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:	Sam
Last name:	Bidwell
Location:	23 Great Smith Street, London, SW1P 3DJ
Role:	Director
Job title:	Director of the Next Generation Centre
Organisation:	Adam Smith Institute
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:

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

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

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

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

The full list of consultation questions is below:

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

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

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

TPLF does not meaningful improve effective access to justice. In 2014, Australia's Productivity Commission completed an inquiry into access to justice, which included an examination of litigation funding. The Commission reported concerns about litigation funding encouraging unmeritorious claims, taking advantage of claimants for their own gain, mainly through high fees. March 2024 research from Prof Rachael Mulheron, at Queen Mary University, identified that most litigation funders only support between 2% and 4% of all cases pitched to them, out of the thousands of proposed cases. Patently, funders are interested in profitable cases, rather than cases which are especially meritorious, or cases in which the claimant would not otherwise have been able to access funding.

2. To what extent does third party funding promote equality of arms between parties to litigation
3. Are there other benefits of third party funding? If so, what are they?
4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?[2] If not, what improvements could be made to it?

A competent regulator (most likely the Financial Conduct Authority) should be given statutory oversight of the UK's litigation funding industry, in line with the reasoning developed in Australia's Brookfield case. This will ensure legitimate regulatory accountability for litigation funders. TPLF should be regulated in the same way as any other investment product. Once this regulatory competence has been established, the FCA should proceed in designing an appropriate regulatory regime for LFAs, with a view towards improving access to information and strengthening public trust in the integrity of the UK's legal system. In particular, courts should be given a greater role in scrutinising LFAs, supported by a blanket requirement of basic disclosure. The regulator should also consider introducing provisions which address potential conflicts of interest between litigant funders, lawyers, and claimants. In particular, litigation funders should be prohibited from directing litigation strategy, while law firm employees should be prohibited from acting as directors of TPLF. Taken together, these measures would ensure continued public trust in the integrity of the UK's legal system, and ensure that class action cases are used as a legitimate tool for consumer protection, rather than a profit spinner for hedge funds. And in order to reduce potential risks to

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

claimants who do not succeed in their actions, the FCA should consider strengthening security around cost arrangements, including by introducing a presumption in favour of a court deposit, unless an insurance policy "as good as cash" is produced. This provision would avoid leaving unsuccessful claimants on the hook for defendants' legal bills in cases which they would not have been able to pursue without TPLF. Finally, legislators should also consider introducing new legislation which enshrines the PACCAR position on litigation funding agreements, wherein litigation funders cannot enforce contingent percentage-based LFAs. This will ensure that LFAs provide a more appropriate and proportionate benefit to litigant funders, curbing the worst excesses of a regime which currently benefits litigant funders to a greater extent than claimants.

5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:
    a. The nature and seriousness of the risk and harm that occurs or might occur;
    b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;[3]
    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.

August 2024 research from CMS report identified England and Wales as a 'high risk' jurisdiction for businesses, alongside the Netherlands and Portugal. Major European competitors, such as Germany and Italy, received only 'medium risk' profiles, the same rating given to Scotland, which operates a distinct, civil law system. France, meanwhile, was rated 'low risk'. At a time when the UK's economic and regulatory fundamentals are already in question for many large businesses, there is a real risk that this noteworthy increase in the number and value of class actions further jeopardises business confidence. When other jurisdictions offer less intrusive class action regimes, there is a particular risk that firms might choose to invest elsewhere, in order to mitigate risks associated with investment in the UK market.

There are also signs that UK firms are spending more of their available capital on legal costs, rather than on research & development, job creation, or expansion. A Thomson Reuters survey in the summer of 2024 identified that nearly half of UK corporations are predicting an increase for their legal spend over the next financial year. While the expansion of class actions cannot be held solely responsible for this expansion, risk mitigation is undoubtedly a factor worthy of greater consideration against the backdrop of expanding class actions.

