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:	**Seema**	**Kenny**
Last name:	**Kennedy**	**Henderson**
Location:	**London**	**London**
Role:	**Executive Director**	**Partner**
Job title:	**Executive Director**	**Partner**
Organisation:	**Fair Civil Justice**	**CMS**
Are you responding on behalf of your organisation?	**Yes**	**Responding on behalf of FCJ**
Your email address:	[redacted]	[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.

Fair Civil Justice – CJC Review of Litigation Funding

Introduction

Fair Civil Justice ("**FCJ**") welcomes the opportunity to respond (the "**Response**") to the Civil Justice Council's ("**CJC**") Review of Litigation Funding, Interim Report and Consultation (the "**Consultation**").

FCJ is a UK-legal reform campaign group which was established in December 2022. It is formally backed by the British Chambers of Commerce, the UK Finance and Leasing Association, the U.S. Chamber of Commerce Institute for Legal Reform, the European Justice Forum and British American Business. It is also supported by scores of companies and business organisations that are active across a range of sectors of the UK economy.

FCJ aims to promote a balanced legal environment in the UK that protects the interests of consumers, businesses, and the public sector. FCJ supports access to justice as an important element of our civil society, but considers that litigation should be a last resort. Ombudsmen systems and voluntary redress schemes are more efficient, less stressful for the participants and avoid increasing the burden on our already overstretched courts. Where litigation is brought, FCJ argues for stronger safeguards for all and for consumers in particular.

The UK TPLF market has grown enormously in recent years, most visibly in the rapidly expanding number of class actions. The "light touch" approach of self-regulation is no longer fit for purpose, including because many TPLF providers do not adhere to the Code of Conduct of the Association of Litigation Funders ("**ALF**"). Regulation is not only in the interests of users of TPLF, but it will also assist in protecting the reputation of the English judicial system.

Regulation is not necessarily negative. Consumers benefit from statutory protections in most areas of commerce and lack of regulation in TPLF is an outlier rather than the norm. As outlined by Professor Robert Baldwin, "*Regulation is a positive thing for consumers, investors and business organisations alike. Think about it in these simple terms: would you buy toys for your children that were unsafe? Would you invest in a toy manufacturing company that sold risky merchandise? Or would you expose your business to class action lawsuits by cutting corners on the toys and playthings you sell to families*".[1] FCJ considers that the case for statutory regulation of TPLF is compelling and that the real issue is over the shape and content of the regulations. Well structured regulations will have limited impact on the TPLF industry but will better protect participants in litigation and will also protect the reputation of the English court system.

Our response to question 5 at paragraphs 5.1 to 5.81 below sets out a proposed framework for regulation. Those proposals are intended to address identified concerns in a balanced manner. FCJ's proposals do not include precise proposed statutory or regulatory language. Should the CJC

[1] Prof. Baldwin R, "The case for regulation has never been more acute. The trouble is that we only care about regulation when something goes wrong" (London School of Economics and Political Science Executive Education) <https://www.lse.ac.uk/study-at-lse/executive-education/insights/articles/the-case-for-regulation-has-never-actually-been-more-acute.-the-trouble-is-that-we-only-care-about-regulation-when-something-goes-wrong>.

recommend formal regulation of TPLF further work will be required to formulate precise regulations. FCJ would be glad to assist in any dialogue on the precise shape of regulation in due course.

FCJ's Response does not reply to every question in the Consultation either because particular questions are outside FCJ's key areas of focus or because we deal with the substance of a question elsewhere.

1. QUESTION 1: TO WHAT EXTENT, IF ANY, DOES THIRD PARTY FUNDING CURRENTLY SECURE EFFECTIVE ACCESS TO JUSTICE?

1.1 In addressing this question, it is important to consider what is meant by "access to justice". Access to justice is a fundamental right and a core component of the rule of law. FCJ considers that access to justice should be measured by reference to outcomes, whether achieved through the litigation process or by less adversarial approaches. **Access to justice should not solely be measured by the availability of means to enter into litigation**.

1.2 A challenge in measuring any correlation between TPLF and effective access to justice is the lack of transparency in this sector. As FCJ sets out in its response to question 27 below, there is no obligation under English law to disclose[2] when TPLF is being used to fund a case, which means that the court and the defendant(s) to a dispute will be unaware of a combination of: (i) its existence; (ii) the terms of the Litigation Funding Agreement ("**LFA**"); (iii) why a certain lender is funding, (iv) who or what other entities may be sitting behind the Third Party Litigation Funder ("**TPL Funder**"); or (v) who is really controlling the litigation process and to what extent. Furthermore, there is no single source of information on the growth of TPLF in the UK, its profitability as an industry or the outcomes of funded cases. We comment on growth at paragraph 4.4.2 and Annex A and profitability of TPLF at paragraph 4.20.1 and Annex A. The lack of transparency and of publicly available information makes any evidence-based analysis more challenging.

1.3 Entry into litigation is not a useful measure in assessing access to justice. Outcomes are key: "good outcomes" for claimants can take different forms. Financial compensation is the most obvious form, but some claimants prioritise drawing public attention to wrongs they have suffered. For others, vindication is key; whether in the form of an apology or a judicial finding.[3] In some cases, particularly for more egregious conduct, participants prioritise cross examination of key witnesses.

1.4 Recognising both that access to justice should be measured by reference to outcomes and also that access to justice can take different forms, **there is no evidence to show a correlation between volume of TPLF-funded cases and effective access to justice**. The most important source of such information would be the views of persons who have litigated claims that were supported by TPLF: the participants' subjective view of outcomes achieved must be a key element of measuring access to justice.[4] FCJ is unaware of any reliable and objective study which has gathered the experience of such persons to ask whether they consider that TPLF assisted with securing effective access to justice.[5] FCJ respectfully suggests that if time permits, the CJC should consider gathering this type

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[2] Except under the Competition Appeal Tribunal's Collective Proceedings Order Regime where part of the criteria for authorisation to act as a proposed class representative and certification involves satisfying the Tribunal that they will be able to: (i) pay the defendant's recoverable costs if ordered to do so (CAT Rules 2015, Rule 78(2)(d)); and (ii) be able to fund its own costs (Rule 78(3)(c)(iii).

[3] Whether on liability or on particular findings of fact.

[4] There have been a number of instances where litigation supported by unregulated TPLF has not led to good outcomes for funded participants and has sometimes led to very bad outcomes. We set out more detail on those instances at Annex B.

[5] Albeit paragraphs B.3-B.6 of Annex B outlines the Legal Negligence and Mismanagement Campaign Group, which campaigns on behalf of persons including those who consider they have suffered bad experiences in funded litigation.

of evidence. The limited empirical evidence available indicates that the general public are very sceptical about the extent to which class actions[6] deliver access to justice, "*the largest majority still believe that lawyers and TPL Funders stand to benefit most.*"[7]

1.5 Although FCJ is unaware of reliable sources indicating any correlation between TPLF and access to justice, there is clear data showing a steep increase in the volume of litigation being supported by TPLF and the amount of money investors are allocating to UK lawsuits.[8] We make the following observations on the growth of TPLF:

1.5.1 First, capital is drawn to returns. The primary reason for the rapid growth of the TPLF sector in the UK is its profitability. That profitability attracts further capital, which is invested in more litigation.

1.5.2 Second, TPLF providers are profit seeking enterprises. They are investors and TPLF is an asset class,[9] and a growing one at that.[10] Investment decisions are not made by reference to access to justice. Different TPLF providers will have different investment criteria, however they typically include factors such as: substantive merits of the claim; whether there is sufficient quantum for the TPL Funder to make a return where measured against the costs of the litigation; any concerns on enforcement; and the defendant's perceived propensity to settle.[11] So-called "good" prospects are often considered to mean prospects of 60% or above.[12] **Put differently, access to justice can be a byproduct of TPLF (as can bad outcomes) but it is not its purpose**.

1.5.3 Third, TPL Funders only support a very small minority of cases; "*Litigation funders accept very few funding opportunities which are pitched to them.*"[13] TPL Funders only support *"3 – 5% of funding opportunities"*[14] and "*most funders typically*

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[6] Which can serve as a proxy for TPLF on this topic.
[7] Reputation and Accountability: Class Actions, ESG and Values-Driven Litigation' (Portland Communications, 27 November 2024) <https://portland-communications.com/publications/reputation-and-accountability-2024/>.
[8] Our response to question 4 at paragraph 4.4.2 and Annex A sets out the growth of TPLF in the UK
[9] "*While its growing fast, litigation finance is still relatively unknown. It's evolving as a market, and there's a trend towards multi-claim portfolios rather than single-use cases emerging. Ultimately, it's one of the most attractive alternative asset classes and is generally considered to be recession proof.*" - Colman J, 'Litigation Funding: Guide to Returns, Risks, and Diversification' (*Hays Mews Capital Group*, 7 August 2024) <https://www.haysmewscapital.com/news/litigation-funding>; "*As a growing alternative asset class that is not correlated to the equity and bond markets, it represents a uniquely attractive opportunity for investors*." - VWM Capital, 'Litigation Funding: What Is It and How It Works' (18 January 2024) <https://vwmcapital.com/insight/litigation-funding-what-it-is-and-how-it-works>.
[10] "*TPLF is a growing asset class. Estimating the fair value of TPLF assets can be difficult due to the lack of publicly traded comparables and the bespoke nature of individual litigation claims. The valuation of these assets can be extremely complex.*" - Houlihan Lokey, *A Valuation Framework for Litigation Finance Assets* <https://hl.com/insights/a-valuation-framework-for-litigation-finance-assets/>.
[11] One such funder, Augusta, reportedly conducts a three-part due diligence process before agreeing to fund a particular case. Augusta Ventures, 'How Augusta Can Support Your Commercial Litigation Claim' <https://www.augustaventures.com/news/how-augusta-can-support-your-commercial-litigation-claim/>.
[12] Mulheron R and Cashman P, 'Third Party Funding of Litigation: A Changing Landscape' (2008) 27 *Civil Justice Quarterly* 312 - 341.
[13] Mulheron R, 'A Review of Litigation Funding in England and Wales' (2024) *Queen Mary University of London* <A-review-of-litigation-funding.pdf>.
[14] Mulheron R, 'A Review of Litigation Funding in England and Wales' (2024) 10 *Queen Mary University of London* <A-review-of-litigation-funding.pdf>.

reject over 95% of applications"[15] meaning that the cases approved for TPLF are typically either: (i) high value cases, or (ii) commoditised cases (portfolio funding).

1.5.4 The low proportion of cases funded by TPLF **is in the present circumstances of absence of regulations and rapid influx of capital**. It is therefore clear that TPLF is not, and cannot be, a "solution" to access to justice more generally. Indeed, the industry appears to accept this and also to acknowledge that it is motivated by profit making rather than being to deliver access to justice. According to the Insurance Information Institute, "*Financing practices of third-party litigation funding have evolved beyond the justice mandate, becoming a cash fountain within the alternative investment space where there is less regulation and more speculative investors. This expansion of investor types over recent decades has made the TPLF less about supporting the right to seek justice and more about enabling speculative profitseeking for investors pursuing returns substantially higher than the stock market*" and as such, it is "*no longer about David vs Goliath, but about speculative investors getting richer as they focus on cases more likely to win the big settlements*."[16] Sean Kevelighan, CEO, Triple-I stated: "*Third-party litigation funding (TPLF) has devastatingly become a multi-billion-dollar global industry, turning lawsuits into investments at the expense of societal good*."[17]

1.5.5 Fourth, the area of litigation which is supported by TPLF which has seen most rapid growth in the UK in recent years is of opt-out class actions, in particular competition class actions brought in the name of consumers under the Collective Proceedings Order regime (the "**CPO Regime**"),[18] within the UK Competition Appeal Tribunal (the "**CAT**"). It is highly questionable whether that mechanism will deliver meaningful access to justice:

(a) For most opt-out claims, following settlement or an award of damages the class members must elect to participate in the distribution stage in order to receive a share of the settlement or damages. Thus, this process could be described as "delayed opt-in". Because such distribution is an opt-in exercise that requires a positive act from class members, often in circumstances where the individual sum of money for class members is low value, take up rates could be very low indeed. In 2019 the U.S.

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[15] Ishikawa T, 'Post Office Scandal: Litigation Funding Is Not the Villain' Law Gazette (19 January 2024) <https://www.lawgazette.co.uk/commentary-and-opinion/post-office-scandal-litigation-funding-is-not-the-villain/5118419.article>.

[16] *"The amount of commercial litigation funding captured by large law firms further dispels the David versus Goliath narrative as 41% of total commitments in 2021 across the funders were allocated to "big law", firms ranked in the AmLaw 200 according to gross revenue. Among all 2021 portfolio commitments, 53% were earmarked for big firms. That amount was a seismic increase (up 488%) from 2020, mainly due to a small number of $50 million plus deals. Only 34% of TPLF deals with large law firms were designated for client-directed, single-matter deals, indicating TPLF may play more of a role in keeping law firms profitable across their case load than in empowering individuals to fight for justice."* - Insurance Information Institute, Third-Party Litigation Funding: Overview and Implications (27 July 2022) <https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf>.

[17] Insurance Business Magazine, 'Triple-I Calls Out Third-Party Litigation Funding' (28 July 2022) <https://www.insurancebusinessmag.com/us/news/breaking-news/triplei-calls-out-thirdparty-litigation-funding-414765.aspx>.

[18] By the end of 2023, claims encompassing in excess of 540 million class members had been filed under the CPO Regime with the vast majority of those class members being party to opt-out claims rather than opt-in claims CMS, "European Class Action Report 2024" (2024) <https://cms.law/en/media/international/files/publications/publications/cms-european-class-action-report-2024?v=4>.

Federal Trade Commission published a comprehensive study showing that the median take-up rate for consumer class actions was just 9%.[19] The CPO Regime has seen very few settlements to date and so there are very limited UK data, but distribution is a question of practicalities and the extent to which class members respond to the incentive of receiving an individually often small sum of money, and therefore there is no reason to think that distribution rates in the UK will be materially higher than in the U.S. In the judgment approving the settlement between the class representative and Stagecoach South Western Trains Limited the CAT expressed concern at anticipated low take up rates, "*the actual class member claims may well be significantly lower than a 10 per cent take up*".[20] In the *Walter Hugh Merricks CBE v Mastercard Incorporated and Others ("**Merricks**")* settlement - that was approved by the CAT in February 2025 - the evidence submitted by Mr Merricks stated that the claim administrator considered that a take-up rate of approximately 5 per cent was "*a realistic estimate*".

(b) There are also recent examples of funded collective actions seeking trivial amounts on a per customer basis compared to substantial amounts that TPL Funders stand to receive.[21] For instance, the high profile Merricks claim has been settled in principle (the settlement is subject to approval from the CAT) for £200m, which is a very small figure relative to the original stated value of the claim of over £10bn.[22] Reports indicate that the Mastercard claimants could receive as little at £2.27 each, while the TPL Funder Innsworth Capital would be paid around £45.57m to cover incurred and future costs, together with a further £54.43m as a return on the funds it provided, depending on the number of people who come forward to make a claim.[23] Similarly, in the proposed opt-out

[19] Federal Trade Commission, "Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns" (2019) <https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf>.

[20] *Justin Gutman v (1) First MTR South Western Trains Limited and (2) Stagecoach South Western Trains Limited* [2024] CAT 32 at paragraph 100. Note, per the collective settlement judgement, the settlement value is up to £25m plus Ringfenced Costs of £4.75m. The Class Representative will separately get £750,000 costs of the distribution. The headline figure in the proposal is £25m but at settlement and to date the final figure has not yet been established. The settlement is based on a structure whereby the figure to be paid out is to be a minimum of up to £10.2m (including any payment of Non-Ringfenced Costs, subject to the order of the Tribunal) and any more is going to be subject to there being valid total claims exceeding that 'up to' a maximum of £25m. At the time of settlement, however, the tribunal doubted that £10.2m would be exceeded. The settlement funds have been split up into three pots differentiated by the level of evidence a claimant needs to provide to make a claim. Pots 2 and 3 are capped at a maximum of £100 and £30 per claimant, respectively. The claim submission deadline was 10 January 2025 and therefore final figures are yet to be established.

[21] In the 2024 collective proceedings by Vicki Shotbolt (funded by Bench Walk Advisors) against Valve Corporation, the PCR provisionally estimates that there are approximately 9.3 to 14.2 million class members falling within the proposed class, and that each proposed class member will recover between a meagre £22 and £44 in total.

[22] See *Walter Hugh Merricks CBE v (1) Mastercard Incorporated, (2) Mastercard International Incorporated and (3) Mastercard Europe S.P.R.L 1266/7/7/16* "Summary of collective proceedings claim form" CAT <https://www.catribunal.org.uk/sites/cat/files/1266_Walter_Hugh_Summary_210616.pdf>.

[23] Prior to Innsworth Capital stepping in to fund the case, Merricks had previously been funded by Burford Capital. In one notable judgement of 21 July, 2017 (regarding the application for a collective proceeding order) it was stated by the CAT that Burford could

collective proceedings in the CAT in *Waterside Class Limited v Mowi ASA & Ors*, the Proposed Class Representative (the "**PCR**") estimates that each member of the proposed class (estimated to be between 35,665,000 – 44,241,000 persons) will recover on average approximately £1.97 – £10.71.[24] Further, in the proposed opt-out collective proceedings in *Professor Carolyn Roberts v Thames Water Utilities Limited Ors*, the PCR estimates that each member of the proposed class (estimated to be 11.46 million persons) will recover on average approximately £13.89.[25]

All of these claims will tend towards very low distribution rates and there is therefore no credible basis for arguing that they deliver meaningful access to justice.[26]

1.6 Lastly, FCJ contends that access to justice is frequently more efficiently – and less traumatically – delivered via means other than litigation.[27] Litigation should always be a last resort. Voluntary redress schemes and well-structured ombudsmen processes will tend towards better outcomes and avoid burdening the courts. It is important that litigation funding does not encourage litigation where other and better avenues are available.

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have earned more than GBP 1 billion on its investment of about GBP 40 million, which is a 3,000% rate of return on its investment. Hyde J, "Mastercard litigation: £2 for each claimant, up to £100m for funder" *Law Gazette* (23 January 2025) <https://www.lawgazette.co.uk/news/mastercard-litigation-2-for-each-claimant-up-to-100m-for-funder/5122116.article>.

[24] *Waterside Class Limited v (1) Mowi ASA, (2) Mowi Holding SA, (3) Grieg Seafood ASA, (4) Salmar ASA, (5) Lerøy Seafood Group ASA, and (6) Scottish Sea Farms Limited 1643/7/7/24*, "Summary of Collective Proceedings Claim Form" <https://www.catribunal.org.uk/sites/cat/files/2024-07/16437724%20Waterside%20Class%20Limited%20v%20%281%29%20Mowi%20ASA%2C%20%282%29%20Mowi%20Holding%20SA%2C%20%283%29%20Grieg%20Seafood%20ASA%2C%20%284%29%20Salmar%20ASA%2C%20%285%29%20Ler%C3%B8y%20Seafood%20Group%20ASA%2C%20and%20%286%29%20Scottish%20Sea%20Farms%20Limited%20-%20Summary%20of%20Collective%20Proceed.pdf>.

Professor Carolyn Roberts v (1) Thames Water Utilities Limited and (2) Kemble Water Holdings Limited 1635/7/7/24. "Summary of Collective Proceedings Claim Form" <https://www.catribunal.org.uk/sites/cat/files/2024-05/16357724%20Professor%20Carolyn%20Roberts%20v%20%281%29%20Thames%20Water%20Utilities%20Limited%20and%20%282%29%20Kemble%20Water%20Holdings%20Limited%20%20Summary%20of%20Collective%20Proceedings%20Claim%20Form%20%203%20May%202024.pdf>.

[26] Advocates for opt-out class actions contend that there are other policy reasons for their use beyond promoting access to justice, such as to disincentivise misconduct and to allow very large claims to proceed through the courts more efficiently than individual claims. FCJ is not persuaded by those arguments. In particular, the primary role of the courts is to resolve issues of fact and law as between parties to a dispute and to facilitate access to justice. Disincentivising corporate misconduct is more efficiently addressed by regulators, the media, corporate ethics, and consumer choices.

[27] Findings from the 30th quarterly wave of the BEIS Public Attitudes Tracker found that seven in ten UK consumers resolve their problem directly with the business - UK Government, *BEIS Public Attitudes Tracker: Wave 30* <https://www.gov.uk/government/statistics/beis-public-attitudes-tracker-wave-30>. Moreover, in this regard, see the cases of *Smyth v BA and easyJet* [2024] EWHC 2173 (KB) discussed in more detail at Annex B, and *Hammon and Others vs University College London* [2024] EWHC 1744 (KB).

2. QUESTION 2: TO WHAT EXTENT DOES THIRD-PARTY FUNDING PROMOTE EQUALITY OF ARMS BETWEEN PARTIES TO LITIGATION?

2.1 By its nature, TPLF can promote equality of arms between parties because TPLF providers invest capital into cases. FCJ understands anecdotally that experienced TPL Funders will not invest in cases where they consider it possible that a defendant may attempt to "outspend" them in the litigation. On that approach, funded cases have equality of arms.

3. QUESTION 3: ARE THERE OTHER BENEFITS OF THIRD-PARTY FUNDING? IF SO, WHAT ARE THEY?

3.1 As set out in FCJ's Response to question 1, TPLF is an asset class which, as a byproduct, is capable of assisting with access to justice in suitable cases. Against that backdrop, FCJ does not consider that TPLF delivers other material benefits. TPL Funders typically employ a small number of highly qualified individuals and so we do not consider that it makes a significant broader positive contribution to the economy. Moreover, as set out at question 4 of this Response, many TPL Funders are based in offshore jurisdictions. There is nothing improper in this per se, but it reduces their tax contributions to the UK and therefore their broader societal contributions.

3.2 The legal services sector makes a significant contribution to the UK economy.[28] However, most data for the legal sector relate to the entire legal sector, from London-centred corporate and finance advisers through to high street firms around the country. TPLF-funded litigation represents a tiny element of the sector overall. Furthermore, unlike general commerce which adds to economic growth, litigation is "zero-sum": where a claimant wins a claim, money is paid by the defendant. Some of that money will go to the claimant and its lawyers and the TPL Funder if TPLF is used. Access to litigation is a necessary element of access to justice, but there is no publicly available information which shows that litigation, and use of TPLF more generally, contributes to economic growth.

[28] Mark Spilsbury, *Economic Contribution of Legal Services 2024* (*The Law Society*) <https://www.lawsociety.org.uk/topics/research/economic-contribution-of-legal-services-2024>.

4. QUESTION 4: 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?

4.1 TPLF is not adequately regulated under the present self-regulatory framework. FCJ considers that it is now time for the industry to be subject to statutory regulation. This is for the following reasons, on which we elaborate below:

4.1.1 Lord Justice Jackson supported self-regulation, **but only as a temporary measure due to the TPLF market being still nascent at the time of his review**. He set the criteria required for mandatory regulation to be introduced, all of which has now been met;

4.1.2 Other key stakeholders have identified the need for statutory regulation;

4.1.3 Unregulated TPLF has contributed to bad outcomes for funded parties;

4.1.4 TPLF is an outlier in being unregulated; and

4.1.5 Self-regulation via the ALF and its voluntary Code of Conduct ("**ALF Code**") is inadequate.

4.2 FCJ considers that users of funded litigation should be able to register complaints with a statutory regulator of TPLF which would then investigate and take action if regulations have been broken. This will be an efficient means of ensuring compliance with relevant regulations. If matters are left as between the parties FCJ anticipates that many funded consumers will be unwilling to take action against well resourced TPL Funders who are experienced in litigation.

Lord Justice Jackson supported self-regulation, but only as a temporary measure and the criteria he set for mandatory regulation have now been met

4.3 In the Review of Civil Litigation Costs: Final Report, by the Right Honourable Lord Justice Jackson, dated December 2009 ("**Lord Justice Jackson's Report**"), Lord Justice Jackson supported the establishment of a voluntary code for TPLF, but only with hesitation and on the basis the industry was "*still nascent*":

> "*I support the approach of the CJC in trying to establish, in the first instance, a voluntary code for third party funding. Provided that a satisfactory code is established and that* ***all funders subscribe to that code****, then at this stage, subject to my concern about capital adequacy requirements, I see no need for statutory regulation. However,* ***if the use of third party funding expands****, there may well be a need for full statutory regulation.*"[29] (Emphasis added.)
>
> "***If funders are supporting group actions brought by consumers on any scale****, then this would be a ground for seriously re-considering the question of statutory*

[29] Jackson LJ, "Review of Civil Litigation Costs: Final Report" (The Stationery Office, 2009) 121 at para 2.12 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

regulation of third party funders by the [Financial Services Authority]."[30] (Emphasis added.)

"*The question whether there should be statutory regulation of third party funders by the FSA ought to be re-visited* ***if and when the third party funding market expands.***"[31] (Emphasis added.)

4.4 Accordingly, Lord Justice Jackson set out criteria that would trigger the need for full statutory regulation (identified in bold text above). We briefly explore each of these criteria as follows:

4.4.1 Many TPL Funders do not subscribe to the ALF Code.

The ALF Code only applies to ALF members, and non-members have no obligation to abide by the self-regulation. Despite Lord Justice Jackson's requirement that a self-regulatory regime would only be appropriate if all TPL Funders subscribe to a voluntary code,[32] only a small portion of TPL Funders operating in the UK – 17 of the 62 known TPL Funders – are members of ALF.[33] The remaining 75%, who are not members of the ALF and do not subscribe to the ALF Code, are therefore entirely unregulated.

In fact, it is likely that more than 62 TPL Funders are operating in the UK.[34] As detailed in our response at paragraphs 5.31 – 5.34 and 27.1 – 27.5, there is very limited transparency in the TPLF market, and many additional unidentified parties could be participating in TPLF.[35]

4.4.2 Use of TPLF funding has expanded.[36]

The market for TPL Funders in the UK has expanded enormously since Lord Justice Jackson's Report.

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[30] Jackson LJ, "Review of Civil Litigation Costs: Final Report" (The Stationery Office, 2009) 121 at para 3.4 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

[31] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009 paragraph 6.1 p142, and recommendation 12 on p464 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> accessed 26 January 2025.

[32] Jackson LJ, " Review of Civil Litigation Costs: Final Report (The Stationery Office, 2009) 464, recommendation 11 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

[32] Association of Litigation Funders "Membership Directory" (21 February 2014) <https://associationoflitigationfunders.com/membership/membership-directory>.

