

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 – except for our response to Question 1, which is confidential
First name:	Sapna
Last name:	Malik
Location:	London
Role:	Joint Head of International & Group Litigation
Job title:	Equity Partner
Organisation:	Leigh Day
Are you responding on behalf of your organisation?	Yes
Your email address:	

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ [REDACTED]

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

In our experience, TPF does help promote equality of arms between parties to litigation. Not only by assisting with cashflow when acting in protracted and complex litigation pursuant to Conditional Fee Agreements or Damages Based Agreements, but also enabling the funding of often very significant disbursements, including expert fees, the commissioning of complex technical reports, counsel fees and often very sizeable ATE premiums.

Post April 2013 and the Jackson reforms to CFA success fees and recoverability of ATE insurance premiums, without TPF it would largely be financially impossible for claimant groups to hold deep-pocketed corporations to account, particularly for claims falling outside the Qualified One-Way Costs Shifting (“QOCS”) regime.

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

The existence of TPF – and the success of claims supported by TPF – should have a deterrent effect on consumer, employee and environmental abuses and harm by the would-be wrongdoers, knowing that those adversely impacted by their acts or omissions are more likely and able to seek redress.

If respondents are aware that claimant legal representatives have been provided with third party funding they will also be aware that the case has been vigorously and independently vetted for merit, which may incentivise early resolution.

In addition, respondent tactics aimed at delay or generating costs (e.g. peripheral litigation, disclosure ‘dumps’) will have reduced effectiveness. This furthers the interests of the overriding objective and reduces the chances that access to justice will be hampered by mounting costs.

More generally, in our experience, the process of obtaining TPF requires the claimant group and their legal team to provide detailed information to an independent third party concerning their case theory, projected budgets, anticipated counter-arguments, litigation risks and the overall merits of the claim. Reporting obligations during the course of the litigation means that the funder is informed of key developments as the claims progress. In this way, the TPF process ensures that high value claims, which often involve significant Court resources, are only initiated (and progressed) where the cases have good prospects of success – thereby suppressing rather than incentivising the growth of spurious litigation. Indeed, recent reports have suggested that most third-party funders typically reject over 95% of applications.² Consequently, if as we maintain TPF is a fundamental tool in providing access to justice, provision should be expanded rather than curtailed.

² <https://www.lawgazette.co.uk/commentary-and-opinion/post-office-scandal-litigation-funding-is-not-the-villain/5118419.article>

4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?³ If not, what improvements could be made to it?

We consider that the current regulatory framework surrounding third party funding -including the regulation of the legal profession and judicial oversight of cases before the Court - does generally operate sufficiently to regulate third party funding.

Having said that, we recognise that the collapse of SSB Law has called in to question the role of the Solicitors Regulatory Authority ("the SRA") in adequately regulating some bulk claim firms and note that the Legal Services Board is due to report into the matter this year.

A potential improvement would be to make it mandatory for all funders operating in England and Wales to become members of the Association of Litigation Funders ("ALF") and to comply with the ALF Code of Conduct ("the ALF Code"). This would increase transparency and accountability across the TPF market, particularly if an annual report was required of the ALF and its members which could be readily accessed by those with concerns around the TPF market. In addition, the ALF Code could be given more teeth, by building in a redress scheme to deal with alleged breaches of the Code.

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;⁴
 - 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.

Potential for Improper Influence of a Funder

One risk is that a third-party funder may seek to influence the conduct of a claim, for example by exerting pressure to settle/settle at a particular level or withholding funds. This is a potentially serious risk as it may run contrary to the interests of the funded party. However, where the funded party is represented by a solicitor, such risk is mitigated by the solicitor's duty to act in a client's best interests, as regulated by the SRA.

We note that the ALF Code provides that members should not seek to influence the funded party's legal teams to release control or conduct of the dispute to the funder. However, membership of ALF is voluntary and the ALF Code itself has little teeth without a redress mechanism.

