Civil Justice Council review of litigation funding

Consultation response from Google

Cover sheet

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Executive summary

This is Google's response to the Civil Justice Council's review of third-party litigation funding (TPLF). It is provided against a backdrop of a dramatic rise in third-party funded class action lawsuits in England and Wales. Google's response is informed by its own experiences of such lawsuits in the CAT and other English courts, with key points summarised below and further detail provided in response to specific consultation questions.

- **TPLF plays an important role in facilitating access to justice.** But care should be taken to avoid TPLF being used to fuel speculative claims brought for-profit with little to no benefits for those represented.
- **The lack of regulation and safeguards for TPLF has resulted in a marked increase in unmeritorious and speculative litigation.** Defending this litigation is extremely time-consuming and costly. The costs to UK consumers and businesses of the emerging litigation culture are substantial and escalating.
- **The current framework for TPLF requires urgent reform to address risks presented by today's market.** The status quo, namely voluntary self-regulation under the Code of Conduct published by the Association of Litigation Funders, is unsuitable for TPLF as it exists today.
- **TPLF arrangements are too opaque, and more transparency is needed.** As matters stand, defendants routinely have to incur significant time and costs to understand who is funding a claim, what their interest in it is, how they may exert control over the proceedings, and whether any conflicts of interest exist.
- **Funders' returns are excessive, incentivising them to gamble on speculative claims.** An upper cap on returns should be implemented alongside a lower limit on returns to claimants. Without such controls, there is a risk that funders are overcompensated at the expense of consumers.

<u>Consultation questions</u>

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

Access to justice is a fundamental right, providing that everyone should be able to protect their rights and seek fair redress for genuine wrongdoing. But great care should be taken to avoid confusing "access to justice" with "access to litigation" - redress can take many forms, and can be obtained in a variety of ways. While the pursuit of damages through civil litigation can, in some circumstances, be an appropriate way to seek redress, litigation can be expensive and protracted. And where class actions are

funded by a third party, there is a risk that they are pursued more in the interests of the funders than of the funded parties. Even where such claims are pursued successfully, the damages awarded to each class member are typically negiligble and go unclaimed, while being dwarfed by sums obtained by the funders and lawyers.[1] Although considerable efforts have been made by some to characterise funded litigation - especially collective proceedings - as providing effective access to justice, such efforts belie the reality of many of those claims.

Funded litigation has resulted in a marked increase of unmeritorious class actions. Despite the enormous resources consumed by such claims to date, the benefit to those represented has been non-existent or negligible.

- In November 2021, after years of litigation, the Supreme Court unanimously dismissed one of the first opt-out UK class actions of modern times (*Lloyd v Google*). The claim, brought on behalf of several million individuals, sought around £3 billion in damages from Google for alleged breaches of data protection legislation, notwithstanding that - on the claimant's own case - it was not alleged that any individual had suffered any damage or distress. In dismissing the claim at first instance, Mr Justice Warby (as he then was) commented: *"It would not be unfair to describe this as officious litigation, embarked upon on behalf of individuals who have not authorised it, and have shown no interest in seeking any remedy for, or even complaining about, the alleged breaches."*[2]
- In May 2023, the High Court rejected another opt-out class action against Google on the basis that it failed to meet the relevant threshold for proceeding (*Prismall v Google*). The claim was brought on behalf of ~1.6 million individuals whose medical records were used by the Royal Free London NHS Foundation Trust and Google in connection with an app for identifying and treating acute kidney injury.[3] In submissions, Google's counsel submitted: "*It cannot sensibly be suggested that an individual who received significantly beneficial, perhaps even life-saving, direct care from clinicians at the Royal Free as a result of an alert generated by the processing of their information within Streams suffered any harm.*" The High Court's decision was upheld by the Court of Appeal.[4] It was the claimant's third attempt to seek 'redress' from Google,[5] made possible on each occasion by TPLF.