[33] Association of Litigation Funders "Membership Directory" (21 February 2014) <https://associationoflitigationfunders.com/membership/membership-directory>.

[34] Anecdotal evidence heard recently from the European Commission is that there are 300 funders operating in the EU, quite an increase compared to the reported 45 European Parliament's study by the EPRS European Parliamentary Research Service, *Responsible Private Funding of Litigation: European Added Value Assessment* (2021) 50 <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf>.

[35] TPL Funders from outside the UK are becoming involved in UK litigation (see, for example, Elliott Management's control of Innsworth discussed at paragraphs 28.5 – 28.6 and the further examples set out in Annex A).

[36] The European Parliament notes that "*TPLF is used not only in collective redress (class actions), but also in the areas of arbitration, insolvency proceedings, investment recovery, anti-trust claims and others*." - Voss A, 'Report with Recommendations to the Commission on Responsible Private Funding of Litigation' (Committee on Legal Affairs, 2022) <https://www.europarl.europa.eu/doceo/document/A-9-2022-0218_EN.html>. The Resolution on responsible private funding of litigation was adopted in the European Parliament by 504 of the 626 MEPs in September 2023.

The TPLF *"industry in England and Wales has now grown to become the second-largest TPF market in the world."*[37] UK TPL Funders' assets have increased from £198m in 2011/12 to £2.2bn in 2021, a more than ten-fold increase.[38] Further, there has been expansion in the use of TPLF with a rise of portfolio funding and class actions. More detail on the growth of the TPLF is set out in Annex A.

4.4.3 TPL Funders are supporting group actions brought by consumers on a large scale.

Collective proceedings in the UK have grown dramatically since the Lord Justice Jackson's Report.[39] Between 2019 and 2023, England was one of five[40] European jurisdictions with significant growth in the number of class action claims issued.[41] At 31 December 2023, the total claimed value of class actions in the UK – opt-in and opt-out – was in the region of EUR 145bn, a huge rise from EUR 12.5bn in 2016.[42] Furthermore, between 2015 and 2023, competition class actions involving consumers had been brought on behalf of over 540 million class members collectively in the CAT.[43] With a population of 67 million, this means that the average number of class actions per person was over 8.1.[44]

4.5 Thus, each of the criteria that Lord Justice Jackson set out for moving away from self-regulation have been met comfortably.

Other key stakeholders have identified the need for statutory regulation

4.6 In 2008/9 the Law Society called for statutory regulation of TPLF[45] and urged the CJC to press the Government to legislate on this issue.[46] In stressing the limitation of self-regulation, the Law Society stated:

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[37] Latham S and Ress G, "The Third Party Litigation Funding Law Review" (6th edn, 2022).

[38] Latham S and Ress G, "The Third Party Litigation Funding Law Review" (6th edn, 2022).

[39] According to Professor Rachel Mulheron KC (2024), "A Review of Litigation Funding in England and Wales", Appendix B, pp.154-175, According to data collected on cases instituted or conducted between 2019 and March 2024 from publicly available sources, the following cases have been funded by TPLF: 27 collective proceedings in the Competition Appeal Tribunal; 10 group litigation cases under Group Litigation Orders in the High Court; 3 representative actions in the High Court; and 15 other cases in High Court and specialist courts and tribunals.

[40] All five include: England, Germany, Netherlands, Portugal, and Slovenia.

[41] CMS, "European Class Action Report 2024" (2024) <https://cms.law/en/media/international/files/publications/publications/cms-european-class-action-report-2024?v=4> at 12. NB. The methodology used in the CMS European Class Actions sought to capture all types of group litigation filed on behalf of five or more economically independent persons seeking damages or other monetary payment (although other remedies may also have been sought).

[42] CMS, "European Class Action Report 2024" (2024) at 6 <https://cms.law/en/media/international/files/publications/publications/cms-european-class-action-report-2024?v=4>.

[43] By the end of 2023, claims encompassing in excess of 540 million class members had been filed under the CPO Regime with the vast majority of those class members being party to opt-out claims rather than opt-in claims. CMS, "European Class Action Report 2024" (2024) <https://cms.law/en/media/international/files/publications/publications/cms-european-class-action-report-2024?v=4>.

[44] CMS, "European Class Action Report 2024" (2024) at 33 <https://cms.law/en/media/international/files/publications/publications/cms-european-class-action-report-2024?v=4>.

[45] Civil Justice Council, "Consultation Paper on a Self-Regulatory Code of Third Party Funding, Summary of Responses" (2009) <https://www.judiciary.uk/wp-content/uploads/2009/10/CJC-Consultation-Paper-on-a-Self-Regulatory-Code-of-Third-Party-Funding-Summary-of-Responses.pdf>.

[46] Civil Justice Council, "Review of Litigation Funding Interim Report and Consultation" (2024) 22, para 3.6 <https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf>.

> *"...there needs to be considerable work done before third party funding can be regarded as an important feature of access to justice. First, the funders are presently unregulated and there are no rules or guidance as to the appropriate level of percentage that they can take from damages, their liability for costs or what happens if they become insolvent or wish to withdraw from the action. Proposals for voluntary regulation do not address these problems. We therefore* ***recommend work should be done on providing a statutory code to regulate third party funding***.[47]

4.7 The Law Society also stated that it was committed to the principle that injured claimants receive 100% of their claim.[48]

4.8 Minutes from the CJC's 8 February 2008 conference on "The Regulation of Third Party Funding Agreements" reveal that stakeholders were advocating for statutory regulation.[49] The Master of the Rolls opened the conference by announcing his belief that TPLF should be encouraged, "*provided that it is controlled. He articulated his concern that an unbridled market might lead to abuses.*"[50]

4.9 Similarly, "*Lawyer 5 argued that self-regulation would not work in the long-term*"[51] and Michael Napier QC who opened the final part of the conference "*concluded that responses from delegates seemed to indicate that self-regulation was not a favourable option*.[52]

4.10 CJC chief executive Robert Musgrove supported self-regulation – like Lord Justice Jackson – on the basis that the TPLF industry was still in its infancy, recognising however, that statutory regulation would be required in the long-term as the TPLF market evolved and failed to exercise self-control:

> *"The CJC both recognises and welcomes the desire of funders to establish effective light-touch regulation* ***at the start of this emerging industry... while leaving the door open to formal regulation should the market fail to exercise sufficient self-control***."[53] (Emphasis added.)

4.11 In August 2009, the CJC confirmed that self-regulation should only be a temporary status:

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[47] The Law Society, "Access to justice review, Final Report" (November 2010) <https://www.lawsociety.org.uk/topics/research/access-to-justice-review-final-report>.

[48] "Chancery Lane Publishes Jackson Review Response" *Law Gazette* (14 October 2010) <https://www.lawgazette.co.uk/news/chancery-lane-publishes-jackson-review-response-/57586.article>.

[49] The minutes do not name many of the speakers and simply refer to them by their professions.

[50] Civil Justice Council, "CJC Minutes of the Third Party Funding Conference on 8th February 2008" (8 February 2008) 1 <CJC Minutes of the Third Party Funding Conference on 8th February 2008.doc>.

[51] Civil Justice Council, "CJC Minutes of the Third Party Funding Conference on 8th February 2008" (8 February 2008) 14 <CJC Minutes of the Third Party Funding Conference on 8th February 2008.doc>.

[52] Civil Justice Council, "CJC Minutes of the Third Party Funding Conference on 8th February 2008" (8 February 2008) 15 <CJC Minutes of the Third Party Funding Conference on 8th February 2008.doc>.

[53] Rose N, "New Conduct Code for Third-Party Funders" *Law Gazette* (24 July 2008) <https://www.lawgazette.co.uk/news/new-conduct-code-for-third-party-funders-/47377.article>.

"*In terms of a practical solution, a voluntary code is an acceptable place to start,* ***if the objective is to introduce regulation quickly in a fast-emerging and unregulated new market…***"[54] (Emphasis added.)

4.12 As detailed at paragraph 1.5 and Annex A, the TPLF market has grown enormously since this time and so mandatory regulation is now appropriate.

Claimants in funded claims have suffered poor outcomes

4.13 Notwithstanding the challenges in gathering information owing to the lack of transparency in the TPLF industry (outlined at paragraphs 5.31 – 5.34 and 27.1 – 27.5), Annex B sets out details of poor outcomes experienced by funded parties who have been through the litigation process. There are likely to be many other examples albeit they are difficult to identify owing to lack of transparency in TPLF and lack of centrally collated data.

4.14 The proposals for regulation that FCJ sets out in this document are intended to reduce the incidence of poor outcomes and therefore improve access to justice.

TPLF is an outlier in being unregulated

4.15 In this section we explain: that lack of regulation of TPLF makes it an outlier; why FCJ respectfully disagrees with the European Law Institute's views on regulation of TPLF; and that many other jurisdictions are either already regulating TPLF or are close to doing so.

Consumer protection is the norm in most areas of commerce

4.16 As set out in the introduction, consumer protection is the norm in most areas of commerce. Consumers are protected in online and bricks and mortar commerce through a range of statutes and regulations. The financial services sector has specific and detailed rules around consumer protection.

4.17 Regulation is not a bad thing per se and it can be good for all participants in a sector by bringing confidence to attract more market participants, "*Research has indicated that a positive regulatory environment can contribute significantly to economic development and sustainable growth, improving the openness of international markets and creating a less constricted business environment for innovation and entrepreneurship. It can protect compliant businesses by enabling fair competition and promoting a level playing field and provide business with the confidence to invest, grow and create new jobs*."[55]

4.18 A recent survey conducted by consumer body *Which?*[56] found that consumer protection regulations are not viewed as a barrier to growth or innovation. In fact, businesses are twice as likely to see consumer protection regulations as promoting innovation (33% say it encourages investment in safer, higher-quality products) compared to those that view it as a hindrance (only 15% believe it impedes innovation). Consumers also value consumer

[54] Rose N, "New Conduct Code for Third-Party Funders" *Law Gazette* (24 July 2008) <https://www.lawgazette.co.uk/news/new-conduct-code-for-third-party-funders-/47377.article>.

[55] Department for Business, Innovation & Skills, *Regulation and Growth* (February 2012) <https://assets.publishing.service.gov.uk/media/5a758828ed915d731495ab1e/12-688-regulation-and-growth.pdf>.

[56] Bellini P and Ashford R, *Understanding Consumer and Business Perspectives on Consumer Protection Regulations* (*Which?*, 5 December 2024) <https://www.which.co.uk/policy-and-insight/article/understanding-consumer-and-business-perspectives-on-consumer-protection-regulations-amxq65u64nEY#key-findings>.

protection regulations. Of those familiar with consumer protection regulations,[57] nearly nine in ten (87%) said they value at least one benefit. Three quarters (76%) of businesses also acknowledge the benefits of regulation in their sector for markets to function efficiently and in the best interest of businesses and consumers. Regulatory oversight is vital to ensure an effective regime of consumer-protection rules applicable to those markets since regulation maximises economic welfare and prevents unjust or exploitative practices.[58]

The European Law Institute's framing on whether to regulate TPLF

4.19 The European Law Institute's report entitled "Principles Governing the Third Party Funding of Litigation"[59] (the "**ELI Report**") framed the question of whether to regulate TPLF as follows:

4.19.1 "*Regulation of this sort [i.e., prescriptive regulation] offers certainty, but in the end, … certainty in this context itself generates problems. For example: regulation which affects the risk/reward balance for funders may well simply lead to funders ceasing to offer funding in the regulated territory. That leads back into serious access to justice issues. Those are sufficiently important that ELI does broadly endorse the view that such regulation is only appropriate where there is an identifiable problem or market failure. That is likely to be a jurisdiction-specific question*".

4.20 For the following reasons, FCJ does not think this is the correct framing for deciding whether or not to impose regulation:

4.20.1 First, insofar as can be ascertained from publicly available information, litigation funding is a highly profitable industry. TPL Funders can and do take significant risks in certain cases and, in aggregate, across a portfolio of investments, TPL Funders can make very large profits. Profits attract capital, and the enormous growth in class actions in the UK in recent years – all or almost all of which are supported by TPL Funders – is consistent with large profits. There is nothing improper in this, but high margins mean the TPLF industry can afford sensible regulation without significantly impacting its activities. Accordingly, there is no evidence that access to justice would be adversely impacted by regulation. Indeed, FCJ considers that access to justice should be measured by reference to outcomes and that regulation can reduce instances of poor outcomes and that therefore well-designed regulation can improve access to justice.

4.20.2 Second, we disagree that "*identifiable problems*" or "*market failure*" are the threshold for implementing regulation. This is not the threshold applied to other

[57] Such as the GDPR and Consumer Rights Act. One respondent is reported as having stated that "*I believe current regulations, such as GDPR and Consumer Rights Act, strike a fair balance between protecting consumers and allowing businesses to innovate and thrive*." <https://www.which.co.uk/policy-and-insight/article/understanding-consumer-and-business-perspectives-on-consumer-protection-regulations-amxq65u64nEY>.

[58] For example, providers may set prices considerably above underlying costs, or be insufficiently responsive to cost and other production efficiencies.

[59] European Law Institute, *ELI Report* (October 2024) <https://www.eli.org/the-environmental-forum/september-october-2024>.

areas of commerce, particularly where consumers are invovled. Regulation is needed to address various risks including capital adequacy and risk of money laundering. In relation to consumers, the starting position in all areas of commerce is that consumers should have specific statutory protections owing to asymmetry of information and negotiating power. This is particularly the case in class actions where consumers solely rely on the class representative and their legal advisers to negotiate the funding arrangements. Consumers have no visibility or control over the terms agreed despite that the class action is likely to exhaust their legal rights. These principles apply in funded litigation also and it is incongruous that there are no specific consumer protections in this field.

Various other jurisdictions are regulating, or exploring regulation of TPLF

4.21 As noted in the Consultation, there are a number of countries that regulate TPLF in one form or another. Australia, Canada, and Germany all enforce court-based regulation where Canada has ruled on the legality of LFAs. Courts in Ontario have also held that LFAs providing for a return of greater than 50% of damages awarded to the funded party are unlawful. Germany has introduced a 10% cap on TPL Funder's share of damages, and the European Parliament proposes that TPL Funders be subject to a 40% cap.

4.22 The European Parliament's recommendations include a provision to prohibit TPL Funder control. Similarly, Hong Kong regulation prohibits the TPL Funder from taking control of or influencing the management of any claim. The Singapore provisions also specify that TPL Funders must not exercise control over funded litigation, and this is in circumstances where TPLF is used only in commercial claims and arbitration in Singapore.

4.23 In Australia, TPL Funders can be made liable for adverse costs, and the European Parliament recommends that TPL Funders be jointly liable with the funded party for adverse costs. Furthermore, when considering transparency and disclosure requirements, many countries have regulations in place where the EU, Hong Kong, Singapore, and American states of Maine, Montana and West Virginia operate a variety of requirements from disclosure of LFAs to the courts, opponents or simply disclosure of the fact of funding.

The Representative Actions Directive and its transposition in EU Members States

4.24 Transposition of the Representative Actions Directive has seen certain EU Member States implementing safeguards for consumers. For example: (i) Greece has prohibited any TPLF; (ii) the Czech Republic – out of concern regarding the potential for money laundering – requires disclosure of the beneficial owner(s) behind TPL Funders; (iii) Bulgaria, Germany and Portugal require disclosure of LFAs to the courts; and (iv) France requires a declaration by the Qualified Entity bringing the claim on behalf of consumers that it the case exclusively pursues consumer interests.

Self-regulation via the ALF Code is inadequate

4.25 The current self-regulatory framework via the ALF Code is not operating adequately. As noted at paragraph 4.4.1, those TPL funders who have not voluntarily signed up to the ALF Code have no obligation to abide by the self-regulation. There are therefore a

significant number of TPL Funders who refuse to abide even by the light touch approach of the ALF Code.

4.26 The ALF Code is also inadequate because it does not address a number of important issues that require a robust framework of rules such as: Anti-Money Laundering obligations; fiduciary duties of TPL Funders; and transparency or disclosure of LFAs. To the extent that the ALF Code does regulate conduct it is a toothless regime with fines capped at £500.

4.27 The complaints process in the ALF Code appears to be almost entirely unused. Research by Professor Mulheron[60] ("**Professor Mulheron's 2024 Report**") shows that there have been only four instances of the ALF complaints process being invoked since its inception.[61] However, Annex B identifies examples of claimants having been through a funded litigation process which have experienced bad outcomes. Thus, the non-use of the ALF complaints procedure does not indicate lack of problems in the use of TPLF. Rather, it merely indicates lack of use of the complaint procedure, perhaps because of the toothless fines or because many operators do not subject themselves to the ALF Code.

4.28 Richard Orpin, Director of Regulation and Policy at the Legal Services Board made the following observations whilst speaking at the CJC conference on 26 February 2025, "*being a member of the ALF is not the badge of honour it was envisaged to be when it was established in 2011. Since then, we have observed that the expansion of TPLF has coincided with an increase in poor practice in some law firms in receipt of such funding, particularly in the high-volume consumer complaints sector which has brought with it an increased risk of harm to consumer.*" He then went on to say: "*We are also concerned about poor practice by some, admittedly not all, litigation funders, such as exerting undue control over litigation process, attempting to obtain excessively high returns, or failing to meet capital adequacy requirements…This requires action from both legal services regulators and financial services regulators to address…on the latter…we think there is a case for bringing TPLF within the remit of the [FCA] in the future to ensure that consumers are protected and do not suffer detriment as the result of poor practice …this would mean, clearly, moving away from the current voluntary model of regulation, to a mandatory model…I would like to address head-on the argument that such a step would be anti-economic growth or anti-competitive. On the contrary we think that it would help support growth by providing a stable and predictable regulatory environment, and support competition too by providing a level playing field which doesn't exist in the currently regulatory model, where only some TPL Funders subscribe to membership.*"

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[60] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

[61] "*Since 2011, the complaints process has been invoked four times: (1) was about a non-ALF member …and could not be addressed; (2) did not name the funder member about whom the complaint was made, so that the complaint was not possible to assess; (3) was about a complaint that the funder member had wrongfully terminated the LFA, but the complainant admitted that it had forged evidence which it had supplied to the funder member; and (4) concerned another complaint about termination (that the funder member had not followed its own process for terminating funding), which complaint was dismissed.*" - Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 63 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

4.29 FCJ agrees with Mr Orpin's assessment and advocates strongly in favour of statutory regulation.

5. QUESTION 5: PLEASE STATE THE MAJOR RISKS OR HARMS THAT YOU CONSIDER MAY ARISE OR HAVE ARISEN WITH THIRD PARTY FUNDING

Introduction

5.1 As explained in our answer to question 4 above, FCJ considers that the current voluntary, self-regulatory framework (to which most TPL Funders do not subscribe) does not adequately regulate the provision of TPLF. In FCJ's view, it is time for statutory regulation to be introduced.

5.2 In answering question 5, we set out key proposals for regulation that FCJ supports. The two tables below briefly summarise these proposals and provide cross-references to the subsequent paragraphs where we provide more detail on each proposal. It is FCJ's primary position that the recommendations in each table apply to all claims that are funded by TPLF, including single-case claims, claims funded on a portfolio basis or any other type of TPLF structure. Notwithstanding this, FCJ recognises that the proposals proffered in the second table are particularly suited for claims brought on behalf of consumers and small and medium-sized enterprises ("**SMEs**"). FCJ recognises that the terms "consumer", "SMEs" and "consumer claims" will need to be clearly defined, but these terms are successfully used in other regulations and so it ought to be straightforward to use those terms in regulation of TPLF.

5.3 FCJ's proposals for regulation of all claims funded by TPLF:

No.	Proposal	Proposal Summary	Paragraph Reference
1	**Introduce licensing requirements for TPL Funders**	All TPL Funders should be required to obtain a licence issued by an independent regulator, possibly the FCA. Breach of the regulatory regime should have material consequences including the sanction of having a licence revoked. It is important that funded parties can complain to the regulator and that it would investigate and take action if appropriate. Potential breaches cannot be a matter for funded parties to police. Consumers in particular will be unwilling to take action against a well-resourced TPLF provider that is well versed in litigation. For the regime to be meaningful it will require the regulator to be active and engaged.	5.5 – 5.7
2	**Capital adequacy**	TPL Funders' capital adequacy should be subject to formal statutory regulation by an independent regulator, such as the FCA. All TPL Funders should be required to maintain access to sufficient capital to cover all their funding liabilities however long the cases they fund may last, and to cover their potential adverse costs liabilities. All TPL Funders should be required to maintain a minimum amount of capital commensurate with their aggregate funding liabilities and adverse costs liabilities.	5.8 – 5.21
3	**Adequate protection against money laundering**	Appropriate regulatory requirements should be introduced to ensure that TPL Funders verify the source of their funds and to report suspicious activity. Similar obligations should be imposed on solicitors who bring claims utilising TPLF. The specific parameters of these regulatory requirements will need to be developed, but where properly designed they will significantly reduce the risk of litigation in this jurisdiction being used to launder money.	5.22 – 5.30

4	**Introduce Specific Transparency Requirements for TPL Funders**	At a minimum, mandatory requirements should be introduced in all funded cases for the funded party to disclose to the court and to their opponent(s): (1) the fact that the case is funded by TPLF; (2) the identity and address of the TPL Funder; and to the court (3) the terms of the LFA. In addition, the LFAs should be disclosed to opponents to support the presumption of security for costs in funded claims (see proposal 6 below).	5.31 – 5.34
5	**Adverse costs**	TPL Funders should remain exposed to full liability for adverse costs of proceedings that they have funded. The extent of the TPL Funder's liability should remain a matter for the discretion of the judge in the particular case and should not be restricted by the 'Arkin cap'.	5.35 – 5.37
6	**Presumption of security for costs or funded claims**	A statutory presumption that TPL Funders will provide security for costs should be introduced. This statutory presumption would see the onus in security for costs applications shift from the defendant to the funded claimant. Rather than the defendant having to satisfy the court that the claimant should provide security, as would be the case in security for costs applications in non-funded proceedings, the funded claimant would instead have to rebut the presumption that security should be provided. Further, the presumption should be as to unconditional and irrevocable security.	5.38 – 5.50
7	**No TPL Funder control**	We propose that TPL Funders and other financial investors should have no control, contractual or indirect, in any element of litigation.	5.51 - 5.56
8	**Fiduciary duties**	In the event that proposal 7 is not adopted, we propose that for funded claims, fiduciary duties should be owed by TPL funders to the funded claimants, e.g., the duty to act in the best interests of the consumer claimant(s).	5.57 - 5.59

5.4 FCJ's proposals for regulation that are particularly important for claims funded on behalf of consumers or SMEs:

No.	Proposal	Proposal Summary	Paragraph Reference
9	**Independent legal advice**	It should be mandatory for claimants to receive independent legal advice on the proposed terms of LFAs before they are entered into. The advice should cover the proposed funding package as a whole. This will include the LFA with the TPL Funder and (where applicable) any contingency fee agreement with claimant lawyers, After-The-Event ("**ATE**") insurance policy, indemnity for adverse costs and co-funding agreements with other TPL Funders.	5.60 - 5.73
10	**TPL Funders' fees / compensation in consumer claims**	Claimants should be entitled to a minimum percentage of in the event of success. FCJ suggests that the minimum percentage is set at 75% of any settlement payment before proceedings are issued, and 50% of any damages or settlement payment after proceedings have been issued. Under the terms of the LFA governing the priority of payments (the "waterfall"), the return to claimants should rank first after the TPL Funder's entitlement to the funded costs and disbursements of the case but ahead of the TPL Funder's return and any other payments.	5.74 – 5.78
11	**AAE exclusions should be mandatory to better protect consumers**	Anti-Avoidance Endorsements should be a mandatory requirement. Anti-Avoidance Endorsements for ATE insurance policies, if correctly worded, mean the insurer cannot avoid or cancel the ATE policy and will always pay claims up to the limit of the indemnity, thereby better protecting consumers against adverse cost risk.	5.79 - 5.81

Proposal 1: Introduce licensing requirements for TPL Funders

5.5 For the reasons set out in our Response to question 4, FCJ considers that TPLF should be regulated. This necessitates a regulatory and licensing regime with sanctions for any unlicensed party improperly participating in TPLF. Provisionally, FCJ considers that the "Regulated Activity" regime under section 19 of the Financial Services and Markets Act 2000 ("**FSMA**") is a suitable framework.

5.6 TPL Funders should be required to hold a licence issued by an independent regulator, paid for by the funding industry, to authorise TPL Funders to engage in litigation funding, and to withdraw licences from TPL Funders and impose fines for non-compliance. The FCA as the regulator of FSMA "Regulated Activities" would be an adequate independent regulator for the TPLF market (although FCJ does not seek to be prescriptive in how this recommendation would be implemented).

5.7 If the UK imposed a requirement for TPL Funders to be licensed in the same way as other providers of financial services,[62] it would ensure much-needed monitoring of the activities of TPL Funders and provide market confidence for those participating in the legal system. Regulation of TPLF would benefit the standing of the English legal system by inhibiting unwanted behaviour. This is also to benefit of reputable TPL Funders.

Proposal 2: Capital adequacy

5.8 Why it is important: TPL Funders should have adequate capital to cover their funding liabilities, to reduce the risk of cases collapsing, which would both cause harm to the funded parties and waste court time.[63] Hence effective capital adequacy requirements and oversight for compliance should be a cornerstone of a properly functioning TPLF market, especially one that is as large as it is now in England and Wales.

5.9 The importance of capital adequacy in TPLF has long been recognised. When Lord Justice Jackson conducted his review of civil litigation costs in 2009, he initially considered that the capital adequacy of TPL Funders should be the subject of statutory regulation by the Financial Services Authority ("**FSA**") (as it then was), because it was a matter of "*such pre-eminent importance*".[64] Nonetheless, after "*some hesitation*", he recommended, in the short term, that all TPL Funders should subscribe to a voluntary code which contained effective capital adequacy requirements, and that the question of statutory regulation should be revisited if and when the TPLF market expanded.[65]

5.10 The risk: Capital adequacy mitigates the risk of a TPL Funder failing and the harm that would follow from that. That risk and harm is not hypothetical; Affiniti Finance Limited

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[62] This is line with what article 4 of European Parliament resolution of 13 September 2022 with recommendation to the Commission on Responsible private funding of litigation (2020/2130 (INL)).

