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CJC Review of Litigation Funding: Consultation Response

Hausfeld's practice and experience with use of third party funding

Hausfeld is a specialist litigation practice, with considerable expertise in complex, high value disputes. Our lawyers act for businesses, public entities, charities, institutional investors, shareholders, and individuals across the areas of antitrust/competition, commercial and financial disputes, environmental law, human rights and technology disputes. We have experience acting both for groups of individuals and companies in group litigation and different forms of collective proceedings.

Hausfeld is widely recognised as the market-leading Claimant practice for competition claims with extensive experience in the Competition Appeal Tribunal (CAT) and High Court in group claims and collective proceedings, which are almost exclusively funded. A number of the cases on which the commercial disputes team have acted have also been funded. For example, it was instructed on a number of the high-profile banking litigation cases arising out of LIBOR manipulation and interest rate swap mis-selling. Hausfeld's human rights and environmental teams advise and litigate on behalf of individuals and groups who have suffered human rights and environmental harms with a particular focus on climate justice. Hausfeld also has notable expertise in resolving complex technology disputes. Our teams have experience of bringing both CPR 19.8 claims and Group Litigation Order (GLO) claims on a funded basis. We also have experience in advising third party funders.

Based on our first-hand experience, third party funding is essential for access to justice. It is the only way many individual and corporate Claimants can pursue legitimate claims. It is also necessary in order for many Claimants to have equality of arms when facing large and well-financed corporate Defendants. In addition, the availability of funding is vital to the continued success and growth of the UK as a leading global disputes hub.

Uncertainty post-*PACCAR* has led to increased satellite litigation in the CAT, High Court and appellate Courts with unnecessary costs and delay, as well as reduced confidence internationally in the UK as a jurisdiction for conducting litigation. Resolving the issues resulting from the Supreme Court Decision in *PACCAR* through the introduction of appropriate legislation is important to ensure third party funding operates effectively in the UK, enabling access to justice. Cases should not be thwarted by uncertainty in relation to the rules on third party funding. Not doing so could reduce confidence internationally in the UK as a jurisdiction for conducting effective litigation.

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

Hausfeld has worked on at least 17 funded claims issued in this jurisdiction in the past 5 years, and many more before that. Many of these cases have resulted in substantial settlements. Others are going to trial in due course. None of these cases could have been commenced without third party funding. For these Claimants, the law would have existed only in theory. Claimants pursuing meritorious (and ultimately successful) claims have, over time, been required to incur increasing costs in order to assert their rights, both due to procedural changes and the rules relating to costs recovery. For example, the Jackson reforms led to more of the costs of bringing a case being borne by the Claimants and the recent reforms under PD 57AD have led to a front loading of the costs of disclosure. In our experience, these changes have resulted in an increase to the cost of litigation and contributed to the present practical reality that even straightforward commercial claims can require several hundred thousand pounds in costs to bring them to a successful conclusion. Many individuals, SMEs and companies cannot bear this level of costs risk for the duration of a litigation (even accepting a proportion of their spend may be recovered at the conclusion of the case). As a result, the absence of third party funding would result in many meritorious claims not being brought.

The impact of third party funding is equally critical to large group actions. For example, there is no practical way to bring collective proceedings for breach of competition law in the CAT without third party funding, the absence of which would mean that consumers, SMEs and other Claimants would have no route to compensation in respect of even admitted breaches of antitrust law by Defendants (e.g. in the case of private enforcement following on from a settlement between a regulator and a cartelist).

In many cases, third party funding is therefore necessary to achieve even the prospect of access to justice. Third party funding also contributes to *effective* access to justice by reducing inequality of arms, which we address further below. The impact of third party funding (TPF) on access to justice is particularly evident in cases involving significant power imbalances. For example, in claims against financial institutions or Big Tech, consumers and SME Claimants typically face Defendants with seemingly unlimited resources. Without funding, these Claimants would have no realistic prospect of pursuing legitimate claims. Similarly, in collective proceedings such as the Post Office litigation, funding was essential to enable individual Claimants to group together effectively against a well-resourced institutional Defendant.

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

Third party funding is in our experience often the only way in which parties to litigation can achieve some element of equality of arms.

In our experience, Defendants typically outspend Claimants by a significant factor (even in funded claims). For example, Hausfeld recently acted on behalf of the Claimants in a funded High Court commercial claim where the Defendants' costs were three times the Claimants' costs. In another example, the *Trucks* collective proceedings, the CAT noted that Defendant estimated costs were significantly in excess of £20 million, with suggestions that adverse costs cover of £60-65 million might be needed. As the CAT observed, this creates a perverse situation where "*the more heinous a cartel infringement of competition law, the greater the costs for victims of the cartel in recovering compensation, and thus the harder it is for them to bring collective proceedings*." Even at the certification stage (i.e. the initial stage of a collective proceeding), the legal spend of well-resourced Defendants can be very significant. In *Merricks v Mastercard*, the Defendant claimed costs of just under £2 million for resisting certification in a hearing that took only 2.5 days and involved no evidence, which the CAT described as "*wholly unreasonable and disproportionate*." Similarly, in a funded High Court collective claim in which we were involved in 2024, two Defendants incurred costs well in excess of £2 million for a 2 day hearing, again incurring costs which were a multiple of those of the Claimant.

It is welcome that the CAT and various recent High Court judgments have recognised in some cases where Defendant spending has been disproportionate. It is nevertheless a practical reality that Claimants facing high spending by well-resourced Defendants are consequentially subject to at least some escalation of their own costs.