If the status quo continues, UK plc stands to suffer enormous reputational and material damage from an ever-expanding class action regime. In terms of business confidence, the growing risk of class actions will encourage firms to spend more money on risk mitigation, at the expense of innovation and job creation. Meanwhile, the continued symbiosis between claimant law firms and TPLF risks calling into question the credentials of the UK's legal system, creating a perception that the UK's legal services industry is more interested in profit than in the interests of victims.

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

This severe damage to business confidence is exacerbated by the current self-regulatory framework, which contributes to a sense that businesses operating in the UK will be unable to insulate themselves against the risk of large and expense class-action cases. Proper scrutiny by a competent regulator (as mentioned above) would ensure continued public trust in the integrity of the UK's legal system, and ensure that class action cases are used as a legitimate tool for consumer protection, rather than a profit spinner for hedge funds.

6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?
    a. If not, why not?
    b. If so, which types of dispute and/or form of proceedings[4] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[5]
    c. Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?
7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?

An ideal TPLF regulation system would give due regard to the following principles:

(a) Consistent application of rules in like-for-like cases, including the extension of regulatory oversight to TPLF, bearing in mind the regulatory regime which governs other investment products
(b) The need to strike a balance between promotion of abstract 'access to justice', and tangible harm to the reputation of the UK legal system/potential harm to UK business confidence
(c) Ensuring that, when TPLF is utilised, it primarily benefits claimants rather than law firms
(d) Ensuring that claimants have alternative means to access justice

8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:
    a. What impact, if any, have the level of litigation costs had on the development of third party funding?
    b. What impact, if any, does third party funding have on the level of litigation costs?
    c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?
    d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[6]
    e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?
        i. If so, why?
        ii. If not, why not?

[4] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.
[5] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.
[6] Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

9. What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.
10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?

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

11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?
12. Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?
    a. If so, why?
    b. If not, why not?
13. If a cap should be applied to a funder's return:
    a. What level should it be set at and why?
    b. Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?
    c. At which stage in proceedings should the cap be set?
    d. Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?
    e. Should there be differential caps and, if so, in what context and on what basis?

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

14. What are the advantages or drawbacks of third party funding?
    Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

While proponents of TPLF argue that this widens access to justice, critics have observed that the sudden expansion of TPLF contributes to a vicious cycle of ever-more class action cases, while also giving litigation funders more control and protection than actual claimants. While class actions are not per se a harmful feature of our legal system, their rapid expansion has resulted in far greater business liability than before. Mass claims are now affecting almost every sector of the UK economy, and claimant firms are continuing to establish innovative case theories to impose liability on new areas. In jurisdictions which have traditionally been open to mass cases, such as the aforementioned US and Australia, this openness has had detrimental impacts on commercial confidence, business growth, and jobs. When any innovation risks prompting litigation, is it any wonder that businesses are spending less on building the future, and more on protecting what they already have? Unsurprisingly, the same problems are now beginning to arise in the UK. Many British firms are being forced to divert funding from R&D and investment into mitigation and litigation. The second-order impact of this shift is a decrease in willingness to invest. The opportunity cost, in terms of job creation and economic growth, is potentially enormous.

The theoretical basis for expanded access to class action is focused primarily on consumers who have been individually harmed, wronged, or disadvantaged by a business. Normatively, this makes sense. Consumers deserve some degree of recourse in cases where they have legitimately suffered due to the negligence or wrongdoing of businesses. Clearly, any compensation should be enjoyed

primarily or exclusively by these adversely impacted consumers. In fact, despite the insistence of some advocates of class actions, this is not the case. The biggest beneficiaries of the UK's class action boom are not individual claimants, but claimant law firms and litigation funders. The procedural changes introduced since 2015 have been responsible for incubating a new and lucrative relationship of symbiosis between these two groups. Claimant law firms stand to gain substantially from the increase in class action cases. The significant legal fees associated with class actions, as well as the ability of firms to request a percentage of up to 50% of the damages awarded in each case, means that class action cases can prove lucrative for claimant firms. The UK's large number of boutique claimant-side law firms, and the growing number of US law firms with experience in pursuing claims into the UK market, are well-placed to take advantage of claimants who may not be willing to engage directly with complicated and lengthy cases. Pogust Goodhead faced criticism from clients after correcting a typographical error in its retainer pack that mistakenly referred to 35 per cent rather than the 50 per cent fee cap it would be charging claimants. Pogust Goodhead's financial backers, US based investment fund Gramercy, is a key driver of their UK class actions. Gramercy is expected to generate approximately £70m annually from its 2023 litigation funding deal with Pogust Goodhead.

