cost of cases and adding risk to the funder involved, recoverability restricts the availability of third party funding both generally and in terms of the individual cases which can be funded.

A major risk in commencing a claim is the risk of paying the defendant's costs if the case is lost. Whilst we recognise that there are public policy justifications for this, including disincentivising frivolous litigation being brought (which, as discussed above, no funder would wish to fund in any event, irrespective of the adverse costs position), few claimants are able to bear this risk and claimants may not pursue good claims because of this risk.

The ATE insurance and funding markets have adapted to address this issue and the arrangements for the payment of adverse or security for costs are commonly part of the offer and provision of litigation funding. The provision for cover may take two forms. Either it can come by way of an insurer providing an ATE insurance policy to the claimant or a funder providing an indemnity for adverse costs, which may in turn be backed by ATE insurance. Such ATE insurance will require payment of the upfront premium, which has to be paid at the point that the policy is taken out, as well as a contingent premium which is payable on the successful resolution of the case. These premiums can be very substantial – pricing varies of course from case to case but on a substantial claim, an upfront premium of 20% of the cover limit (being broadly the expected amount of the defendant's costs) and the contingent premium of 60% of the cover limit are not unusual. Funders will then fund the payment of the upfront premium (so charging a multiple of the upfront premium). The cost of such protection therefore may well be a very substantial proportion, or even exceed, the cost to the claimant of paying the defendants' costs in any event. However, the advantage of such arrangements to claimants is in shifting the liability from being an uncovered liability to pay in the event of losing the case (when the claimant will not have recovered damages) to it being a contingent liability to pay from the proceeds of the case on success, when the claimant has the resources (i.e. the damages) to meet the liability. This mechanism removes the disincentive on the claimant to bring their claim (and provides the defendant with access to resources to meet any costs order in their favour) but it imposes a significant and unavoidable cost on claimants in terms of a reduction in their net recoveries on success. This burden is asymmetric in effect: for a well-resourced defendant the adverse costs exposure will be a fraction of its balance sheet and can easily be absorbed whereas for a funded claimant - which may be a consumer or an SME and in any event almost invariably has far fewer resources - an adverse costs award will almost always be a far greater risk than that that claimant can responsibly assume and will frequently exceed the size of its entire net assets. Moreover, the obligation to provide security for costs (dealt with below) which can force claimants to put ATE insurance and other arrangements to be in place, falls only on the claimant side.

Recoverability of adverse costs also restricts the availability of third party funding, both by restricting the cases that can be funded economically and by discouraging funders from entering the market at all. As the above explanation demonstrates, the cost of addressing the risk of paying adverse costs ultimately falls on the claimant and has to be met from the proceeds of the case on success. This increases the overall cost of bringing each case and increases the amount of funding that is required. This means that cases have to be larger than otherwise would be necessary in order for the case to be economic to be brought, restricting the availability of funding to those larger cases. As stated elsewhere in this Response, funders are typically very selective over the cases that they fund and one of the major reasons why cases are not funded is because the economics of the case do not support the funding and ATE cost required. Further, the fact that the funder may have a capped, or even uncapped, liability for such adverse costs itself is a major disincentive on funders entering the UK market. This point is developed further at Question 10.

The cost of meeting this adverse costs risk which ultimately falls on claimants has been exacerbated by judicial decisions which have increased the burden on claimants and funders at the urging of defendants. Under CPR 25.14, the Court may make an order for security for costs against a funder, even where security for costs could not otherwise be ordered against the claimants, for instance because they are individuals. In order to avoid the funder (and therefore ultimately the claimant) bearing the cost of paying cash into Court as well as buying ATE cover, claimants have sought to rely on ATE insurance policies as a means of meeting that security obligation which has in turn led to satellite litigation over whether exclusions in the policies render them unsuitable as a means of providing security. Now it is frequently the case in modern funding practice that the ATE insurance policy contains wording in the form of an anti-avoidance clause which prevents the ATE insurer relying on exclusions so as to allow the claimant to offer the policy as security. However, this comes at the cost of higher insurance premiums if they incorporate anti-avoidance language, increasing the funding cost of financing such premiums and ultimately diminishing claimants' recoveries.

As the CJC Interim Report notes, the case of *Rowe v Ingenious Media Holdings* [2021] EWCA Civ 29 did not concern the adequacy of an ATE insurance policy as security because, in that case, there was not sufficient ATE insurance cover in place to meet the rising costs which the defendant expected to incur and the claimants were seeking to defend an application for security for costs on the basis that they were funded and the funder would in practice have to pay any costs order. In that case the Court of Appeal suggested that funders should be structured and operated in such a way so that there is no doubt they could meet an adverse costs order made against them. The CJC Interim Report at 6.62-6.64, picking up this suggestion, questions whether the costs of putting up security by funders is a costs liability that should be borne by the claimant or the litigation funder personally.

There is a fallacy inherent in the question in suggesting there might be an "either/or" way in which costs fall. All costs of litigating ultimately are met from the proceeds and so fall on the claimant when it wins. There is not a capital pool that can simply be freely sequestered for the purposes of adverse costs. If there is a cost to funders (and their capital sources) then it will be reflected in the price and availability of funding. If it is not a direct cost on the claimant in a case - because it loses the case - it will be a cost on future claimants who must bear the impact of increased prices for funding. The CJC Interim Report rightly says that it will consider these issues and in doing so it should be in this real-world context of acknowledging the necessary cost and pricing of capital.

Further, at present funders and claimants can agree what is the most efficient way to meet the adverse costs risk and, as insurance capacity is typically cheaper than funder capital, typically using ATE insurance will be cheaper than funders allocating capital to the risk. Requiring that funders should be structured in such a way as to be able to bear the costs liability restricts the ability of the market to adopt the most efficient structure to address the risk (or potentially to run the funder's business). As discussed in more detail at Question 10 below, it also creates a significant risk of moral hazard if, in order to satisfy security for costs concerns, funders, who are not in control of the litigation, are forced to de-risk claimants, who have control over settlement, without a limit on the indemnity or without the protection of the terms that would commonly be seen in an ATE insurance policy or funding agreement.

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

Since the *Arkin*[50] decision, case law has moved incrementally to increase the exposure of funders to adverse costs. A funder is now treated as having joint primary liability for costs with the claimant rather than secondary liability[51] if the claimant (or the ATE insurance) does not pay. The application of the Arkin cap, which has been described in academic commentary as '*rather messy*'[52], is now uncertain and the causation requirement, that the funder should have caused the costs to be incurred, has been eroded. The tendency of the Courts, in determining what is just for the purpose of where costs should lie, is to look beyond the claimants to the funder as a deep pocket to meet the costs, irrespective of any agreement that the claimant may have entered into

[50] *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655
[51] *Sharp and others v Blank and others* [2020] EWHC 1870 (Ch)
[52] LSB review, 87

with the funder over its exposure or the extent of the funder's involvement in the case or the measures that it has put in place to address the expected adverse costs risk.

This places funders, but also claimants, in an invidious position. The funder is unable to control the litigation or the adverse costs that are being incurred (because control would render a funder's agreement champertous) but yet will be held liable for those costs, notwithstanding this absence of control. For the defendant, the greater the costs that it incurs, especially in circumstances where it is aware that the claimant has insufficient ATE insurance to meet those costs, the more pressure that it puts on the claimant's funding budget. When the funding budget is exhausted there is no guarantee that a funder will increase its commitment to a claim and, even where it does so, disruption will be caused. In some cases, budget exhaustion may result in a claim being abandoned or in a change of - or downsize to - the legal team. Even where additional funding can be secured, it will increase the funding cost and erode the claimant's ultimate recovery from the claim. In contrast, a defendant at the very least stands good prospects of benefitting from the disruption caused by running up the claimant's costs. The security for costs rules exacerbate this problem, enabling the defendant to require that the funder provide security for those increased costs. All of this squeezes the economics of the case, straining the ability of the funder to keep funding and potentially forcing the claimant to accept a low settlement.

As referenced in the answer to Question 9, this dynamic also creates a moral hazard that the claimant may take advantage of the funder's exposure to adverse costs. This was illustrated in *Rowe v Ingenious Media Holdings*[53]. In that case, the claimants had taken out ATE insurance but costs had escalated and the adverse costs had exceeded the limit of the ATE insurance cover leaving a shortfall. The defendants sought security for costs and in resisting this application, the claimants argued that the funder would meet any third party costs order made under s51 of the Senior Courts Act 1981. This was notwithstanding that the funder had not accepted any contractual liability to meet those costs. The argument was unsuccessful because the funder did not provide evidence of its resources to meet such an order but the case illustrates how s51 and the funder's potential liability for third party costs orders can be used to treat the funder as the ATE insurer of last resort. This dynamic may be particularly acute in other circumstances where, for instance, the claimants are impecunious (so an adverse costs order against it would have little impact) or a large group (where the defendant would have little incentive to seek to enforce an order against the group rather than the funder) and where increasing the ATE insurance cover comes at the cost of additional premium and potentially additional funding cost associated with that, which would diminish the claimant's recovery from the damages. In these circumstances, once funding is in place, the funder's potential exposure to adverse costs perversely may

[53] *Rowe v Ingenious Media Holdings* [2020] EWHC 235 (Ch)

encourage claimants not to put in place appropriate further measures to meet adverse costs themselves, leaving the defendant to fall back solely on the Court's powers under s51.

The exposure that a funder has for adverse costs pursuant to s51 means that the funder stands to lose not just its investment if the case is lost but also potentially an uncapped amount in addition. This is a significant disincentive for funders to fund in England and Wales relative to other jurisdictions, diminishes the availability of funding in the jurisdiction and increases its cost.

Funders are treated inconsistently

The treatment of funders is also inconsistent with the treatment of other third parties that provide comparable economic support for litigation, most notably lawyers acting on risk, ATE insurers (who may receive a contingent premium payable from the proceeds of the claim) and insurers that fund the defence of claims (who benefit from that defence in mitigating their liability under the policy). Funders have less control over the proceedings that they fund than any of these other third parties. Law firms may be more centrally involved in the development of claims, may have a greater degree of practical control in the running of claims and may also participate in their success through conditional fees and DBAs. ATE insurers will typically have the right to approve or reject settlements and defence-side insurers are able to control the conduct and settlement of claims. Yet none of these other parties are treated in a comparable way to funders and lawyers are specifically exempted from liability for adverse costs as a matter of public policy.

We recognise that third party costs orders serve a legitimate purpose in circumstances such as where a director of a company is in control of the company's litigation, funds that litigation and the claim is pursued for the benefit of the director not for the company. However, we suggest that, absent improper conduct such as seeking to control the litigation, the mere provision of third party funding should not itself cause the funder to be directly liable for adverse costs or for providing security for costs, save where they have contractually accepted such liability. Such a change would not prejudice defendants as they would continue to be able to recover costs and demand security for costs from the claimants in the same way as if the case were not funded. And in order to facilitate claimants bringing claims in circumstances where they are typically reluctant to risk being liable for adverse costs, funders and the law firms advising claimants would continue to be incentivised to put in place mechanisms to meet adverse costs in any event. Such a change would encourage wider participation by investors in the funding market and would remove the perverse incentives that the current system creates.

If the Civil Justice Council considers that funders should remain subject to applications under s51, we suggest that the Arkin approach of limiting the funder's exposure to the amount of its funding should remain in order to provide certainty to funders and to prevent funders from being potentially liable for the entire costs of proceedings when they may only have provided a portion of the requisite funding, for instance if a claimant has run out of money in a long running matter and has turned to a funder later in proceedings or where a claimant runs its case on a very lean funding and/or legal budget but the defendant, by contrast, incurs enormous legal fees.

