Cover Sheet

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:	Nikhil
Last name:	Ramakrishnan
Location:	London
Role:	Public Affairs
Job title:	Public Affairs Manager
Organisation:	Zurich
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:

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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.

Zurich Insurance UK Response

Preamble

Zurich UK provides a suite of general insurance and life insurance products to retail and corporate customers. We supply personal, commercial, and public sector insurance through a number of distribution channels, and offer a range of protection, retirement and savings policies available online and through financial intermediaries for the retail market and via employee benefit consultants for the corporate market. Based in a number of locations across the UK - with large sites in Birmingham, Farnborough, Glasgow, London and Swindon - Zurich employs approximately 5,000 people in the UK.

Introductory Remarks

Zurich's main interest in this area is the pursuit of tort-based claims by claimants against insured defendants. Therefore, the response is drafted with liability classes of insurance in mind and chiefly consideration to collective proceedings or individual claims where traditional funding methods such as Before The Event Insurance or Trades Union backing may not be available.

For the purpose of this response, litigation is taken to include the making of a claim or seeking a remedy before legal proceedings are actually issued.

Zurich supports access to justice and recognises that well-regulated litigation funding is a means by which this can be achieved, but very careful checks and balances are required in order to ensure that unmeritorious claims are not pursued and that the law develops in the right way, with litigation funders not able to control the progress of the litigation to the detriment of the litigants, given the differing objectives that the claimant and the litigation funders have. A key tenet of litigation funding activity must be the disclosure of the existence of the funding arrangement and preferably its terms, as these are considerations that defendants have to assess when weighing the risk. Equally, prospective claimants should be fully aware of funding arrangements, so that these can be considered and facilitate the most informed decision as to the right legal representation for them.

Zurich is in favour of firm regulation in this area and in agreement with the recommendations of the European Parliament in 2022 as to the nature of regulation of litigation funding.

As a general statement, Zurich recommends that consideration be given to whether the current "loser pays" costs model remains appropriate, noting that the generation of costs can become an end in itself and detract from the resolution of the underlying dispute in the litigation. It is noted that in some jurisdictions, notably the USA, costs are not recoverable between the parties. It should not be overlooked that a significant amount of litigation has been and continues to be generated concerning the question of costs, which is undesirable and an unwanted generator of expense for parties to litigation.

Finally, litigation funding should not serve to increase overall costs involved with litigation. It has been a clear policy aim of government and the judiciary to reduce the costs of legal proceedings and bring as much certainty as possible in terms of a paying party's liability. This has crystallized up til now with the extension to fixed recoverable costs in October 2023. In our view, there is more still to do in this regard, such as fixing disbursement costs, and we welcome the ongoing work in this area. The reality is that the costs of pursuing litigation are very high and in many instances disproportionately so, as the consultation document recognises. In our view, reform is required in relation to litigation costs,

which if reduced, ought to have a subsequent impact on litigation funding considerations. It is worth noting that litigation costs in certain other jurisdictions are clear and predictable, which has the benefit of enabling effective planning for their financing. Whilst the recent expansion of fixed recoverable costs for most types of civil litigation in England and Wales is welcome, we have yet to see the results of the programme play through in any volume from which to draw conclusions.

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

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

As an insurer, we do not act for claimants, who currently have no compulsion to disclose litigation funding arrangements, so it is difficult for us to comment on its prevalence or effectiveness, but we recognise that third party funding ("TPF") has a role in securing access to justice in enabling cases to be brought that might not otherwise be possible without it. However, key is understanding the TPF arrangement and the conditions imposed by the funder upon the claimant(s) to benefit from it, which we imagine can be obtained from funders responding to this consultation, or claimants' legal representatives which have and do secure TPF.

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

We are unable to comment on the extent to which TPF promotes the equality of arms between parties to litigation, but undeniably, the presence of TPF can finance the production of expert evidence for claimants, for example, as a means of pressing a claim and acting as a balance to expert evidence adduced by another party to the litigation. More generally, TPF can allow for a case to be advanced that might not otherwise be possible.

