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:	Rhea
Last name:	Gupta
Location:	London, UK
Role:	Legal and Policy Officer
Job title:	Legal and Policy Officer (Consultant)
Organisation:	Class Representatives Network
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:

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

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

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

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

CRN | Class Representatives Network

Civil Justice Council Review of Litigation Funding Consultation Submission

Rhea Gupta

Legal and Policy Officer

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Abbreviations:

ALF – Association of Litigation Funders

CPO – collective proceedings order

CSAO – collective settlement agreement order

CR – class representative

CRN – Class Representatives Network

LFA – litigation funding agreement

PCR – proposed class representative

Introduction

About the Class Representatives Network

The Class Representatives Network (CRN) is a community interest company (CIC) and non-profit organisation dedicated to supporting and representing class representatives leading collective actions in England and Wales. The Class Representatives Network fulfils its aims by providing practical support to class representatives and conducting research on their experiences to inform legal and policy discussions.

This submission has been concluded in furtherance of the Class Representatives Network's objectives,[1] and the following objective in particular:

> "that the legal regimes providing for representative actions can develop in a way that commands the support of the judiciary, lawyers, parliamentarians, policymakers, consumers and interest groups in different parts of the economy."

This submission is the product of the CIC entity of the CRN. While our submission aims to provide an accurate, evidence-based snapshot of the experiences of class representatives, it does not reflect an agreed 'consensus position' of all class representatives who are involved with the network. Any references to the 'author' in this work refer to Rhea Gupta (Legal and Policy Officer) and the Class Representatives Network CIC.

Response of the Class Representatives Network to the Civil Justice Council's consultation on litigation funding

The Class Representatives Network welcomes the chance to respond to this consultation, which seeks to consider litigation funding reform as the funding market continues to develop in the United Kingdom, particularly following the recent introduction and growth of collective redress mechanisms.

The CRN has been in a possibly unique position to carry out some limited empirical research on the role played by litigation funders from the point of view of class representatives. It is understood that no equivalent empirical studies of this nature have taken place in other jurisdictions where class actions are permitted. This may be attributed to the unusually active role played by class representatives in the United Kingdom's collective proceedings regime, and their dual obligations towards their class members and towards third party funders.

[1] Class Representatives Network, 'Aims and Objectives https://classrepresentativesnetwork.org/our-approach/ (accessed 5/3/2025)

While the report focuses primarily on the experience of class representatives leading collective actions under the regime established by the Consumer Rights Act 2015, we hope that the Civil Justice Council can extrapolate our findings to other contexts as they deem appropriate, especially the interplay between litigation funders and other non-commercial consumers of litigation funding.

The CRN recognises that the scope of the Civil Justice Council's consultation is very broad, and that the views of its own members may differ widely in light of each individual's experiences with their funders. The CRN therefore seeks to present a factual picture of class representatives' experiences 'on the ground' to enable the CJC to better understand the benefits, risks and harms associated with litigation funding. Nevertheless, the research conducted in support of this submission suggests two main conclusions which we hope reforms the CJC's policy recommendations.

The first conclusion is that litigation funding is vital for ensuring continued access to justice via the collective actions mechanism. Without litigation funding, it is likely that most (if not all) collective actions could not be pursued at all. Moreover, many class representatives maintain positive relationships with their funders and consider them a helpful influence on their ability to conduct litigation effectively. Any reforms proposed by the Civil Justice Council should therefore support the continued availability of litigation funding, especially for collective actions, and the healthy development of a competitive litigation funding market.

The second conclusion informed by our research is that the current regulatory framework is not fit for purpose and urgently requires reform. Specifically, the current reliance on self-regulation and on ordinary commercial contractual negotiations between litigants and funders does not adequately address the difficulties that arise in a collective proceedings regime.

In the United Kingdom, class representatives occupy a unique position in the administration of justice. Their primary obligation is to act in the best interests of the class whom they seek to represent, and they are effectively *required* to rely on litigation funding in pursuit of this obligation. The class representative's obligations include, as part of the certification matrix, their ability to procure adequate funding to pursue the case, as well as the ability to satisfy any adverse costs order against them.[2] Moreover, alongside the CAT itself,[3] class representatives bear the primary responsibility of ensuring that the interests of class members are represented in all stages of the litigation,[4] and that any conflicts

[2] CAT Rule 78(2)(d).
[3] Which also has a role in protecting the interests of class members – *BT v Le Patourel* [2022] EWCA Civ 593 Green LJ at [48].
[4] *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5 at [31].

of interests arising between class members, lawyers, and funders are managed.[5] The precise contours of these obligations continue to be mapped out by the CAT and higher courts in response to disputes as they happen to arise. Class representatives should therefore be differentiated from other commercial consumers of litigation funding, who may elect external sources of funding for their *own* litigation for a variety of reasons (e.g., to bring litigation costs 'off the books'). However, as demonstrated by our findings in Section 2.1 of this submission, the fulfilment of these obligations is not straightforward in the commercial context in which class representatives are acting.

Firstly, collective claims inherently require extremely large, high-risk and bespoke investments. There are typically few funding options available in practice for any given case, resulting in a particularly constrained market for this category of claim. Cases which require the deployment of significant capital for many years may not attract the interest of a 'panel' of funders willing and able to fund the case.[6]

Secondly, proposed class representatives (PCRs) may only be considered or approached after the funding arrangements have been negotiated (or at least, when the putative funder has been identified). This may remove class representatives' leverage in commercial negotiations, thereby making it more challenging to negotiate any subsequent changes once they become involved.

Thirdly, while the CAT maintains supervisory jurisdiction over the terms of funding agreements at certification and settlement, it has offered little guidance to class representatives (and their legal advisors) on its views about the suitability of non-commercial funding terms and has typically deferred decisions on substantive commercial terms (such as the value of the funder's return) to any settlement or judgment. To date, there is scant judicial guidance on the terms which will be found acceptable by any court.

Fourthly, commercial funding arrangements are not negotiated in a vacuum. In addition to the challenges outlined above, class representatives may also face significant time pressures resulting from potential carriage disputes, or limitation periods applying to their claims. When funding terms are renegotiated during ongoing litigation, these pressures are amplified significantly. This is especially common in the context of collective actions, which typically run for several years. A decision which triggers the class representative's duty to act 'in the class's best interests' may therefore be much more complex than simply ensuring that the terms of the agreement are favourable to the class. A well-

[5] Ibid. [106].
[6] Since the collective proceedings regime was introduced in 2015, only one case has been litigated to judgment (*BT v Le Patourel*); this case was registered in 2021, taking a total of 3 years to reach its conclusion. Other cases, such as *Merricks v Mastercard*, have taken upwards of eight years (and, but for the recently approved settlement, would have likely concluded after nine years).

informed class representative may reasonably be more concerned with ensuring that the claim can be brought *at all*, let alone on funding terms which operate in the class's favour.[7]

These conditions place *all* class representatives in a challenging position that cannot easily be overcome in the context of fast-passed commercial negotiations. While the Class Representatives Network endorses the view that class representatives should proactively and vigorously advocate for their class's interests at all stages of the litigation, it is no answer to these difficulties to simply insist that class representatives are more rigorous in their pursuit of their class members' interests, or that class representatives procure additional legal advice, as has been implicitly suggested by the CAT in recent decisions.[8] The challenges posed by the need to balance the class's interests with the commercial realities of funded litigation are much more nuanced, and even the most active and well-resourced class representative may face intractable obstacles. Likewise, the vulnerability of class representatives' funding arrangements to legal attack and criticism by defendants has led to funding-related issues becoming an additional cost centre in collective actions and has resulted in significantly more argument (and therefore delay) in the courts.

The CRN identifies the following areas as requiring urgent reform:

1. The rules governing the enforceability of litigation funding agreements (LFAs) should be clarified immediately. The principles applied by the CAT when reviewing LFAs and the duties of class representatives in securing funding remain unclear. Likewise, the lack of clarity following the *PACCAR*[9] judgment is untenable. The absence of sufficient clarity about the court's views on LFAs makes it extremely difficult for proposed class representatives to receive meaningful *ex-ante* legal advice about the suitability of their funding arrangements, thereby significantly disadvantaging class representatives and the class members they represent in commercial negotiations and exposing class representatives to considerable additional litigation risk.[10]
2. As discussed in Section 3 of this report, funded collective proceedings pose some risk of inflated litigation costs. Under the current regulatory framework, deep-pocketed defendants are incentivised to increase their own costs to increase pressure on class representatives, who must demonstrate their continuing ability to satisfy adverse costs orders to maintain certification.

[7] See Section 1 of this report for evidence supporting these findings.
[8] *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5

[9] *R (on the application of PACCAR Inc and others v Competition Appeal Tribunal and others* [2023] UKSC 28 (*'PACCAR'*)
[10] See Section 2 of this report for evidence on this topic.

Therefore, although funders might otherwise exercise downwards pressure on costs to ensure the most effective deployment of their capital, class representatives may experience additional pressure to procure higher levels of insurance coverage or increase expenditure to guarantee equality of arms in litigation. The current *ex-post* controls on costs exercised by the CAT may be insufficient to address these risks.

3. The current regulatory framework does not adequately resolve funding-related disputes which arise during litigation. As discussed in Section 4 of this report, our findings demonstrate that the risks of disputes between class representatives and their funders increase significantly as litigation progresses to trial or settlement, or when budgeted funding runs out. Since funding renegotiations occur against the backdrop of an existing (and often exclusive) funding arrangement, and under significant time pressure, class representatives are often at a serious disadvantage and may even be exposed to personal litigation risk. Moreover, our findings indicate that class representatives are doubtful about whether existing dispute resolution mechanisms, including those provided by the ALF, are capable of satisfactorily addressing these disputes in a way that properly protects class representatives or the interests of class members.

4. The current regulatory framework does not adequately address the risk that funders may seek to exercise improper control over litigation. As further discussed in Section 4 of this submission, offers of additional funding are often made conditional on the introduction of contractual terms which confer implicitly or explicitly confer greater control over the litigation upon funders. It may be practically impossible for class representatives to reject these offers when further funding is required for the litigation to continue. They may reasonably consider that it is in the best interests of their class to accept funding on these terms rather than withdrawing the claim or settling for an artificially low figure. This is unacceptable and runs counter to the judicial principles prohibiting champerty and maintenance. Urgent reforms are required to ensure that renegotiations for additional funding do not pose these risks and that while maintaining fairness for both class representatives and funders.

Notwithstanding these concerns, the Class Representative Network is cognisant of the commercial realities of litigation funding as an investment. Collective actions must remain an economically viable investment for funders if they are to be pursued in future. If commercial funding, it is unlikely that alternative funding sources will be available for private, collective competition enforcement, except in particularly unusual cases.[11] We therefore strongly encourage that the CJC remain mindful of these realities when considering potential options for reforming the regulatory framework.

While we have identified a number of issues in relation to third party funding, the CRN does not believe that these are impossible to overcome. Nor do they indicate that the United Kingdom's collective actions regime is not working as intended. Indeed, the fact that class representatives are conscious of these challenges, and are thinking about how best to overcome them, is a strong sign of a *healthy* collective proceedings regime. It demonstrates that class representatives in the United Kingdom take their responsibilities to their class members seriously and are committed to acting in their best interests. In our view, reforms which can address the issues we have identified will result in a world-leading collective proceedings regime that offers fairness to consumers, defendants, and funders alike.

[11] See e.g. 1698/7/7/24 *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc*

Method and Limitations

Method

This submission has been drafted by Rhea Gupta, the Legal and Policy Officer (consultant) at the Class Representatives Network. The CRN has 42 members comprising class representatives (CR) and proposed class representatives (PCRs) under the competition collective actions regime,[12] and representative claimants bringing representative actions under CPR 19.8.

Our submission aims to present factual insight into the experiences of class representatives in ongoing competition collective actions. The submission is supported by empirical research, conducted by way of anonymous surveys completed by members of the Class Representatives Network. The response rate to these surveys reflects around 50% of our membership (see 'Limitations' below). As such, these surveys provide a snapshot of the views and experiences of some class representatives and cannot be said to reflect all their experiences or views. All survey participants were current or proposed class representatives bringing collective actions under s.47B Competition Act.[13]

Two surveys were issued to CRN members: one more limited survey issued in August 2024, which focused on the process of selecting and negotiating funding agreements, and a broader survey issued in December 2024. In addition to the surveys, we conducted some informal discussions with members of the Class Representatives Network about their experiences. The report makes limited reference to these discussions, and the identities of the individuals involved remain confidential.

Our submission is supported by secondary legal research conducted by the author on judgments which explicitly rule on the validity of LFAs used in collective proceedings, or to the certification and settlement criteria which relate to class representatives and their duties in relation to funding.[14] This commentary should not be taken to reflect the views of all CRN members but highlights some common causes for concern or confusion in the jurisprudence.

[12] s.47B Competition Act 1998

[13] Although the Class Representatives Network includes members leading claims under CPR r.19.8, these members' experiences have been excluded from our submission for clarity. It can be argued however that the Competition Act regime, which specifies that the CAT must exercise "continuous oversight" of collective claims, provides opportunities not available in the High Court under CPR r.19.8. The CJC should bear this in mind when considering our views regarding smaller scale reforms, such as the introduction of *ex-parte* applications, Practice Directions or Guidance Notes.

[14] E.g. the 'authorisation' and 'eligibility' conditions specified in s.47B(8)(b) Competition Act 1998 and r.78 and r.79 of the CAT Rules 2015.

Limitations

The August 2024 survey received a total of 18 individual responses, and the December 2024 survey received 19 individual responses.[15] All questions in both surveys were optional. As a result, some parts of the survey received far more responses than others. Although the surveys received a reasonable number of responses relative to the number of ongoing cases,[16] the collective proceedings regime is developing, and few cases have reached trial or settlement. This should be borne in mind when considering the data presented, and we have aimed to highlight differences between the experiences of those who are further progressed in their litigation where possible.

The Class Representatives Network is a voluntary organisation with a limited budget. As such, the surveys were not managed under market research conditions. While this report aims to accurately reflect the views and experiences of as many class representatives as possible, the data that we have is limited and cannot be said to reflect all views of all class representatives, particularly in respect of questions of 'high policy'. The author of this report has also encouraged class representatives to make their own representations to the CJC where their cases fall outside the remit of our research.

Structure of this submission

This submission proceeds in five sections. Section 1 sets out empirical evidence of the funding and costs control mechanisms used in collective actions. Section 2 discusses the deficiencies of the current regulatory framework, contextualising the discussion within commercial context in which funding agreements for collective proceedings are typically concluded. Section 3 discusses the relationship between LFAs and litigation costs, and the pros and cons of different funding models. Section 4 discusses the relationship between class representatives and their funders, and questions regarding funders' control over litigation. Section 5 discusses questions pertaining to access to justice and vexatious litigation.

[15] Survey participants were asked to complete the survey once for each set of proceedings on which they act as a class representative. A 'set of proceedings' in this context includes all proceedings based on substantially the same allegations, even if they are constituted as separate cases on the CAT website. For example, a claim against six separate defendants based on allegations of the same harm counted as one 'set of proceedings' for this survey. Two participants sought to reissue survey results due to changing circumstances on their cases during the survey period. The aggregated survey data (19 responses) excludes earlier responses from these participants however, text comments from both responses will be utilised throughout our submission.

[16] There are currently 60 collective proceedings listed on the CAT website, though the CAT website, although some proceedings which are being managed and funded in practice are listed individually (e.g. proceedings brought by Mr Justin Gutmann against Vodafone, Telefonica UK, EE and Hutchinson 3G).

1. Which funding and costs-management mechanisms are deployed in collective actions?

This section seeks to present an evidence-based picture of the funding arrangements currently deployed in collective actions and the commercial context in which such agreements are negotiated. It relies on data collected from surveys conduct in August 2024 and December 2024.

Who funds collective proceedings, and how are funders regulated?

All collective proceedings in the CAT rely on litigation funding provided by a third-party organisation.[17] As Mulheron observes, this is typically the *only* viable option for funding collective actions, particularly given the vehement opposition of the government at the time of the regime's introduction to law firms funding cases themselves using DBAs.[18] In addition, collective actions often rely on other measures to manage costs, such as legal expenses insurance and conditional fee arrangements.

Participants in the December 2024 Survey were asked how many funders were involved in their case, and whether their funder(s) were members of the Association of Litigation Funders (ALF).[19] Our findings suggests that most respondents are bringing cases funded by a single ALF member. Sixteen out of seventeen respondents indicated that their cases were funded by a single funder.[20] Thirteen out of eighteen respondents indicated that their funder was an ALF member.[21] Importantly, while ALF members are subject to the 'ALF Code of Conduct', this self-regulatory code is not mandatory and merely provides guidance on appropriate conduct.[22]

[17] In most cases, they rely on 'third party litigation funding' as defined in paragraph 1.3 of the CJC's Interim Report; the sole exception is CAT 1698/7/7/24 *Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc*, which is funded by the Home Office. This case falls outside the definition because the Home Office does not seek to recoup a success fee from any damages award.
[18] Mulheron, 'A Review of Litigation Funding in England and Wales – A Legal Literature and Empirical Study' (28 March 2024), Legal Services Board https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf pp.18
[19] Funder members of ALF include Asertis, Augusta, Balance, Bench Walk Advisors, Burford Capital, Calunius, Deminor, Erso Capital, Harbour, Innsworth, Omni Bridgeway, Orchard Global, Redress Solutions, Therium, Vannin Capital, Woodsford
[20] December 2024 Survey, Question 4. One respondent indicated that they had two funders because they had swapped funders part-way through the litigation; there was therefore only one 'active' funder involved.
[21] December 2024 Survey, Question 5.
[22] Funders who breach the ALF Code of Conduct may face the termination of their ALF membership; they may also be liable to complaints under the ALF complaints procedure. However, unless the funder has made an undertaking to comply with the Code of Conduct, there are no other legal consequences for a failure to comply with the ALF Code of Conduct.

Which other costs management mechanisms are adopted in collective proceedings?