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?

With the exception of opt-out competition claims brought in the CAT where the ultimate beneficiaries of the claim are not parties to the funding agreement, the courts do not interfere in the contractual financing arrangement between funder and funded party by, for example, controlling the pricing of third-party funding arrangements that have been agreed between the parties. For CAT opt-out claims, as part of the certification process, the Court must consider the terms of the funding agreement including the pricing. It must also approve the terms of any settlement (including the portions payable to the class, funder, legal representatives, insurers etc) and it retains the right to review the pricing in the event of there being a judgment in the claimants' favour.

The pricing of third party litigation funding is controlled by inter-linking factors: (1) competition between asset classes in the capital markets; (2) assessment of underlying litigation risk of a given litigation investment; (3) win/loss rates expected at the portfolio level; and (4) competition between funders in the litigation funding market.

a. **Competition between asset classes in the capital markets:** the riskier an investment asset class, the higher the returns expected by investors in capital markets – a so-called risk premium. Litigation finance is a high risk asset class, and investors such as pension funds, financial institutions, university endowment funds, and family offices who typically invest in it will only do so if the returns offered are justified by the risk and the duration of capital on-risk. Without a sufficient risk-premium, capital allocators will simply switch into other competing asset classes such as private equity or venture capital. The returns offered to investors necessary to attract capital towards this high risk asset class, plus the costs of funder's overheads, drives the costs of capital that funders can offer to claimants, law firms, insolvency practitioners in the underlying funded cases.

   There are various reasons why litigation funding justifies a higher risk premium than other private asset classes. For example, (i) whilst private equity funds can place directors on the boards of portfolio companies and exert complete control of the business, litigation funders cannot control conduct of the case in English litigation; (ii) whilst a private equity fund will have certainty of the acquisition cost of a business, a litigation funder is vulnerable to budget overruns and duration extensions; and (iii) as discussed in question 10, courts in England frequently expect litigation funders to be liable for any shortfall in adverse costs. Indeed, uncertainty in the UK created by the current climate where the Supreme Court's decision in PACCAR has been left unfixed and an assault on even multiple-based pricing alternatives looms in the Court of Appeal, just adds to the risks that both reduce supply, and/or increase the price, of capital in this space.

b. Litigation risk assessments of a given investment

Through due diligence, funders assess the profile, strengths, and risks of a specific investment, including the prospects of winning or losing, and the amount of proceeds likely to be recovered on a win, or the amount of funder capital likely to be lost on a loss, the duration of the investment and the risks of any adverse cost liability for the funder.

A funder's assessment of all these factors will inform whether to offer to fund a case at all, or whether to offer higher or lower pricing in order to earn a sufficient risk-adjusted return to meet its target portfolio returns and cover its operating costs (explained next).

c. **Portfolio dynamics – winning cases must pay for losing cases and operating costs and generate returns to compete in the capital markets**

As litigation funding is typically advanced on a "non-recourse" basis (meaning that the funder faces total loss of capital deployed if the funded case is not successful[54]), it is an "equity-like" investment, akin to Series A venture capital (being the first money invested in a start-up company, and therefore, the riskiest) and is similarly priced. Some investments will fail, and others will win. The performance of an asset manager's portfolio is driven by returns from the winning investments which cover the losing/underperforming investments and operating costs. As such, the methodology for litigation funding pricing is in line with other established asset classes. (An insurance business is analogous; the premiums must cover the likelihood and costs of meeting potential claims under the insurance policies sold, plus the underwriting and administration costs, and a profit.)

Funders are not incentivised to invest in cases that don't have good prospects as their business models would fail, they would be subject to judicial criticism and face adverse costs. While

[54] With the risk of further capital loss beyond this if the funder is exposed to uninsured adverse costs risk.

funders are very selective about the cases they back, even cases that looked objectively strong at the beginning can fail. Some cases may ultimately turn on legal points that may only be resolved in the Court of Appeal or even the Supreme Court. Other cases may take substantially longer and cost more than forecast at the outset due to budget overruns, attritional defendant conduct, lawyer availability, case management, or enforcement delays, materially impacting the funder's return on its investment. A case can "win" on its merits but "lose" as an investment. These examples provide a stark reminder that the risk and impact of losing cases is real and must be overcome by returns elsewhere in the portfolio in order for a litigation fund to be viable overall.

d. **The competitive forces in the funding market –** there are 16 funder members of the ALF and some non-ALF funders competing for a limited number of viable funding opportunities. Negotiations between potential funders and the claimant and their solicitors takes place in relation to the pricing and other terms of the funding. Lawyers in the market now have an expectation of the kind of funding terms which are available, and claimants (usually via their lawyers, or brokers) often seek pricing for funding on a case from a number of funders to create competitive tension and therefore optimal terms, although pricing will not be the only consideration for a claimant when seeking a funding partner. (See more on this in question 12 below).

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

a. If so, why?

b. If not, why not?

No, a funder's return on third party funding arrangements should not be subject to controls such as a cap. Although it may seem superficially attractive and ostensibly designed to protect claimants, limits on funder returns (such as a cap) will reduce the number cases that funders are willing or able to support in the UK. It is this chilling effect on the industry that in fact motivates many proponents of caps, for example see US Chamber of Commerce-backed groups calling for introduction of a cap.[55]

As discussed above in question 11, litigation funding is non-recourse - if a case loses, the funder loses its investment (and may incur further adverse costs). In a market where funders, ATE insurers, and law firms will only support meritorious cases, the mathematics of probabilities pricing based

[55] Good Law Project, *The dark money shielding corporate wrongdoing*, 24 October 2024 - https://goodlawproject.org/the-dark-money-shielding-corporate-wrongdoing/

on win / loss rates drives the pricing funders need in order to make a return commensurate with litigation risk, duration and operating costs (akin to other asset classes).

Why pricing controls are inappropriate

There are three overarching reasons why a funder's returns should not be limited by artificial controls:

1. A competitive funding market is best placed to assess and price each claim. Each claim's risk profile is different and is the subject of a sophisticated and thorough assessment by the funder at the outset. Given the wide variation in risk profile from case to case, a blanket approach to pricing, such as a cap, is not appropriate. In each funded matter, the funded party is advised by their solicitor about the terms of the funding and the extent to which the terms are competitive. The funding market is now sufficiently established that there is choice for claimants and competitive pressures for funders. Solicitors are familiar with the typical pricing and terms required by funders, and there are often brokers involved to help claimants and lawyers source optimal terms (of both funding and ATE insurance).

2. Any cap will narrow the number and type of cases on which funders are willing/able to offer funding. It may have particular impact on the funding of meritorious but high-risk cases, or cases that don't have very high quantum relative to the costs or funding requirement. This will limit the extent to which third party funding can facilitate redress for businesses and consumers.

3. Artificial controls or caps on funder returns on individual cases ignore the underlying costs and commercial aspects of funding. They do not account for, more generally, the effect of risk and duration on returns, and do not consider the commercial mechanics impacting funder returns on a portfolio basis (i.e. net of losses on unsuccessful cases) as illustrated above.

For reasons that are likely to include the above, no jurisdiction in the world where litigation funding is used (other than Germany[56]), has imposed caps on funding. Australia reviewed the possibility but decided not to apply statutory fee controls, and ELI in its Report[57] decided against recommending a cap on funder returns.

[56] Whilst the EU Representative Actions Directive ("**RAD**") does not impose any cap on funders' fees, the German legislator when implementing the RAD opted for a price cap, limiting the funder's fee to 10% of the sum awarded. The effect of this is to make it unattractive for funders to get involved with consumer organisations within the scope of application of the RAD in Germany, stifling the use of the procedure.

[57] ELI report, 44

1. <u>A competitive funding market is best placed to assess and price the risk profile of a case.</u>

When a funder is approached with a new claim (by a potential claimant, law firm, or broker) it will assess the risks of the case and propose commensurate pricing.

The pricing exercise is a sophisticated one. A funder will have a base or target return requirement based on its internal costs of capital or underlying investor requirements. It will consider the particular prospects, profile, and risks in the case, and the likely recovery on settlement or court award, and the probability of recovery outcomes at different stages of the case (and the likely timeframe for the recoveries), in order to model the potential risk-adjusted return from the investment. It will then tailor the pricing terms to achieve a balance between pricing that meets its target portfolio return requirements, and reflects the nature and timing of the capital requirement and the profile and risks in the case (including compared to other investment opportunities available to the funder, in the UK or elsewhere), whilst being sufficiently competitive and attractive for acceptance by the funded party and its advisors.

This exercise involves the consideration and assessment of case specific factors on each matter including:

1. The type and profile of the claim (head of claim, forum, governing law, procedure)
2. The value of the claim (quantum) and the risks around establishing this;
3. The legal merits of the claim, and overall prospects of success;
4. The identity and nature of the defendant(s) - including location, asset position, creditworthiness, enforceability concerns;
5. The nature of the claimant and any counterparty (contractual) risk for the funder
6. The extent of supportive evidence for the case (or risk that evidence will not be obtained to support the claims);
7. The case budget, legal team fee arrangements (including any conditional or contingency fee (DBA) arrangement), details of the funding requirement, and the ratio between the funding commitment and the expected recovery;
8. Likely defendant costs, potential adverse costs liability for claimant or funder, and ATE insurance cost;

9. The expected timeline to an outcome in the matter, and to payment of the amounts due to the funder (and the risk that the timelines are stretched, for example through any prolonged appeal or enforcement process);

10. The claimant's objectives with regards to settlement, and the likelihood of settlement (at different stages in the proceedings);

11. Whether there are any procedural hurdles and if so the consequent costs;

12. The details of the likely proceeds waterfall (i.e. the amounts that need to be paid to third parties such as lawyers, funders and insurers as well as the claimant, from the proceeds recovered in the claims, and the order of priority for such payments, and the extent to which such sums may be paid in priority to the funder's return).

This analysis will feed into the level of funding return sought by the funder, and also the structure of the funding return.[58]

Competition in the funding market also dictates pricing. It is open to the recipient of a funding offer to attempt to negotiate the pricing, so should the claimant wish to agree a cap it is open for it to seek to do so (and depending on the profile of the funding opportunity, it may have bargaining power to achieve this). This is an approach endorsed in Singapore[59] and Hong Kong.

It has been suggested that it would be advisable for the Court to have greater control over funding pricing, with funder fees being approved at an early stage of a case, or after the event. There are many issues with this, including that it goes against freedom of contract, and overrides the matter specific analysis undertaken by funders when determining the appropriate pricing for a case, the competitive drivers behind pricing, any negotiation between the funder and the claimant/their advisers when entering the contract, and the nature of the specific rights and obligations of the parties to the funding agreement. It also overlooks the fact that few judges have experience of funding and what pricing should be. Judges do not get involved in any other type of financial transaction to set pricing and giving them a role here with regards to third party litigation funding would cause uncertainty for all parties, add to the risks for the funder, and likely lead to fewer claims being funded.

[58] Fee structures can be linked to funding deployed, funding committed, to the timing (and extent) of recovery, to the lawyers' fee arrangements, or to interest or IRR based calculations.
[59] The Civil Law (Amendment) Act 2017 (No 2 of 2017), in force 1 Mar 2017, was passed to permit litigation funding in international arbitration seated in Singapore and in related court (including enforcement) and mediation proceedings. Discussed in: Mulheron, The Modern Doctrines of Champerty and Maintenance, OUP, 2023, 7071.