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

It is accepted that TPF can enable meritorious claims to be brought that might otherwise have had to be discontinued or never pursued. The presence of TPF, if disclosed, would also serve as important information to another party in order to assist with its overall assessment of the risk posed by the case and the potential level of determination of the funded party to press the matter.

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

As insurers, we are not well-placed to offer a view on the regulatory framework concerning TPF. However, our view is that self-regulation is never as effective as external regulation, which is particularly important in financial spheres. Further, the growth in the TPF market and the scope for major risks and harms from it is such that external formal regulation is necessary. Indeed, TPF was recommended for statutory regulation in 2009 within Lord Justice Jackson's report in the event of TPF

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

market expansion. Such regulation is arguably best performed by the Financial Conduct Authority (FCA), which would helpfully act in an umbrella regulatory capacity, noting its regulation of insurers and other bodies within the compensation arena.

We understand that only 16 funders out of 44 in England and Wales are signatories of the Association of Litigation Funders' code of conduct Membership | Association of Litigation Funders, further noting that no ALF member has been expelled. As the sanction is a fine of just £500, there is clearly no powerful incentive away from non-compliance. The European Law Institute has published its report on litigation funding, which recommends a flexible regulatory framework based on a principles approach ELI Principles Governing the Third Party Funding of Litigation.pdf. In our view, it is better for effective regulation to be in place before major issues that might occur that would have been prevented by it, rather than a regime created as a result of poor outcomes.

5. **Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:**
    a. **The nature and seriousness of the risk and harm that occurs or might occur;**

In our view, there are a number of major risks associated with TPF. It can be difficult to quantify these in order to rank seriousness. Therefore, what follows is a list of the major risks, in no particular order:

- The pursuit of novel or questionable varieties of claim, where those bringing the action hope to secure an offer in settlement in the knowledge that to defend the case will involve considerable cost and so there is an economic imperative created whereby recipients of claims may feel compelled to settle, even if in possession of a sound defence. This is a particular concern where groups of claims may be brought in a collective action.
- Exacerbation of the compensation culture which remains prevalent in our society, as seen by the migration of claim types (e.g. from travel sickness to data breach), as reform activity seeks to curtail excess volumes and profitability in the pursuit of compensation and costs
- Serious risk of the litigation being pursued for the benefit of the funder, rather than for the litigant, noting examples of cases whereby claimants have ultimately been left with very little in the way of damages due to the TPF arrangement.
- Conflicts of interest; for example where either the funded or the funding party wishes to press on or discontinue the litigation against the wishes of the other party to the funding arrangement.
- The bringing of claims by legal representatives on behalf of parties (particularly groups of claimants based on alleged wrongs done to them) not domiciled in England and Wales, but in other jurisdictions, who are looking to sue in this jurisdiction as a result of the levels of damages and costs available which are far greater than could be recovered in the jurisdiction where the harm allegedly occurred. A particular example is where the UK parent of a multinational organisation is sued in England and Wales, despite all of the claimants being overseas.
- The absence of "skin in the game" for funders, beyond their financial investment, such that a brake on poor behaviour, if exhibited, is not present.
- Undesirable damages inflation, to ensure that there is sufficient share of the proceeds of the action between the claimant and funder. This is a particular mischief, given the concerns expressed as to the affordability of certain classes of insurance and the creation of perceptions that very high damages are recoverable for modest infringements or other civil wrongs.
- Costs inflation for much the same reasons as damages inflation.
- The historic challenges created by CFAs with recoverable success fees and ATEI with recoverable premia necessitated the LASPO reforms, other than in excepted classes e.g.

mesothelioma. The concern is that unchecked TPF may lead to a need for firmer regulation and control, which may have the unintended result of limiting access to justice.

b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;[3]

In line with the answer to 4., our view is that regulation would be ideally undertaken by the FCA via the implementation of licensing and formal standards, subject to audit. Whilst we recognise that the current self-regulation system provides some safeguards, these do not go far enough to mitigate the major harms and risks outlined above. Whilst it is appreciated that those representing funded parties will be regulated and subject to professional obligations, that is not sufficient to control the risks identified. In addition, the regulatory obligations do not of themselves serve as a brake to the progression and development of a culture of pursuing claims where undesirable.

