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

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

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

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

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

Your response is (public/anonymous/confidential):	Public
First name:	Rachel
Last name:	Bright
Location:	London
Role:	Solicitor
Job title:	Solicitor
Organisation:	Austen Hays Limited/Gateley Legal
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

The full list of consultation questions is below:

- **Please give reasons for your answers. Please do so by reference, where applicable, to the guidance given in the footnotes.**
- **All answers should be supported by evidence where possible to enable evidence-based conclusions to be drawn.**
- **It is not necessary to answer all the questions.**

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

1. To what extent, if any, does third party funding currently secure effective access to justice?[1]
   TPF is essential for securing access to justice in the current legal landscape.
   Between court fees, solicitor's fees, counsel's fees, experts and adverse cost risk, litigation is extremely expensive. Individuals or entities with legitimate claims may be deterred from bringing litigation because of the costs, and the adverse cost risk. Indeed, in the case of individuals, the cost of litigation may make bringing a claim impossible.
   TPF helps claimants who lack the financial resources to pursue their claims on an individual basis. By covering the cost of litigation, it enables individuals and entities to access the legal system, which might otherwise be too costly.
   TPF can empower marginalized communities by providing the necessary resources to assert their rights. This is crucial for addressing systemic barriers that inhibit access to justice.
2. To what extent does third party funding promote equality of arms between parties to litigation?
   TPF provides a means for levelling the playing field between individuals/smaller entities and well resourced, large corporate opponents. TPF enables claimants and law firms to hold corporates and others accountable when there is wrongdoing.
   By absorbing the risk of litigation, TPF empowers individuals to pursue these claims.
   TPF enables claimants to have access to top tier legal representation, which will improve their chances of success, and will enable them to match the firms instructed by high profile defendants.
3. Are there other benefits of third-party funding? If so, what are they?
   In addition to promoting equality of arms, and facilitating access to justice, TPF also encourages meritorious claims. Funders usually invest in cases with a high likelihood of success. This means that TPF can help bring forward strong claims that might otherwise go unpursued due to financial constraints.
4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[2] If not, what improvements could be made to it?
   The current self-regulatory framework is not sufficient for the following reasons:
   - The Associate of Litigation Funders lacks any real power. The ALF has established a Code of Conduct for funders, but there is no obligation for a funder to join the ALF, which means that many funders operate outside of the self-regulatory framework. The sanctions the

[1] When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.
[2] This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

ALF can issue for breach of the Code of Conduct are also relatively minor when compared to the value of the claims being funded. For example, a fine of £500.

- Anyone can become a funder or claim to be a funder, and there is no way to verify what the provenance of funds is and whether a funder has the capital they claim to have. This leads to law firms/clients wasting an inordinate amount of time speaking to people who are in reality simply trying to become funders. The other issue is that funders never want to disclose their source of funds. They are usually backed by private equity funds who also may not want to disclose their identity. Compared to obtaining funds from a bank, where one can assume that there are no AML issues, drawing down funds without knowing about its origins is risky. Litigation is time sensitive, with limitation dates, client pressures and requirements to bookbuild making it essential for law firms to know that funders have already been through a certain degree of diligence by a regulator.
- There is no cap on returns for funders. A 50% cap would remove the need for negotiation between funders and law firms and would protect claimants by ensuring the keep a certain percentage of their damages. However this could disincentivise funders and restrict access to justice, so a cap should be balanced with the ability for claimants/funders to recover the cost of funding in the event of success in a case.

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;
    Ultimately, TPF is a tool for good, and ensures access to justice and equality of arms. However, there are risks that arise due to the current self-regulatory system.
        - Funders cannot be properly held to account for any misconduct as there is no compulsory regulatory body.
        - There is no way to verify where funds are coming from, which poses an AML risk.
        - There is no cap on return for funders, which can reduce the damages available for claimants.

    b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;[3]
    The risks are not effectively mitigated by the self-regulatory framework.
    The risks could be mitigated by the introduction of a regulatory body for funders, a compulsory code of conduct and effective sanctions, as set out above. This body could be the ALF, if they are given power to impose effective sanctions, and all funders in the market have to be a member.
    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.
    A compulsory code of conduct and regulatory body would mitigate the risks that are currently present in the TPF market. If they are balanced with the commercial

[3] Please give full details of each possible mechanism and explain how each would work (including who any potential 'regulator' or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.

realities of the market, and the need to make litigation funding an attractive investment, there are no disadvantages.