[63] The importance of capital adequacy has been recognised by the ALF and its members, as capital adequacy requirements are enshrined in the ALF Code and the ALF's Rules of Association.

[64] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 121 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 121, 242 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>. The importance of capital adequacy has always been recognised by the ALF and its members, as capital adequacy requirements are enshrined in the ALF Code and the ALF's Rules of Association.

("**Affiniti**")– which described itself as the "*leading consumer credit litigation funder in the UK*"[66] and was funding primarily low value consumer legal claims – entered administration after it defaulted on its obligations under a loan agreement. Affiniti, which depended on funding to fund claims via Consumer Credit Act Agreements with individual litigants and via "direct law firm lends" left more than £40m outstanding in debt. Notice of administrator's progress reports for Affiniti detail the ongoing efforts of the Joint Administrators to manage the company's affairs, recover funds from the Loan Book, and conduct investigations into the company's prior management.[67]

5.11 As pointed out in Professor Mulheron's 2024 Report if a TPL Funder fails there is no safety net in the form of an indemnity fund or financial compensation scheme set up by the Government, or by the TPLF industry, out of which a funded party's own costs, or their opponent's adverse costs, can be paid.[68]

5.12 The risk of TPL Funder failure may be higher where TPL Funders fund cases by borrowing via debt facilities. As explained in Professor Mulheron's 2024 Report this is a more precarious funding model compared to funding cases from capital investment, because debt facilities can be cancelled in the event of default, and lenders can demand immediate repayment of all amounts outstanding,[69] as occurred when Affiniti defaulted on its loan agreement and Fortress accelerated and demanded repayment of the total amount outstanding, which Affiniti was unable to repay.[70]

5.13 The current self-regulatory framework is inadequate: In summary, the ALF Code lays down two main capital adequacy requirements for its TPL Funder members, namely that a TPL Funder must: (i) maintain access to a minimum of £5m of capital;[71] and (ii) ensure that it, and its subsidiaries and associated entities, maintain the capacity: (i) to pay all debts when they become due; and (ii) to cover aggregate funding liabilities under all of their LFAs for a minimum period of 36 months.[72] FCJ considers that those requirements are insufficient.

5.14 First and foremost, TPL Funders operating outside the ALF are not obliged to follow these requirements.

5.15 As regards the £5m minimum capital requirement, the CJC's Interim Report notes that it is similar to that in Singapore under its statutory regulation.[73] However TPLF in Singapore

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[66] Hyde J, 'Major Litigation Funder Goes into Administration' (*Law Gazette*, 10 November 2021) <https://www.lawgazette.co.uk/news/major-litigation-funder-goes-into-administration/5110468.article>.

[67] Despite challenges, including non-cooperation from the managing director, the Administrators have made significant recoveries and settlements. The Administration is now scheduled to end on 4 November 2025. See latest progress reports for Affiniti Finance Limited reports available at <https://find-and-update.company-information.service.gov.uk/company/09205014/filing-history>.

[68] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 55, 59 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf >.

[69] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 75 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf >.

[70] As explained in the "Joint Administrator's Statement of Proposals for Affiniti Finance Limited (In Administration)" *Companies House* (9 January 2022) Companies House <https://find-and-update.company-information.service.gov.uk/company/09205014/filing-history>.

[71] Association of Litigation Funders "Code of Conduct for Litigation Funders" (2018) paragraph 9.4.

[72] Association of Litigation Funders "Code of Conduct for Litigation Funders" (2018) paragraphs 9.4., 9.4.1, and 9.4.2.

[73] Civil Justice Council, "Review of Litigation Funding Interim Report and Consultation" (2024) 20, 24, 45 <https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf>.

is mainly used in commercial litigation, insolvency proceedings and arbitration, and is not available for a wider range of cases as it is in England and Wales.[74] Therefore the capital adequacy requirement limit in Singapore is not necessarily a useful comparator.

5.16 In any event, the ELI Report described the £5m figure as having been "*overtaken by events*", such that it is "*now widely seen as inadequate*".[75] Professor Mulheron's 2024 Report showed that some TPL Funders also consider that the £5m capital requirement is too low, with one TPL Funder suggesting that it might usefully be increased to approximately £20m, "*given the quantum of claims that are being funded nowadays (especially in light of the collective proceedings regime in the CAT)*".[76]

5.17 Proposed mechanisms and advantages/disadvantages: FCJ considers that all TPL Funders should be required to maintain a minimum amount of capital. That amount does not have to be a single figure which applies across the board. Instead, it should be commensurate with a TPL Funder's aggregate funding liabilities and adverse costs liabilities. In other words, a TPL Funder with higher funding and adverse costs liabilities can be required to maintain a higher minimum capital amount, and vice versa. Requiring TPL Funders to maintain a minimum amount of capital relative to their total financial exposure should create a more level playing field amongst TPL Funders and avoid placing a disproportionate burden on small TPL Funders or new entrants.

5.18 As regards the other capital adequacy requirement in the ALF Code to maintain capacity to cover all funding liabilities for 36 months, FCJ considers that this should not be time-limited[77] and that TPL Funders should be required to maintain the capacity to cover all their funding liabilities, however long their funded cases last. We expect that all responsible TPL Funders would only enter into LFA if and to the extent that they have sufficient access to capital, otherwise they should not enter into those agreements in the first place.

5.19 In addition, we consider that the requirement for a TPL Funder to cover aggregate liabilities should include not only its commitments to cover the funded parties' costs, but also the TPL Funder's potential adverse costs liabilities. On the face of it, it is unclear whether adverse costs are within the scope of the ALF Code's requirements for TPL Funders to maintain the capacity: (i) to pay all debts when they become due; and (ii) to cover aggregate funding liabilities under all their LFAs for 36 months. It is particularly unclear if the terms of the LFA provide that the TPL Funder is not liable to the funded party to meet any liability for adverse costs (which could be the case where the funded party has ATE insurance for example). In that scenario, a TPL Funder's liability to pay adverse costs would not be a liability under the LFA and so it is questionable whether the ALF Code's "aggregate liabilities" requirement would apply. Regardless of what the LFA says, we consider that

[74] Civil Justice Council, "Review of Litigation Funding Interim Report and Consultation" (2024) 20, 24, 45 <https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf>.

[75] European Law Institute, "European Law Institute (ELI) Principles Governing the Third Party Funding of Litigation" *SSRN Electronic Journal* (2024).

[76] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 58 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf >.

[77] Particularly as major litigation can last significantly longer than 36 months.

this capital adequacy rule should bite upon a TPL Funder's adverse costs exposure, as it is in the interests of both funded parties and their opponents to know that a TPL Funder is required to maintain the capacity to pay adverse costs if the case is lost.

5.20 Finally, there ought to be an indemnity fund to compensate funded parties in the event that a TPL Funder becomes insolvent. It should at least cover consumers SMEs. We do not consider that it would need to cover commercial parties who use TPLF, as they are in a better position to protect themselves.

5.21 We consider that the indemnity fund for consumers and SMEs should cover the following amounts (to the extent that they cannot be paid by the TPL Funder): (i) outstanding fees and expenses due and owing to the funded party's lawyers in respect of the funded party's own costs, and (ii) any liability of the funded party for adverse costs that is not covered by ATE insurance. In each case, the amount available for a funded party should be capped at an appropriate amount, so that the fund remains sufficiently capitalised for other funded parties to access where necessary. For the same reason, we do not consider that the fund should make available money for funding the future costs of the funded party's claim. In our view, that would be impractical and unrealistic.

Proposal 3: Adequate protection against money laundering

5.22 Introduction: FCJ considers that the risk of money laundering is an important issue, including for the reputation and integrity of the court system, which is within the scope of the CJC's Terms of Reference.

5.23 The existing self-regulatory framework for TPL Funders: Unlike law firms, insurers, banks, and various other financial institutions (and even art dealers), TPL Funders do not have specific anti-money laundering obligations. Neither the ALF Code nor the ALF's Rules of Association impose any anti-money laundering obligations on ALF's members. Nor (so far as FCJ is aware) has the ALF published any guidance on the risks of money-laundering and the steps to be taken by TPL Funders to address those risks.

5.24 FCJ understands that most TPL Funders are not subject to The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the "**2017 Money Laundering Regulations**"), which require "relevant persons" to implement measures to prevent and detect money laundering, including to conduct risk assessments, maintain records and put in place appropriate controls, policies and procedures. The exception are those TPL Funders who are authorised by the FCA in respect of their regulated investment activities, who are required to have effective anti-money laundering controls in accordance with the FCA handbook.[78]

5.25 The regulatory framework for law firms: Guidance issued by regulators and anti-money laundering supervisors for the legal sector states that litigation is generally considered to be outside the scope of the 2017 Money Laundering Regulations.[79] Its non-exhaustive list

[78] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf >.

[79] Solicitors Regulation Authority, "Your AML Obligations" (31 October 2024) 206 <https://www.sra.org.uk/solicitors/resources/money-laundering/guidance-support/>.

of red flags and warning signs highlight the risk of sham litigation, where legal proceedings or settlement negotiations are intentionally fabricated to launder the proceeds of crime.[80] It also cites the Government's National Risk Assessment of money laundering and terrorist financing 2020, which found that client accounts remained at risk of exploitation by criminals through sham litigation.[81] To date, the Solicitors Regulation Authority has not provided any specific guidance on the anti-money laundering and know-your-client checks that should be carried out by law firms in respect of TPL Funders.[82] According to the Law Society, legal professionals (among others) – defined collectively by as "*'Professional enablers' pose a significant risk to the integrity of the UK's economy and reputation as a global financial centre*"[83] and in the Law Society's 2023 Anti-Money Laundering Guidance for the Legal Sector ("**Law Society's 2023 AML Guidance**"), it was stated that:

> "*Given the important role UK's legal sector plays in facilitating global finance, this [i.e. money laundering] could represent a particular risk to the UK, notably in relation to trust and company service providers given the ease of establishing companies in the UK.*"[84]

5.26 The Law Society's recent concerns have also been shared by prominent members of the judiciary. In *Vneshprombank -v- Bedzhamov*[85] Mrs Justice Cockerill observed that there was "*reasonable cause to suspect that A1 [a funder in the claim] is owned or controlled by a designated person or designated persons within the meaning of regulations 5-6 of the Russia (Sanctions) (EU Exit) Regulations 2019*." This case was widely reported in the press.[86]

5.27 The risk: Based on empirical feedback, Professor Mulheron's 2024 Report found that, in practice, it may be difficult for law firms (as well as insurers and brokers) to know the sources of funds used by TPL Funders. Whereas it may be easier for law firms to conduct anti-money laundering checks where the TPL Funder is an ALF member, particularly if it is a public listed company with audited financial statements and known sources of funds, it can be difficult where TPL Funders utilise complex, offshore corporate structures which

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[80] Solicitors Regulation Authority, "Your AML Obligations" (31 October 2024) 44, 183 <https://www.sra.org.uk/solicitors/resources/money-laundering/guidance-support/>.

[81] HM Treasury, "National Risk Assessment of Money Laundering and Terrorist Financing 2020" *GOV.UK* (17 December 2020) <https://www.gov.uk/government/publications/national-risk-assessment-of-money-laundering-and-terrorist-financing-2020>. See page 90, paragraph 10.10. The National Risk Assessment also stated (at paragraph 10.11): *"[Legal service providers] often use client accounts to hold and move money on behalf of their clients for related legal services. Money may move through these accounts rapidly and in large sums to third parties. It is also possible that criminals are using new forms of payments such as cryptoassets or crowdfunding to obscure the origins of funds."*

[82] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf> .

[83] The Law Society "Professional enablers" (16 September 2024) <https://www.lawsociety.org.uk/topics/anti-money-laundering/professional-enablers>.

[84] Legal Sector Affinity Group "Anti-Money Laundering Guidance for the Legal Sector 2023" *The Law Society* (2023) <https://www.lawsociety.org.uk/topics/anti-money-laundering/anti-money-laundering-guidance>.

[85] *Vneshprombank -v- Bedzhamov* [2024] EWHC 1048 (Ch).

[86] Holland J and Siegel E "Man Linked to Money Laundering Aids Litigation Finance Startup" *Bloomberg Law* (28 November 2023) <https://news.bloomberglaw.com/business-and-practice/man-linked-to-money-laundering-aids-litigation-finance-startup>; Rose, N "High Court: Sanctioned Russians "probably owned" litigation funder" *Legal Futures* (14 May 2024) <https://www.legalfutures.co.uk/latest-news/high-court-sanctioned-russians-probably-owned-litigation-funder>.

lack transparency, or if they are not an ALF member, or if they are a new entrant to the market.[87] **It is important to recognise that solicitors' AML duties are centred around their clients and the TPL Funder is not the client of the claimant law firm**.

5.28 Professor Mulheron's 2024 Report concluded that there is "*an undoubted risk*" of TPLF being used to launder money, albeit the risk "*may (presently) be more theoretical than real*". The suggestion that, at present, the risk may be "*more theoretical*" appears to have rely on the fact that there have not been any direct findings of money laundering in TPLF. That said, Professor Mulheron states that there is an "*undoubted risk*" and given the seriousness of the issues FCJ considers that it requires regulation.[88]

5.29 Proposed mechanisms and advantages/disadvantages: FCJ believes that, where litigation is funded by a TPL Funder, it should not just be law firms, insurers and brokers who must comply with legal and regulatory requirements to detect and prevent money laundering. As the ones sourcing the funds, TPL Funders themselves are best placed to assess the risks and undertake checks. Accordingly, FCJ considers that appropriate regulations should be introduced to ensure that TPL Funders verify the source of their funds and report suspicious activity, thereby preventing the use of such funds for money laundering. Similar obligations should be imposed on solicitors who bring claims utilising TPLF. The specific parameters of these regulatory requirements will need to be developed, but if properly designed, they will significantly reduce the risk of litigation in this jurisdiction being exploited for money laundering purposes. .

5.30 FCJ cannot see any downside in this proposal and does not consider that they would have any adverse effect on the market for TPLF. Mitigating the risk of money laundering should not be difficult and will protect the reputation and integrity of the civil justice system.

Proposal 4: Introduce Specific Transparency Requirements for TPL Funders

5.31 Lack of transparency causes a number of problems. At a systemic level, it makes it difficult to regulate the industry. Lack of transparency also makes it difficult for the court to perform its gatekeeping role (e.g., the protection of class members in the context of the CPO Regime) or for class members to adequately represent their interests. We consider that, for the administration of justice, the starting point for TPLF should be full transparency, subject to appropriate safeguards where disclosure would undermine the prospects of the funded claim.

5.32 A key problem with the current lack of transparency is that funded parties are not required to notify their opponents that their claim is funded by TPLF. Whilst the existence of TPLF arrangements is sometimes disclosed to opponents voluntarily, in general this only tends to happen where the funded party considers that disclosure is in its own interests.

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[87] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 78, 149 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>; See also "Litigation Funding and AML Obligations" *Commercial Dispute Resolution* (22 July 2019) <https://www.hausfeld.com/media/o1rp0xvw/litigation-funding-and-aml-obligations_article_-1-_-002.pdf>.

[88] [88] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) Executive Summary, 75 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

5.33 In our view, there should be a mandatory requirement in all funded cases for the funded party to disclose to the court and to their opponent(s): (i) the fact that the case is funded by TPLF; (ii) the identity and address of the TPL Funder; and (iii) the terms of the LFA, including level of return. We consider that the LFAs should be disclosed to the court (or tribunal) and to opponents, particularly if the CJC recommends a presumption for the provision of security for costs in funded claims (as proposed at paragraphs 5.38 to 5.50 below), or a similar reform to that effect. Disclosure would be subject to such redactions by the funded party as are necessary to protect privileged matters. There could be some divergence of views on redactions, but the guiding principle should be transparency, and so minimal redactions ought to be the starting point.

5.34 This should be a non-negotiable requirement in class actions brought on behalf of consumers or SMEs in particular. In *Christine Riefa v Apple and Amazon* ("**Riefa**") the CAT was concerned with the ability to scrutinise the PCR's funding arrangements to allow transparency "*not only by the court but also by the members of the class on whose behalf the claims are brought*."[89] The CAT referred to this as a form of "*protection*" in ensuring the best interests of the class members. The CAT also noted in Riefa that: "*Our concerns are exacerbated by the confidential nature of the LFA*" in circumstances where the PCR was "*alive to the interests of the funder*... but *not... sufficiently...the interests of the class members*".[90] FCJ is firmly of the view that transparency requirements for TPL Funders are paramount in order to allow the court to perform its gatekeeping role. The CAT's observations and concerns demonstrate the need for a transparency framework **in addition to and beyond the CAT's powers under the CPO regime**.

Proposal 5: Adverse costs

5.35 FCJ considers that TPL Funders should remain exposed to full liability for adverse costs of proceedings that they have funded and that the extent of the TPL Funder's liability should remain a matter for the discretion of the judge in the particular case.

5.36 As detailed in FCJ's response to question 10 below at paragraphs 10.1 to 10.7, the jurisdiction to award adverse costs against a TPL Funder without reference to the Arkin cap is a vital safeguard for defendants (who have no choice but to incur costs in defending claims) and for funded parties. It is also consistent with the conclusion of Lord Justice

[89] *Christine Riefa Class Representative Limited v Apple Inc & Others* [2025] CAT 5 (Competition Appeal Tribunal, 14 January 2025) pare 31<https://www.catribunal.org.uk/sites/cat/files/2025-02/16027723%20Christine%20Riefa%20Class%20Representative%20Limited%20v%20Apple%20Inc.%20%26%20Others%20-%20Judgment%20%28CPO%20application%29%20%5B2025%5D%20CAT%205%20%20%2014%20Jan%202025.pdf>.

[90] *Christine Riefa Class Representative Limited v Apple Inc & Others* [2025] CAT 5 (Competition Appeal Tribunal, 14 January 2025) pare 112 <https://www.catribunal.org.uk/sites/cat/files/2025-02/16027723%20Christine%20Riefa%20Class%20Representative%20Limited%20v%20Apple%20Inc.%20%26%20Others%20-%20Judgment%20%28CPO%20application%29%20%5B2025%5D%20CAT%205%20%20%2014%20Jan%202025.pdf>.

Jackson's Report[91] and with the recommendation in Article 18 of the European Parliament's Resolution on responsible private funding of litigation.[92]

5.37 In addition, TPL Funders' exposure to costs liability incentivises them to ensure that robust ATE cover is in place full. This proposal compliments and also aligns with the rationale for proposal 10.

Proposal 6: Presumption of security for costs for funded claims

5.38 Introduction: For the reasons set out below, FCJ considers that the existing security for costs mechanism does not adequately protect claimants and defendants in funded proceedings or promote efficiency in litigation and that it should be altered by including a presumption that security for costs should be provided for all funded claims.

5.39 The existing regime: security for costs affords the defendant a degree of protection against the risk that, if successful, the claimant does not meet an adverse costs order. At present, the burden rests with the defendant to establish that security for costs should be ordered but whether it is in fact ordered is in the court's discretion.

5.40 In funded litigation defendants typically seek security for costs, and funded claimants head off a security for costs application by providing security in the form of ATE insurance. However, it is the experience of FCJ's members that arriving at the end point of security being obtained is often a drawn out and expensive process, with the parties engaging in multiple rounds of correspondence to seek to agree first that security should be provided and then as to its terms.

5.41 Proposed change: FCJ considers that a presumption of security for costs in funded claims is preferable to the current position. This proposed presumption would see the onus in security for costs applications shift from the defendant to the funded claimant. Rather than the defendant having to satisfy the court that the claimant should provide security, as would be the case in security for costs applications in non-funded proceedings, the funded claimant would instead have to rebut the presumption that security should be provided.

5.42 This proposal draws on the recommendation of the Australian Law Reform Commission for a statutory presumption that TPL Funders who fund class actions provide security for costs in any such proceedings. The Australian Law Reform Commission explained it's proposal as follows:[93]

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[91] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>. See page 464, recommendation 13: "*Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.*"

[92] Voss A, "Report with Recommendations to the Commission on Responsible Private Funding of Litigation" *Committee on Legal Affairs* (2022) <https://www.europarl.europa.eu/doceo/document/A-9-2022-0218_EN.html>. The Resolution on responsible private funding of litigation was adopted in the European Parliament by 504 of the 626 MEPs in September 2023.

[93] Australian Law Reform Commission, "Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" *Australian Government* (2018) para 6.48 – 6.53 <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess-1.pdf>.

"Recommendation 12 imposes a statutory presumption that a litigation funder will provide security for costs and requires that the security be of a type that may be called upon in Australia…While as a matter of practice the Court typically requires third-party litigation funders to provide security for costs, a statutory presumption would shift the onus from the respondent who ordinarily is required to satisfy the Court that the security should be provided, to the representative plaintiff (in reality, the funder) if they wish to rebut the presumption. This recommendation, in part, responds to submissions that raised concerns that security for costs will be given only when sought by respondents and is at the discretion of the courts. The ALRC considers that a presumption is more appropriate than a mandatory requirement as it retains the Court's discretion and ensures that the presumption can be rebutted in suitable cases, such as where the matter is in the public interest….

The second part of Recommendation 12 is designed to respond to concerns in submissions that the types of security being provided by funders are less secure than a bank guarantee and would put the respondent to considerable costs if they were to seek to call on the security…

Recommendation 12 should give respondents greater comfort that capital will be available to cover their costs in the event that they are successful than could be provided by licensing litigation funders. The license could only impose a generic capital adequacy obligation on the funder that may not take into account the likely costs in individual matters. Through these recommendations, consumers (being the representative plaintiff and group members) are protected from the principal financial risk that they will incur financial losses in the event that a TPL Funder was to become insolvent during the course of the litigation.

The consumer's remaining risk in this situation is that they are unable to continue with the litigation unless they can find an alternative funder to step in. In such a situation, the consumer is unlikely to be in a worse position than if the funder had been unavailable to fund the matter in the first place."

5.43 FCJ agrees with the comments of the Australian Law Reform Commission that a presumption would give defendants greater comfort that their costs will be covered in the event they are successful, whilst also, and importantly, providing a corresponding benefit for funded claimants by helping ensure protection for them from the financial risk that they will incur losses if they are to face an adverse cost order.

5.44 Additionally, a presumption that there be security in funded claims would more accurately reflect the realities of funded claims because a claimant that requires TPLF to bring their claim will in almost all cases be unable to satisfy an adverse costs order if the TPL Funder fails to meet it. It would also reflect the reality that the types of litigation that are typically being funded tend to be large group or collective actions which are considerably more expensive, protracted and risky than ordinary proceedings.

5.45 Further, a presumption would achieve real efficiencies and reduce costs, by removing the need for defendants to be put to the additional cost and effort of having to seek to

negotiate or apply for security in funded cases, given the reality that security will likely be sought in many funded cases.

5.46 Consistent with the position of the Australian Law Reform Commission, FCJ does not suggest that there should be a mandatory requirement for security for costs in funded claims, recognising that such an approach would be too inflexible. A presumption strikes a sensible balance between achieving the benefits and efficiencies stated above whilst still allowing the court discretion.

5.47 Additionally, drawing on the concerns considered by the Australian Law Reform Commission as regards the strength of the security being offered in funded claims, FCJ considers that further cost reductions and efficiencies could be achieved if the presumption of security for costs is as to unconditional and irrevocable security, reflecting conventional forms of security such as cash or bank guarantees.

5.48 This would avoid the common approach of funded claimants to only offer an ATE policy as security. As the courts have recognised,[94] an ATE policy typically contains a number of conditions that serve to undermine the security offered including: provisions allowing an insurer to withdraw cover; limits on the scope of coverage; redaction of relevant policy terms; or there is potential for the policy to be avoided on the grounds of fraud and/or reckless non-disclosure/misrepresentation. Further, as the defendant will not be a party to the ATE policy, it will not have a direct right of enforcement.

5.49 To address these issues, defendants routinely seek Anti-Avoidance Endorsements to the ATE Policy or a deed of indemnity, which (if correctly worded) ensures that the insurer cannot avoid or cancel the policy and will always pay claims up to the limit of indemnity. It is the experience of FCJ members that it is common for claimants to resist providing an Anti-Avoidance Endorsement or a deed of indemnity, and for claimants only to provide such an endorsement (or a suitably worded endorsement) or a deed of indemnity following protracted negotiations. If a suitably worded Anti-Avoidance Endorsement or a deed of indemnity was instead the default position, by reason of it being necessary for the security to be unconditional and irrevocable, that cost and inefficiency could be avoided. In doing so, it would serve the overriding objective of cases being dealt with justly and at proportionate cost.

5.50 To support this proposal of a presumption of security, there should be a requirement for claimants, in all funded proceedings, to disclose their security to the court and the defendant, with redactions if strictly necessary to protect privilege or those matters that might confer a tactical advantage on the defendant. FCJ considers that disclosure of the plaintiffs' security should occur when the statement of claim is filed or as soon as practicable after the security has been arranged.

Proposal 7: No TPL Funder control

5.51 **We propose that TPL Funders and other financial investors should be prohibited from having any control, contractual or indirect, in any element of litigation**. They should be

[94] See for instance *Asertis Ltd v Lewis Barry Bloch* [2024] EWHC 2393 (Ch).

able to receive progress reports and other updates and be at liberty to terminate their investment but only in a manner which does not exercise any control.

5.52 TPL Funders would continue to conduct due diligence on potential claims prior to making any decision to fund. But once they fund a case, the funding should be a passive investment and a ban on any form of control would address many of the conflict concerns with the current unregulated system.

5.53 Many forms of investment are passive, and so prohibiting control is not a controversial suggestion in of itself. Furthermore, there is precedent for passive investments even within the TPLF sector as providers of legal expense insurance do not tend to have control over the litigation that they fund. FCJ's proposal is that there should be specific legislation or regulations preventing any form of direct or indirect control.

5.54 Concerns around TPL Funder control are not unique to England and Wales. The Dutch case against Airbus[95] involved joined class action lawsuits brought – on behalf of investors who had acquired or held listed shares in Airbus – by two claim foundations namely, the Investor Loss Compensation Foundation ("**SILC**"), and the Airbus Investors Recovery Foundation concerning claims of misleading information related to Airbus shares.