The survey also asked participants whether conditional fee arrangements (CFAs) were being utilised by (i) solicitors and (ii) counsel. Fourteen out of sixteen respondents confirmed that their solicitors are engaged on CFAs,[23] and twelve out of sixteen confirmed that their counsel are engaged on CFAs.[24] Participants in the December Survey were also asked about their use of 'after the event' legal expenses insurance.[25] As demonstrated by the table below, almost all class representatives (or their funders) have purchased an insurance policy to cover losses. Only one participant responded that their funding arrangements did not include after-the-event insurance, indicating that their funder self-insures.

'Do your funding arrangements include after-the-event insurance? (select as many as apply)'[26]

ANSWER CHOICES	RESPONSES	
No	7%	1
I am insured against adverse costs orders	87%	13
I am insured against unexpected appeals/delays	7%	1
My costs/my funders costs are insured in the event we lose	47%	7
Other	0%	0
I don't know	0%	0
If you are insured and your insurance is not covered by the above, please briefly provide further details	7%	1
TOTAL		23

[23] December 2024 Survey, Question 8
[24] December 2024 Survey, Question 9.
[25] Certification of collective proceedings is conditional on the class representatives' ability to satisfy adverse costs orders (CAT Rule 78(2)(d)); this can be achieved a number of ways, of which purchasing a designated ATE policy is one.
[26] Note that there were 13 individual responses to this question.

2. The current regulatory framework in commercial context

Consultation Questions relevant to Section 2

Q33. To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?

Q34. 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?

Q35. 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.

Q4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding? If not, what improvements could be made to it?

Q27. 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?

Introduction

In the context of competition collective actions, the terms of litigation funding agreements are controlled in three ways:

- By ordinary commercial contractual principles, which are theoretically reflected in negotiations between class representatives (as supported by their legal teams) and funders.
- The supervisory jurisdiction of the CAT over LFA terms, particularly in the context of certification and settlement.
- Where the funder is a member of ALF, LFAs are also subject to the requirements of the ALF Code of Conduct[27].

The Class Representatives Network takes the view that the current regulatory framework is out of step with the commercial realities in which LFAs are negotiated and ultimately operate. To date, our research has demonstrated that class representatives (and their legal teams) may be at a significant disadvantage in commercial negotiations from the outset, owing primarily to the constrained market for funding for large-scale collective actions. As a result, the current regulatory framework has two main deficiencies.

[27] Note that non-ALF members have on occasion been required to undertake that they will abide by the Code of Conduct in collective proceedings see *BSV Claims Limited v Bittylicious Limited & Others* [2024] CAT [48] at [100].

Firstly, although the CAT exercises a degree of supervisory jurisdiction over the terms of LFAs, there has been little judicial guidance to date. In particular, the CAT has generally deferred any review of commercial terms [28] to judgment or settlement unless the terms are 'sufficiently extreme to warrant calling out'[29] at certification stage. This means that class representatives and their legal advisors are effectively negotiating funding agreements in a legal blind spot, with insufficient knowledge about how a given term will be received by the CAT. Likewise, since the ALF's Code of Conduct contains no specific provisions about collective proceedings, there are no other standards upon which a class representative and their legal advisors may rely. The reliance on '*ex-post'* regulation by the CAT ultimately increases uncertainty and cost for claimant side teams, potentially increasing the cost of funding itself, ultimately to the detriment of class members.

Secondly, the current regulatory framework places a heavy burden on class representatives (and their legal teams) to ensure that the terms of LFAs are in the class's best interests, with the CAT exercising its supervisory jurisdiction via the 'gateway' of the authorisation condition.[30] While the CRN acknowledges the need for appropriate scrutiny over class representatives and the performance of their role, we consider that this approach is entirely ineffective as a means of regulating the substantive terms of LFAs. In reality, class representatives who are operating at a commercial disadvantage and without reference to objective legal standards may face real practical challenges in negotiating fair funding terms. As a result this approach simply exposes the class representative to opportunistic legal attacks on the grounds that the LFA has not been concluded in the class's best interests, without addressing the practical commercial obstacles that many class representatives and their legal advisers may face when negotiating funding agreements. The upshot is increased uncertainty, potentially resulting in more costly funding arrangements and increased litigation costs, both of which can operate to the class's detriment.

[28] In this context 'commercial terms' refers to terms which stipulate the funder's proposed cost outlay, the funder's level of the return, and any changes to the funder's level of return over time or under certain conditions.
[29] *Gormsen v Meta* [2024] CAT 11 at [36]
[30] See e.g. *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5

2.1. Litigation Funding Agreements for collective actions in commercial context

The courts have observed that LFAs are concluded in the context of commercial, confidential negotiations between the class representative (with advice from their legal team) and the funder.[31] The efficacy of the present regulatory framework must be evaluated in light of this commercial context, as the terms and pricing of LFAs are currently dictated primarily by market conditions.

Collective actions in the CAT aggregate the claims of thousands, if not millions of individuals, and are therefore inherently operate at a much larger scale and (typically) run for a much longer period when compared with non-aggregated claims. Costs are likely to be in the tens of millions of pounds, and cases may run for several years, especially in the context of competition proceedings which require the disclosure and economic analysis of vast amounts of data. As a result, collective actions represent a large-scale, high-risk, and bespoke investment for funders, which necessarily constrains the market in which class representatives (and their legal advisors) may select a funder and negotiate a funding agreement. Likewise, *without* confirmed funding, the identification and development of any potential claims by those with the relevant technical expertise (namely lawyers, expert economists) could result in wasted money and time, as any failure to secure funding would result in cases failing to get off the ground.[32]

The August 2024 survey sought to gain further insights in this regard by asking class representatives about the circumstances in which their funding agreements were negotiated.[33] This research uncovered the following insights.

Firstly, proposed class representatives generally become involved in the litigation once the terms of funding agreements had already been agreed between law firms and funders, with 12 out of 17 respondents indicating that a prospective funder had already been identified by their legal team prior to their involvement. This is unsurprising given the costs associated with bringing collective actions, and the likelihood that any law firm investigating a potential claim would wish to ensure its practical viability at a preliminary stage.

[31] E.g., *Gormsen v Meta* [2024] CAT 11 at [35]
[32] As observed by the Court of Appeal in *BT v Le Patourel* [2022] EWCA Civ 593
[33] See the CRN's report, 'Selecting Litigation Funders and Negotiating Funding Agreements' (September 2024), accessible at < https://classrepresentativesnetwork.org/research-and-reports/>

Secondly, most respondents (75%, or 12 out of 16) were presented with one possible funding arrangement by their legal teams. It is likely that this is also because there are very few viable funding options available in practice for any individual case, owing to the size and investment risk of collective actions. As one proposed class representative observed:

> "It is not the case that there are a panel of funders willing to fund the case with the class rep/law firm able to pick the 'most suitable' and negotiate terms."

Likewise, funders may be unwilling to fund litigation that is particularly sizeable because they lack sufficient capital adequacy. This was observed in a statement provided by Dr Liza Lovdahl Gormsen in support of the September 2024 research report.[34] Unusually, Dr Gormsen is the only class representative who has built her case (including legal and economic arguments) from the ground up and was therefore involved from the very outset of communications with funders. Dr Gormsen experienced some difficulties in securing funding owing to the scale of her claim and individual funders' lack of sufficient capital adequacy.[35]

These findings demonstrate that the market conditions in which litigation funding agreements are procured by claimant teams are constrained, with few viable options available for class representatives. This places class representatives and their legal teams at a significant disadvantage at the outset of commercial negotiations. If a class representative only has one viable funding option owing to the scale, predicted length, or subject-matter of their case, the funder may state their price and terms for funding on a 'take it or leave it' basis, leaving the class representative with little room for manoeuvre. If the class representative is presented with the option of accepting the terms as stated, or otherwise failing to bring the claim at all, they may well conclude that accepting the funder's terms is ultimately in the class's best interests.

The CRN also observes that the ALF Code of Conduct does little to regulate the substantive terms of LFAs in competition collective actions. While the Code states that the LFA must specify whether or how funders may provide input in relation to the funded party's decision to settle, and when funders may terminate the LFA on various grounds,[36] it does not specify the substantive content of these terms, leaving them to be determined by ordinary commercial contractual negotiations (and judicial regulation, when challenged).

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[34] Class Representatives Network 'Selecting Litigation Funders and Negotiating Funding Agreements' (September 2024), accessible at < https://classrepresentativesnetwork.org/research-and-reports/> p. 22-23.
[35] Ibid.
[36] ALF Code of Conduct s.11 < https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>

Moreover, class representatives may not be party to the whole of the LFA negotiations, with their primary legal teams taking the lead in procurement processes. As Professor Mulheron rightly argues, the fact that primary legal teams take on this role does not present a conflict of interest either in theory or in practice, as the LFA will only be formally concluded once the proposed class representative has instructed their solicitors, who will then owe their client (the PCR) a professional duty of care.[37] Nevertheless, the fact that the LFA will be largely negotiated and agreed prior to the class representative's involvement may reduce any leverage which the class representative might seek to exercise in commercial negotiations with their funder, both prior to and throughout the litigation.

2.2. The role of the CAT

This section will consider the role of the CAT under the current regulatory framework.[38] Relying on a combination of empirical evidence and legal research, it is argued that the lack of detailed judicial guidance from the CAT fails to address the challenges faced by class representatives outlined in section 2.1 above. Specifically, the current state of the law simultaneously requires a high degree of scrutiny over class representatives' role in procuring funding, without offering sufficient guidance as to what this requires, or as to which terms may be appropriate in funding agreements.

How does the CAT regulate funding agreements?

As part of the certification process, the CAT exercises supervisory jurisdiction over the terms and pricing of LFAs. Perceived flaws with the terms or enforceability of LFAs have now become a regular point of contention for defendants who wish to prevent the certification of collective proceedings against them, particularly following *PACCAR*[39] (see e.g., the CPO judgment in *Alex Neill Class Representative Ltd v Sony*).[40] Notwithstanding the frequency of funding-related objections (and the alacrity of defendants pursuing these arguments), the CAT's approach to regulating LFAs remains somewhat unpredictable and unclear:

[37] Mulheron, 'A Review of Litigation Funding in England and Wales – A Legal Literature and Empirical Study' (28 March 2024), Legal Services Board https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf pp.126

[38] Recall that while the CAT *necessarily* reviews the terms of LFAs when deciding whether to certify collective proceedings, there is no equivalent requirement in the context of other funded litigation, such as collective proceedings under CPR 19.8.

[39] *R (on the application of PACCAR Inc and others v Competition Appeal Tribunal and others* [2023] UKSC 28

[40] [2023] CAT 73

- The CAT has an obligation to scrutinise the LFAs at certification stage and seek adjustment if there are "concerns that cannot otherwise be managed".[41] However, the CAT has repeatedly stated that LFAs are fundamentally commercial agreements, and that it will not venture into the commercial terms of LFAs unless they are 'sufficiently extreme to warrant calling out'.[42] As a result, little concrete guidance has emerged from the regime ten years after its inception in 2015.
- Even in circumstances where the CAT has expressed concerns about the projected level of funders' returns at CPO stage, it has typically concluded that such concerns are best dealt with in the context of any settlement or judgment.[43] This means that even in cases where funding has been procured at a relatively high price, it is unlikely that the Tribunal will exercise its discretion *ex-ante* to alter the terms at certification. This approach has limited the development of judicial guidance or regulation on the price of funding agreements under the regime to date.
- Substantially similar terms have elicited varied responses from differently constituted tribunals, leaving parties 'in the dark' during negotiations. One might compare the CAT's treatment of a term in the LFA in *Gutmann v Apple*,[44] which required the PCR to potentially pay the funder's costs and success fee in priority to distributing funds to class members, and the CAT's potential concerns with a similar term in *Christine Riefa v Apple and Amazon*.[45] The result is that class representatives may struggle to obtain meaningful advice on their funding terms, even when they have spent time and funds on independent costs counsel.

Ultimately, the effect of the CAT's approach is to impose discretionary *post-hoc* restrictions on the most 'extreme' funding arrangements. This is likely to result in a failure to price funding appropriately at the outset, which is more likely to lead to renegotiations of commercial funding terms (and therefore disputes)[46] down the line. This may negatively impact upon both class representatives and funders throughout the proceedings. Firstly, given that the terms of the LFA approved at certification will form the backdrop of any subsequent renegotiations, a class representative who has been offered funding on a 'take it or leave it' basis at a high price effectively remains at a disadvantage in negotiations throughout the proceedings. Secondly, funders may find it incredibly difficult to effectively assess and allocate risk as proceedings progress if their projected

[41] *Alex Neill v Sony* [2023] CAT 73 [166]
[42] *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5
[43] *Alex Neill v Sony* [2023] CAT 73 [167]
[44] [2024] CAT 18
[45] *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5
[46] See Section 4 of this report.

returns are likely to be significantly altered at the eleventh hour. This increased uncertainty is likely to drive up the price of funding and potentially promote disputes between class representatives and funders.

Navigating the 'legal blind spot' in Gormsen v Meta

The absence of clear and consistent guidance on LFAs in competition collective proceedings makes it very difficult for class representatives to procure meaningful legal advice on the terms of their funding arrangements. Given that taking and acting on specialist legal advice in respect of funding terms is at the core of class representatives' duties, this represents yet another obstacle for class representatives under the current regulatory framework.

A striking example was observed in *Gormsen v Meta,*[47] which is one of few cases in which the class representative took the lead in negotiating her own funding arrangements, in addition to seeking independent advice on the LFA's terms from costs counsel.[48] Dr Gormsen's case provides a strong example of the practical challenges which even the most proactive and involved class representative might face in negotiating terms which the CAT may consider to be fair. On no reading of Dr Gormsen's involvement may it be said that Dr Gormsen did not understand the terms of her funding agreement; nor can it be said that Dr Gormsen was insufficiently involved in the process of negotiating her LFA. Likewise, Dr Gormsen sought independent advice from costs counsel, who would have been able to advise on any judicial or regulatory opinions relevant to the terms of the LFA. However, the CAT ultimately concluded that the commercial terms of the funding agreement were 'sufficiently extreme to warrant calling out'.[49]

This suggests that even the most active class representative with access to the highest quality legal advice may struggle to secure a funding arrangement which secures the CAT's approval on a first attempt.[50] In the CRN's view, this inevitably stems from the *ad-hoc* development of the law in this area, and the fact that funders, class representatives and lawyers alike are left in the dark during commercial negotiations. This amplifies class representatives' disadvantage in commercial negotiations, and creates myriad opportunities for satellite litigation on the terms of funding agreements, incurring additional delays and costs.

[47] *Gormsen v Meta* [2024] CAT 11 at [37]
[48] See the CRN's report, 'Selecting Litigation Funders and Negotiating Funding Agreements' (September 2024), accessible at < https://classrepresentativesnetwork.org/research-and-reports/>
[49] *Gormsen v Meta* [2024] CAT 11 at [37]
[50] This was technically the second LFA which had been put before the CAT in these proceedings; however, the agreement had been ren

The suitability of the 'authorisation' condition as a vehicle for regulating LFA terms

The CAT's scrutiny of LFAs is explicitly tied to the duties of the class representative, who bears the formal responsibility of funding its own costs of bringing the proceedings,[51] and ensuring that it can satisfy any adverse costs orders made in favour of the defendant(s). In *Christine Riefa Class Representative Limited v Apple and Amazon*,[52] it became clear that the terms of the proposed LFA are therefore a relevant factor in the CAT's decision to authorise a particular class representative.

In the first CPO hearing in *Riefa*, the defendants argued that the proposed class representative (PCR) had failed to adequately represent the interests of the class in negotiating the terms of the LFA, which included a provision which placed an unqualified obligation on the PCR to apply to the CAT for an order permitting all or part of the award to be paid in respect of costs fees and disbursements incurred in the event of a successful judgment or settlement.[53] In the second CPO hearing, the PCR was cross-examined in respect of her role in negotiating the funding arrangements. The CAT ultimately refused to grant the CPO on the grounds that the PCR did not appear to have a sufficiently strong understanding of her responsibilities to the class, or the conflicts of interests at play, and had therefore failed to meet the 'authorisation' condition.[54]

The CRN takes the view that the approach taken in *Riefa*[55] is not an appropriate means of regulating the terms of LFAs. The CRN does not seek to express a view as to whether it may be necessary in some cases to scrutinise a PCR's understanding of the terms of their LFAs by way of cross examination. However, it is extremely inappropriate for the CAT to rely on the 'authorisation' condition as a proxy for regulating the terms of LFAs, especially in the absence of further guidance which can inform class representatives' negotiations with funders prior to a certification hearing. As discussed above, without further guidance, it is highly likely that even class representatives which the Tribunal considers to be sufficiently 'robust' will be unable to negotiate fair funding terms on behalf of their class in practice.

Moreover, if concerns about the fairness of LFA terms are conflated with questions regarding the suitability of the class representative, it is difficult to see how the CAT can properly isolate its review of funding terms from its assessment of the class representative who bears the formal obligation of

[51] CAT Rule 78(2)(d), read with paragraph 6.33 of the CAT Guide. See also *UK Trucks Claim v Fiat Chrysler Automobiles* [2019] CAT 26 at [52].
[52] Ibid.
[53] Ibid [37]-[38].
[54] I.e. that it is 'just and reasonable for the PCR to act as class representative - section 47B(8)(b) Competition Act 1998 and CAT Rule 78(1)(b).
[55] *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5

negotiating these terms. The likely consequence is a misplaced emphasis on the class representative's ability to withstand cross-examination and defend their funding arrangements, rather than any substantive improvements of LFAs. In a commercial context where class representatives may be at a disadvantage in negotiations, this outcome is entirely counterproductive and may lead to more problems than it solves – including the potential for increased costs, or the refusal to certify proceedings which may otherwise be viable, if the terms of the LFA were modified.[56] Both of these outcomes would ultimately serve to disadvantage class members, rather than supporting class representatives to act in furtherance of their legal duties.