What's more, as a result of the lack of requirement for litigation funders to disclose the ultimate source of funds underpinning legal actions, there is significant scope for foreign investors to benefit from the recent surge in class actions. Shareholder class actions are particularly attractive to litigation funders as the returns can be significant. In recent years, we have even seen non-traditional private equity funds looking for avenues to fund litigation and gain a share of this ever-increasing market.36 If the UK is to have an expanding class actions regime, it should exist primarily to benefit individual claimants who can identify particular harms that they have suffered as a result of a failure from one or more businesses. Clearly, class actions should not serve to enrich law firms and overseas litigation funders hoping to profit from the UK's legal system.

15. What are the alternatives to third party funding?
    a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?
    Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.
    b. Can other forms of litigation funding complement third party funding?
    Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.
    c. If so, when and how?

Where possible, legal aid is a preferable alternative to TPLF, particularly for class action cases; it eliminates third-party interest in class action litigation altogether and removes any conflict of interest for claimant law firms. While legal aid should be sufficiently restrained as to prevent abuse, a well-delivered system of legal aid can help to ensure expanded access to justice on reasonable terms. Taken together, these reforms will retain the legitimate consumer protection benefits of a relatively open class action system, whilst curbing the worst excesses of the current, TPLF-dominated system, in which business confidence and confidence in the integrity of the UK's legal system is at risk. These reforms will restore business confidence in the UK, as a good-faith jurisdiction in which innovation is not punished by excessive class action liability and will ensure that class action cases focus on the legitimate needs of consumers, rather than the profit motives of litigant funders and claimant law firms

16. Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?
17. Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?

Courts should be given a greater role in scrutinising LFAs, supported by a blanket requirement of basic disclosure. The regulator should also consider introducing provisions which address potential conflicts of interest between litigant funders, lawyers, and claimants. In particular, litigation funders should be prohibited from directing litigation strategy, while law firm employees should be prohibited from acting as directors of TPLF. Taken together, these measures would ensure continued public trust in the integrity of the UK's legal system, and ensure that class action cases are used as a legitimate tool for consumer protection, rather than a profit spinner for hedge funds. And in order to reduce potential risks to claimants who do not succeed in their actions, the FCA should consider strengthening security around cost arrangements, including by introducing a presumption in favour of a court deposit, unless an insurance policy "as good as cash" is produced. This provision would avoid leaving unsuccessful claimants on the hook for defendants' legal bills in cases which they would not have been able to pursue without TPLF.

18. Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?
19. What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?
20. Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?
21. Are there any reforms to portfolio that you consider necessary? If so, what are they and why?
22. Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?

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

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?
24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?
25. Is there a need to amend the Civil Procedure Rules in the light of the *Rowe* case? If so in what respects are rule changes required and why?

26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?
27. To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?

Questions concerning provision to protect claimants.

28. To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?

Since TPLF allows claimants to pursue their cases without any legal overheads, there is little risk for claimants and claimant law firms in advancing non-meritorious claims. TPLF also allows funders to exercise undue control or influence over litigation, to the detriment of courts, defendants, and claimants. For example, in some TPLF agreements in the United States, funders have insisted upon provisions that allow them to make strategic decisions like whether and when to settle, even if claimants would rather proceed to trial. Unlike lawyers, funders do not owe a fiduciary duty to the claimants that they support and may not be acting in their best interests. If funders are unhappy with the progress or status of a case, lax regulation of funding agreements could allow them to pull funding from cases altogether. Walter Merricks, the representative in the case of Merricks v Mastercard, ran into difficulty when Burford Capital Ltd. dropped out of funding his case after it was initially denied certification by the CAT in 2017. In the same vein, funding agreements often allow funders to take the first cut of compensation, ahead of claimants. In some US cases, funders have reportedly received over 40% of the proceeds of a case, before claimants have had an opportunity to receive their compensation. These arrangements can leave claimants with little or no compensation, particularly if lawyers also take a large winning fee, and if the number of claimants is particularly large. Of particular note, is the recent case of Bates v The Post Office, a high-profile example of a class action case, in which TPLF funders representing the claimants received approximately 80 per cent of the damages awarded. If a third party has a financial stake in a legal case, that third party will undoubtedly seek to control the case to their advantage. As a result, lawyers funded by that third party are also liable to be influenced by the third party, sometimes to the detriment of actual claimants. All of this creates an incentive structure in which claimant focused firms are incentivised to identify and push large class actions, in order to seek TPLF. Funders, in turn, encourage firms to seek these class actions while designing LFAs which benefit their financial interests rather than the compensatory interests of class action claimants.

