RESPONSE FROM THE CITY OF LONDON LAW SOCIETY (LITIGATION COMMITTEE) TO THE CJC'S LITIGATION FUNDING CONSULTATION

Introduction

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through over 20 specialist committees. This response has been prepared by the CLLS Litigation Committee. This response addresses the consultation insofar as it relates to the law and civil procedure of England and Wales. It does not, therefore, address the questions in the consultation paper insofar as they relate to the law and civil procedure of Northern Ireland or Scotland. It likewise reflects the CLLS Litigation Committee's experience acting on larger, more complex claims rather than smaller cases or those before more specialist tribunals.

Summary observations

The Committee welcomes the CJC's review of third party funding and the opportunity to contribute to this consultation. Our responses to the consultation's questions are set out below, but we preface those responses with a number of overarching observations which are intended to contextualise the Committee's position.

There is no question that third party funding has grown to become an established and important element in the English litigation landscape. The Committee starts from the premise that third party funding has (and should continue to have) a valuable role to play for a variety of users. Consumers represent one such class of users, and we note the CJC's understandable focus on the protection of consumers and the facilitation of access to justice. The nature of the CLLS, however, means that the Committee's members tend to specialize in large-scale commercial litigation, often acting for corporates, asset managers, trustees or other institutions. It is from this perspective that we note the importance of third party funding to a non-consumer audience, both as claimants and defendants.

Against this background, the Committee believes that it is vital that an appropriate regulatory balance is struck: we recognize that there are well-publicized instances of third party funding failing to deliver optimal outcomes to consumer claimants in group litigation and, as we discuss in more detail in this response, there are steps which the Committee considers could usefully be taken to strengthen the current regulatory framework. However, it is the view of the Committee that any new regulation be carefully calibrated to recognize the different positions and interests of other users, including sophisticated litigants.

In short, the Committee recognizes that third party funding can create or exacerbate a number of risks for funded claimants, defendants and the courts. Some of these risks relate more to how third party funders operate as businesses and some more to the current tools available to manage funded claims in the courts. We believe that the proposals set out in this response constitute a proportionate response to those risks. In particular, and without prejudice to the totality of our proposals, we consider that steps to increase transparency in the third party funding market, including through the mandatory disclosure of the fact of funding arrangements, will help to foster a competitive and stable market, to the benefit of all stakeholders.

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]**

   The Committee is aware that 'access to justice' in the broadest sense can be achieved through a range of means, including specialist redress forums, statutory schemes or pro bono work.

[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.**

However, in the Committee's experience, third party funding in its current form can help to ensure effective access to justice in certain types of cases. This has typically been in relation to high-value commercial claims, large-scale collective claims and within the insolvency sphere:

- In high-value commercial claims, the size of these actions can incentivise third party funders. This is because the scale of the claim provides sufficient potential return on investment to justify the risk of their outlay. In many instances, the claimants might not otherwise be able to bring such claims; either due to the claimant's cashflow difficulties or, in extreme cases, the expropriation of their assets.

- In relation to large-scale collective claims, these are usually brought on behalf of individuals / consumers who would not otherwise be able to bring an action against the defendants. In such cases, funders will typically back cases with strong merits, following extensive due diligence. Examples of such actions include cases before the Competition Appeal Tribunal (CAT) or brought in the High Court under group litigation orders (GLOs). Indeed, these are the examples that the general public might most often hear about – e.g., the recent cases of *Bates & Others v Post Office* and / or *Merricks v Mastercard*.

- In the insolvency sphere, third party funding has enabled liquidators to pursue claims on behalf of creditors, where they might not otherwise have been able to make recoveries.

Outside of these three areas, the members of the Committee have limited experience in relation to other areas (e.g., the employment tribunal or isolated claims), so are not in a strong position to comment. However, the members of the Committee are not aware that third party funding is common in such instances. To follow on from the above, third party funding is less likely to apply in relation to smaller-scale cases, because the amounts at stake are not sufficient to provide an incentive for the funder. Some funders have worked with law firms on a portfolio basis, which enables them to back smaller claims; however, even in such instances, the Committee members are not aware of any claims in the Intermediate Track or in the lower end of the Multi-Track in the High Court that have been funded by such a mechanism. Other mechanisms, such as the use of conditional fee agreements (CFAs), are much more common in such claims (and the Committee notes below the potential risks for claimants and defendants where law firms become over extended and/or reliant on CFAs).