2. <u>Any cap will reduce claimants' access to capital particularly in meritorious but high-risk cases, or in relation to cases that don't have very high quantum relative to the funding requirement.</u>

A cap will disincentivise funders from investing in cases where the claim value is small compared to the budget and / or there is a risk of material increases in the budgeted costs or decreases in the expected recoveries. Where the ratio between quantum and costs on a case is tight, then it becomes more likely that the amounts due to a funder will make up a higher proportion of proceeds. If a cap were in play, while at the outset of a case a projected funder return may appear to be within a potential returns cap, changes to the recoverable quantum or to the budget may push the amounts due to the funder to be outside of a cap. The application of a cap on funder returns would therefore act to limit the probability of scenario outcomes where a funder is paid back its capital and its full return, making a case less commercially sound as an investment and meaning fewer meritorious cases received funding.

A cap is an arbitrary tool and would prevent certain claimants from obtaining funding notwithstanding that they are willing to agree to the funder receiving a recovery greater than the level of any cap in recognition of the risks of the particular case.

Furthermore, for meritorious but higher risk cases (for example cases involving a novel point of law, or where there is a higher enforcement risk), a cap which limits the funder returns in certain potential outcomes will limit the appetite and ability of funders to provide capital for such cases (given the risks in the case, and the funding requirement, and the funders internal cost of capital, remain the same), including high-risk disputes such as the Post Office Group Litigation[60]. As the lead claimant Alan Bates has commented, had their claim not been funded and succeeded, the sub post-masters would never have been in a position to expose what had happened to them and to be able to seek additional compensation. The funding was critical to achieving that outcome as recognised by Lord Arbuthnot of Edrom during the 15 April 2024 House of Lords debate on the Litigation Funding Agreements (Enforceability) Bill when he said:

"*However, I do not say that the litigation funders were unfairly recompensed. They took the immense risk of taking on the country's most trusted brand, the Post Office, which was backed by the bottomless purse of the taxpayer. That was a risk that needed a high pay-off if it succeeded, because it would have been ruinously expensive for the litigation funders if it had failed. We know, and we watched, how the Post Office did its best to spend the sub-postmasters into submission in a disgraceful display of legal bullying, so the litigation funders deserved their fees*".

[60] [2019] EWHC 871 (QB)

The Post Office case provides an illustration of a matter in which the total amount of capital requested from the funder can end up significantly higher than the expected costs projected by the law firm at the outset of a case. This was partly due to the defendants deliberately fighting every point to drive up costs in an attempt to make the claim uneconomic. Emails from the Post Office's law firms specifically stated they should drive up costs for the claimant by their (defence) tactics in order to drive a wedge between the claimants and the funder in an attempt to convince the funder to stop funding[61].

In addition to this, again funders have only very limited tools to seek to encourage the lawyers to keep to the budget which they proposed at the outset. It is problematic to funders if budgets are exceeded; it increases the funder's concentration risk (i.e. it increases the portion of the funder's capital which is invested in a particular investment or class of investments) and makes the investment riskier as the economics become strained and move towards, or beyond, the point where more funding is no longer viable.

The effect of this is that successful cases which result in a large "fee" being paid to the funder (which may make up large proportions of the total proceeds in the case) may not actually be as profitable for the funder as they may at first appear because most of the fee paid to the funder will be to reimburse the funding drawn to meet costs. As Professor Rachel Mulheron noted in the LSB Review:

> "*Cases which may appear successful on their face can be 'disasters' for funders, because the success fee is 'consumed' by costs. There may be no profit made at all. This may particularly occur if: (i) the claim value is significantly less than what was envisaged (according to one funder, its statistics show that, 'on average, the amount of financial benefit recovered in our funded cases was only 30% of the original claim value projected by the law firm, which shows that law firms do not assess the value of their client's claim very well'); (ii) the case had a much longer duration than anticipated; (iii) there are changes to the substantive law underpinning the case that requires further legal opinion, expert evidence, or revisiting of factual evidence; or (iv) there is a procedural hiccup (such as the PACCAR saga) which necessitates interlocutory hearings about preliminary issues which were not anticipated when the success fee was contractually negotiated. The fact that cases which outwardly look successful may end up being 'losing cases' for a funder is precisely because the success fee for a funder typically includes the own-side costs, expenses and*

[61] See Professor Richard Moorhead's Hamlyn Lectures on the failure of legal professional ethics through the Post Office Case and a need for a change in litigation culture - https://law.exeter.ac.uk/about/thehamlyntrust/lectures/; John Hyde – *Judges urged to call out litigators working to hide the truth* – 14 November 2024, Law Gazette, available at https://www.lawgazette.co.uk/news/judges-urged-to-call-out-litigators-working-to-hide-the-truth/5121531.article?; Johsua Rozenberg, *Are solicitors blinded by an 'ideology of zeal'?* – 4 November 2024, Law Gazette, available at https://www.lawgazette.co.uk/commentary-and-opinion/are-solicitors-blinded-by-an-ideology-of-zeal/5121419.article

disbursements incurred in pursuing the case on the funded client's behalf. This is in contrast to DBA funding, where the DBA success fee covers counsel's fees, but does not cover items such as court filing fees, expert witness fees, any ATE premium that must be paid, transcript fees, etc – under the DBA regime, the client must pay those types of 'expenses' in addition to the DBA success fee. This contrast is an important one to draw, when explaining why, inwardly, funders' success fees may be 'consumed' by costs to a much greater degree than a lawyer's DBA fee would ever be."[62]

This misinterpretation of the amounts paid to the funder appears to have led to a misalignment between the public perception of the funder return, and its actual profit, in the Post Office Group Litigation. The Law Society Gazette reported, on this case, that:

"*The 555 postmasters who exposed the scandal by suing the Post Office received more than £42m plus costs when their claims were settled in 2019. But around £31m of this sum went to litigation funders, leaving the surviving claimants with little compensation for their shattered lives.*"[63]

This passage suggests that the funder's profit was almost 75%. The US Chamber of Commerce Institute for Legal Reform has suggested that the funder's profit on this case was almost 80%.[64] However, these figures are **wrong** as they assume the amounts paid to the funder are pure profit, whereas actually much of the amount paid to the funder was just reimbursement of the capital the funder had provided for the costs. This is illustrated by the following breakdown of the proceeds arising from the Post Office matter:

[62] LSB Review at Page 98.
[63] Joshua Rozenberg, *Post Office scandal: Lawyers in the frame* (LSG, 5 Jan 2024), available at: https://www.lawgazette.co.uk/commentary-and-opinion/post-office-scandal-lawyers-in-theframe/5118335.article)
[64] US Chamber of Commerce Institute for Legal Reform, *ITV's Mr Bates v Post Office highlights problematic TPLF practices* (22 Jan 2024), available at: https://instituteforlegalreform.com/blog/itvs-mr-bates-vs-the-postoffice-highlights-problematic-tplf-practices/

Breakdown of the Distribution of the £57.75m[65] Settlement in the Post Office Group Litigation

	(£)	% of Total
Reimbursement of Legal Costs and Disbursements	22,000,000	38%
Funder Return on Investment	24,000,000	42%
Return to Claimants	11,700,000	20%
Total	57,700,000	100%

The £22m spent on legal fees and disbursements was more than three times the amount originally budgeted for when the case was signed. However, it was necessary for the funder to continue to increase the budget (and take on more risk) to ensure equality of arms with the Post Office who had deep pockets and were willing to spend more on legal fees than the total amount of the damages they ultimately paid to the claimants (£43m legal fees v £42m paid in damages). Sir Alan Bates himself has criticised this behaviour – see Sir Alan Bates' piece in the Guardian May 2024.[66] Were the funder's recoveries to have been capped it would have acted as a significant disincentive to the funder agreeing to increase its funding commitment to meet the increases in the budget and it is likely that it would have blocked the funder from continuing to fund the case as there would have been a material risk that the funder may not recover its contractual return or even all of its invested capital.[67] In other words, a cap would have likely made the Horizon case unfundable, meaning one of the UK's most prominent miscarriages of justice may never have come to light.

3. Artificial controls or caps on funder returns on individual cases ignore the costs of funding more generally, the effect of duration on returns, and do not consider returns to a funder on a portfolio basis (i.e. net of loses on unsuccessful cases).

Any cap on returns would apply to pricing on an individual case but, for funders, pricing is affected by both the risk / reward on that case but also their assumptions about risks and return prospects across a portfolio, as well as their costs of providing funding more generally (funder overheads, the cost of capital etc). To attract investment, returns funders generate for their investors need to be

[65] £42m for damages; £0.75m for a Support Fund which the Claimants would establish and ad-minister to provide financial relief and assistance in hardship cases; £15m was payable by the defendant Post Office towards the Claimants' legal costs.
[66] Bates, *Our Post Office victory is being twisted by those who don't want to see its like again*, Guardian, 10 May 2024
[67] Neil Purslow, *Litigation funding cap can only help defendants with deep pockets* (The Times, 14 March 2024)

equivalent to the returns the investors could make from investing in another asset class of equivalent risk and timescale; if not, funders will not be able to attract external capital to invest in litigation, meaning less funding and less access to justice.

Across a portfolio of litigation cases, some cases may be successful, some may give rise to limited or no profit, and others will result in a capital loss. Profits on the successful cases need to be sufficient to produce an attractive return for investors net of losses on the unsuccessful cases (and netting off internal business costs). A cap limiting returns on individual cases would impact these commercial dynamics and likely restrict the types of cases they could invest in in the UK (potentially only focussing on higher value matters).

Caps on returns, and in particular a "one size fits all" percentage cap, are a blunt instrument which does not consider these commercial factors, the consequence being that it will likely restrict funders to only being able to support the very largest of claims (where there is a lower likelihood that, with a cap in play, the target funder returns would not be reached) in order to attract investors and remain attractive as an investment type. Funding will be less forthcoming for cases which caps render less commercially viable for funding, which would have a negative effect on access to justice. Furthermore, the effect of a cap across a portfolio is to reduce the overall return (by capping upside on successful cases without mitigating losses on losing cases). As well as leading funders to avoid cases where the cap may apply, they will also need to increase pricing across all cases to compensate for the negative impact of the cap at a portfolio level or otherwise the attractiveness of investing will be diminished, reducing availability of capital in the market and access to justice.

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

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

For the reasons set out above, no "one size fits all" cap should be set.

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

N/A.

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

N/A

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

See point above.

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

See point above.