5.55 The Dutch court found that the Supervisory Board within SILC had far-reaching control, which the court found was "concerning" given the requirement that control over the claim must lie with SILC itself[96] and that SILC had "delegated" almost all of its activities to one of the TPL Funders.[97]

5.56 The financing agreement stipulated that SILC would inform and consult with the TPL Funders in advance of any material decisions related to the legal proceedings, including settlements. This provision allowed the TPL Funders to exert significant influence over the strategic decisions of SILC, contrary to the legislative intent that the claim foundations themselves should have control over the claim.[98]

Proposal 8: Fiduciary duties should be owed by TPL Funders to the funded claimants

5.57 Fiduciary duties are owed to funded claimants by their legal representatives. However, where there is the potential for conflicts of interest to arise (as set out at paragraphs 34.1 – 34.2) – and to the extent that the CJC is not minded to adopt proposal 7 prohibiting TPL Funder control – in claims funded by TPLF, fiduciary duties should also be owed by TPL

[95] See judgment dated 20 September 2023 in *Airbus Investors Recovery Foundation v Airbus SE* in District Court of the Hague, Case number C-09-623288-HA ZA 22-26 and C-09-627583-HA ZA 22-313.

[96] *Airbus Investors Recovery Foundation v Airbus SE* in District Court of the Hague, Case number C-09-623288-HA ZA 22-26 and C-09-627583-HA ZA 22-313 paragraph 5.118 <ECLI:NL:RBDHA:2023:14036, District Court of The Hague, C-09-623288-HA ZA 22-26 and C-09-627583-HA ZA 22-313>.

[97] It was this TPL Funder which initiated the case, attracted claimants, registered their claims, gathered evidence, and filed the case at the court by means of the writ of summons and the Court concluded that this claim foundation was an empty shell created by the TPL Funders. See paragraph 5.113 of the ruling.

[98] The legislative amendments under the WAMCA were designed to ensure that the approval or disapproval of a settlement proposal could not be significantly influenced by third parties, particularly TPL Funders. *Airbus Investors Recovery Foundation v Airbus SE* in District Court of the Hague, Case number C-09-623288-HA ZA 22-26 and C-09-627583-HA ZA 22-313 paragraph 5.119 <ECLI:NL:RBDHA:2023:14036, District Court of The Hague, C-09-623288-HA ZA 22-26 and C-09-627583-HA ZA 22-313>.

Funders to the funded claimants. FCJ believes that this this is particularly appropriate in consumer claims where consumer claimants should be owed a higher duty of care.

5.58 As the CJC recognises in its interim report, conflicts of interest can arise where TPLF is used. If TPL Funders owed funded parties a fiduciary duty, the risk of the TPL Funder elevating its interest above the funded party would be reduced albeit not eliminated.

5.59 Other jurisdictions are considering a similar approach:

5.59.1 Article 7 European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130 (INL)). The European Parliament recommended that TPL Funders owe a fiduciary duty, requiring them to act in the best interests of the funded party. According to the European Parliament, TPL Funders cannot have undue control over the legal proceedings they fund; such control must be the responsibility of the claimant and their legal representatives.[99]

5.59.2 In the US State of Montana, section 8 of the Litigation Financing Transparency and Consumer Protection Act applies to any civil action filed or certified as a class action in which litigation financing is provided. It states: "*A litigation financer owes a fiduciary duty to all class members or intended beneficiaries of a certified class and shall act in a manner consistent with the litigation financer's fiduciary duty throughout the civil action.*"[100]

Proposal 9: Independent legal advice

5.60 The risk/harm: FCJ shares the concern highlighted in the CJC's Interim Report that some claimants may enter into TPLF arrangements without being properly informed and advised.[101] The ELI Report cited information asymmetry and imbalance of power between TPL Funders and funded parties during the negotiation of LFAs (particularly where funded parties are consumers) as a key driver behind calls for regulation of litigation funding.[102] FCJ also agrees with the observation noted in the CJC's Interim Report that this problem can arise in collective actions in the CAT, where class representatives may not shop around for the best deal or obtain independent legal advice on the terms of the funding package on offer.[103] This was the case in Riefa where the judgment (rejecting certification) confirmed that the LFA had been presented to Prof. Riefa as the only option and the

[99] Voss A, "Report with Recommendations to the Commission on Responsible Private Funding of Litigation" *Committee on Legal Affairs* (2022) <https://www.europarl.europa.eu/doceo/document/A-9-2022-0218_EN.html> Last accessed 26 January 2025. The Resolution on responsible private funding of litigation was adopted in the European Parliament by 504 of the 626 MEPs in September 2023.

[100] Voss A, "Report with Recommendations to the Commission on Responsible Private Funding of Litigation" *Committee on Legal Affairs* (2022) <https://www.europarl.europa.eu/doceo/document/A-9-2022-0218_EN.html>. The Resolution on responsible private funding of litigation was adopted in the European Parliament by 504 of the 626 MEPs in September 2023.

[101] Civil Justice Council, "Review of Litigation Funding Interim Report and Consultation" (2024) 6, 13 <https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf>.

[102] European Law Institute, "European Law Institute (ELI) Principles Governing the Third Party Funding of Litigation" *SSRN Electronic Journal* (2024).

[103] Civil Justice Council, "Review of Litigation Funding Interim Report and Consultation" (2024) 6, 13 <https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf>.

Tribunal's concern around the lack of evidence of independent consideration, heavy reliance on her legal advisers and lack of understanding of the funding arrangements.[104]

5.61 Independent advice is important for funded parties, especially consumers, because: LFAs and other related funding documentation are complex, interlocking contractual arrangements; conflicts can arise as between funded parties, the TPL Funder and the lawyers; and the litigation process can be drawn out and is not risk free. The LFA could be terminated by the TPL Funder (see below), including for its own commercial reasons, leaving the funded party without funding to pursue its claim. The TPLF and ATE arrangements may not provide sufficient adverse costs protection if the claim fails, such that funded parties may incur liability for adverse costs (as was illustrated by the experience of 5,800 claimants in the Lloyds/HBOS group litigation: see Annex B).

5.62 Recent research indicates that there is a range of practice in relation to the provision of advice to funded parties on the proposed terms of funding. On the question of *who* customarily provides the advice to the funded client, empirical feedback from TPL Funders obtained by Professor Mulheron is said to show a "mixed bag": some TPL Funders reported that the advice is given by an independent law firm or costs counsel, whilst others said that it had been given by the law firm acting on the case. **For the reasons explained below, FCJ considers that the advice should always be given by an independent lawyer, rather than by a lawyer handling the case**.

5.63 In the context of class actions, the Class Representatives Network ("**CRN**") recently conducted a survey of its members (comprising existing and proposed class representatives in collective proceedings under the Competition Act 1998 or representative proceedings under CPR 19.8) ("**CRN Survey**") on the subject of selecting TPL Funders and negotiating LFAs.[105] It found that only 50% of respondents (i.e. 6 out of 12) said that they had taken legal advice on the terms of their LFA from a lawyer outside their primary legal team at the point the funding arrangement was first negotiated. Furthermore, over 40% said that they had received no advice at all.[106]

5.64 The CRN concluded from the data that "*it is by no means standard practice*" for class representatives to seek independent advice.[107] PCRs bringing collective proceedings in the CAT tend to be highly sophisticated consumer campaigners or academics. **In contrast,**

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[104] *Christine Riefa Class Representative Limited v Apple Inc & Others* [2025] CAT 5 (Competition Appeal Tribunal, 14 January 2025) <https://www.catribunal.org.uk/sites/cat/files/2025-02/16027723%20Christine%20Riefa%20Class%20Representative%20Limited%20v%20Apple%20Inc.%20%26%20Others%20-%20Judgment%20%28CPO%20application%29%20%5B2025%5D%20CAT%205%20%20%2014%20Jan%202025.pdf> para 5, 90.

[105] Gupta R, "Selecting Litigation Funders and Negotiating Funding Agreements" *Class Representatives Network* (20 September 2024) <https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf>.

[106] Gupta R, "Selecting Litigation Funders and Negotiating Funding Agreements" *Class Representatives Network* (20 September 2024) 16 <https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf>. More detail on the CRN Survey is set out at Annex C.

[107] This is because the survey did not collect data about *when* respondents first negotiated their funding arrangements: see Class Representatives Network, *Research and Reports* <https://classrepresentativesnetwork.org/research-and-reports> 16, 23.

it is fair to assume that individual consumers who elect to join opt-in mechanisms are even less likely to take independent legal advice.

5.65 The current self-regulatory framework: Paragraph 9.1 of the ALF Code provides: "*A Funder will take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute*." In other words, to comply with the ALF Code, it is sufficient that the funded party has taken advice on the terms of the LFA from their own lawyer handling the case. In addition, the wording of the ALF Code is limited to the provision of advice on the terms of the LFA and does not extend to other related funding documentation (such as ATE insurance policies and any contingency fee agreement(s) with the funded party's lawyers) which may also form part of the LFAs as a whole. For TPL Funders who are not members of the ALF, there is no requirement for funded parties to receive independent advice on the terms of the LFA.

5.66 In FCJ's view, the existing voluntary self-regulatory code is insufficient to ensure that funded parties, especially consumers, receive comprehensive, independent advice on TPLF arrangements. It does not guard against the risk of a funded party not receiving advice, that the advice received is not genuinely independent, or that the advice does not cover the full funding package.

5.67 Proposed mechanism: FCJ considers that there should be a mandatory requirement for funded claimants in consumer claims to receive independent legal advice from a lawyer outside their own legal team before the LFAs are entered into.

5.68 This echoes the call by the ELI Report to ensure that proposed funded parties receive "*genuinely independent legal advice (i.e. not from the proposed funded lawyer)*".[108] However, whilst the relevant principles advocated by the ELI Report might introduce some welcome additions to the ALF Code (if the industry was to remain self-regulated), they do not go far enough.[109]

5.69 It is important that the advice should be provided not by the claimant lawyers handling the case, but by another lawyer who is independent of the claimant legal team and the TPL Funder. Although the claimant lawyer owes duties to the funded party as their client, in reality they are likely to have a vested interest in the consumer pursuing the claim. As the ELI Report has pointed out, there may also be a material connection between the proposed TPL Funder and the claimant law firm, either via portfolio funding arrangements

[108] European Law Institute, "European Law Institute (ELI) Principles Governing the Third Party Funding of Litigation" SSRN Electronic Journal (2024) 26.

[109] See: Principle 4(2) which provides that TPL Funders' promotional materials must state that any party considering entering into a litigation funding agreement should seek independent legal advice from a lawyer with no connection to the TPL Funder; Principle 8(3) which sets out various matters relating to the provision of funding and the TPL Funder's fees which are to be explained to the funded party, either by the TPL Funder or an independent lawyer, prior to entering into the funding agreement; and the Appendix outlining minimum content for funding agreements, paragraph 7 of which provides that the agreement shall set out the acknowledgment of both parties that the funded party has a need for independent advice on the content of the funding agreement and the circumstances in which it can be terminated and the way in which that need has been met, identifying the source of that advice.

or repeat instructions, which may result in a financial conflict of interest or may otherwise make it inappropriate for them to advise the funded party on the terms of the LFA.[110]

5.70 The advice should cover the proposed funding package as a whole. This will include not just the terms of the proposed LFA (as is presently the case under the ALF Code) but also the terms of the other funding documents proposed. This would include any contingency fee agreements to be entered into with claimant lawyers and any ATE insurance policies, plus any other funding documentation, including (if separate) any indemnity for adverse costs, and (where applicable) any co-funding agreements with other TPL Funders. Consumers should receive advice on the entire funding package, so that they have a complete picture as to (inter alia) what amounts may be paid to the TPL Funder and claimant lawyers should the case succeed, what adverse costs liabilities they may be personally exposed to if the case is unsuccessful and in what circumstances the funding may be withdrawn by the TPL Funder.

5.71 This would not be the only area where independent legal advice is a mandatory safeguard in order for legal agreements to be binding, it is also a requirement for settlement agreements between employers and employees.[111]

5.72 Advantages/disadvantages: FCJ believes that mandatory advice from an independent lawyer will promote better informed access to justice and reduce the risk of bad outcomes. This is especially important for consumers. Just as TPL Funders themselves often appoint an independent lawyer to verify the claimant lawyers' assessment of the merits when considering prospective cases to fund, it is only right that consumers also have access to independent advice on the proposed terms of TPLF. It is also important for the integrity of our court system.

5.73 FCJ does not see any disadvantage in making independent advice mandatory in consumer claims and does not believe that this would have any adverse effect on this aspect of the TPLF market. Indeed, Professor Mulheron's 2024 Report for the LSB found that in most cases the cost of independent advice is borne by the TPL Funder, rather than the client, with some TPL Funders having commented that paying for the advice was "*an 'access to justice' issue, and part-and-parcel of the ethos of funding the funded client's disbursements 'from beginning to end'*."[112] FCJ is agnostic as to who pays for such advice but would refer back to Annex A on the profitability of TPL Funders. The additional cost involved should not outweigh the importance of consumers obtaining independent legal advice. Moreover, Professor Mulheron notes that in most (but not all) cases, the costs of independent legal advice is a disbursement which the TPL Funder (rather than the client) pays.[113]

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[110] European Law Institute, "European Law Institute (ELI) Principles Governing the Third Party Funding of Litigation" *SSRN Electronic Journal* (2024) 31.

[111] Under section 203(3) of the Employment Rights Act 1996.

[112] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 125, 127 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

[113] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 125, 127 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

Proposal 10: TPL Funders' fees / compensation in consumer claims

5.74 **FCJ is in favour of introducing controls on TPL Funders' fees. The details of FCJ's proposals and the reasons for them are explained in response to questions 12 and 13 but are briefly summarised here**.

5.75 For commercial claimants, we can see that it may be appropriate to leave the pricing of TPLF arrangements to market forces.

5.76 In consumer claims, however, we consider that there ought to be controls on the fees payable to TPL Funders out of any damages recovered or settlement payment in order to protect consumers. Consumers in particular warrant protection because they generally cannot afford other forms of funding and because there is a greater imbalance of power between consumers and TPL Funders. Otherwise, in a system where there are no controls, we believe that there is an inherent risk of consumers being under-compensated as highlighted at paragraph 1.5.4.

5.77 FCJ considers that, in consumer cases funded by TPLF, claimants should be entitled to receive a minimum percentage of the proceeds recovered from their opponent if the case succeeds. This should be achieved by imposing a minimum percentage on the amount that must be paid to claimants out of any damages recovered or settlement payment. It should avoid financial outcomes where claimants end up receiving only a small proportion of their recovery after the TPL Funder has been paid, as happened in the Post Office group litigation cited in the CJC's Interim Report (where 555 sub-postmasters received, collectively, approximately 20% of the settlement sum).[114]

5.78 The minimum percentage should be imposed by legislation, with a higher percentage for the pre-action stage given that the TPL Funder will have made less financial investment in the case and that there is greater scope for the TPL Funder to be over-compensated if the case settles before it is issued. We suggest that the minimum percentage to be returned to claimants is set at 75% of any settlement payment if it occurs before proceedings are issued to reflect the fact that before proceedings are issued, there is less risk to TPL Funders in backing a (prospective) claim. However, once proceedings have been issued and a claim is on foot, to reflect the greater risk that the TPL Funder is taking, we suggest that claimants receive 50% of any damages recovered or settlement payment. In addition, we consider that there should be a mandatory requirement in respect of the terms of LFAs in consumer claims (the "waterfall"), such that the return to claimants ranks first after the TPL Funder's entitlement to the funded costs and disbursements of the case, but ahead of the TPL Funder's return and any other payments.

Proposal 11: AAE exclusions should be mandatory to better protect consumers

5.79 As in other areas of insurance, ATE insurance providers may be able to cancel or avoid policies for breaches of the policy or for fraud and/or reckless non-disclosure/misrepresentation. Consumers may not be aware or fully appreciate the risk of

[114] Civil Justice Council, "Review of Litigation Funding Interim Report and Consultation" (2024) 15-16 <https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf>.

this eventuality or the financial consequences that may flow from the same. Further, the events leading to cancellation or avoidance may be as a result of the claimant law firm, over which consumers have no control.

5.80 For the protection of consumers in funded group and collective actions and the reputation of the judicial system, Anti-Avoidance Endorsements should be a mandatory requirement. Anti-Avoidance Endorsements for ATE policies, if correctly worded, mean the insurer cannot avoid or cancel the ATE policy and will always pay claims up to the limit of the indemnity, thereby better protecting consumers against adverse cost risk.

5.81 Inevitably, there will be a cost associated with the purchase of an Anti-Avoidance Endorsement, but that is more than justified by the consumer protection it affords.

6. QUESTION 6: SHOULD THE SAME REGULATORY MECHANISM APPLY TO: (I) ALL TYPES OF LITIGATION; AND (II) ENGLISH-SEATED ARBITRATION?

6.1 FCJ considers that the pervasive regulatory requirements set out at section 4 of this Response (i.e., Proposals 1 – 8) should apply to all types of litigation and arbitration, but the consumer requirements (i.e., Proposals 9 – 11) need not apply for arbitration because the UK does not (yet) have mass arbitrations.

7. QUESTION 7: WHAT DO YOU CONSIDER TO BE THE BEST PRACTICES OR PRINCIPLES THAT SHOULD UNDERPIN REGULATION, INCLUDING SELF-REGULATION?

7.1 As stated by the European Parliament, the principles which should underpin the TPLF industry are "*Transparency, fairness and proportionality*." As discussed at section 4 of this Response, it is clear that TPLF has outgrown self-regulation and already reached the critical point referred to in Lord Justice Jackson's Report where regulation is necessary. A pervasive regulatory regime as set out at section 5 of this Response should apply to TPLF, ensuring transparency, fairness, and proportionality for claimants.

7.2 In addition to these principles identified by the European Parliament, FCJ considers the following further themes to be key: (i) litigation should be a last resort; (ii) access to justice can only be assessed by reference to outcomes; and (iii) in all aspects of litigation, the interests of the claimant(s) should be prioritised above the interests of other parties, such as the legal advisors and the TPL Funders.

8. QUESTION 8: WHAT IS THE RELATIONSHIP, IF ANY, BETWEEN THIRD PARTY FUNDING AND LITIGATION COSTS?

8.1 We address questions 8(a) and 8(e). FCJ has nothing to add to questions 8(b) – 8(d).

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

8.2 High legal costs act as a strong deterrent to litigation and are a barrier to access to justice, as was acknowledged by Sir Rupert Jackson in the foreword to the 2009 Report: "*In some*

areas of civil litigation, costs are disproportionate and impede access to justice."[115] As such, there is the public interest to ensure that there is constant downward pressure on legal costs.

8.3 The Lord Justice Jackson Reforms have played a significant role in controlling costs. In particular, the introduction of cost budgeting has provided for all parties to have visibility of costs in the proceedings and allowed the court to manage the process. The intention was that, among other things, the involvement of the court at an early stage in costs management would bring down the cost of litigation. As demonstrated by the example given at paragraphs 8.4 and 8.6 below, the courts have shown themselves willing to slash costs budgets. Cost budgeting is not a panacea, most obviously because it only applies for claims of less than £10 million (and in other cases at the judge's discretion).

8.4 In recent years, corporate clients have negotiated on fees with increasing toughness and are calling for greater price transparency from law firms, as economic pressures force clients to drive a harder bargain for legal advice.

8.5 However, in group proceedings, claimants have less direct control over the steps that their lawyers take and are less able to require efficient case management. As was described in the Cost Budgeting judgment in the "*Pan-NOx*" emissions group litigation, the client pressure on costs is absent in funded group litigation:[116]

> "*It may be that this approach is driven by the overall model of this group litigation in which the traditional downward pressure imposed by a client on their lawyers is lacking in the overall funding model…Whatever the reason, the staggering costs both incurred and estimated are in numerous individual respects and in the aggregate frankly absurd and – whether or not the Claimants still intend to incur and charge for work on such a basis – this Court will not sanction this wholly unreasonable expenditure of costs*."

8.6 The scale of the cost inflation by the funded claimants in the "*Pan-NOx*" emissions group litigation example was stark. The claimants' overall estimated costs were, in the view of the court, so inflated that it decided to reduce them by almost 75%. The Judges noted that the claimants' budgets were "*redolent of financial incontinence*;" "*strain[ing] all credulity*"; "*wholly disproportionate*"; involved "*wildly inefficient resourcing*" and "*over-lawyering*".[117]

8.7 Whilst this is one example, it provides important insight into the potential for cost inflation in funded litigation more generally.

(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?

8.8 **The costs of TPLF should not be recoverable from opposing parties as a cost in court proceedings.**

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[115] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

[116] *Pan NOx Emissions Litigations* [2024] EWHC 1728 (KB) (05 July 2024) at 36.

[117] *Pan NOx Emissions Litigations* [2024] EWHC 1728 (KB) (05 July 2024) at 36.

Argument in favour of allowing the costs of litigation funding to be recoverable

8.9 Whilst this approach may allow funded parties to retain more of the proceeds of any settlement or damages award, that benefit would be significantly outweighed by the disadvantages and risks described below. Moreover, the object of ensuring that funded claimants receive a fair share of recoveries through LFAs can and should be catered for by other means, namely by introducing a minimum percentage on the amount that must be returned to funded claimants from any damages or settlement payment recovered from their opponent as addressed in the responses to questions 11 and 12 below.

8.10 As a starting point, FCJ does not consider that much weight, if any, should be ascribed to the fact that some arbitral tribunals have the power to award a defendant to pay the costs of funding. Arbitration diverges from litigation in a number of respects, most notably because it is a consensual process, and is not used in collective claims in the UK (at least not yet) where – as explained at paragraph 8.5 above – there is judicial concern as to the absence of downward cost pressure. Accordingly, there is no need for the courts and arbitration panels to take the same approach on this issue.

The reasons for considering recoverability of Conditional Fee Arrangement success fees and ATE Premia apply equally to recoverability of TPLF

8.11 The logical starting point for considering recoverability of funding costs is Lord Justice Jackson's Report. Lord Justice Jackson conducted a thorough analysis of recoverability of conditional fee agreement ("**CFA**") uplifts and ATE premia and his analysis has an almost complete read across to recoverability of funding costs. The Lord Justice Jackson Reforms resulted in the abolition of the recovery of CFA success fees and ATE premiums and FCJ considers that the same conclusion should be reached in respect of the funding cost recovery. In the interests of brevity, we highlight below the key points from Lord Justice Jackson's Report, but we encourage the CJC to review Chapters 9 and 10 of the report in full.

8.12 Lord Justice Jackson's Report identified a number of flaws with the then regime which allowed the recovery of ATE premia and CFA success fees, and which resulted in the regime generating "*disproportionate costs*."[118]

8.13 For the first flaw, Lord Justice Jackson gave three examples of the anomalies and unintended consequences that flow from allowing recovery. One of the examples was that, as regards commercial claims, it was "*absurd that one party to commercial litigation can become a 'super-claimant' [by entering into a CFA and taking out ATE insurance] and thereby transfer most of the costs burden to the other party*."[119] Lord Justice Jackson noted

[118] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 109 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

[119] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 109 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

the argument made in favour of recoverability that the opposing party can avoid the significant costs burden by settling early and responded in his report as follows:[120]

> "*It is perfectly reasonable for the companies on both sides to decide to fight. It is quite wrong for one or other party to be pressurised into settling by a gross imbalance in the costs liabilities of the parties. If party A has a CFA and ATE insurance and party B does not, party A may be litigating at virtually no costs risk, whereas party B may face liability for quadruple costs if it loses. This is not the level playing field which the courts ought to provide for such litigation.*"[121]

8.14 The second flaw identified by Lord Justice Jackson was that:

> "[...] *the party with a CFA generally has no interest in the level of costs being incurred in his or her name. Whether the case is won or lost, the client will usually pay nothing.... This circumstance means that the client exerts no control (or, in the case of a no win, low fee agreement, little control) over costs when they are being incurred. The entire burden falls upon the judge who assesses costs retrospectively at the end of the case, when it is too late to 'control' what is spent.*"[122]

8.15 The third flaw identified by Lord Justice Jackson was that the "*costs burden placed upon opposing parties is excessive and sometimes amounts to a denial of justice*." Lord Justice Jackson went further, indicating that the "*costs consequences of the recoverability rules can be so extreme as to drive opposing parties to settle at an early stage, despite having good prospects of a successful defence*" and that the effect of this is sometimes described as "*blackmail*."[123]

8.16 The fourth flaw identified by Lord Justice Jackson was that it may lead to claimant firms seeking to enlarge their earnings by cherry picking cases:

> "*If claimant solicitors and counsel are successful in only picking "winners," they will substantially enlarge their earnings. As Professor Zander pointed out at the London seminar, if the claimant solicitor wins a case with a 100% success fee, he or she receives an additional 300% profit. As the Senior Costs Judge explained at the same seminar, it is not possible for costs judges effectively to control success fees retrospectively.*"[124]

8.17 FCJ also draws attention to the views of the judiciary as recorded in Lord Justice Jackson's Report, which were equally critical of CFA uplifts and ATE premia being recoverable.

8.18 The Council of Her Majesty's Circuit judges stated:

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[120] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 110 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

[121] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 110 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

[122] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 110 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

[123] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 111 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

[124] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 111 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

"*The concept of a losing defendant in any particular case having to subsidise the costs which the opposing solicitor has notionally or actually lost in other cases is manifestly unfair, and could indeed be called grotesque. It means that defendants pay for everything, and claimants can litigate entirely risk free whatever the lack of merit in their claims. It is especially unfair when claimants' solicitors do their best not to take on cases which they may lose anyway. CFAs have themselves led to considerable satellite litigation.*"[125]

8.19 The Chief Chancery Master is cited as stating: "*My strong view is that success fees and ATE premiums visited on the losing side are, quite simply, an iniquity in a civilized society.*"[126]

8.20 All of the flaws and concerns identified in Lord Justice Jackson's Report as regards the recovery of CFA success fees and ATE premia apply equally in respect of the funding cost recovery and, indeed, those flaws and concerns are even more pronounced because the quantum of the funding costs will be many times higher than the CFA success fees and ATE premia examined in Lord Justice Jackson's Report. The reasoning in Lord Justice Jackson's Report, which draws on first principles, is as relevant today as it was more than 10 years ago. FCJ is not aware of any developments since the Lord Justice Jackson Reforms that would lead to a different conclusion now. Given those issues and concerns led to the abolition of the recovery of CFA success fees and ATE premia, it would be an odd outcome to permit the recoverability of funding costs.