In competition cases more generally, we regularly see third party funding helping to address significant power imbalances between Claimants and Defendants. For instance, in the *FX* collective proceedings against eight global banking groups for cartel damages, the scale and complexity of the litigation, combined with the Defendants' vast resources, would make the case impossible without very substantial third party funding. These cases typically require funding commitments of tens of millions of pounds, often over 5-7 years.

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

Economic and market benefits

Beyond direct economic contribution, third party funding plays a crucial role in market efficiency and corporate behaviour. Private enforcement facilitated by funded litigation complements public enforcement, creating a more comprehensive system of market oversight. This reduces the burden on public resources, whilst increasing detection and deterrence of, for example, anticompetitive conduct. The threat of funded private enforcement incentivises better corporate behaviour and compliance. Examples such as the "Dieselgate" group actions, swap mis-selling cases following the financial crisis and the recent motor finance cases, all demonstrate how funding enables consumer redress that would otherwise be impossible. While amounts per Claimant might appear small (and are often characterised as such by Defendants), the sums at stake in these cases are significant to both consumers and SMEs and it is important both that affected persons are able to recover those sums and that companies found to have been involved in wrongdoing cannot profit from those activities. Recent polling shows strong public support for such accountability - research by Portland in 2024 found that 56% view the growth in

climate change litigation positively, 75% support increased litigation addressing greenwashing and 62% are in favour of ESG-related shareholder claims.

By way of an example, this is particularly important post-Brexit in competition law. While the CMA does excellent work, it is not practical or financially viable for it to investigate every potential infringement. Private enforcement (invariably funded) fills this gap, as demonstrated by recent cases such as the App Store collective proceedings, where the consumer harm which is asserted is significant. Private enforcement is playing a key role supplementing public enforcement, whilst also ensuring there is compensation to those who are impacted.

Third party funding and enabling access for claims to be pursued also contributes significantly to the UK economy and legal services sector. As the CJC Interim Report notes, UK third party funders assets were £2.2 billion in 2021, and that figure is no doubt much higher now. This money is deployed into the legal sector and filters into the economy. Any review of third party funding must therefore also take into account the importance of the UK legal sector as a contributor to the UK economy. For example:

- The December 2024 edition of TheCityUK's UK Legal Services 2024 report noted that the legal services sector contributes £37 billion to the UK economy (1.6% of UK real Gross Value Added), with total revenues from legal service activities reaching £47.1 billion and a trade surplus of £7.6 billion. The report concludes that Litigation and Alternative Dispute Resolution is the third biggest market segment in this sector (after insolvency/banking work and corporate work).

- According to research by TheCityUK and the City of London Corporation, the total tax contribution of the related professional services industry (which includes legal services) in 2023 was estimated to be £30.9 billion. The legal services sector is also a major employer, with 368,000 people employed across the UK in 2022, with almost two thirds outside London.

- The Law Society confirmed in November 2024 that the most recent available data from 2022 shows that the legal services sector includes 32,501 enterprises, generates £44 billion in turnover and £34.2 billion in Gross Value Add. This confirms the importance of protecting London as an international hub for litigation and arbitration.

International Competitiveness

The UK legal sector must maintain its position at the forefront of international disputes. Competition from other jurisdictions is increasing - whether from the Netherlands' collective regime, other European jurisdictions with less expensive legal systems, or the DIFC and Singapore Commercial Court, as well as other commercial Courts internationally. Third party funding is essential for the UK to remain competitive with these jurisdictions as a leading international disputes hub. This is all the more so as the impact of Brexit bites and we start to see claims that previously would have been brought in the UK having to be brought elsewhere. Costs of UK proceedings and adverse costs risk are very high compared to jurisdictions such as the Netherlands – without third party funding many UK citizens, SMEs and other Claimants will have to rely on being able to secure compensation in other jurisdictions (including potentially by taking advantage of permissible funding arrangements in those jurisdictions), or in other cases not at all.

The economic and policy benefits of an effective litigation funding regime extend far beyond individual cases. A well-functioning funding system serves multiple public policy objectives that align with the government's focus on economic growth and efficient markets.

Funder Due Diligence

Third party funding together with adverse costs insurance also bring sophisticated litigation expertise through the due diligence processes required for any claim to get off the ground. Far from encouraging speculative litigation, our experience is that funders and insurers conduct thorough diligence reviews, typically funding only a small percentage of cases presented to them. This process usually involves detailed merits analysis, quantum modelling, and rigorous cost budgeting and can take a period of months, usually requiring significant investment by solicitors to do the work necessary to satisfy the funder that the claim is meritorious and for which the solicitor will not be compensated if the funder

declines to fund the claim. This dynamic functions as a filter for case quality, benefitting the litigation landscape as a whole by ensuring that only meritorious claims with proportionate costs budgets receive funding.

Efficiency and certainty

We believe that funding drives litigation efficiency and certainty. Funders typically want a streamlined and efficient procedure aimed to promote early settlement and, if not, arrive at judgment as soon as reasonably possible. Funders also typically require ATE cover for the Defendant's costs. This benefits Defendants who benefit from the costs and time saving of a streamlined process and having security that any adverse costs orders can be met. Our experience is very much that satellite litigation in funded cases is driven by Defendants, not Claimants, and in some cases with the aim of putting pressure on funding budgets.

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?