[1] Bates v Post Office being a case in point, in which the subpostmasters received only around 20% of the damages awarded, whilst funders and claimant lawyers took 80%.
[2] Lloyd v Google LLC [2018] EWHC 2599 (QB)
[3] Prismall v Google UK Limited and DeepMind Technologies Limited [2023] EWHC 1169 (KB)
[4] Prismall v Google UK Limited and DeepMind Technologies Limited [2024] EWCA Civ 1516
[5] An earlier formulation of the claim having been discontinued after the Supreme Court's decision in *Lloyd*.

- In December 2024, the Competition Appeal Tribunal gave the first, and so far only, judgment in an opt-out competition class action brought via the procedure introduced by the Consumer Rights Act 2015 (*Le Patourel v BT*). Judgment was the culmination of almost 4 years of litigation, tens of millions of pounds of legal fees, and an eight-week trial. The claim was unanimously dismissed.[6]
- Also in December 2024, it was reported that the parties in *Merricks v Mastercard* had agreed in principle to a settlement. The claim was brought on behalf of more than 40 million people and had originally been described as being worth over £10bn. After almost 10 years of litigation, the claim will settle for £200m. The per capita recovery - equivalent to £4.50 per class member - will be dwarfed by the fees due to the funders and lawyers, and is impossible to characterise as providing meaningful redress for a genuine wrong.[7] This is not "effective access to justice".

The UK Government is aware of the risks associated with opt-out class actions.

- It is instructive to consider the Department for Culture, Media and Sport's recent consultation on the Representative Action Provisions under Section 189 of the Data Protection Act 2018 (DPA).[8] This consultation sought views on the possibility of introducing a dedicated opt-out class action procedure for data protection claims (in the same way that competition claims currently have a dedicated procedure in the CAT). The Government decided against introducing such a procedure. The Government's reasons for arriving at this conclusion are highly instructive for current purposes because very similar issues arise in relation to the current unchecked TPLF market. For example:
    - The Government noted many business groups' concerns that introducing an opt-out procedure would "*give rise to a compensation culture that tended to benefit claimant law firms and litigation funders more than ordinary people.*"[9]
    - Based on respondents' feedback, the Government expressed concern that introducing an opt-out procedure would drive up the insurance premiums of companies potentially subject to opt-out claims (the obvious consequence being that price increases would be passed on to consumers).
    - The Government highlighted that businesses, especially start-ups, would potentially be adversely affected by an environment favourable to mass claims.

[6] Justin Le Patourel v BT Group Plc and British Telecommunications PLC [2024] CAT 76
[7] Recent commentary suggests that the funders are likely to receive approximately £100m
[8] Call for views and evidence - Review of Representative Action Provisions, s189 DPA 2018
[9] Call for views and evidence - Review of Representative Action Provisions, s189 DPA 2018 - government response

    - The Government also recognised that an environment which is favourable to mass claims may stifle investment in the UK.
- In reaching its conclusion that no new procedure should be introduced, the Government placed strong emphasis on the fact that an active and properly resourced regulator is the best means of ensuring that individual rights are protected.
- Similar points were made in the outcome of the "*Reforming competition and consumer policy*" consultation by the Department for Business, Energy and Industrial Strategy in 2022. This concluded that a collective redress mechanism under consumer law must "*protect businesses against unmeritorious claims*".[10]

The principal beneficiaries of funded class actions are invariably the funders and lawyers, each seeking rewards many orders of magnitude greater than can be obtained by represented parties.