³ This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

⁴ 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.

Crucially, the recent decision in the Competition Appeal Tribunal (CAT) (21.2.25), in the collective action between MasterCard and Walter Merricks⁵, representing 44 million UK consumers, is a good example of how the funded-party's legal representatives and Courts can keep any potential influence from a third-party funder in check: In MasterCard, Innsworth Capital, objected to the settlement reached between the parties on the basis that it was significantly below the figure at which the claim, and presumably therefore Innsworth's estimated 'take home' fee, was valued (£200m vs £10bn). Innsworth challenged the settlement, however the CAT dismissed the funder's concerns emphasising several key points, including:

- The reasonableness of the settlement reached, factoring in the uncertainties of litigation continuing etc.
- Efficiency and costs, making settlement a pragmatic resolution; and
- Public interest in settlement, encouraging settlement it was deemed promotes access to justice.

The CAT's robust judgment in MasterCard sends a clear message to all TPF providers that funders cannot improperly influence or control settlement decisions – ensuring that the legal representatives and the parties remain the key decision makers, alongside the Court, in determining the course of the litigation, and particularly its resolution, even when funded by powerful TPF providers.

Capital Adequacy

Another risk is that the initial funding arrangement may not adequately reflect the actual cost of the litigation. This may be due, for instance, to overly optimistic initial budgets or to the case taking longer than anticipated or due to additional costs associated with peripheral litigation and the tactics pursued by the counter-party.

If funding runs out, a claimant firm will have an obligation to existing clients that it may be hard pressed to meet. This would mean that in any negotiation for further funding, the legal representatives and the third party funder would be on an uneven footing, however, the funder would also have an interest in seeking to prevent the litigation from collapsing for this reason.

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 proceedings⁶ should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?⁷
 - 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

⁵ Walter Hugh Merricks CBE v Mastercard Incorporated and Others.

⁶ Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.

⁷ Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?

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

Control and influence of the litigation

Although this is generally regulated by the principles of champerty and maintenance, funders may still seek to influence the running of the litigation, particularly the level of any settlement (as recently seen with the *Merricks* settlement). It is important that lawyers representing the funded party are able to fulfil their role in advising their clients in an unfettered way.

In *Merricks*, the CAT approved the settlement, despite the funder's objection. We also note that the ALF Code requires funder members: "*not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder*", albeit with no redress mechanism for any breach/over-reach.

Capital adequacy

As noted above, capital adequacy is another area of concern. While some law firms may be able to continue running a funded case if they under-estimated the initial cost and the funding runs out, many firms will not be in such a position - but that is perhaps an area for the SRA to monitor.

The ability of a funder to meet all its liabilities through the litigation is essential. We note that the ALF guide to the ALF Code states:

The Code requires funders to maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months.

However, without more robust enforcement and reporting mechanisms across the TPF market, via the ALF for example, this sensible statement in the Code is little more than a guideline as it currently stands.

8. What is the relationship, if any, between third party funding and litigation costs? Further in this context:
- What impact, if any, have the level of litigation costs had on the development of third party funding?
 - What impact, if any, does third party funding have on the level of litigation costs?
 - To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?
 - How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?⁸

⁸ Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

- 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?

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

Third party funding may enable a costly case to be pursued but does not of itself increase the costs over and above what is needed in the interests of equality of arms. The incentive to avoid escalation of costs, at least on the part of claimant representatives, remains the same irrespective of the involvement of a funder. Further, as evidenced in the recent cost budgeting exercise in the Pan-NOx Emissions Group Litigation, the Court maintains a powerful role in managing cost budgets and, thus recoverable costs and expenditure, in largescale funded litigation.

Should the costs of litigation funding be recoverable?

As exemplified by the widely reported funding issues involved in the Post Office litigation the cost of TPF can have a very significant impact on the compensation ultimately paid out to claimants, particularly where their legal battle has been complex, hard won and expensive – not least due the conduct of their opponent.