Hausfeld has not observed widespread problems in the third party funding industry that require to be remedied through regulation. A number of funders have signed up to The Association of Litigation Funders (ALF) voluntary code. The requirements of the ALF Code of Conduct and the best practice articulated by the International Legal Finance Association (ILFA) appear to be a good starting point for an industry-wide standard.

If it is decided that regulation should be adopted, there should be a light-touch approach, reflecting the principles contained in the ALF Code of Conduct and set out by ILFA, rather than seeking to prescribe or cap returns. This will require careful calibration in order to ensure funders are not deterred from funding litigation in the UK, potentially choosing to deploy their capital elsewhere. Careful drafting will also be necessary to prevent the proliferation of satellite litigation in relation to funding agreements.

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

a. **The nature and seriousness of the risk and harm that occurs or might occur;**

b. **The extent to which identified risks and harm are addressed or mitigated by the current self regulatory framework and how such risks or harm might be prevented, controlled, or rectified;**

c. **For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third-party funding market.**

We are not aware of significant risk or harm that has arisen because of third party funding.

We have discussed elsewhere in this document improvements we believe could be made to the liquidity of the funding market in the UK.

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 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?

We consider that, as a general principle, the same regulatory mechanism (and the same rules) should apply to all types of English litigation and all English-seated arbitration.

Arbitration is a legally reasoned and binding form of dispute resolution, equivalent to litigation. It is also as diverse as litigation, ranging from low-cost consumer arbitrations resolved in a matter of weeks, to ultra-high-value investment treaty arbitrations which can take many years to conclude. There is therefore no principled reason for any divergence. Divergence will add complexity and inhibit parties' autonomy to choose Court or arbitral jurisdiction.

In addition, having lighter regulation for English seated-arbitrations would give arbitration users less protection, when they are arguably already more vulnerable than Court users because of the lower transparency in arbitration and because English-regulated solicitors and barristers need not represent parties.

Having said that, we consider it is important to bear in mind two factors. First, London is a leading centre for international arbitration and needs to stay competitive internationally. The availability of third party funding is important for that. Second, members of the international arbitration community, including leading institutions, have already grappled with third party funding, developing specific rules for arbitration in different contexts and industry sectors. This has already resulted in divergences with litigation.

We address here three of these:

- **Disclosure requirements**: Many arbitral rules and institutions impose obligations on parties to disclose funding arrangements, a requirement over and above that in litigation. We consider that this reflects the greater risk of conflicts of interest in arbitration and so is a justified divergence. However, we do not consider the issue is so significant that the law should be changed to make this a rule in all arbitrations, noting that the Law Commission choose not to pick up a similar suggestion in its recent review of the Arbitration Act 1996.

- **Recoverability of funders' fees**: It was held in *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm) and *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 that funders' fees are potentially recoverable as "*other costs*" under section 59(1)(c) of the Arbitration Act 1996, whereas they are not recoverable in litigation. We consider this approach in arbitration should continue. It is a rule based on specific statutory wording and developed through arbitral and Court case law which is well understood and applies only in specific and limited circumstances. We note that *A Review of Litigation Funding in England and Wales* highlights the advantages of the rule and suggests it extends to litigation.

- **Liability for adverse costs**: Funders cannot be made the subject of adverse costs orders in arbitration (due to lack of arbitral privity), whereas in litigation they can be subject to non-party costs orders. Whilst this is an area of divergence, we do not support changing the rules relating to arbitration to bring this into line with litigation, as that would be such a serious derogation from the contractual basis of arbitration. We note that this was another suggestion made by consultees to the Law Commission in its review of the Arbitration Act 1996 but not taken forward.

Given those divergences and because of the community and institutional engagement with third party funding mentioned above, we consider that it is important that any review of third party funding in arbitration carefully balances a desire for consistency with litigation with preserving both the availability of third party funding in arbitration, especially international commercial arbitration where participants are likely to be able to access legal advice, and the arbitration community's ability to self-regulate and develop bespoke and flexible rules.

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

We have referred to these in our answer to question 4.

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

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

The relatively high cost of litigation and arbitration in the UK increases the need for and the dependency on third party funding. It is not possible for the vast majority of individuals and SMEs to fund significant disputes, the cost of which often runs into multiple millions. Even if solicitors are willing to work on discounted rates under an alternative fee structure, these fees account only for a fraction of the overall cost of a dispute which is driven also by the cost of counsel, experts, disclosure providers, and the high cost of ATE premia. The costs of litigation are also such that not all claims will be capable of funding but will usually require a minimum financial threshold in terms of claim value, either for individual claims or by grouping claims together, with claims under this threshold not being viable.

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

In our experience, budgets for funded claims are subject to careful funder scrutiny, with detailed and sophisticated negotiations (and, in some claims such as collective actions, Claimant costs budgets are subject to judicial scrutiny at the outset of proceedings). There is moreover a very real risk that no further funds will be forthcoming if budgets are exceeded. These circumstances clearly deter funded Claimants from running up unnecessary costs. There is not a direct relationship between third party funding and the level of litigation costs. We understand that it has been suggested by some commentators that third party funding means that the Claimants spend more. In our experience, this has not been the case. Third party funding budgets are closely negotiated with the funder at the outset of the case, with funder pressure to keep costs down. Where unexpected events arise during the course of the litigation, this can leave budgets very tight. The law firm has to submit a comparison of spend to budget usually on a monthly basis and any overspend will be scrutinised.