Class Representatives' views on the role of the CAT

Although the CAT's review of the class representative's funding arrangements is a significant hurdle in the certification process, respondents to our surveys generally took a positive stance towards the CAT's role in regulating funding agreements.[57]

'To what extent do you agree with the following statements?'[58]

	STRONGLY AGREE	AGREE	NEITHER AGREE NOR DISAGREE	DISAGREE	STRONGLY DISAGREE	TOTAL
The CAT exercises an appropriate level of scrutiny over the level of funders' returns	13% 2	53% 8	20% 3	13% 2	0% 0	15
The CAT exercises an appropriate level of scrutiny over increases in funders' return over time	14% 2	43% 6	29% 4	14% 2	0% 0	14
The CAT is well-placed to comment on, and regulate, non-financial terms in funding agreements	27% 4	40% 6	33% 5	0% 0	0% 0	15
The current rules on disclosing funding agreements are appropriate	14% 2	43% 6	7% 1	36% 5	0% 0	14

As highlighted by the table above, the majority of respondents to this question endorsed the CAT's role regulating non-financial terms (e.g. terms which regulate confidentiality, or which set out the PCR's obligations). However, several respondents observed in comments appended to this question

[56] Note that the CAT has generally been willing to allow class representatives to amend LFA terms that it does not consider to be fair – see e.g. *Gormsen v Meta* [2024] CAT 11
[57] Our December 2024 preceded the CAT's CPO judgment in *Riefa.* The data therefore does not account for any possible changes in class representatives' views since this development.
[58] December 2024 Survey, Q57.

that it may be 'too early to tell' whether the CAT exercises an appropriate level of scrutiny over the level of funders' returns, both in general and in respect of increases in funders' returns over time.

Moreover, when filtered to isolate responses from class representatives who have reached trial or settlement, the responses were more equivocal, with only 50% of these respondents 'agreeing' with any of the above statements.

Judicial regulation of LFAs and disclosure

Prior to the Supreme Court's decision in *PACCAR*, it was accepted by the Tribunal that the disclosure of funding arrangements in full should be avoided where this would confer an unfair advantage to defendants (e.g., by conveying the funder's assessment of the claim's merits).[59] The risk that the disclosure of LFAs may give rise to 'scorched earth' tactics by defendants has also been recognised by Prof Mulheron in her recent research for the LSB.[60] Following *PACCAR*, however, the CAT has generally taken the view that the terms of LFAs should be transparent and open to scrutiny, both by the CAT and by members of the putative class.[61] Class representatives have generally responded positively to this development, with one participant in the December survey repeatedly emphasising their preference for greater transparency. Likewise, the disclosure of LFAs is an inevitable corollary of a heightened standard of judicial review over funding terms.

The December 2024 survey sought to explore the extent to which the disclosure of LFAs may have an impact on the way in which parties conduct litigation. The survey results presented a mixed picture. On one hand, only one out of 14 respondents took the view that the disclosure of their funding arrangements was likely to have influenced their opponent's conduct in litigation. On the other hand, a significant number of respondents considered that their opponents had pursued tactical strategies to delay litigation or increase costs (see further discussion in Section 3).

These responses suggest that class representatives endorse increased transparency, and do not consider that this should be sacrificed to prevent defendants from pursuing tactical strategies. However, the CJC should remain mindful of the risks which arise from the disclosure of LFAs. As has been recently highlighted in the funding dispute arising in the *Merricks* litigation, the status of the funding relationship and of the funds available to the claimant are highly relevant to the

[59] *Kent v Apple Inc* [2021] CAT 37 [29]
[60] Mulheron, 'A Review of Litigation Funding in England and Wales – A Legal Literature and Empirical Study' (28 March 2024), Legal Services Board https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf pp.123
[61] *Gormsen v Meta* [2024] CAT 11 at [37]; *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5 at [31]

defendant's litigation and settlement strategy.[62] Even if the CAT is able to regulate settlement terms, it likely that unfairness to the class will eventuate if the defendant can utilise knowledge of the funding agreement to manoeuvre the litigation to a stage where it is no longer economical. The CJC may wish to consider reforms to other costs rules to address these risks.[63]

2.3. Conclusions on the current regulatory framework

In conclusion, the CRN highlights the following deficiencies in the current regulatory framework:

- Currently, class representatives and their advisors have insufficient guidance in respect of the terms that the CAT considers fair or appropriate. This makes it extremely difficult for class representatives or funders to negotiate terms which they know the CAT will consider 'fair' ahead of any certification hearing, or for legal professionals to offer meaningful advice on funding terms.
- The current regulatory framework does not adequately address the imbalance of power which operates between class representatives (and their legal advisors) and funders in a constrained market. The provisions of the ALF Code of Conduct offer minimal substantive guidance to funders and class representatives, leaving contractual terms up for commercial negotiation in circumstances where class representatives lack sufficient leverage. Moreover, the rules on certification, as currently understood, implicitly depend on the class representatives' ability to overcome any such imbalances in power to negotiate an agreement in the class's best interests. Without further guidance on substantive LFA terms and pricing, it is unlikely that this can change. In the immediate term, the current state of the law exposes class representatives to considerable risk without addressing the underlying issues.
- The deferral of the CAT's regulation of commercial terms in LFAs to settlement or a judgment increases uncertainty. This is likely to drive up the price of funding and potentially reduce its availability, ultimately to consumers' disadvantage.
- While class representatives generally endorse the CAT's role in regulating and scrutinising LFA terms, as well as increased transparency, this presents a heightened risk of unfavourable litigation strategies by defendants which can potentially disadvantage class members. Moreover, defendants' challenges to the enforceability of funding arrangements at

[62] Mr Merricks' Fourth Witness Statement (filed 16 January 2025) at [51-53]. <https://mastercardconsumerclaim.co.uk/Content/Documents/Fourth%20Witness%20Statement%20of%20Walter%20Merricks.pdf>

[63] Section 3 below also addresses the potential vulnerability of funded litigation and its relationship with costs.

certification stage have made funding issues an additional costs centre in litigation. The lack of clarity in the current regulatory framework contributes to these increased costs.

Possible solutions?

Although more detailed guidance on LFA terms in collective proceedings is necessary, the CRN recognises that it may be undesirable to implement this via the development of a statutory regime. In this respect, we suggest that the following changes might be made to the CAT Rules to address these problems immediately in the context of collective proceedings:

- Firstly, the CAT rules could be amended to create a distinct certification requirement which requires the judicial approval of any funding arrangements utilised in collective actions, thereby making funding agreements a distinct requirement from the authorisation of the class representative. This would streamline the development of judicial guidance governing LFAs, without misdirecting scrutiny of the funder (or the LFA terms) at the class representative, or vice versa. This would partially restore the CAT's approach prior to *Riefa*.
- Secondly, the CAT should be permitted to hear *ex-parte* applications for judicial approval of LFA terms prior to certification, as is the case in Canada.[64] This would enable sufficient judicial oversight over the terms of the LFA, with a view to the class's interests, and enable judges to keep apace of potential developments in the terms of funding agreements. Moreover, it might reduce costs by enabling funding to be dealt with as a preliminary issue, rather than facilitating ongoing disputes about enforceability as litigation progresses.
- Thirdly, the CAT could issue guidance on their views on the substantive content of LFAs in the form of a practice direction or note, which could be used as an immediate reference for class representatives, their advisers, and funders alike. With the introduction of CAT judges with relevant expertise, most notably Professor Rachael Mulheron, such guidance could be made available fairly quickly and at minimal cost to litigants.

[64] R. Howie & G. Moysa, Financing Disputes: Third-Party Funding in Litigation and Arbitration, (2019) 57:2 487 (see also the CJC's Interim Report on Third Party Litigation Funding at p.39.

3. Litigation Funding, Costs, and the conduct of defendants

Consultation Questions relevant to this section

Q2. To what extent does third party funding promote equality of arms between parties to litigation?

Q8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:

a. What impact, if any, have the level of litigation costs had on the development of third party funding?
b. What impact, if any, does third party funding have on the level of litigation costs?
c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?

3.1. The relationship between third-party litigation funding and litigation costs

The interplay between third-party litigation funding and litigation costs is highly complex, and potentially under-researched. In this section, the Class Representatives' Network seeks to support the CJC's evaluation of Consultation Questions 2 and 8 above through reliance on empirical evidence.

Litigation funding and downwards pressure on litigation costs

On one hand, litigation funding is the deployment of a capital asset with the intention of recouping a return on investment; this implicitly places downward pressure on costs, as funders seek to ensure the greatest return possible from the capital deployed. Some support for this view may be observed in the data set out in Section 1 of this report, which shows that in most cases, both solicitors and counsel are instructed on CFAs, thereby deferring a proportion of the litigation costs to the conclusion of the litigation (and indeed, reducing the funder's immediate costs outlay). Moreover, when asked about how the level of lawyer's fees were negotiated,[65] one fifth of respondents (3 out of 15) responded that funders actively negotiated down the level of lawyer's fees, with one additional respondent noting that their lawyers provided their pricing in response to the funder's proposed costs outlay. These results suggest that in at least some cases, funders exert downwards pressure on costs.

[65] December 2024 Survey, Q.27: "When your funding agreement was negotiated, how was the level of your lawyers' fees negotiated?'

Furthermore, 10 out of 17 respondents stated that the responsibility for monitoring their costs budget was jointly shared between themselves, their solicitors, and their funder.[66] This also reflects positively on funders' influence on costs, as it suggests that funders take an active role in seeking to ensure that the litigation remains within budget.

Is funded litigation 'vulnerable' to costs inflation?

On the other hand, funded litigation, particularly collective actions in the CAT, may be particularly vulnerable to possible costs inflation by *defendants*.

Firstly, defendants to collective proceedings in the CAT are typically deep pocketed; not only do they possess sufficient resources to vigorously defend litigation, but they may be able to access additional sources of funding to defend claims from across their business (for example, by redirecting cashflow). This is *not* the case for class representatives, who have typically negotiated a finite amount of resources at the outset of litigation, and must renegotiate the commercial terms of their LFA should they run out.

Secondly, class representatives must demonstrate that they can satisfy any adverse costs order made against them throughout the course of the litigation as a condition of certification,[67] whereas defendants are under no such obligation. Although this is rightly intended to ensure that any defendant is adequately protected in the face of extremely expensive, large-scale litigation, this potentially creates perverse incentives. Defendants may be encouraged to run up exorbitant costs in order to put claimant teams at risk of decertification, force claimant-side teams to purchase additional adverse costs cover, or otherwise pressure class representatives or their funders to abandon or settle the claim prematurely.

A striking recent example of this phenomenon may be observed in the recent ruling by Justin Turner KC in *Consumers Association v Qualcomm Incorporated* CMC 6, dated 19th December 2024.[68] In this case, Qualcomm requested that security be ordered by requiring the class representative to increase its ATE insurance within eight weeks to £27.5 million from its previous level of £13.5 million, applying an estimate of its total costs at £42.31 million.[69] As Justin Turner KC pointed out,

[66] December 2024 Survey, Q.28: 'Who takes the lead in monitoring the costs/budget of your case?
[67] CAT Rule 78(2)(d).
[68] Case No: 1382/7/7/21
[69] See transcript dated 19th December 2024, pp. 131 of the PDF following: https://www.catribunal.org.uk/sites/cat/files/2025-01/13827721%20Consumers%27%20Association%20v%20Qualcomm%20Incorporated%20-%20Transcript%20of%20CMC%20with%20Rulings%2019%20Dec%202024.pdf

this figure was an "extraordinarily large sum that require[d] some sort of explanation",[70] especially given that this case has not yet reached the first of its two trials. Subject to the ability of the CAT to exercise control over the defendant's expenditure, it is difficult to see how the class representative in this case has any alternative but to increase their own costs on ATE cover in response to already incurred costs.

This case illustrates three points. Firstly, while it cannot be proved that defendants tactically and intentionally incur costs to exert strategic pressure on the funded claimants, the implications of the defendant's conduct in *Qualcomm* demonstrates that this is possible. Secondly, this case demonstrates that the dynamics of the insurance market may have serious consequences for the conduct of litigation, although unfortunately this was not the subject of detailed exploration in our research. The CRN strongly suggests that the CJC explores the potential influence of the ATE market on other aspects of the conduct of litigation (such as decisions to appeal, applications to the court, and litigation timetables). Thirdly, the possibility that *either* party could incur costs on this scale prior to the substantive trial of the issues demonstrates that the CAT's capacity to monitor and control incurred costs may require further attention.[71]

These views are corroborated by our findings that some class representatives perceive that defendants engage in tactical litigation strategies with the intention of increasing costs or incurring delays in litigation.[72] Ten out of sixteen respondents to this question observed that defendants had incurred delays (for instance by failing to meet deadlines for applications or the submission of documents). Nine out of sixteen respondents considered that defendants made unnecessary applications to the courts, and the same number considered that defendants unnecessarily took up issues which should not be in dispute. Seven out of sixteen respondents stated that defendants had made unmeritorious applications to appeal.

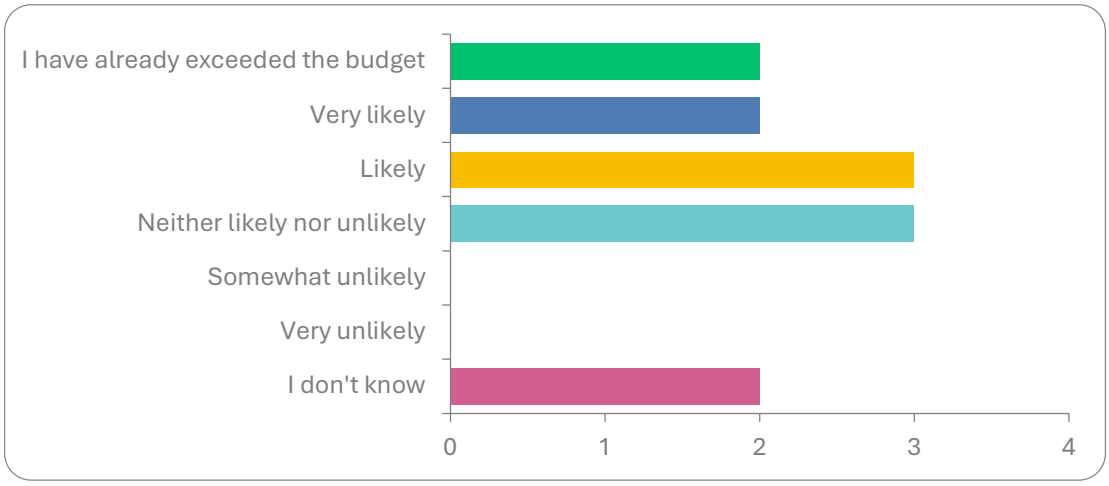
Further evidence that funded litigation may have a propensity to inflate costs may be observed from our empirical findings on costs budgets. In response to a question asking whether class representatives where likely to exceed their costs budgets, most respondents indicated that they were likely to exceed their costs budgets (see table overleaf).

'How likely are you to exceed your costs budget?'

[70] Ibid., pp. 114 of the PDF
[71] In this regard, the CRN notes that care should be taken to avoid making satellite litigation over costs an additional costs centre in proceedings, as often occurs where courts adopt a more stringent standard of review.
[72] December 2024 Survey: "Have your defendants ever pursued tactical strategies to delay litigation or increase costs?"

ANSWER CHOICES	RESPONSES	
I have already exceeded the budget	17%	2
Very likely	17%	2
Likely	25%	3
Neither likely nor unlikely	25%	3
Somewhat unlikely	0%	0
Very unlikely	0%	0
I don't know	17%	2
TOTAL		12

The picture worsens, however, when the responses of class representatives at a later stage in litigation (e.g. trial, post-trial, or settlement) were isolated, with 2 out of four stating that they had already exceeded their budget, and the remaining two stating that it was 'very likely' or 'likely' that they would exceed their budgets.



However, this reading presents several key limitations. Firstly, since no collective actions have been brought without the assistance of external funding, there is no comparator by which the impact of third-party litigation funding may be assessed. Secondly, competition litigation is expensive by nature, owing to the vast quantities of economic evidence which must be analysed and the high costs of disclosure and other disbursement costs (e.g. economic expert reports). Thirdly, in the context of a developing legal regime, it is likely that costs have increased due to the high incidence of novel issues which require detailed legal argument, and delays caused by ongoing legal developments (e.g. *PACCAR*).

It is therefore unclear whether the prevailing tendency of competition collective actions to exceed budgeted costs results from the role of funders, or from extraneous factors. Nevertheless, these results suggest that funding budgets have frequently been pitched at a lower level than the actual spend needed in practice. Moreover, as will be discussed in Section 4, the probability that claimant-side team will exceed its budgeted costs results in a higher likelihood that funding terms will require renegotiation as litigation progresses, particularly at critical pressure points (such as decisions to appeal or settle).

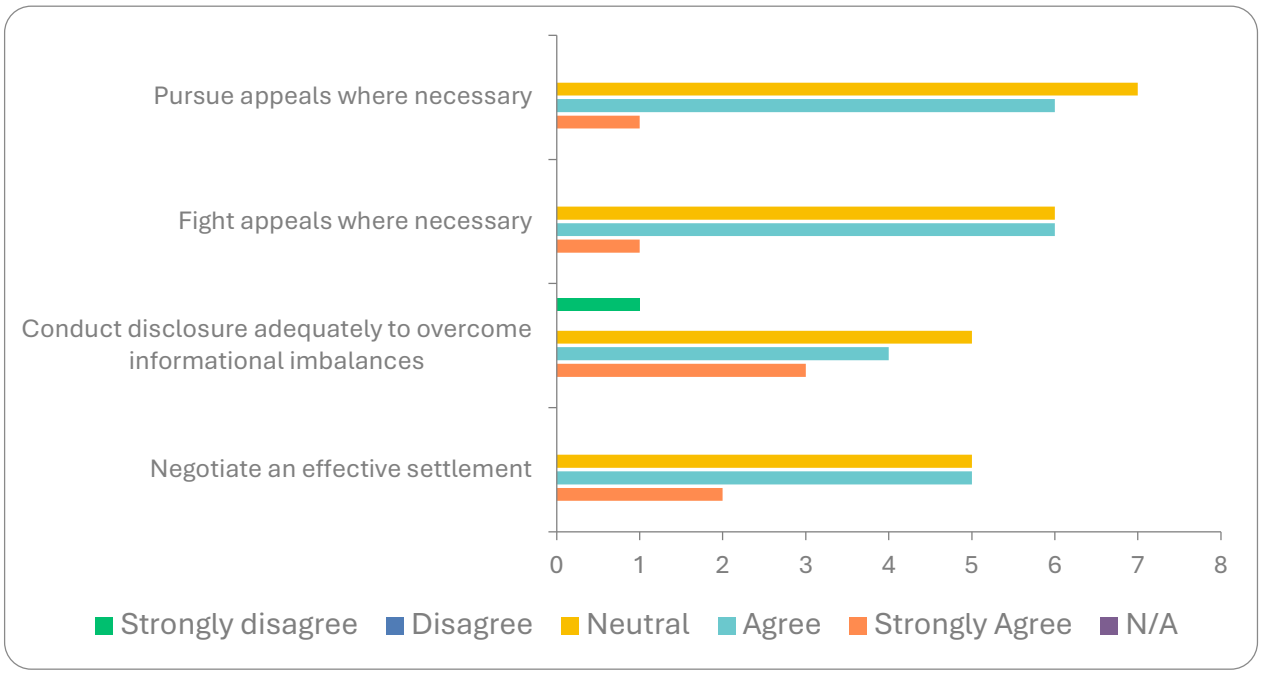
3.2. To what extent does third party funding promote equality of arms between parties to litigation?