This could potentially be remedied by giving the Courts powers to allow for the recoverability of success fees, ATE premiums and/or litigation funding costs, in some instances. This would create a discretionary power for the Courts to ensure that claimants' damages are not significantly reduced by TPF costs at the end of a hard-won case, as per the Post Office litigation. Such a discretion might only be exercised in the most egregious cases, where the conduct of the defendant has caused a significant increase in the cost of the litigation.

It is our understanding that in some instances recoverability of such costs is still facilitated in other legal forums such as arbitration matters.⁹

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

The recoverability of adverse costs and/or security for costs can inhibit access to justice if purchasing adequate ATE cover becomes prohibitively expensive, particularly in non-personal injury claims that do not benefit from QOCS. Where a case has TPF, the funder will usually fund the ATE premium (increasing its overall return on success), but for modest yet important claims with limited funding options this may not be viable, or the return on the funding of an ATE premium alone may not be economically worthwhile for the litigant.

The *Arkin cap* limited a litigation funder's exposure to adverse costs to the amount of funding it had contributed. Subsequent decisions have moved away from operation of this cap. The lack of a reliable adverse costs cap does not appear to have cooled the market for TPF,

⁹ <https://www.lawgazette.co.uk/commentary-and-opinion/post-office-scandal-litigation-funding-is-not-the-villain/5118419.article>

although funders may be more inclined to insist on sufficient ATE insurance (with anti-avoidance endorsements) and/or may demand a higher percentage of proceeds to offset risk.

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

Yes, but limiting exposure to the amount of funding they have provided and subject to the discretion of the Court.

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?

In our experience TPF is often secured by working with brokers who have good oversight of the TPF market: A broker may set up a number of initial discussions with potential providers - who may then offer terms. This means that on some cases there is competition between TPF providers to ensure that the terms are as favourable to the potential claimant group as possible in seeking to ensure that their term sheet is favoured.

At present we consider that market forces alone are sufficient in controlling the costs of funding at source.

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?

Outside of the CAT, which understandably takes a proactive role, we do not consider that TPF arrangements should be subjected to a mandatory cap. This this would unnecessarily fetter negotiations between legal representatives and prospective funders. The funder’s return will vary depending on the nature of a case (e.g. the anticipated length of litigation and the risk profile). Setting a cap may have the consequence of reducing available funding for more complex litigation and thus limiting access to justice.

Champerty already safeguards against funders unreasonably profiting at the expense of the client.

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?

See above.

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.

Advantages:

- Can provide equality of arms
- Makes complex, large and lengthy litigation possible where the costs involved could not otherwise be met
- In collective actions/group claims it allows access to justice for individuals who could not pursue a case alone as the costs would outweigh the potential award
- May encourage early resolution where an opponent is aware that claimants have sufficient funding to stay the course and will not be forced out due to lack of funds
- May discourage opponent tactics aimed at delay and increasing costs
- Sends a message to the opponent that merits have been independently assessed as positive
- In group claims it potentially allows funds to be expended on publicising a case which increases access to justice

Disadvantages:

- If a funding agreement is poorly negotiated at the outset or if the costs of litigation exceed those initially anticipated it can leave claimants and their legal representatives vulnerable
- Legal representatives with little experience of entering into or negotiating TPF agreements, may inadvertently agree to unfair terms, leaving their clients and themselves with a poor outcome even in a successful claim.
- Funders may seek to exert undue influence, obliquely or overtly, to reduce their exposure and/or maximise their returns
- As the example of SSB Law shows, without sufficient oversight, claimants may be left vulnerable if a firm or funder overextends itself.
- If TPF becomes focussed on particularly lucrative areas of the law this may super-charge some areas of litigation, whilst others struggle to access TPF and there is a consequent impact on access to justice. To remedy this, TPF needs to continue to develop in hand with other funding sources, e.g. social impact and/or philanthropic funding etc. TPF offers a good solution for some cases, but as set out above, is unlikely to assist claimants in lower value cases who cannot evidence that there is sufficient value in the claim to make TPF viable for example.