- In dismissing *Lloyd*, Mr Justice Warby (as he then was) noted: "*It is not easy to estimate the quantum of the costs that this litigation would generate. ...The damage sustained and the compensation recoverable by each represented individual are modest at best. The main beneficiaries of any award at the end of this litigation would be the funders and the lawyers, by a considerable margin.*"[11]
- Recent research by Professor Rachael Mulheron KC (Hon) of Queen Mary University of London, on behalf of the Legal Services Board, identified that most litigation funders only support between 3% and 5% of all cases presented to them.[12] As the Adam Smith Institute pointed out in its 2024 paper *"Judge Dread: How Lawfare Undermines Business Confidence in the UK"*, this suggests that "*...funders are interested in profitable cases, rather than cases which are especially meritorious, or cases in which the claimant would not otherwise have been able to access funding.*"[13]
- In a recent judgment (*Riefa v Apple*), the CAT observed that the UK status quo is open to abuse on the part of funders and claimant lawyers looking to construct claims for their own ends, rather than to provide access to justice for class members.[14] The CAT noted "*that Prof Riefa was extremely reliant on her legal advisers. We were not convinced that she had properly understood the arrangements into which the PCR had entered on behalf of the Proposed Class*

[10] Reforming competition and consumer policy - government response
[11] Lloyd v Google LLC [2018] EWHC 2599 (QB)
[12] "*A Review of Litigation Funding in England and Wales - A Legal Literature and Empirical Study*", https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf
[13] https://www.adamsmith.org/research/judge-dread
[14] Christine Riefa Class Representative Limited v Apple Inc. & Others [2023] CAT 38

Members, and we were concerned about her ability to protect the interests of the class robustly and independently."[15]

- Outside of the technology sector, a similar point was made recently in *Smyth v British Airways plc & Anor*, namely: *"There has been and there continues to be a lack of transparency regarding Ms Smyth's motivation, funding and suitability. On the material before me, I do not accept that her motivation lies in a desire to secure redress for consumers"*.

Even where funded litigation results in an award of damages, the vast majority of beneficiaries in opt-out actions will not make any effort to claim it.

- In the Stagecoach South Western Trains Limited claim,[16] the court expressed concern at anticipated low take up rates: "*the actual class member claims may well be significantly lower than a 10 per cent take up*" given the low amount for each individual class member and the burden of coming forward to take distribution.
- In the US, the Federal Trade Commission has reported that although 100% of the settlement fund is made available to claimants in US collective actions, only 9% (on average) is paid out to consumers due to the extremely low class member uptake rate.[17]
- Mr Merricks' claims administrator, Epiq, is reported as estimating that only 5% of the class will come forward to claim distribution of the settlement amount in his claim against Mastercard.

Far from enabling "access to justice", TPLF has prioritised litigation over more appropriate mechanisms of redress or regulatory scrutiny, and has resulted in an explosion of speculative claims being brought for-profit with little to no benefits for those represented. This approach provides little in the way of justice, but large rewards for funders and lawyers.

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

Third party funding has the potential to promote equality of arms between parties in some cases, but the current regulatory landscape means an imbalance of power and conflicts of interest can instead reside between funders and beneficiaries.

[15] Ibid, at paragraph 90
[16] Justin Gutman v First MTR South Western Trains Limited and Stagecoach South Western Trains Limited [2024] CAT 32 at paragraph 100
[17] https://www.ftc.gov/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns

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

As we explained in our answer to Question 1, access to justice is a fundamental right. This includes effective access to courts, which in some cases will only be possible with TPLF. Nevertheless, care should be taken to avoid funding being used to fuel speculative claims brought for-profit with little to no benefits for those represented.

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?

In its 2024 "*European Class Action Report*", the law firm CMS observed that the UK continues to see the highest volume of class actions in Europe, encompassing over 500 million class members with claimed quantum in the region of EUR 145bn. TPLF operates in this area in an environment almost entirely free of regulatory safeguards. In its November 2024 paper, "*Call for regulation of private Third-Party Litigation Funding (TPLF) at EU level*",[18] a coalition of trade associations and chambers of commerce noted that such lack of oversight in the EU is in stark contrast with other related sectors, such as legal and financial services, which are carefully regulated.

