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:	**(1) Ravi** **(2) Andrew** **(3) Adrian**
Last name:	**(1) Nayer** **(2) Higgins** **(3) Zuckerman**
Location:	**(1) London** **(2) Oxford** **(3) Oxford**
Role:	**(1) Author** **(2) Author** **(3) Author**
Job title:	**(1) Partner** **(2) Professor of Civil Justice Systems, Faculty of Law** **(3) Emeritus Professor of Civil Procedure, Faculty of Law**
Organisation:	**(1) Bryan Cave Leighton Paisner LLP** **(2) University of Oxford** **(3) University of Oxford**
Are you responding on behalf of your organisation?	**No**
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.

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3 March 2025

Dear Chairperson,

Civil Justice Council's Review of Litigation Funding – Consultation

We write in response to the Council's Litigation Funding Working Group's Interim Report and Consultation published on 31 October 2024.

This submission is based upon independent academic research and high-level litigation practice advising and acting for a range of actors. The views represented are the views of the authors and should not be attributed to Bryan Cave Leighton Paisner LLP or its clients.

Our submission is organised by question type and as a hyperlinked PDF as follows:

(a) 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.

(b) 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.'

(c) 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.'

(d) 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.'

(e) Questions concerning provision to protect claimants.

(f) Questions concerning the encouragement of litigation.

We are happy to provide additional submissions if further detail on any responses would be helpful and intend to attend the CJC.

Yours sincerely,

Andrew Higgins
Professor of Civil Justice Systems, Faculty of Law, University of Oxford

Emeritus Professor Adrian Zuckerman
Emeritus Professor of Civil Procedure, Faculty of Law, University of Oxford

Ravi Nayer
Partner, Bryan Cave Leighton Paisner LLP

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Question	Response
Section 1: 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?	Compared with alternative options, we consider it incontrovertible that third party funding (TPF) provides a greater number of individuals in a wider variety of situations, with the means to seek redress for harm through the courts of England and Wales. Lack of resources to pursue litigation is one of the principal barriers to justice in England and Wales. The large majority of the population cannot afford the traditional, pay by the hour, method of obtaining legal assistance given the very high costs of litigation. Further, public funding is increasingly unviable following cuts to Legal Aid by previous governments' austerity programmes, whereby entire categories of cases are not eligible for legal aid regardless of means and there have been substantial reductions in the number of legal aid providers. In these circumstances, private funding in the form of TPF is crucial. TPF has been shown to concentrate on litigation where the case for public funding is lowest (commercial litigation between sophisticated commercial parties) and/or the cost of public funding is highest (collective redress actions). Put simply, TPF fills the gap left by public funding. For individuals seeking redress for mass torts or competition infringements, TPF is particularly crucial. Costs are especially prohibitive in these collective redress actions, which involve complex arguments and last several years. The claim brought by sub-postmasters against the Post Office is a prime example of a claim that would not have been brought without TPF. TPF is clearly an effective method of enabling access to justice. TPF imposes no burden or cost on the taxpayer and promotes a more efficient and equitable distribution of resources by enabling only those cases with strong prospects of success to be brought to court and providing greater equality of arms between litigants. Litigation funders currently take on a very small percentage of cases that seek litigation funding – just 3–5% on average. A major reason for that small number is the robust screening processes used by funders to ensure that the cases they fund have strong prospects of success. As there is no correlation between litigation funding and unmeritorious litigation, it cannot be said to cause any unfairness to defendants either.
2 To what extent does third party funding promote equality of arms between parties to litigation?	Equality of arms refers to the extent to which a litigant can adequately prepare and present their case under conditions that do not place them under a significant disadvantage vis-à-vis their opponent. Clearly, in providing financial resources to litigants to engage adequate legal representation and robustly pursue any necessary proceedings, where litigants would be unable to do so otherwise, TPF significantly promotes equality of arms between parties to litigation.

Question	Response
	Further, as TPF is typically non-recourse, claimants do not have to repay the funder if they lose. This shifts the financial risk away from claimants, allowing them to pursue their claim without fear of financial liability. In addition, TPF enables claimants to counter the defence strategies of deep-pocketed defendants, such as prolonging litigation to exhaust the claimants' resources. The presence of a litigation funder can therefore encourage defendants to settle cases more quickly and fairly, knowing that the claimant has the financial wherewithal to see the case through to the end. In our experience, it is reasonable (from a defendant perspective) to assume that once a claim has been filed, the claimants have the resources to complete one or more trials and or enforce any judgment. TPF is particularly crucial for promoting equality of arms for victims of mass harm seeking redress through litigation. In litigation of this nature, defendants tend to be well-resourced listed companies, their insurers and/or emanations of the state. Other routes to obtaining a similar level of representation as these defendants, such as legal aid, are ineffective here. For the state to fund legal teams that match the legal resources available to these defendants is both prohibitively expensive, and not sustainable in the long term.
3 Are there other benefits of third party funding? If so, what are they?	Although often overlooked, TPF can provide crucial benefits to defendants too. TPF can strengthen a defendant's willingness to defend itself from an otherwise impecunious claimant by providing an alternative means of recovering their costs, should they successfully defend the claim. This offers a degree of financial security to defendants facing well-funded litigation and can reduce the risk to defendants when facing claims.
4 Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?	Firstly, there is a compelling and urgent need to reverse the effects of the UK Supreme Court's decision in *R. (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023]. The Supreme Court held that Litigation Funding Agreements (LFAs) were Damages Based Agreements (DBAs) within the meaning of s.58AA(3)(a) of the Courts and Legal Services Act 1990 (CLSA 1990), making all of them unenforceable. A viable litigation funding market requires certainty of enforcement of contracts. This is a universal business proposition which applies equally to TPF. If our country is going to rely on private funding as an alternative to public funding of collective redress actions, it is crucial that there is certainty over the enforceability of funding agreements. Without this, a crucial source of funding for victims of mass harm will simply dry up. The Supreme Court's decision in *PACCAR* damaged, or to use the modern terminology "disrupted", the TPF market but did not destroy it. The greatest testament to the indispensable role of TPF in facilitating access to justice is that in virtually all ongoing cases where there was a LFA in place, those agreements were voluntarily renegotiated by funders and funded litigants to make them *PACCAR* compliant by recalculating success fees as a multiple of funds invested as opposed to a percentage of the damages recovered.