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.

a. Advantages

i. As argued by Lord Neuberger, in the lecture he delivered in 2013[68], litigation funding is critically important in ensuring equality of arms and enabling those whose individual claims are insufficient to support the costs of pursuing their claims. Without funding, numerous good claims are unable to be pursued and there is an inevitable imbalance in favour of alleged wrongdoers.

ii. As set out in our answers to previous questions, there are numerous legitimate claims which are not pursued because the claimant(s) cannot afford the costs of running their claim. They also cannot afford to buy ATE insurance to protect them from adverse costs exposure. Unlike success fee arrangements and insurance, funding provides cash investment which pays for disbursements and in particular the costs of experts which cannot be borne on a success basis. Some forms of claim are only possible, to date, with the support of litigation funding — there are no opt out consumer cases in the CAT which are not funded. The individual claim values in these cases are such that no individual could ever contemplate bringing an individual claim in light of the extremely high cost of bringing these claims, which can run into the tens of millions. And lawyers are

[68] Lord Neuberger gives the inaugural Harbour Lecture at Gray's Inn - UK Supreme Court

not permitted to run cases on a DBA in the CAT. Even if they were, no law firm is keen to both risk their fees and also pay for the very high third-party costs of counsel, experts and the ATE insurance premium. And in many cases the claims brought in the CAT are follow on cases from a regulatory finding that has already found the defendant guilty of a breach of competition law, sometimes criminally. The claim in the CAT is intended to provide compensation to the victims of that wrongdoing. Without funding, these companies would continue to have free rein to act unlawfully, safe in the knowledge that their customers do not have the resources to bring a claim against them. That cannot be right in a civilised society.

iii. Litigation funding brings equality of arms in the funding of a dispute so that the defendant cannot so easily deprive claimants of what they are entitled to by trying to outspend and outlast the claimants, as seen in the Post Office case. One way to solve this would be to order the payment of the funder's fee by a losing defendant, which would go some way to providing greater equity to claimants (see answer to Question 8(e) above).

iv. Commercial claimants face similar challenges. Most companies only have small legal budgets and even larger companies have finite legal budgets which have to be used for a variety of activities, such as regulatory and defence work. Funding is essential if they are to be able to pursue claims e.g. the claims brought by road hauliers against truck manufacturers in the CAT.

v. External litigation finance permits companies and individuals to assess the opportunity cost of paying for litigation. In other words, companies and individuals may choose litigation finance as their best route to pursue their claims in courts or tribunals. It means that money otherwise needed to pay for litigation may be deployed by the claimant elsewhere in a way that makes it economic to rely on litigation finance for the litigation instead. To take one example, a company's annual legal budget is exhausted half way through the year. It could be topped-up for instance by cutting salaries and bonuses in the compensation round, or cancelling investments in new machinery or postponing expensive scientific research. On the other hand the company could decide that it would prefer to maintain those investments and use third party capital instead on a non-recourse basis so it did not need to borrow money but rather part of any winnings could be used

vi. Funding also offers benefits to defendants. The defendant facing a funded case knows it should have the benefit of ATE insurance to cover their costs in the event they successfully defend the claim. This puts them in a better position than they might be with a claimant who is not so financially stable.

vii. Litigation funders carefully diligence potential cases, providing an objective review and directing resources towards meritorious cases. Frequently the funder will bring expertise and experience to the table. Traditional third-party funding arrangements also have in-built checks and balances which help, for instance, manage costs.

b. Disadvantages

Unfortunately, commercial litigation funding is not suitable for all types of claims – such as low quantum disputes or those where the remedies are non-monetary, because of the high costs of litigation. If the costs of litigating were lower, more good cases could be able to be pursued with support from litigation finance.

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.

i. Conditional Fee Agreements (CFA) and Damages Based Agreements (DBA):

There are some claims which are suitable to be run by law firms on either:

- a CFA (where an uplift is chargeable by the lawyers on their usual hourly rate in return for a discount ("partial CFA") or no charge ("full CFA") through the life of the case); or
- a DBA, which rewards the lawyer with a share of the proceeds in return for foregoing their fees through the life of the case as well as paying for all the third party costs of the case.

Full CFAs tend only to work for smaller cases, such as personal injury claims, which have a shorter life cycle and a lower risk.

DBAs do not tend to be widely used because most law firms' capital structure is such that they distribute profits annually to partners and therefore don't have the retained funds to be able to support the foregoing of fees and payment of third party costs involved in larger cases (barrister fees, expert fees, ATE premia, disbursements, etc). Firms are reluctant to fund the cash costs as well as defer their own fees. Partial CFAs are often used not as an alternative to but rather in conjunction with third party funding which is provided alongside.

Law firms acting on a CFA or DBA arrangement may also be the recipients of funding behind the scenes, with the capital being provided to the firm rather than the claimant. In this situation the CFA and DBA arrangements are not alternatives to funding at all but are still reliant on funding.

There can be conflict in CFA and DBA fee structures because the lawyer with conduct of the case also stands to benefit from its outcome and internal financial pressures can cause them to accept settlements on cases to ease cash flow. Further, as was evidenced in the emissions cases, CFAs and DBAs can have a tendency to cause firms to charge much higher fees where there are not the checks and balances provided by conventional third party funding.[69]

ii. Before the Event Insurance (BTE), (also known as 'legal expenses insurance'):

Many insurance policies have legal cover included as part of the cover. These typically cover personal litigation issues which might arise out of, for example a motor accident. They are typically limited in their coverage up to, for example, £100,000 of cover, and contain a number of limitations as to the law firm the policy holder can use. They don't cover all types of dispute.

Some businesses take out polices which might cover them in relation to employment disputes, but there is not insurance available which will cover them to bring large claims of the type litigation funding can cover.

iii. Trade Union Funding:

When Union membership was much higher and Trade Unions therefore had more funds available, they would, as a benefit of membership, often cover the costs of litigation on behalf of their members. Typically that covered employment related disputes. However, falls in union membership has led to a

[69] *Pan NOx Emissions Litigations* [2024] EWHC 1728 (KB)

drop in income which means they are unable to do so to the same scale. As a result, funders have, where they can, stepped in to fill the gaps left, in relation to, in particular, equal pay claims and claims on behalf of zero hours contract workers who have not been paid minimum wage or holiday pay, for example in the ongoing Asda claim seeking to secure compensation for 60,000 (largely female) shop floor workers paid less than their (largely male) warehouse worker colleagues.[70] Without funding, these critical rights would not be enforced as individuals cannot afford to bring the claims themselves.

iv. After the Event (ATE) Insurance:

This is insurance purchased by a party after a dispute has arisen. It covers the party's exposure to adverse costs in the event the case is lost. It is available to both claimants and defendants. However, not only does it not provide funding to cover the legal costs to bring the claim, it also requires the upfront payment of a premium to secure the cover (premiums typically running at around 35-40% of the amount of cover required, potentially with some portion of premium deferred and contingent on success) i.e. £35-40,000 in premium for every £100,000 of cover required. This is no longer a recoverable cost from the opposing party, and is sufficiently expensive to be inaccessible for many claimants.

v. Legal Aid:

As we are all aware, civil legal aid now covers only a tiny handful of civil claims as the financial eligibility criteria have been squeezed. More broadly, the National Audit Office found that legal aid has seen £728 million in cuts over the last decade.[71] Given current spending pressures on the Government more widely, it seems highly unlikely that it would be available for the types of cases for which litigation funding is requested. Where the State is unable to provide access to justice, it is incumbent on it to promote, not stifle, alternative funding options, and private enforcement (often possible solely due to third party litigation funding). This has been recognised by the CMA among others as a

[70] Leigh Day, *Equal Value hearing for Asda equal pay claim starts following Next win*, 10 September 2024 - https://www.leighday.co.uk/news/news/2024-news/equal-value-hearing-for-asda-equal-pay-claim-starts-following-next-win/

[71] National Audit Office, *Government's management of Legal Aid*, 6 February 2024 - https://www.nao.org.uk/wp-content/uploads/2024/02/governments-management-of-legal-aid.pdf

critical part of properly functioning consumer and competition law.[72] On the other hand, funded group and collective actions have partially addressed this need.

vi. Crowd Funding:

As the ELI Report identified, crowdfunding has very limited application and is not able to provide the range of solutions litigation funding provides.[73]

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.

The most typical example of where different types of funding complement each other is where the law firm running the claim acts partly or fully on risk and the funder covers the third party expenses and adverse costs exposure (usually with an ATE insurance policy) and the law firm and funder (and often an ATE insurer) then share in the upside of the case if it is successful.

c. If so, when and how?

This model is very case and law firm dependent. It will depend on the level of appetite for risk which the law firm is prepared to take and whether the funder thinks that the levels of financial risk and reward are aligned between all parties. Law firms vary considerably as to the amount of risk they will take, despite the flexibility provided by the CFA and DBA mechanisms available to do so. Law firms rarely reduce their rates below a level which covers their overhead, so this is an imperfect alternative.

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?

Funding is used not only by those without the financial resources to self-fund their litigation but also by entities who have finite legal budgets or wish to use their funds for investment in their business. They see funding as an option in the same way they fund many other aspects of their business and assess the cost of doing so on a case by case basis. While clients might want their lawyers to act fully on risk rather than using litigation finance, most law firms are not prepared to do so beyond

[72] CMA, *Private actions and public enforcement*, 5 May 2023 - https://www.gov.uk/government/speeches/private-actions-and-public-enforcement
[73] ELI report, 68

risking a fraction of their work in progress. They are not usually prepared to pay third party disbursements or cover the adverse costs risk on behalf of their client. As discussed elsewhere in this submission, group and class actions are essentially only possible with litigation funding support of the group and the law firm prosecuting the case.

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 last review of DBAs was carried out in 2019 by Professor Rachael Mulheron and Nick Bacon KC. They made a number of sensible recommendations for reform of the DBA Regulations which it is disappointing were not implemented at the time as they would have provided much needed clarity.

The PACCAR judgment found that Litigation Funding Agreements are DBAs and therefore fall within the requirements of the DBA Regulations, despite the fact that legislators never intended the regulations to apply to funding arrangements. This decision has had a chilling effect on the environment for funding and numbers of collective actions issued in the CAT and the numbers of cases in the Commercial Court have both dropped since. The decision has also been the cause of satellite litigation brought by claimants seeking to take advantage of the decision in order to escape the obligations that they agreed to in taking the benefit of funding.

Even though the CAT has found that the DBA Regulations do not apply to funding agreements with multiple-based funding terms, defendants continue to challenge that point and the issue is due to be decided by the Court of Appeal in the summer. These challenges to funding arrangements are often deployed by defendants to attack the funding arrangements so the cases against them cannot proceed. It is an often cynical use of the court's time when such defendants may have already been found guilty of wrongdoing by the relevant regulatory authorities. While the appeals in these cases continue, the funding market continues to face material uncertainty which is causing investors to fund elsewhere.

The Litigation Funding (Enforceability) Bill was very close to being passed in July 2024 when the general election was called, before running out of time to complete its passage through Parliament. This was despite having cross party support to reverse PACCAR. We can see no public policy justification for the continuing application of the DBA Regulations to third party funding, it being acknowledged in the dissenting judgment in the Supreme Court in PACCAR that funding agreements could not comply with those regulations. Irrespective of whatever other conclusions the CJC may reach in its final report, we believe that third party funding should be removed from the ambit of the DBA Regulations as soon as possible by the reintroduction of the PACCAR Bill.

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?

Public mandatory legal expenses insurance typically only covers small personal claims and would have no impact on the claims which funders fund and the budgets for which can run into the millions per case. If it were to be made compulsory it would also, presumably, lead to an increase in the cost of insurance as the risk profile of the product changed for the insurers issuing these policies, becoming more expensive and so less accessible for consumers and small businesses.

A useful reform would be to replicate the position in the US where defendants are obliged to disclose the amount of insurance cover which they have. This would level the playing field and increase efficiency in the Court system and decrease demands on Court resources because some cases would not proceed once it became clear there is insufficient insurance cover available.

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?

CFAs and ATE insurance tend to work well together in smaller cases. The removal of the recovery of CFA success fees and ATE insurance premiums from losing parties meant that an increasing number of cases were not financially viable, which has led to a reduction in the number of certain types of smaller claims run on this basis. ATE insurance is used by funders in their cases as a more cost-effective way of covering adverse costs orders.

It is not evident that reform is required, though many lawyers say that if the ability to recover a reasonable CFA success fee and reasonable ATE insurance premium were reinstated, it would leave the claimant whole, rather than being penalised for resorting to these products as their only way to bring their legitimate claim.

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

We agree with the position taken in the ELI Report on crowd funding but do not propose specific reforms as this is not the area of business of ILFA members.

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

Portfolio funding can take many different forms, ranging from multiple third party funding arrangements between funder and client being in place, to non-recourse or recourse debt funding to law firms where the lender has no relationship with the firm's clients and where the lender expects repayment solely from the fees generated by the law firm across the portfolio of cases.

In the former category the issues involved are substantially the same as in the case of single case third party funding and so we do not address that here and rather focus on the latter category of portfolio funding provided to law firms.