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

In the Committee members' experience, the role of third party funding in promoting an equality of arms is highly dependent on the parties involved in the litigation. In claims of a sufficiently high value, third party funding can provide a means by which to ensure that the claimants are able to bring claims against large and well-resourced defendants. However, by that same token, access to funding on the claimant-side risks creating a countervailing imbalance, where the claimants might have significantly greater access to funding than less well-resourced defendants.

That being said, the experience of the Committee members is that funders typically conduct background checks on potential defendants' liquidity, and that they will be unlikely to fund a claim against a defendant who does not appear to have sufficient resources to meet any judgment (and thus, as it generally follows, sufficient assets to defend the claim). This serves to act as an effective existing guardrail against an imbalance of resources in favour of potential claimants.

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

The increased availability of litigation funding enhances the possibility that meritorious claims can be brought. As such, the availability of third party funding forms a key part of the litigation landscape of England and Wales, and it serves to bolster and cement London's reputation internationally as a forum for the resolution of large-scale and significant disputes.

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?**

The Committee believes it would be helpful to distinguish when answering this and other questions between (i) the regulation of funding as an investment activity and (ii) whether reform is needed (through amendments to the CPR or otherwise) with respect to the management of litigation that is backed by a third party funder. They are, the Committee believes, separate questions which merit separate consideration.

As a general rule, the court does not become involved in the relationship between the funded party and the funder. Although this can result in instances where public concerns are raised about a perceived unfair relationship between a claimant and their funder, the counter-argument remains that there would otherwise be an absence of access to justice for those same claimants. Taking again the recent example of *Bates & Others v Post Office*, the members of the Committee note that Mr. Bates has been vocal about his support for third party funding, both before and after the award of damages, and notwithstanding the large portion of the settlement that went to the litigation funders.

In relation to collective actions before the CAT, these each have to be certified in accordance with Clause 6.33 of the Competition Appeal Tribunal Guide to Proceedings. As part of this, the Tribunal will consider the proposed class representative's available financial resources, including their ability to fund their own costs. This means that any such third party funding arrangement will have to go through an appropriate degree of scrutiny, before the action can be certified by the Tribunal. Such a model of early review of the claimant's financial resources in collective actions and whether the terms of the funding are appropriate for the proposed class as a whole may be suitable for introduction at an appropriate juncture in other cases, e.g., at the first CMC.

The Committee recognises that there may be a case for introducing regulation where the funded parties in a claim are consumers (as opposed to businesses / commercial entities), not least because other lending transactions involving consumers would ordinarily be heavily regulated by relevant consumer legislation and overseen by the FCA and other bodies. However, since the members of the Committee rarely (if ever) represent consumers or consumer interests, the Committee will leave it to relevant consumer bodies and interest groups to comment, in response to this question and others that follow below, on whether there is a need to specifically regulate litigation funding arrangements involving consumers.

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:**

The Committee members consider there to be five main risks / harms that may arise or have arisen in relation to third-party funding:

[1] The bringing of unmeritorious claims;

[2] A large increase in the volume of claims, for an already backlogged legal system;

[3] Claims being abandoned by their funders, to the detriment of the courts;

[4] Excessive returns for funders, leading to insufficient returns for claimants; and

[5] Funders exercising an inappropriate level of control over the course of the litigation, including with regard to settlement negotiations.

(A) The nature and seriousness of the risk and harm that occurs or might occur;

On each of the risks / harms identified above:

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

[1] The members of the Committee consider this to be more of a perceived risk, rather than a real risk. Given that most third party funders are sophisticated entities with relevant market experience, they typically conduct extensive due diligence, including obtaining an independent KC's opinion on the merits, before providing financial support for any claim. Thus, they are unlikely to fund unmeritorious claims. Further, solicitors and barristers are prevented by their own professional rules from advancing claims which have no merit or are not supported by any factual evidence.

[2] The members of the Committee do not consider this to be a genuine risk. Although access to third party funding may result in an increased number of claims being brought; the members of the Committee consider that, if those claims are indeed meritorious, then they should be brought, regardless of the current case load of the legal system.

[3] The members of the committee consider this to be low risk, given the existence and availability of after the event insurance cover (ATE Cover) for funders, alongside the safeguarding obligations contained in Clause 4.2 in the SRA Code of Conduct (CoC) for the solicitors acting on the claimant's behalf.