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

The FCA has the advantage of knowledge of how other areas responsible for the conduct of matters connected to funding operate and could act as a regulator of both sides of the litigation funding / damages paying coin, with an overarching, non-partisan position.

The FCA is already established and regulates other quasi-legal entities such as companies supplying legal referral, so would not require a new body to be created to regulate TPF.

We are not ideally positioned to understand how regulation by the FCA would affect the TPF market, but we cannot identify a specific disadvantage from it.

6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?

We see no reason to have a different regulatory mechanism to apply to different types of litigation, although different types have different considerations (of which we will not necessarily be aware) that need to be accounted for.

a. If not, why not?

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

b. If so, which types of dispute and/or form of proceedings[4] should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?[5]

Our view is that any type of group or collective action requires a careful and highly controlled approach, to ensure that the interests of all stakeholders are appropriately balanced. For instance, a regulatory regime needs to be careful to ensure access to justice in cases where redress is sought in connection with a claimed widespread harm, but at the same time, TPF ought not operate in such a way as to result in a negligible return for the claimants (if successful), noting the outcome in the *Bates and Others v The Post Office* matter. Equally, TPF must not be permitted to encourage the pursuit of cases where the overriding consideration is the solvency level of another party, which may be assessed as apt to reach a commercial settlement to see an end to the litigation (to include prospective proceedings), irrespective of the merits.

c. Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?

Whilst we lack the knowledge to comment authoritatively on this point, it seems to us logical that different approaches are required depending on the nature of the TPF and indeed, the different types of party. For example, we would expect a litigation funder to interact with an individual litigant in line with the Consumer Duty, whereas a litigation funder dealing with a sophisticated commercial litigant will be able to contract on different terms, mindful of the parties' respective positions. That said, a common overarching regulatory framework is appropriate in all cases. It should be noted that any presumption that corporate defendants are well-resourced is not well-founded. Unfortunately, many commercial enterprises become insolvent every year.

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

The best practices or principles that should underpin regulation should be consistent with those applicable to lending generally. It is noted that the key features that voluntary Codes of Conduct discussed in the CJC's report provide for are appropriate, although we take the view that the principles need to go further and recognise the scope for detriment to both the funded party and the civil justice system more generally unless TPF conduct is adequately controlled.

In terms of implementation, prompt self-referral to the regulator will be an essential element in the event of a breach of standards or other conduct demanded by the regulator. Further, for regulation to be effective, a proportionate sanctions regime is necessary in the event of breaches of standards, whether or not actual detriment is caused.

[4] Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.
[5] Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

8. **What is the relationship, if any, between third party funding and litigation costs? Further in this context:**
    a. **What impact, if any, have the level of litigation costs had on the development of third party funding?**

It is difficult for us to answer these questions, as insurers tend not to know of the existence of funding arrangements post-LASPO in most types of case seen, nor the extent of costs not recovered from other parties leading to shortfalls for litigants, but it is clear that litigation costs are too high and why measures to limit these separately are welcome, as well as steps to bring greater certainty to them.

A concern we have is that the relationship between the level of costs and TPF is self-fuelling, in that as litigation costs rise, so then does the need to secure TPF to finance such costs, with the result that damages and litigation costs risk inflation to ensure a sufficient return for the TPF whilst ensuring the recovery for the claimant is also appropriate.

In addition, court-imposed costs budgeting does not apply in all cases; certainly not those which are compromised before a CCMC nor in matters over £10M nor claims subject to fixed recoverable costs. When one considers that the majority of claims with which we are concerned do not reach CCMC stage, costs budgeting is only of limited effectiveness in controlling the costs of presenting claims. Reform of the costs budgeting process itself is the subject of separate consideration.