As the CJC Interim Report identifies, this has been an area in which there have been notable law firm failures which have impacted clients. These failures have also impacted the lenders to these firms and have occurred notwithstanding that these arrangements should in theory, and according to the pricing of the funding, be lower risk than single case third party funding arrangements.

In the experience of the funding market, the problems in these firms arise from a) a failure of the firm to carry out the work competently or in many cases at all and b) the firms running imprudent business models in which they focus on drawing as much debt funding as they can by recruiting clients without sufficient (or even any) focus on realising results and therefore fees that will enable them to repay those loans. These problems appear to arise in areas of practice involving large numbers of relatively low value individual consumer cases but not in the large group litigation cases where the dynamic is more akin to commercial litigation, even if the claimants are consumers.

The source of the issue in these is not an absence of regulation of third party funding (as these are not third party funding arrangements but debt funding), nor an absence of regulation of the law firms involved: the law firm borrowers are regulated by the SRA and they are subject to a variety of professional obligations governing the running of the firms and the work that they undertake for clients. It is beyond the scope of this Response to comment on potential reforms of the regulation of firms in this area but we note that the SRA is focussed on the business models being run by these firms and has conducted a thematic review into this area, both of which we welcome.

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?

Any reforms should consider the impact on claimants of having to use any of the funding solutions used here, as discussed in our comments about DBAs above. Critically the Litigation Funding

Agreements (Enforceability) Bill needs to be reintroduced and passed into law as soon as possible. The uncertainty created by the judgment, its negative impact on availability of funding, the misuse of court time in raising spurious PACCAR connected arguments by defendants and the consequent impact on the English legal market is significant and only increasing.

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?

ADR/NDR:

We support the court's active use of its powers to promote alternative or negotiated dispute resolution at pre-action and post-issue stages, for example the recent inclusion of CPR Rule 1.1(2)(f) "*Dealing with a case justly and at proportionate cost includes, so far as is practicable – promoting or using alternative dispute resolution*". Similarly, we support the CJC's proposal to introduce a new pre-action protocol for multi-track proceedings in the Business and Property Courts, which would require parties subject to the pre-action protocol to engage in a pre-action dispute resolution process.

Funder's return in representative actions:

Where a claim is brought under CPR 19.8 by a representative party, typically it will only be the representative party who is a party to the funding agreement. All of the other class members are not therefore a party to it. Leggatt LJ in *Lloyd v Google*[74] raised the point that difficulties may arise if a funded representative party receives damages and intends to pay a third-party funder's commission in circumstances where: (i) the other class members have not provided express consent to such a payment being made; and (ii) given that there is no rule which currently addresses the question of funder's remuneration in representative actions. This is in contrast to the position for payments to funders in collective proceedings before the CAT. To address this issue, we propose that CPR 19.8 is amended to expressly permit that representative parties may make payments to litigation funders in accordance with their contractual arrangements prior to distributing the residual balance of the damages to the class.

[74] [2021] UKSC 50, [83]. See also discussion of this issue in the judgment of Mr Justice Knowles in *Commission Recovery Ltd v Marks & Clerk LLP & Anor* [2023] EWHC 398 (Comm) at paragraphs 73 to 76.

Amendments to rules on costs:

Consistent with our response to question 8(e), we support appropriate amendments being made to the CPR (e.g. at CPR 44 and 46) and court specific court rules as appropriate to reflect our proposal that in certain limited circumstances the court may order a defendant to pay the reasonable funding cost of a successful claimant.

Amendments to rules on security for costs:

For the reasons set out in answer to Question 9 above, we suggest that the mere provision of third party funding by a member of the ALF (and therefore subject to the ALF Code of Conduct) should not create a separate right for a defendant to seek security for costs and so should be excluded as a basis for ordering security for costs under CPR 25.14.

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

We refer to our answer to question 20 above.

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?

See the discussion on adverse costs in the answers to Questions 9 and 10 and the proposed rule changes in answer to Question 23. We propose that the use of third party funding should not in itself give the defendant the right to seek security for costs as this increases the costs of claimants, such as groups of individuals, who would otherwise not be obliged to provide security.

We also propose that funders should not, absent improper conduct or where they have contractually agreed to do so, remain exposed to paying adverse costs in proceedings they have funded, as such liability creates perverse incentives and discourages investment in the funding market.

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?

Increased use of costs management

Litigation funders wish to see cases dealt with proportionately, brought to resolution as swiftly as possible, and costs managed effectively. In many respects, the court oversees funded cases being conducted effectively. But costs management (both of funded claimant and defendant costs) is a common concern for our members – and certain funders have observed that the court's active case management has led to costs increasing considerably.[75]

We consider that greater use of the court's *existing* costs management powers (requiring costs budgeting or the exchange of costs estimates) would allow the court to better appreciate the costs consequences of case management decisions, e.g. ordering split trials in large or complex cases.[76] Prior to making a case management decision with cost consequences, the parties could, for example, exchange costs estimates for the different options being considered.

Pre-action disclosure in the CAT

In addition, we propose that the court should encourage pre-action correspondence and disclosure in proceedings anticipated to be heard by the CAT, as this may allow claims to be disposed of more efficiently (indeed they may never be filed) or brought on a narrower basis. This could be achieved by (i) a practice direction issued by the CAT or (ii) commentary otherwise to encourage claimants to seek pre-action disclosure.

In the CAT, there is limited experience of pre-action disclosure. As the minutes of the CAT User Group meetings record,[77] there had been no applications for pre-action disclosure in the CAT and therefore no incentive for potential defendants to engage with claimants to share documents that will narrow the issues in dispute.

Increased use of pre-action disclosure may also avoid rather than cause further carriage disputes to be brought, to the extent that claims are avoided or narrowed in scope.

We also support the court actively seeking to promote ADR/NDR (see our response to Question 23).

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[75] LSB Review, 84-85.
[76] This view accords to a degree with the authors of the Interim CJC report at paragraph 6.9.
[77] Page 3 of Minutes of the Minutes of the Competition Appeal Tribunal User Group Meeting (01/23) on Wednesday 8 February 2023 records.

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?

We suggest that any disclosure of private funding arrangements should only be required in order to meet a specific and legitimate public policy objective. In our view we do not believe that a general requirement to disclose the existence of funding is required or necessary.

The experience of the cases in the CAT, most graphically illustrated in the PACCAR challenge but also reflected in other challenges to funding arrangements in the *Road Haulage Association Limited v Man SE and Others*[78] and other CAT cases, show that disclosure of funding to defendants leads to satellite litigation where the defendant's challenges to the funding arrangements may be less driven by a concern for the claimant class but rather by the defendant's interest in stifling the claim itself.

Similarly, as illustrated by the evidence to the Post Office inquiry about *Bates v The Post Office* (described in the answer to Question 2 above) defendants seek to use information about the funding of cases, including the fact of funding and the amount of the funding available, for strategic purposes, such as attempting to incur costs to exhaust the funding in the knowledge that this may bring an end to the claim and cause tension between the claimant/class representative and funder.

These practical reasons therefore buttress the principle that, subject to legitimate public policy concerns, claimants should be free to enter into private funding arrangements as they see fit. Disclosure of the details of funding also risks straying into disclosure of information concerning the claimant's case and their approach to the litigation which is privileged.

We recognise and agree that one instance where disclosure of funding arrangements is justified is in collective proceedings such as in the CAT where the represented class is not before the tribunal and the tribunal must certify the proceedings as being appropriate to proceed. However, the practice in the CAT of scrutinising a funding agreement and permitting the defendants to make submissions on the funding agreement seems to risk potential harm, beyond (i) the legitimate interest of the defendants understanding the adverse costs coverage position and (ii) the tribunal, in its supervisory capacity, being satisfied that the agreement does not place the class representative in a position of an irreconcilable conflict with his duties to the tribunal or to the class. The tribunal could alternatively receive information and hear submissions from the claimant / class representative *in camera* as needed on funding arrangements beyond arrangements to cover adverse costs.

[78] *Road Haulage Association Limited v Man SE and Others* 1289/7/7/18

Another area where disclosure of the existence of funding arrangements has become commonplace is in connection with applications for security for costs under CPR 25.14, following the case of *Stuart Barrie Wall v Royal Bank of Scotland plc*[79]. Such disclosure of the fact of the funding and the identity of the funder is justified in support of the defendant's right to seek security for costs from a funder funding the proceedings. While we recognise that the defendant has a legitimate interest in understanding the basis on which adverse costs orders in its favour will be paid by the claimant, as set out at Question 10 above we consider that the fact of third party funding should not entitle a defendant to seek security for costs in circumstances where the claimant would not otherwise be liable to provide it and the third party funder should not itself be directly liable for adverse costs simply by virtue of being a commercial provider of funding to the claimant. Consistent with that position, we do not see any that the defendant has any legitimate interest in knowing information about the claimants funding arrangements, unless the claimant wishes to volunteer that information itself as an answer to its own liability to provide security for costs.

As to details of the funding arrangements beyond the fact of funding and the identity of the funder, it is not clear to us what the justification is for disclosure of such to the defendant. Any requirement to require routine disclosure of funding may therefore have the inadvertent effect of driving up cost and increasing complexity and duration of proceedings. As above, if there is such a justification, the court could alternatively receive information and hear submissions from the claimant / class representative *in camera* as needed.

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?

This reply relates to third party funders. It does not relate to claims assigned by an insolvency practitioner, which a funder may control[80].

<u>To what extent, if at all, do third party funders exercise control over litigation?</u>

Third party funders provide money – to pay the claimant's bills. The funding agreement between funder and claimant will cover other ground, including the mechanics of payment, the funder's conditional success fee, the flow of information between the parties and how any disputes are resolved, but fundamentally the funder's role is, as the name suggests, to fund.

[79] *Wall v The Royal Bank of Scotland*, [2016] EWHC 2460 (Comm)
[80] *Seear v Lawson* (1880) 15 Ch D 426

In England and Wales, the claimant always has conduct and control of its litigation. This is reflected in ALF's Code of Conduct, which provides that a funder will not seek to influence the funded party's solicitor or barrister to cede control or conduct of the dispute to the funder. This lack of control by funders is one of the multiple risks inherent in litigation funding and one of the factors that inform a commensurate return on such risks.

It is sometimes said, without evidence, that funders effectively have control because they can threaten to stop funding if they do not get their way. However, this argument fails on two counts.

First, it ignores the funder's increasingly weak commercial position as the litigation progresses and funding is advanced to the claimant. After a relatively short period, the funder will generally have invested a significant amount and will not lightly throw its investment away. Termination of funding would materially harm the funder's investment so the funder is under significant pressure to continue funding unless doing so would be to 'throw good money after bad'.

Second, ALF funder members cannot just stop funding. Sir Rupert Jackson considered termination of funding agreements in his review of civil litigation costs[81] and formed the view that a funder should continue to provide whatever funding it originally contracted to provide, unless there are proper grounds to withdraw. He recommended that a satisfactory voluntary code be drawn up and place appropriate restrictions on funders' ability to withdraw support for ongoing litigation. That was done and ALF's Code of Conduct provides[82] that funding agreements shall not establish a discretionary right for a funder to terminate unless the funder:

(i) reasonably ceases to be satisfied about the merits of the dispute;

(ii) reasonably believes that the dispute is no longer commercially viable; or

(iii) reasonably believes that there has been a material breach of the funding agreement by the funded party.

Clearly, these are proper grounds. The first is a factor that all claimants, funded or not, should constantly review. Nor would it be in the interests of the proper administration of justice for a funder to continue funding unmeritorious or commercially unviable claims.