6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?
    a. If not, why not?
    b. If so, which types of dispute and/or form of proceedings[4] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[5]
    Across all types of dispute, regulation needs to be more hands on, and all funders need to be subject to a supervision by a regulatory body, there needs to be a system of authorisation before funding can be offered and there should also be an awards cap.
    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?
    Regulation of TPF should be set by legislation and should apply across the board. There should be no case-by-case basis or different approach depending on the type of funded party.
    To ensure proper transparency in the market, the same standard should be applied across the board.

7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?
    - Transparency: All parties should be able to see where funds are coming from and how funders are operating.
    - Accountability: Funders should be held accountable for their conduct by their regulatory body and sanctions should be effective.
    - Engagement: Those impacted by the regulations should be consulted to ensure that regulations remain proportionate and up to date.
    - Proportionality: Regulatory measures should be proportionate to the risks they aim to mitigate. Any regulation of funders needs to balance the commercial realities of the funding market with protecting claimants.
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?
    The rising cost of litigation funding has had a direct impact on the development of litigation funding. TPF I necessary precisely because the costs of litigation are so high. Many cases could not be run without TPF.
    b. What impact, if any, does third party funding have on the level of litigation costs?
    TPF enables claimants to be better prepared and better resourced. This allows litigation to be pursued more effectively.
    c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?

[4] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.
[5] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

N/A

d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[6]

N/A

e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?

   i. If so, why?

   Yes. There is no reason why the cost of funding should not be considered in the same way other costs are, as it is an essential cost for bringing litigation. There could be a requirement to disclose the cost upfront so that defendants become aware of the potential exposure and consider the need for them to obtain insurance firstly, and also to not drag matters on when they know if their defence is weak.

   Recoverability will also minimise the percentage/multiple that funders seek to recoup from damages and will protect claimants.

   ii. If not, why not?

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

   The recoverability of adverse costs is essential to prevent vexatious litigation and ensures that only serious and well-founded cases proceed. However, the risk of having to pay adverse costs can be a significant financial barrier for claimants. This may discourage individuals with legitimate claims from pursuing litigation due to the fear of financial ruin.

   Equally, requiring a claimant to provide security for costs can protect defendants from the risk of not recovering their costs. However, this requirement can also prevent financially disadvantaged claimants from accessing the courts, particularly if they cannot afford to provide the security.

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

    Yes. Litigation funding is high risk, and high reward. Funders seek to recoup a large return on investment, and so it is only right that they should remain exposed to paying the cost of the proceedings they have funded.

    Funders carry out intensive due diligence before deciding to fund a claim, and so they will be alive the possibility of adverse costs risks.

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

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

    The High court does not currently get involved in any third-party funding arrangements, unless there is a specific dispute between parties in that arrangement and a claim is brought by any of the parties. The Competition Appeals Tribunal does not directly control the pricing of the

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

arrangements but can approve funding agreements, and at the end of a case, if the claimant's case is successful, to approve how funds should be distributed to clients, funders and the law firm. This may have the indirect impact of controlling pricing in the market, because the uncertainty that courts may dictate how funders recover their investment without being able to rely on existing contractual terms between parties increases the cost of this type of capital and even the availability of capital in the market.