Question	Response
	However, to rely on the TPF market to find cracks in the Supreme Court's *PACCAR* decision is not sound public policy, and there is a risk that the temporary solution found by the market may increase costs to consumers given that success fees are no longer fixed as a proportion of the damages recovered. In addition, the renegotiation of funding agreements was not an option for cases that had already been resolved prior to the *PACCAR* judgment. For all cases, but especially those that have already been concluded, there is a need to restore the parties to the legal position upon which the parties contracted—namely, that LFAs were not DBAs and not subject to the DBA Regulations. Our suggested proposal for reform is that the Government should resurrect the now defunct Litigation Funding Agreements (Enforceability) Bill. This Bill only, but crucially, returned the legal position on funding to that which all parties assumed it to be prior to the *PACCAR* decision. There was cross party support for reversing *PACCAR* through legislation and there is no need to await the outcome of any further reviews of litigation funding. The need for legal certainty to the TPF market is and will remain a pressing need, whatever regulatory framework the Government ultimately chooses to adopt for litigation funding. By contrast, there is no urgency to decide what, if any, new regulation is needed for TPF in light of the decades of experience of TPF under the same regulatory framework provided by case law and rules of procedure. Secondly, we also think that there is a strong case for providing the courts with case management powers to approve, reject, and, in appropriate cases, set a third party litigation funder's fees by making a common fund order in class actions or other collective redress contexts (i.e. representative proceedings, Group Litigation Orders and multi-party actions). However, we believe that such management powers would be best introduced through a new comprehensive class action regime (see Answer 23 for more detail). We strongly oppose legislative caps on third party litigation funders' fees, even in the context of group litigation, as they are likely to have deleterious effect on access to justice. Therefore, no further specific regulation of TPF seems necessary, especially given that TPF outside of collective redress actions, typically involves sophisticated commercial parties. The existing case law, anti-bribery and corruption rules, rules of court, and voluntary self-regulation already in place are sufficient. We accept that there is a theoretical risk that portfolio funding arrangements could cause consumer detriment, but this form of funding is still in its embryonic stages and trying to anticipate the problems that might emerge risks stifling innovation in the sector, to the detriment of the ultimate consumer i.e. ordinary individuals. If further regulations were to be introduced, our concern is that this might further limit access to justice for ordinary people by increasing the cost, or limiting the availability, of TPF. In the absence of a system of widely available legal aid for those without the necessary means to access justice, the Government should approach with extreme caution any proposals that would restrict access to TPF.

Question	Response
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;[1] (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.	There are several theoretical risks which could arise with TPF, but these have not in practice actualised. Theoretical risks include that TPF might encourage unmeritorious claims, that funders might exploit vulnerable consumers through high Return on Investment metrics or other unfair terms, and that funders might pursue litigation in ways that do not serve the best interest of claimants or the public, exerting undue influence over cases. Few of these risks have been allowed to proliferate in practice. Firstly, there is no correlation between TPF and unmeritorious claims. As commented in Answer 1, funders have robust screening processes and accept only 3 to 5% of cases. The fact that a clear majority of third party funded litigation is resolved with a settlement or award of damages in favour of the funded litigant is a testament to the rigorous screening requirements that funders follow when deciding whether or not to fund a case (in reality, this is the least expected of their own investors). Secondly, as to the risk of potential consumer detriment caused by TPF, there is no evidence of litigation funders exploiting vulnerable consumers through high success fees or other unfair terms. The Post Office Group Litigation settlement is a noteworthy example. The headline figure of a 75% success fee prima facie looks worryingly high, especially in contrast to the modest sums that were paid to individual sub-postmasters as part of the settlement. However, Alan Bates himself has defended those success fees given the crucial role litigation funding played in exposing the Post Office's conduct, and the fact that the litigation funder took a significant "haircut" on its own expected return in order to achieve a settlement. <u>Sufficient Regulatory Framework In Place</u> Third party commercial litigation funders do not need to be regulated in England and Wales. This accounts for the diversity of backgrounds and sophistication of third party litigation funders in this country. Some third party litigation funders are Appointed Representatives bringing into play all of the FCA's Handbook duties or otherwise come under FCA remit by virtue of their investment activities, others are simply private or limited liability companies investing from abroad or domestically (either directly into law firms or through an investment manager), whilst others will be part of much larger funds that are regulated by other agencies (such as, say, the SEC, in the United States). All of course need to comply with Anti-Money Laundering and Bribery law in this jurisdiction, and it is hard to see how it would assist access to justice or the economy to further refine who exactly can fund litigation in England and Wales. Solicitors are of course under a duty to perform AML and Know Your Client checks

[1] 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.

Question	Response
	before accepting money from such funders, either in respect of the institution of their funds or when having their invoices paid on behalf of their clients. Even if contrary to their *own* interests third party litigation funders seek to bring unmeritorious litigation, inappropriately exploit claimants and/or inappropriately influence proceedings (or their settlement), we believe that the existing supervisory framework is sufficiently robust. The courts in England and Wales have well-established procedures and a well-deserved reputation for being able to weed out claims that have no basis in law or fact, including through summary judgment procedures. Courts also have powers to protect against abuse of process and can declare LFAs contrary to public policy where the funder seeks to exercise undue control of the litigation. In collective redress actions in the CAT, courts have the power to scrutinize the terms of settlement proposals, including fees, as they are beginning to do even at an early stage. The benefit of using these existing procedures (instead of new ones) as a means of discouraging unmeritorious claims is that they avoid the inherently regressive effects of restricting access to litigation finance. By way of postscript, our comments apply to funders of commercial parties or sophisticated individuals, as opposed to those who might be described as creating consumer products for sale to unsophisticated consumers, such as in the field of divorce cases. The latter we acknowledge is properly a regulated activity that merits significant supervision, like the sale of any other financial product (especially where the loan is a recourse one that can be enforced against the borrower).
6 Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?	Regulatory approaches should vary based on the type of litigation and the parties involved, given the varying levels of vulnerability and bargaining power. Sophisticated commercial purchasers of TPF might be assumed to be capable of protecting their own interests, while others, for example individual consumers and victims of mass harm, may require greater protection. As noted above, due to the economics of the industry, TPF is concentrated on specific categories of litigation: large scale commercial litigation and collective redress actions. There is no case for further regulating the former category which involves sophisticated commercial parties who neither need nor expect the intervention of the state in constraining their contractual negotiations. As for collective redress actions, we suggest that the most targeted method of ensuring that LFAs in these actions are fair to claimants, is to examine the rules on collective redress, not litigation funding. Please see further our Answer 23. As well as considering the type of litigation, regulatory policy of litigation funding should differentiate between the different markets for LFAs, and the role of litigation funding in facilitating access to justice in those markets.

Question	Response
	We have no proposals to make in relation to the regulatory mechanism that should be applied to English-seated Arbitration.
7 What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?	Generally, regulation should be targeted to address specific harms, while also avoiding stifling innovation and reducing access to justice. The focus should be on protecting vulnerable parties while ensuring that the litigation funding market remains robust and flexible enough to allow innovation that could reduce costs to consumers. Until policy makers ensure that litigants in mass harm situations have a cheaper alternative or no need for funding, it should not be the role of the state to reduce access to funding any more than the market decides. Regulation that seeks to anticipate problems, which may never materialise, is likely to stifle innovation in litigation funding methods that could reduce costs to consumers, especially where the law firm agreements are themselves regulated. More specifically, in developing regulatory policy for TPF, it is important to recognise the nature of the markets in which funding arrangements are offered. Thus, there is a strong case for regulating claims management companies which recruit consumers directly en masse often without any scrutiny of the merits of consumers' claims. We consider this is a positive change to protect often vulnerable people from exploitation. There is also a case for regulating CFAs and DBAs because these agreements can be offered as alternative funding options, and consumers have limited ability to judge which funding agreements would work best for them. However, none of these considerations apply to third party litigation funders themselves, who will often sit behind not only CFAs but also increasingly DBAs (so-called "back-to-back" funding) providing that these third party funders comply with the law. We have recently published an article setting out eleven principles that should guide civil litigation reform in order to better facilitate access to justice for victims of mass harm. The principles that should guide lawmakers can be stated at a high level of generality. These principles should be beyond dispute, but they are often forgotten in the noisy arguments advanced by groups with vested interests. The following principles are particularly relevant when considering regulatory reform of TPF: A lack of resources should never prevent persons with meritorious claims from access to court The balance of public and private funding for the justice system is legitimately a matter for the government There is nothing inherently wrong with private litigation funding that gives the funder an interest in the outcome of the litigation any more than in using any other private enterprise to provide a public service Regulatory policy of litigation funding should differentiate between the different markets for LFAs, and the role of litigation funding in facilitating access to justice in those markets