Conversely, we understand that well-resourced Defendants, knowing or suspecting that a Claimant is funded, can apply tactics designed to drive up the costs of the litigation and/or to delay its resolution in an attempt to exhaust the available funding (or continued willingness of the funder to provide additional funds) before trial. A recent well-publicised example of this is the Post Office litigation, where much reporting has been conducted on the facts that (i) TPF enabled the pursuit of that case; and (ii) the Post Office responded with scorched earth tactics, spending 10s of millions of pounds in an attempt to exhaust the Claimants' resources.

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?

It should be within the discretion of the Court to allow the cost of the litigation funding to be recoverable as a litigation cost under part of the Court's general discretion as to costs and as part of the Court's regard to all the circumstances of the case. Examples where the Court may decide to allow the cost of funding to be recoverable might include where, for instance, the Court considers the Defendant's conduct to have unnecessarily driven up the cost of the litigation, or where Defendants' conduct has resulted in unnecessarily lengthy proceedings (for example by rejecting a reasonable settlement offer).

The current situation places the burden of paying for funding and ATE costs on the Claimant, even where the Claimant has a meritorious claim and could not have brought the claim without funding. A successful Claimant must pay to the funder on average, 3x on the cost of funds or more depending on the length of litigation. A successful Defendant would only lose the portion of Standard Costs not

reimbursed. Consequently, this significantly changes the balance of the principle behind "loser pays". As things stand the Supreme Court decision in *PACCAR* creates risks in any arrangement in which a Claimant might seek to cap its funding exposure.

The suggested justification for the elimination of the recovery of insurance premia and success fees in the Jackson Reforms was to discourage vexatious litigation and a resulting unfair economic imbalance in favour of the vexatious Claimant. However, safeguards already exist to prevent this (for example summary determination/strike out). The current arrangements put in place due to a fear of vexatious litigation in fact go too far the other way, in leaving the Claimant to bear the full cost of funding and ATE.

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

The ability to recover funds from the other side does not assist a Claimant who does not have the upfront funds to bring the litigation in the first place. This is why third party funding is necessary.

Security for costs can be and is used as a mechanism by Defendants to thwart meritorious litigation. The cost of ATE is very high. ATE premia can often be 30% of the adverse cost exposure. This premium may be funded by the funder; however, a successful Claimant will pay a 3x return on this funded cost. If £10 million of ATE is required, this will cost on average £3 million to put in place and the successful Claimant would pay £12 million out of the proceeds for this amount (the repayment of the investment and a 3x return). This ends up forming a significant part of the funding costs on which a multiple is therefore applied. The amount required to be expended for ATE can be driven by the Defendant's tactics (a Defendant who incurs more costs can then attempt to require the Claimant to purchase ever more ATE cover). The recent developments of Defendants treating an ATE policy as being insufficient and requiring additional anti-avoidance endorsement on top should be reserved only for those cases where there is a genuine threat of non-disclosure and voidance, rather than what appears to have developed into a tactic to frustrate the bringing of a claim, without any clear evidence that the risk of voidance is real/significant.

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

The *Arkin* cap with discretion granted to the Court to vary it in appropriate circumstances works well. If a Defendant has unnecessarily increased the amount of costs spent by both sides, the Court should have greater discretion to reduce the amount recovered, together with other case management powers to appropriately balance the costs.

11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?

The cost of third party funding is driven by market forces. The market, however, is not very liquid and third party funders can require exclusivity when they are conducting due diligence into a case. This detailed process can take from weeks to months. If the funder does not proceed to fund the case, only then can the case be presented to another funder. This does not optimise the ability to "shop around", particularly when faced with limitation deadlines and other timing constraints, and during which period the Claimant is usually dependent on solicitors being prepared to act on a fully deferred/conditional basis. It is important that the Courts understand these dynamics where they become involved in assessing or approval of funding returns.

For the first time the UK Courts have taken on some oversight of third party funding in the collective regime in the CAT. While there have been some initial CAT decisions at the certification stage, where the CAT has exercised preliminary oversight of third party funding, it remains to be seen how this function develops as the CAT has to consider assessment of funding returns at the later stages of cases.

Importantly, in opt-out proceedings, the CAT has ultimate control over both the distribution of damages and the payment of costs, including funding costs, under section 47C of the Competition Act. This

means that regardless of the terms agreed between funders and class representatives, the CAT will ultimately determine what payment to funders is appropriate post-distribution to the class. It remains key that the CAT has the benefit of an understanding of the funding market in order to take decisions that balance the interests of a class in an individual claim with the collective proceedings regime as a whole.

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

We do not believe that a funder's return should be subject to a cap.

b. If not, why not?

So long as parties are properly advised, they ought to be able to agree terms between themselves. The terms that will be appropriate and viable will vary from case to case. A prescribed cap across funding generally could have perverse, unintended consequences in some cases.

We fear that imposing caps could imperil access to justice and also threaten availability of third party funding for litigation in the UK.

Caps could prevent the pursuit of viable claims that require higher returns due to their risk or complexity. For example, in a typical complex case requiring £10m funding over 5 years with a 60% chance of success, a cap of 10% on damages or 2x investment would reduce returns well below what is usually needed to attract capital (usually 25-30%). The mathematics of litigation funding requires sufficient upside to justify the substantial risk and long-term capital commitment. A Claimant may prefer to bring the case with a higher funding fee than not at all.

Further, cases can evolve – costs may increase and damages estimates may decrease during proceedings. With fixed caps, cases that were initially viable could become uneconomic, forcing them to be abandoned if there is no flexibility to reprice the funding.