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

    The self-regulation is not effective for several reasons. Anyone can become a funder or claim to be a funder, and there is no way to verify what the provenance of funds is and whether a funder has the capital they claim to have. In our experience, some who have claimed that they are funders are simply trying to find cases and then trying to find the funds for those cases, not the other way round. This leads to law firms/clients wasting an inordinate amount of time speaking to people who are in reality simply trying to become funders. The other issue is that funders never want to disclose their source of funds. They are usually backed by private equity funds who also may not want to disclose their identity. Compared to obtaining funds from a bank, where one can assume that there are no AML issues, drawing down funds without knowing about its origins is risky. Litigation is time sensitive, with limitation dates, client pressures and requirements to bookbuild making it essential for law firms to know that funders have already been through a certain degree of diligence by a regulator.

    A cap on returns to funders would also be welcome. It will remove the need for negotiation between law firms and funders and ensure that claimants get a certain minimum percentage of the damages. However this could disincentivise funders and restrict access to justice, so a cap should be balanced with the ability for claimants/funders to recover the cost of funding in the event of success in a case. There is no reason why the cost of funding should not be considered in the same way other costs are, as it is an essential cost for bringing litigation. There could be a requirement to disclose the cost upfront so that defendants become aware of the potential exposure and consider the need for them to obtain insurance firstly, and also to not drag matters on when they know if their defence is weak. It will force parties on both sides to be sensible. On the claimant side, funders will not continue to fund a claim if they think the claim is weak and their chances of recovering the cost of funding are low/get lower as the case progresses, so the chances of vexatious/frivolous litigation continuing is low.

    b. If not, why not?

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

    a. What level should it be set at and why?
    It should be 50%, which is also the maximum deduction under DBA regulations. It would keep things simple if it's the same across the board.
    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?
    It should be set by legislation. Courts should stay away from making decisions on funding on a case-by-case basis as the uncertainty will make it very difficult to obtain funding and to predict recoveries for all stakeholders involved.

c. At which stage in proceedings should the cap be set?
It should be part of legislation, not linked to stage of proceedings.
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?
The same cap of 50% should apply to all cases, which ensures that at least half the recoveries go to claimants.
e. Should there be differential caps and, if so, in what context and on what basis?
No.

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

14. What are the advantages or drawbacks of third party funding?
Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.
The main benefit of third-party funding is enabling access to justice. It allows claimants and law firms to hold corporates and others accountable when there is wrongdoing.

Third-party funding itself has no drawbacks. However, there are improvements to be made to the sector as outlined above. There is no risk in England & Wales that funding would encourage frivolous litigation. Research published by the LSB shows that only 3-5% of potential cases get funded LSB publishes research into litigation funding - The Legal Services Board. Funders do not only consider the legal merits of a case but their chances of recovery, since it is often non-recourse funding. Funders take a huge risk in funding a case which is not just limited to losing the amounts invested, but even being exposed to adverse costs of the opposing party.

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?
    There is no real alternative to funding for group litigation/collective actions.
    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.
    These are not alternatives – they do not actually provide funds to pay for disbursement and WIP on case.
    c. If so, when and how?
16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?
While this is not an actual alternative to funding, insurance products which insure the funding itself are now becoming more available. This should have the impact of making funding significantly less risky and encourage more funding capital on the market. This sort of product should therefore be encouraged.

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?
    Changes to these regimes are not required as long as changes are made in relation to a cap of 50% from deductions from damages which applies across both regimes, as well as a mechanism for recovering cost of funding from the opponent.
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. As outlined above, the only reform which would lead to better use of court time and reasonable behaviour by all parties would be if cost of funding is recoverable.
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?
    Funders are often exposed to adverse costs despite after-the-event insurance (ATE) being in place, if insufficient. The amount of ATE coverage is determined and agreed by the law firm and funders and it is up to them to ensure that the coverage does not expose them to any risk. This can have the effect of funders (who will be paid a multiple on any premiums paid as part of funding) to over-egg the amount of ATE in place. It would therefore be a welcome change if the ATE coverage is something that can be legislated, as a percentage of the claimant's budget (minus ATE), for instance. This would give funders certainty on the level of coverage needed and negates the need to provide for excessive coverage.
20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?
    N/A
21. Are there any reforms to portfolio that you consider necessary? If so, what are they and why?
    This question isn't clear.
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?
    N/A

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

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?