[4] The members of the Committee believe that this may be a valid risk. Given that third party funders are often funding cases on behalf of claimants who would not otherwise be able to bring a legal case, this can create a power imbalance between the parties, with the potential for funders to exert improper pressure on claimants. This might create instances where the funding arrangements strongly favour the funder in the allocation of any potential reward, resulting in inadequate recompense for the claimants. The Committee notes the dissatisfaction expressed by certain claimants in *Bates & Others v Post Office* and the position in *Therium Litigation Funding A IC v Bugsby* where the claimant was to be left with nothing after settling a claim for over £27 million, if the funders were entitled to what they claimed. However, the members of the Committee note that these are risks inherent to the nature of litigation - i.e., that there is never any guarantee of recovery, and that in every piece of litigation a claim could fail or might not provide a large enough sum of damages to repay the funder – and there is therefore a balance to be struck between the respective interests of consumer claimants and third party funders. As noted above, this is a risk in consumer-facing funding arrangements not necessarily the market more generally.

[5] Similar to [4] above, the members of the Committee consider this to be a real risk, given the power imbalance that may be present between funder and claimant. Specifically, the risk that the funder may seek to exert influence over the progression of the case and any settlement negotiations. Further, solicitors' professional rules require them to be satisfied that they are taking instructions from their client (as opposed to another party), that their client has properly understood the solicitor's advice when giving instructions, and that the client has not been unduly influenced by a third party when giving instructions.

(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]

On each of the risks / harms identified above:

[4] The current self-regulatory framework is held in balance by the operation of free market forces. There are a range of established third party funders in the market – indeed, over 40, by the estimation of the Civil Justice Council's Review of Litigation Funding Interim Report (CJC Interim Report). The members of the Committee understand that there is also active and dynamic engagement between these funders and the various claimant groups (or their legal representatives). Accordingly, any claimant group with a meritorious claim should, in theory, be able to find multiple different funders interested in the claim. The existence of multiple active funders within the market helps to ensure

[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.**

that funding agreements remain competitive. Furthermore, brokers within this market exist, who often undertake the tender process on behalf of any potential claimant group.

[5] The "Arkin Cap", as established in *Arkin v Borchard Lines Ltd and others*, means that funders' adverse costs exposure has tended to be limited to the amount of their investment. However, as recognised at paragraph 3.4 of the CJC Interim Report, the courts have since stated that the Arkin Cap is no longer treated as a binding rule. The Court of Appeal emphasised the discretion afforded to trial judges and stated that other factors could also be taken into account in deciding whether the funder should be liable for all costs, including to a level above the amount committed by way of funding. Regardless, whether the funder has demonstrated that it is taking a more direct involvement in the management of the case remains one of the factors that the court considers, which can result in additional exposure for the funder. This should continue to act as a deterrent to funders (albeit, now to a more limited extent following the reversal of the position on the Arkin Cap) from taking an inappropriate level of control over the course of the litigation, and provides an incentive for them to avoid any direct control over the proceedings of the case. As explained above the issue is also, to some extent, addressed through existing professional rules governing the conduct of solicitors when taking instructions.

(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.

Recognising the distinction between regulating third party funding as a business and changes to the applicable court rules, the members of the Committee consider that there are three potential options for regulation changes, as set out below. The members of the Committee do not consider that other more interventionist approaches should be enacted, given both the potential dampening effect that they may have on the appetite for participation in what is still a developing market, as well as the unnecessary extra costs and administrative burdens they would impose. These three options are as follows:

(A) Maintaining the current self-regulatory framework;

(B) Establishing a "light touch" regime, where observance of an existing private code - e.g., the Association of Litigation Funders Code of Conduct (ALF Code), would become mandatory through regulation, in a "Co-Regulation Model" as defined at paragraph 4.5 of the CJC Interim Report; and

(C) Enacting formal regulation to directly address such concerns.

As a starting position, the members of the Committee believe that the current self-regulatory framework, [A], is doing a reasonable job of controlling the two primary risks identified above, [4] and [5]. However, the Committee also considers below whether the implementation of a regulatory framework with greater external oversight – i.e., options [B] and [C] proposed above, would serve to better mitigate these identified risks:

[4] The key way of addressing the concerns around imbalances in funding arrangements would be to implement a cap on the overall percentage of damages that could be retained by a funder. This could either be done through the insertion of additional wording within an existing private code and making compliance mandatory through legislation [B], or through the implementation of s.58B of the Courts and Legal Services Act 1990 (CLSA), as proposed and laid out in Appendix D of the CJC Interim Report, with amended wording within s.(3)(f).