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

In line with the answer to a., it is difficult to say definitively, as defendants are generally not told of the existence of TPF, but the presence of TPF will act as an incentive to increase costs overall in order to ensure a sufficient return for the funder, the instructed solicitors and the claimant. One need only consider the case of *Pankhurst v MIB* / the lengthy litigation surrounding CFAs to understand the impact of TPF on litigation costs and why TPF needs to be carefully regulated to ensure that the interests of all concerned are balanced.

    c. **To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?**

We are not adequately sighted on this issue to respond.

    d. **How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?**[6]

The introduction of a formal regulatory regime should serve to ensure a fair outcome for parties seeking TPF, whilst ensuring that there is sufficient return for lawyers acting for funded parties.

    e. **Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?**

No.

        i. If so, why?

Not applicable.

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

ii. If not, why not?

In our view, to allow the costs of litigation funding to be recoverable as a litigation cost would work against the purpose of the LASPO reforms and would add to the costs of pursuing litigation generally, which is undesirable, and it would increase paying parties' liabilities significantly. However, if the costs of litigation funding were to become recoverable, a trade-off would have to be the removal of Qualified One Way Costs Shifting (QOCS) in personal injury cases, which already creates an imbalance against the defendants of such claims.

A further challenge is the huge scope for satellite litigation addressing what is within the scope of recoverability and the costs thereof. As the interim report recognised, the CFA regime pre-LASPO led to many years of litigation concerning the recoverability of success fees and ATEI premia. No steps should be taken which might entertain a repeat of that. As a hypothetical question, if funding costs were, in principle, recoverable, would the court be able to assess the reasonableness of the fees claimed, given the lack of publicly available comparators?

Our concern is that if funding costs were recoverable, behaviours would change to ensure maximum profitability by third party funders, exacerbating the "winner takes all" model for claimants in this jurisdiction, which is as mentioned itself in need of review.

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.

We are unable to comment on the impact of the recoverability of adverse costs and costs security issues insofar as the availability of TPF is concerned. However, we are clear that there should be mechanisms in place to ensure the recoverability of adverse costs and to obtain security for costs, in order to ensure an appropriate check and balance between the parties' interests. It is important that defendants be able to recover costs they are forced to incur in the successful defence of claims brought against them. Requesting security of costs is sometimes necessary to ensure that defendants with a strong case can be assured as to the prospects of being able to recover what can often be significant sums in defending a claim which is felt to be without merit.

Essentially, the recoverability of costs is another factor litigants have to weigh in the risk matrix overall.

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

Yes. Determining the extent would likely need to be assessed on a case by case basis, looking inter alia at the conduct of the proceedings, but the "skin in the game" principle should dictate that those willing to finance litigation should be exposed to the potential for paying the costs of proceedings they have funded.

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

11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?

We are not sufficiently sighted on this issue to offer a response.

12. **Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?**
    a. **If so, why?**

Yes, to ensure proportionality and to prevent the litigant from paying over a disproportionate amount of their damages, restitutionary award or other redress to the funder.

It is also important to prevent spurious litigation or the development of the law in an undesirable way, including limiting the furtherance of compensation culture.

    b. **If not, why not?**

Not applicable. Our firm view is that funding arrangements need to be subject to controls.

13. **If a cap should be applied to a funder's return:**
    a. **What level should it be set at and why?**

A definitive response is not possible given the variables in play, the possible funding mechanisms available and so on, but the most important consideration is that that it must be proportionate to the value of the case and the issues at stake.