    Civil Procedure Rules
    As a starting point, litigation funding should play no part at all in the conduct of litigation. Whilst it is acknowledged that litigation funding plays a crucial role in providing access to justice, it should be a solely pecuniary endeavour, as any role that funding plays in the

litigation may: (1) give rise to direct conflicts of interest with claimants; and (2) not be in the best interests of the claimants.

Notwithstanding the above, a distinction can be made between the role of litigation funding for opt-in proceedings and representative actions.

With respect to the CPR pertaining to opt-in collective actions, namely CPR 7.3, 19.2, 19.21 and 19.8(1), it is unnecessary to amend the CPR as it is averred that litigation funding should play no role in the conduct of litigation for opt-in proceedings.

However, in relation to representative actions under CPR 19.8(4), it may be reasonable for the court to scrutinise the role of litigation funding via the terms of the litigation funding agreement. Given that represented claimants in representative actions are not directly or actively involved in the litigation, the courts have a duty to actively manage the case and to comply with the overriding objective. The inherent nature of represented claimants by way of the degree of separation to the 19.8 action justifies a degree of interrogation. This may be achieved by ensuring that any litigation funding agreements in representative actions treat the claimants fairly and justly, in accordance with the overriding objective.

This could be achieved by an express amendment to CPR 19.8. Alternatively, it could be inferred from the broad powers conferred upon the courts pursuant to CPR 3.1(2)(p) that "the court may take any other step or make any other order for the purpose of managing the case and furthering the overriding objective…". Given that recent cases brought pursuant to CPR 19.8 have not been favourable to claimant parties , it is our view that unless caselaw precedent changes direction significantly, litigation funding will not play a large role in representative actions in England and Wales moving forwards, and therefore express amendments will not be required given the discretion already conferred by CPR 3.1(2)(p).

The court should be made aware of the cost of litigation funding, if it is to become a recoverable cost.

Competition Appeal Tribunal Rules

In relation to the Competition Appeal Tribunal Rules (**CAT Rules**) relevant to the funding of collective proceedings, we refer in particular to:

Authorisation of class representative

- Rule 78(2)(d). As set out in the CAT Guide to Proceedings (**CAT Guide**) at para 6.33, the Tribunal will consider the ability of the Proposed Class Representative (**PCR**) to fund its own costs. The Tribunal will have regard to the PCR's financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. In relation to the authorisation of class representative, the CAT Guide at para 6.30 refers to the potential conflict between the interests of law firms or third party funders and the interests of the class member, which may mean such body is unsuitable to act as a class representative.

- Rule 78(3)(c)(iii). In authorising the class representative, the Tribunal shall take into account whether the PCR has prepared a plan for the collective proceedings that satisfactorily includes any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the PCR shall provide.

Undistributed damages

- Rule 93(4) – 5. Where there are undistributed damages, the Tribunal may make an order directly that all or part of any undistributed damages is paid to the class representative in

respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.

- In exercising its discretion under Rule 93(4), Rule 93(5) provides the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court (or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session).

- With respect to undistributed damages, we refer to paras 6.87 – 6.90 of the CAT Guide.

Collective settlements

- Rule 94(4) and (9). In relation to collective settlements, the application shall set out the terms of the proposed collective settlement including any related provisions as to the payment of costs, fees and disbursements. In determining whether the settlement is just and reasonable, the Tribunal shall take into account a number of factors including the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements. See in particular para 6.98 and para 6.125 of the CAT Guide.

- Please also refer to Rule 97(2) and (7) in relation to a collective settlement approval order which reference the settlement terms including any related provisions as to the payment of costs, fees and disbursements.

We also refer to Rule 113 which provides that subject to section 47C(8) of the Competition Act 1998 (**CA98**) and Rule 93(4), the rules on funding arrangements made under Part 2 of the Courts and Legal Services Act 1990 apply to proceedings before the Tribunal.