In *Merricks v Mastercard*, the Supreme Court observed that the primary purpose of the collective proceedings regime is that "it enables claimants to benefit from the same economies of scale as are already naturally enjoyed by the defendant as a single litigant." [73] This is especially true of competition cases, where the loss suffered by any individual class member are dwarfed by the costs of proving that the claimant class has suffered loss in the first place. In addition to substantial legal costs, the costs of procuring in-depth economic and market analysis (which requires significant defendant-side disclosure and the instruction of economists and actuarial experts) are so great that it is unlikely that any private individual could bring a claim. As is further discussed in Section 5 of this submission, it is unlikely that true equality of arms between class representatives and defendants can be achieved through means other than third party litigation funding.

Nevertheless, there is a lack of empirical evidence on the extent to which litigation funding fully restores the balance between class representatives (who possess finite resources by virtue of their commercial funding agreements) and deep-pocketed defendants. The December 2024 survey sought to address this gap by asking participants whether they felt that their funding arrangements gave them sufficient resources with which to pursue their case by isolating large and/or unexpected costs which might arise in litigation. Our question isolated the example of negotiating effective settlements, with the intent of understanding whether class representatives felt that they had the 'financial backing' to impose sufficient pressure on defendants to settle (presumably, if a claimant lacked sufficient financial backing to realistically pursue the claim to trial/judgment, defendants may be reluctant to settle even where the claim is otherwise meritorious).

[73] [2020] UKSC 51 at [84]

‘How far would you agree with the following statement? "My funding arrangements provide me with sufficient resources to…’



This question received a total of 14 responses. The data suggests that class representatives generally feel that they have sufficient financial resources to bring their cases. Several participants provided additional comments emphasising that their cases had not yet reached a stage where appeals were necessary, or settlement was viable; accordingly, the adequacy of the resources provided under their LFAs has not yet been tested.

However, due to the distribution of cases represented in our data, this evidence is inevitably skewed towards class representatives who are at a relatively early stage of litigation and therefore must have recently demonstrated (or must soon be able to demonstrate) that they have sufficient funds to bring proceedings in accordance with the class’s best interests in order to satisfy the requirements for certification.[74] As noted in Section 3.1. above and further discussed in Section 4 of this report, several class representatives who have reached the latter stage of their litigation have in fact exceeded initial budget estimates and have had to renegotiate further funding to continue pursuing their claims. This points towards the ‘vulnerability’ of funded litigation. It also suggests that the prevailing academic perspective that class actions inevitably impose strong pressure on defendants to settle may be open to question.

[74] There were nineteen responses to the December 2024 Survey. Thirteen respondents specified that their cases were either awaiting certification or recently certified.

3.3. The pros and cons of different funding models

Following the *PACCAR* judgment in August 2023,[75] 'percentage-based' LFAs (i.e., where the funder's return is calculated as a percentage of any damages or settlement) are unenforceable in the context of competition collective actions.[76] As a result, funders and class representatives have increasingly concluded 'multiples-based' LFAs, which calculate the funder's return as a multiple of their cost outlay. Under a 'multiples-based' agreement, the multiplier may increase at pre-determined dates to reflect the change in risk to deployed capital over time.

The survey sought to identify whether there is any correlation between the increased reliance on '*PACCAR*-compliant'[77] LFAs and an increase in funders' returns.[78] Our questions were based on a hypothesis that *PACCAR*-compliant agreements may result in a higher cost expenditure because the funder may be incentivised to spend more to increase its potential return.[79] On one hand, this increased expenditure may more closely align the funder's interests with those of the class by encouraging funders not to spare or withhold funding; on the other, it may have the effect of increasing expenditure beyond what is necessary to achieve a successful outcome, contrary to the class's interests.

The December survey sought to explore this question by asking participants whether their funders' returns relative to their costs outlay had changed after renegotiating LFAs to comply with *PACCAR*.[80] Of nine total responses to this question, none indicated that the level of their funders return had increased, which suggests that that the switch to 'multiples-based' agreements has not resulted in significantly higher returns for funders. Likewise, none of the nine respondents indicated that their relationship with their funder had explicitly changed as a direct result of renegotiations emerging from the pivot from 'percentage-based' LFA to a 'multiples-based' LFA[81] (though two observed that their relationships with their funders had worsened in the context of *other* commercial

[75] *R (on the application of PACCAR Inc and others v Competition Appeal Tribunal and others* [2023] UKSC 28
[76] Competition Act 1998, s.47C(8)
[77] *R (on the application of PACCAR Inc and others v Competition Appeal Tribunal and others* [2023] UKSC 28
[78] See Professor Mulheron's observations in Mulheron, 'A Review of Litigation Funding in England and Wales – A Legal Literature and Empirical Study' (28 March 2024), Legal Services Board https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf pp.99-100
[79] See, for example, the submissions made by the defendants in *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited; Sony Interactive Entertainment Network Europe Limited; and Sony Interactive Entertainment UK Limited* [2023] CAT 73
[80] December 2024 Survey, Q.19 "Has the level of the funder's return relative to their costs outlay changed since your funding arrangement was renegotiated? If so, how?"
[81] December 2024 Survey, Q.20: "Did you experience any changes in your relationship with your funder/in the conduct of litigation following your renegotiations? If so, please specify further details below."

LFA renegotiations – see Section 4 of this report). In isolation, these results seem to indicate that multiple-based agreements do not necessarily pose immediate risks.

However, there are a few limitations to this understanding. Firstly, there is *some* evidence that multiples-based funding arrangements may result in worse outcomes for funded litigants in at least some cases; for instance, in *Gormsen v Meta*,[82] the CAT took the view that an LFA which had been converted from a 'percentage-based' model to a 'multiples-based' model *did* result in the funder gaining an inappropriately high return following its renegotiation.

Secondly, as Professor Mulheron observed in her report for the LSB, multiples-based funding agreements may result in worse outcomes for a funded litigant, especially where the claim value is lower than expected.[83] Likewise, as is hinted in Professor Mulheron's report, 'multiples-based' arrangements may disadvantage funded litigants who are vulnerable to the risk of costs inflation, especially as a result of 'scorched earth' tactics by defendants (see section 3.1 above).[84]

Thirdly, the CRN observes that class representatives may be unable to readily compare funders' returns under a 'percentage-based' LFA with those under a 'multiples-based' LFA, since the quantum of the funder's return under the latter is inherently based on the duration of the litigation, and any changes to the risk profile over time. Under a multiples-based funding agreement, it is impossible to know the level of the funder's return relative to the damages payable to the class until *after* the litigation has concluded.[85]

[82] *Gormsen v Meta* [2024] CAT 11
[83] Mulheron, 'A Review of Litigation Funding in England and Wales – A Legal Literature and Empirical Study' (28 March 2024), Legal Services Board https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf pp.99-100.
[84] Another possibility is that multiples-based agreements create a perverse incentive for funders to increase their costs outlay to increase any potential return. However, as our data suggests, this risk does not seem to have arisen in practice.
[85] Under Competition Act 1998, the damages payable to a funder following a judgment in the class's favour may be limited by s.47C(6), which specifies that additional sums for the costs and disbursements operate as a *second charge*, after any claims to the damages by class members. However, this is not the case for any settlement of the claim.

Class Representatives' views on different models of funding arrangement

Our surveys did not explicitly ask class representatives about their views as to whether the pre-*PACCAR* position should be restored. However, many class representatives hold the view that percentage-based LFAs should be permitted, and that *PACCAR* should be reversed. Undoubtedly, this view has been encouraged by the instability created in the wake of the *PACCAR* judgment and its impact on the funding market generally. This has been reflected in the Class Representatives' Network's open communications with the Rt. Hon Shabana Mahmood MP and in private and public discussions with class representatives.

However, the CRN observes that not all class representatives share this perspective. Justin Gutmann[86] takes the view that percentage-based LFAs are wholly inappropriate, as they disengage the level of the funder's return from the amount of capital at risk, the level of risk, and estimated duration for which the capital will be deployed.[87] As a result, Mr Gutmann considers that percentage-based LFAs may result in an undeserved windfall for the funder. If, as in Mr Gutmann's own case against Apple, the funder takes first priority under any distribution waterfall specified in the terms of the LFA,[88] this windfall would operate to the direct detriment of class members.

On a purely principled approach, the author has considerable respect for Mr Gutmann's arguments, and shares his view that, in ideal circumstances, funding agreements should not permit funders to benefit from a windfall at the expense of class members. However, the author ultimately takes the view that practical difficulties are much more likely to arise in the context of multiples-based agreements, thereby posing greater challenges for regulators and class representatives alike.

Firstly, multiples-based LFAs typically account for the increasing risk exposure of deployed capital by increasing the applicable multiplier at dates which are pre-determined at point at which the funding agreement is negotiated. The dates at which the multipliers are to increase generally reflect funders' views of the cost of outlaid money over time and the need for a return on it. Whether these dates turn out to occur at critical points arising in the litigation will be entirely fortuitous. When the terms of funding agreements are disclosed at the outset of litigation, this potentially increases the likelihood that class representatives will run into 'pressure points' under the funding relationship that could damage their litigation strategy, ultimately to the disbenefit of class members.

[86] Justin Gutmann has submitted a separate submission to the CJC reflecting his views on this topic.
[87] Mr Gutmann's submission, Section E.
[88] *Gutmann v Apple* [2024] CAT 18. Recall that while this problem might arise in the context of a settlement, or under an LFA which prioritises the funder, this issue does *not* arise in the context of a claim which proceeds to judgment where the LFA prioritises the claims of class members, in accordance with Competition Act s.47C(6).

Secondly, in a well-balanced market, one would expect frequent or at least occasional renegotiation of multiples-based agreements as the risk profile of the litigation shifts. As will be observed in section 4 of this report, the renegotiation of commercial terms in LFAs increases the likelihood of protracted, costly disputes between funders and litigants. Likewise, in the context of ongoing litigation, any renegotiations make it more likely that more favourable commercial terms may be offered in exchange for terms conferring increased control over the litigation on funders, resulting in potentially negative outcomes for class members.[89] While our empirical findings on multiples-based LFAs do not suggest that disputes have eventuated in this context, the durability of these relationships over time has not yet fully been tested.

If reforms mean that the effect of *PACCAR* is reversed through legislation, it will be important to gather information as to whether parties to existing LFA's agree to revert to percentage-based models, and if not, why not – and what models are adopted post-reform. The CRN will aim to keep track of such developments and, as far as possible, publish the results.

[89] See Section 4 below for further evidence on this point.

4. The relationship between Funders and Class Representatives

Relevant Consultation Questions

Q3. Are there other benefits of third party funding? If so, what are they?

Q4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?2 If not, what improvements could be made to it?

Q5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:

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

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

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

Q28. 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?

Q34. 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?

Q35. 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?

Introduction

Interactions between class representatives and funders have been subject to greater scrutiny following the recent collective settlement application in the *Merricks v Mastercard* litigation, and the overlapping dispute between Mr Merricks and his funder, Innsworth. Simultaneously, the Competition Appeal Tribunal has highlighted the importance of the class representative's ability to navigate the conflicts of interest which may arise in the context of funded litigations, and their duty to act with the class's interests at the forefront of their mind, even if this requires that the class representative adopt a stance contrary to the preferences of their funder.[90] This section presents empirical evidence of class representatives' experiences of their relationships with funders, evaluates the risks of different types of funder 'control', and identifies regulatory requirements.

[90] *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5

4.1. How do funders affect class representatives' choice of litigation team?

Our findings in the December 2024 Survey demonstrated that a quarter of respondents[91] considered that their funder had sought to influence the choice of solicitors, counsel or experts on their case.[92] One participant noted that their funder made an offer of additional funding conditional on changing the solicitors instructed in the case. Similarly, another participant stated that a funder made further funding conditional on the replacement of one lawyer with a KC of the funder's choice; when they sought independent advice from a KC on this point, the funder also chose this KC. Another participant noted that a funder objected to the choice of expert economist who had been involved in preparing the case. In the participant's own words:

> "We (the CR and the funder) discussed for a long time but they were implacable and eventually we were forced to choose another expert (who has been fine) but it delayed the case by a year."

These comments suggest that funders can, and do, leverage their control over funding to exercise control over the choice of team involved. This appears contrary to the courts' long-held perspective that class representatives should maintain control over the litigation (which presumably includes the choice of counsel, solicitors and experts that they choose to instruct). As discussed in Section 2 of this submission, a class representative who faces significant time pressures may lack sufficient commercial leverage in practice to argue with the funder supporting their claim, especially where such changes are insisted upon as a condition of further funding.[93] This suggests that some regulatory mechanism may be necessary to combat this risk.[94]

Happily, only one out of fifteen respondents suggested that their funder had refused to fund independent costs advice,[95] suggesting that funders do not seek to control or influence funded litigants by limiting access to third-party advice on their funding arrangements.[96]

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[91] Four out of sixteen total responses.
[92] December 2024 Survey, Q32: Has the funder attempted to influence the choice of solicitors, counsel, or experts on your case?
[93] In the context of ongoing litigation, *any* renegotiation is likely to be subject to time pressures. However, these pressures may be particularly pertinent at the flashpoints where renegotiations of funding are likely to arise, i.e. where funding is depleted and there are outstanding bills, or where an unexpected (and therefore unbudgeted) appeal is being contemplated.
[94] The CJC may consider the potential for additional judicial oversight over such amendments, or the introduction of implied terms prohibiting this practice.
[95] December 2024 Survey, Q30: "Has your funder ever objected to paying for specialist costs advice, or put pressure on you not to pursue such advice?"
[96] This is much less likely to occur following the CAT's judgment in *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5; indeed, funders may be *more* likely to pay for independent costs counsel to ensure that class representatives can surpass the higher standard for certification.

4.2. Funders' 'soft control' over the conduct of proceedings

The December 2024 survey aimed to gather insight into the level of 'soft control' that funders exerted over the day-to-day conduct of proceedings. Our findings on funders' 'soft controls' over the conduct of litigation presented a generally positive picture.

Firstly, participants were asked a series of questions about the extent to which funders influenced (i) decisions to appeal,[97] (ii) the pursuit of specific lines of argument,[98] (iii) decisions to make applications to the court,[99] and (iv) litigation timetables.[100] In general, our findings indicated that funders did not seek to exert influence over these areas. Out of sixteen respondents, two stated that their funders sought to influence the lines of arguments pursued, and only one indicated that their funder had sought to influence applications to the court. No respondent indicated that their funder had sought to influence litigation timetables.

Four out of sixteen respondents indicated that funders had influenced decisions to appeal, indicating that they *encouraged* the pursuit of appeals and provided further funding to enable this. However, nine respondents indicated that this question was not applicable as no appeals had yet arisen. Again, this indicates that the true extent of funders' influence over decisions to appeal may be limited because relatively few cases have progressed to a stage where appeals may arise.

Although these results generally suggest that funders do not exercise excessive control, there was one notable exception. One participant shared that while the funder had not sought to influence the progress of litigation directly, they employed a barrister who closely monitored the litigation to the point that the class representative was ultimately required to intervene. However, they noted that this reflected more on the barrister's perception of their own role, rather than the funder being overbearing *per se*.

Secondly, participants were asked to rank on a scale of 1-100 how much influence their funder has exerted over the conduct of their proceedings. Fifteen participants responded to this question, resulting in a 'mean' average rating of 31/100. However, six respondents (just over one third) responded with a rating of 40 or over. When filtered to only include data from those participants whose cases had reached trial or settlement, one response showed a low level of funder control (10),

[97] December 2024 Survey, Q35: Has your funder ever influenced decisions to appeal by providing their opinion on whether an appeal is worth pursuing?
[98] December 2024 Survey, Q36: Has your funder sought to influence the specific lines of argument pursued in your case?
[99] December 2024 Survey, Q37: Has your funder sought to exert influence over decisions to make applications to the court? (e.g. applications for disclosure, information, amendments etc)
[100] December 2024 Survey, Q38: Has your funder sought to influence litigation timetables?

one indicated a moderate level of control (34) and two responses indicated a relatively high level of funder control (45 and 55). Given that the data is skewed towards relatively early-stage litigation, these results suggest that funders may exert an increasing level of 'soft' control as litigation progresses towards trial or settlement. However, seeing as these figures reflect participants' perception of their funder's level of influence, the CRN does not seek to express a firm view on this point.

Participants were also invited to provide insights into the extent to which they communicated with the funders involved in their case.[101] Out of fifteen total responses, five stated they had 'minimal' communication with their funder, two had a 'low' level of communication, five maintained a 'moderate' level of communication, and three had a 'strong' level of communication.[102] These results did not seem to suggest that there was an overwhelming risk that funders would seek to exert tight control over the conduct of litigation to the detriment of litigants.

4.2.1. Funders' positive impact on the conduct of proceedings

While the traditional rules prohibiting champerty and maintenance have rejected litigation funding arrangements *entirely* on the grounds that they inevitably pose the risk that funders will exercise improper control over the conduct of litigation, more recent developments have acknowledged that funders may exercise some degree of positive influence over the conduct of litigation.[103] The CRN explored this in our surveys by asking participants about the extent to which funders exercised a positive influence over the conduct of proceedings.[104]

Out of sixteen total responses to this question, eight indicated that funders exercised a positive influence over litigation. Six stated that they were 'neutral' on this point, and only two stated that they did not feel that funders had positively influenced the conduct of their proceedings.