Question	Response
	A viable litigation funding market requires certainty of enforcement of contracts Defendants have no legitimate interest, and an obvious conflicting interest, in seeking regulation of, or challenging the terms of, litigation funding between funder and claimant(s) The only circumstances in which TPF is offered to ordinary people is in collective redress actions. Accordingly, there is a strong case for limiting control of LFAs between funder and claimant(s) to collective redress actions where it can be managed in a way that does not restrict access to justice
8 What is the relationship, if any, between third party funding and litigation costs? Further in this context…	Fundamentally, TPF does not materially alter the problem of the high cost in the market for legal services, however there are good reasons to believe that both third party litigation funders and the clients they are funding have shared economic incentives in seeking to keep legal costs low. This can be proved by two obvious propositions: third party litigation funders like funded clients have an interest in obtaining higher damages awards or settlement amounts with lower legal costs; and in our experience, it is often third party litigation funders that apply a pressure on litigants not to take certain points in litigation, not to appeal decisions that are unlikely to succeed, and ultimately to curtail unnecessary or disproportionate work upon the basis they will not pay for it.
(a) What impact, if any, have the level of litigation costs had on the development of third party funding?	There is an inverse relationship where high litigation costs have been a significant driver in the development of TPF. The high cost of litigation in England and Wales means that many individuals and businesses cannot afford to pursue meritorious claims without financial assistance. This has created a market for third party litigation funders who provide the necessary capital to pursue these cases.
(b) What impact, if any, does third party funding have on the level of litigation costs?	TPF does not inherently increase litigation costs and may in some instances help manage them. The terms of LFAs generally include a contractual responsibility to keep within the agreed budget. Further, the market for TPF where there is rivalry and competition between funders, can exert downward pressure on not only the cost of funding but the budgets put forward by law firms. This is particularly seen in carriage disputes arising in collective redress actions before the CAT. It is certainly plausible that TPF has increased demand for litigation services – through funding claims that could not otherwise have been brought and/or by freeing up capital to allow litigants or law firms to fund other cases; in this regard it has played a role along with improved technology and innovations in claimant book builds. But whether increased access to justice has resulted in litigation service providers being able to charge higher fees is not clear. And even if it had this effect, that is not an outcome that can be fairly laid at the door of third party litigation funders. It merely demonstrates that they are playing an important role in facilitating access to justice.

Question	Response
(c) To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?	Further regulation of TPF could limit access to justice for ordinary people by increasing costs or limiting the availability of funding. Regulation that seeks to anticipate problems that may never materialize could also stifle innovation in litigation funding methods that could reduce costs to consumers.
(d) How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[2]	Funding litigation via private means where a funder, rather than a claimant, takes on the risk of a claim failing, invariably increases the costs of access to justice for the claimant. This in turn means a reduction in total compensation to successful claimants who fund their litigation out of the damages awarded to them. While there are ways of minimising this reduction in compensation, it is impossible to avoid it altogether in a privately funded legal system that provides fair access to all litigants. This is borne out by the experience of the previous Labour Government when it centred its access to justice policy around CFAs. The Government sought to avoid a reduction in damages to successful claimants by making success fees, and the insurance premiums to cover the adverse cost risk, recoverable from the unsuccessful defendant. Whatever the moral appeal of this policy, it led to a "moral hazard" in the conduct of litigation, because claimants had no incentives to limit their costs, and the lawyers funding the action had incentives to increase costs in claims they judged were likely to succeed. This moral hazard caused a very sharp increase in the overall costs of litigation, which the Labour Government's Lord Chancellor at the time, Charlie Faulkner, recognised was scandalous. The Government's acceptance of these unintended consequences ultimately led to the Jackson review of the costs of litigation which recommended the abolition of recoverable success fees and After the Event (ATE) premiums for all but a small category of cases.
(e) Should the costs of litigation funding be recoverable as a litigation cost in court proceedings? If so, why? If not, why not?	Whilst some litigation funders are currently lobbying for the introduction of recoverable success fees, it would in our view be a mistake to reintroduce the same risk of moral hazard to cases funded by litigation funders that blighted CFAs. Not only might it increase the costs of funded litigation, it could also have the unintended consequence of incentivising defendants to ramp up "scorched earth" tactics designed to overwhelm and out-litigate funded claimants, and avoid settling disputes. However, it should be recognised the conduct of corporations defending collective redress actions and other important litigation can be objectionable, as demonstrated by the Post Office Group Litigation. Such inappropriate

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

Question	Response
	and blameworthy conduct could justify an award of indemnity costs, and courts should be more willing to make such orders when parties engage in "lawfare" of this kind. By contrast we accept that there is a case – consistent with existing practice – for third party litigation funders' success frees to be recoverable in arbitration. The requirement to pay such fees ultimately derives from the arbitral agreement between the parties, and the parties retain the right to agree different arrangements regarding the funding of arbitrated disputes between them should they wish. Please see Answer 23 and 37 for other more effective ways that courts can manage complex civil litigation, specifically collective redress actions, without letting costs blow out, or allowing parties to increase their opponents' costs as a cynical litigation tactic.
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 prospect of a funded party having to pay adverse costs, or there being a basis for seeking costs from the TPF if the funded party does not pay, or the prospect of the funded party or its TPF being required to provide security, does inevitably mean that the cost of funding increases. That is because, one way or another, funds have to be made available or ring-fenced for payment of adverse costs, and for providing security or alternatively demonstrating that the arrangements for payment of adverse costs are themselves sufficiently secure that (further) security is not required. In practice this typically means that there has to be ATE insurance (with anti-avoidance endorsement if it is also to stand in lieu of security) and or capital protection insurance, the premium for which must be funded save where it is deferred. The alternative is that the funder is potentially required to provide security or pay adverse costs. Either way, this will be priced into the cost of funding and the bargain more generally. In theory, the recoverability of adverse costs and security for costs requirements can impede access to justice for claimants, particularly for those with limited resources (a dynamic which, in our view, exists whether a litigant is funded or not). However, access to justice at proportionate cost is a universal right, which is equally important to claimants and defendants alike. The rules on security, and third party litigation funders' liability to pay them, play an important role in protecting defendants' right of access to justice at proportionate cost and protecting them from unmeritorious litigation. Beyond security for costs, what additional requirements for capital adequacy in the field of TPF (if any) remains to be decided. Consistently with the views that Professor Zuckerman has advanced over many decades now, we believe any liability to pay adverse costs, whether it be litigants or the third party litigation funders funding them, should be fixed in advance so that the amounts are predictable and proportionate to the amounts in dispute.
10 Should third party funders remain exposed to paying the costs of	Yes, third party litigation funders should remain liable to pay the costs of proceedings they have funded, within the existing framework of case law and procedural rules. The existing framework for TPF liability, including the Arkin