Case law developments

The prohibition arising under section 47C(8) CA98 provides that a DBA agreement is unenforceable if it relates to opt-out collective proceedings, which is referred to in the CAT Rules as noted above. In light of the Supreme Court's ruling in *PACCAR*[7], and the abandoned legislation introduced by the previous government to reverse the *PACCAR* decision, numerous changes have been made to existing litigation funding agreements (LFAs) in place in respect of opt-out collective proceedings.

The Court of Appeal is in the process of determining appeals from CAT judgments on the adequacy of funding arrangements. The appeals include:

- *Commercial and Interregional Card Claims I Limited v Visa Inc & others* (CA-2024-000602) and *Commercial and Interregional Card Claims II Limited v Visa Inc & others* (CA-2024-000601);
- *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited and another* (CA-2024-000151);
- *Apple Inc. and Apple Distribution International Limited v Kent* (CA-2024-000285); and
- *Gutmann v Apple Inc and Others* (CA-2024-000892).

Judgments on the appeals are anticipated during the course of 2025 and should clarify many aspects of the CAT's approval of funding arrangements.

[7] R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28.

In terms of other anticipated developments, in February 2025 the CAT is due to hear the settlement approval application in the *Merricks*[8] case. The funder has been given permission to intervene in the settlement hearing. Given the publicised disagreement between the funder in that case and the class representative and law firm bringing the claim, the CAT's determination of the settlement issues including payment of costs, fees and disbursements will be significant.

We note the Tribunal's general recognition of the importance of funding. For example, in the recent settlement approval ruling in *McLaren*[9], at para 83 it stated, "The Tribunal appreciates professionals need to be paid and funders have to have a reasonable opportunity to make a reasonable return on its investment across their set of cases, otherwise funders go out of business, and they will not be available to fund these types of cases." However, considerable uncertainty as to funding arrangements and reasonable funder returns remains in the regime.

Need for greater clarity

It is clear the Tribunal has an important supervisory function, including relating to payments to funders under the collective proceedings regime. The Tribunal has an important role assessing the reasonableness of funding arrangements in collective proceedings and exercises close supervision in that regard, such as what is a reasonable rate of return for funders on the facts of a particular case.

However, we consider that given the lack of clarity regarding funding arrangements since the *PACCAR* ruling, it would be of benefit for the CAT Rules to be amended to reflect recent decisional practice relating to funding arrangements. We note the currently minimal references to funding arrangements in the CAT Rules and would suggest the rules be amended to now reflect a decade of experience since the CAT collective proceedings regime was introduced in 2015. Greater clarity would be beneficial in terms of entering into LFAs at the outset of proceedings and would help increase legal certainty overall as to acceptable terms and rates of return.

We note the necessary changes could be in the form of the CAT Guide or a practice direction, if it is considered that the CAT Rules themselves should remain broadly unamended in substance.

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?
    N/A
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?
    In light of the Court of Appeal judgment in Rowe, we do not consider amendments to the CPR necessary. Increased funding risk, in this case the Court of Appeal's refusal to grant Therium with a cross-undertaking for security of costs, whilst becoming precedent in English law as a result, does not need to be reflected in changes to the CPR.
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?
    It is our view that the starting point for third party funding is to have no role in the conduct of litigation generally, whether pre-action or after proceedings have commenced.

[8] Walter Hugh Merricks CBE v Mastercard Incorporated and Others 1266/7/7/16 [2025] CAT 7
[9] Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others 1339/7/7/20 [2025] CAT 4

Despite the above we consider that, should the court perceive it is appropriate to get involved in issues related to funding, that control should be exerted in the pre-action phase of litigation only. Any interrogation into the type of funding arrangement and/or the terms of the funding agreement should be settled prior to commencement of proceedings or at most an early stage of the proceedings. For example: in CAT proceedings, pursuant to PACCAR, it is necessary for the CAT at certification to established whether the funding arrangement is lawful. Once the court is satisfied that the funding arrangement is acceptable, the court should not need to revisit the funding arrangements at a later stage unless there is good reason and absolutely necessary to do so.