It is also important to understand how restrictions on funder returns could in fact reduce protection for Claimants. The impact of the *PACCAR* decision that a % cap could be capable of being challenged might remove a protection for the Claimant which is built into some funding agreements of there being a maximum cap on the funder's fee to ensure a minimum compensation amount to the Claimant.

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.

The advantages of third party funding are addressed in our responses to questions 1-3 above.

There are drawbacks in the current landscape. The primary current challenges stem from regulatory uncertainty. Post-*PACCAR*, uncertainty around funding structures has led to increased satellite litigation, causing unnecessary costs and delay and presenting a barrier to access to justice.

In addition, cases need to reach a minimum quantum threshold in order to secure TPF, given the costs of litigation and adverse costs exposure, which may prevent meritorious lower value claims being brought.

15. What are the alternatives to third party funding?

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

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

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

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

c. If so, when and how?

We assess below the main alternatives to third party funding based on our direct experience. While each alternative has its place, none currently offers a complete solution.

Conditional Fee Agreements

CFAs are frequently used to assist the Claimant in bringing a claim. Whilst they allow clients to defer some or all of their legal fees until the conclusion of the case, in the kind of proceedings in which we are most often instructed, CFAs do not provide the full extent of funding needs. For example this still leaves the need to fund upfront disbursements, including expert fees and Court fees, and the costs of insuring against adverse costs exposure. For instance, in a typical competition collective action, disbursement costs alone can exceed £10-15 million, including expert fees plus ATE insurance premiums costing several million pounds and noticing and claim administration fees reaching hundreds of thousands of pounds. These costs must typically be funded upfront, creating a significant gap that CFAs alone cannot bridge.

We have substantial experience with CFAs, having acted on full or partial CFAs in many of our cases, in collective proceedings and other forms of group and individual litigation. This experience underlines the limitations of CFAs in addressing funding needs: even when acting on a full CFA, we typically need to source external funding to cover the significant upfront costs involved.

Damages-Based Agreements

In principle DBAs should be an alternative or complement to third party funding. In practice, however, their use remains severely limited, due to ambiguities in the rules. These issues were recognised by the Ministry of Justice in a 2019 report, which noted a "*consensus amongst all stakeholders that DBAs are rarely used and the regulations needed improvement to increase clarity and confidence in the use of DBAs as a funding method*", Ministry of Justice, Post-Implementation Review of Part 2 of LASPO (CP38, 2019) 11. See also the draft 2019 DBA Reform Project: Explanatory Memorandum, by Professor Rachael Mulheron and Nicholas Bacon QC. This remains a key issue which has led to unfortunate satellite litigation – it does not create a level playing field where lawyers willing to act on risk are subject to challenges and additional cost and delay, which detracts from progressing the substance of the case.

The prohibition on DBAs in opt-out collective proceedings is particularly significant, given the funding needs of such cases - DBAs could potentially enable law firms to take on more of the financing role currently filled by third-party funders. This may also assist in allowing some lower value claims to be brought.

Legal expenses insurance

Legal expenses insurance plays a key role in allowing Claimants to pursue claims, but for many larger claims will only cover adverse or own disbursement costs when a case is lost, rather than providing funding for disbursement costs up front. BTE insurance rarely provides sufficient cover for complex

claims, typically capping at around £50,000-£100,000, compared to the millions required for complex commercial litigation. ATE insurance, whilst essential for managing adverse costs risk, is expensive and may be difficult to obtain for complex claims or where there are multiple Defendants, with premiums often reaching 30% of the cover provided. In our experience, neither provides a complete solution for substantial claims with any meaningful disbursements.

Other funding options

While options like pure funding, crowdfunding, and trade union funding may serve important roles in certain contexts (particularly employment claims or public interest litigation), they cannot address the needs of complex commercial litigation, nor in many consumer/group litigation cases. These alternatives lack either the scale to fund claims requiring tens of millions in disbursements, the sophistication to manage complex risk profiles, or both.

The key to unlocking more cost-effective funding structures is creating a regulatory framework that allows for innovation while preserving appropriate safeguards. For example, resolving the concerns around enforceability of DBAs and extending their use to opt-out collective proceedings would provide an alternative to the more expensive third-party funding options in certain types of case. These reforms would lower costs for class members, improve access to justice and enable more efficient and competitive funding structures.

The Canadian model mentioned below should also be considered in the context of opt-out proceedings – where undistributed funds are put towards a funding scheme which might provide a cheaper alternative to commercial funding in some cases.

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?

We do not think any of the alternatives should be encouraged in preference to third party funding. However, DBAs should be encouraged alongside third party funding.

The UK legal establishment has historically been wary of US-style contingency fees, particularly concerns about lawyers earning extraordinary returns from vulnerable Claimants. However, evidence from mature class action jurisdictions, particularly the US and Canada, shows these concerns can be effectively managed and that DBAs can create more efficient and cost-effective funding structures than current arrangements. There are the following benefits:

- In established class action regimes, competition between law firms drives down contingency fees, particularly in large cases. US experience shows fees can be compressed to as low as 5-10% in the most substantial cases. Market competition between firms for cases would create pressure to offer competitive funding terms, benefiting class members.

- DBAs create direct incentives for efficient litigation by rewarding lawyers for achieving successful outcomes quickly. Under DBAs, law firms' interests align with class members - both benefit from swift, efficient resolution.

- The potential for higher returns to law firms could justify firms taking on substantial risks and investments across a portfolio of cases.