Question	Response
proceedings they have funded, and if so to what extent?	Cap, for costs is adequate and no changes are obviously required. That said, we accept that the extent of a funder's liability is ultimately a policy, and as the case law demonstrate on the Arkin cap demonstrates, there is clearly a range of views amongst the judiciary on this issue. Funders must consider the potential for adverse costs and the need for security when deciding whether to fund a claim, whether or not they must also fund the insurance of their own capital outlay (which is a commercial decision based on risk appetite). This is part of the robust screening process that funders use to ensure the cases they fund have strong prospects of success. The current system ensures that funders are held accountable for the risks they take in funding litigation (in particular placing defendants in a position to defend themselves), while also allowing access to justice for those who cannot afford to litigate on their own. Put simply, the legitimate interests of defendants vis-a-vis third party litigation funders are already addressed through existing case law and procedural rules. There is no obvious need to change that law. Those interested in so-called ESG litigation, a sub-set of which essentially amounts to public interest litigation, such as that relating to Net Zero policies of listed companies, might push forward the need for funders to be able to fund these cases without risk to themselves. We do not recommend a blank cheque in this regard.
Section 2: 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 TPF market uses a combination of risk assessment, market dynamics (including demand), regulatory factors, access to and cost of money, and case specifics to determine the pricing of funding arrangements: Risk Assessment: Funders evaluate the risk associated with each case, including the likelihood of success and potential recovery amount. More complex and higher risk cases (such on proving fraud or enforcement of judgments in foreign jurisdictions) typically attract higher funding costs. Market Competition: The level of competition among funders can impact pricing. Competition among funders can exert downward pressure on costs and more favourable terms for those seeking funding. This is seen when multiple funders are interested in financing the same collective action both before proceedings are issues but also afterwards where there is competition for "carriage" of the case and funders willingly amend their terms. Type of Case: The nature of the case (e.g., commercial litigation, personal injury, class actions) can influence pricing. Complex cases with higher potential recoveries attract different pricing structures. Funding Structure: The specific terms of the funding agreement, such as the percentage of recovery the funder will receive, can vary. Some agreements may include a fixed fee, while others might involve a percentage of the settlement or judgment.

Question	Response
	Courts in England and Wales have well-established procedures to weed out claims that have no basis in law or fact, which practically act to discourage funders from taking on weak cases or pursuing weak causes of action. This is especially the case now that funders are not immune from adverse costs decisions in public interest type cases. In collective redress actions under the CAT, the Tribunal scrutinises funding settlement proposals, including the fees payable to a litigation funder. They have the power to ensure that settlements are fair and reasonable to all class members, thus acting as a check on the potential for overpricing. As set out in Answer 23, we believe this is a power that all courts managing collective redress actions, of whatever kind, should have.
12 Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?	We think the answer to the possibility of regulatory caps should be a resounding "no". A cap would likely restrict access to justice for ordinary people by increasing the cost, or limiting the availability, of litigation funding. Some of the recent reduced returns in shareholder claims and CAT claims are already, in our experience, having the effect of removing a number of funders in the market for certain types of collective redress action, and a cap could kill off this important area of access to justice and economic activity. Accordingly, control of TPF return should not be radical, not least in order to encourage more long duration money (i.e. pension funds and insurers rather than short term hedge fund money) to enter the market over the medium and long term. By way of further comment, private litigation funding is inherently expensive and risky, and claimants often cannot pursue their rights without it. Therefore, the terms of the LFA must be judged in the context of the risk the funder is taking, and the potential lack of other attractive options for the claimant. Many will consider that, set against the risk of a failure of access to justice, even high percentages can be fair. In the small number of cases in which it is offered, claimants would usually not be able to vindicate their rights without access to this funding. Such judgments can only be made on a case-by-case basis, and it is the courts who are best placed to make them. Regulatory caps would be an extremely blunt regulatory tool that would invariably have the effect of deterring funders from taking on difficult cases. The failure of effective reform of Civil Procedure has only added to the risks inherent in funding collective redress actions. Moreover, post- *PACCAR* what has in fact been seen is a reduction in the money deployed to fund these actions in England and Wales, particularly in the field of so-called "uneconomic" claims, where no claim or few claims are economically viable. There is also little need for a cap as there is no evidence of litigation funders exploiting vulnerable consumers through high success fees or other unfair terms that we are aware of at the time of writing. The Post Office collective action settlement is a noteworthy example. The headline figure of a 75% success fee prima facie looks worryingly high, especially in contrast to the modest sums that were paid to individual sub-postmasters as part of the settlement. However, Alan Bates himself has defended those success fees given the crucial role litigation funding played in exposing the Post Office's conduct, and the fact that the litigation funder took a significant "haircut" on its own

Question	Response
	expected return in order to achieve a settlement. This case ably demonstrates that the fairness of a funding agreement term must be judged in its proper context. None of this is to deny that reducing litigation funding costs should be a public policy objective. However, this can be achieved by introducing more structured collective redress procedures where a combination of court supervision (see further at Answer 23), and healthy competition between funders looking to fund collective proceedings (as well encouraging more pension fund and insurance money), can exert a significant downward pressure on litigation funding costs as international experience demonstrates.
13 If a cap should be applied to a funder's return: [deleted]	We do not consider a cap on return to be either desirable or practical at this stage.
Section 3: 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?	We have set out the considerable advantages offered by TPF in terms of promoting access to justice in Answer 1. Third party litigation funders also assist sophisticated commercial parties to better manage risk, and in a society built on free market principles, we cannot see any principled basis for opposing this. While there could in theory be drawbacks to TPF, given the existing regulatory framework, combined with the suggested reforms to the management of collective redress actions giving the court supervisory jurisdiction over funding arrangements and settlements (see Answer 23), we think any such risks can be effectively managed in practice.
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	<u>Legal Aid</u> Legal aid (i.e. public funding for legal representation) provides access to justice for those who cannot afford it. The drawback for claimants is that eligibility is restricted, with a declining percentage of the population now eligible, regardless of means. There are also substantial reductions in the number of legal aid providers, creating legal aid "deserts". In addition to being rarely available, legal aid is often insufficient in providing sufficient resources to match those of well-funded opponents. A substantial drawback for the wider public is that legal aid is provided at a significant cost to the taxpayer. In the long term, the state funding legal teams that match the resources of large corporations is prohibitively expensive and not sustainable. <u>Conditional Fee Agreements (CFAs)</u> These are arrangements where lawyers are paid a success fee if the case is won. The advantage for claimants is that

Question	Response
litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.	CFAs allow claimants to access legal services without upfront costs. The drawback for the claimant is that the success fee reduces the compensation the claimant receives. Drawbacks for defendants and the operation of the courts were seen when the policy of making success fees recoverable from the unsuccessful defendant led to "moral hazard" in the conduct of litigation. Claimants had no incentive to limit their costs and lawyers had incentives to increase costs. Eventually, the Jackson Review recommended the abolition of recoverable success fees. CFAs, sometimes backed by TPF, can create conflicts of interest, as lawyers have an interest in the amount and outcome of litigation. However, TPF does not involve recoverable success fees, and so, does not create the same moral hazard. <u>Damages-Based Agreements (DBAs)</u> These are agreements where lawyers are paid a percentage of the damages recovered. Advantageously for claimants, they allow access to legal services without upfront costs. However, they currently have little practical utility. The DBA Regulations 2013 were so poorly drafted that they were rarely used even before *PACCAR* (see further at Answer 17). Like TPF, DBAs align the interests of clients and their lawyers by limiting fees to an agreed percentage of damages albeit this recovery for the law firm is usually a multiple of what standard fees might be, save in the case of a "bad" result. <u>Trade Union Funding</u> Unions may fund litigation for their members, particularly in employment-related cases. This source of funding is severely limited in scope as it is typically only available to union members and does not cover all types of litigation. <u>Legal Expenses Insurance</u> Insurance policies can cover legal costs. However, insurance policies may not cover all types of litigation and may have exclusions or limitations on coverage. <u>Crowdfunding</u> This refers to the funding of litigation by raising funds through public donations. Particularly in cases with broad public support, this can provide a way to raise funds to cover the costs of legal action. However, this may not be a reliable source of funding and may not be sufficient for large, complex or well-defended litigation. Further, for those contributing funding, there may be little transparency about how their donations are spent or what obligations are owed to them by the recipient.