The view that funders exert a positive influence was also reflected in several text comments appended to the December 2024 survey. One participant revealed that their funder had been "very supportive" in circumstances where they had to change the legal team instructed on their case (for reasons unrelated to the funder). Likewise, in a response to an earlier question about the availability of resources under funding arrangements,[105] another participant shared that although they retained

[101] December 2024 Survey: "Q33: How would you characterise the level of communication/consultation between yourself and your funder?"
[102]
[103] *Excalibur Ventures v Texas Keystone Inc* [2016] EWCA Civ 1144
[104] December 2024 Survey: Q44: In your experience, has your funder exerted a positive role in ensuring your litigation can run smoothly or effectively?
[105] December 2024 Survey, Question 40.

final decision-making powers, their funder was a ‘good useful experienced advisor’ whom they would expect to involve in most decisions.

Another participant shared the following sentiment of their experiences with their funder:

> “The range of Funders and how they manage their investments is likely to be wide. I am fortunate, perhaps, in that we have a healthy and consultative relationship, helped along the way by regular and useful communication. A one-team approach does make a positive difference.”

However, this participant ultimately decided to reissue their response to the survey after further developments in their case during the survey period. This comment was not echoed in the subsequent survey response, which indicated that the participant no longer agreed with their prior sentiment in light of these developments.

These comments are tempered somewhat by the bad experiences faced by a few class representatives. One participant in the December 2024 survey noted that their relationship with their funder has been ‘bad from the outset’, and that the funder had been ‘belligerent’ from start of proceedings. This participant also experienced several more explicit forms of control (discussed in the following section). Likewise, it appears that class representatives’ views of their relationship with their funder can change quickly once challenges arise in practice (often towards the later stages of litigation).

Overall, the data presented in section 4.2 suggests that funder can exert positive ‘soft influence’ on the conduct of proceedings, often supporting and encouraging class representatives when faced with non-funding related challenges in their cases. Moreover, funders can play a valuable consultative role within the litigation team, assisting with difficult issues arising within the litigation team and providing experienced litigation advice distinct from the solicitors instructed in the case. The CRN therefore takes the view that it is unnecessary to implement any formal regulation to limit funders’ soft influence over the conduct of litigation. However, the CRN will continue to monitor these issues.

4.3. Funders' 'hard' controls over the conduct of proceedings

By contrast, our empirical findings have shown that there is a strong risk that funders will seek to exercise 'hard' control over the conduct of proceedings. Funders may impose contractual controls over the role of class representatives or leverage their power as 'budget holder' by withholding (or threatening to withhold) funding, especially towards the latter stages of litigation. These findings are of increased relevance in light of the recent controversy surrounding the *Merricks v Mastercard* litigation, in which a settlement agreed between the class representative and their opponents was heard at a collective settlement application hearing from 19-21 February 2025. Remarkably, the funder in this case contested the proposed settlement on the grounds that the overall settlement sum was too low and opposed Mr Merrick's proposed plan for distribution. Moreover, it is now public knowledge that Mr Merricks' funder has not only threatened proceedings against Mr Merricks himself but has carried out that threat.[106]

Threats by funders

The December 2024 survey asked participants whether they had experiences of a series of possible 'hard' controls' by their funders, including threatened or actual refusals to pay fees, threats to withdraw funding, and threats of litigation against class representatives.

	YES	NO	TOTAL
Funder failing to make payments on time	5	8	13
Funder refusing to pay incurred costs	3	10	13
Funder terminating the funding agreement	0	12	12
Funder threatening to terminate/withdraw funding	2	11	13
Funder threatening litigation against you personally	2	12	14
Funder threatening litigation against your SPV (if you have one)	0	9	9
Funder threatening litigation against solicitors	0	12	12

[106] Neil Rose, 'Mastercard backs Merricks with £10m for litigation funder dispute' (24 January 2025), Legal Futures https://www.legalfutures.co.uk/latest-news/mastercard-backs-merricks-with-10m-for-litigation-funder-dispute?utm_source=litigationfinanceinsider.com&utm_medium=newsletter&utm_campaign=bizarre-twist-in-funding-dispute-north-american-funder-expands-to-uk&_bhlid=c905f481a313f450c042e26b6e39080d5a7a96ba
The Lawyer, 'Claimant sued by own Litigation Funder' (25 January 2025)

These results indicate that it is not uncommon that for funders to threaten to withhold funding for incurred costs, or otherwise fail to make payments on time, although it is less common that funders will go as far as threatening to terminate funding or bring litigation against class representative. However, when the data is adjusted to include *only* those cases which have proceeded to trial or settlement, the results present a much more concerning picture:

	YES	NO	TOTAL
Funder failing to make payments on time	3	0	3
Funder refusing to pay incurred costs	1	2	3
Funder terminating the funding agreement	0	2	2
Funder threatening to terminate/withdraw funding	2	1	3
Funder threatening litigation against you personally	2	2	4
Funder threatening litigation against your SPV (if you have one)	0	2	2
Funder threatening litigation against solicitors	0	2	2

The data above suggests that the frequency of unfavourable behaviour by funders is significantly higher in cases which have progressed towards settlement or trial. Since the collective proceedings regime is still in its infancy, with very few cases progressing beyond certification to date, this might suggest that the actual risk of harm associated with litigation funding is higher than is presented by class representatives' current views of their relationships with their funders. As one participant noted while giving *positive* feedback about their funder, their funder 'had not overstepped the mark- yet'.

Alarmingly, the data suggests that the position of Mr Merricks is not unique, with other class representatives experiencing threats of litigation from their funders. The CRN accepts that it is possible that there may be circumstances in which class representatives may behave contrary to the interests of funders, and in doing so breach the terms of their LFAs. However, under the statutory scheme, class representatives are obliged to prioritise the interests of class members if they are to exercise their role properly. As observed in *Riefa,* class representatives cannot stand as mere 'figureheads' but must 'act as the independent advocate for the class'.[107] Depending on the terms of the funding agreement, these duties may conflict with the class representative's obligations to the

[107] *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5 at [115]

funder under the letter of the contract. It would be extremely difficult for any class representative to fulfil their duties to the class effectively if funders are able to exert improper influence by threatening proceedings against them. Likewise, since most class representatives are private individuals,[108] it is highly unlikely that they would have the funds necessary to defend themselves in the face of threatened or actual proceedings. Indeed, in Mr Merricks' case, his opponent has provided him with the funds necessary to defend himself against prospective proceedings by his funder as part of his settlement terms,[109] and the reasonableness of the settlement in the circumstances was ultimately approved by the CAT.[110]

The same may be said of funders failing to make payments on time or threatening to withhold funding or (wrongly) terminate funding agreements in the middle of proceedings. In such circumstances, it is difficult to see how a class representative with limited financial resources could seek judicial enforcement of the agreement. Likewise, any attempt at judicial enforcement would likely damage the relationship between the funder and the class representative significantly, with potential adverse impacts on the interests of the class.

Although it is noted that the ALF Code of Conduct limits the contractual bases on which a funder may terminate an LFA, funders retain the right to terminate funding in circumstances where the class representative has breached the terms of the LFA.[111] Thus, if the terms of the contract are drafted sufficiently widely, funders will find it relatively easy to identify grounds on which to terminate the funding agreement– for example, in cases where it is alleged that the class representative has breached confidentiality terms, or failed to act in the funder's interests in securing judgment or settlement (a common obligation placed on class representatives in LFAs).[112] Again, it is difficult to see how a class representative would be able to hold the funder to their agreement in these circumstances.

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[108] Many class representatives have incorporated SPVs that represent the legal personality of the class representative on the claim form. While this has the effect of limiting class representatives' litigation exposure under their funding arrangements, class representatives are nevertheless unlikely to have any funds with which to defend themselves if this is circumvented.

[109] Neil Rose, 'Mastercard backs Merricks with £10m for litigation funder dispute' (24 January 2025), Legal Futures https://www.legalfutures.co.uk/latest-news/mastercard-backs-merricks-with-10m-for-litigation-funder-dispute?utm_source=litigationfinanceinsider.com&utm_medium=newsletter&utm_campaign=bizarre-twist-in-funding-dispute-north-american-funder-expands-to-uk&_bhlid=c905f481a313f450c042e26b6e39080d5a7a96ba

[110] *Merricks v Mastercard*, CSAO Application Hearing 19-21 February 2025 (judgment and transcript forthcoming).

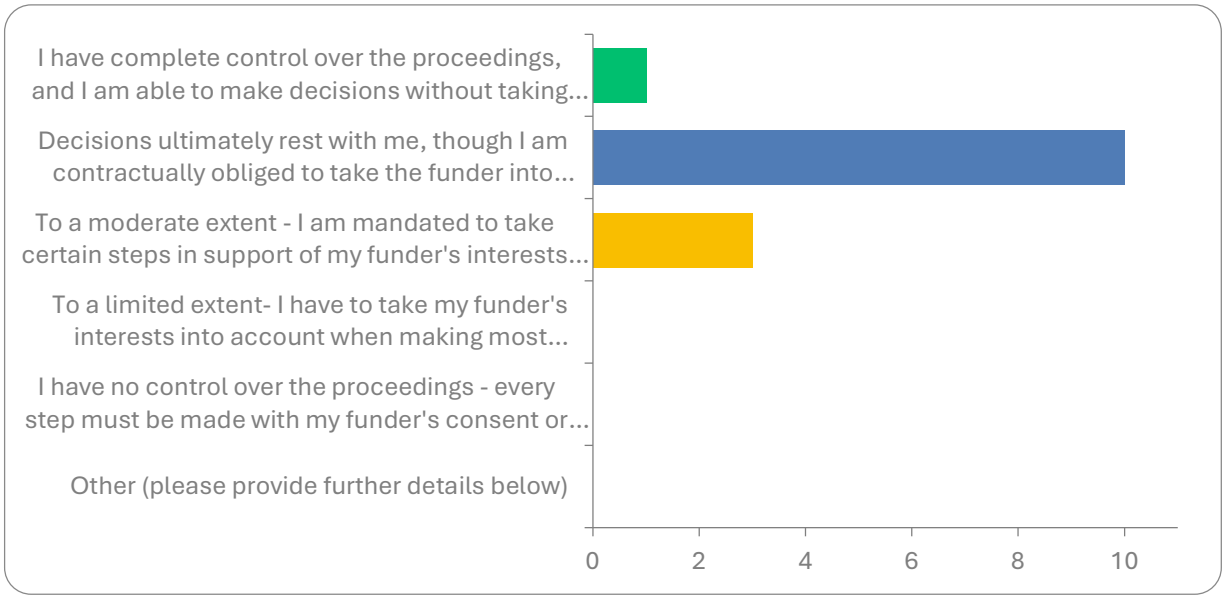
[111] ALF Code of Conduct (January 2018), s. 11.2.3 < https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>

[112] Recall that the terms of LFAs are dictated by the market conditions in which funding is offered – see Section 2 of this report. If funding terms are offered on a 'take it or leave it' basis, and a class representative is unable to exercise sufficient leverage to ensure that *they* are properly protected under their own funding arrangements, this creates the risk that class representatives may be subject to a higher level of control.

4.4. Contractual controls in Litigation Funding Agreements

The nature and extent of contractual controls over class representatives in LFAs has arisen as a serious point of concern in our research. As noted in the previous section, the ALF Code of Conduct permits LFAs to provide for unilateral termination where the funded party has breached the terms of the LFA.[113] Therefore, the scope and nature of the class representatives' contractual obligations to the funder are vital when considering when, and how, funders can exercise control over litigation. Likewise, as has been observed by the CAT, the nature of a class representatives' obligations towards the funder can have a direct impact on the extent to which they are able to act in the best interests of class members.[114]

'To what extent do the terms of your funding agreement allow you to act independently in controlling and conducting proceedings?'



The data suggests that class representatives generally consider that they have a strong level of control over their role in proceedings. However, most class representatives observe that they are contractually obliged to take the funder's interests into account in certain circumstances, while others are mandated to take certain steps in funders' interests (such as pursuing specific costs applications). Although the Class Representatives Network recognises that these terms are important for securing funders' returns, and ensuring that the LFA is legally meaningful, we urge the CJC to consider how such terms can be reconciled with class representatives' duties to their class members.

[113] ALF Code of Conduct (January 2018), s. 11.2.3 < https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>
[114] *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5 at [39]

Participants were also asked about whether funders had sought to influence whether class representatives stood for the role as an individual, or through incorporating an SPV. The importance of this distinction is that where an SPV is party to the LFA rather than an individual, the individual can enjoy some protection of their personal assets in the event that a dispute arises. The data suggests that funders have had a limited influence in this regard, with only two out of 16 respondents indicating that their funder had influenced their decision.[115] Nevertheless, the CJC should note that 66% of respondents to the December 2024 survey were acting as individuals, with 27% of respondents having incorporated an SPV.

Contractual controls as a condition of further funding

A particularly controversial instance where a funder has sought to impose stricter contractual controls over the conduct of litigation has arisen in the *Merricks* litigation. As explained in Mr Merricks' fourth witness statement, the funder in this case sought to make the availability of further funding conditional on an amendment to the terms of the LFA. The proposed amendment was that Mr Merricks would give up his exclusive control over the litigation and over settlement by agreeing to a binding Kings Counsel process in the event of any disagreement between himself and the funder about whether to accept or make any settlement offer.[116] Mr Merricks considers that given that the LFA already provided for an independent, non-binding KC review procedure, this amendment was sought to leverage Mr Merricks' need for further funding in order to gain greater control over the litigation.[117]

Our empirical findings demonstrate that this is not a unique case, and further funding has often been offered on condition that class representatives cede some degree of control. Another participant in the December 2024 survey explained that, when faced with making an application to the court which necessitated the availability of further funding, the funder offered more funding on condition that they would obtain further control over the litigation. The full extent of this additional control was not specified, but the funder did insist on replacing one member of the class representative's legal team with a KC of their choice. Likewise, another participant observed that their funder had started to refuse to make payments due under the funding agreement after a dispute arose over an application for further funding, creating havoc for teams who remain instructed in ongoing

[115] December 2024 Survey: Q39: "Did your funder attempt to influence your decision to stand as class representative as an individual or incorporate an SPV?"
[116] Walter Merricks' fourth witness statement, dated 16 January 2025, at [42] (accessible here < https://www.mastercardconsumerclaim.co.uk/Content/Documents/Fourth%20Witness%20Statement%20of%20Walter%20Merricks.pdf>)
[117] Ibid at [44]

litigation. It is likely that the funder's conduct in this case intentionally sought to put pressure on the class representative in contractual negotiations.

These examples raise several crucial points about the risks associated with such amendments. Firstly, in all these cases, a failure to secure further funding would effectively have resulted in the claims collapsing, ultimately to the detriment of class members. As a result, these class representatives face an impossible choice in respect of their duty to conduct litigation in the interests of class members: both accepting or refusing these conditions of further funding would likely have a negative impact on their class. Secondly, while Mr Merricks noted that the Tribunal was informed of the changes to his agreement,[118] this amendment was clearly not open to the same level of scrutiny by the CAT as would be the case at certification stage. Moreover, the disclosure of the amendment to the Tribunal (and therefore to the defendants)[119] may have resulted in the defendants gaining tactical advantages in settlement discussions for reasons wholly unrelated to the merits of the case (again, to the potential detriment of class members).

Linking these examples back to the observations in Section 2 of this report, it is argued that a lack of sufficient scrutiny of LFAs as proceedings progress may give rise to adverse outcomes to class members. However, we note again that the disclosure of LFA terms (or variations to those terms) may confer unfair tactical advantages on defendants. This risk is amplified where changes to LFA terms indicate that the class representative has run out of funds, or that there is an ongoing dispute between litigants and their funder. Further judicial scrutiny may be provided by permitting class representatives to apply for an *ex-parte* application to seek judicial approval for any variations to the funding agreement if they change over the course of litigation.

Under the current regulatory framework, the resolution of these disputes gives rise to serious concerns of practicality and fairness. Invariably, the costs of resolving disputes between class representatives and funders are paid for by the funder.[120] This may put class representatives at a disadvantage where a case is referred for determination by an independent KC, and the funder chooses and pays for the KC in question,[121] or where proceedings are resolved by way of private arbitration.

[118] Ibid. at [44]
[119] Ibid at [50]
[120] As noted above, class representatives are private individuals who are unlikely to possess the private funds necessary to issue judicial or arbitral proceedings to enforce or determine the terms of the LFA.
[121] A respondent to the December 2024 Survey indicated that this had happened in their case.

Confidentiality and transparency of LFAs

Another significant form of contractual control is the use of non-disclosure or confidentiality clauses in LFAs. The December 2024 Survey asked participants about the extent to which they felt that they were prevented from raising and resolving issues relating to funding with third parties because of their confidentiality obligations.[122] Four out of thirteen responses stated that participants had sometimes been unable to raise and resolve disputes as a result of their confidentiality obligations. However, most respondents suggested that they had had no problems with this, either because they had no issues to raise (six out of thirteen responses), or because their confidentiality obligations did not prevent them from raising such issues (three out of thirteen responses).

However, our survey did not address class representatives' exposure to potential litigation risks arising from their confidentiality obligations. While it is accepted that certain confidentiality obligations are necessary, class representatives may find themselves in a difficult position if their contractual duties to their funders conflict with their duties to class members (especially if this duty develops to include a certain degree of transparency, as was suggested in *Riefa*).[123] A failure to comply with confidentiality obligations in this context may leave class representatives exposed to claims by their funders, even if the class representative acts in furtherance of their obligations to the class. It is advisable that any forms of contractual regulations contemplated by the CJC consider the extent to which class representatives should be subject to confidentiality clauses, and if so, what kind of information should remain confidential in these cases.

4.5. Disputes and Dispute resolution

Closely related to the issue of 'hard' contractual controls in LFAs is the resolution of disputes between class representatives and their funders. As noted above, disputes are much more likely to arise where there is a (perceived) conflict between the class representatives' obligations towards the class, and their obligations under their funding agreements.[124]

[122] December 2024 Survey "Q56: In your experience, have your confidentiality obligations under the funding agreement prevented you from discussing and resolving issues relating to your funding arrangements with third parties?"
[123] *Christine Riefa Class Representative Ltd v Apple & Amazon* [2025] CAT 5
[124] See, e.g. the dispute between Mr Merricks and his funder, Innsworth.