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

Courts should be given a greater role in scrutinising LFAs, supported by a blanket requirement of basic disclosure. The regulator should also consider introducing provisions which address potential conflicts of interest between litigant funders, lawyers, and claimants. In particular, litigation funders should be prohibited from directing litigation strategy, while law firm employees should be prohibited from acting as directors of TPLF. Taken together, these measures would ensure continued public trust in the integrity of the UK's legal system, and ensure that class action cases are used as a legitimate tool for consumer protection, rather than a profit spinner for hedge funds.

31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?
32. What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?
33. To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?
34. To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?
35. Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.

Questions concerning the encouragement of litigation.

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:
    a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?
    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?
    When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.

TPLF is problematic for a variety of reasons. Allowing non-claimants to use courtrooms as a trading floor incentivises TPLF support for non-meritorious legislation. Litigation is extremely expensive and businesses generally seek to avoid, through settlement or mediation. Rather than engage in protracted litigation, many businesses prefer to settle cases, even when claimants are not pursuing a meritorious claim. However, since TPLF allows claimants to pursue their cases without any legal overheads, there is little risk for claimants and claimant law firms in advancing non-meritorious claims.

37. To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.

In order to curb the negative externalities of expanding class actions, decisive action is required. In particular, legislators should aim to introduce greater transparency into an opaque litigation funding sector, and ensure that competition law is fit for purposes, by ensuring that businesses institute mechanisms by which they can offer appropriate redress following adverse regulatory findings.

The most pressing area of concern is the inconsistent regulatory regime around TPLF, and the lack of regulatory oversight for litigation funders. Regardless of one's position on the value of the FCA's current remit, it is unquestionably the case that regulations should be applied evenly and consistently to sectors with sufficiently similar characteristics. The issue is not, per se, a lack of regulation, but the lack of consistently applied and enforced regulatory oversight – which even ardent supporters of deregulation should oppose. Even the most laissez-faire state requires the consistent application of rules in like-for-like cases. Similarly, whether or not the UK's class action system should permit TPLF is a question for legislators; however, consistent regulatory oversight of

TPLF should prove relatively uncontroversial, providing greater accountability and greater information for claimants, defendants, and the broader UK justice system alike.

In particular, a competent regulator (most likely the Financial Conduct Authority) should be given statutory oversight of the UK's litigation funding industry, in line with the reasoning developed in Australia's Brookfield case. This will ensure legitimate regulatory accountability for litigation funders. TPLF should be regulated in the same way as any other investment product. Once this regulatory competence has been established, the FCA should proceed in designing an appropriate regulatory regime for LFAs, with a view towards improving access to information and strengthening public trust in the integrity of the UK's legal system. In particular, courts should be given a greater role in scrutinising LFAs, supported by a blanket requirement of basic disclosure. The regulator should also consider introducing provisions which address potential conflicts of interest between litigant funders, lawyers, and claimants. In particular, litigation funders should be prohibited from directing litigation strategy, while law firm employees should be prohibited from acting as directors of TPLF. Taken together, these measures would ensure continued public trust in the integrity of the UK's legal system, and ensure that class action cases are used as a legitimate tool for consumer protection, rather than a profit spinner for hedge funds. And in order to reduce potential risks to claimants who do not succeed in their actions, the FCA should consider strengthening security around cost arrangements, including by introducing a presumption in favour of a court deposit, unless an insurance policy "as good as cash" is produced. This provision would avoid leaving unsuccessful claimants on the hook for defendants' legal bills in cases which they would not have been able to pursue without TPLF. Finally, legislators should also consider introducing new legislation which enshrines the PACCAR position on litigation funding agreements, wherein litigation funders cannot enforce contingent percentage-based LFAs. This will ensure that LFAs provide a more appropriate and proportionate benefit to litigant funders, curbing the worst excesses of a regime which currently benefits litigant funders to a greater extent than claimants.