Question	Response
(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.	Yes, other forms of litigation funding can complement TPF. Indeed many third party litigation funders look positively on underlying claimants having "seed" funded their own litigation through private funds or community funds, indeed in our experience it is often impossible to A plurality of funding options is therefore welcome to ensure access to justice for a variety of claimants and a combination of funding methods may be appropriate in some cases, albeit the blending of different priorities on returns will always be an issue for negotiation between claimant and third party litigation funder. For example, a claimant might use legal expenses insurance or trade union support to cover part of the costs and then use TPF for the remainder or combine a DBA with a CFA backed by TPF depending on the stage of litigation and risk appetite.
(c) If so, when and how?	It is important to consider the circumstances and nature of each specific case. TPF is particularly useful in complex and costly collective redress actions, while DBAs and other arrangements may be more appropriate in other cases. In particular, making DBAs more accessible would complement TPF by providing another alternative for claimants with limited means.
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?	Certain alternatives to TPF should be encouraged, not in preference to TPF, but as complementary options to ensure broader access to justice. Although the legal services market is one that many consumers find difficult to navigate, the greater the number of funding sources and funding models available, the greater the chances that less-resourced groups will be able to access funding for their legal disputes. A natural consequence of the clear utility of private litigation funding models – especially those that allow people of limited means to obtain access to legal assistance without having to pay significant amounts upfront, and only pay for that assistance in the event their claims are successful – is that such funding models are more widely available provided there is a regulatory framework that facilitates rather than restricts access. DBAs should be encouraged as they align the economic interests of clients and their lawyers more closely than other private funding models. They allow people of limited means to access legal assistance without significant upfront costs and provide a way to pay for legal assistance only if a claim is successful. There is a need to reform the Damages Based Agreements Regulations 2013 to make them more workable (see Answer 17)

Question	Response
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?	It is universally accepted that there is a need to reform the DBA Regulations 2013. DBAs were one of Sir Rupert Jackson's recommendations as part of his "package" of reforms to promote access to justice at proportionate cost. Yet the regulations to give effect to this recommendation, the DBA Regulations 2013, were so poorly drafted that they were rarely used and written off by claimant lawyers as "Don't Bother Agreements". The Government itself effectively conceded that the DBA Regulations had been a failure in its formal review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Act. Shortly after that review, Professor Mulheron and Nick Bacon KC produced a paper for the Ministry of Justice proposing changes to the regulations that would make them workable. This paper is a very good place to start in reforming DBAs. There is a good case for going further and abandoning the "safe harbour" model of regulation (specifying the conditions that DBAs must meet to be enforceable) in favour of more targeted regulation aimed at protecting clients from the specific harms that the regulations are designed to avoid: namely disproportionate fees or otherwise unfair terms. The "safe harbour" model of regulation is an unfortunate legacy of the laws prohibiting maintenance and champerty. Once it is accepted that there is nothing wrong with contingency agreements – and that they have a distinct advantage of more closely aligning the economic interests of the client and their lawyer than most other private funding models – here too the priority should be to facilitate such arrangements as much as possible with appropriate regulations that prohibit known harms. Although attractive in theory, the principal drawback of single regulatory regime for all funding models is that it would be difficult to distinguish between different types of funding markets and different types of consumers. For this reason, we do not support replacing the separate regulatory regimes for CFAs and DBAs with a single regime. TPF is offered in a small fraction of cases, usually collective redress actions or offered to law firms, not consumers. Targeted court-based regulation is, in our view, the best way to regulate TPF in the collective redress context. (see further Answer 23).
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?	Insurance is regulated, especially for capital adequacy, already. Mandatory legal expenses insurance raises large underwriting questions, and it is doubtful that compelling individuals or companies to take out legal expenses insurance would be right in principle or workable in practice (for example, it is unclear what limits would be priced in), or ultimately provide the cover needed to meet people's needs for legal services. Even where it is habitually used in commercial litigation, claimants are required to obtain legal advice before taking certain unexpected steps in the litigation, which is necessitated because of the difficulty of underwriting litigation risk. That is a barrier that is only justifiable where after-the-event insurance (ATE) cover is optional. The best way to promote the before-the-event (BTE) insurance market is to have a stable and proportionate fixed costs regime so that BTE insurers can accurately price the costs of litigation services when setting premiums for particular types of litigation. There will be lots of cases however, including those affecting consumers, where BTE funding is never viable because the events triggering

Question	Response
	demand for litigation are subject to manipulation (e.g. contract disputes). BTE works best in those areas where parties have no incentive to trigger the events (car accidents, building defects) giving rise to legal disputes. In some areas (product liability for example) the law is so complex that it is unlikely that BTE could provide sufficient legal expenses coverage for consumers to be able to pursue their claims to court. Our sense is that those in favour of mandatory BTE (as some countries have adopted), see it as a reform to ensure the maximum return to litigants in consumer class actions, for what are generally considered to be "uneconomic" claims (i.e those claims that would not be brought individually). For the reasons described above, as well as others, we do not consider mandatory BTE overlaid the present procedural rules of litigation would create that outcome. We would encourage policy makers to instead focus on more effective mass settlement tools that avoid the need for these unwieldly litigations of many thousands of claimants, not least because of the real concern that would still remain as to client understanding of and agency in the litigation process (which of course BTE cannot solve).
19 What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?	In our experience, the market is highly efficient in the placing of ATE cover, depending on the type of case, competition to write the risk, structuring including payment terms, and number of claimants in need of individual policies. The relationship between CFAs and ATE in general terms is that CFAs together with ATE are used together to enable a claimant to bring a claim without having to fully fund costs up-front, and to be protected against adverse costs (and any own costs, typically disbursements) s/he is liable to pay if the claim is lost. The placement of ATE does not necessarily, or even generally, require TPF (save perhaps for own disbursements). The relationship between ATE and TPF typically is that the funder pays the ATE premium, save where it is deferred and or contingent (albeit in our experience there is usually sum up front payment added to the TPF budget). As set out above we do not believe there is any need for reform in this area given the existing regulatory framework, and the capacity of the courts, through the common law, to respond to changing funding practices and any issues to which they give rise.[3]
20 Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?	Most recently, the impact of crowdfunding, ultimately for an unmeritorious claim, can be seen in case of *McGaughey v Universities Superannuation Scheme Ltd* [2022].

[3] Our responses to Questions 18 and 19 were informed by detailed discussion with and experience of leading costs and litigation funding counsel, Robert Marven KC. Any errors remain our own.

Question	Response
	The obvious concern of those defendants that have been the subject of unsuccessful crowdfunded claims against them are the duties owed by those collecting the money to bring the claim, including the return of unused contributions. Generally speaking, the crowdfunding of litigation costs would benefit from specific study particularly as to whether and by whom fiduciary duties are owed to funding participants.
21 Are there any reforms to portfolio funding that you consider necessary? If so, what are they and why?	We accept there is a theoretical risk that portfolio funding arrangements could cause consumer detriment, but this form of funding is still in its embryonic stages and trying to anticipate the problems that might emerge risks stifling innovation in the sector to the detriment of the ultimate consumer i.e. ordinary litigants. It should also be noted that portfolio lending is a financial agreement where the risk is hedged between sophisticated commercial parties, and it would be difficult to find a good reason why this should be anymore regulated than, say, a bank loan to a law firm, given that where law firms seek to pass on the consequences of any operating costs in a detrimental way to clients, the SRA steps in to regulate this relationship. We also note that the courts are already dealing with security related disputes in the context of portfolio funding. Accordingly, we believe there is no need for statutory intervention at present.
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?	There is an urgent need to reverse the effects of the UK Supreme Court's decision in *PACCAR*, which rendered LFAs unenforceable. We recommend resurrecting the Litigation Funding Agreements (Enforceability) Bill, which would restore the legal position on funding to what it was before the *PACCAR* decision. This is an urgent priority to provide legal certainty to the TPF market. (please see further at Answer 4)
Section 4: 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	The limitations on third party litigation funders having conduct over litigation to which they are not party is well-known, as is the point that (KC clauses aside) representative claimants should not have their right to decide the outcome of litigation fettered. Nevertheless, this question is plainly one that is topical following the settlement hearing in *Merricks v Mastercard,* which has recently concluded but as at the time of writing reasons to approve the settlement have not yet been published.