Frequency and ease of resolving disputes

When asked whether they had ever experienced any disagreements[125] arising from their funding arrangements,[126] four out of fifteen respondents confirmed that they had. Questions about the frequency of disputes and ease of dispute resolution indicated that class representatives' experiences were varied. These responses suggest that although disagreements between funders and class representatives have occurred relatively infrequently, they have been difficult to resolve when they have arisen.

'How frequently do disagreements relating to your funding agreement arise?'

ANSWER CHOICES	RESPONSES
Frequently	1
Often	0
Sometimes	3
Rarely	3
Never	4
TOTAL	11

'If you have had disagreements with your funder, to what extent have you felt able to resolve these disagreements to your satisfaction?'

ANSWER CHOICES	RESPONSES
I am able to resolve disagreements with my funder easily	2
I am able to resolve disagreements with my funder, but have found it difficult to do so	3
I have been able to resolve some disagreements with my funder, but not all	1
I have been unable to resolve disagreements with my funder	2
TOTAL	8

[125] For this question, the phrase 'disagreements' refers to any of the following: - disagreements over the meaning/construction of the agreement- disagreements over the performance of the agreement - allegations that one or more parties have breached the funding agreement

[126] December 2024 Survey: Q51: Have you ever experienced any disagreements arising from your funding arrangements? For this question, the phrase 'disagreements' refers to any of the following: - disagreements over the meaning/construction of the agreement- disagreements over the performance of the agreement - allegations that one or more parties have breached the funding agreement

When this data is filtered to exclude responses from participants whose cases had not yet reached trial or settlement, the proportion of participants who experience disputes (and struggle to resolve them) increases significantly, with only one out of four respondents stating that they had never experienced a dispute with their funder. This suggests that the actual risk of disputes and disagreements between class representatives and funders is likely to be higher than the data suggests and is likely to increase as litigation progresses.

One participant noted that these questions focused on 'larger' disputes and made clear that minor issues (such as disagreements over bookbuilding processes or choice of supplier) were easily resolved. In identifying potential reforms, the CJC might therefore wish to consider the categories of dispute which pose improper risks to the class or to the class representative (e.g. disputes over applications for further funding) and focus their attention on these mechanisms.

Dispute resolution via self-regulatory mechanisms (i.e. via the ALF)

Participants in the December 2024 survey were generally aware of the dispute resolution mechanisms provided by the ALF (i.e., the 'independent KC' arbitration clause), with 13 out of 17 respondents confirming that they were aware of this provision.[127]

However, despite the incidence of disputes arising between class representatives and their funders, no participants have chosen to rely on the ALF dispute mechanism to date. One participant provided insight as to why they have not relied on this mechanism:

> "Going through ALF means other funders know about the dispute and anyway it is not independent but also it is expensive."

Another reason why the independent KC resolution clause may not be relied upon by class representatives (or funders) is that it is non-binding. In the *Merricks* dispute, the funder sought to introduce a *binding* KC arbitration clause to the LFA.[128] It is possible that class representatives and funders alike may see little value in a non-binding dispute resolution mechanism, especially given that class representatives may nevertheless be subjected to threats of litigation by their funder irrespective of whether they have obtained KC's opinion in their favour.

[127] December 2024 Survey, Question 54.
[128] Walter Merricks' fourth witness statement, dated 16 January 2025, at [42] (accessible here < https://www.mastercardconsumerclaim.co.uk/Content/Documents/Fourth%20Witness%20Statement%20of%20Walter%20Merricks.pdf>)

Notably, despite evidence of disputes and disagreements between class representatives and funders, the ALF complaints procedure seems to be underutilised. Mr Merricks has not raised a formal complaint with ALF via its complaints procedure,[129] nor has ALF sought to intervene of its own motion. Although we would not wish to speculate on the reasons for this, ALF's lack of involvement in the dispute might reflect that the ALF lacks, or is perceived to lack, the power or impartiality necessary to intervene in such a dispute.

Dispute resolution by the Competition Appeal Tribunal

Participants in the December 2024 survey were asked about whether they felt that the CAT should be involved to resolve disputes between funders and class representatives[130], and whether they felt that another dispute resolution mechanism was required.[131] The results painted a mixed picture:

'Do you think that the CAT should be able to resolve issues between Class Representatives (either on their own behalf, or on behalf of the represented class) and Funders?'

ANSWER CHOICES	RESPONSES
Yes	
No	6
I'm not sure	1
TOTAL	8

In your view, is there a need for some other mechanism for resolving disputes between Class Representatives and Funders beyond the CAT? If so, why?

ANSWER CHOICES	RESPONSES
Yes	7
No	0
I'm not sure	8
TOTAL	15

Respondents expressed some doubt regarding whether the CAT should take on the role of resolving disputes between class representatives and funders, although there seemed to be strong (if not

[129] https://associationoflitigationfunders.com/wp-content/uploads/2025/01/Merricks-v-Mastercard-ALF-Board-Statement-January-2025.pdf
[130] December 2024 Survey, Q58: Do you think that the CAT should be able to resolve issues between Class Representatives (either on their own behalf, or on behalf of the represented class) and Funders?
[131] December 2024 Survey, Q59: In your view, is there a need for some other mechanism for resolving disputes between Class Representatives and Funders beyond the CAT? If so, why?

majority) support for the view that another dispute resolution mechanism is necessary. When these results were filtered to isolate the views of those whose cases had progressed to trial or settlement, three out of four respondents considered that an alternative dispute mechanism was necessary.

However, further insight on this point might be gleaned some of the text responses provided alongside these responses. In response to the question which asked whether the CAT should be involved in resolving disputes between funders and class representatives, participants expressed the following views:

> "Only as a last resort, as surely we can resolve and use the independent arbitration service? Should not be a matter for the CAT to have to manage, hence a 'no' rather than 'I'm not sure'."

> "I am unsure this is a role the CAT (a judicial tribunal) should take on."

> "Depends what the issues are."

> "There is no real mechanism at the moment, [the] ALF is… useless, and the CAT should probably remain independent of such issues"

> "I feel they should but on the other hand that might call into question the CAT's impartiality."

Participants made the following comments on the need for an independent regulator (other than the CAT:

> "The conduct of funders in dealing with class representatives should be regulated. The ability to resolve disputes is important, but the way a funder behaves in pursuing a dispute (e.g. using threatening tactics against individual representatives) should be scrutinised by a regulatory body. Class representatives are not private litigants, they are performing a public function."

> "I'm not aware of any such disputes. If the Merricks one is such, then surely this is an internal matter that should have been sorted pre settlement, or if not settled post consultation, then the arbitration service should come into its own?"

> "I am unsure the CAT should be involved in resolving funding disputes but a more formal mechanism within the sector might be helpful if the current voluntary arrangements are not sufficient."

> "We need an independent regulator but that is unlikely..."

> "ALF is a waste of time in my view… The FCA or an independent regulator needs to be involved."

> "Have no confidence in ALF, should be a mechanism in Law ...independent mediation, or through SRA or Bar Counsel...but would prefer an independent regulator".

Drawing the threads of this analysis together, it is clear that several class representatives, particularly those who have themselves been involved in disputes with funders, feel strongly that the current mechanisms for resolving disputes between class representatives and funders are deficient. Some participants strongly doubt ALF's impartiality as a self-regulatory body and their ability to resolve disputes fairly. Likewise, several participants recognise that the CAT may not be best placed to resolve disputes either, given the CAT's role as a judicial body and the need to maintain a degree of impartiality. Several respondents have expressed a clear view in favour of the introduction of a public regulator, or reliance on existing public regulators (such as the FCA) to regulate inappropriate conduct by funders and monitor the funding market.

Likewise, the proper role of the CAT and the need for an independent regulator may require consideration of the nature of disputes at hand. Given that many disputes arise over the renegotiation of commercial funding terms (i.e. applications to provide further funding), the involvement of the CAT or any other judicial body may be highly inappropriate, save for confirming whether certain provisions (e.g. those conferring additional controls to the funder) are lawful.

4.6. Conclusions on the relationship between funders and class representatives

Following the discussion in section 4 of this report, the CRN makes the following observations:

1. In many cases, funders and class representatives enjoy positive, consultative working relationships which have an overall positive effect on the conduct of litigation. Class representatives often appreciate the guidance and experience of funders in pursuing large-scale litigation. There are several clear examples of funders providing positive support to class representative, particularly where class representatives face challenges in litigation which are unrelated to funding issues.
2. However, the data suggests that there is a reasonably high risk of disputes at key stages of litigation, particularly trial and settlement, or in circumstances where funds have been depleted. and further funding must be negotiated to continue pursuing the claims. These disputes not only have potential ramifications for class members and the value of their expected returns, but also for class representatives as individuals.
3. Specific risks which have been identified include:
    a. The risk that funders may refuse to pay teams instructed on the case,
    b. The risk that funders will withdraw or terminate funding
    c. The risk that funders will seek additional contractual controls or (inappropriately) higher returns as consideration for further funding
    d. The risk that funders will threaten or pursue litigation or arbitration against class representatives.
4. While the CAT may be able provide appropriate scrutiny of funding agreements and variations of funding terms at the beginning and end of litigation (i.e. at certification, trial and/or settlement), there is insufficient scrutiny over proposed variation of funding terms between these points. Moreover, as is recognised by a number of participants in the surveys, the CAT may not be an appropriate body to exercise such scrutiny.
5. Class representatives generally have little confidence in the ALF or in the ability of the ALF to provide an impartial, unbiased and inexpensive dispute resolution mechanism.
6. Class representatives are unlikely to have the means of resolving disputes independently via access to other courts and tribunals. This may be especially true in circumstances where they are simultaneously attempting to manage their case and facing personal threats of litigation from funders.

These observations, coupled with trends in the data showing the frequency of disputes in late-stage litigation, suggest that the CJC should strongly consider implementing a regulatory mechanism which resolves disputes between funders and funded litigants at no cost to the funded party. Moreover, in implementing such a mechanism, the CJC should remain mindful of the ways in which class representatives differ from 'ordinary' commercial litigants or private individuals who obtain third party funding. Class representatives occupy a unique role in the administration of justice and in the public interest. It is possible that similar issues arise in other categories of litigation; however, these risks are much more pronounced where the class representative is under a legal duty to act in the best interests of the class and may face personal litigation notwithstanding this professional duty.

5. Access to Justice and 'Vexatious' Litigation

Relevant Consultation Questions

Q15. What are the alternatives to third party funding?

Q36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:

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

Q37. 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.

Introduction

The final section of our submission addresses the CRN's views on two closely related issues – (i) the role of funders in ensuring access to justice for funded litigants in the context of collective proceedings, and (ii) the risk that funders may encourage vexatious or unmeritorious litigation. The CRN is conscious that as an organisation which explicitly seeks to support class representatives and the continued operations of the class actions regime, our views on these issues may be perceived as biased. To address this, we have sought to combine some analysis of the academic literature with the real experiences of class representatives bringing funded litigation.

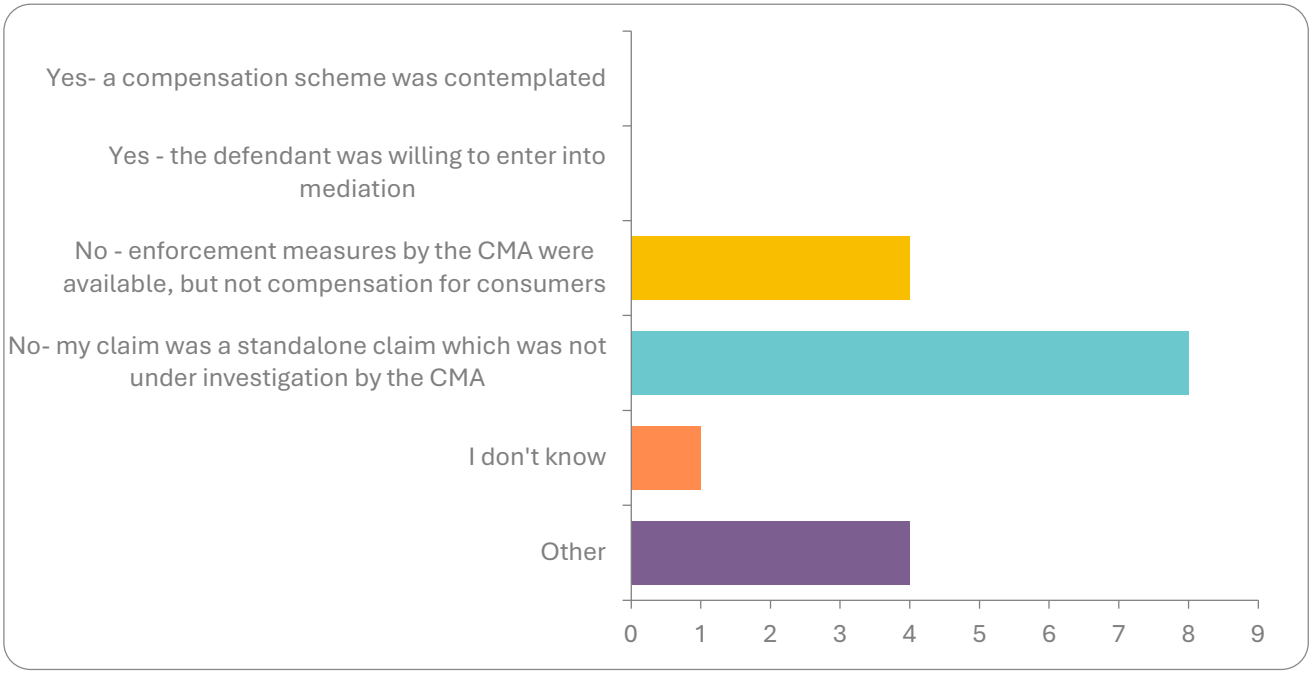
Nevertheless, the CRN emphatically disapproves of the narrative that collective actions are inherently unfair to consumers or class members. As has been observed by Professor Rachael Mulheron,[132] and Professors Andrew Higgins and Adrian Zuckerman,[133] the alternative to collective proceedings is often not individual litigation, but *no* litigation, preventing any real opportunity for redress or law enforcement. This is corroborated by our empirical findings on access to justice, which suggest that the collective proceedings regime is needed to plug gaps in enforcement.

[132] Mulheron, 'Further Impetus for a Statutory Class Action, Post-Lloyd v Google' (2022) 42 CJQ 10
[133] Higgins A and Zuckerman A, 'Class Actions in England? Efficacy, Autonomy and Proportionality in Collective Redress' [2013] (93) Oxford Legal Studies Research Paper

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

'Could compensation or redress for your class have been realistically achieved without you bringing proceedings?'

This question aimed to enhance understanding about the availability of measures other than private legal enforcement (i.e. litigation) to secure redress for consumers. It assumes that other measures may be funded other than by way of litigation funding (i.e. public funding), but that collective proceedings cannot be brought without third party funding. By asking whether redress could have been 'realistically' achieved, the question focused not on the *existence* of alternative measures (i.e. regulatory redress) but on whether they were a practical and available alternative to private enforcement measures.



The data strongly suggests that class representatives consider that alternative means of securing consumer redress are unavailable in practice. In most cases, this is because the underlying allegations had not been subject to prior investigation by domestic regulators (i.e. the Competition and Markets Authority). However, class representatives leading 'follow-on' claims[134] also held the view that alternative redress measures were not generally available.[135]

[134] i.e., claims which had already been the subject of a decision by the CMA
[135] Such measures might include 'voluntary redress schemes' - https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements

One participant observed that while some members of their class are larger businesses and could have brought claims individually, this route of redress would have been simply unavailable to smaller business class members, even if they had the requisite awareness and knowledge of the existence of their claims. The effect of pursuing private enforcement by other means would therefore have the effect of reducing access to justice when compared with an externally funded collective action.

Three participants observed that their cases had been brought to address the ineffectiveness of existing public regulators. One participant explicitly noted their dissatisfaction with the need to rely on the collective proceedings regime at all, describing it as a "cumbersome, expensive, time-consuming and lengthy process that operates without certainty". These comments suggest that for some class representatives, funded collective actions are viewed as a necessary 'last resort' when the primary means of securing justice for the same harms have failed.[136]

The December 2024 Survey also asked class representatives whether alternative funding mechanisms had been contemplated for their cases.[137] This question aimed to understand whether alternative forms of third-party funding, including pure funding, crowdfunding, and portfolio funding had been seriously considered. Fifteen out of sixteen respondents stated that no other forms of third-party funding had been contemplated, with the remaining respondent stating that they did not know.

Notably, there is **one** recorded instance of a case which is being funded by the Home Office.[138] The Home Office in this case does not seek a return in these proceedings, however it is unclear how they envisage to recoup other non-recoverable costs. It is unlikely that similar funding arrangements would be available in cases where the claimant class does not include public authorities (as is the case for all other claims before the CAT).

[136] Since this survey focussed only on the experiences of class representatives under the competition collective proceedings regime, there were clear options for alternative regulatory redress measures (i.e., the CMA's powers of enforcement, and power to approve voluntary redress schemes). Other categories of group litigation, such as actions under the representative rule and claims brought under the GLO regime are often brought because there are *no* alternative options to achieve redress for class members.

[137] In this question, 'alternative funding' means any funding other than third party litigation funding whereby the funder takes a return from damages. Examples include: 'Pure funding' - altruistic funding provided by a third party with no return available to the funder; 'Crowd funding' - altruistic funding provided by individuals; 'Portfolio funding' - funding by a third party funder whereby the funder provides upfront investment into a law firm, in return for a payout from their fees

[138] Clare Mary Joan Spottiswoode CBE v Airwave Solutions Limited, Motorola Solutions UK Limited & Motorola Solutions, Inc (1698/7/7/24), registered with the Competition Appeal Tribunal on 5/12/2024. This case is brought on behalf of organisations which include many public authorities (including central government agencies, local authorities, health services, police, fire and ambulance services) alongside private companies.

5.2. Funders and class actions

The concern that claims funded by non-litigants are more likely to be 'vexatious or 'frivolous' has been repeatedly rehearsed in the academic literature.[139] In the class actions context, these arguments stem from the theoretical power dynamics which follow from the economies of scale achieved by aggregating damages claims, and the risk that defendants may elect to prematurely settle unmeritorious class actions.[140] Notably, however, much of the literature to date has emerged from the United States, where class actions are funded by law firms, and settlements are concluded without judicial oversight.