The reference to 'control' in this question may relate to the Court of Appeal decision in Arkin[83]. It held that a professional funder should be potentially liable for the costs of the opposing party '*to the extent of the funding provided*' and described this as an approach designed to cater for the

[81] Jackson Final Report, 119
[82] Clause 12
[83] *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655 (26 May 2005)

commercial funder financing the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. '*Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation*'.

'*Control*' became a component of the test for what remains of the medieval law of champerty, which prohibits interference with the due administration of justice by a third-party funder. We are not aware of any recorded findings of champerty since the Criminal Law Act 1967[84] when champerty ceased to be a criminal offence (along with '*challenging to fight, eavesdropping or being a common barrator, a common scold or a common night walker*'), and also ceased to be a tort. This is unsurprising in the context of modern third party funding given that a finding of champerty renders a funding agreement unenforceable and there is, therefore, a significant commercial incentive for funders to stay on the right side of the line, however vague it may be.

At the same time, the law does expect funders to keep abreast of the claims they fund. As mentioned in the answer to question 1 above, Lord Justice Tomlinson sitting in the Court of Appeal[85] put it as follows:

> "*Litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest. What the judge characterised as "rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals' is what is to be expected of a responsible funder – as the ALF to some extent acknowledges and as did some of the funders in this case in their evidence presented to the judge – and cannot of itself be champertous. I agree ... that, rather than interfering with the due administration of justice, if anything such activities promote the due administration of justice.*"

Following this decision ALF updated its Code of Conduct, which now states:

> *"Nothing in this Code shall be construed to prohibit a Funder from conducting appropriate due diligence, both before offering funding and during the course of the litigation procedures that are being funded, including but not limited to analysis of the law, facts, witnesses and costs relating to a claim, and including regularly reviewing the progress of the litigation."*

This judicially sanctioned oversight of litigation funding investments should not be confused with controlling claimants' claims.

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[84] https://www.legislation.gov.uk/ukpga/1967/58/contents
[85] *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2016] EWCA Civ 1144 (18 November 2016)

To what extent should third party funders exercise control over litigation?

The Australian Experience

This was explored by the High Court of Australia in Fostif[86]. The court held that third-party funding arrangements, which involved a funder seeking out those who may have claims and offering terms which not only gave the funder control of the litigation but also would yield significant profit for the funder, did not, either alone or in combination, constitute an abuse of process, or warrant condemnation as being contrary to public policy.

The majority said there was no basis for the formulation of an overarching rule of public policy that would, in effect, bar the prosecution of an action where any agreement had been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control the funder may have under the agreement[87].

Subsequent to that decision, it has become a common practice for funders of Australian class actions to exercise varying degrees of control over the litigation. In many funding agreements, control of the proceedings is ceded by participating group members to the funder, who provides day-to-day instructions to the representative plaintiff's lawyer.

In 2018, twelve years after Fostif, the Australian Law Reform Commission (ALRC) considered whether class action proceedings and litigation funders should be subject to regulation[88]. It consulted with several government agencies, academics, judges, members of the legal profession, insurers and industry stakeholders both in Australia and, where relevant, internationally. It also drew on empirical data[89]. Control per se was not found to be an issue. Rather than proposing the licensing of funders, ALRC's recommendations sought to ensure appropriate and effective consumer protection through improving court oversight of funders on a case-by-case basis. Specifically, ALRC recommended that the Federal Court of Australia Act 1976 (Cth) be amended to expressly empower the court to award costs against funders and insurers who fail to comply with the overarching purposes of the Act, namely to facilitate the just resolution of disputes according

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[86] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (Fostif)* (2006) 229 CLR 386, [85]

[87] Ibid. [91]

[88] Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (ALRC Report 134)

[89] Including Vince Morabito, *The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report* (July 2017)

to law and as quickly, inexpensively and efficiently as possible - an objective that squarely aligns with funders' objectives.

<u>The Insolvency Context</u>

Assignment of a right of action and with it control has long been valid in the insolvency context. Following the liquidation of a company, officeholders are entitled to assign e.g. to a litigation funder causes of action vested in the company.

The Small Business Enterprise and Employment Act 2015 brought section 246ZD of the Insolvency Act 1986 into force. In addition to contractual or tortious claims vested in the insolvent estate, insolvency practitioners can assign causes of action commonly referred to as 'officeholder claims' (including the proceeds of an action). These include claims for fraudulent trading, wrongful trading, transactions at an undervalue, preferences and extortionate credit transactions. This ceding of control to a funder has not adversely affected the proper administration of justice.

<u>The European Example</u>

As civil law systems do not have the concept of champerty, in Europe there is no general bar to funders controlling cases and the parties are free to agree on the extent to which the claimant is willing, and indeed wishes, the funder to control the litigation and in what respects. This is reflected in the ELI Report and Principle 10 which provides that, whilst the starting point is that the funded party shall be ultimate decision-maker, the parties are free to agree the extent to which the funder may exert influence or control decisions and the nature and scope of its involvement in the proceedings and any appeals, including as to settlements. Principle 10(4) specifically recognises that the funding agreement may "*confer on the Third Party Funder the right to control one or more material aspects of the funded litigation*" subject to the requirement that the funded party is expressly informed of this prior to entering into the funding agreement.

In both the Netherlands and Germany, in addition to collective actions, there is an established practice of claims aggregation by way of assignment of claims to a specialised litigation vehicle. This assignment model has often been used in the field of competition damage actions and other types of proceedings. This bundling can create of significant procedural and practical synergies and damages quantification can be conducted using a broader and more robust data base. The right of litigation vehicles to claim damages in their own name and the validity of the underlying assignment contracts, have been confirmed by various Dutch courts in the Air Cargo, Sodium Chlorate and Paraffin Wax cartel cases. The assignment model has been approved by the highest German Court.

In short, litigation funders do not control cases and in any event concerns relating to control by funders appear unfounded.

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

The fact that a claimant is funded is generally more significant than the way it is funded. A well-resourced defendant can effectively force an unfunded or underfunded claimant to settle, whereas a funded claimant can negotiate on an equal financial footing. Litigation funding 'levels the playing field' in this sense and facilitates settlement based on relevant factors such as the merits of the claim. As Sir Rupert Jackson said in his Preliminary Report:

> '*It is the experience of funders that the existence of [litigation funding] sometimes in itself promotes settlement. This is for two reasons. First, the defendant appreciates that the claimant has the resources to see the case through. In other words, where a strong party is pitted against a weak party [litigation funding] creates a level playing field and thereby promotes access to justice. Secondly, the defendant appreciates that an independent party (viz the funder and its advisers) has looked at the claim objectively and assessed that there are good prospects of success.*'[90]

The CJC Interim Report includes several similar questions relating to settlements.

<u>To what extent do funders currently exercise any flexibility in their contractual entitlements where there are downward pressures on anticipated damages recoveries?[91]</u>

Our position is that parties should generally expect that agreements as to funding terms which they freely enter into should be honoured. Funding agreements are carefully negotiated to reflect an allocation of risk and return that both parties are willing to agree to, in the knowledge that litigation outcomes are inherently uncertain. However, it is the case that funders are commercially rational entities and will respond as such to changed circumstances. The existing regulatory environment has the significant advantage of allowing funders the flexibility to respond appropriately to such changed circumstances, reflecting their commercial interests which are for the most part aligned with the claimant's. Regulation that constrains this flexibility by e.g. mandating certain outcomes would not in any practical, real-world sense enhance access to justice. It would make investment in claims harder and render fewer claims fundable.

[90] Jackson Preliminary Report, 163

[91] Paragraph 6.25

To what extent is the funder forced to reduce its return in order to encourage the funded client to accept a settlement offer?[92]

Several parties (claimant, defendant, lawyers on both sides, insurers on both sides and the funder) with different and evolving perspectives are generally relevant in a settlement, which the question does not recognise. Each party may have to adjust its financial or other expectations depending on the circumstances.

What of the funded client who sees little incentive to settle despite [sic] and becomes intent on going to trial whilst the funder or law firm may think that the offer on the table is reasonable?[93]

Unlike funders, most claimants have little experience of litigation. The claimant's lawyers' focus will generally be on the evolving legal merits of the claim. The funder will bring useful input on the economics of a case and the cost/benefit of settling versus continuing, which may give a helpful/fresh perspective on the settlement offer.

That said, the question identifies one of the many risks involved in litigation funding. The funder cannot control the funded client's litigation so cannot make the claimant settle. However, the claimant is also subject to the economic realities of the litigation where, for example, refusal may mean incurring the significant (and possibly unexpected) costs of one or more trials and impact the claimant's ultimate recovery.

ATE insurers typically have greater rights than funders to control settlement in that the claimant will usually need insurer's consent on settlement, failing which the claimant will cease to be insured. Further, a claimant's refusal to accept its lawyers' advice that a settlement offer is reasonable might also invalidate the claimant's ATE insurance and expose it to potential adverse costs liability, which may incentivise a more balanced approach.

Also, what of situations where funded clients have unreasonable settlement expectations, which cause them to run cases forward and incur costs whilst they have funding to do so?[94]

This addresses the same situation as the previous question. The claimant's lawyers, not the funder, advise the claimant and have a duty to properly manage settlement expectations. The claimant's lawyers also have duties to the court which include not wasting the court's time by running cases forward when they could reasonably be settled. The SRA's Code of Conduct for Solicitors also states '*You [the solicitor] do not mislead or attempt to mislead … the court or others, either by your*

[92] Paragraph 6.44
[93] Paragraph 6.44
[94] Paragraph 6.44

own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client)'. The funding agreement and any ATE insurance policy may also provide that the claimant will prosecute the litigation as if a reasonably prudent unfunded party.

To what extent is the impact of litigation costs on settlement decisions provided for in the litigation funding agreements, whether through termination clauses entitling the funder to withdraw funding where certain economic parameters are not met or otherwise?[95]

Before a funding agreement is concluded the funder and the claimant, advised by its lawyers, will form views on realistic claim value and the realistic cost of litigating the claim to a conclusion. These numbers need to include a margin for error so that, within reason, the claim value can decrease and the cost of the litigation can increase without adversely affecting the desired outcome for all stakeholders. That said, many defendants without good answers to a claim will tactically aim to outspend the claimant and force a low settlement as illustrated in the example of *Bates v The Post Office* referenced above. Managing the adverse impact of excessive litigation costs on settlement, through the funding agreement or otherwise, is, therefore, challenging.

To what extent can rising costs in static or depressed damages valuation cases lead to cases collapsing with financial support being withdrawn and the claimant(s) then forced to settle at levels they would not otherwise accept but for the demands of the funders' costs and the litigation costs?[96]

The claimant's costs may rise because the claimant's lawyers have not estimated them properly or because they have not managed the claim efficiently. They might also rise because of the way the claim is defended with the deliberate intention of causing the claimant to run out of money. The claim value may also fall because damages have not been estimated properly by the claimant and its lawyers, which may also have caused the claimant to adopt unreasonable settlement expectations. In these instances, often the funder will be expected to provide additional funding (due to rising costs) despite the economics of the case worsening (either due to the additional costs, or falling quantum, or both). Such a situation would not be of the funder's making and may be highly undesirable from the funder's perspective but the funder is nevertheless highly incentivised to try to reach the best outcome possible from the case, including providing additional funding if possible.

[95] Paragraph 6.44
[96] Paragraph 6.45

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 response relates solely to third party funders.

The CAT is already required to approve the settlement of opt out representative proceedings. This is appropriate because there is no contractual relationship between the funder and the represented class of often hundreds or thousands of claimants who benefit from the funding. Although any court approval process has limitations, the relevant jurisprudence in the CAT is still evolving and it remains to be seen whether it will encourage or discourage funding.