Question	Response
respects are rule changes required and why?	It might be stated that further regulations will not therefore stop third party litigation funders from, for want of a better phrase, trying their luck. Furthermore, due to the economics of the industry TPF is concentrated on specific categories of litigation: large scale commercial litigation and collective redress actions. There is no case for regulating the former category which involves sophisticated commercial parties who neither need nor expect the intervention of the state in constraining their contractual negotiations. As for collective redress actions, the most targeted method of ensuring that LFAs in these actions are fair to claimants, is to examine the rules on collective litigation, not litigation funding. The courts' powers in collective redress actions are sufficiently broad to allow scrutiny of the terms of collective settlement proposals, including fees payable to a litigation funder. However, there is no uniform structure in the various collective redress procedures in England and Wales for considering the fairness of a funding agreement when deciding whether to allow the proceeding to continue as a collective action, or when deciding whether to approve a settlement proposal that would resolve all or part of the proceeding. England and Wales remains a notable outlier in the advanced common law world in not having its own generic class action statute, allowing class actions to be brought across different types of litigation in a variety of sectors. Rather there are four kinds of collective redress procedures available: class actions in the Competition Appeal Tribunal (CAT) under the Competition Act 1998, Group Litigation or "GLOs" under CPR r.19 Pt III[4], representative proceedings under CPR r.19.8 and multi-party proceedings (sometimes more recently called "GLO Lite"). In typically British style, claimant lawyers have worked pragmatically within the existing framework to deliver as much collective justice as possible. Nonetheless, we think the class action legislation in Canada and Australia, and our own CAT provide a clearer and much better structure for ensuring that collective redress is both widely available, and that the court has the power *and responsibility* to ensure that the conduct and resolution of class actions, including the terms on which they are funded, are fair to all class members. Successive governments have failed to grasp the nettle in this regard. One of the advantages of the class action statutes in Canada and Australia is that they have proved more effective at putting victims of mass harm on an equal footing with the corporate giants responsible for perpetrating it. Arguably, courts administering class action statutes in Australia and Canada have been more successful in combatting it and ensuring cases are resolved fairly, at proportionate cost and within a reasonable time. A further advantage of the class action statutes in both Australia and Canada (and the class action regime before the CAT) is that they also help foster healthy competition between rival funders looking to fund the same collective

[4] The CPR permits any number of claimants or defendants any number of claims to be covered by one claim form. The test is whether all of those claims can be "conveniently" disposed of in the same proceedings (CPR r.19.1 and r.7.3)

Question	Response
	action which exerts downward pressure on funding costs. Under these regimes, in deciding who should be appointed as a class representative, the courts consider the quality of their legal teams as well as the proposed costs and funding arrangements (the CAT's reasoning in respect of a contested carriage dispute was recently set out in *BIRA Trading v Amazon* [2025]). While the courts do not always appoint the class representative with the cheapest funder, because there may be concerns about the adequacy of representation offered, this competition for "carriage" of the class action has led to lower funding costs in those jurisdictions, and as was seen in the CAT in *BIRA* an immediate renegotiation of unfavourable funding terms mid-hearing. Under most class action statutes, the court also has an express or implied power to make a costs order directly in favour of the funder or lawyers funding a class action, either at the beginning or the end of the proceeding, and this power has also led to a reduction in funding costs. In this regard, we would draw attention to the empirical research of litigation funding in class actions in Australia by Professor Vince Morabito.
24 Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?	We think more research into crowd funding is needed before an assessment as to what, if any, regulation is necessary. We have no other proposals on this issue.
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. Essentially, *Rowe* decides that, as a general rule, funders who give security do not get a cross-undertaking in damages. There is no reason this needs to change. In the High Court, the judge opined that ALF membership did not necessarily mean that the funder would be able to meet a costs order (and this is referred to in the Interim Report), but, again, there is no apparent basis for amending the CPR: if anything that would be addressed by capital adequacy regulation of funders.
26 What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?	The court should (and to some extent, already does) play a significant role in controlling the conduct of litigation supported by TPF in collective redress actions. However, the existing regulatory framework is generally sufficient for most other cases. Further, there is little need for the court to regulate funding arrangements in commercial litigation between sophisticated commercial parties. Please see Answer 23 for our view on what the court's role should be in collective redress actions supported by TPF. Particularly, the court should manage the conflicts of interest that arise from private funding arrangements. These

Question	Response
	conflicts cannot be removed but they can be managed through regulatory standards applicable to lawyers, rules of court, case law, and self-regulation. If any abuse of process occurs, the court should have the power to ensure that litigation funders do not exert undue control over litigation.
27 To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?	The existence of funding arrangements should be disclosed to the court in collective redress actions but generally the terms of such funding agreements should not be disclosed to the opposing party. In collective redress actions, the court has a significant role in ensuring that the terms of LFAs are fair and reasonable to claimants. This scrutiny includes assessing the reasonableness of legal costs and any success fee paid to a litigation funder. Therefore, the existence of a litigation funding arrangement should be disclosed to the court, along with the relevant terms of the agreement, so that the court can fulfil its supervisory role. Conversely, defendants should have no right to disclosure of funding arrangements to which they are not a party, nor liable to pay, nor any right to object to them in any legal proceedings. Representations made by business lobby groups such as Fair Civil Justice about how litigation funding should be regulated are clearly not made with aim of protecting people like Mr Bates, Windrush survivors, shareholders and pension funds who suffer write downs of investments or thousands of customers mischarged by financial institutions (to give but a few recent examples). Rather they seek to insulate their corporate members -many of whom are large multi-national corporations and repeat offenders - from effective legal challenge. This lobbying is further testament to the vital role that litigation funding plays in promoting access to justice for ordinary people who are the victims of mass harm. Also, defendants are already protected by existing procedural rules and case law, which regulate the circumstances and extent to which a funder can be liable for a defendant's costs if the litigation is unsuccessful. Disclosure of funding arrangements to the opposing party would very likely provide a tactical advantage to defendants and produce a chilling effect on the TPF market. Defendants could utilise this information to assess the funder's view on the claimant's prospect of success and adapt its own strategy accordingly.
Section 5: 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?	There seems to be a broad consensus that funders should not exercise control over litigation strategy generally (albeit note the nuance of not absolutely barring it in the Association of Litigation Funders (ALF), *Code of Conduct*). That is subject to two caveats. First, not exercising control is not the same as depriving third party litigation funders a right to withdraw funding or not fund certain steps in the case of unexpected developments in the litigation. The line is not always easy to draw in practice as confusion can arise where the approval of third party litigation funders is required for circumstances beyond those considered in the LFA, but where they use the opportunity to extract