In the UK, self-regulation of third party funding is effectively limited to voluntary compliance with the Code of Conduct published by the Association of Litigation Funders (the ALF Code). This is insufficient for a number of reasons, including:

- Only a small number of funders (16 out of the approximately 70 that are or have recently actively funded claims) are members of the ALF and, therefore bound by the ALF Code. When the current self-regulatory approach was endorsed by the Jackson Costs Review of 2009, it was on the basis that all funders would subscribe to the ALF Code.
- There are no penalties for non-compliance with the ALF Code and the ALF has no enforcement powers.
- The ALF Code does not represent a 'gold standard' for funders. For example, it does not specify the level of control or decision making a TPLF provider should have over settlement decisions to be included in the litigation funding agreement (LFA). Instead, it simply states that the LFA should "*state whether (and if so how) the Funder or Funder's Subsidiary or Associated Entity may provide input to the Funder Party's decisions in relation to settlements*". A funder

[18] https://www.businesseurope.eu/publications/call-regulation-private-third-party-litigation-funding-tplf-eu-level-joint-statement

provider may, therefore, have the right unduly to influence a claimant/class representative's decision to settle and yet comply with the ALF Code.[19]

We describe in our response to Question 5 below the improvements that Google believes could be made to the current regulatory framework.

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.

As we explain in our answer to Question 3, effective access to courts is a fundamental right which must be protected. But according to research carried out in 2024, class actions encompassing more than 540 million class members have been brought in the UK, a country with a population of less than 70 million.[20] This equates to more than 8 class actions for each person in the UK. This dramatic increase in class actions, fueled by easy access to unregulated TPLF, has created a climate of speculative litigation.

These claims have offered little in the way of benefit to claimants, but have burdened businesses with immense defence costs. In both the introduction of the Financial Services Act 2012 and the Consumer Rights Act 2015, the legislator was at pains to avoid the introduction of US-style class actions and was concerned by the related impact those would have on defendants. Baroness Noakes stated at the time, "*[t]he spectre of US-style class actions, referred to by the noble and learned Lord, Lord Goldsmith, has rightly terrified the business community in the UK*"[21].

[19] This was most recently demonstrated in Merricks v Mastercard in which Innsworth Capital challenged the settlement agreement between Mastercard and the claimant
[20] "*Opt-out claims now dominate European class actions, CMS report reveals*" via https://cms.law/en/gbr/news-information/opt-out-claims-now-dominate-european-class-actions-cms-report-reveals
[21] https://hansard.parliament.uk/Lords/2010-02-23/debates/c9385a71-93dd-46fb-9092-547f84017216/LordsChamber

Almost three quarters of UK businesses have reported an increase in cases brought against them over the past five years. This trend will likely have stifling effects on the UK's economy, as large companies may be discouraged from maintaining their existing business in the UK, or indeed bringing new, innovative initiatives to the UK.[22] **It is clear that self-regulation isn't working, and better safeguards are urgently needed.**

We support the proposed reforms set out by Fair Civil Justice in its submission to the CJC. In particular:

- **We agree that funders should be licensed by an independent regulator, with powers to withdraw licences and impose fines for non-compliance with new regulation.**
- **We agree that capital adequacy should at minimum cover the funder's own funding obligations and its exposure to adverse costs.** We also consider that rules should require such assets to be in the jurisdiction and not committed to other matters.[23]
- **We agree anti-money laundering requirements should be introduced.** As Steven Friel, chief executive officer at Woodsford Litigation Funding, has highlighted: "*Some litigation funders use complex offshore structures, which may not be straightforward to understand, not least because of the difficulty in accessing independent corporate and financial information.*"[24]
- **We agree that transparency requirements should require disclosure of funding (and insurance) arrangements to all parties.** We consider that law firms should be prohibited from accepting funding from funders in which the law firm has a financial interest.[25]
- **We agree that funded parties should be entitled to a minimum portion of any award and/or that a funders' return should be capped.**

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?