Although the rules governing the United Kingdom competition collective proceedings regime do not strictly fall within the scope of the present consultation, they are nevertheless relevant to the extent to which vexatious litigation *can* be brought. It is submitted that the judicial oversight over certification and judgment under the competition collective proceedings regime ensures that funded opt-out class actions in the United Kingdom pass the strike-out standard. Moreover, since the opt-out collective action regime is restricted to competition claims, most defendants in these proceedings are, by definition, dominant companies which have sufficient financial resources to vigorously defend these claims.

Some academics have also raised the view that funded litigation may be utilised to achieve 'path manipulation' in legal development.[141] While some certified collective actions cover 'new ground' in competition law,[142] these developments cannot solely be ascribed to the role of funders. Although the opt-out collective action is a procedural mechanism which does not explicitly change substantive competition law, it is inevitable that the potential to bring claims which could not have previously been brought will have an impact on the development of substantive competition law (e.g. by recognising new theories of harm or by refining the categories of abuse of dominance). To assert that funders are responsible for such developments puts the cart before the horse. While it is true that such claims could not be brought without external funding, they are not brought *because* such funding is available.

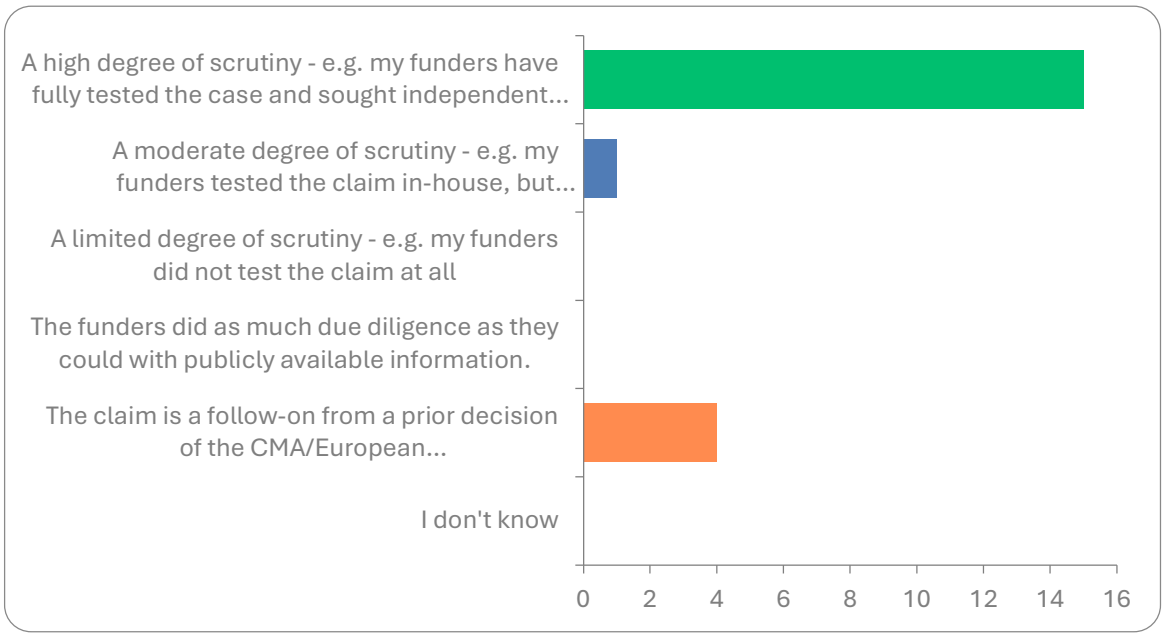
[139] J Kidd, 'To Fund or not to Fund: the Need for Second Best Solutions to the Litigation Finance Dilemma' (2012) 8 Journal of Law Economics and Policy 613
[140] *Matter of Rhone-Poulenc Rorer Inc,* 51 F.3d 1293 (1995, 7th Cir)
[141] J Kidd, 'To Fund or not to Fund: the Need for Second Best Solutions to the Litigation Finance Dilemma' (2012) 8 Journal of Law Economics and Policy 613 p.3
[142] E.g. *Gormsen v Meta* [2024] CAT 11

5.3. The role of funders in bringing collective proceedings

The sentiments of section 5.2. are echoed by our empirical findings on class representatives' perception of funders' involvement in formulating or developing claims. Roughly two thirds of class representatives surveyed were aware of the extent to which the funder was involved in formulating or developing their case.[143] These responses should be considered against the backdrop of our findings set out in section 2 of this report, namely that most law firms had identified prospective funders prior to class representatives' involvement in their claims. Accordingly, the fact that some class representatives are unaware of the nature of funders' initial involvement does not itself suggest that funders 'encourage' litigation.

None of our survey participants stated the view that their funders were responsible for generating or formulating the claim, and two thirds of respondents considered that their funder was not involved in putting together the claim at all.[144] This data suggests that funders play no role in 'instigating' claims. Four respondents asserted that their funders actively supported bringing the claim, but that their lawyers were the primary instigator. It is impossible to know from our data whether these funders had worked with legal teams from the outset to identify possible claims, or whether the funders were brought onboard speculatively at a very early stage to assess the claims' viability.

'How much scrutiny has the merit of your claim received from your funders?'



[143] December 2024 Survey: Q24: Do you know the extent of your funder's involvement in formulating or developing your claim?
[144] December 2024 Survey: Q25: If 'yes', how would you characterise your funder's involvement in developing or bringing your claim?

Our findings also demonstrate that in almost all cases, funders have scrutinised the merits of prospective claims thoroughly and/or have recognised that the claim is likely to be meritorious based on an existing regulatory decision which establishes proof of unlawful conduct on the part of the defendant(s). In only one case did funders accept the legal advice of the class representatives' solicitors without seeking independent advice of their own. This suggests that contrary to the theoretical position that funding encourages unmeritorious litigation, most funded cases receive a higher degree of scrutiny than ordinary claims. This is unsurprising given that litigation is a high-risk asset class, and the risk profile of such claims are even higher in a developing class action regime.

Conclusion

Our empirical findings suggest that litigation funding plays a key role in securing access to justice by making collective redress possible by way of private collective proceedings in circumstances where other redress measures are unavailable or ineffective. Moreover, it is unlikely that private collective proceedings may be brought under the existing regime without the involvement of external litigation funding. Although collective proceedings may, in some circumstances, be funded by a third party without any expectation of a financial return, this is likely to be exceptional.

Conversely, while litigation funding is a *necessary* ingredient for a functioning collective proceedings regime, its availability does not encourage vexatious or unmeritorious litigation. Indeed, our empirical findings suggest the opposite- namely, that funders pay scrupulous attention to the merits of the claims that they fund, taking independent advice, and taking any risks into account when making pricing decisions.

The CRN also wishes to highlight another potential control on unmeritorious claims in the context of collective proceedings – namely, class representatives themselves. Unusually, in the United Kingdom, most class representatives are 'ideological' claimants. They do not act on behalf of the class because they have a legal claim which is representative of the claims of other class members. Rather, they represent their classes because they bring crucial career experience – from academic expertise to consumer relations or consumer rights expertise, or prior experience in the market underlying their claim. Many class representatives are in the middle of their careers and have considerable personal and professional reputational 'skin in the game'— they recognise that if their cases go poorly, it may reflect poorly on them. While this does not operate as a perfect 'filter' for potentially unmeritorious cases, proposed class representatives increasingly think very carefully about cases they choose to endorse and manage.

At this juncture, the CRN wishes to echo the sentiment of Higgins, Zuckerman and Nayer in their recent editorial for the CJQ, namely that it is wrong to distinguish between 'access to justice' and 'fairness to claimants' in the present review,[145] since this rests on an 'impoverished' view of access to justice. On our view, mass private enforcement mechanisms must be deployed alongside public regulatory measures if we are to keep in step with modern commercial practices and facilitate real redress for consumers. When it is practically impossible for consumers to pursue their own claims individually, as in the case in all competition collective actions, it is simply inaccurate and unrealistic to pitch the possibility for improved 'access to justice' against 'fairness to claimants'. Though the CRN acknowledges that there is inevitably always some room for improvement when it comes to both private and public enforcement mechanisms, it is wrong to suggest that the obstruction or removal of those mechanisms would enhance fairness for class member claimants. In our view, the removal of these mechanisms, or the funding which supports them, ultimately operates to claimants' detriment.

[145] Higgins, Zuckerman, and Nayer "Facilitating access to justice for victims of mass harm" C.J.Q. 2025, 44(1), 1-16

6. Conclusions

To conclude, the CRN wishes to make the following observations:

1. Litigation funding, whether made available by third-party funders or otherwise, is a necessary ingredient for a collective actions procedure. To quote Professor Andrew Higgins, it is the 'petrol' to the class actions engine.[146] Without it, collective litigation simply cannot be pursued, with potentially damning consequences for access to justice. Moreover, while it is possible that some cases may be publicly funded, these are likely to be the exception to the rule. In enacting the Consumer Rights Act 2015, the government made clear that collective private enforcement, supported by private investment, should be facilitated. Accordingly, any reforms should be mindful of this policy and ensure that litigation funding remains available and an economically viable investment in this jurisdiction.

2. Litigation funding does not disadvantage defendants in the context of competition collective proceedings. As stated above, the Conservative/LibDem Coalition Government in 2015 clearly intended that collective actions should be permitted. Our empirical findings suggest that even if collective actions cover relatively novel ground, the merits of these claims are rigorously tested, and funding is not readily made available for non-meritorious claims. Moreover, whereas large commercial defendants may have access to sufficient resources on an ongoing basis to vigorously defend any claims, class representatives do not; rather, they have access to a limited and finite resource which must be used economically. Any substantive restrictions on litigation funding should therefore not seek to reduce the number of potentially viable claims.

3. As the CRN has identified, numerous factors (including the constraints on the funding market, and the size and risk associated with collective proceedings) place class representatives at a disadvantage in commercial negotiations. Moreover, the jurisprudence on funding agreements remains at an early stage of development, offering little helpful guidance to class representatives or their legal advisors. Given that class representatives occupy a distinct position in the administration of justice, and owe professional duties to class members, some common terms in LFAs (e.g. those conferring a degree of control to funders) may be particularly inappropriate. Further legal clarification on these standards will be necessary to ensure class representatives can receive suitable advice on the terms of their LFAs and negotiate LFA terms

[146] Higgins & Zuckerman, Class actions in England? Efficacy, autonomy and proportionality in collective redress, http://ssrn.com/abstract=2350141 p.41

that properly protect class members' interests. This must be tempered against the commercial reality of funding as an investment, and the need to ensure that funding remains a commercially viable investment prospect.

4. Our findings demonstrate that funding relationships often run into difficulty at critical points in the litigation. These difficult stages include trial or settlement, instances where the funds due under the LFA are likely to run out and further funding must be negotiated. Current regulatory mechanisms and dispute resolution processes appear to be inadequate in addressing these issues, particularly as the imbalance of power between class representatives and funders highlighted in paragraph 3 is likely to be starker in these circumstances. While further judicial oversight over funding agreements may help, these difficulties may indicate that there is a need for an independent regulator or dispute resolution mechanism.

5. Renegotiations over the commercial terms of funding agreements are expected, and perhaps even necessary, in the context of commercially funded cases that are likely to take years to complete. Such renegotiations are even more likely to occur in the context of competition class actions, where the public data available to claimant teams and funders is likely to be limited, and a claim may only be properly valued once an extremely expensive disclosure process has already been completed. Such renegotiations are much more likely to take place in cases relying on '*PACCAR*-compliant' funding arrangements where funders' returns are calculated as a multiple of their costs outlay, with multiples to be increased on pre-determined dates. Any reforms which contemplate permitting or prohibiting certain kinds of funding arrangements should take this into account, as well as the need to maintain transparency and simplicity of funding terms.

While the Class Representatives Network does not seek to put forward a substantive view on the precise policies which should be adopted, it further observes that many class representatives can see the need for an independent regulator, either by conferring responsibility upon an existing regulator such as the FCA, or by establishing a new, independent body.

Likewise, the CRN observes that incremental judicial intervention on the terms of LFAs may be an inadequate solution in the long term, especially given that collective actions may run for many years during which the substantive law may change significantly. This instability, as exemplified by the wake of the *PACCAR* judgment, has the potential to significantly derail litigation by enabling

questions about the enforceability of LFAs to be re-opened and encourage the renegotiation of LFA terms during disputes. Our findings show that such renegotiations more likely to result in intractable disputes between funders and class representatives, leading to unnecessary satellite litigation and ultimately disadvantaging class members. In the immediate term, we consider that the introduction of practice directions or guidance from the CAT would be extremely helpful.

This Review by the CJC is framed as a one-off exercise. What the data from these surveys together with outcomes in recent CAT cases show is that a number of unsatisfactory features have emerged with respect to the role of funders in the operation of the class action regime. The CRN has been in a rare position to carry out some limited empirical research throwing light on what has been happening behind well-guarded walls from the point of view of class representatives. It is to be hoped that the litigation funding industry will present similar data to the Review and to allow further research to be carried out.

The calls for an independent regulatory body have largely stemmed from the experiences of unresolved disputes. The role of an independent body however should not be confined to dispute resolution. Such a regulator should also have a remit to gather and publish information on the operation of the market, while intervening where necessary to correct undesirable imbalances. That may relieve the CJC itself from having to maintain too close an interest in the topic of litigation funding. It would also assist the CAT in arriving at case decisions by allowing it to see the wider contextual background against which the relevant circumstances in issue can be assessed.

Appendix 1 – Survey Questionnaires

Survey 1: August 2024

At the point when you became involved in your case, had your legal team already identified a prospective funder?

1. Yes
2. No
3. I don't know

How did your legal team go about identifying a funder?

1. Via a broker
2. Direct enquiries with multiple funders
3. Direct enquiries with a single funder
4. Law firm had previous relationship with funder
5. I don't know

How did your team go about identifying a funder?

1. Via a broker
2. Legal team made direct enquiries with multiple funders
3. Legal team made direct enquiry with a single funder
4. I made direct enquiries with multiple funders
5. I made direct enquiries with a single funder
6. I don't know

How many funding options were you presented with?

1. One
2. Multiple

If you were presented with only one option, do you know why this was the case?

1. There were no other funders willing to take the case
2. My solicitors advised that this offer was suitable and there was no need to enquire further
3. Other

Please provide further details of why you were only presented with only one funding option:

If you were only presented with one funding option by your team, did you undertake any separate/independent inquiry into the availability of alternatives?

1. Yes
2. No

If there were multiple funding options on the table, how did you choose?

1. I went with my primary legal team's advice on the most suitable funding arrangement.
2. I sought advice on the best funding option from an independent legal advisor.
3. I sought advice on the best option from my consultative panel.
4. I made a decision based on my own understanding of the options available.

When choosing between multiple funding arrangements, which factors did you consider the most important? (Pick two)

1. The agreement provided the funders with the lowest rate of return in the event that their success fee was taken from any undistributed damages
2. The agreement provided the funders with the lowest rate of return in the event that their success fee was taken as a 'first charge' prior to distribution (per Gutmann v Apple)
3. I had a good working relationship with the funder
4. The financial risk was allocated in the best way over the course of the litigation
5. The funder was the most reputable/they had been recommended
6. There was a risk of a carriage dispute

At the point when you first negotiated the terms of your funding arrangement (i.e., excluding any subsequent renegotiations) which of the following factors were most important? (Pick two)

1. Whether the financials were in the best interests of the class
2. The overall quantum of the funder's expected success fee
3. The increase in financial risk as litigation progresses (e.g. if the quantum of the funder's return increased in stages)
4. Any terms pertaining to settlement
5. Whether the terms were a 'good deal', relative to the funding market as a whole
6. Non-financial terms
7. Urgency/Speed in reaching an agreement
8. The risk of carriage disputes
9. Other _____

Please provide further details of the relevant factors:

At the point when you first negotiated the terms of your funding arrangement (i.e., excluding any subsequent renegotiations) did you seek independent advice on the terms of the agreement? (Select all that apply)

1. Advice from a lawyer/barrister outside of primary legal team
2. Advice from a consultative panel
3. Advice from a professional consultant
4. I received no independent advice

Do you have a funding expert on your consultative panel?

1. Yes
2. No

Have you had to renegotiate funding agreements due to PACCAR?

1. Yes; I renegotiated the terms of my funding arrangements to comply with PACCAR
2. Yes; I switched funders following PACCAR
3. No; I negotiated my funding agreement for the first time after PACCAR
4. No; I maintained the same terms before and after PACCAR

When re-negotiating the terms of your funding agreements, which of the following factors were most important? (Pick two)

1. Whether the financials were in the best interests of the class
2. The overall quantum of the funder's expected success fee
3. The increase in financial risk as litigation progresses (e.g. if the quantum of the funder's return increased in stages)
4. Any terms pertaining to settlement
5. Whether the agreements were a 'good deal', relative to the funding market as a whole
6. Non-financial terms
7. Urgency/Speed in reaching an agreement
8. The risk of carriage disputes
9. Other

Please provide further details of the relevant factors:

When you renegotiated the terms of your funding arrangements, did you seek any independent advice? (Please select all that apply)

1. Advice from a lawyer/barrister outside of primary legal team
2. Advice from a consultative panel
3. Advice from an independent consultant
4. I received no independent advice

Based on your experiences with your current funder, would you recommend them to future class representatives?

Would strongly recommend against	Would not recommend	Neutral	Would recommend	Would strongly recommend

How satisfied are you with the following?

	Very dissatisfied	Dissatisfied	Neutral	Satisfied	Very Satisfied
My funder's conduct	❑	❑	❑	❑	❑
The terms of my funding arrangement	❑	❑	❑	❑	❑
Ease of negotiating funding arrangements	❑	❑	❑	❑	❑

Survey 2: December 2024

Please note that any reference to ‘Additional Comments’ in the boxes below denotes that participants had the option of providing an additional, free text comment in addition to their answers.