Question	Response
	broader concessions or "agreement" as to litigation strategy. Second, in the context of settlements, there exists precedent (backed up by LFA wordings in practice) to the effect that the acceptance or making of settlement offers can require funder approval, which the courts have not held champertous. The extent to which this precedent would be followed today to justify a third party litigation funder having a veto over a settlement must be doubted in light of the recent settlement approval hearing in *Merricks v Mastercard* in February 2025. Accordingly, it is questionable that further regulation is necessary particularly in light of the approach of the CAT and also the duties owed by solicitors to their clients (and not the funder).
29 What effect do different funding mechanisms have on the settlement of proceedings?	Under CFAs, lawyers are only paid if the case is successful, which aligns their interests with those of their clients. This can motivate lawyers to work diligently towards a favourable outcome, including settlements. However, since lawyers are working on a "no win, no fee" basis, they may be more inclined to settle cases prematurely to ensure some payment, rather than risk losing at trial. Similar to CFAs, DBAs align the financial interests of lawyers and clients, as lawyers receive a percentage of the damages awarded. This can encourage lawyers to seek settlements that maximize the client's recovery. Lawyers under DBAs may push for higher settlements since their fee is a percentage of the damages recovered, potentially leading to more aggressive negotiation strategies. Litigation funders often bring expertise and resources that can improve the quality of settlements. This is seen throughout the different phases of litigation. From the outset, by sharing the financial risk, funders can encourage claimants to pursue their claims more vigorously, potentially leading to higher settlement amounts. As the case proceeds and costs stack up, litigants who receive litigation funding may feel less financial pressure to settle quickly, allowing them to hold out for better settlement offers. Generally, third party litigation funders can help balance bargaining power between parties, leading to settlements that better reflect the merits of the case rather than economic disparities.
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	Courts should be required to approve the settlement of proceedings funded by third party litigation funders only in collective redress actions. In collective redress actions, court oversight is needed for four reasons. First, to protect the interests of class members not present but still bound by the terms of the agreement. Second, to protect the interests of vulnerable claimants who may not have the resources or expertise to negotiate fair settlements on their own. Third, to balance the interests of funders, who seek to maximize their returns, and claimants, who seek fair compensation for the harm they have suffered. Fourth, to ensure that settlements, including funding agreements, are fair and reasonable and to prevent abuse of process.

Question	Response
	These reasons necessitating court oversight do not have the same force outside of the collective action context, where parties have the opportunity, and the ability, to guard their own interests. The court's role is to act as a guardian of the class, ensuring that settlements are fair, reasonable, and in the best interests of all class members.
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?	Guidance can be taken from the CAT Rules 2015 (Rule 94). In sum, the court should, at a minimum, consider: 1. Whether the settlement is just and reasonable to all class members. This assessment includes examining the reasonableness of legal costs, success fees and the proportion paid to third party litigation funders. 2. The context of the case. Even high percentage success fees can be considered fair when set against the risk of a failure to access justice without access to funding. 3. The public interest. The court should consider any wider public interest in the settlement. The court will want to ensure, for example, that the settlement does not facilitate future wrongdoing by the defendant, or adversely affect third parties; in short that the settlement is in the interests of justice. Guidance can also be taken from international experience. In Canada and Australia, this process includes an assessment of the reasonableness of legal costs and any success fee paid to a litigation funder. As part of these processes, courts routinely appoint independent counsel, or "contradictors", to examine the proposal and report to the court on whether they consider it to be fair to class members. This independent advice helps the court counteract the phenomenon that when settlement proposals are agreed, the parties, their lawyers and funders often all become a "friend of the deal", and any limitations in the proposed settlement are not properly ventilated. Reference here might also be made to the court's approach to approving schemes of arrangement (s899 Companies Act 2006), which as well as needing a specific majority of the votes of those creditors affected, also needs to be considered "fair", which clearly opens up an elastic enquiry. See also Rule 23(e) of the Federal Rules of Civil Procedure in the United States which uses the language of "fair, reasonable and adequate".

Question	Response
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?	Claimants are already protected in England and Wales through a combination of regulatory standards applicable to lawyers (via the Solicitors Regulatory Authority (SRA) and Bar Standards Board (BSB)), rules of court, case law and self-regulation. Concerns that funders might, through control of the litigation, undermine the administration of justice have already been addressed at common law. In the series of cases in the 1990s and 2000 approving LFAs at common law, the courts have developed powers to protect against abuse of process and could declare LFAs contrary to public policy where the funder sought to exercise undue control of the litigation. See also our Answer 23 for proposals of a uniform class action procedure for civil claims.
33 To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?	The TPF market does not currently enable claimants to effectively compare funding options from different funders, particularly in the context of collective redress actions involving ordinary people. Please see the Class Representatives Network's recent September 2024 Report entitled 'Selecting Funders and Negotiating LFAs'. In collective redress actions before the CAT, ultimately, it is the court's role to authorise a person to act as a class representative (see CAT Rules 2015, Rule 78). A key element to that decision, including where there is more than one proposed class representative, is the suitability of the funding model that the proposed class representative intends to employ for the action. This way there can be healthy competition between funders, and prospective class representatives, as to the most suitable funding model and class representative (otherwise known as 'carriage' disputes internationally).
34 To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?	The debate that has recently arisen in the context of *Merricks v Mastercard* is clear evidence that conflicts of interest do arise between funded claimants, their legal representatives, and third party litigation funders. We consider this inevitable, however, and the ambition should be to reduce the risk of unfair outcomes (which the rules around conduct of claims and court approval of class representative and settlement help to achieve). By way of further explanation, a fundamental feature of private funding of litigation – in whatever form: hourly fees; Conditional Fee Agreements (CFAs); Damages-Based Agreements (DBAs); LFAs etc – is that it creates conflicts of interest between the litigant, the funder and the administration of justice. These conflicts of interest cannot be entirely removed but need to be managed. They are currently managed through a combination of regulatory standards applicable to lawyers, rules of court, case law, and self-regulation. Lawyers acting on hourly fees have an interest in the amount of litigation involving their clients. Lawyers acting on CFAs have an interest in the amount and outcome of litigation. Similarly, lawyers acting on DBAs have an interest in the outcome of litigation. These differing interests can create conflicts with their clients which is apparent in the

Question	Response
	course of litigation in our experience, especially where co-claimants in collective redress actions have different funding arrangements. Commercial funders offering LFAs also have an interest in the outcome of litigation. Funders aim to maximize their return on investment, which can sometimes conflict with the claimant's interest in obtaining the maximum compensation or achieving other non-financial goals. There is, in our view, nothing about TPF that gives rise to more intense or difficult conflicts than other forms of funding arrangement. In some ways they more closely align the interests of clients and funders of legal services by limiting fees to an agreed percentage of the damages recovered, which both parties have an interest in maximising.
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	There is no need for specific reforms to address conflicts of interest in TPF. In the context of collective redress actions, we think the conflicts of interest between funders, lawyers and class members can be effectively managed by the court exercising its supervisory jurisdiction when appointing class representatives and approving collective settlements and by the duties owed by lawyers to their clients and the court. Concerns that funders might, through control of the litigation, undermine the administration of justice have already been addressed at common law. In the series of cases in the 1990s and 2000s approving LFAs at common law, the courts developed powers to protect against abuse of process and can declare LFAs contrary to public policy where the funder seeks to exercise undue control of the litigation. Further regulation of TPF would likely increase costs, limit the availability of funding, and reduce access to justice for ordinary people. Fundamentally, there is nothing inherently wrong with TPF that gives the funder an interest in the outcome of the litigation any more than in using any other private enterprise to provide a public service. There is no evidence of commercial funders abusing the court process or inappropriately directing litigation. The case for allowing litigants to obtain access to litigation funding, from whatever lawful source and on whatever terms can be obtained in the market, in the absence of affordable alternatives, also has a long philosophical lineage. Bentham famously stated: "[S]o long as the expense of seeking relief at law [is expensive], the purpose of seeking that relief will of itself, independently of every other, afford a sufficient ground for allowing... every man to borrow money on any terms on which he can obtain it."