Further reasons why costs of funding should not be recoverable

8.21 Aside from the reasons set out in Lord Justice Jackson's Report, FCJ also wishes to draw out the following additional risks:

8.21.1 The possibility of recovering the costs of funding, even if that possibility was remote, risks reducing downward pressure on the claimants' lawyers legal costs. As stated at paragraph 8.2 above, increasing legal costs are themselves a barrier to access to justice and downward pressure on costs should be exercised throughout.

8.21.2 Commoditisation of litigation and excess profits for the benefit of investors risk tarnishing the image of the judicial system.

8.21.3 Large funding costs could be weaponised to create settlement pressure, which would be a perverse outcome as such pressure has no correlation to the underlying merits of the claim. As a consequence of having the ability to use the funding costs for settlement pressure, more unmeritorious claims may be pursued, particularly against large corporates.

8.22 Paragraph 6.54 of the Consultation includes a quote from Professor Mulheron to the effect that allowing recovery of the TPL Funder's success fee would provide a "counterpoint" to

[125] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 107 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.
[126] Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 107 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

the Arkin jurisprudence by which a non-party costs order may be made against a TPL Funder to pay the costs of a successful defendant.[127]

8.23 The "counterpoint" to TPL Funders being susceptible to costs orders is the potential for any third party including those on the defendant's side to also be subject to a third party costs order. In stark contrast, it is the recovery of funding costs that would be without any counterpoint as it will fall on defendants. This is manifestly unfair because those same defendants are unable to recover the costs of a CFA or damages-based agreements ("**DBAs**") against the claimant or TPL Funder if they are successful (quite aside from the point, as noted above, that the quantum of the funding costs is likely to be many times larger than the equivalent CFA or DBA costs).

8.24 Paragraph 6.54 of the Consultation includes a further suggestion from Professor Mulheron that recovery of funding costs may "*curb the more egregious behaviour of defendants*" if an "'*Essar-type order*' *was possible*", being a reference to the arbitration in which a defendant was ordered to pay the funding costs due to the defendant's "*reprehensible*" conduct which drove the claimant into expensive litigation.[128]

8.25 We have already explained the risks of introducing the jurisdiction to allow the costs of funding, including by pointing to Lord Justice Jackson's reasoning. But, in any event, powers already exist to limit egregious conduct. First, through the use of indemnity costs orders or even wasted costs orders where appropriate. Second, where judges identify concerning conduct they will typically warn the offending party and that is often an effective way of moderating behaviour. Third, the Part 36 mechanism in the Civil Procedure Rules has proven a highly effective means of encouraging parties to make realistic settlement offers and to prevent themselves against adverse costs.

8.26 FCJ is firmly of the view that recovery of TPLF costs should not be allowed.

8.27 If however the CJC were, contrary to above, to recommend that recovery of funding costs should be allowed, FCJ contends that recovery should be: (i) limited to those instances where there is egregious behaviour, with a threshold significantly higher than that applied for indemnity costs; and (ii) that recovery should be limited only to the amount of TPLF costs for which it can demonstrably be shown were incurred only as a result of the aforementioned conduct.

9. QUESTION 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.

9.1 See response to question 8.

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[127] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 121 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

[128] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 122 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

10. QUESTION 10: SHOULD THIRD PARTY FUNDERS REMAIN EXPOSED TO PAYING THE COSTS OF PROCEEDINGS THEY HAVE FUNDED, AND IF SO TO WHAT EXTENT?

10.1 FCJ considers that TPL Funders should remain exposed to full liability for adverse costs of proceedings that they have funded and that the extent of the TPL Funder's liability should remain a matter for the discretion of the judge in the particular case.

10.2 FCJ's view reflects the conclusion of Lord Justice Jackson's Report.[129] It is also consistent with the recommendation in Article 18 of the European Parliament's Resolution on responsible private funding of litigation.[130]

10.3 Lord Justice Jackson's reasoning was twofold. First, the application of the Arkin cap would inhibit access to justice for defendants who faced funded claims and who would have to bear their own costs even if they won. Second, it would be unjust to funded parties, who may be exposed to adverse costs liabilities which they cannot meet. Moreover, Lord Justice Jackson found no evidence that full liability for adverse costs would stifle TPLF or inhibit access to justice for claimants.

10.4 The Court of Appeal's decision in *Chapelgate Credit Opportunity Master Fund Ltd v Money*[131] has brought the position closer to what was advocated for by Lord Justice Jackson and is, therefore, a development that was welcomed by FCJ. The Court of Appeal held that the Arkin cap is not a binding rule that judges had to follow, rather judges retain a discretion when determining the extent of a TPL Funder's liability for adverse costs and may consider it appropriate not to limit the TPL Funder's liability to the amount of funding provided by it. Depending on the facts of the case, judges might take into account matters other than just the extent of the TPL Funder's funding, such as the TPL Funder's potential return.

10.5 The Court of Appeal noted that, when *Arkin* was decided (in 2005), TPLF was still "*nascent*" and ATE insurance was relatively new, and that these were now much more established. Consequently, a TPL Funder should now be able to protect its adverse costs risk by ensuring that either it, or the funded claimant, has sufficient ATE insurance[132] (and, as Professor Mulheron notes, in practice most TPL Funders do seek to lay off the risk of adverse costs to an ATE insurer).[133]

10.6 The reasoning in the Lord Justice Jackson Report remains relevant today. The jurisdiction to award adverse costs against a TPL Funder without reference to the Arkin cap is a vital safeguard for defendants (who have no choice but to incur costs in defending claims) and for funded parties. This includes where the quantum of the defendant's recoverable costs

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[129] *"Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge."*, Jackson LJ, "Review of Civil Litigation Costs: Final Report" *The Stationery Office* (2009) 464, recommendation 13 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

[130] Voss A, "Report with Recommendations to the Commission on Responsible Private Funding of Litigation" *Committee on Legal Affairs* (2022) <https://www.europarl.europa.eu/doceo/document/A-9-2022-0218_EN.html>. The Resolution on responsible private funding of litigation was adopted in the European Parliament by 504 of the 626 MEPs in September 2023.

[131] *Chapelgate Credit Opportunity Master Fund Ltd v Money* [2020] 1 WLR 1751.

[132] *Chapelgate Credit Opportunity Master Fund Ltd v Money* [2020] 1 WLR 1751 at 36.

[133] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 90 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

exceeds the amount covered by ATE insurance and/or by the TPL Funder, or if the ATE insurer does not pay out, or if the insurer or TPL Funder become insolvent, or a combination of those eventualities.

10.7 FCJ also notes that the responses from TPL Funders that are included in the Professor Mulheron's 2024 Report[134] do not suggest that erosion of the cap by the *Chapelgate* decision will result in adverse consequences. To the contrary, by and large the TPL Funders indicate either that the *Arkin* cap was of little relevance to them because they were obtaining ATE to cover the full adverse costs risk or that they simply want certainty either way as to their exposure.

11. QUESTION 11: HOW DO THE COURTS AND HOW DOES THE THIRD-PARTY FUNDING MARKET CURRENTLY CONTROL THE PRICING OF THIRD PARTY FUNDING ARRANGEMENTS?

11.1 The courts do not control the pricing of third party funding arrangements.

11.2 Under the CPO Regime, the CAT is obliged to review an LFA in accordance with rules around group proceedings, where any PCR is required to prove to the court that it will be able to fund a claim and meet any adverse costs order. It will also approve settlements and payments to TPL Funders. However, the CAT has made it clear that "*the Tribunal should be reluctant to venture into an assessment of the commercial terms of the LFA unless they are sufficiently extreme to warrant calling out.*"[135] In other words, it is not the utility of the courts to control pricing, which would be overly burdensome. It is therefore clear that even the CPO regime does not have any real influence on pricing.

12. QUESTION 12: SHOULD A FUNDER'S RETURN ON ANY THIRD-PARTY FUNDING ARRANGEMENT BE SUBJECT TO CONTROLS, SUCH AS A CAP?

12.1 FCJ is in favour of introducing controls on TPL Funders' fees.

12.2 For commercial cases, we do not propose any absolute cap on TPL Funders returns. Rather, for the reasons explained below, we consider **funded claimants in consumer cases should be entitled to a minimum percentage of the proceeds if their case is successful**. Our reasoning is as follows:

12.2.1 First, access to justice requires that claimants should receive a fair financial outcome where cases succeed and a rule on the minimum percentage to be returned to the claimants will achieve this. Outcomes where the funded class receive only a very small share, as happened in the Post Office group litigation (where 555 sub-postmasters received, collectively, approximately 20% of the

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[134] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 90, 93 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

[135] *Christine Riefa Class Representative Limited v Apple Inc & Others* [2025] CAT 5 (Competition Appeal Tribunal, 14 January 2025) para 110 <https://www.catribunal.org.uk/sites/cat/files/2025-02/16027723%20Christine%20Riefa%20Class%20Representative%20Limited%20v%20Apple%20Inc.%20%26%20Others%20-%20Judgment%20%28CPO%20application%29%20%5B2025%5D%20CAT%205%20%20%2014%20Jan%202025.pdf>.

settlement sum),[136] do not constitute effective access to justice. Those outcomes are bad for the claimants and also, as high profile incidents, they are bad for the reputation of the court system. A minimum percentage recovery would avoid this.

12.2.2 Second, this approach would be consistent with the expectations of the general public in the UK, i.e., consumers themselves. Last year, Survation conducted polling on regulation of TPL Funders on behalf of FCJ: see Annex D. The survey found that most respondents (69%) believed that there should be a limit set by the Government on the proportion of damages that TPL Funders are allowed to take, and that 74% thought there should that there should be a regulated cap.

12.2.3 Third, there is an incongruence between TPLF and lawyers' contingency fee agreements, in that lawyers' success fees under conditional fee agreements and damages-based agreements are subject to pricing controls and caps, but TPL Funders' fees are not.

12.3 There are reports that some TPL Funders are charging multiples of up to fourteen times their investment.[137] Given that TPL Funders contend that they do not fund nuisance cases and only fund meritorious claims, it is difficult to see how multiples of this magnitude can be justified. **That said, FCJ's proposal is not a cap on profitability**. Rather it would provide a minimum return to the funded parties. It is thus framed around the parties to the claim and their interests. As there is a minimum return for the funded parties, the service providers (solicitors, barristers, TPL Funders) would need to have an agreement or agreements in place to ensure that the minimum return is achieved. This is not particularly different to how these financial stakeholders operate in practice already. In circumstances where budgets are being renegotiated, the claimant advisors will typically talk amongst themselves and renegotiate agreements. There is no reason why those parties cannot collectively operate within the framework of a minimum return. This approach would also encourage those parties to work efficiently without imposing an abstract cap on any one of them.

12.4 If a minimum share of recoveries was introduced for claimants, TPL Funders may decline to fund a narrow tier of prospective claims. But those claims were in any event marginal investments where there is a serious risk that only very small portions would be shared to the claimant groups and this will be an acceptable price to protect consumers in the bast majority of cases and will avoid future scandals that harm the reputation of the court system.

[136] Civil Justice Council, "Review of Litigation Funding Interim Report and Consultation" (2024) 15-16 <https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf>.

[137] Mulheron R, "A Review of Litigation Funding in England and Wales" *Queen Mary University of London* (2024) 111-114 <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.

13. QUESTION 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 ANY 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 FACTOR? (E) SHOULD THERE BE DIFFERENT CAPS AND, IF SO, IN WHAT CONTEXT AND ON WHAT BASIS?

13.1 As set out at the response to **question 12** above, FCJ considers that funded claimants in consumer claims should be entitled to a minimum percentage of any damages or settlement payment recovered from their opponent.

13.2 We consider that different minimum percentages should apply for the pre-action and post-issue stages, with a higher percentage for the pre-action stage. This is justified given that there is greater scope for the TPL Funder to be over-compensated if the case settles before it is issued, as the TPL Funder will have invested less capital in the case. We suggest that the minimum percentage is set at 75% of any settlement payment before proceedings are issued, and then 50% of any damages recovered or settlement payment after proceedings have been issued.

13.3 The percentage minimum described above should be imposed by legislation. It should apply in all opt-in and opt-out collective proceedings.

13.4 The minimum should be mandated at 50%/75% rather than being determined by the court on a case-by-case basis. Assessment by the court would likely to give rise to frequent and costly satellite disputes involving excessive and complex evidence. It would be far better for the minimum to be set by legislation, as the certainty and clarity will allow claimant law firms and TPL Funders to assess the costs/benefits before they invest time and money in a case without knowing the level of their return.

13.5 In addition, collective proceedings, we consider that there should be a mandatory requirement in respect of the terms of the LFA (the "waterfall"), so that the return to claimants ranks first after the TPL Funder's entitlement to the funded costs and disbursements of the case, but ahead of the TPL Funder's return and any other payments.

14. QUESTION 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.

14.1 FCJ has nothing further to add in relation to this question.

15. QUESTION 15: WHAT ARE THE ALTERNATIVES TO THIRD PARTY FUNDING?

15.1 FCJ has nothing further to add in relation to this question. In particular, we have suggested that litigation should be a last resort and that there is a strong argument for ADR e.g., in the form of complaints processes, ombudsmen services and mediation.

16. QUESTION 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?

16.1 FCJ has nothing further to add in relation to this question.

17. QUESTION 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?

17.1 The DBA Reform Project recommended that DBAs should be prohibited in CPR 19.8 representative actions. That would bring the position into line with the prohibition of DBAs in opt-out Collective Proceedings Orders. FCJ supports this proposal.

17.2 FCJ is agnostic on the question of whether the separate regimes for CFAs and DBAs should be replaced by a single regime. What is important in our view is that the relevant regulations are clearly drafted, to reduce room for uncertainty. This applies particularly to the existing DBA regulations, which have been the subject of substantial criticism (as noted in the CJC's Interim Report).

17.3 CFA success fees should remain irrecoverable from opponents.

18. QUESTION 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?

18.1 FCJ is not in favour of mandatory legal expense insurance because: (i) in cost of living crises it is difficult to justify imposing mandatory costs, whether on members of society already struggling to meet bills or on the economy more generally; and (ii) there is no evidence that introducing such a scheme would offer desirable outcomes, where consumers and businesses would be pushed towards the courts to resolve disputes rather than via alternative means. As set out at question 1 of this Response, FCJ considers that litigation should be a last resort for the reasons described.

19. QUESTION 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?

19.1 FCJ views this issue as a sub-issue of the question of statutory regulation, on which we comment more cohesively in our response to question 5 of the Consultation, above.

20. QUESTION 20: ARE THERE ANY REFORMS TO CROWDFUNDING THAT YOU CONSIDER NECESSARY? IF SO, WHAT ARE THEY AND WHY?

20.1 FCJ has nothing to add in relation to this question.

21. QUESTION 21: ARE THERE ANY REFORMS TO PORTFOLIO FUNDING THAT YOU CONSIDER NECESSARY? IF SO, WHAT ARE THEY AND WHY?

21.1 Portfolio funding (in particular, the "*law firm funding*" subset of portfolio funding) is on the rise. For example:

21.1.1 for TPL Funder Fortress, what started as $5 million to $10 million investments in single commercial cases has grown into loans exceeding $100 million to law firms for their entire caseloads;[138]

21.1.2 in September 2021, Bench Walk Advisors LLC provided Gateley LLP with a credit facility worth up to £50m for use across its entire caseload;

21.1.3 in August 2023, Harbour Litigation Funding provided a £33m credit facility to Slater and Gordon to invest in its consumer legal services teams and fund a large volume of clinical negligence and personal injury claims; and

21.1.4 Pogust Goodhead has a corporate debt facility of $552.5 million provided by Gramercy PG (UK) Holdings Ltd, with US hedge fund Gramercy Funds Management LLC acting as the investment manager for the debt facility, for the purpose of enabling Pogust Goodhead to bring its claims.[139]

21.2 At the 25 March 2024 hearing on costs in the NOx Emissions Group Litigation,[140] Pogust Goodhead argued that the Gramercy debt facility operates as a business-to-business loan facility such that there is no direct contact or relationship – contractual or otherwise – between the claimants and Gramercy and, therefore, no funding agreement within the scope of CPR r25.14(2)(b) whereby the TPL Funder could be liable for security for costs on the basis of contributing to the claimant's costs in return for a share of any proceeds recovered.

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[138] Emily R Siegel, 'Fortress' Billions Quietly Power America's Biggest Legal Fights' (*Business & Practice*, 16 October 2024).

[139] Prior to the involvement of Gramercy, Pogust Goodhead received funding from private credit investor NorthWall Capital. NorthWall Capital reaped €210 million ($221 million) in profit after Gramercy provided a loan that refinanced the €178 million of funding North Wall had channelled to Pogust Goodhead, according to an investor letter seen by Bloomberg. That amount could swell to €470 million depending in part on the firm's success in winning its claims, North Wall said. Ellen Milligan, 'North Wall Doubles Money by Funding Law Firm Fighting ESG Cases' (*Bloomberg*, 2 October 2023) <https://www.bloomberg.com/news/articles/2023-10-02/north-wall-doubles-money-by-funding-law-firm-fighting-esg-cases>.

[140] *Various Claimants v Mercedes-Benz Group AG and Others; Volkswagen AG and Others; Dr Ing HCF Porsche AG and Others and Others* [2024] EWHC 695 (KB).

21.3 In FCJ's view, portfolio funding should not be used to reduce scrutiny of to reduce protections either to the funded claimants or to the defendants.

22. QUESTION 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?

22.1 FCJ has nothing to add in relation to this question.

23. QUESTION 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?

23.1 FCJ has nothing to add in relation to this question.

24. QUESTION 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?

24.1 FCJ has nothing to add in relation to this question.

25. QUESTION 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?

25.1 The Court of Appeal's finding in *Rowe*[141] that a cross-undertaking in damages in relation to security for costs should "*at the very least be an exceptional remedy*" to be applied only in "*rare and exceptional*" circumstances was supported by clear and compelling reasoning. As noted by the Court of Appeal, cross-undertakings being required as a matter of course would increase costs for security applications and lead to satellite litigation. Importantly, it could also lead to defendants being discouraged from seeking security for costs for fear of being required to assume an unquantifiable liability in return.

25.2 Accordingly, FCJ considers that any changes to CPR in relation to the *Rowe* case should do nothing more than reflect the findings of that judgment.

26. QUESTION 26: WHAT ROLE, IF ANY, SHOULD THE COURT PLAY IN CONTROLLING THE PRE-ACTION CONDUCT OF LITIGATION AND/OR CONDUCT OF LITIGATION

[141] *Rowe & Ors v Ingenious Media Holdings PLC & Ors* [2021] EWCA Civ 29.

AFTER PROCEEDINGS HAVE COMMENCED WHERE IT IS SUPPORTED BY THIRD PARTY FUNDING?

26.1 FCJ views the enquiry into the role of the court as a sub-issue of the question of statutory regulation, on which we comment more cohesively in our response to question 5 of the Consultation, above.

27. QUESTION 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?

27.1 There should be a mandatory requirement in all funded cases for the funded party to disclose to their opponent and the court or tribunal: (i) the fact that the case is funded by TPLF; (ii) the identity and address of the TPL Funder; and (iii) the terms of the LFA including TPL Funders' return and whether the return will be recovered by the TPL Funder before damages are distributed to the claimant or class members. This disclosure will ensure that the court/ tribunal can adequately scrutinise the terms; whether they comply with the proposed regulation; and the interests of the claimants/ class members have been adequately promoted. The same principle (at least for proposals (i) and (ii)) are advocated by the ELI Report in its Principle 5(2) in relation to the transparency of TPLF arrangements.[142]

27.2 As noted by the ELI Report, disclosure of this information to opponents is supported by the majority of academic commentators and the Irish Law Reform Commission ("**ILRC"**) in its Consultation Paper on TPLF, and reflects best practice in other jurisdictions, such as Singapore and Hong Kong. In its Consultation Paper, the ILRC cited a number of benefits of such a requirement. These include helping identify and reduce conflicts of interest and facilitating applications for security for costs and applications for non-party costs orders against the TPL Funder.[143] We agree with these observations.

27.3 As to the question of when this information should be disclosed, Principle 5(3) of the ELI Report advocates disclosure at the earliest available opportunity after the claim has been commenced where the LFA is entered into pre-issue, or within 14 days of execution if the LFA is entered into post-issue. We support this approach. Where the LFA is entered into pre-issue, disclosure could be required no later than when the claim form is served. FCJ would suggest further that, where the TPL Funder changes, or the terms of the LFA are materially amended, those facts should be disclosed to opponents, along with any amended terms, within 14 days of the change of TPL Funder or the agreement of the amendments (as the case may be).

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[142] European Law Institute, "European Law Institute (ELI) Principles Governing the Third Party Funding of Litigation" *SSRN Electronic Journal* (2024) 31.

[143] Law Reform Commission, "Consultation Paper, Third-Party Litigation Funding" (2023) 136 – 137 <https://www.lawreform.ie/_fileupload/consultation%20papers/cpThirdPartyLitigationFunding.pdf>.

27.4 Details stemming from two recent decisions of the Financial Ombudsman Services evidence the damage that can be caused by failure to be transparent and create a conflict of interests when providing TPLF. In the case of "Mr A"[144] and "Miss H"[145] who had been in a relationship and bought a house together but subsequently split-up and became involved in a property dispute, they were unknowingly lent money by the same TPL Funder causing a further conflict and risk to Mr A's interests.[146] See full details at Annex B.

27.5 Disclosure of the TPLF arrangements themselves would support the proposals outlined in response to question 5 in relation to the presumption for security for costs in funded claims. It would be a simpler and more efficient means to ensure those obligations are complied with, rather than requiring defendants in each proceeding to apply for disclosure. It would also allow the court and defendants to identify instances where the funding amounts to an abuse of process and would generally bring about much needed transparency. As a safeguard for the funded party, disclosure would be subject to such redactions as are necessary to protect privileged matters. There could be some divergence of views on redactions, but the guiding principle should be transparency, and so minimal redactions ought to be the starting point.

28. QUESTION 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?

28.1 As discussed elsewhere in this Response, claimants may obtain litigation funding but not achieve good outcomes. Poor claimant outcomes are more likely to arise where TPL Funders exert control over litigation given the potential for their interest to conflict with the claimants/class members.

TPL Funders should not have any control over claims

28.2 The European Parliament believes that TPL Funders cannot have undue control over the legal proceedings they fund; such control must be the responsibility of the claimant and their legal representatives.[147] FCJ shares this view. England's common law system relies on clients receiving legal advice and then issuing instructions. Naturally, in group litigation members of the group cannot give individual instructions, but even where decision making is pooled it is essential that the decisions are made by the clients. Any control by the TPL Funders cuts across this principle and risks cutting into the fiduciary relationship that the law firm owes to its clients.

28.3 In *Laser Trust v CFL Finance Ltd*[148], the TPL Funder expressly denied exerting control over the litigation. However, the Court found that the LFA demonstrated what the court

[144] See FOS decision DRN-3692047 dated December 2024 relating to "Mr A" and in particular the conclusions drawn by the FOS at para 187.
[145] See FOS decision DRN5132754 dated 2021 relating to "Miss H".
[146] Michael Cross, 'Funder Lent to Both Parties in Former Couple's Property Battle' (*Law Gazette*, 30 January 2025) <https://www.lawgazette.co.uk/news/funder-lent-to-both-parties-in-former-couples-property-battle/5122161.article>.
[147] Voss A, "Report with Recommendations to the Commission on Responsible Private Funding of Litigation" *Committee on Legal Affairs* (2022) <https://www.europarl.europa.eu/doceo/document/A-9-2022-0218_EN.html>. The Resolution on responsible private funding of litigation was adopted in the European Parliament by 504 of the 626 MEPs in September 2023.
[148] *Laser Trust v CFL Finance Ltd* [2021] EWHC 1404 (Ch).

referred to as the TPL Funder's "*control of an extraordinarily high order*" over the proceedings. The distinction between these types of arrangements and "pure funders" was recognised by the court as going beyond the mere funding of litigation. The court did not find that the TPL Funder's control over the litigation was necessarily absolute, but it was considered to be "*quite clear that under the terms of the funding agreement, the control that [the TPL Funder] had was massive*." FCJ considers that the default position must be that TPLF agreements should leave the Funded Party "*in control of the conduct of the litigation*."[149]

Control can exist either implicitly in terms in funding agreements and/or indirectly

28.4 TPL Funders have an interest in protecting their investment.[150] However, FCJ considers that any prohibition on exercising control should extent to exercising control indirectly, e.g., other than through direct contractual rights. Thus, threatening to withdraw funding should not be used to influence decision making of funded parties.

There are instances of TPL Funders having control or seeking control

28.5 As was widely reported in the legal press,[151] Innsworth, the TPL Funder in the Merricks v Mastercard claim objected to the settlement in principle agreed between Mr Merricks and Mastercard. A spokesperson for Innsworth said:

> "*We strongly oppose this reported settlement which was struck without our agreement. It is both too low and premature…*
>
> *… Walter Merricks [has] repeatedly claimed this is a multi-billion pound case, yet they seemed to have rushed to settle for a reported £200 million raising some serious questions. We will be challenging this agreement and have already written to the CAT. We will have more to say in the coming days*."[152]

28.6 Mr Merricks' lawyer stated, "*The [TPL Funder's] decision to oppose the settlement and to go public with that, attacking Mr Merricks,* ***is the latest in a sustained campaign it has engaged in to inappropriately pressure and seek to influence Mr Merricks' decision making in order to take control of the litigation****. It is good that this has all come to light and will be considered by the Tribunal when it comes to assess the settlement that has been agreed with Mastercard. The role of litigation funders, and their ability to seek to influence and control litigation so as to advance their financial position over and above all*

[149] *Arkin v Borchard Lines* [2005] EWCA Civ 655 [40] per Lord Phillips MR in the English Court of Appeal as referred to in European Law Institute, "European Law Institute (ELI) Principles Governing the Third Party Funding of Litigation" *SSRN Electronic Journal* (2024) 49.

[150] European Law Institute, "European Law Institute (ELI) Principles Governing the Third Party Funding of Litigation" *SSRN Electronic Journal* (2024) 48.

[151] Cross M, "Funder to Challenge 'premature' Mastercard Case Settlement" *Law Gazette* (4 December 2024) <https://www.lawgazette.co.uk/news/funder-to-challenge-premature-mastercard-case-settlement/5121721.article>.

[152] Cross M, "Funder to Challenge 'premature' Mastercard Case Settlement" *Law Gazette* (4 December 2024) <https://www.lawgazette.co.uk/news/funder-to-challenge-premature-mastercard-case-settlement/5121721.article>.

other considerations, raises important public policy issues that go to the integrity of the collective action regime."[153] (Emphasis added.)