    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?**

Our view is that legislation is better to set the cap than allow it to develop through case law, as statute should provides less scope for interpretation. At the same time, it is recognised that some discretionary element to revise the cap may be appropriate in light of developments in the course of proceedings and so we see merit in the court being able to work within certain parameters within a statutory framework.

    c. **At which stage in proceedings should the cap be set?**

Ideally, legislation would impose a cap from the pre-litigation phase, so that the overall merits of proceeding with TPF can be considered at the earliest stage, with the potential ability of the court to revisit the cap at once proceedings are issued and then subsequently, by which time additional issues may need to be considered.

    d. **Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?**

Yes. The following are the factors we consider appropriate:

- The financial means of the litigant seeking TPF.
- Whether the party is 'legally sophisticated' (for which a definition should be provided).
- The amount the litigant is reasonably expecting to recover from the funded litigation

- The existence of BTE insurance or other arrangements which could finance the proceedings. It occurs to us that a combination of resources could be utilised to bring a claim, such as BTE insurance with a TPF on top, to overcome the effect of any BTE policy limit.
- Whether the case is deemed to be of particular importance.

e. Should there be differential caps and, if so, in what context and on what basis?

The concept of differential caps is sensible, depending on the nature of the case and its size, along with the issues it hopes to address.

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

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

The advantages are that TPF:

- Can assist access to justice by enabling claimants to pursue cases they might not otherwise be able to bring, due to the absence of legal expenses insurance, for example.
- Provides an alternative means by which to finance legal proceedings at no or limited direct cost to the litigant.
- Is able to facilitate group litigation in a way that may otherwise be challenging.

The drawbacks are:

- TPF has the potential for conflicts of interest between claimant and funder, particularly where settlement proposals are under consideration and there are differing views between the funded and funding parties as to acceptability.
- TPF may enable "portfolio" litigation to be pursued, in relation to which there have been egregious examples of weak cases pursued and then claimants left personally exposed to adverse costs.
- Encouraging a litigious culture and society.
- Adding to the costs paying parties have to make (either directly or indirectly).
- Encouraging damages and litigation costs inflation as a result of the need to secure an effective result for the funded party, its legal representatives and the funder.

15. What are the alternatives to third party funding?

a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?
Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

It is recognised that there is very limited or no appetite for state-funding (including some kind of BTE scheme) for most types of civil litigation already, but given the relatively low proportion of the population or corporate bodies involved in legal disputes over time and inevitable concerns over premium costs for a product that may never need to be used, we do not imagine that changing. Trades Union membership is an effective way to pursue litigation and indeed we are aware that this is very common in Employers' Liability claims.

BTE insurance would also be very helpful as a mechanism to fund litigation and where in place, it is probably under-utilised. It is noted from the consultation document that in certain other European jurisdictions, the use of BTE is far more prevalent. However, it is proposed that one of the main reasons for this is greater certainty as to the costs of litigation in those jurisdictions and another reason why increasing the predictability and certainty of litigation costs in England and Wales is very much welcome, as such may well lead to a greater market for BTE.

b. Can other forms of litigation funding complement third party funding?
Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.

Yes. All of those listed are relevant. Our view is that TPF should effectively be funding of last resort in a hierarchy of funding options, starting with funding mechanisms already in place (e.g. BTE), those accessible at modest cost (whether up-front or later) e.g. DBA, before TPF is considered. It is recognised that securing funding in the form of pure funding or crowdfunding may be very difficult in certain cases.

c. If so, when and how?

As above, other options should be considered before TPF is entered into, in our view, particularly where there is a product or vehicle which can satisfactorily meet all of the anticipated costs of concluding the action, which may include discontinuing it early on.

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?

Some of the responses to earlier questions apply. Generally, existing arrangements are preferable as they do not require examination of the prospective litigation (other than to ensure it is within the scope of the arrangement) and an assessment of the risk by the funder, which can impact whether the litigation is funded or not and on what terms.

One option could be a requirement that a prospective litigant has to declare the existence of other arrangements which could finance the litigation (taken to include the pre-issue of proceedings phase) and to provide a statement as to why these are considered to be unsuitable or unresponsive to the particular prospective litigation before entering into TPF.

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?**

From an insurer's perspective, the only reforms considered appropriate for CFAs is the removal of the recoverability of the success fee in those classes of personal injury claim where it is still permitted. In our view, there is no good reason for this, given the operation of QOCS more than makes up for the potential to incur unrecovered costs if an action fails.

In our view, the operation of CFAs and DBAs in principle is effective and we would support a single regulatory regime applicable to all forms of contingent funding agreement.