Question	Response
Section 6: 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?	TPF tends to concentrate on and encourage meritorious collective redress claims. This is seen by Professor Rachael Mulheron's recent review of litigation funding for the Legal Services Board, which found that only a very small number of cases obtain TPF (with funders only taking on 3 - 5% of cases seeking funding), that the majority of these cases are collective redress claims and the fact that a clear majority of third party funded litigation is resolved with a settlement or award of damages in favour of the funded litigant.
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.	Given TPF encourages meritorious collective redress claims, often against harm perpetrated by the state, public bodies should have an obligation to establish fair dispute resolution schemes that victims can choose to engage with as an effective and fair alternative to litigation. While it is undoubtedly the case that a generic class action statute is long overdue in England and Wales (see Answer 23 above), we also believe that many cases that became the subject of very protracted and costly collective redress actions, could and should have been resolved through fair redress schemes that appropriately acknowledged the harm caused by the defendant and delivered appropriate levels of compensation to the victims in a much more timely fashion. Many of the worst injustices that have occurred in the last few decades, including the Post Office Horizon scandal, the Windrush scandal, Hillsborough and the Infected Blood scandal ended up in litigation not against multi-national corporations but the British state itself, or corporations wholly owned by the British state. We applaud the Government's announcement of a duty of candour on civil servants. Such a duty will help avoid the kind of institutional cover ups that occurred in the Infected Blood and Windrush scandals. However, we think there should be a corresponding obligation on the State in litigation brought by the victims of such mass tragedies, to institute a fair, independently monitored, redress scheme. An obligation of this kind would save rather than cost the state money, for provided the schemes are designed and administered appropriately, as we have led on in our work, in most cases they will avoid both the costly litigation associated with holding the state accountable but also protracted and expensive inquiries into the State's inability to adequately respond to the tragedy. Such a response also remains true to progressive values in that they are consistent with core principles of restorative justice. Building on these principles, from recent experience of what can work, we note the following principles that the state should follow where it is responsible for mass harm:

Question	Response
	1. In the case of mass torts where liability is accepted by public bodies or publicly owned corporations, there should exist a statutory duty to institute a redress scheme. This will give the British public confidence that such scandals will not be allowed to fester. 2. Redress schemes should so far as practicable be independent of government. They should have separate administrators as the most successful schemes in recent years have done. The Government will know that the absence of separate administrator is a major criticism of the Windrush scheme, as was confirmed by a recent report conducted with the assistance of Ravi Nayer for JUSTICE. 3. Whilst each redress scheme will be structured differently depending on the needs of stakeholders (such as for speed in the case of concealed torts where the cohort is dying or interim payments where there is obvious hardship) at the very least all should be required to make provision for "fair" legal costs. From our experience of designing effective redress schemes in the fields of data, sexual abuse, and the blacklisting of workers, we have found claimant lawyers very willing to accept fixed costs here. 4. If fixed costs are accepted as a universal requirement, and are set at affordable and proportionate levels, it may be justified to prohibit use of both CFAs and DBAs, in order to avoid unnecessary reductions in compensation to victims. 5. Additionally, we think the Government should consider a formal statutory responsibility on state regulators to encourage redress schemes in the private sector. In respect of competition law infringements, this Rubicon has already been passed with s.49C of the Competition Act 1998 (as amended by the Consumer Rights Act 2015), which for the first time in UK legislation introduced formal legislation which allows businesses to develop redress schemes on a voluntary basis for some competition law infringements.
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 stated above, TPF is generally concentrated on collective redress litigation and commercial litigation between sophisticated commercial parties. In the latter context, individuals require no extra assistance in obtaining relevant information concerning available options for TPF. They have sufficient means, ability and opportunity to request and interrogate any required information independently. Prescribed information is likely to be rudimentary and not sufficient for sophisticated purchasers of legal services and funding. Therefore, any measures improving access to information concerning TPF options, to the extent required, should be focused on individuals in collective redress actions, where one party is more likely to be from a group of ordinary consumers and/or vulnerable individuals. When considering the need to improve access to information concerning available options for litigation funding, it should also be recognised that the class representative process acts as a mechanism by which competition between

Question	Response
	funders takes place in collective redress actions. There is already an incentive for funders to provide information regarding their offering to potential class representatives or individuals who may need funding to pursue their claims. It might also be possible to set up, or encourage TPF associations to set up, online platforms that aggregate information about various litigation funders, their standard terms and application procedures. This would make it easier for individuals to find and compare options to pursue or defend claims. However, it must be firmly recognised that the majority of those involved in collective redress actions play no active part in the action and rely on the class representative, their lawyers, and ultimately the court, to ensure that the conduct, and any settlement, of the action is fair and adequate. Finally, insofar as any changes are deemed necessary to ensure access to information, it should be kept in mind that in the DBAs context, any funding is likely to be a private matter between law firm and funder, and in the more common CFAs context, a claimant will choose their lawyer before they choose their third party litigation funder.
Section 7 – General issues	
39 Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?	We have no further matters to raise.

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Appendix 1: Glossary

1 **Glossary**

1.1 Key terms are defined in accordance with the CJC's Interim Report on Litigation Funding.

1.2 Third Party Funding (TPF) refers to the provision of finance by a commercial party to cover some or all of the legal expenses incurred by a party in a legal dispute (Part 1, 2.3). It specifically involves funds being advanced by organisations (third party litigation funders) either directly or indirectly to litigants on the basis that, if the funded party's claim is successful, they will repay the funds advanced plus a specified additional amount (Foreword, 1.3).

1.3 Commercial Litigation Funding is not specifically defined nor explicitly differentiated from TPF in this Response. Where others mention it, we take Commercial Litigation Funding to refer to a subset of TPF, where sophisticated commercial entities seek funding for legal disputes against other sophisticated parties (usually in bilateral litigation). Commercial Litigation Funding is to be contrasted from Consumer Litigation Funding, which refers to family and personal injury cases in which unsophisticated parties seek financial assistance to pursue their legal claims, which is a highly regulated activity.

1.4 Collective Redress is used generally to refer to situations where a group of individuals have suffered similar harm or share a common interest and seek a remedy, which includes out of court remedies.

1.5 Collective redress actions (sometimes known as "Collective Actions" in the literature) refers to the legal mechanisms that allow individuals seeking collective redress to jointly bring a claim to court. There are four kinds of collective redress procedures available in England and Wales: (i) Collective redress actions in the Competition Appeal Tribunal (CAT) under the Competition Act 1998, (ii) Group Litigation or "GLOs" under CPR r.19 Pt III[5], (iii) representative proceedings under CPR r.19.8 and (iv) multi-party proceedings.

1.6 Group Litigation refers specifically to the procedure under CPR r.19, Part III whereby multiple claimants with similar claims can be grouped together to pursue their cases collectively following the grant of a Group Litigation Order (GLO).

[5] The CPR permits any number of claimants or defendants any number of claims to be covered by one claim form. The test is whether all of those claims can be "conveniently" disposed of in the same proceedings (CPR r.19.1 and r.7.3)