29. QUESTION 29: WHAT EFFECT DO DIFFERENT FUNDING MECHANISMS HAVE ON THE SETTLEMENT OF PROCEEDINGS?

29.1 Funded actions are made more difficult to settle based on the traditional structure of funding agreements that entitle the TPL Funder to recoup their investment first, before any proceeds are shared with the claimant. TPL Funders insist this structure is necessary to justify the risk they take in investing in litigation. However, it means the claimant has no incentive to even consider settling a case unless the amount greatly exceeds the amounts (typically in the millions) provided by the TPL Funder, even if the merits of the case do not justify such a higher amount. Thereby, these typical funding structures convert each funded lawsuit into a gamble for both claimants and TPL Funders.

30. QUESTION 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?

30.1 Court approval should only be required for opt-out proceedings, in order to protect the interests of the opt-out class. For funded opt-in claims we don't think it necessary for there to be court approval per se, but it is important that our other proposals are followed (including minimum return to the funded class) and that disaffected persons can complain to the regulator which will take swift enforcement action.

31. QUESTION 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?

31.1 FCJ has nothing to add in relation to this question.

32. QUESTION 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?

32.1 Please see FCJ's response to question 5 above.

[153] Tinson A, "Willkie hits back at litigation funder over Merricks/Mastercard settlement" *The Lawyer* (4 December 2024) <https://www.thelawyer.com/willkie-hits-back-at-litigation-funder-over-merricks-mastercard-settlement>.

33. QUESTION 33: TO WHAT EXTENT DOES THE THIRD PARTY FUNDING MARKET ENABLE CLAIMANTS TO COMPARE FUNDING OPTIONS DIFFERENT FUNDERS PROVIDE EFFECTIVELY?

33.1 There is very little objective information available owing to the lack of transparency in the TPLF market (as discussed at paragraphs 27.1 – 27.5). Claimants rarely have the opportunity to review competing offers and the same goes for different funding options.

33.2 On the contrary, the process of allocating TPL Funders to cases (or vice versa) is driven from the claimant law firm and TPL Funder side as seen at paragraphs 5.63 – 5.64 and Annex C. Despite this, FCJ makes two comments in this regard:

33.2.1 There is broad variation in fees and how they are presented which makes costs difficult to compare. Funding arrangements can comprise a suite of documents including the LFA, the retainer with the law firm, a CFA or DBA and or ATE. These documents are not standard form and have interlocking provisions. Even experienced corporate claimants require external lawyers in order to analyse and quantify projected returns in order to advise on the viability of progressing with a particular TPL Funder. FCJ thinks it close to impossible for non-advised consumers to properly compare competing funding packages.

33.2.2 As the CRN Survey at Annex C to this Response makes clear, LFAs are often negotiated between the claimant law firm and TPL Funder even before clients are onboarded. In most collective actions to date, PCRs are identified by law firms who have identified the existence of a potential claim and are likely to have already identified prospective TPL Funders to support the litigation. Moreover, claimant law firms tend to prefer: (i) TPL Funders with which they have an existing working relationship; or (ii) TPL Funders which fund said claimant law firm as part of a portfolio (i.e., the TPL Funder provides large-scale loans to that claimant law firm to fund its entire caseloads).

34. QUESTION 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?

34.1 Conflicts of interest are inherent and pervasive in the TPLF model. The TPL Funder may have different motivations and expectations from the claimant(s). On a purely financial level there is a direct conflict in that any funds being returned to the TPL Funder are coming out of the pot that would otherwise go to the claimant(s). As these conflicts are unavoidable, the question is how can they be best managed?

34.2 Positions or divergent interest and conflict are worsened where TPL Funders have direct or indirect control. For this reason, FCJ proposes prohibiting all elements of TPL Funder control. To the extent that is not accepted, the TPL Funder should owe direct fiduciary duties to the funded party in order that the interests of the funded party will generally be prioritised.

35. QUESTION 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.

35.1 Please see our proposals on banning TPL Funder control and imposing fiduciary duties. FCJ also considers that the ethical rules for solicitors may need reviewing. Group litigation, whether under the Group Litigation Order regime, the CPO Regime or using representative actions, all engage a more diffuse lawyer/client relationship than where a lawyer is acting for a defendant or directly advising an individual. Given the scale of these large claims and the risk of reputational harm to our court system, FCJ considers it appropriate to review whether ethical rules need to be adjusted to ensure they are fit for purpose for these types of claims and the particular challenges they bring.

36. QUESTION 36: TO WHAT EXTENT, IF ANY, DOES THE AVAILABILITY OF THIRD PARTY FUNDING OR OTHER FORMS OF LITIGATION FUNDING ENCOURAGE SPECIFIC FORMS OF LITIGATION?

36.1 FCJ has nothing to add in relation to this question.

37. QUESTION 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?

37.1 FCJ has nothing to add in relation to this question.

38. QUESTION 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?

38.1 FCJ has nothing further to add in relation to this question.

39. QUESTION 39: ARE THERE ANY OTHER MATTERS YOU WISH TO RAISE CONCERNING LITIGATION FUNDING THAT HAVE NOT BEEN COVERED BY THE PREVIOUS QUESTIONS?

39.1 FCJ has nothing further to add in relation to its Response to the Consultation. However, as stated above, FCJ would be glad to assist in any dialogue on the precise shape of regulation in due course.

Fair Civil Justice – CJC Review of Litigation Funding

Annexes

1. Annex A
2. Annex B
3. Annex C
4. Annex D

Annex A

Industry Growth and Profitability

Industry Growth and Diversification

A.1 There is no single source of information on the size of the TPLF market in the UK, its profitability, or the outcomes of funded cases.

A.2 From the limited publicly available data, FCJ is able to ascertain that:

A.2.1 the TPLF "*industry in England and Wales has now grown to become the second-largest TPF market in the world.*"[1]

A.2.2 UK litigation funders' assets increased from £198m in 2011/12 to £2.2bn in 2021, a more than ten-fold increase.[2]

A.2.3 "*the UK…now has a well-developed [TPLF] market which has grown exponentially over the last decade. In 2022, PwC UK predicted assets under management would grow by 8.7% per annum over 5 years, from £2.2bn in 2023 to £3.7bn by 2028.*"[3]

A.2.4 "*It's a fast-growing alternative asset class.*"[4]

A.2.5 In 2021, "*the global litigation funding market was estimated at USD 12.2 billion and is projected to reach approximately USD 25.8 billion by 2030, with a compound annual growth rate of roughly 9% between 2022 and 2030*".[5]

A.2.6 "*Financing commercial litigations has become an increasingly popular area of investment in recent years… the amount of capital entering the [US] market is enormous with some estimates showing up to $5 billion of capital now committed to the U.S. commercial litigation market.*"[6]

A.2.7 the US litigation funding market grew by 44% between 2019 and 2022.[7]

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[1] Latham S and Ress G, "The Third Party Litigation Funding Law Review 2022" (6th Edition, 2022) <https://www.augustaventures.com/news/the-third-party-litigation-funding-law-review-2022-6th-edition/>.

[2] Latham S and Ress G, "The Third Party Litigation Funding Law Review 2022" (6th Edition, 2022) <https://www.augustaventures.com/news/the-third-party-litigation-funding-law-review-2022-6th-edition/>.

[3] Chartered Insurance Institute, 'Litigation Funding' by Carolyn Mackenzie, CII Claims Community Board Member dated 23 April 2024 and updated 25 February 2025 <https://www.cii.co.uk/learning/learning-content-hub/articles/litigation-funding/0685bcd6-9932-4f51-82af-08496f0b4699>.

[4] Colman J "A Comprehensive Guide to Litigation Funding as an Alternative Investment" *Hays Mews Capital* (7 August 2024) <https://www.haysmewscapital.com/news/litigation-funding>.

[5] Custom Market Insights, 'Global Litigation Funding Investment Market 2025 – 2034' <https://www.custommarketinsights.com/report/litigation-funding-investment-market/#:~:text=In%202021%2C%20the%20global%20litigation,9%25%20between%202022%20and%202030>.

[6] "INSIGHT: Seven Things You Need to Know Before Investing in Litigation Finance" by James Q. Walker, Bloomberg Law, published 18 September 2018 <https://news.bloomberglaw.com/class-action/insight-seven-things-you-need-to-know-before-investing-in-litigation-finance>.

[7] "Economic Insights: US liability claims: the shadow of social inflation still looms", Swiss Re Institute, Issue 24/2023, 2 <https://www.swissre.com/dam/jcr:43197ba4-e07b-4156-a189-af90c2335087/2023-09-social-inflation.pdf>.

Class Actions

A.3 The growth of class actions can be used as a proxy for the growth of the TPLF market.

A.4 Some headlines on the growth of class actions are as follows:

A.4.1 the UK, the Netherlands, Germany and Portugal experience the most class actions, comprising 78% of all European class actions between them, in 2023. Of these, 46% of claims were filed in England.

A.4.2 the total claimed value of opt-out claims in the UK has increased exponentially in the past three years, with eight-fold growth between 2020 and 2023.[8]

A.4.3 the UK continues to see the highest figures within Europe, with cumulative claimed quantum in the region of EUR 145 billion by the end of 2023, growing by a factor of 10x from 2016 (see, Graph 2 below).[9]

A.4.4 between 2015 and 2023 competition class actions have been brought in the UK on behalf of over 540 million class members collectively (see, Graph 1 below). With a population of 67 million, this means that the average number of class actions per person was over 8.1.[10]

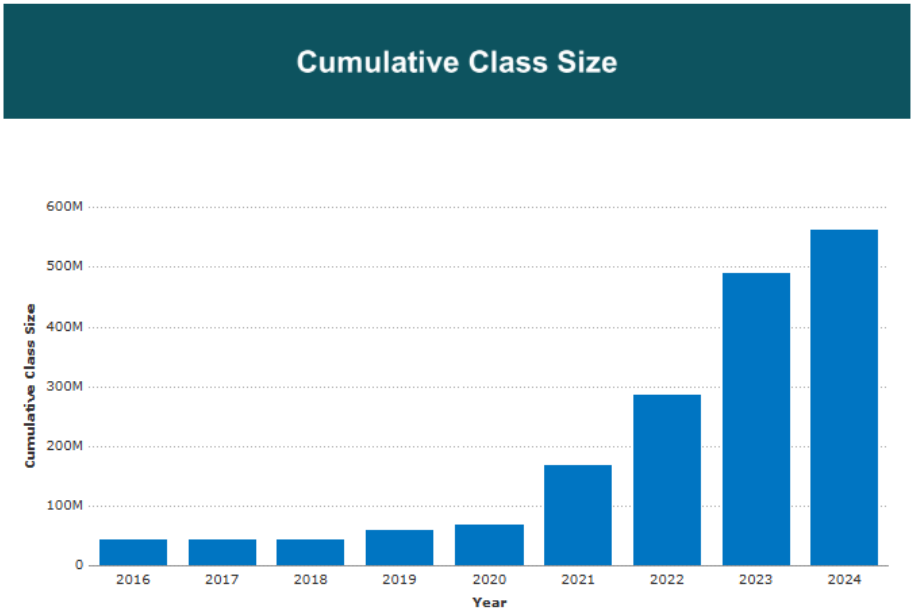
A.5 As at the date of this Response, 56 collective proceeding applications have been filed with the CAT since 2016. Two of these applications have been withdrawn and 20 have been consolidated with other claims. Accordingly, there are 34 'live' claims in the CAT (inclusive of those which have been certified to proceed as collective proceedings, and those where the CAT is still to reach a determination on a collective proceeding application). All collective proceedings filed with the CAT since 2016 have reportedly been funded by a TPL Funder.

[8] The total value of opt-out claims in the Netherlands and Portugal also increased substantially in 2023, increasing by 115% and 44%, respectively. CMS, "European Class Action Report 2024" (2024) <https://cms.law/en/media/international/files/publications/publications/cms-european-class-action-report-2024?v=4>.

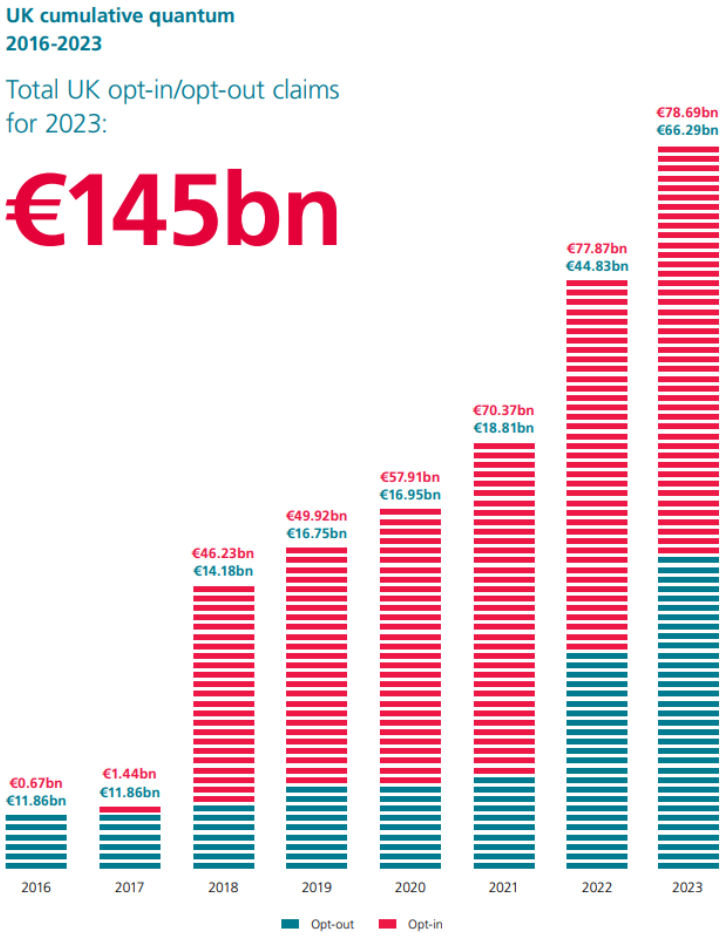
[9] Swiss RE Institute, "Litigation costs drive claims inflation: indexing liability loss trends"(2024) <https://www.swissre.com/institute/research/topics-and-risk-dialogues/claims-and-liability/litigation-costs-drive-claims-inflation.html>.

[10] CMS, "European Class Action Report 2024" (2024) 33 <https://cms.law/en/media/international/files/publications/publications/cms-european-class-action-report-2024?v=4>.

A.6 **Graph 1: Cumulative Class Size in the UK CAT**



A.7 **Graph 2: Cumulative Quantum**



Industry Profitability

Profitability Generally

A.8 According to a European Parliament study, the growth of the TPLF market is a result of, among other factors, "*the extremely high returns to funders*".[11] A survey by Bloomberg[12] cited by the same European Parliament study showed "*TPLF outperforming other financial market investments, with TPLF returns higher than those observed in private equity, real estate, traditional credit and hedge funds*".[13]

A.9 In addition, "*Endowment funds, family offices and other savvy investors have been allocating cash to lawsuits, **attracted by juicy payouts** and the sense that –similar to private equity and real estate – the returns aren't necessarily correlated to movements in equity and bond markets.*"[14] (Emphasis added)

Profitability of Specific Funders

A.10 Very few funders make their investment data publicly available; however, two funders, Burford Capital Limited ("**Burford**") and Litigation Capital Management ("**LCM**") are listed and so release more information on their profitability.

A.11 Burford was founded in 2009 and has grown significantly in the past 15 years:

A.11.1 the firm's total income for 2012 was $54.2 million and pre-tax profit was $34.1 million;[15] both double the 2011 figures.

A.11.2 In 2013, Burford reported more than $300 million in capital.[16]

A.11.3 Burford's net profit for the year 2014 was up 43% on the previous year to $60.7 million[17], and this continued to rise year-on-year to reach a net profit of approximately $97.5 million for the year ended 31 December 2022.[18]

A.11.4 in 2023, Burford's portfolio was valued at $7 billion, with a net profit for the year ended 31 December 2023 of $718.2 million.[19] Moreover, Burford won the largest trial verdict in New York history ($16.1 billion) against Argentina. Burford issued

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[11] Saulnier. J, Müllerwith. K and Koronthalyova, "Responsible private funding of litigation: European added value assessment" *European Parliamentary Research Service* (March 2021) 57 at 2.1(a) <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf>.

[12] "For the World's Super Rich, Litigation Funding Is the New Black" by Emily Cadman, 28 August 2018 <https://www.claimsjournal.com/news/international/2018/08/28/286470.htm>.

[13] Saulnier. J, Müllerwith. K and Koronthalyova, "Responsible private funding of litigation: European added value assessment" *European Parliamentary Research Service* (March 2021) 14 at 2.1(a) <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf>.

[14] "For the World's Super Rich, Litigation Funding Is the New Black" by Emily Cadman, 28 August 2018 <https://www.claimsjournal.com/news/international/2018/08/28/286470.htm>.

[15] Burford Capital "Full Year Results" (2012) <https://investors.burfordcapital.com/financials/Regulatory-News/regulatory-news-details/2013/Full-Year-Results-04-11-2013/default.aspx>.

[16] Burford Capital "Annual Report" (2012) <https://s201.q4cdn.com/169052615/files/doc_financials/2012/AR/fy2012_report.pdf>.

[17] Burford Capital "Annual Report" (2014) <https://s201.q4cdn.com/169052615/files/doc_news/PressReleases/2015/03/burford-capital-fy2014-results-rns-final.pdf>.

[18] Burford Capital "Annual Report" (2022) <https://investors.burfordcapital.com/financials/annual-reports/default.aspx>. 97,459,000

[19] Burford Capital "Annual Report" (2023) <https://investors.burfordcapital.com/financials/Regulatory-News/regulatory-news-details/2024/Burford-Capital-Ltd---Annual-results-for-year-ended-December-31-2023/default.aspx>.

a capital statement[20] following the damages ruling in their favour, including noting that in the Petersen case, Burford is entitled by virtue of a financing agreement entered into with the Spanish insolvency receiver of the Petersen bankruptcy estate to 70% of any recovery obtained.[21]

A.11.5 for the three months ended 30 September 2024, Burford reported a net income of $157.9 million.[22]

A.12 LCM has also maintained a strong track record, with a 13-year investment performance of a 2.9x multiple of invested capital.[23] Headline comments on LCM's financial performance are as follows:

A.12.1 for the financial year ending 30 June 2019, LCM reported a statutory profit before tax of A$10.15 million.[24] The company generated gross revenue of A$34.71 million, up 17% from the previous year, and a gross profit of A$20.34 million, up 23%.[25] Total invested capital during financial year 2019 was A$27.84 million, a significant increase from A$14.62 million in financial year 2018.[26]

A.12.2 LCM reported the following financial performance over the period 2020 – 2023:

(a) 2020: gross revenue of A$38.4 million, up 11% from the previous year, and a statutory profit before tax of A$8.1 million.[27]

(b) 2021: gross revenue of A$37.1 million, a slight decrease from the previous year, and a statutory profit before tax of A$12.9 million, up 61%.[28]

(c) 2022: gross revenue of A$47.4 million, up from A$37.1 million in the previous year, and a statutory profit before tax of A$6.64 million.[29]

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[20] Burford Capital, "Burford Capital Statement On Ypf Damages Ruling" (8 September 2023) <https://investors.burfordcapital.com/news/news-details/2023/BURFORD-CAPITAL-STATEMENT-ON-YPF-DAMAGES-RULING/default.aspx>.

[21] Burford Capital, "Burford Capital Statement On Ypf Damages Ruling" (8 September 2023) <https://investors.burfordcapital.com/news/news-details/2023/BURFORD-CAPITAL-STATEMENT-ON-YPF-DAMAGES-RULING/default.aspx>.

[22] Burford Capital Reports Third Quarter 2024 Results, 7 November 2024, <https://investors.burfordcapital.com/news/news-details/2024/Burford-Capital-Reports-Third-Quarter-2024-Results/default.aspx>.

[23] Annual Report and Financial Statements 2024, Year ended 30 June 2024, published 17 September 2024 <https://lcmfinance.com/wp-content/uploads/2024/09/LCM-2024-Annual-Report-web-3.pdf >

[24] Annual Report and Financial Statements 2019, Year ended 30 June 2019, published 10 September 2019, <https://lcmfinance.com/wp-content/uploads/2023/03/2019-Annual-Report.pdf >

[25] Annual Report and Financial Statements 2019, Year ended 30 June 2019, published 10 September 2019, <https://lcmfinance.com/wp-content/uploads/2023/03/2019-Annual-Report.pdf >

[26] Annual Report and Financial Statements 2019, Year ended 30 June 2019, published 10 September 2019, <https://lcmfinance.com/wp-content/uploads/2023/03/2019-Annual-Report.pdf >

[27] Full Year Results and Annual Report 2020, Year ended 30 June 2020, published 22 September 2020 <https://lcmfinance.com/wp-content/uploads/2023/03/2020-Annual-Report.pdf>.

[28] Full Year Results and Annual Report 2021, Year ended 30 June 2021, published 21 September 2021 <https://lcmfinance.com/wp-content/uploads/2023/03/LCM-FY21-Annual-Report-.pdf>.

[29] Full Year Results and Annual Report 2022, Year ended 30 June 2022, published 20 September 2022 < https://lcmfinance.com/wp-content/uploads/2023/03/LCM-2022-Annual-Report-2-2.pdf>.

(d) 2023: gross revenue of A$180.8 million, a significant increase from the previous year, and a statutory profit before tax of A$42.7 million.[30]

[30] Annual Report and Financial Statements 2023, Year ended 30 June 2023, published 10 October 2023 < https://lcmfinance.com/wp-content/uploads/2023/10/LCM-Annual-Report-2023.pdf >

Annex B

Examples of Claimants experiencing poor outcomes in funded cases

"Poor Outcomes" for Claimants

B.1 As explained at paragraph 1.5 of the Response, there is no reliable source for assessing the outcomes of funded litigation. Those challenges notwithstanding, there are clear examples of persons using funded litigation experiencing poor outcomes. This is not to suggest that the relevant funders, solicitors or any other parties involved in these cases did not try their best. However, at least some of those poor outcomes could have been avoided had the regulatory protections that FCJ supports been in place.

B.2 We below detail some poor outcomes and responses to such outcomes.

Legal Negligence and Mismanagement Campaign Group

B.3 The Legal Negligence Mismanagement Campaign Group ("**LNMCG**") was established in 2024. A founder of the LNMCG told FCJ that:

> "*Litigation Funding in all of our cases (and there are thousands of us) has NOT helped us achieve justice, it's complicated and extended legal proceedings and caused legal costs to become crippling.*"

B.4 The LNMCG comprises individuals who have experienced funded litigation in a variety of areas. Some have received funding for divorce claims, whilst others have had funding for wills and probate cases.

B.5 The Financial Ombudsman Service ("**FOS**") has reviewed a number of funded claims brought by members of the LNMCG. In several instances, the FOS has upheld complaints or parts of complaints as they relate to funders acting fairly and reasonably (or not as the case may be). One such FOS decision relates to "Ms H" who was provided with £230,000 in loans to fund her divorce proceedings. According to the FOS:

> "*Our investigator concluded that the... [relevant] loans [used to finance the litigation] were unaffordable to Ms H and he didn't think [the lender] had completed proportionate affordability checks before lending. Both [the lender] and Ms H have accepted that conclusion... I'm also persuaded that [the lender] didn't carry out adequate affordability checks.*" [31]

B.6 In the case of "Mr A"[32] and "Miss H"[33] who had been in a relationship and bought a house together but subsequently split-up and became involved in a property dispute, they were unknowingly lent money by the same litigation funder causing a conflict and risk to Mr A's interests. As the FOS stated:

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[31] Financial Ombudsman Service, "Decision Reference DRN-3992510" <https://www.financial-ombudsman.org.uk/decisions/DRN-3992510> 2023, page 3.

[32] See FOS decision DRN-3692047 dated December 2024 relating to "Mr A" and in particular the conclusions drawn by the FOS at para 187.

[33] See FOS decision DRN5132754 dated 2021 relating to "Miss H".

"*agreeing to fund both sides of the litigation created a situation where [the funder] had two or more competing interests and there was at least the potential that serving one of those interests could damage or harm the other interest.*"[34]

B.7 In the same case, the FOS also commented that:

> "*I consider that reasonable and proportionate checks would more likely than not have shown that Mr A was unable to have been able to repay these loans in a sustainable manner. I consider that reasonable and proportionate checks, including those relating to his income and expenditure, would have likely revealed:*
>
> *that Mr A had earnings of under £10,000 a year in 2014;*
>
> *Mr A already owed over £240,000 to existing creditors, including almost £217,000 in lending secured on his home. The majority of Mr A's monthly income was spent on his monthly mortgage payments alone.*
>
> *The above details show that Mr A had an obvious lack of disposable income. So it's difficult to see how he would have been able to repay an additional £60,000 and £30,000* [the amounts loaned by the TPL Funder to Mr A] *in a sustainable manner."*[35]

B.8 In another case, one victim ("**Mr S**") complained about the information provided by his solicitor before taking out a fixed sum loan to cover legal fees, arguing that the solicitor misrepresented the loan's insurance and liability terms, leading Mr S to enter the agreement. The FOS upheld the complaint, finding that: (i) the solicitor acted as the funder's agent or broker in the loan agreement process; and (ii) the solicitor gave "*confidence that taking out the loan would be risk free and he would not be liable to make any repayments if his legal action wasn't successful.*"[36] The ombudsman also required the funder to refund the interest applied to the loan, refund the insurance cost and administration fee, "*engage with Mr S about a repayment plan for the remaining loan balance, which takes into account his income and expenditure and pay Mr S £250 for the distress and inconvenience he's been caused*".[37]

<u>*Bates v the Post Office*</u>

B.9 The Bates *v The Post Office* was very high profile and there was also significant media attention on the fact that only 20% of the gross settlement went to the funded claimants, with the remainder being paid to the lawyers, the funder and other service providers supporting the litigation. It has been reported that each sub-postmaster received approximately £20,000 "*when their losses…have been estimated to often be well in excess of £100,000*"[38] whereas, the funder's fee was "*slightly less than £24 million*".[39]

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[34] See FOS decision DRN-3692047 dated December 2024 relating to "Mr A" and in particular the conclusions drawn by the FOS at para 118.
[35] See FOS decision DRN-3692047 dated December 2024 relating to "Mr A" at para 65.
[36] See FOS decision DRN0812737 dated March 2021 <https://www.financial-ombudsman.org.uk/decision/DRN0812737.pdf>. page 4
[37] See FOS decision DRN0812737 dated March 2021 <https://www.financial-ombudsman.org.uk/decision/DRN0812737.pdf>.
[38] House of Commons Business, Energy and Industrial Strategy Committee "Post Office and Horizon - Compensation: interim report" *GOV. UK* (22 February 2022) page 7 <https://publications.parliament.uk/pa/cm5802/cmselect/cmbeis/1129/report.html>.
[39] "*The Times* (14 March 2024) <https://www.thetimes.com/uk/law/article/litigation-funding-cap-can-only-help-defendants-with-deep-pockets-xvrxmm75h>.