[5] The key way of addressing concerns around the risk of funders exercising an inappropriate level of control would be to enact a formal prohibition on funders taking such control of the litigation, such as the making the wording contained in Clause 9.3 of the ALF Code of Conduct applicable to all funders active in litigation and arbitration in England and Wales. It might also be beneficial to introduce more specific language within the appropriate code to ensure such separation between funder and claimant. This could either be achieved by inserting additional wording into a private code and

making compliance mandatory, or by enacting the proposed s.58B of the CLSA with an additional Clause addressing such concerns.

In either instance, the main advantages of implementing [B] or [C] would be to create greater transparency within the third party funding market. However, the main disadvantages would be the added costs and complexity of implementing, maintaining and enforcing such legislation, including both the enactment of some form of enabling regulation or legislation establishing the necessary framework, as well as the ongoing control and policing of these standards. The members of the Committee therefore believe that the overall impact of options [B] or [C] would risk having an overall counterproductive and dampening effect on the third party litigation funding market, particularly if these measures acted as a barrier to entry for other funders.

Thus, on balance and recognizing there may be specialist considerations in consumer claims outside the Committee's expertise, the members of the Committee are of the opinion that the best option of the three outlined above is [A], i.e., to maintain the current self-regulatory framework. To re-iterate, the members of the Committee consider that the current system of self-regulation is functioning relatively well, with occasional exceptions – e.g., the case of *Excalibur Ventures LLC v Texas Keystone Inc and others*, although it should be noted that in that particular case the relevant funder was not an established funder within the industry. Furthermore, the members of the Committee consider that any attempts to introduce further regulation beyond the current level would have potential counterproductive impacts that do not outweigh the benefits of the increased structure that the changes would bring.

Indeed, the members of the Committee consider that the recent developments in the *Merricks v Mastercard* CAT claim, where a funder has expressed dissatisfaction with a settlement that it was not involved in concluding, as a good illustration of the fact that funders themselves do not currently feel that they are able to exert a level of control over the nature of the proceedings, in direct rebuttal of the risk identified at [5]. The members of the Committee therefore believe that consideration needs to be given as to whether the pros of implementing further legislation outweigh the cons identified above. This is particularly the case if, as laid out at paragraph 1.5 of the CJC Interim Report, the intention of this current government is not to re-introduce the 2024 bill dealing with the judgment in *R (PACCAR Inc) v Competition Appeal Tribunal*, unless the question of reform is seriously considered.

Considering the current court rules, however, the members of the Committee make the following suggestions for improvement on the current system. These particular suggestions are to address the current risk of exposure to defendants in circumstances where a claimant is potentially unable to meet a costs ruling from the courts. These can be made under the existing system to address an identified risk, without the formality of implementing further regulation such as in options [B] or [C]. These are as follows:

Security for costs against individuals

- At present the court can order security for costs against a claimant resident outside the jurisdiction (to reflect the additional costs that would need to be incurred in enforcing a costs order against it) or against a corporate claimant resident within the jurisdiction which may lack the means to satisfy a costs award made against it. However, the court cannot presently order security for costs against an individual claimant (i.e. a natural person) resident within the jurisdiction. This is, the Committee suggests, a lacuna which ought to be addressed – particularly because that individual may in fact be able to provide security without stifling their claim, and because the individual's claim may be supported by third party litigation funding. The Committee therefore proposes an amendment to the CPR that would make it possible to obtain security for costs orders against individual claimants in the United Kingdom, within certain, appropriate circumstances.

Requiring the disclosure of the fact of funding and the identity of the third party funder

- At present the Court has a discretion to order, in light of an application, that a claimant discloses whether or not its claim is backed by a third party litigation funder and, if so, the identity of that funder. The Committee recommends an amendment to the CPR to make disclosure of this information at an early stage in a case the default position. It should still be open to a claimant to resist disclosure of the information (or limit disclosure in some other way, e.g. through a confidentiality ring), for example if disclosure of commercially sensitive

information could harm the funding arrangement. We would not recommend that the power to order disclosure generally extends to the power to oblige a claimant to reveal the terms on which they are funded by a third party (though, as noted above, there may be merit in applying some of the tools presently available in the CAT when testing the appropriateness of funding arrangements for any proposed consumer or representative claim).