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?

Trade Union Funding - provides access to justice for members, especially in employment or personal injury claims, often at no cost to the claimant, but it is usually limited to specific types of cases and claimants and excludes commercial disputes.

Legal expenses insurance ("LEI") – is usually limited in amount of cover and scope – often seeking to restrict legal representation to panel membership. A plethora of LEI products makes it unwieldy and impractical for largescale and complex group litigation.

CFAs and DBAs - are often used in conjunction with TPF - frequently capping any deduction from client damages.

Pure funding - is rarely available or appropriate for largescale and complex litigation.

Crowdfunding – is appropriate in public interest claims, usually for non-damages claims, such as public law challenges – it is unlikely to generate sufficient funds or interest for largescale compensation claims.

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?

Other than trade union funding for some types of claims, the alternatives set out above are inappropriate for meeting the cost of largescale and/or complex collective claims. This directly impacts the viability of such claims and, in turn, access to justice for some Claimants.

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?

Regulation/legislation is anticipated to reverse the uncertainty created by *R (PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28.

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?

In our experience LEI purchased by consumers through credit cards, house insurance etc, is very often inadequate to support the types of litigation that a claimant wishes to bring, or there are carve outs for actions involving, for example, personal injury other than trauma/RTA, product liability litigation, and very often any type of legal action brought via a Group Litigation Order.

We would welcome better auditing and regulation of LEI in the UK: Consumers continue to pay for LEI, but very often when they need to access this insurance, it is non-responsive and/or it can be difficult for claimants to get clear answers from their providers.

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

The case of *Rowe v Ingenious Media Holdings Ltd* raised significant issues regarding litigation funding and the disclosure of funding arrangements, particularly ATE insurance policies and potential liabilities of funders.

In the *Rowe* decision the Court of Appeal emphasised that TPF providers ought to be properly capitalised in order to meet potential adverse costs orders, such that security for costs orders are not necessary. This links back to the above points regarding the importance of ensuring sufficient funding capital is in place from the outset, and that this is properly addressed in TPF contracts. These principles are already within the ALF Code, and so, on our analysis, the *Rowe*

judgment underscores the need for wider ALF membership and compliance rather than CPR reforms .

Clarifying the extent to which funders are liable for adverse costs, particularly when they have a significant control or financial interest in the case would enhance predictability and lead to less satellite litigation.

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?

As has been experienced in the ongoing largescale Pan-NOx Emissions Group Litigation, the Court already has wide case management powers to enable the efficient and effective management of claims supported by TPF once proceedings have commenced, including through cost budgeting and innovative case management techniques (such as regular progress meetings before the Managing Judge(s)).

The Court already has a role in pre-action conduct to encourage resolution and appropriate behaviour through the relevant pre-action protocols and the costs regime, which take into account *inter alia* the parties' conduct at the pre-action stage.

We do not consider there is any need to change the role the Court currently has in respect of claims supported by TPF.

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?

A high degree of transparency as to the existence and nature of the specific terms of litigation funding already exists in the CAT. Beyond CAT claims, we do not consider that a similar level of disclosure is required. Indeed, disclosure of the terms of such funding arrangements to an opponent could provide them with significant strategic advantage and privileged information in conflict with the overriding objective.

Questions concerning provision to protect claimants.

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

Third-party funders should not seek to influence or exercise control over the litigation, although they are entitled to monitor their investments and ask probing questions/seek information from the legal teams they are funding.

The ALF Code stipulates that third-party funders should not exercise control over litigation and this should be clearly specified in any funding agreement.

We refer to our comments above re the recent *Merricks* judgment by the CAT.