Safeguards and oversight

Concerns about excessive fees can be effectively addressed through a combination of market competition and institutional safeguards. The CAT already scrutinises funding arrangements and could exercise similar oversight of DBAs, ensuring returns remain proportionate to risk and effort.

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?

Three key reforms are required to create a more efficient funding landscape and to provide clarity and certainty for law firms who are taking risk to enable claims to be brought but should not have to take additional risk in relation to satellite litigation due to lack of clarity in relation to engagement structures.

First, the DBA regulations require reform to provide certainty and workability. Current ambiguities create significant practical challenges. For example, uncertainty around hybrid arrangements prevents firms from combining DBAs with other funding sources that could reduce client costs. Similarly, the lack of clarity on payment for work done if cases terminate early creates unmanageable risk – firms cannot currently recover even base fees if a case ends early due to circumstances outside their control. There should also be no presumption that counsel will act on a DBA alongside solicitors, putting the burden on solicitors to fund counsel fees, when in practice it is much less common in our experience for counsel to act on a DBA. Clear rules enabling innovation while maintaining appropriate protections would encourage greater use of these potentially more efficient funding structures. Any reform needs to be carried out with an eye to ensuring as much clarity as possible and minimising any potential for years of satellite litigation by Defendants challenging engagement structures.

Second, the prohibition on DBAs in opt-out collective proceedings should be lifted. This restriction limits access to funding for collective actions, driving costs up. Allowing DBAs would enable more efficient funding structures – for example, law firms could develop hybrid arrangements combining DBAs with traditional credit financing, reducing overall funding costs compared to current TPF arrangements.

Third, the restrictions on CFAs should be reconsidered within a broader reform of contingency fee arrangements. Rather than maintaining separate regimes for CFAs and DBAs, a unified framework could provide more clarity and flexibility, whilst ensuring appropriate safeguards through Court oversight. The current 100% cap on CFA success fees prevents law firms from taking on the financing role in complex, high-risk litigation and is ripe for reconsideration. For example, firms may face 5-7 years of work, disbursement costs that can reach single or even double-digit millions (particularly in collective or large group proceedings), and the risk of failure - a risk/reward ratio that cannot be properly reflected within the current success fee cap. There is also a case for permitting inter partes recovery of success fees in certain cases, particularly those involving SMEs or consumers, where the inability to recover success fees can make otherwise meritorious claims unviable. As with DBAs, Court oversight of success fees would ensure returns remain proportionate while enabling more efficient funding structures.

These reforms would give clients and their lawyers the flexibility to develop funding structures tailored to specific case needs, promoting access to more efficient funding structures and better access to justice while maintaining appropriate judicial oversight to ensure proper safeguards.

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?

Finding ways to bring down the cost of ATE would promote effective litigation funding. The cost of insurance is a barrier, particularly on smaller value claims where lawyers might be prepared to take the risk on their own fees and enable claims to be brought but the Claimant would remain exposed to adverse costs risk. Improved costs case management and budgeting would also be helpful in ensuring there is clarity on adverse cost exposure early in proceedings. Consideration of use of fast-track procedures in appropriate cases may also assist in reducing cost exposure/promoting certainty.

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?

In our experience, third party funding will typically be put in place alongside ATE – i.e. a Claimant who requires funding will typically not be able to meet adverse costs. In some cases, as an alternative, the funder might give an indemnity to the Claimant for adverse costs as part of the funding package (which indemnity may be backed by the funder's own ATE policy).

As above, most complex commercial matters of group litigation involving CFAs will typically need third party funding and ATE alongside.

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

Crowdfunding is not a viable alternative to third party funding for the majority of cases in which we are involved due to the scale of the costs. It is effective in smaller public interest cases particularly where cover is needed for adverse costs and lawyers are prepared to act on CFAs or on a pro-bono basis, in particular where adverse costs may be capped. For larger cases though, it is not usually feasible to raise the amounts required through crowdfunding.

For example, we recently tried to raise funds through crowdfunding for a claim which has the potential to be beneficial to thousands of SMEs. Our attempt to raise funds through crowdfunding raised approximately £100k. This represented many individual donations but was only a fraction of the amount required to bring the claim, which would not have proceeded if we and counsel had not in effect been prepared to act on a primarily *pro bono* basis. Crowdfunding may provide effective cover for adverse costs protection, but often only where adverse costs are capped.

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?

Under the mature class action regime in Ontario, Canada, lawyers with smaller class action cases can apply to fund them by application to the Class Proceedings Fund, established in 1992. This Fund provides financial support for legal disbursements to class action plaintiffs approved for funding under the Fund and also indemnifies them in respect of any costs awarded against them in relation to the case. The Class Proceedings Committee decides which cases will receive funding and the Fund is constituted by levies which are required to be paid back into the Fund when a funded case either succeeds or is settled. The constitution of a similar fund could promote effective litigation funding for smaller claims in the UK, potentially using damages which go undistributed in collective claims.

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?

In relation to the CPR, Part 19.8 remains challenging and uncertain, including around how the parties other than the representative may interact with and be bound by TPF arrangements. It would be beneficial to make express provisions in relation to this, including in relation to the Court's supervisory role over funding for a class, along the same lines as the CAT Rules in collective actions. The absence of these provisions results in low usage of the Part 19.8 procedure, the effect of which is to reduce access to justice where claims that are otherwise suitable for collective action are not pursued because of this uncertainty.