Sharp & Ors v Blank & Ors [2020] EWHC 1870 (Ch) ("**Sharp v Blank**").

B.10 The retail investors in Sharp v Blank brought group proceedings litigation against HBOS/Lloyds. The litigation failed and the claimants were ordered to pay costs to the defendants. In a consequentials hearing, the Court queried whether the claimants were aware that they faced an adverse costs risk, "*In these circumstances there is a (most regrettable) risk that individual Claimants may face a several liability for costs to the extent that it overtops their direct ATE cover … **It may well be that many of the 5800 Claimants never foresaw this as a real question because they thought that they were litigating risk-free. But most unfortunately that is not the case***."[40] (Emphasis added.)

B.11 It is clearly alarming that persons joining litigation may not have been aware of the adverse costs risk.

SSB and Pure Legal Collapse

B.12 The collapse of Sheffield based firm SSB Law left at least 1,400 clients, who believed they had instructed the firm risk-free on a 'no win no fee' basis, personally liable to substantial costs orders amounting to on average, £20,000.[41]

B.13 When SSB Group went into administration in January 2024, it owed six litigation funders £200m.[42] Successful defendants sought to enforce substantial costs awards against claimants in the cavity wall insulation claims and ATE policies did not pay out leaving claimants personally liable for adverse costs.[43] The Solicitors Regulation Authority ("**SRA**"), in a statement dated 4 March 2024, confirmed:

> "*SSB had arranged after the event (ATE) insurance for clients to cover the other side's costs in relation to their CWI claims on a 'no win, no fee' basis. However, the ATE insurance providers have declined to meet the costs as expected under the insurance policy, and so the [successful] defendants have pursued SSB's clients for costs.*"[44]

B.14 The SRA concluded: "*Given the significant consumer detriment and serious questions this case raises, we are committed to progressing our investigation as swiftly as possible, while making sure it is thorough and fair.*"[45]

B.15 The issue has since been subject to parliamentary debate with Halifax MP Holly Lynch describing it as a "*scandal upon a scandal*,"[46] emphasising that the affected individuals had

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[40] *Sharp & Ors v Blank & Ors* [2020] EWHC 1870 (Ch).

[41] Hyde J, "MPs' fury at 'parasitic' firms preying on cavity wall claimants" *Law Gazette* (27 March 2024) <https://www.lawgazette.co.uk/news/ssb-collapse-mps-express-fury-at-parasitic-law-firms-preying-on-cavity-wall-claimants/5122116.article>.

[42] Rose N, "SRA investigates after-the-event insurance fall-out from SSB collapse" *Legal Futures* (8 March 2024) <https://www.legalfutures.co.uk/latest-news/sra-investigates-after-the-event-insurance-fall-out-from-ssb-collapse>.

[43] Rose N, "SRA investigates after-the-event insurance fall-out from SSB collapse" *Legal Futures* (8 March 2024) <https://www.legalfutures.co.uk/latest-news/sra-investigates-after-the-event-insurance-fall-out-from-ssb-collapse>.

[44] Solicitors Regulation Authority, "Cavity wall insulation claims handled by SSB Group (SSB) and Pure Legal Limited (Pure Legal)" (1 November 2024) <https://www.sra.org.uk/solicitors/resources/money-laundering/guidance-support/>.

[45] Rose N, "SRA investigates after-the-event insurance fall-out from SSB collapse" *Legal Futures* (8 March 2024) <https://www.legalfutures.co.uk/latest-news/sra-investigates-after-the-event-insurance-fall-out-from-ssb-collapse>.

[46] Rose N, "MPs urge SRA to speed up investigation into SSB collapse" *Legal Futures* (28 March 2024) <https://www.legalfutures.co.uk/latest-news/mps-urge-sra-to-speed-up-investigation-into-ssb-collapse>.

already suffered from the government-backed CWI scheme's failures. Given that SSB took over a number of CWI claims from Pure Legal after it went out of business, Dr. Whitehead commented that "*one might say, therefore, that it is a scandal, upon a scandal, upon a scandal.*"[47]

B.16 Ms Lynch also highlighted that many of those eligible for the CWI scheme were on welfare support, making the substantial cost orders particularly devastating.[48] Ms Lynch highlighted the severe impact on those individuals, many of whom now face the prospect of losing their homes due to their inability to pay the costs.[49]

B.17 Imran Hussain, (then) Labour MP for Bradford East, stated that with many of his constituents "*growing more and more desperate*," it was clear that "*no one in the current system has any inclination to deliver them justice*."[50]

B.18 In its updated statement dated 1 November 2024, the SRA advised:

> "[We] *have an ongoing investigation into another firm, Pure Legal, which went into administration in November 2021. Some of Pure Legal's files were transferred to SSB and other firms following the administration of Pure Legal. Our investigation into that firm also includes, among other issues, similar concerns about clients being unexpectedly pursued for defendant's adverse costs after claims being handled by Pure Legal either failed or were discontinued.*"[51]

B.19 The SRA also confirmed:

> "*in addition to [the] investigation[s], these cases raise questions about the role of ATE insurance providers and surveyors in these cases. We have been liaising with the FCA (which regulates the ATE providers) and the Royal Institution of Chartered Surveyors (RICS) (which regulates surveyors) to share information and insights and understand what action they may be taking.* ***More broadly, these cases raise wider issues about whether the bulk litigation market is working as well for the public as it should be, and whether there are appropriate protections in place***."[52] (Emphasis added)

B.20 FCJ is encouraged that the SRA is investigating these matters, but in a sense that action is too late for those who have suffered. Sensible ex ante regulation would help prevent these types of scenarios arising in the first place.

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[47] Rose N, "MPs urge SRA to speed up investigation into SSB collapse" *Legal Futures* (28 March 2024) <https://www.legalfutures.co.uk/latest-news/mps-urge-sra-to-speed-up-investigation-into-ssb-collapse>.

[48] Rose N, "MPs urge SRA to speed up investigation into SSB collapse" *Legal Futures* (28 March 2024) <https://www.legalfutures.co.uk/latest-news/mps-urge-sra-to-speed-up-investigation-into-ssb-collapse>.

[49] Hyde J, "MPs' fury at 'parasitic' firms preying on cavity wall claimants" *Law Gazette* (27 March 2024) <https://www.lawgazette.co.uk/news/ssb-collapse-mps-express-fury-at-parasitic-law-firms-preying-on-cavity-wall-claimants/5122116.article>.

[50] Rose N, "MPs urge SRA to speed up investigation into SSB collapse" *Legal Futures* (28 March 2024) <https://www.legalfutures.co.uk/latest-news/mps-urge-sra-to-speed-up-investigation-into-ssb-collapse>.

[51] Solicitors Regulation Authority, "Cavity wall insulation claims handled by SSB Group (SSB) and Pure Legal Limited (Pure Legal)" (1 November 2024) <https://www.sra.org.uk/solicitors/resources/money-laundering/guidance-support/>.

[52] Solicitors Regulation Authority, "Cavity wall insulation claims handled by SSB Group (SSB) and Pure Legal Limited (Pure Legal)" (1 November 2024) <https://www.sra.org.uk/solicitors/resources/money-laundering/guidance-support/>.

SRA Interventions

B.21 In its December 2024 '*Client Protection Annual Report*', the SRA described having carried out more than twice as many interventions (65) in 2022/23 as the year before (25).[53] Paul Philip, chief executive of the SRA recently stated that:

> "*… for consumers to get the benefit, bulk litigation needs to be done well, and we are increasingly concerned that there are significant problems in some areas of this market.*"[54]

Cases whereby "Access to Justice" was proven to be more effectively – and less traumatically – delivered via means other than Litigation

Smyth v BA and easyJet [2024] EWHC 2173 (KB)

B.22 In the case of *Smyth v BA and easyJet* [2024] EWHC 2173 (KB), the High Court rejected a "Representative Action" brought pursuant to CPR 19.8, which sought an estimated £319 million against easyJet alone on behalf of persons entitled to compensation for cancelled or delayed flights. The action was brought on behalf of a reported 23 million passengers, with the alleged delayed flights spanning a period of 7 years.

B.23 The High Court rejected the claim both on discretionary grounds , and because the claim did not meet the "same interest" test set out in CPR 19.8. Master Davison commented:

> "*I do not accept that her [i.e., claimant's] motivation lies in a desire to secure redress from consumers*."[55]

The claimant was employed by the TPL Funder for the claim, who was a Monaco-based Australian Businessman.[56] Neither the employment relationship with the claimant nor the investigation was disclosed at the start of the trial. Neither the employment relationship with the lead claimant nor the investigation was disclosed at the start of the trial.[57]

B.24 Both airlines had portals which allowed class members to seek compensation direct without having any sum deducted, whereas this claim sought to deduct 24% of all recoveries which, for claims against just one of the two airlines, would have netted an estimated £70 million. Not only were members of the class able to claim direct – and at no cost through claims systems maintained by the airlines, failing that – for a small court fee – there was the option to claim through the Small Claims process of the Country Court, which has special procedures for these kinds of claims.

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[53] Solicitors Regulation Authority, "Client Protection Annual Report 2022/23" (20 December 2024) <https://www.sra.org.uk/sra/research-publications/client-protection-annual-report-2022-23/>.

[54] Philip P, "Bulk Litigation – Not Always Working in Consumers Interests" *Legal Futures* (11 November 2024) <https://www.legalfutures.co.uk/blog/bulk-litigation-not-always-working-in-consumers-interests>.

[55] *Smyth v British Airways and easyJet* [2024] EWHC 2173 (KB) para 36 <https://www.judiciary.uk/wp-content/uploads/2024/09/Smyth-v-British-Airways-and-easyJet.pdf>.

[56] Hyde J "Group flight claim thrown out as judge criticises financial motives" *Law Gazette* (2 September 2024) https://www.lawgazette.co.uk/news/group-flight-claim-thrown-out-as-judge-criticises-financial-motives/5120721.article.

[57] Faulkner J, 'Judge Criticizes Motives Behind £319M Flight Delay Claim' (*Law360*, 2 September 2024) <https://www.law360.co.uk/articles/1875447>; Hyde J 'Group Flight Claim Thrown Out as Judge Criticises Financial Motives' (*Law Gazette*, 13 November 2023) <https://www.lawgazette.co.uk/news/group-flight-claim-thrown-out-as-judge-criticises-financial-motives/5120721.article>.

B.25 Exercising its discretion against permitting the claim to proceed, Master Davison concluded:

> "*I would not allow the claim to go forward as a representative action because the dominant motive for it lies in the financial interest of its backers, principally Mr Armour, and not in the interests of consumers…That motive has translated into a proposed deduction from the compensation available to each represented party which is excessive and disproportionate both in its overall amount and in relation to the available alternative remedies, which would lead to no deduction at all.*"[58]

[58] *Smyth v British Airways and easyJet* [2024] EWHC 2173 (KB) para 27 <https://www.judiciary.uk/wp-content/uploads/2024/09/Smyth-v-British-Airways-and-easyJet.pdf>.

Annex C

Summary: Class Representatives Network (2024) 'Selecting Litigation Funders and Negotiating Funding Agreements'.

C.1 In the context of class actions, the Class Representatives Network ("**CRN**") recently conducted an anonymous survey of its members (all of whom are existing or proposed class representatives in collective proceedings under the Competition Act 1998 or representative proceedings under CPR 19.8) on the subject of selecting litigation funders and negotiating funding agreements (the "**CRN Survey**").[59]

C.2 The CRN Survey made several conclusive findings:

C.2.1 only 50% of respondents (i.e. 6 out of 12) said that they had taken legal advice on the terms of their funding arrangement from a lawyer outside their primary legal team at the point the funding arrangement was first negotiated. (Question 9 of CRN Survey)

C.2.2 over 40% said that they had received no advice at all. Where the terms of the funding agreement were renegotiated, two-thirds of respondents (4 out of 6) did not receive independent legal advice.[60] (Question 9 and 13 of CRN Survey)

C.2.3 almost three-quarters of respondents (71.43%) said that their legal team had already identified a prospective funder by the time they became involved in the case, and 76.92% said that they were only presented with one funding option.[61] (Question 1 and 3 of CRN Survey),

C.2.4 when the 76% of respondents were questioned why they had only been presented with one funding option, 80% said that their solicitors had advised that the offer was suitable and there was no need to enquire further. Moreover, 90% confirmed that they did not seek to undertake any separate/independent enquiry into the availability of alternative funding options. (Question 4 and 5 of CRN Survey)

C.2.5 three-quarters of respondents (9 out of 12) said they did not have a funding expert on their consultative panel. (Question 10 of CRN Survey)

C.2.6 two-thirds of respondents confirmed their litigation funding agreements were renegotiated following PACCAR. Factors most important to respondents when renegotiating the terms of the LFA were the 'best interests of the class' and the

[59] Gupta R, "Selecting Litigation Funders and Negotiating Funding Agreements" *Class Representatives Network* (20 September 2024) <https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf>.

[60] Gupta R, "Selecting Litigation Funders and Negotiating Funding Agreements" *Class Representatives Network* (20 September 2024) <https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf>.

[61] Gupta R, "Selecting Litigation Funders and Negotiating Funding Agreements" *Class Representatives Network* (20 September 2024) <https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf>.

'urgency/speed needed to reach agreement.' These factors were closely followed by 'concerns regarding the quantum of the funder's expected success fee' and 'whether the agreement was a 'good deal''. (Question 11 and12 of CRN Survey)

C.2.7 factors most important to respondents when their funding agreements were first negotiated were 'whether the financials were in the best interests of the class' and 'whether the agreement was a 'good deal'' (Question 8 of CRN Survey)

C.3 The CRN Survey made the following further findings:

C.3.1 In cases where more than one funding arrangement was available, respondents were asked (i) how did they select which funder to proceed with and (ii) which factors were important. Only three respondents answered part (i) and two answered (ii), therefore it is not possible to draw any meaningful conclusion from this data. (Question 6 and 7 of CRN Survey)

C.3.2 Respondents were asked whether they would recommend their existing funder to future class representatives and how satisfied they were on various elements of their experience with TPLF. Ten responses were received however the responses were varied and therefore a greater number of responses are required before meaningful conclusions or trends can be drawn. (i.e four respondents would strongly recommend their funder, whilst another four would not or strongly not recommend their funder (two for each) and two were neutral on this question. A similar spread can be seen in relation to how satisfied the respondents were with thee funding experience. (Question 14 and 15 of CRN Survey)

C.3.3 Respondents were asked how did: (i) your legal team; and/or (ii) your team, go about identifying a funder. Ten respondents answered in relation to (i) and (ii) was asked to the four respondents whose funder was chosen after they became involved with their case. Responses were mixed and as a result of the limited number of respondents, it is difficult to draw any meaningful conclusion however taking the responses from both questions together suggests that, regardless of whether a funder is found before or after the class representative becomes involved, it is usually the solicitors of the class representatives who take the lead in identifying and contacting potential funders, rather than the class representatives themselves. (Question 2 and 2.1 of CRN Survey)

C.4 The CRN concluded from the data that:

C.4.1 it is by no means 'standard practice' for class representatives to seek independent advice, although it is not clear whether this has changed since the collective proceedings regime was introduced;[62]

[62] This is because the survey did not collect data about *when* respondents first negotiated their funding arrangements: see Gupta R, "Selecting Litigation Funders and Negotiating Funding Agreements" *Class Representatives Network* (20 September 2024) 16 <https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf>.

C.4.2 it is unclear whether this is because (a) there is a limited number of viable funding options for each case or (b) that only one funding option is presented by the claimant law firm to the class representative for sign-off;[63]

C.4.3 funding agreements are often negotiated between the claimant law firm and funder even before clients are onboarded; and

C.4.4 in most collective actions to date, PCRs are identified by law firms who have identified the existence of a potential claim and are likely to have already identified prospective funders to support the litigation.[64] For example, during the initial certification hearing in *Christine Riefa v Apple and Amazon* (which took place on 12th July 2024), in considering whether the PCR should be authorised (i.e., whether it was 'just and reasonable' for the PCR to act as class representative), the CAT questioned whether, and the extent to which, the PCR had received independent advice about which litigation funder to use and their proposed terms, rather than simply following the advice of her law firm (Hausfeld).[65] The CAT cited concerns that if the PCR did not undertake adequate due diligence into the selection and terms of the funding arrangements, the interests of the class would not have been adequately represented at that stage of the litigation; otherwise, the protection of their interests would have been inappropriately delegated to the PCR's solicitors.[66] Dr Lovdahl Gormsen is the only class representative reported to have identified and developed their own legal claim "from the ground up," before instructing their legal team and engaging TPL Funders.

[63] Gupta R, "Selecting Litigation Funders and Negotiating Funding Agreements" *Class Representatives Network* (20 September 2024) 23 <https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf>.

[64] Gupta R, "Selecting Litigation Funders and Negotiating Funding Agreements" *Class Representatives Network* (20 September 2024) <https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf>.

[65] *Christine Riefa Class Representative Limited v (1) Apple Inc.; (2) Apple Distribution International Limited; (3) Amazon.com, Inc; (4) Amazon Europe Core S.à.r.l; (5) Amazon Services Europe S.à.r.l; (6) Amazon EU S.à.r.l; and (7) Amazon.com Services LLC 1602/7/7/23,* Transcript of [first] CPO certification hearing (12 July 2024) <https://www.catribunal.org.uk/cases/16027723-christine-riefa-class-representative-limited-v-apple-inc-others>.

[66] Gupta R, "Selecting Litigation Funders and Negotiating Funding Agreements" *Class Representatives Network* (20 September 2024) <https://classrepresentativesnetwork.org/wp-content/uploads/2024/09/Final-CRN-Report-20th-September-2024-second-edition-2.pdf>.

Annex D

Survation Polling Data – the FCJ Survey

Polling on regulation of litigation funders

Conducted by Survation on behalf of
Fair Civil Justice

Conducted by Survation on behalf of Fair Civil Justice
Methodology: Online interviews of UK residents aged 18+
Fieldwork: 11th – 14th October 2024
Sample size: 2,006

Survation.

Methodology

Fieldwork Dates

- 11th – 14th October 2024

Data Collection Method

- The survey was conducted via online interview. Invitations to complete surveys were sent out to members of the panel.

Population Sampled

- UK residents aged 18+

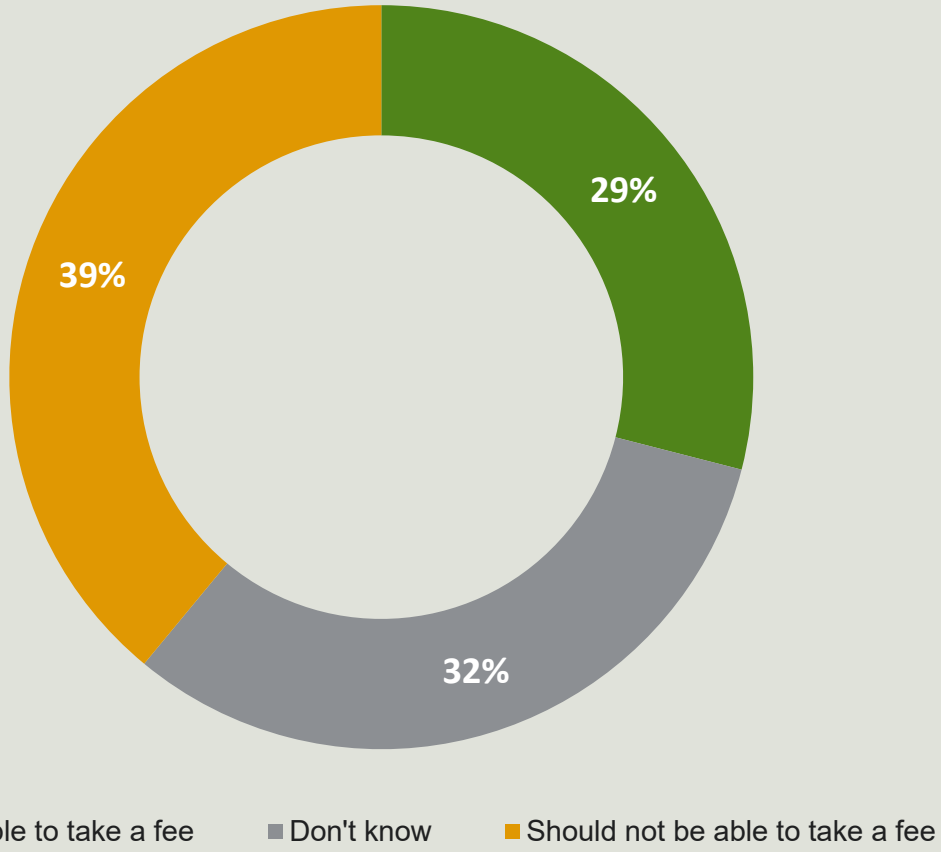
Sample Size

- 2,006

Survation.

Q1. Third party litigation funding is where legal action is funded by an individual or organisation with no prior connection to the case. This is done in return for a fee that comes from the proceeds recovered at the end of the case. These funders can be based in other countries.

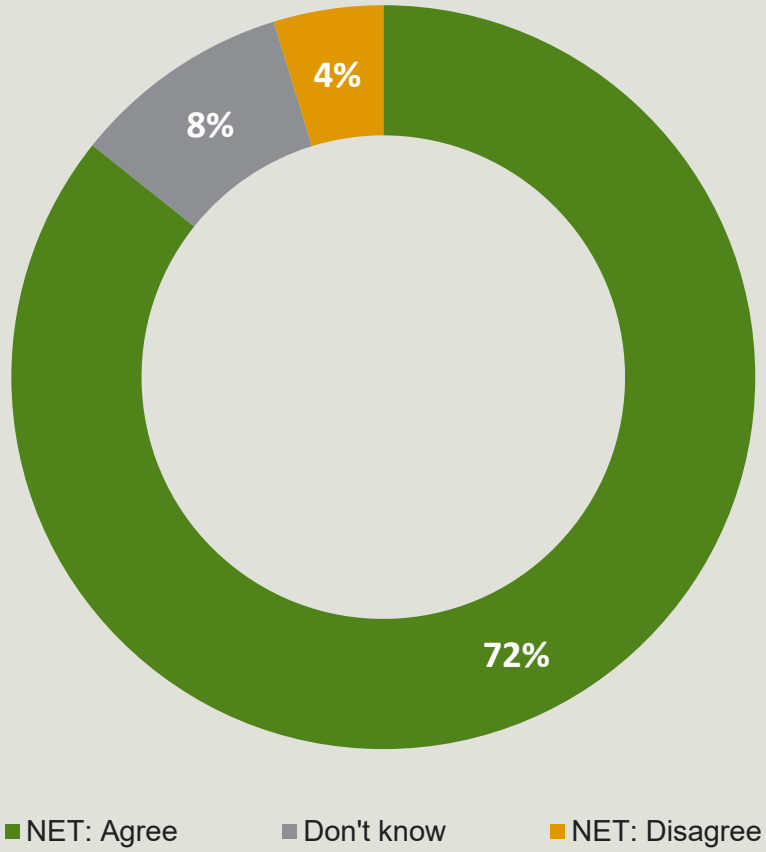
Do you think third party litigation (legal action/lawsuit) funders should or should not be able to take a fee from British legal cases?



3 **BASE: All respondents. Unweighted total: 2,006**

Survation.

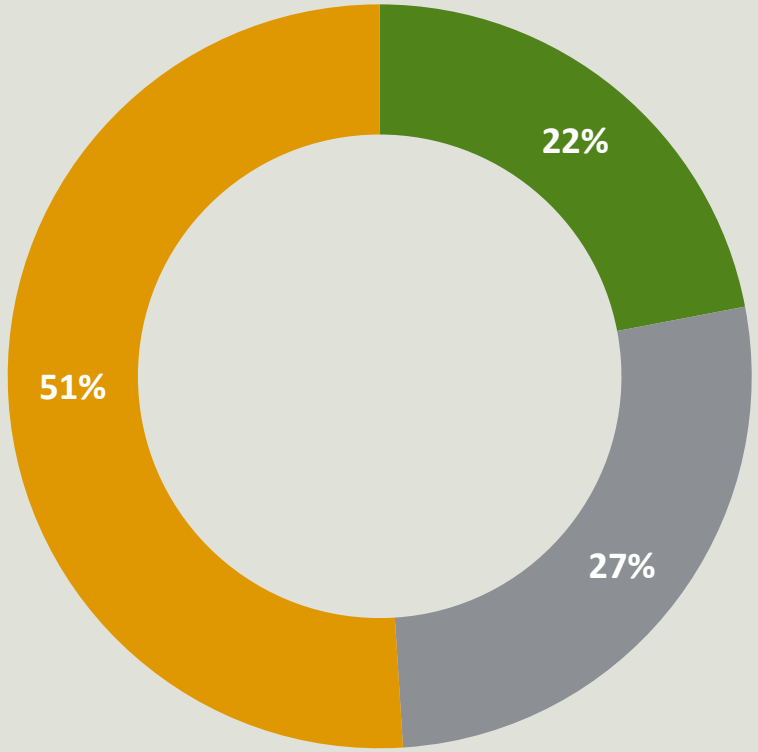
Q2. To what extent do you agree or disagree that third party litigation funders should be required to publicly disclose information about their ownership when investing in British legal cases?



4 **BASE: All respondents. Unweighted total: 2,006**

Survation.