Further still, consideration should be given to litigation costs reform to remove inter parties costs recoverability, which would among other things have the benefit of increasing healthy market competition in the litigation funding arena, as well as serve to control costs better, as prospective litigants seek the most advantageous arrangements for the bringing of their claims where other funding mechanisms are not in place.

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?**

Whilst a sensible suggestion, we cannot envisage a public mandatory legal expense insurance scheme gaining traction, not least as it would need to be funded publicly through taxation or some other levy, which poses problems due to the perceived infrequency of need to call upon the scheme by most and affordability concerns in the sense of a negative cost-benefit-analysis as a result.

Encouraging the public and business to consider purchasing LEI of some kind, particularly BTE, has a lot to commend it, particularly if being able to be promoted alongside reform to the litigation costs system to bring greater certainty and costs reduction to litigants.

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?**

Our view is that ATE is beneficial in that it does or should enable unsuccessful litigants to meet adverse costs orders. However, in personal injury litigation, the advent of QOCS as a result of LASPO has arguably removed the need for ATE in such cases, noting there are certain exceptions to the operation of QOCS, which if triggered are likely to result in the withdrawal of ATE cover in any event. It is also important that ATE providers are held to account. Zurich has experience of ATE funders refusing to indemnify a claimant after a case is lost.

ATE could be a helpful adjunct to TPF, but key in our view is the continuation of irrecoverability of ATE premia in most cases.

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

It must depend on the arrangement. We have limited experience of this in practice, given our experience is responding to claims based in tort or breach of contract, where crowdfunding is not believed to be prevalent.

Our general understanding is that crowdfunding primarily takes the form of donations with no expectation of recovery or repayment. We would be concerned that informal arrangements without any contractual terms between funder and the funded party were able to be reflected in a deduction from a funded party's damages or result in conduct of a claim against the defendant in a particular way motivated by the need to ensure a return for the crowdfunders or the personal interests of the crowdfunders.

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

The SSB example covered within the report and consultation material is the exemplar of why great care is needed in this area, given the scope for the pursuit of unmeritorious litigation. The ability of one class of claim to effectively subsidise another is of concern, particularly where the latter class is notoriously weak, or novel; for example, Cavity Wall Insulation claims. Such also has the propensity to further fuel compensation culture and generate a more litigious society.

Our view is that funding needs to be approached exclusively on a by category basis, so that the only portfolio considerations involve cases within the same category, which will inevitably have claims of differing individual merit, but sufficient collective homogeneity to enable suitable funding decisions to be made by prospective funders.

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?

No.

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

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?

In our view, the Civil Procedure Rules need to include that the existence of funding arrangements be disclosed as soon as they are entered into, as it is key the other parties to the litigation are aware of them and can consider these as part of their approach to the litigation. Such changes should form part of an updated Pre-Action Protocol. The disclosure should include the key features of the funding

arrangement. In our view, it is particularly important in collective or group proceedings, so that the opposing party can understand the overall situation and have a greater opportunity to identify and challenge any apparent conflicts of interest, as well as quite properly understand the potential exposure arising from the claim.

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?

In our view, any funding arrangement should have to be disclosed to the other party or parties, so that the fullest background to the case and issues associated with it are fully understood.

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?

This is a complex issue and it is not easily clear how this would work, given *Rowe* was about requiring the funders to have security for costs. The 'skin in the game' principle suggests that if financing litigation with a view to a share in the proceeds, that a share in the risk should be taken too and providing for security for costs would bring a needed check and balance and ensuring a careful approach to supporting litigation by third party funders.

26. What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?

In our view, the need to control pre-action conduct generally is absolutely key in the effective and appropriate management of cases and should work toward the aims of reducing the volume of issued legal proceedings and facilitating dispute resolution between parties without suit. There is a case for the court taking a particularly interventionist role in proceedings funded by TPF, especially prospective collective proceedings.

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?