We do not believe that court approval should be required for any other type of proceeding. Third party funded individual claimants and class representatives in representative proceedings have the benefit of high-quality advice from specialist and experienced solicitors and barristers. These lawyers owe no duties to the funder and are themselves regulated by the SRA and the Bar Standards Board respectively. Claimants, in their own best interests, and class representatives, in the interests of class members, are free to settle proceedings and their lawyers are free to advise them. We do not believe the fact that a claimant is funded justifies a court having powers over its decision to settle its claim.

Many factors go into a party's desire to settle, not all of which necessarily relate to the litigation itself, and not all of which may be known to the court. This absence of all the facts means the court is not best placed to opine on a settlement the parties, on advice, have agreed.

Additionally, the current regulatory system has provisions which address this. Consistent with the ELI Report, ALF's Code of Conduct aims to provide clarity. For example, the Code requires the funding agreement to state whether (and if so to what extent) the funder is liable to the funded party to meet any liability for adverse costs, pay for adverse costs insurance, provide security for costs and meet any other financial liability. The benefits of contractual certainty provided for both parties at the outset are in our experience sufficient, and do not warrant reforms which would lead to a situation where the court can effectively reopen the position through a subsequent settlement approval process. Additionally, without contractual certainty for investors, any investment, including in meritorious claims, becomes problematic.

There can also be a '20:20 hindsight' problem. No matter how long running and expensive a funded litigation turns out to be, by definition, a settlement generally represents a success of some sort. The court's perspective of the risks shouldered by the funder will inevitably be influenced as a result. The court is not well placed to appraise the bargain struck between the claimant and funder potentially many years before and will not necessarily see entirety of the picture, potentially including the funder's losses on unsuccessful claims and the market environment at the time the claimant was seeking funding. All of this which may tempt the court, through a settlement approval process, into an asymmetric process of rewriting the bargain originally struck by the funded claimant on successful cases but disregarding losses on other cases and, in so doing, removing the certainty a funding agreement is designed to provide for all parties.

31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?

As things stand individual settlements are not permitted in relation to opt-out proceedings in the CAT. Only a collective settlement is possible and only binding if approved by the CAT, by issuing a collective settlement approval order. In the still nascent regime, many aspects remain untested, including how the settlement approval procedure will be approached in practice. Uncertainty is of course undesirable, for all parties, as is any delay.

The first step in the process is a joint application by the class representative and the defendant(s) with:

- details of the claim(s) to be settled;
- the settlement terms, including provisions as to the payment of costs, fees and disbursements;
- a statement that the applicants believe that the terms are just and reasonable, supported by evidence (such as an independent expert opinion or an opinion of the legal representatives as to the merits of the settlement);
- details of how sums received are to be paid and distributed;
- a draft of the collective settlement approval order; and
- how the class representative proposes to give notice of the application.

Given the amount of information involved, this can be a time-consuming exercise for all parties, exacerbated by the fact that there are notice requirements to ensure publicity around the settlement hearing allowing those affected to make submissions.

A separate settlement tribunal must be constituted to hear the application. The settlement panel is distinct from the trial tribunal, which can continue to hear the subsequent trial if the settlement is not approved. This is not just a cost to the parties but also takes up court time and resources.

The CAT must be satisfied that the terms of settlement are "*just and reasonable*"[97] taking into account all relevant circumstances, including:

- the amount and terms of the settlement, including as to the payment of costs, fees and disbursements. This would include legal fees, any funder's return and any non-monetary settlement;
- the estimated number of those likely to be entitled to a share of the settlement and how they will be required to claim any entitlement;
- the likelihood of judgment being obtained for an amount significantly more than the settlement amount. The CAT Guide refers to this as a 'broad brush' assessment, having regard to the prospect of success and estimated quantum of damages;
- the likely duration and costs of the proceedings, if they proceeded to trial;
- any opinion by an independent expert and any legal representative of the applicants;
- the views of any represented person or class member; and
- the provisions regarding the disposition of any unclaimed balance of the settlement.

In short, this can represent an uncertain, lengthy, costly process that takes up court time and resources. At the same time, despite the resource intensity of the system, it may not capture all the factors informing the parties' decision to settle and may imperfectly 'second guess' the parties' decision taken on advice. Absent evidence that class representatives, with the benefit of high-quality legal advice, are not fulfilling their duties to class members, the advantages over allowing class representatives and defendants to conclude their litigation are not clear.

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

We believe that the current system provides adequate protection for claimants whose litigation is funded by third party funding. A combination of the ALF Code of Conduct, the transparency provided by funders with regards to funding agreements they offer claimants, the CAT's oversight of opt-out cases all contribute to the protection for claimants.

[97] Section 49A(5) Competition Act 1998 and CAT Rule 94(8)

Most importantly, claimants represented by solicitors who typically source the funding for their clients and who advise their clients on the arrangements. The ALF Code of Conduct at paragraph 9.1 requires the ALF member to "*take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution*...". Solicitors acting on cases are themselves under professional duties to advise their clients on costs and on funding options and there exist solicitors and counsel who specialise in advising clients in these circumstances. As such the regulatory framework is already in place to ensure that clients are advised appropriately and we are not aware of evidence that points to a need to alter this framework is.

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

The third party litigation funding market in the UK is diverse and competitive, helping ensure claimants have a broad array of funding on offer, enabling them to freely choose the most advantageous support.

According to a 2021 EPRS study[98], there were then at least 45 litigation funders operating in the EU. It identified 18 UK funders plus Omni Bridgeway, which does operate in this jurisdiction. Of those 19, two may be considered to be more brokers than funders, two specialise in smaller claims and are not members of ALF, three are no longer funding, and one is a specialist insolvency litigation finance company that does not provide third party funding. The rest are funder members of ALF[99] together with Asertis, Bench Walk Advisors, Erso Capital, Innsworth, Orchard Global and Winward Litigation Finance, who are also members of ALF.

Not only do the ALF members, who are bound by ALF's Code of Conduct, therefore represent virtually the entirety of the specialist funding market, this large cohort of businesses focused on litigation funding makes the market highly competitive.

The amount of available capital will vary over time as many funders adopt a fund structure and have a cycle of fund raising, deployment and realisation that plays out over several years. In any event the number is significant. Funding in the UK is variously estimated at US$1.3 billion or as providing £500 million of legal costs a year.[100]

[98] European Parliamentary Research Service - Responsible private funding of litigation - March 2021
[99] https://associationoflitigationfunders.com/membership/membership-directory/
[100] ELI Report,15

Funders seek to allocate this capital only in meritorious/winning cases and, despite the significant capital available, the approval rate for proposed cases by litigation funders is remarkably low (with only 3% to 5% of all pitched funding opportunities being accepted in the UK, as noted above).[101]

Alongside competitive pressures which support choice for claimants, the same claimants have access to expert and informed advice from a law firm or broker before approaching the funding market. By definition, brokers know the market well and are skilled negotiators charged with achieving the best possible terms for their clients. Law firms also often have a great deal of experience of dealing with the funding and ATE insurance markets, know which funders will support which kinds of cases funders at different times and what typical pricing looks like and they are highly effective negotiators. They are also an important driver of competition in their own right using CFAs and DBAs.

These three factors – large amounts of available capital and a diverse body of funders, a small number of investable claims and the route to market through an informal tender process — results in a highly competitive market.

In relation to opt out competition claims in the CAT, a form of regulation already exists. The CAT reviews and must be satisfied with the funding arrangements as a precondition of the litigation proceeding.

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?

Unlike lawyers who charge on a time spent basis and who, therefore, have a financial interest in claims continuing for as long as possible and often no financial interest in settlement, the claimant and the funder's financial interests are aligned. They both want to achieve the highest possible proceeds at the lowest possible cost as quickly as possible.

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.

ILFA best practices require ILFA members to *"maintain effective systems to detect and manage potential conflicts of interest, including conflicts that could affect the enforcement of an award or judgment"*. The most commonly identified source of conflicts of interest relates not to civil proceedings where judges are independent but to systems of arbitration where arbitrators or their

[101] ELI report,18

firms may have relationships with funders on other cases and where failure to identify such potential conflicts could lead to awards being challenged and potentially set aside.

Outside this specific situation which does not apply to court proceedings, concerns about conflicts relate to the scope for conflicts on the part of the legal team. These issues are addressed by the professional regulation of the lawyers who (unlike funders) owe professional duties to their clients but the ALF Code of Conduct also addresses this issue at paragraph 9.2 which provides that a funder will "*not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties*." This obligation has never been the subject of a complaint and we know of no situation over the past 13 or more years in which this has been an issue.

Much more so than the lawyers or any other party to the litigation process (who, unlike funders, owe fiduciary duties to their clients), funders and funded parties' commercial interests in fact very substantially align, as described in the answer to Question 34. Nevertheless, several tangible measures to deal with the potential for disputes between funder and funded client have been reflected in English law to date, particularly with regards to settlement.

First, there is the dispute resolution procedure under ALF's Code of Conduct. Disputes about whether a settlement is reasonable and fair are to be referred to a KC whose opinion will be binding, which has proven to be a useful 'backstop' in practice, both directly and indirectly.

Second, for any settlement of a collective proceedings action under the CAT regime, judicial approval is mandated before it can be rendered binding and enforceable. The CAT must be satisfied that the terms of the proposed settlement are 'just and reasonable'. This serves as considerable protection for the avoidance (or resolution) of any scenario whereby the class representative and the funder may be divergent in their views as to the merits of particular aspects of the proposed settlement.

Third, for the lawyer, their duty is owed to the funded client always – the funder is not their client. Suggestions have been made in Australia[102] that the ongoing accreditation of lawyers who conduct representative proceedings should require continuing education and certification in relation to identifying and managing actual or perceived conflicts of interests and duties arising in respect of litigation funding. A similar proposal may be useful to consider in England and Wales in the context of litigation funding across the board.

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[102] Australian LRC, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report* (Rep 134, 2018), recommendation #20 and associated text.

Questions concerning the encouragement of litigation.

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

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

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

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

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

Third party funding supports individuals, SMEs, and other businesses with the costs of meritorious legal proceedings. Some of these proceedings could potentially be brought without the support of a funder (i.e. where costs could be otherwise met by the claimant); but others (in particular, most group or representative litigation) would not be feasible without third party funding to help pay for upfront costs, and/or to promote an equality of arms against a well-resourced defendant. From that perspective, where third party funding is available, this enables and thereby encourages the bringing of meritorious litigation (reducing barriers to access to justice), and if third party funding support is not available, this acts to discourage the bringing of meritorious litigation.[103]

Funding does not encourage vexatious litigation or litigation without merit. The success of a professional litigation funder's business relies on backing claims that result in successful outcomes (via settlements or court awards) and so which, by default, have merit. If a case backed by a litigation funder is not successful, the funder will not only lose the capital it has invested, it also risks being liable for the successful defendant's costs.

Professional litigation funders therefore have no incentive to advance frivolous or vexatious claims but instead endeavour to only back claims where:

(i) the legal team acting on the claim (specialist dispute resolution lawyers) provide credible advice that the claim has good prospects; and

[103] See also comments made in our response to question 1 ("*To what extent, if any, does third party funding currently secure effective access to justice*") in relation to litigation funders' contribution to access to justice.

(ii) the funder has performed its own analysis and agrees that the claim has good prospects. Through these criteria and diligence controls, and their specialist understanding of litigation risks, professional litigation funders endeavour to reject applications for funding for unmeritorious claims, and to only offer capital for claims which are likely to be successful. Furthermore, professional funders will monitor a funded case as it progresses, and the courts require this, including to watch out for any deterioration in the merits or viability of the claim (for example pursuant to the disclosure of unsupportive evidence during the case), such that reasonable steps can be taken to terminate funding should the claim turn out to lack merit. Via this approach, support from specialist litigation funders is unlikely to be available (or continue to be available) for unmeritorious claims, and this discourages the bringing of unmeritorious litigation (in particular where the claimant cannot fund themselves)[104].