In particular, the court should get involved in any settlement attempts between the parties, or consider funding arrangements to inform the level of damages. Once the funding arrangement has been approved by the court, the court should divest its control over it, and any funding-related issues should be the jurisdiction of the litigating parties only.

It is acknowledged that the CAT Rules makes provision for the CAT to control: (1) the authorisation of the class representative as part of certification, see Rule 78(2)(d); and (2) collective settlement if a collective proceedings order has been made, see for examples Rules 94 and 97. This may be appropriate due to the remoteness of claimants to the litigation who are represented by the Class Representative; the Tribunal's obligation to fulfil the governing principles; and to act in the best interests of the claimant class who are far removed from the claim. This requirement is heightened in the case of opt-out claimants who may not even be aware of the existence of the litigation, and thus the Tribunal may act as an auditor to the litigation on their behalf. In these circumstances, the court may control funding-related issues once proceedings have commenced to comply with the existing CAT Rules.

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?

Court

Regarding opt-out proceedings in the CAT, the CAT Rules stipulate that the existence of funding arrangements and the terms of such funding must be disclosed to the CAT. We do not contest this, but the extent should only be the minimum level required for the CAT to discharge its obligations and protect the interests of the claimant class.

In non-CAT proceedings, there are no rules in the CPR to stipulate that the court must be made aware of the existence of funding arrangements or the terms, save that this may required by the solicitors' duties to the court. We are not opposed to the court having information about the funding, so long as it is the minimum required for the court to effectively administrate the litigation.

Opponent knowledge

In relation to the funded party's opponents, our view is they should not be made aware of the existence of funding arrangements and/or the terms of such funding in any court proceedings, unless there is justifiable reason to do so. The courts are able to satisfy themselves of the legality and adequacy of any funding arrangements without prejudicing the interests of the funded party's opponents. It is our view that there will be extremely limited reasons, if any, why the funded party's opponents should ever need to be aware of funding arrangements or the terms of funding. Should the opponents require affirmation that the funding party is adequately funded to cover the opponent's costs, including any adverse cost risk, this can be achieved in other ways such as applying for security for costs, seeking an undertaking or providing evidence of escrowed funds to the court.

Disclosure of funding arrangements to an opponent could inform them of the funded party's litigation risk and litigation strategy which would prejudice their ability to conduct proceedings in the best interests of their clients. This risk is heightened if the opponent is the defendant party, which is the more likely scenario in a funded litigation. Should a defendant party have visibility of the claimants' funding arrangements, the defendant party can make use of knowing:

- The type of funding arrangement (CFA/DBA);
- The litigation funder's expected return, including any specific terms such as rachets and success fee; and
- The cost of funding the litigation.

The above, which is not exhaustive, may allow the defendant to reverse engineer the financials and strategise the most advantageous position to conduct the litigation and to offer unfavourable settlement terms in light of the context provided by the claimants' funding arrangements. The existence and terms of the funding arrangement also provide the defendant with another angle to probe and find fault with in order to delay and obstruct the substantive issues of the proceedings. Accordingly, it is our view that the funding party's opponents should not be made aware of the existence or terms of funding, unless the court has sufficiently good reason to provide them with the funding arrangements.

Questions concerning provision to protect claimants.

28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?
Third party funders should not exercise any control at all over litigation. They do not provide legal advice and should only serve a purely financial function in order to provide access to justice to claimants that do not have the resources to fund their own claims. Any intervention by a third party funder may cause a conflict of interest between the interests of the funder and the interests of the claimant(s). As the funder and claimant will draw down from the same pool of damages/settlement, each party has a vested interest to obtain the largest proportion of monies for themselves, at the expense of the other party.

If a third party funder was able to exercise some control over the litigation, they may influence it in a way that allows them to draw down a larger proportion of recompense. For example: a third party funder may direct the legal representative to run legal arguments contrary to the best interests of the claimants. Whilst this is rather unlikely and hyperbolic, this serves to explain on a basic level why funders should not interfere with litigation. A more realistic example is where a funder may wish to intervene in a settlement process where the funder has an opinion about the settlement offers proffered. A funder will always have a vested interest for a higher settlement offer, and may intervene where the funder feels that an offer is not as higher as expected, or even below their outlay in the litigation. However, this may be a realistic offer and it may be in the best interests of the claimants to accept and conclude the litigation.