In line with these recommendations, regulators should also consider applying further restrictions on foreign-backed TPLF, in order to mitigate the risk of cases such as A1. The risk of malicious foreign influence in the UK's class action system is considerable; as such, legislators should introduce new primary legislation, modelled on the proposed Protecting Our Courts From Foreign Manipulation Act of 2023. In particular, this legislation should introduce provisions for transparency around the ultimate source of funds underpinning legal actions, with specific provisions for transparency of foreign investments. In other words, funds used for TPLF should be transparently disclosed, and this information made available publicly ahead of litigation. Large foreign shareholdings in TPLF, particularly by national governments, sovereign wealth funds, or businesses in which a national government are a large stakeholder, should be prohibited altogether, in order to prevent the most obvious cases of foreign influence in the UK legal system. At the same time, anti-money laundering policies should be strengthened in regard to foreign TPLF, even in cases where this TPLF does not come from sources linked directly to foreign governments. FCA jurisdiction over the UK's litigant funding industry will aid in the design, application, and enforcement of these new regulations; the FCA already applies anti-money laundering regulations on other financial products, and is best placed to design a bespoke anti-money laundering regime for TPLF.

While these initial recommendations have focused on introducing more accountability for TPLF, legislators should also consider amending existing competition law to bolster business confidence in the face of expanding class action liability. In particular, a basic restriction on class action cases while businesses are seeking an appeal of regulatory finding should be introduced. A relatively modest measure, this change would ensure that businesses cannot be subject to class actions on contested issues, giving reasonable confidence to businesses that the appeals process will not be frustrated by the additional introduction of a time-intensive and costly class action. This change

would not prevent businesses from facing class actions after a final regulatory decision has been reached; it is not a blanket ban on class actions in any particular case type. This change merely ensures that class actions cannot be brought against businesses already contending against a high degree of uncertainty. Competition law should also be amended to introduce arbitration clauses as an expected feature of regulatory decisions wherein businesses might be expected to provide compensation. These clauses should provide details on how, to whom, and to what extent businesses could be expected to provide redress in the result of an adverse regulatory finding. This step would put the ball back in business' court when they fall foul of regulators, giving them the opportunity to provide adequate compensation without the need for legal proceedings. In the first instance, this change would give businesses a reasonable level of confidence that adverse regulatory findings will not be accompanied automatically by an expensive and lengthy TPLF-backed class action.

Finally, in order to reduce the UK's structural need for class actions and TPLF the Government should conduct a review into funding for courts and legal aid. Where possible, legal aid is a preferable alternative to TPLF, particularly for class action cases; it eliminates third-party interest in class action litigation altogether and removes any conflict of interest for claimant law firms. While legal aid should be sufficiently restrained as to prevent abuse, a well-delivered system of legal aid can help to ensure expanded access to justice on reasonable terms. Taken together, these reforms will retain the legitimate consumer protection benefits of a relatively open class action system, whilst curbing the worst excesses of the current, TPLF-dominated system, in which business confidence and confidence in the integrity of the UK's legal system is at risk. These reforms will restore business confidence in the UK, as a good-faith jurisdiction in which innovation is not punished by excessive class action liability and will ensure that class action cases focus on the legitimate needs of consumers, rather than the profit motives of litigant funders and claimant law firms. The UK must not wait until it reaches the untenable position of jurisdictions such as the US or Australia before it takes action. A quick and decisive package of reforms now could prevent long-term damage to UK plc.

38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?

General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?[7]

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