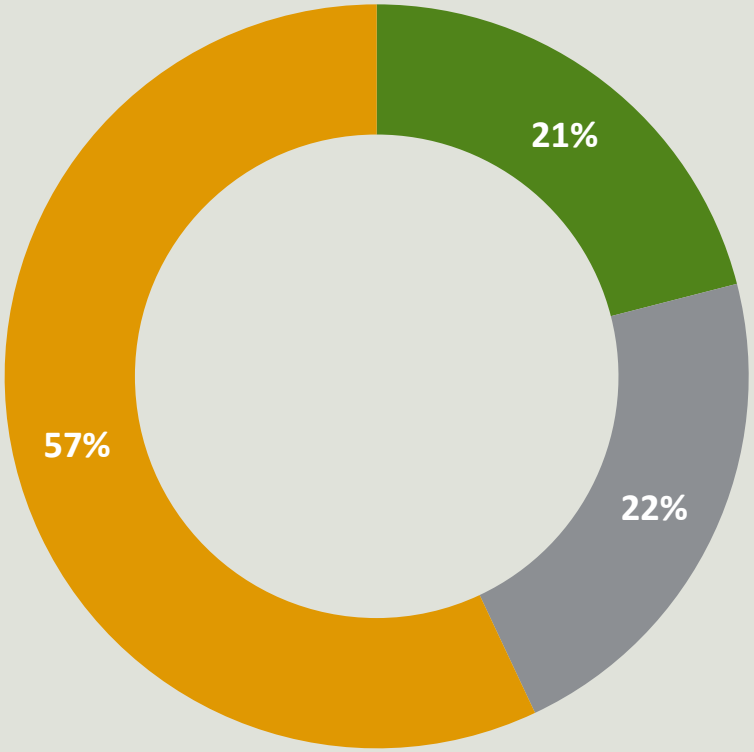
Q3. Do you think that foreign governments and sovereign wealth funds should or should not be allowed to act as third party litigation funders in British legal cases?



5 **BASE: All respondents. Unweighted total: 2,006**

Survation.

Q4. Do you think that foreign governments and sovereign wealth funds should or should not be allowed to take a fee from British legal cases?

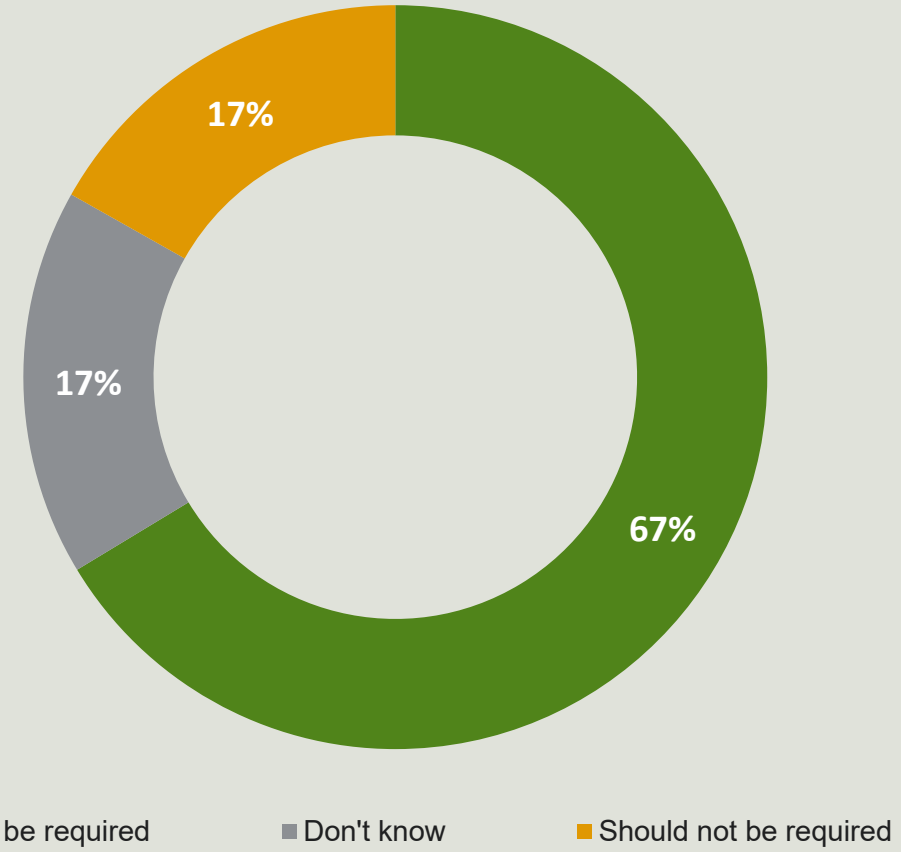


6 **BASE: All respondents. Unweighted total: 2,006**

Survation.

Q5. In the case of class actions, where a lawsuit is filed on behalf of a large group of people who have the same legal problem, claimant law firms take a portion of up to 50% of damages awarded in every case – a share of which goes back to the litigation funders.

Do you think it should or should not be a requirement to disclose who is funding class action lawsuits in the UK?

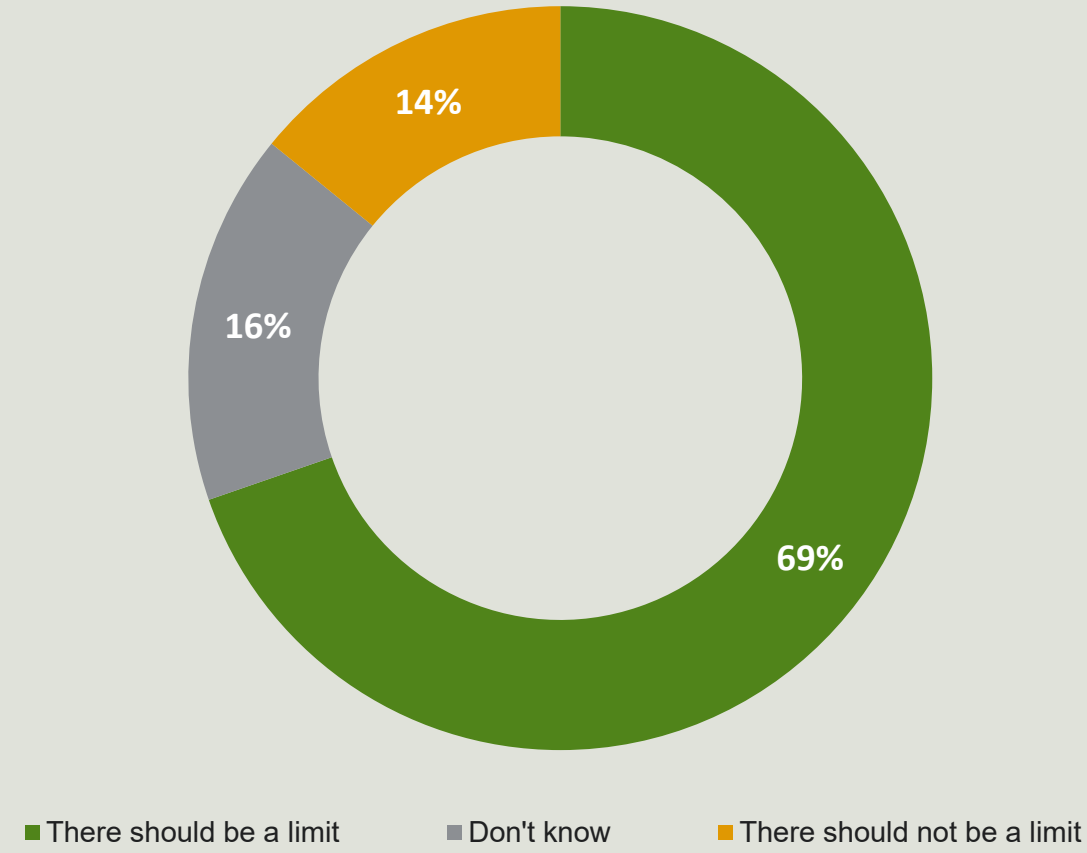


7 **BASE: All respondents. Unweighted total: 2,006**

Survation.

Q6. Litigation funders take their fee as a proportion of the damages awarded in a legal case.

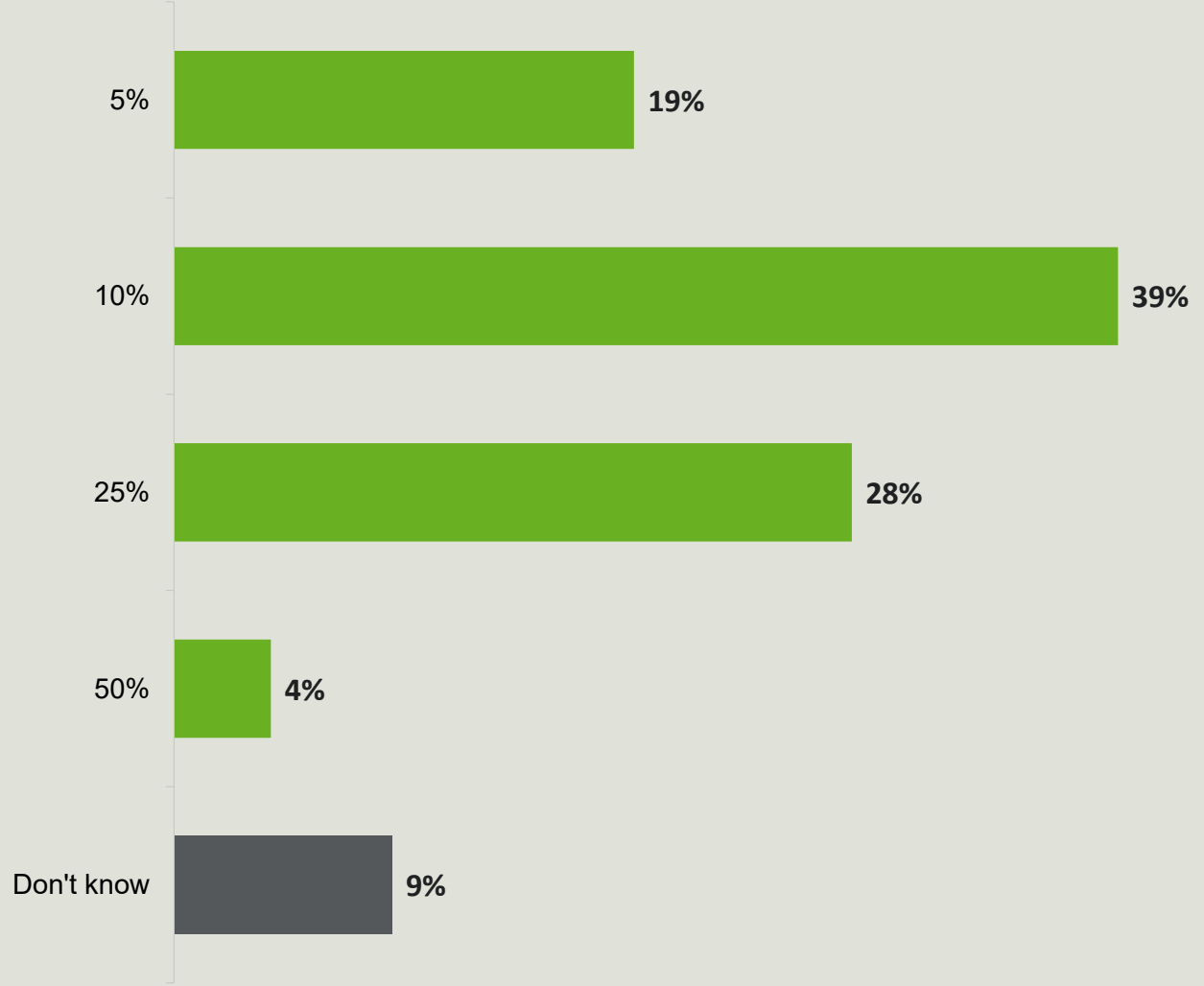
Do you think there should or should not be a government-set limit on the proportion that litigation funders are allowed to take?



8 **BASE: All respondents. Unweighted total: 2,006**

Survation.

Q7. What do you think should be the appropriate upper limit on the proportion that litigation funders are allowed to take from a case?

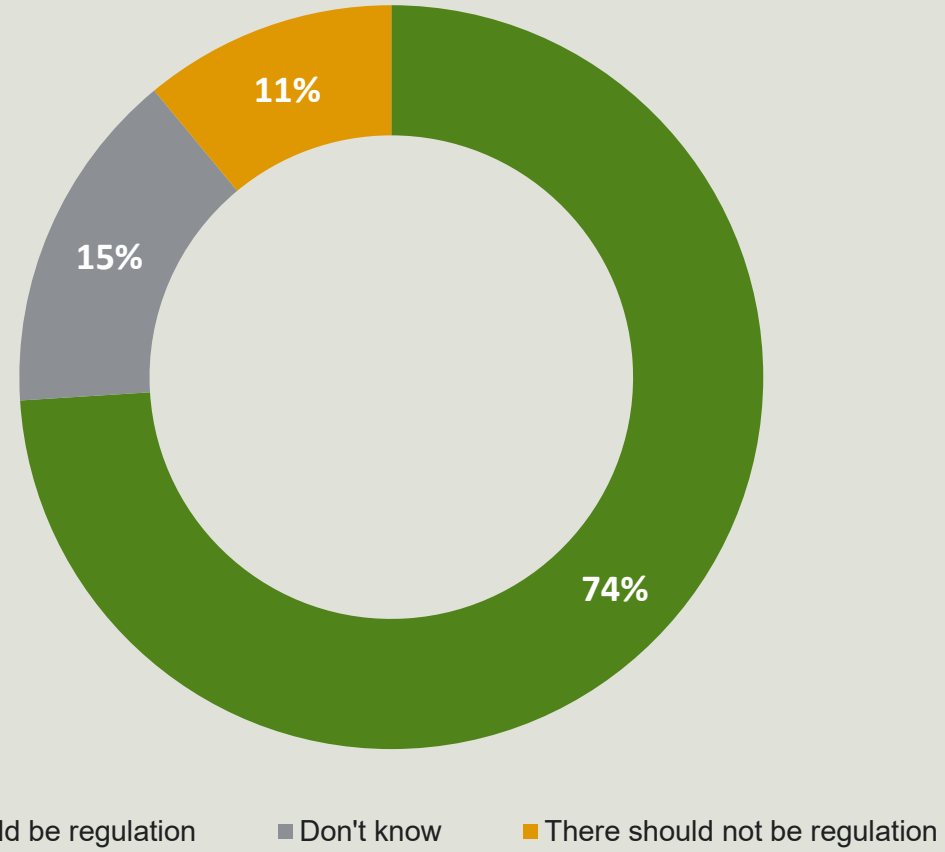


9 **BASE: Respondents who think there should be a limit on the damages taken by litigation funders. Unweighted total: 1,388**

Survation.

Q8. There is currently no government regulation around third-party litigation funders and are instead self-regulated.

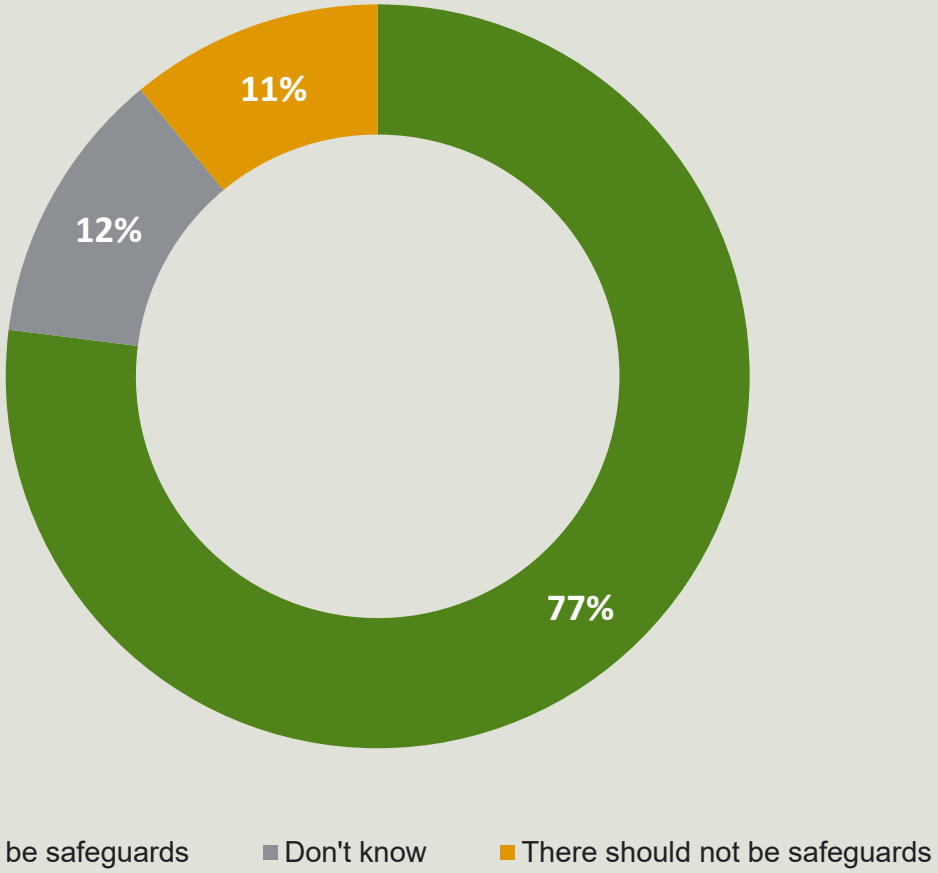
Do you think there should or should not be government regulation of third party litigation funders?



10 **BASE: All respondents. Unweighted total: 2,006**

Survation.

Q9. Do you think there should or should not be safeguards against which individuals, businesses and nations can be eligible to fund litigation in the British court system?

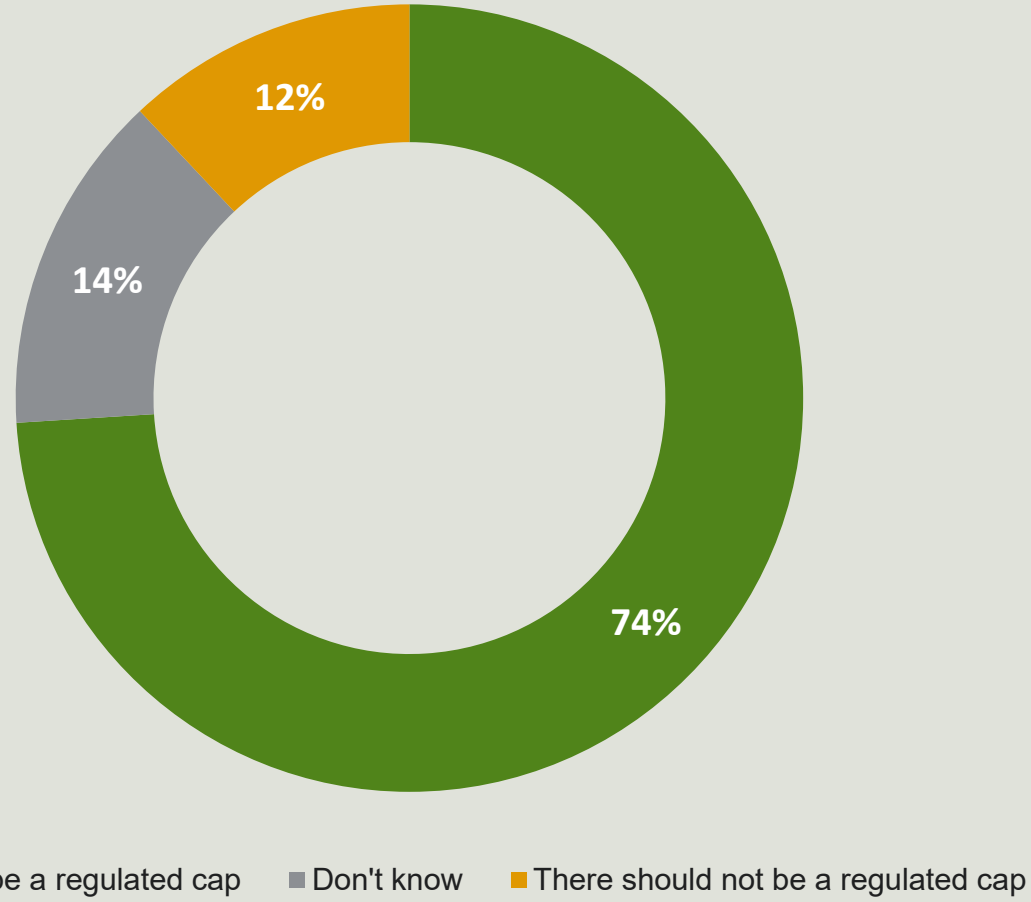


11 **BASE: All respondents. Unweighted total: 2,006**

Survation.

Q10. The government has previously intervened to ensure lawyers' fees are capped in no-win-no-fee cases. In class actions, lawyers are able to set their own fee structure.

Do you think there should or should not be a regulated cap on the percentage of returns that litigation funders can take in British lawsuits?

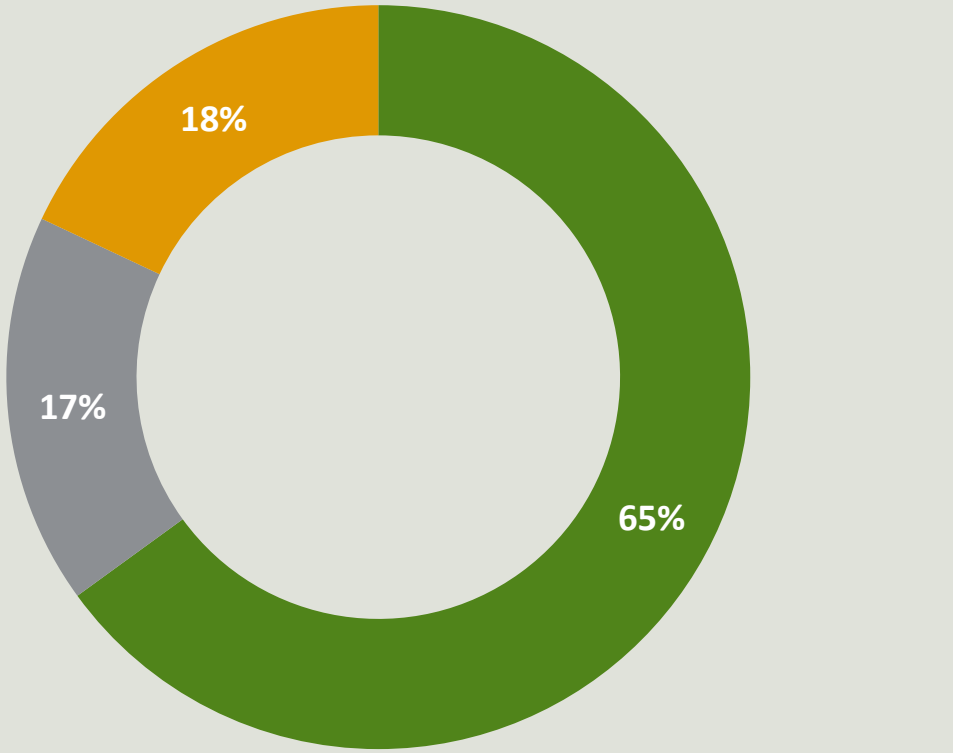


12 **BASE: All respondents. Unweighted total: 2,006**

Survation.

Q11. In Britain, before victims get their share of a settlement, law firms and third party litigation funders take their portion first.

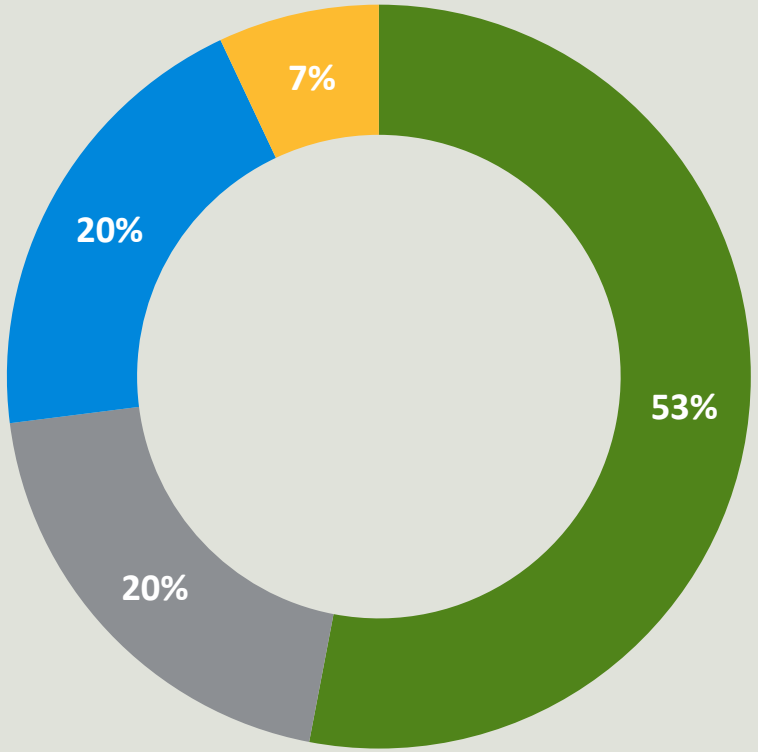
Do you think there should or should not be a requirement for claimants in a case to be paid before any third-party funders receive returns?



13 **BASE: All respondents. Unweighted total: 2,006**

Survation.

Q12. Do you think there should or should not be greater government legislation to govern the relationship between law firms and litigation funders?



14 **BASE: All respondents. Unweighted total: 2,006**

Survation.

Survation. Engaging opinion to inform the future.
Survation provides vital insights for brands and organisations wanting to better understand authentic opinion, adding value and credibility to the research we provide to our clients. We are an innovative and creative market researcher and do not believe any single method can always be the right answer to complex client objectives. We conduct bespoke online and telephone custom research, omnibus surveys, face to face research, and advanced statistical modelling and data analysis.

Survation is an MRS Company Partner. All MRS Company Partners and their employees agree to adhere to the MRS Code of Conduct and MRS Company Partner Quality Commitment whilst undertaking research. As a member of the British Polling Council, Survation has a strong commitment to transparency and the integrity of our work.

The Living Wage
Survation is proud to be a Living Wage Employer. This means that every member of staff in our organisation plus any contract staff are paid the London Living Wage. The Living Wage is an hourly rate set independently and updated annually, based on the cost living in the UK. We believe that every member of staff deserves at least a Living Wage. You can find out more about the Living Wage by visiting www.livingwage.org.uk

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