Our view is, in the absence of court intervention, any settlement should be the result of bilateral negotiation between the claimants' and defendant's solicitors. The funder should not be involved in any way, and the risk of an unacceptable settlement to the funder should have been priced into their calculations at the point the funding agreement is negotiated.

In light of the recent settlement proposal in Merricks , where the settlement offer of £200m had been provisionally accepted by the class representative, intervention by the funder Innsworth Capital has demonstrated how a third party funder's influence can derail a litigation. This is despite the fact that £100m would be going to Innsworth, which is higher than its outlay in the proceedings. If Innsworth was not able to intervene in the settlement proceedings, acceptance of the settlement offer would conclude the litigation, subject to the CAT approving the settlement on behalf of the best interests of the opt-out claimants. Innsworth would still be free to pursue the class representative if they feel that Merricks breached the funding arrangements, but this would not affect the outcome of the litigation.

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

During settlement, different funding mechanisms, namely conditional fee agreements ("CFA") and damages based agreements ("DBA") can affect the level of return to the legal representatives. In a winning case, a CFA will provide the legal representatives with their legal costs plus a success fee, whereas in a DBA the lawyers earn a percentage of the damages.

Various factors can affect the return to the lawyers including but not limited to:

- The level of damages;
- The length of the proceedings before settlement; and
- The costs/WIP incurred by the lawyers.

In cases with high damages, a DBA may yield a higher return for the legal representatives because the fee is a percentage of the total recovery. However, in cases with lower damages, or where the case is settled quickly, a CBA might be advantageous as the success fee is capped and might result in lower overall costs. Consequently, the legal representatives may conduct themselves in any settlement discussions based on the type of funding mechanism between them and the client/funder and the factors above to maximise their return.

For the litigation funder, we aver that they should not have any participation in settlement proceedings and that this is between the parties to negotiate. However, for completeness, if the funder is able to exercise some control over settlement, they would do so in a way most advantageous to them to maximise their return as well, regardless of the funding mechanism used.

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

As a general rule, and as alluded to previously, our view is that the court should have a minimal role in relation to third party funding. Should the court, at its own discretion, decide that it is necessary to interrogate the existence and terms of a funding arrangement because the court would otherwise be unable to discharge its obligations, then this should be done in the pre-action stage or concluded at an early stage of the proceedings. Once the court has satisfied itself that it is able to rubber-stamp the funding arrangement, the court should not need to revisit the funding arrangements again, so long as no material issues with the arrangements occur that could affect the conduct of litigation. The onus of this would be placed on the funded party in accordance with their duties to the court.

Therefore, our view is that the court should not be required to approve the settlement of proceedings where the settlement terms are provided at a mid to late stage of the litigation, which is typically when settlement is made to avoid the costs of trial.

In the event that a settlement offer is made pre-action or at an early stage of the proceedings, the court may be required the approve the terms of settlement if it is aware of the existence

and terms of the funding arrangement already. This is to protect the best interests of the parties and to ensure that the funding arrangement will not prejudice any party, such as the funder getting an excessive proportion of the settlement damages. Where the court is not yet aware of the existence or terms of the funding arrangement, and the funded party should disclose the arrangement as part of their duties to the court, then a request should be made to the court for approval. Similarly, if the court decides that they need to review any funding arrangement, they have the discretion to do so.

The above applies to all proceedings, save for opt-out collective actions in the CAT. In the case of opt-out CAT actions, the CAT rules mandate that the CAT must be made aware of the funding arrangements and we do not contest the existing rules as the distance of opt-out claimants to the proceedings warrant a higher level of protection of their interests, and the CAT acts as a gatekeeper of the same.