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

In general, we have not experienced differing effects of alternative funding mechanisms on the settlement of proceedings. Usually, a funder will listen to the advice and recommendations of the legal representatives as to whether a proposed settlement is appropriate (taking on board litigation risks) – possibly obtaining their own legal advice as a second opinion. The *Merricks* judgment by the CAT demonstrates the primacy of the parties' instructions and their legal advice over funder influence in settlement decisions, and the importance of the Courts in enforcing this primacy.

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?

Beyond opt-out CAT claims we do not consider that the Court should be required to approve the settlement of proceedings where they are funded by TPF or other providers of litigation funding (other than where claimants are protected parties such as minors or those lacking capacity).

31. If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?

As above

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?

Professional legal services are already substantially and adequately regulated by the SRA. Lawyers owe professional and fiduciary duties to their clients, which supercede the requirements of a funder if interests diverge. In order that all those involved in bringing and funding a case are clear about where control of the litigation lies, third-party funders should be required to abide by the ALF Code (or similar). We do not consider that additional regulation is required at this stage.

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

The SRA Code of Conduct requires solicitors to advise their clients of funding provisions and options to enable them to make informed decisions. This may include ensuring that a client understands how a funding offer compares with other available funding products (e.g. insurance).

TPF is often accessed through brokers and there may be approaches made to multiple potential funders on any case: This enables the claimants' legal representatives to compare and contrast different funding proposals to ensure that they obtain the most advantageous for their clients. The nature of all solicitors' regulatory obligations means that they must act in their clients' best interests in negotiating and securing TPF.

In the Pan-NOx Emissions Group Litigation, at various intervals the publication Money Saving Expert provided comparisons of key fee agreement terms offered by competitor legal

representatives (which in turn may be impacted by the TPF agreements underlying them), as well as consumer ratings on Trust Pilot, to assist potential clients making informed choices.

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

Conflicts of interest should not arise where legal representatives abide by their duty to act in their clients' best interests. Any third-party funding agreement should specify that a litigation funder will not seek to influence the conduct of the case.

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.

A combination of the ALF Code and the already heavily regulated legal profession is sufficient to guard against conflicts of interest.

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.

As set out above, in our view TPF has the effect of reducing the potential for spurious litigation, because of the robust nature of discussions between the funder and the legal advisors during the negotiation of the TPF agreement. It is our understanding that in 95% of all applications TPF is refused, on that basis and with an eye to the commercial interests of the funder we maintain that it is likely that TPF acts as a further filter against non-meritorious claims.

The economics of group actions, whether they are brought on an opt-in or opt-out basis, may more readily lend themselves to attracting TPF on the basis that the ratio between the costs involved versus the overall quantum is likely to be more favourable. This is particularly so for competition cases which remain the only area of law in the UK for which opt-out proceedings are available. The fact that opt-out competition cases have attracted significant TPF in the last 10 years has fuelled the development of this area of law in the UK thereby facilitating access justice for UK consumers and creating an important area of commercial growth for the UK more generally.

The Representative Actions Directive (RAD) now being implemented across the EU will mean that in most EU jurisdictions, litigants will have access to 'opt-out' proceedings across a range of different legal issues – not just in a competition context. It is anticipated that this will facilitate better access to justice for claimants in the EU, and also attract significant TPF investment. This is likely to widen the justice gap between litigants in the UK versus those in the EU, and TPF providers may well be more inclined to fund cases in the EU than in the UK to the detriment of UK based claimants and the UK legal sector.

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.

We anticipate that this response is beyond the scope of this submission, however, as set out above, wider systemic reforms to facilitate 'opt out' legal actions beyond the competition law sector in the UK, as per the RAD in the EU, would better facilitate access to justice in the UK for claimants, stimulate the TPF market in the UK and ensure that the UK's legal sector does not become further adrift from the EU commercially.

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?

Annual reporting by the ALF based on data contributed by their members may assist litigants in evaluating the suitability of TPFs.

General Issues

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

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