[22] See pages 36 and 37 of the Adam Smith Institute report on TPLF
[23] Additionally, where there is doubt about the funder's ability to meet an adverse cost award, an appropriate level of security should be provided through a payment into court.
[24] https://www.hausfeld.com/media/o1rp0xvw/litigation-funding-and-aml-obligations_article_-1-_-002.pdf
[25] https://legalfundingjournal.com/burford-german-funding-sued-over-hausfeld-ownership-stake/

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?

The regulation of TPLF requires care. There is a risk that any regulatory mechanism which is intended to cover all types of litigation may become so generic that it fails to address the areas with the greatest need. By way of illustration, regulating funding for litigation involving two or more commercial entities inherently carries a lower risk compared to group litigation, where claims are brought on behalf of large numbers of individuals and the value of the claims is significantly higher.

Accordingly, while it may be appropriate to establish a regulatory mechanism with general applicability to all types of litigation, including safeguards like those proposed by Fair Civil Justice (see our answer to Question 5), the greatest need is for targeted regulatory mechanisms for group actions.

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

Google agrees with the principles stated by Axel Voss MEP[26] which should underpin the TPLF industry, namely "*transparency, fairness and proportionality*". We consider this can be achieved through the introduction of the regulatory proposals referred to in response to Question 5.

8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:

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

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

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

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

[26] Voss, "*Report with Recommendations to the Commission on Responsible Private Funding of Litigation*"

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?

Funders and law firms collaborate on claims from their inception, and only later seek a class representative as a conduit to bringing their claim. This practice was identified in the Competition Appeal Tribunal's judgment in *Riefa* and the CAT explicitly discouraged it.[27] Where a claim has been "invented" by a law firm or funder, we question whether it is apt to be characterised as providing access to justice. It is notable that funded claims are typically opt-out collective actions in the CAT where funder returns will be highest and the levels of legal costs are likely to be tens of millions of pounds (see, for example, *Merricks v Mastercard* in which Mr Merricks obtained funding of £45m for his costs and disbursements).[28] We note in this regard that, post PACCAR, many litigation funding agreements provide for the returns to the funder to be a multiple of the investment made. Such a structure has the potential to result in excessive returns for funders.

The current system of self-regulation through the ALF Code is inadequate. In particular, neither the voluntary nature of the Code, nor the consequences of breach, are sufficient to deter abuse. This is unsurprising given the current regime was never intended to regulate TPLF in the way it does now. The self-regulatory approach was endorsed by the Jackson Review but this recommended that, if and when the TPLF market expanded, the question of statutory regulation should be revisited. The CJC interim report has identified a tenfold increase in the value of the UK third party funder's assets since 2012 and the current approach is as a result now outdated.

As set out above, Google considers that the provision of funding by unregulated funders, many of whom are not members even of the ALF, encourages speculative litigation for the benefit of funders, and not with the aim of ensuring access to justice. Such practices significantly increase the overall litigation costs of UK businesses.

We do not consider that the costs of TPLF should be recoverable. The possibility of recovery would further incentivise speculative litigation, disincentivise claimants' lawyers from controlling legal costs, and place additional undue pressure on defendants to settle unmeritorious claims.

[27] Christine Riefa Class Representative Limited v Apple Inc. & Others [2023]
[28] Merricks v Mastercard Incorporated and others [2021] CAT 28 at paragraph 23

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 principles of 'loser pays' and security of costs have long been established in this jurisdiction. Funders should be required to incorporate these foreseeable litigation costs into their business models and funding agreements.

As stated in our response to Question 1 above, access to justice should not be conflated with access to litigation. Mandating that funders cover adverse costs and security of costs in funded claims ensures that the inherent risks of litigation are properly accounted for and helps prevent unmeritorious litigation.

We refer also to our answer to Question 19 regarding ATE insurance.