Our clear view is that disclosure of a funding arrangement should be made as soon as it is entered into or a claim or case is presented against another party, whichever comes last. Early disclosure will assist those responding to the claim in assessing the merits of the case, recognising that TPF and the link to litigation costs are key issues that weigh into the overall risk matrix for the other party.

Parties' approaches to litigation are likely to be influenced by the level of disclosure provided. We feel that it is in the overall interests of justice for disclosure concerning TPF to be as full as possible, in support of openness principles and to further the overriding objective.

Questions concerning provision to protect claimants.

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

We are not sighted on the extent to which funders exercise control over litigation generally, but have experience of funders attending certain settlement meetings independent of the funded party. Our clear view is that funders should exercise no control over litigation, to preserve core champerty and maintenance principles. However, funders should be fully and appropriately informed by the funded party's legal advisors in order to determine the level of financial support to give and decide if it is necessary to withdraw support, depending on developments in the case.

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

We can only speak to historic experience of CFAs and ATEI (and where it still exists). Regrettably, experience has shown that due to the recoverability of costs between the parties in this jurisdiction, costs-maximisation behaviours are an inevitable result. We feel that it is very important that whatever funding mechanism be in place, it must be geared toward the earliest resolution of the case at modest cost.

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?

The concept of court approval of the arrangement such as we understand exists in certain Canadian jurisdictions and the CAT has much to commend it. Approval would ideally be at the stage of the formal issue of legal proceedings, or at a pre-issue stage when disclosure of a funding arrangement has been made to the defendant, particularly in collective actions. Subsequent Directions could then ensure adherence to the funding agreement and that the litigation proceeds appropriately. A formal checkpoint could be at the Costs and Case Management Conference to ensure that any issues with the arrangement are able to be addressed.

Court approval would add another layer of costs, but we can see some benefit of a safeguard to ensure that claimants are not disadvantaged by the settlement (in terms of the apportionment of the recovery between themselves and their funders). However, court approval may not be needed if there is a sufficiently clear legislative framework surrounding TPF.

We can see a greater place for court approval in group actions rather than in individual cases. The latter ought to be capable of being governed by clear rules with minimal or no need for court approval, although where a party lacks litigation capacity, the approval of the settlement in a claim financed by TPF would need to be a consideration of the court in terms of the apportionment of the recovery between the claimant and their funders, as distinct from the overall recovery, per se. It is crucial in our view to ensure that the acceptability by the court of a damages recovery from a defendant not be influenced by any TPF arrangement in place.

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

In line with our answer to the previous question, the key element as we see it is to ensure the fair division of the recovery between funded and funding parties, not an assessment of the actual recovery achieved from the other parties to the litigation.

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?

In line with our responses to earlier questions, our view is that formal state regulation is necessary to ensure that the objective of protection for claimants is met and to strike the right balance between claimants' and defendants' interests. Self-regulation is considered to be insufficiently robust to address the risk of mischief and harm caused to funded parties as a result of potentially poor practices by funders.

It is particularly important to ensure that not more than a reasonable proportion of recovered damages or other redress is able to be paid over to funders and that funded parties are not pursued for the recovery of sums not expressly provided for within the terms of their arrangements. Terms must be very clear so that litigants know what degree of personal risk they are taking. Individual and other qualifying funded parties should be subject to the protections afforded by the Consumer Duty.

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

We are not sighted on this as we do not act for claimants and do not receive details of these arrangements in the courses of the cases we handle. However, we do believe that a competitive TPF market would enable potential litigants to identify and compare different funding options, with a view to reducing the costs of TPF as funders compete for business. Reduced costs of TPF should lead to reduced litigation costs.

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?

As we do not act for claimants, we are unsighted on the issues and conflicts that may arise between funded claimants, their legal representatives and/or third party funders.