The members of the Committee consider that the above amendments to the CPR would give defendants sufficient comfort that any costs incurred would ultimately be recoverable in the event of the claim being unsuccessful. In particular, it would allow equivalent diligence to be done by the proposed defendants on the funding behind any claim as the Committee expects would have been done by the funder on the proposed defendant before agreeing to fund the relevant claim(s). In addition, the introduction of these amendments would encourage those individuals to obtain appropriate ATE Cover, or risk having to provide security for costs for the defendant. In any case, in the experience of the members of the Committee, all funders with whom the members have engaged have already always insisted that the claimants obtained appropriate ATE Cover. Regardless, if these amendments were to be made, the members of the Committee consider that this should be sufficient to guard against the danger, such that it exists, of funded claims being brought where defendants might be exposed to a situation where the costs they have incurred might not be recoverable in the event of the claim being unsuccessful.

For the sake of clarity, the above suggestions could be implemented under the existing system [A], without having to implement new legislation or regulatory oversight as proposed under options [B] or [C]. This hopefully illustrates an example of how risks might continue to be addressed, to the extent that they exist, without having to implement more formal regulation.

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

(A) If not, why not?

See below.

(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]

See below.

(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?

In principle, the same regulatory mechanisms should be applied to both litigation and arbitration, consistent with the scope of the Courts and Legal Services Act 1990. The members of the Committee see no reason as to why any regulation of the litigation funding industry should apply differently in arbitration proceedings seated within the jurisdiction of England and Wales. That, in the Committee's experience, funding in arbitration claims tends to fall more in to the high value commercial claim category described above (rather than consumer claims) emphasizes the importance of testing whether additional regulation for third party funding as a business is really appropriate in all circumstances.

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

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[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.

The members of the Committee consider that any regulation of third party funding should be underpinned by the guiding principle of minimum interference over and above what is necessary to enable access to justice and redress, and to ensure the smooth running of court services. This would ideally involve a transparent and light-touch approach over what is still a developing market.

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?

See below.

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

See below.

(C) To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?

See below.

(D) How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?[6]

The members of the Committee consider it extremely difficult to draw any direct conclusions for Questions (A)-(D). Certainly, access to third party funding promotes an equality of arms where parties would otherwise lack the means to bring a claim, but the costs of litigation are ultimately subject to control by the courts, regardless of how or whether a claim is funded. There are several factors affecting the cost of litigation, including: the complexity of the dispute, the scope of relevant data to be searched for evidence, the introduction of expert evidence and the scope of disclosure obligations. It is, therefore, difficult to draw any direct link between third party funding and litigation costs. The costs of litigation, including any identifiable risks, are also actively managed by the courts on an ongoing basis, including through Case Management Conferences.

Regardless, the members of the Committee note that there is little incentive for the funder to drive up the costs of litigation in any instance, given the inherent risks associated with litigation and the possibility that they might not recover all or any of their investment. Furthermore, the members of the Committee note that there are protections against solicitors and barristers running up excessive costs, given that these are regulated professions governed by the rules of their respective professional bodies. Regard to the "Overriding Objective", underpinning the Civil Procedure Rules (CPR), also acts as a further check and balance against incurring disproportionate costs.

(E) Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?

[1] If so, why?

See below.

[2] If not, why not?

The members of the Committee do not believe that this is appropriate, except in exceptional circumstances – the Committee points towards the example of *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd*, as addressed at paragraphs 6.30-6.32 of the CJC Interim Report.

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

The Committee members consider that it would place an intolerable burden on defendants if this were established as a general rule. The effect would be greater than requiring unsuccessful parties to pay the success fee on CFAs, a practice that was abolished in most claims in 2013, and in insolvency claims in 2016. It was widely felt that the recoverability of success fees under CFAs created an undue pressure on defendants to settle claims, and here the same would be true if the cost of funding was recoverable.

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.**

Exposure to adverse costs is a cornerstone of the dispute resolution process in the courts of England and Wales, and ensures that claimants (and any funders that they may approach) must carefully consider whether or not to bring a claim. The members of the Committee consider this to be an important safeguard, already built into the existing legal system, that helps to prevent exposure to unmeritorious claims.