Q2. Is the class representative in your case an individual, organisation or an SPV (special purpose vehicle)?
Answer Choices

- Individual
- SPV
- Organisation
- Additional Comments: Other (please specify)

Q3. Are you bringing a claim against more than one defendant?(Please select 'no' if you are bringing a claim against multiple defendants which are part of the same 'corporate group', e.g. Alphabet Inc and Google LLC)
Answer Choices

- Yes
- No

Q4. How many funders are involved your case?
Answer Choices

- One
- Two - my case was jointly funded from the outset
- More than two - my cases was jointly funded from the outset
- Two or more - I have swapped funders, and my old funder continues to have a stake in the case
- Two or more - My funders reached an agreement to jointly fund the case after a potential/actual carriage dispute
- Additional comments: If your funding arrangements do not correspond with one of the options outlined above, please specify how many funders you have and why there is more than one funder involved. Likewise, if you have more than two funders, please specify how many you have.

Q5. Is your funder(s) a member of ALF? ALF members include: Asertis, Augusta, Balance, Bench Walk Advisors, Burford Capital, Calunius, Deminor, Erso Capital, Harbour, Innsworth, Omni Bridgeway, Orchard Global, Redress Solutions, Therium, Vannin Capital, Woodsford
Answer Choices

- Yes
- No
- I don't know
- I have multiple funders

- Additional comments: Please specify how many funders you have and whether they are ALF members

Q6. Why is your funder not a member of the ALF?
Answer Choices

- I don't know
- My funder was not eligible for ALF membership (due to e.g. their location or capital adequacy)
- My funder has chosen not to join the ALF
- My funder is a new entrant on the market and is in the process of joining ALF
- Other (please see comment box below)
- I have multiple funders (please see comment box below)
- Additional comments: Please provide further details if any of the following apply: Your funder has decided not to join ALF for reasons other than its eligibility for membership (please specify the reason); You have more than one funder, and one (or more) is not an ALF member; Your funder is not an ALF member for reason not specified in the options above

Q7. Are you aware of the contractual dispute resolution mechanism mandated by the Association of Litigation Funders? The mechanism is a provision which allows disputes between parties to the funding agreement to be resolved by an opinion provided by an independent KC.
Answer Choices

- Yes
- No
- N/A

Q8. Are your solicitors engaged on CFAs (conditional fee arrangements)?
Answer Choices

- Yes
- No
- N/A
- I don't know
- Additional Comments: Please specify any further details which you think may be relevant. Examples include: Your solicitors are on CFAs, but their success fees vary according to the quantum of damages/settlement terms; Your solicitors are on CFAs for some, but not all of their work

Q9. Are your counsel engaged on CFAs?
Answer Choices

- Yes
- No
- N/A
- I don't know

- Additional comments: Please specify any further details which you think may be relevant. Examples include: Your counsel are on CFAs, but their success fees vary according to the quantum of damages/settlement terms; Your counsel are on CFAs for some, but not all of their work

Q10. Are you financially remunerated by the funder to act as class representative?
Answer Choices

- Yes- I am compensated for my time
- Yes - I receive a fee
- No
- N/A
- Additional comments: Other (please specify)

Q11. Do your funding arrangements include after-the-event insurance? (select as many as apply)
Answer Choices

- No
- I am insured against adverse costs orders
- I am insured against unexpected appeals/delays
- My costs/my funders costs are insured in the event we lose
- Other
- I don't know
- Additional Comments: If you are insured and your insurance is not covered by the above, please briefly provide further details

Q12. Does your funding agreement contain any provisions covering pre-action costs?
Answer Choices

- Not at all
- No; but it is envisaged that these will be covered by any judgment/settlement
- Yes; my funder has covered all pre-action costs and these will be accounted for by any judgment/settlement
- Yes; my funder has covered pre-action costs and does not intend for these to be recouped by judgment settlement
- Other
- Additional comments Please specify further details if your arrangements are not covered by the above options.

Q13. What is the current stage of your case?

Answer Choices

- Preliminary stages (i.e. no summary of claim on the CAT website/not yet public knowledge)
- Pre-CPO/ Public/knowledge, but not yet certified
- Certified, but not progressed to substantive trial
- Trial
- Post-trial
- Settlement
- Additional comments; If part of your claim is ongoing, and part of it is settled, please select the option above which reflects your progress in proceedings, and specify in the below comment box that you have settled part of your claim.

Q14. When did your CPO take place?
Answer Choices

- Before 2020
- 2020-Aug 2023 (Pre-PACCAR)
- Aug 2023- present (Post-PACCAR)

Q15. Did you ever have a pre-PACCAR LFA?
Answer Choices

- Yes
- No
- Other
- Additional Comments: Other (please specify)

Q16. Have you ever had to renegotiate your funding agreements to comply with PACCAR?
Answer Choices

- No - my funding agreement was PACCAR-compliant from the outset
- Yes - prior to my CPO
- Yes - post-CPO, but pre-trial
- Yes - during the trial phase/during settlement discussions

Q17. How long did you have to renegotiate your funding arrangements to comply with PACCAR?
Answer Choices

- Less than two weeks
- Two weeks - one month
- 1-3 months
- 3-6 months
- More than 6 months
- Additional comments: Please specify how long you had to renegotiate your funding arrangements

Q18. Have you ever had to re-negotiate your LFA for reasons other than the need to comply with PACCAR? If 'yes', please state (briefly) the reason for renegotiating your funding arrangements.
Answer Choices

- No
- Additional Comments: Yes (please specify reason and how the funding arrangement changed)

Q19. Has the level of the funder's return relative to their costs outlay changed since your funding arrangement was renegotiated? If so, how?
Answer Choices

- Yes
- No
- I don't know
- Other
- Additional comments: Please specify further details on how your funder's returns have changed.

Q20. Did you experience any changes in your relationship with your funder/in the conduct of litigation following your renegotiations? If so, please specify further details below.
Answer Choices

- Yes
- No
- I don't know
- Additional comments: Please provide further details

Q21. Could compensation or redress for your class/consumers have been realistically achieved without you bringing proceedings?
Answer Choices

- Yes- a compensation scheme was contemplated
- Yes - the defendant was willing to enter into mediation
- No - enforcement measures by the CMA were available, but not compensation for consumers
- No- my claim was a standalone claim which was not under investigation by the CMA
- I don't know
- Other
- Additional comments: If you are aware of any alternative enforcement or compensation mechanisms which were contemplated for your case, please briefly explain below.

Q22. Were any alternative funding mechanisms contemplated for your case?In this question, 'alternative funding' means any funding other than third party litigation funding whereby the funder takes a return from damages. Examples include:'Pure funding' - altruistic funding provided by a third party with no return available to the funder'Crowd funding' - altruistic funding provided by individuals 'Portfolio funding' - funding by a third party funder whereby the funder provides upfront investment into a law firm, in return for a payout from their fees
Answer Choices

- Yes
- No
- I don't know
- Additional Comments: If any alternative funding mechanisms were contemplated, please provide further details of these funding mechanisms and why they were not chosen below.

Q23. How much scrutiny has the merit of your claim received from your funders?
Answer Choices

- A high degree of scrutiny - e.g. my funders have fully tested the case and sought independent legal advice on the merits
- A moderate degree of scrutiny - e.g. my funders tested the claim in-house, but largely accepted the advice of my lawyers and did not seek independent legal advice
- A limited degree of scrutiny - e.g. my funders did not test the claim at all
- The funders did as much due diligence as they could with publicly available information.
- The claim is a follow-on from a prior decision of the CMA/European Commission/regulator, so some proof of unlawful anti-competitive conduct had already been established.
- I don't know
- Additional comments: Please briefly provide further details if you think this is necessary.

Q24. Do you know the extent of your funder's involvement in formulating or developing your claim?
Answer Choices

- Yes
- No

Q25. If 'yes', how would you characterise your funder's involvement in developing or bringing your claim?
Answer Choices

- My funder was actively involved in coming up with and bringing the claim
- My funder has actively supported bringing the claim, but my lawyers were the primary instigators
- My funder was approached and brought onto the claim; they had no involvement in coming up with the claim.
- I don't know
- Other

- Additional comments: Please provide brief further details if your answer is not captured by the above options.

Q26. Who has taken primary responsibility for negotiating the terms of your funding agreement? (Select one)
Answer Choices
- Myself
- The solicitors instructed in my case
- A specialists costs barrister
- A broker
- Other
- Additional comments: Further Details

Q27. When your funding agreement was negotiated, how were the level of your lawyers' fees negotiated?
Answer Choices
- The lawyers put forward their own pricing, which the funder accepted without negotiation
- The lawyers put forward their own pricing, which the funder negotiated to reduce
- The funders put forward their proposed cost outlay, and the lawyers negotiated their fees in response to this figure
- I don't know - the funding agreement was agreed before I was involved
- I don't know
- Other
- Additional comments: Please provide further details if you are aware of how your lawyer's fees were negotiated and this is not covered by the above options.

Q28. Who takes the lead in monitoring the costs/budget of your case?
Answer Choices
- My funder
- My solicitors
- Me
- Joint responsibility between me and my funder
- Joint responsibility between my funders and my solicitors
- Joint responsibility between me, my solicitors, and my funders
- Additional comments: Other (please specify)

Q29. Since your funding agreement was initially negotiated, has your funder taken an active role in negotiating better deals from suppliers/reductions in legal/expert fees?
Answer Choices
- Yes
- No
- I don't know

- Additional comments: Further details

Q30. Has your funder ever objected to paying for specialist costs advice, or put pressure on you not to pursue such advice?
Answer Choices

- Yes
- No
- Additional comments: Further details

Q31. Has your funder ever objected to, or pressured you against seeking other advice (e.g. from an advisory panel)
Answer Choices

- Yes
- No
- Additional comments: Further details

Q32. Has the funder attempted to influence the choice of solicitors, counsel, or experts on your case?
Answer Choices

- No
- I don't know
- My funder was brought on after my legal/expert team was put together
- Additional comments: Yes (please briefly specify further details)

Q33. How would you characterise the level of communication/consultation between yourself and your funder?
Answer Choices

- Minimal- we rarely communicate
- Low - we communicate about big decisions, but about little else
- Moderate - we communicate about most, if not all financial decisions
- Strong - we communicate about all financial decisions and some legal/case management decisions
- Very strong - we communicate about almost everything on the case.

Q34. How much influence has your funder exerted over the conduct of your case?
Answer Choices

- Rating – 0 to 100

Q35. Has your funder ever influenced decisions to appeal by providing their opinion on whether an appeal is worth pursuing?
Answer Choices

- Yes - my funder has encouraged appeals to be pursued and offered additional budget to enable this
- Yes - my funder has refused to fund decisions to appeal
- No - my funder has left these decisions entirely to my legal team/myself
- I don't know
- Not Applicable
- Additional comments: Other (please specify)

Q36. Has your funder sought to influence the specific lines of argument pursued in your case?
Answer Choices

- Yes
- No
- I don't know
- Additional comments: Further details

Q37. Has your funder sought to exert influence over decisions to make applications to the court? (e.g. applications for disclosure, information, amendments etc)
Answer Choices

- Yes
- No
- I don't know
- Additional comments: Further details

Q38. Has your funder sought to influence litigation timetables?
Answer Choices

- Yes
- No
- I don't know
- Additional comments: Further details

Q39. Did your funder attempt to influence your decision to stand as class representative as an individual or incorporate an SPV?
Answer Choices

- Yes - my funder encouraged me to represent the class as an individual
- Yes - my funder encouraged me to incorporate an SPV
- No
- I don't know
- Additional comments: Further details

Q40. How far would you agree with the following statement? "My funding arrangements provide me with sufficient resources to..."

- Pursue appeals where necessary
- Fight appeals where necessary
- Conduct disclosure adequately to overcome informational imbalances
- Negotiate an effective settlement
- Additional comments: Please provide brief details of any examples, if you think they are relevant.

Q41. Has any of your funding agreement been disclosed to the CAT/the defendants? (select as many as apply)
Answer Choices

- The overall/maximum level of my funder's return
- The level of my funder's return as the litigation progresses (e.g. increases in multiples)
- Waterfall provisions
- Non-funding terms (e.g. confidentiality clauses, dispute resolution clauses, etc)
- None
- Additional comments: If you have disclosed parts of your funding arrangements not included in the above options, please briefly state them here.

Q42. In your view, has the disclosure of your funding agreement affected the way in which your opponents have pursued the litigation? If so, how?
Answer Choices

- I don't know
- No
- Yes
- Additional comments: Please specify further

Q43. Have your defendants ever pursued tactical strategies to delay litigation or increase costs? (select as many as apply)
Answer Choices

- Unnecessary applications to the court
- Unmeritorious applications to appeal
- Taking up issues which should not be in dispute
- Delays or failures to meet deadlines/applications for extension of time
- No
- I don't know
- Other
- Additional comments: Other (please specify)

Q44. In your experience, has your funder exerted a positive role in ensuring your litigation can run smoothly or effectively?
Answer Choices

- Yes
- No
- Neutral
- I don't know
- Additional comments: If 'yes', please provide brief examples:

Q45. Have you experienced any of the following?

- Funder failing to make payments on time
- Funder refusing to pay incurred costs
- Funder terminating the funding agreement
- Funder threatening to terminate/withdraw funding
- Funder threatening litigation against you personally
- Funder threatening litigation against your SPV (if you have one)
- Funder threatening litigation against solicitors
- Additional comments: If you ticked 'yes' to any of the above, please explain the circumstances in as much detail as you are able.

Q46. How likely are you to exceed the budget for your litigation?
Answer Choices

- I have already exceeded the budget
- Very likely
- Likely
- Neither likely nor unlikely
- Somewhat unlikely
- Very unlikely
- I don't know
- Additional comments:

Q47. Do you feel that your funder's conduct has been influenced by the budget available as your case has progressed?
Answer Choices

- Yes
- No
- I don't know
- Additional comments: If 'yes', please specify how you feel that your funder's conduct has changed and identify any possible triggers for changes in conduct.

Q48. To what extent do the terms of your funding agreement allow you to act independently in controlling and conducting proceedings?
Answer Choices

- I have complete control over the proceedings, and I am able to make decisions without taking my funder's interests into account.
- Decisions ultimately rest with me, though I am contractually obliged to take the funder into account in certain situations.
- To a moderate extent - I am mandated to take certain steps in support of my funder's interests (e.g. in costs applications)
- To a limited extent- I have to take my funder's interests into account when making most decisions
- I have no control over the proceedings - every step must be made with my funder's consent or approval
- Other (please provide further details below)
- Additional comments

Q49. To what extent do the terms of your funding agreements allow you to negotiate settlements independently?
Answer Choices

- I have absolute freedom to negotiate settlements
- I have the final say, but I am contractually mandated to take my funders' interests into account
- I am required to negotiate for specific outcomes in settlement, but I can choose to settle even if those outcomes cannot be negotiated successfully
- I am unable to settle without my funders' approval
- Other (please add further details below)
- Additional comments

Q50. When negotiating the terms of your funding arrangements, to what extent did you feel able to negotiate the degree of control your funder could exercise over the litigation?
Answer Choices

- I don't know
- I did not need to negotiate- I felt the proposed terms were appropriate
- I was able to negotiate the extent to which funders could control litigation
- I was able to raise concerns with the terms, but did not renegotiate them
- I was unable to raise concerns regarding the funder's level of control over litigation.
- Other
- Additional comments

Q51. Have you ever experienced any disagreements arising from your funding arrangements? For this question, the phrase ‘disagreements’ refers to any of the following: - disagreements over the meaning/construction of the agreement- disagreements over the performance of the agreement - allegations that one or more parties have breached the funding agreement
Answer Choices

- Yes
- No
- I don’t know
- N/A
- Other
- Additional comments: If you have any experiences which come close to, but do not exactly match the above description, please briefly describe these here.

Q52. How frequently do disagreements related to your funding agreements arise?
Answer Choices

- Frequently
- Often
- Sometimes
- Rarely
- Never

Q53. If you have had disagreements with your funder, to what extent have you felt able to effectively resolve these disagreements to your satisfaction?
Answer Choices

- I am able to resolve disagreements with my funder easily
- I am able to resolve disagreements with my funder, but have found it difficult to do so
- I have been able to resolve some disagreements with my funder, but not all
- I have been unable to resolve disagreements with my funder
- Additional comments

Q54. Have you heard of the contractual dispute mechanisms mandated by the Association of Litigation Funders? These contractual provisions enable disputes over funding agreements to be resolved by procuring an independent opinion from a KC appointed by the parties to the funding agreement
Answer Choices

- Yes
- No
- I’m not sure
- Other
- Additional comments

Q55. Have you ever tried to use ALF's mandatory dispute resolution mechanism?
Answer Choices

- Yes, and it was effective at resolving the dispute
- Yes, but it was not effective (please specify why below)
- No, but I have sought to resolve disputes with assistance from independent costs counsel
- No - there has been no need to resort to an external dispute mechanism
- No - (other - please specify further information below)
- Additional comments

Q56. In your experience, have your confidentiality obligations under the funding agreement prevented you from discussing and resolving issues relating to your funding arrangements with third parties?
Answer Choices

- I have been prevented from raising and resolving issues relating to my funding agreements, but not because of my confidentiality obligations
- I have frequently been prevented from raising and resolving issues due to my confidentiality obligations
- I have sometimes been prevented from raising and resolving issues due to my confidentiality obligations
- I have not had any issues to raise
- I have not been prevented from raising and resolving issues due to my confidentiality obligations
- Additional comments

Q57. How much do you agree with the following statements?

- The CAT exercises an appropriate level of scrutiny over the level of funders' returns
- The CAT exercises an appropriate level of scrutiny over increases in funders' return over time
- The CAT is well-placed to comment on, and regulate, non-financial terms in funding agreements
- The current rules on disclosing funding agreements are appropriate
- Additional comments

Q58. Do you think that the CAT should be able to resolve issues between Class Representatives (either on their own behalf, or on behalf of the represented class) and Funders?
Answer Choices

- Yes
- No
- I'm not sure
- Additional comments: Please elaborate on your views

Q59. In your view, is there a need for some other mechanism for resolving disputes between Class Representatives and Funders beyond the CAT? If so, why?
Answer Choices

- Yes
- No
- I'm not sure
- Additional comments: Please provide support for your views.

Q60. Please provide any further comments or evidence about your experiences with litigation funding which were not covered by this survey

- Free Text