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

Funders should be fully exposed to paying the legal costs of the cases they fund, providing a crucial safeguard for defendants. The 'loser pays' principle is fundamental to litigation in this jurisdiction, and a feature that it was posited during debate on the Consumer RIghts Act 2015 would contribute to ensuring the worst excesses of the US class actions system were not replicated here.[29]

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

The courts are still in the early stages of managing and controlling the use of TPLF in this jurisdiction. The CAT has recently shown an interest in scrutinising pricing and funder returns during the certification process. In *Gormsen v Meta* the CAT expressly noted that it did not consider the ratchet provisions in the funding agreement to be "*defensible*" where they would see a return to the funder of 8.3 times its exposure (assuming an exposure of £90 million, this would have equated to a return of £750 million).[30] The class representative and her funder volunteered changes to their

[29] https://hansard.parliament.uk/Lords/2014-10-29/debates/14102976000131/ConsumerRightsBill and https://hansard.parliament.uk/Lords/2014-11-03/debates/14110315000095/ConsumerRightsBill
[30] Gormsen v Meta [2024] CAT 11, at paragraph 39(4)

arrangements to address the CAT's concerns, although we do not believe that the changes are publicly known. Given the huge sums involved, however, this approach seems very rough and ready, and the court is carrying out a task which ought to be the subject of specific legislation and/or regulation to ensure that a consistent approach is taken, based on a predictable framework.

Google has limited visibility as to how the TPLF market controls the pricing of funding agreements. This gap in defendant insight is another manifestation of the opacity surrounding TPLF and the motives of funders.

12. Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?
   a. If so, why?
   b. If not, why not?

We consider that funded parties must be protected from exploitative funding arrangements, and that this should be achieved by introducing controls on funders' fees. Without controls on a funder's return, there is a risk of consumers being under-compensated while funders are over-compensated.

It is striking that in the Bates v Post Office group litigation, subpostmasters received only about 20% of the damages awarded, whilst their funders and lawyers reaped 80%.

13. If a cap should be applied to a funder's return:
   a. What level should it be set at and why?
   b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?
   c. At which stage in proceedings should the cap be set?
   d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?
   e. Should there be differential caps and, if so, in what context and on what basis?

Such controls could include:

- An upper limit on the returns that litigation funders are entitled to receive in the event of successful litigation or a settlement. Although PACCAR effectively prevents funders from recovering an agreed percentage of any award, it has not

prevented funders from recovering many multiples of their outlay at significant internal rates of return. The ways in which a funder's uncapped return may be expressed often has the potential to compound the funder's remuneration at a very high rate over time without limit. Where proceedings extend over several years - which is extremely likely - this can lead to excessive funder returns relative to total exposure (a prospect criticised by the CAT in *Gormsen v Meta*).[31] In some EU jurisdictions, including some jurisdictions where class actions are prevalent, an upper limit has been introduced on the returns that litigation funders are entitled to receive. For example, in Germany funders' recoveries in the context of collective actions under the Representative Actions Directive are limited to 10% of the damages awarded, and in the Netherlands the ceiling is 25%. While Google does not advocate for a specific figure, we encourage the CJC to evaluate these approaches as a means to curtail disproportionate funder returns.

- A lower limit on returns due to claimants. This would mean setting a minimum amount that claimants would receive from any damages or settlement to ensure they receive a fair share of the total recovery, regardless of the funder's fees.

14. What are the advantages or drawbacks of third party funding?

As explained throughout this response, while there will be instances where TPLF provides necessary access to funds, we consider that unregulated TPLF has fueled a climate of speculative litigation and resulted in an increase in unmeritorious class actions which offer little benefit to claimants and burden businesses with immense defence costs.

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?

[31] Ibid, at paragraphs 34-41

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?

[No answer]

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?

[No answer]

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?

We consider that the government response to the 2013 consultation on private actions in competition law remains increasingly relevant today: that prohibiting the use of DBAs in opt-out collective proceedings is necessary to avoid a litigation culture, and that "*allowing DBAs could encourage speculative litigation, thereby placing unjustified costs on defendant businesses*".[32]

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?