However, we are keen to ensure the well-reported mischief is avoided whereby litigation is clearly pursued by credit-hire companies against motor insurers whether or not the claimant in whose name the litigation is brought is in agreement, showing that the direct financial interest of the credit-hire company is the driving force behind the proceedings, as it wishes to recover sums which are not the claimant's direct loss. This is a clear conflict and needs to be addressed in a way that prevents such actions being brought and does not have to put the defendant to the expense of seeking a non-party costs order to achieve that aim. We would be loath to see a claimant forced to continue with a claim it wished to settle due to pressure from funders seeking a greater return. However, to balance this, it is recognised that funders ought not have to continue with a claim that should be compromised but for the claimant's wish to continue.

It is for these and many other reasons that effective formal regulation is needed in relation to TPF.

We again refer to the unfortunate case of *Pankhurst v MIB* and would not wish to see similar situations arise in the future.

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.**

Our view is that the most effective way to understand the potential for a conflict of interest is to ensure that the TPF arrangement is disclosed to the opposing party in sufficient detail for the key provisions to be understood.

Beyond that, we feel that if a conflict should arise at a later stage, it would need to be declared promptly to the other parties to the litigation following its emergence.

Questions concerning the encouragement of litigation.

36. **To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:**
    a. **Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?**

It is difficult to provide a current evidence base for this. Historic (pre-LASPO) recoverability of additional liabilities stemming from CFAs and ATEI premia encouraged a high volume of personal injury claims to be made and flagrant profiteering by law firms acting for claimants. However, we are unsighted on the volumes of claims involving individuals or businesses which may have been encouraged by TPF.

    b. **Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?**

Due to the lack of visibility over TPF arrangements, defendants usually do not know if vexatious or unmeritorious litigation is the subject of third party funding, though it is occasionally suspected. It occurs to us that well-regulated and effective TPF practices could act as a filter to exclude litigation without merit from proceeding, as funders would presumably either have the experience or obtain advice to determine the strength of the underlying case in law and whether the facts and available evidence support it.

We repeat the concern that a highly solvent defendant could be targeted by third party funded vexatious or unmeritorious litigation in the hope of securing a settlement, aware of the high costs the defendant will incur in looking to defend the claim, even if a strong defence is felt to exist.

    c. **Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?**

We are aware that certain grouped claims (even if not subject to a formal Group Litigation Order, but being collectively case-managed) have only been possible to intimate due to the existence of TPF. However, we are unaware of the volumes of such claims which may have been encouraged by TPF.

When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.

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

Our view is that a robust regulatory framework will address issues regarding the encouragement of litigation generally and as outlined previously, a key provision must be the disclosure to the other party or parties of the existence of litigation funding as soon as it is entered into, which should include a broad outline of the arrangement. Our clear view is that an effective regulatory framework is far preferable to issues having to be resolved through expensive litigation and case law over time.

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?

There could be an expansion of the professional obligation on lawyers and other representatives to ask prospective and actual clients to check for the existence of Trades Union funding, BTE or whether alternative funding methods could be secured without having to resort to third party funding; e.g. a DBA or obtaining a specific loan, before litigation funding arrangements are taken up. It should be made very clear to claimants the implications of entering into a funding arrangement in terms of the impact on their recovery, compared to what other forms of funding would mean, by reference to an example based on the assessed value of the claim or a proxy matter.

Our view is that TPF should really be an option of last resort, with the most preferable option where self-financing is not an option being the use of BTE where in place, given a premium or other consideration has been paid or made for it.

General Issues

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

Litigation funding undoubtedly has a role to play in ensuring access to justice, but it must be strictly controlled to prevent undesirable developments in the law or unintended consequences, such as to unduly increase claims frequency or cost.

The curtailment of compensation culture is very important, as a litigious society is one which becomes defensive, involving the unwarranted diversion of funds to mitigate the risk of lawsuits, to the detriment of development and stifles innovation. The concerns regarding the unchecked operation of TPF are well set out in the joint statement from November 2024 dealing with the Call for Regulation of Private Third-Party Litigation Funding (TPLF) at EU level.

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

It is our clear position that in order to better enable defendants to take an informed view on the overall risk posed by a case presented that funding arrangements should be disclosed to the defendant as soon as they are entered into, along with their broad terms, so that early decisions can be taken, with a view to arriving at an appropriate outcome as soon as possible.