There should not in principle otherwise be a need to amend procedural rules just because a matter is funded. Consideration might be given to cost management in larger funded cases to avoid the risk of Defendants increasing costs as a pressure tactic where they know there is a limitation to a funding budget.

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?

After the *Rowe* Court of Appeal case, the current position is that where security for costs has been ordered, a cross-undertaking in favour of a Claimant will only be ordered by the Court as a condition of security 'in rare and exceptional' circumstances. Additionally, only in 'even rarer and more exceptional' circumstances will an undertaking of this kind be required in favour of a funder. The *Rowe* case marked a change from the previous approach of the English Courts, as the previously developing approach had been for cross-undertakings to be routinely required from Defendants (for example in the *RBS Rights Issue Litigation* in 2017). The Court of Appeal in *Rowe* noted that the area might be appropriately reviewed by the Law Commission/Civil Procedure Rules Committee.

In our experience, security for costs applications are often used tactically by Defendants in an attempt to stifle genuine claims. Given the risks to access to justice, we consider that it would be desirable to reverse the position set out in *Rowe*, so that cross-undertakings against Defendants are a routine condition of the ordering of security for costs, whether that security has been ordered against Claimants themselves or against a funder.

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?

No more than any other litigation, save in respect of funding for a class of Claimants where (as with the CAT in collective actions) the Court takes a supervisory responsibility over the funding arrangements entered into by the class representative.

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?

The existence of funding, and its terms, can be used strategically by opponents, and the relevant information is also usually privileged. No one is suggesting that a Defendant should be required to explain how it is funding its defence – that information could provide strategic benefit to a Claimant (for example a Defendant may wish to settle a case at a given time because of reporting requirements or cash-flow issues, which could be exploited by the Claimant when seeking to agree terms of settlement). It would similarly be inherently unfair to require a funded party to disclose its arrangements for this reason. The rule should be (as it is) that there is no obligation to disclose funding arrangements on any party, unless it is necessary to give effect to the Court's/Tribunal's case management powers and/or is already prescribed by the rules – e.g. where applying to act on behalf of a class of Claimants in opt-out proceedings or under CPR 19.8.

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?

Funders in the UK are not able to exercise control over litigation. Rather, there are robust reporting mechanisms in the funding agreement. It is not appropriate for a funder to exercise control over litigation. Such control would interfere with the relationship between solicitor and client. The solicitor must act in the best interests of the client and the client must be free to make decisions with respect to the litigation as it sees fit.

To our understanding, whilst the law of champerty still applies to litigation funding agreements, applying the test from *Giles v Thompson*, we are not aware of many challenges to litigation funding arrangements as being champertous and to our knowledge only one has been held champertous (*Grovewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80, now 30 years old). That indicates to us that funder control is not a significant issue.

Funding agreements typically provide mechanisms dealing with disputes between funder and funded party, for example in relation to settlement.

In our experience, funders do not exercise control over the litigation.

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?

We do not see the need for the Court to have to approve settlement just because the matter is funded. Rather, this will vary depending on the type of proceedings.

It is not necessary for the Court to approve the settlement of proceedings in private commercial litigation. The Court does not have to approve settlement for cases that are not funded and there is no reason that cases funded by third parties should change this dynamic.

For opt-out collective proceedings in the CAT, however, Tribunal approval of settlements is already required under sections 49A and 49B of the Competition Act and Rule 94 of the CAT Rules. This requirement exists regardless of funding arrangements and serves an important purpose - protecting the interests of class members. Similar provisions might apply to amended provisions in relation to CPR 19.8 claims.

Recent CAT decisions demonstrate how this oversight works in practice. In the *McLaren RoRo* settlements, the CAT emphasised that whilst funders need reasonable returns to remain in business, the Tribunal must retain control over allocation of settlement funds to ensure class members' interests are protected. The CAT also made clear it will carefully scrutinise the calculation and reasonableness of funding returns before approving payments to funders. It will be important in enabling them to make that determination that the Tribunal members have the benefit of some form of training in funding/market conditions etc to assist them in making these decisions.

This existing framework provides appropriate protection for class members while maintaining commercial flexibility.

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?

For opt-out collective proceedings in the CAT, the key considerations include whether the settlement terms are "just and reasonable" considering the litigation risks, the likely costs of continuing proceedings, the likelihood of success at trial, the proposed distribution mechanism, whether class members' interests are adequately protected, particularly as to the balance between payments to class members and stakeholders, expected take-up rates and treatment of undistributed funds. As the first cases are starting to reach conclusion, including the *McLaren* settlements, we are starting to see how these criteria will work in practice, although in no case yet has the CAT determined a return to the funder. Getting the balance right in these decisions will be key to ensuring funding remains available for these sorts of claims.

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

As mentioned above, it can be difficult to compare alternate funding offers on a particular case. The due diligence process requires a lot of time and resource. This must be provided by the Claimant’s law firm, nearly always without payment and often without the prospect of reimbursement once funding is secured. Further, funders often require a period of exclusivity while they conduct the due diligence. This process can take months and if this process were to be run several times, it would take years to secure funding. This can be challenging in all circumstances and particularly when up against limitation deadlines. Funders will also differ as to the particular cases they are wiling to fund at a particular point and by reference to the status of their funding portfolio.

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?

All solicitors owe their clients a duty of care. In addition, the interests of clients, lawyers and third party funders are aligned most of the time in funded cases. It is in the interests of all three parties for the claim to be a success and for any damages awarded or achieved through settlement to be as high as possible in the circumstances of the case. In practice, as in any case, this has to be weighed up against the risks and costs of continuing. In many cases settlement will require some compromise on the part of all parties in order to enable a settlement to be reached.