[No answer]

[32] "*Private Actions in Competition Law: A consultation on options for reform - government response*", https://assets.publishing.service.gov.uk/media/5a795a65ed915d07d35b4c60/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf

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?

It is now standard in collective redress cases that the TPLF provider will require the claimant to procure after-the-event (ATE) insurance to protect them (and the TPLF provider) against the risk of incurring an adverse costs order, for which the premium is incurred in stages. Add to that the premium for an anti-avoidance endorsement, which is now required by funders as the norm, and it is plain to see why the costs associated with opt-out proceedings have escalated in such an extraordinary manner. With greater transparency of funding arrangements, the need for an anti-avoidance endorsement in particular may be reduced. The need for ATE in every case may similarly be reduced if the TPLFs provided greater clarity around their sources of funding and capital adequacy.

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

[No answer]

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

[No answer]

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?

[No answer]

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?

See our answer to Question 37.

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?

[No answer]

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?

[No answer]

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?

Judicial oversight and involvement is essential both before and after proceedings have commenced when TPLF is deployed.

Firstly, the court has a role in protecting the administration of justice by striking out or giving summary judgment where funded claims are deemed as unmeritorious or inappropriate (see our answer to Question 37). Consequently, the court has an important role in evaluating both the claim itself and the motives of the claimant at the outset.

Secondly, the courts play an important and necessary role in safeguarding and ensuring transparency when litigation is supported by third party funding. As referenced in the Voss report, claimants should be required to inform the court and other parties to the litigation of the existence of a funding arrangement and the identity of the funder. Additionally, if requested by the court or defendant, the claimant should provide an unredacted copy of the funding agreement at an early stage of proceedings.[33] The courts should play a crucial role in mandating the disclosure of funding agreements to

[33] Voss, "*Report with Recommendations to the Commission on Responsible Private Funding of Litigation*"

prioritise transparency from the outset. Currently defendants may incur substantial costs to prepare applications merely to have sight of these agreements.[34]

Finally, as noted by the CJC in paragraph 6.31 of their interim report, the courts should have a role in determining whether the funder's returns are a *'reasonable expense to discharge from the proceeds of the claim*.' This involves the courts scrutinising both the circumstances of the case and the terms of the funding agreement to ensure that funding arrangements do not result in "*excessive costs or disproportionate shares of any awards or settlements being allocated to the funder*."[35]

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?

Per our answer to Question 5, we consider that funded parties should be required to disclose the existence and full terms of funding arrangements. As highlighted by Voss, "*adequate supervision of litigation funders and third-party funding agreements cannot be ensured in the absence of obligations on litigation funders to be transparent regarding their activities. This includes transparency vis-à-vis courts or administrative authorities, defendants and claimants.*"[36]

Such mandatory disclosure would:

- assist with security for costs considerations by efficiently providing defendants with the necessary information to assess whether the funding is sufficient to cover possible adverse costs awards and pursue security for costs applications where appropriate;
- eliminate the need for parties to engage in satellite disputes about the need for disclosure of funding arrangements;
- enable the court and defendants to identify and address inappropriate funding arrangements such as those which provide too much control to a funder, or too little benefit to the funded party;
- avoid conflicts of interests, by allowing scrutiny of funding arrangements;
- allow the public and potential class members to scrutinise the funding arrangements, so that the "price" that the class pays for the claim to be funded

[34] See for example Google's application for disclosure of funding arrangements in Case 1408/7/7/21- Elizabeth Helen Coll v Alphabet Inc and Others.
[35] See Chambers and Partners, Review of Litigation Funding in 2024.
[36] Voss, "*Report with Recommendations to the Commission on Responsible Private Funding of Litigation*"

is fully understood; and
- bring much-needed transparency to the TPLF landscape.

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?