As stated above, funders reject over 90+% of the claims brought forward to them, showing the efficacy of this commercial incentive in ensuring the industry only supports meritorious claims. Evidence from the ELI Report and other jurisdictions supports this.[105]

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.

N/A. To the extent that third party funding encourages meritorious claims to be brought (and promotes equality of arms for claimants, reducing barriers to access to justice), this is a positive for justice in the UK and there is no evidence that funding tends to encourage frivolous or vexatious litigation (and hence, in the absence of harm, no need for reform to prevent this).

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?

Existing SRA regulation addresses this issue but enhanced professional duties for litigators (as the legal advisers) to advise clients on costs and funding options, for example with training / CPD requirement on third party funding and funding options, potentially via an addition to the SRA Standards and Regulations (e.g. the Costs Information rules in the SRA Transparency Rules) may mitigate this problem.

[104] See also comments made in our response to question 1 ("*To what extent, if any, does third party funding currently secure effective access to justice*"), in which reference is made to Tomlinson LJ's comments in the *Excalibur* litigation regarding the continuing rigorous analysis and review expected from a responsible funder, and the adverse consequence for a funder that fails to do this.

[105] See for example ELI Report, 18-19 or the example of the Netherlands in the BEUC Report, 8

General Issues

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

The Role of Lawyers

Third party funders do not interact with funded litigants in a vacuum, because the claimant(s) are represented by both solicitors and barristers who are formally regulated by the SRA (and Bar Council). Where funded claims involve corporate claimants, they will often also have qualified in-house counsel involved. The role that lawyers play in securing and negotiating funding terms on behalf of their clients, and in continuing to interact with clients on funding issues during the progress of a funded proceeding, should not be ignored.

By Principle 7 of the SRA Principles, those legal teams (whether in-house or external) have an obligation to always act in the best interests of their clients in respect to the applicable claim – including with respect to the funding terms and documents agreed.

The instructed lawyers in the claim will have the most visibility on all aspects of the claim: the factual background and legal basis of the claim, the merits, the quantum claimed and the budget proposed. It is the lawyers' obligation to advise their clients both about the merits' value and cost of running the claim and also the pros (or cons) of any funding offer that may be received. After all, it is the lawyers who are the principal beneficiaries of funding, often being paid millions of pounds to run the claim which they keep regardless of the outcome of the claim (unlike funders that stand to lose all of their capital if the matter is unsuccessful). A challenge for funders is that lawyers often overstate realistic claim values and understate what budget will be required to take the matter to conclusion. This has inevitable consequences for the funded party.

As it is in any normal negotiation, it is the lawyer's role and obligation to represent the interests of their client and to advise their client on the funding terms. They should ensure that the funding structure is explained to their client and that the funder has the resources and available capital to fund the matter to conclusion. If the instructed lawyers don't consider the funding terms on offer are reasonable or appropriate for the matter in consideration, they should advise their client accordingly, bearing in mind the dynamics of that claim.

So when considering whether formal regulation of funders is required, it is important not to forget that a funded party already has regulated professionals acting on their behalf, they have a judge overseeing their claim and defendants who commonly push to obtain adverse costs protection to protect their interests in the event the case is successfully defended.

International Legal Finance Association
The Association of Litigation Funders of England & Wales
28 February 2025

Table of Additional Abbreviations and Acronyms

Abbreviation or acronym	**Meaning**
ALF Code of Conduct	ALF Code of Conduct for Litigation Funders, January 2018
BEUC	Bureau Européen des Unions de Consommateurs
BEUC Report	BEUC, *"Justice Unchained, BEUC's view on third party litigation funding for collective redress"*, Ref: BEUC-X-2024-091-20/11/2024, www.beuc.eu/sites/default/files/publications/BEUC-X-2024-091_Third_Party_Litigation_Funding.pdf
CJC Interim Report	Civil Justice Council Review of Litigation Funding Interim Report and Consultation
DBA Regulations	Damages-Based Agreements Regulations 2013
ELI	European Law Institute
ELI Report	European Law Institute, *Principles Governing the Third Party Funding of Litigation*, 10 December 2024, www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf
Jackson Final Report	Lord Justice Jackson, *Review of Civil Litigation Costs, Final Report*, December 2009, www.judiciary.uk/wp-content/uploads/2013/05/jackson-final-report-140110.pdf

Jackson Preliminary Report	Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report,* May 2009, www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf
LSB	Legal Services Board
LSB Review	Professor Rachael Mulheron KC (Hon), *A Review of Litigation Funding in England and Wales, a Legal Literature and Empirical Study*, 28 March 2024 - https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf
PACCAR Bill	Litigation Funding Agreements (Enforceability) Bill
PACCAR Judgment	Judgment of the Supreme Court in the case of *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and Others* [2023] UKSC 28
SRA	Solicitors Regulation Authority

CODE OF CONDUCT for LITIGATION FUNDERS

January 2018

1. This code ('the Code') sets out standards of practice and behaviour to be observed by Funders (as defined in clause 2 below) who are Members of The Association of Litigation Funders of England & Wales ('the Association') in respect of funding the resolution of Relevant Disputes. Relevant Disputes are defined as disputes whose resolution is to be achieved principally through litigation procedures in the Courts of England and Wales.

2. A litigation funder:

   2.1 has access to funds immediately within its control, including within a corporate parent or subsidiary ('Funder's Subsidiary'); or

   2.2 acts as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control, including within a corporate parent or subsidiary ('Associated Entity'),

   ('a Funder') in each case:

   2.3 to fund the resolution of Relevant Disputes; and

   2.4 where the funds are invested pursuant to a Litigation Funding Agreement ('LFA') to enable a party to a dispute ('the Funded Party') to meet the costs (including pre-action costs) of the resolution of Relevant Disputes.

   In return the Funder, Funder's Subsidiary or Associated Entity:

   2.5 receives a share of the proceeds if the claim is successful (as defined in the LFA); and

   2.6 does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.

3. A Funder shall be deemed to have adopted the Code in respect of funding the resolution of Relevant Disputes.

4. A Funder shall accept responsibility to the Association for compliance with the Code by a Funder's Subsidiary or Associated Entity. By so doing a Funder shall not accept legal responsibility to a Funded Party,

which shall be a matter governed, if at all, by the provisions of the LFA.

5. A Funder shall inform a Funded Party as soon as possible and prior to execution of an LFA:

5.1 if the Funder is acting for and/or on behalf of a Funder's Subsidiary or an Associated Entity in respect of funding the resolution of Relevant Disputes; and

5.2 whether the LFA will be entered into by the Funder, a Funder's Subsidiary or an Associated Entity.

6. The promotional literature of a Funder must be clear and not misleading.

7. A Funder will observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party. For the avoidance of doubt, the Funder is responsible for the purposes of this Code for preserving confidentiality on behalf of any Funder's Subsidiary or Associated Entity.

8. An LFA is a contractually binding agreement entered into between a Funder, a Funder's Subsidiary or Associated Entity and a Funded Party relating to the resolution of Relevant Disputes.

9. A Funder will:

9.1 take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute;

9.2 not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties;

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

9.4 Maintain at all times access to adequate financial resources to meet the obligations of the Funder, its Funder Subsidiaries and Associated Entities to fund all the disputes that they have agreed to fund and in particular will;

9.4.1 ensure that the Funder, its Funder Subsidiaries and Associated Entities maintain the capacity;

9.4.1.1. to pay all debts when they become due and payable; and

9.4.1.2. to cover aggregate funding liabilities under all of their LFAs for a minimum period of 36 months.

9.4.2 maintain access to a minimum of £5 m of capital or such other amount as stipulated by the Association;

9.4.3 accept a continuous disclosure obligation in respect of its capital adequacy, including a specific obligation to notify timeously the Association and the Funded Party if the Funder reasonably believes that its representations in respect of capital adequacy under the Code are no longer valid because of changed circumstances;

9.4.4 undertake that it will be audited annually by a recognised national or international audit firm and shall provide the Association with:

9.4.4.1. a copy of the audit opinion given by the audit firm on the Funder's or Funder's Subsidiary's most recent annual financial statements (but not the underlying financial statements), or in the case of Funders who are investment advisors to an Associated Entity, the audit opinion given by the audit firm in respect of the Associated Entity (but not the underlying financial statements), within one month of receipt of the opinion and in any case within six months of each fiscal year end. If the audit opinion provided is qualified (except as to any emphasis of matters relating to the uncertainty of valuing relevant litigation funding investments) or expresses any question as to the ability of the firm to continue as a going concern, the Association shall be entitled to enquire further into the qualification expressed and take any further action it deems appropriate; and

9.4.4.2. reasonable evidence from a qualified third party (preferably from an auditor, but alternatively from a third party administrator or bank) that the Funder or Funder's Subsidiary or Associated Entity satisfies the minimum capital requirement prevailing at the time of annual subscription.

9.5 comply with the Rules of the Association as to capital adequacy as amended from time totime.

10. The LFA shall state whether (and if so to what extent) the Funder or Funder's Subsidiary or Associated Entity is liable to the Funded Party to:

10.1 meet any liability for adverse costs that results from a settlement accepted by the Funded Party or from an order of the Court;

10.2 pay any premium (including insurance premium tax) to obtain adverse costs insurance;

10.3 provide security for costs; and

10.4 meet any other financial liability.

11. The LFA shall state whether (and if so how) the Funder or Funder's Subsidiary or Associated Entitymay:

11.1 provide input to the Funder Party's decisions in relation to settlements;

11.2 terminate the LFA in the event that the Funder or Funder's Subsidiary or Associated Entity:

11.2.1 reasonably ceases to be satisfied about the merits of the dispute;

11.2.2 reasonably believes that the dispute is no longer commercially viable; or

11.2.3 reasonably believes that there has been a material breach of the LFA by the Funded Party.

12. The LFA shall not establish a discretionary right for a Funder or Funder's Subsidiary or Associated Entity to terminate a LFA in the absence of the circumstances described in clause 11.2.

13. If the LFA does give the Funder or Funder's Subsidiary or Associated Entity any of the rights described in clause 11, the LFA shall provide that:

13.1 if the Funder or Funder's Subsidiary or Associated Entity terminates the LFA, the Funder or Funder's Subsidiary or Associated Entity shall remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach under clause 11.2.3;

13.2 if there is a dispute between the Funder, Funder's Subsidiary or Associated Entity and the Funded Party about settlement or about termination of the LFA, a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council.

14. Breach by the Funder's Subsidiary or Associated Entity of the provisions of the Code shall constitute a breach of the Code by the Funder.

15. The Association shall maintain a complaints procedure. A Funder consents to the complaints procedure as it may be varied from time to time in respect of any relevant act or omission by the Funder, Funder's Subsidiary or Associated Entity.

16. Nothing in this Code shall prevent a Funder, when not engaged in the funding of the resolution of Relevant Disputes, from engaging in any other kind of financial or investment transaction that is permitted under the relevant law, such as taking an assignment of a claim from an insolvency practitioner.

17. This Code of Conduct shall only apply to a Funder in relation to the funding of the resolution of Relevant Disputes and does not purport to regulate the activities of a Funder if it engages in any other kind of financial or investment transaction.

18. Nothing in this Code shall be construed to prohibit a Funder from conducting appropriate due diligence, both before offering funding and during the course of the litigation procedures that are being funded, including but not limited to analysis of the law, facts, witnesses and costs relating to a claim, and including regularly reviewing the progress of the litigation.

January 2018