31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?
    As above, the Court should not have a role in approving settlements in cases where there is third party funding. With the protections referenced within this response, the Claimants' interests would be adequately protected, without adding uncertainty and delay to proceedings. There must be balance in providing protection for claimants, vs ensuring those claimants are still able to access third party funding. If there is too much uncertainty in the process, it will likely reduce the size of the litigation funding market and/or increase the cost of funding, to reflect the uncertainty.
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?
    a. The introduction of a regulator in the third-party funding market;
    b. Legislate a 50% cap on the amount deductible from a claimant's damages, whatever the contingent fee arrangement in place, to include any shortfall contribution to cost of funding; and
    c. Provision in the CPR for the cost of funding to be a recoverable cost, payable by the losing party. Such cost to be visible during the course of the litigation/ set out in parties budgets.
33. To what extent does the third-party funding market enable claimants to compare funding options different funders provide effectively?
    It doesn't. Due to the nature of these funds, there is very little visibility over the different structures that each funder offers for third party litigation funding. Some solutions are dependent on the type and nature of the case. Consequently, it can be a lengthy process to complete DD with a funder, before the funding model is finalised. That process is not always successful and can lead to the same process having to be repeated with second, third and fourth funders. Whilst unhelpful and time consuming, realistically, there is never going to be greater transparency over the funding models on offer. To require this would likely discourage funders from entering/staying in the market. There is increasing awareness of fundings models by legal firms in this space, who seek litigation funding with the interests of their clients in mind.
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?
    Conflicts should not arise, as under the terms of the LFA in place, it should be an express provision that whilst a funder should be kept updated on the progress of the litigation, including on all elements of the merits, a Funder should have no role in the litigation progress and decision making itself. Conflicts can arise and we have seen it publicly in the Mastercard litigation. At the point of settlement there can be a divergence of interest when determining

whether the settlement offer is adequate or not. It is of course for those instructing to act in the best interest of the claimants. If that is to the detriment of full recovery by the Funder, it can give rise to a conflict.

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.
The mechanism for information sharing should remain in the LFA, so that the Funder is kept apprised of developments which may affect their investment. It is a matter for a properly informed Funder to take a view on whether to continue funding a piece of litigation, if the merits or quantum figures shift during proceedings. When entering litigation, all parties are alive to the fact that merits and quantum can change. The risk reward is a significant return on investment if proceedings are successful or a settlement is achieved.
Additionally, to ensure there is a mechanism to address improper engagement by a Funder, with the introduction of a regulator, and a complaints/reporting mechanism, this will act as a reminder of where the boundaries are, o worst case, provide Claimants with an avenue for resolution, without taking up Court time.

Questions concerning the encouragement of litigation.

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:
    a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?
    It facilitates, rather than encourages, individuals and businesses in a group context, to access justice for meritorious claims where they might not have been able to without 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?
    As referenced previously, there is no encouragement of vexatious litigation, it rarely if ever exists in a litigation funded context. Funders consider the merits of a claim at great length before committing capital, usually on a non-recourse basis. Vexatious or unmeritorious claims simply would not be funded.
    c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?
    As above, third party litigation funding provides one of very few entries to accessing justice in group/collective/representative claims against well resourced defendants. Such litigation would otherwise be cost prohibitive. It is therefore critical that it is preserved as a funding mechanism for these types of actions, albeit with the suggested protections in place, to ensure that damages are not eroded away entirely in the process.
    When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.

37. To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.
See earlier responses. In the group/collective/representative actions context, reform /protections that should be introduced are:
    a. The introduction of a regulator in the third-party funding market, with a requirement for source of funds to be provided as part of the regulator's approval process;

b. Legislation to require a 50% cap on the amount deductible from a claimant's damages, whatever the contingent fee arrangement in place, to include any shortfall contribution to cost of funding;
c. Provision in the CPR for the cost of funding to be a recoverable cost, payable by the losing party.

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?
As above, there is limited scope in our view, given the nature of those funding. Introducing a requirement for funders to provide this information could lead to them exiting the litigation market. Assurances as to the legitimacy/source of funds however, through a regulator led process, will be beneficial and bring a greater level of transparency then there currently is.

General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?[10]

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