It is increasingly evident that third party litigation funders exert a high degree of control over funded litigation. While funders will inevitably have a legitimate interest in protecting their investment, the control they may exert can come into conflict with the interests of the funded party. This can manifest itself in various ways, such as a funder refusing to allocate a budget for a particular course of action they do not agree with. See also our response to Question 29 below. In this manner, defendants can routinely find themselves locked into funded claims in which the claimant no longer has any interest in pursuing, but which they cannot afford to abandon on account of the sums that would become payable to their funder.

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

Recent press attention has highlighted the significant influence that funders can exert on the settlement of proceedings. This is particularly the case where a DBA is used and the funder's return is dependent on damages awarded. This often leads to a situation where the funder's objective is to maximise damages (and thereby their own return) which stands in sharp contrast to the typical motivations in litigation, which often include a desire to settle the dispute and avoid the uncertainties and costs of going to trial.

Merricks v Mastercard now provides a revealing example of the type of conflict that can arise, with the funder (Innsworth, an ALF member and so in principle bound by the ALF Code) publicly opposing the claimant's attempt to settle the claim at a level they considered too low (and precipitous) amidst accusations from the claimant's lawyers that the funder was trying inappropriately to pressure their client.[37] Funders do not owe fiduciary duties to clients, which may lead to this conflict becoming more frequent.[38]

[37] "*Solicitor blasts "greedy" funder for Mastercard settlement opposition*", https://www.legalfutures.co.uk/latest-news/solicitor-blasts-greedy-funder-for-mastercard-settlement-opposition
[38] See page 24 of the Adam Smith Institute report on TPLF

30. Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?

[No answer]

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?

[No answer]

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

We refer to our previous responses to Questions 5, 13 and 27 regarding proposals for controls, reforms and disclosures which we believe would protect claimants, as well as providing certainty for defendants.

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

Google has no visibility of the extent to which the third party funding markets enables claimants to effectively compare funding options from different funders.

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

As highlighted in our response (eg to Question 29), it has become increasingly evident that the objectives of funders and claimants can be fundamentally at odds when it comes to the conduct and settlement of proceedings. The primary goal of funders is to secure and prioritise a return on their investment, which can often starkly contrast with what is in the best interests of the class as a whole. This divergence in objectives underscores the need for stringent oversight and regulation to ensure that the interests of claimants are prioritised over those of the funders.

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.

See our previous answer to Question 29. Funders do not owe any professional obligations to act in the best interests of their client. Ultimately, the funder's goal is to maximise its return on investment, which may lead to conflicts of interest in how the litigation is conducted and in settlement decisions.

Funders should be held accountable by the court and an independent regulator (see our answer to Question 5) and mandated to disclose funding agreements to prevent these conflicts from arising.

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

- **a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?**
- **b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?**
- **c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?**

We consider that the third party funding of collective proceedings, which offer the potential for very significant financial returns for funders and lawyers, provides major incentives for unmeritorious and speculative litigation. See our answer to Question 1 for evidence of the unmeritorious claims determined to date, and the lack of meaningful benefits being felt by consumers.

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.

By December 2024, we understand that funded claims were responsible for more than 50 applications for a Collective Proceedings Order in the Competition Appeals Tribunal. Defendants opposed more than half of such applications (around 60%), yet every single

application was allowed to proceed by the CAT. Google recognises that the UK's collective action regime is intended to perform the important role of facilitating access to justice for those with bona fide grievances who would otherwise not be able to obtain it on their own. Nonetheless, the courts must play a gatekeeping function and must "*be astute to ensure that a system intended to further access to justice does exactly that, and does not become a "cash cow" either for lawyers or for funders.*"[39] **The striking reality that so few applications are being rejected suggests that this gatekeeping function is not working.** It is essential that the court's gatekeeping function has real teeth; that collective proceedings are carefully scrutinised and allowed to proceed only if it can be said with conviction that they will provide fair resolution of genuine disputes, and are not simply opportunistic investments by funders thinly disguised as "access to justice".

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?

[No answer]

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

[No answer]

[39] Gormsen v Meta Platforms [2024] CAT 11, at para 35.