While it is not usually suggested that the standard model of the billable hour engenders a conflict, it is in the client's financial interests for the solicitor to spend as few hours as possible on their case and could be perceived to be in the solicitor's interests to spend as much time as possible and for the claim to proceed rather than settle. The addition of a third party funder adds a different complexion to this dynamic but does not fundamentally change it. The solicitor must always act in the best interests of the client and that is the premise that underlies all ethical challenges. There is no evidence we are aware of that this has caused a problem. Most funding agreements will in any event contain agreed dispute resolution clauses to enable a third party counsel view to be given in the event there is any dispute in relation to settlement offers.

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

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

In principle yes – a significant barrier to the pursuit of many meritorious claims is that funding is not available to pursue them. This is a key barrier to access to justice. Ensuring funding is as accessible as possible is key to ensuring this is available in practice. The costs of litigation and price of funding means that claims will often need to be of a sufficient value to generate commercial funding and lower value claims may not be possible. Grouping Claimants together - particularly SMEs and consumers - is usually necessary to facilitate funding.

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?

The level of due diligence required to obtain funding and ATE should not encourage vexatious litigation or litigation that is without merit. The investment processes of the established funders and insurers, described above, are sophisticated and add a further layer of filtration in terms of claims that are ultimately advanced. Funders will fund (and insurers will insure) cases on which they are satisfied that there is a good chance of making a recovery/avoiding paying on the policy. This is incompatible with vexatious litigation. In our experience, funders and insurers are on the conservative end of the spectrum of views on case merits.

It is important to remember what vexatious litigation actually is – Royal Mail would have and did describe the claims brought by the sub-postmasters against the Post Office as unmeritorious; they were not, as the outcome showed. To describe claims in this way is a common tactic deployed by Defendants and it is one of the points of rebuttal that respondents to this consultation will offer to justify inappropriate restrictions on third party funding. In reality, however, funding enables the exploration and pursuit of meritorious cases, in pursuit of justice – the alternative being that such meritorious claims would not be brought, leaving Defendants to benefit from misrepresentations, fraud, anti-competitive conduct etc.

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

Third party funding and ATE and flexible fee arrangements are all a necessary precondition of group litigation. It is considered by this firm to be an essential component of justice that consumers and SMEs are able to seek redress for harm suffered which would otherwise not

be possible (for example, absent funding, and where individual losses do not justify the risk of pursuit of legal proceedings).

The costs of third party funding and ATE create a higher threshold for claims to be brought and very meritorious smaller claims may not be possible. Clarification of CPR 19.8 and extension of the opt-out regime in the CAT to other areas would significantly facilitate access to justice.

It is also important to understand that putting in place funding and ATE arrangements requires significant effort and time commitment - we regularly receive approaches from Claimants who are seeking funding but who will not in practice succeed in obtaining funding.

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

Expanding collective redress

The collective action regime in the CAT provides an efficient means of pursuing collective claims compared to other group structures such as the GLO and simplifies funding by avoiding the need for every Claimant member having to agree funding terms. The collective action procedure should not be limited to the jurisdiction of the CAT and breaches of competition law (which is an arbitrary distinction for the purpose of remedying consumer and/or collective harms) and should extend to the High Court and to all actionable wrongdoing.

The use of CPR 19.8 continues to be very challenging for Claimants. The lack of prescription around the effects of CPR 19.8 on substantive issues such as limitation and its interaction with the Court's case management powers (as brought into sharp focus in the very recent Court of Appeal decision in *Wirral v Indivior and Reckitt* [2025] EWCA Civ 40) makes the procedure unworkable in most settings, meaning that vast numbers of Claimants with claims that are not viable to pursue individually are left without access to the Court, making it impossible to hold wrongdoers to account for much of the effect of their wrongdoing.

Improvements to liquidity of third party funding

Certain improvements could be made to third party funding to improve liquidity of the funding market.

- The cost of third party funding can be very high and can lead to the under-compensation of Claimants. Increased competition in the third party funding space will help to bring costs down, particularly in cases where Defendants escalate costs and Claimants are not protected by an agreed % cap of damages which can be deducted. Helping Claimants to "shop around" providers with greater ease would also help. Claimants are often bound by exclusivity periods which make it difficult to look for funding from multiple funders - particularly when constrained by limitation deadlines.

- The lead time to put in place a third party funding agreement is very long. The time that funders take to conduct due diligence is often long and arduous. Lawyers are not paid during this period. This in itself can mean that some cases are not taken on.

- The negotiation of the litigation funding agreement (LFA) can take a long time. This might be improved by a standardised LFA. This would need to remain as user-friendly as possible, given that this is often a consumer or SME-facing document and it would also need to be adapted as appropriate to each case.

- It may be difficult to set a budget at the outset of a claim when the various contingencies are not known, particularly in new procedural areas such as the collective regime. This is particularly challenging given that Defendants may face no external constraint on the costs they can choose to expend. Costs budgeting and some certainty around recoverability would assist significantly in some areas. It is also important that there is an understanding of realistic costs

of dealing with a large group of Claimants, particularly in claims where there is no effective collective mechanism, as in group consumer litigation outside the CAT.

These issues would be resolved by increased competition in the UK funding market which would be stimulated by a resolution of the issues raised by *PACCAR* and the regulatory uncertainty currently hampering third party funding.