The inherent risk of adverse costs means that any third party litigation funder approached will need to carefully consider whether to fund a claim and, in the experience of the members of the Committee, is one of the key driving factors in encouraging funders to obtain ATE Cover for a claim they are funding. Furthermore, the members of the Committee note that it has been established that (suitably drawn-up) ATE Cover can be considered to be appropriate security for costs.

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

The members of the Committee strongly agree that third party funders should remain exposed to paying the costs of proceedings that they have funded. This serves as an important safeguard, built into the existing legal system, that ensures both that only meritorious claims are brought, as well as that funders obtain appropriate ATE Cover. Furthermore, as raised at paragraph 3.4 of the CJC Interim Report, the members of the Committee understand that the Arkin Cap is no longer treated by the courts as a binding rule.

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?**

The courts do not currently become involved in funding arrangements, unless it is part of an opt-out collective action before the CAT. As noted in the response to Question 4 above, in such instances, the Tribunal will consider the proposed class representative's available financial resources before they certify their case, as these cases are being brought on behalf of individuals who have not yet been identified and who have no control over the bringing of the case (beyond retaining the option to opt-out). However, outside of the collective action sphere, pricing is currently entirely controlled by market forces and the process of competition.

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

(A) If so, why?

See below.

(B) If not, why not?

The members of the Committee consider that, although it may seem superficially attractive to seek to enact greater control over the third party funding market, any actual mechanism of doing so would be unwieldy and impractical. In practice it would be unworkable to set a single percentage or cap methodology when pricing and returns on a case can be part of a wider commercial funding package. To return to the example *of Bates v Post Office*, although criticisms have been raised over the portion of the settlement distributed to the claimants, these

claimants would ultimately not have had the opportunity to take this case to trial at all, nor received the opportunity to receive any damages (or public vindication), had third party litigation funding not been available.

Furthermore, since the decision in *PACCAR* funders are only currently able to invest by reference to a multiple of any potential returns. If a cap is introduced in addition to this, further limiting any potential returns, the members of the Committee are concerned that this would risk further disincentivising funders and potentially reducing the likelihood of litigation being brought via third party funding.

The members of the Committee consider that any instance where a claimant receives nothing, following any damages paid to the funder, is unusual. That is to say, they are typically instances where the case has failed, or the quantum achieved was far less than anticipated. In other words, such instances are typically a result of unsuccessful litigation, rather than any inherent unfairness in a funding arrangement. To take the example of *Therium Litigation Funding A IC v Bugsby*, the damages received were not as high as the claimant and funder anticipated, and the costs incurred were higher. This led to the situation where the total of the sums claimed by the two funders exceeded the total value of the settlement sums – see paragraph 87 [2023] EWHC 2627 (Comm) of the relevant judgment.

13. **If a cap should be applied to a funder's return:**

(A) What level should it be set at and why?

To develop on the answer in question 12(B) above, the members of the Committee feel that no cap should be set on a funder's return.

The members of the Committee are of the opinion that, in the rare instances where a claim is successful but there is either no or extremely limited recovery of costs, that this is simply an example of a failed claim (again, please see our answer to question 12(B) above), i.e., a failure in the sense that any funding agreement is typically entered into in the hope and expectation that a successful claim would provide sufficient recovery to repay both the claimant and the funders.

If there is not sufficient recovery for both the claimant and the funders, then that is just an example of a failed claim. The risk of such failure is simply one element of broader litigation risk that both the claimant and the funder should be alive to.

Furthermore, the members of the Committee are of the opinion that another, unintended effect of setting a cap would be to drive up the costs of funding overall. That is to say, if there were to be a cap on potential returns, this would either increase costs elsewhere or reduce the appetite of funders to invest in cases in which there is any risk of such a situation. Accordingly, funders would either need to seek higher returns in other cases, or seek higher returns in order to protect themselves against a situation in which a portion of the damages would need to be paid to the claimant despite their own stipulated return having not been met.

Thus, given the concerns outlined above, the members of the Committee feel that a cap should not be set.

(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?

In light of the comments above, in the theoretical situation where a cap had to be set, the members of the Committee believe that the most effective way of ensuring compliance would be through the enactment of legislation.

The members of the Committee consider that the simplest way of doing so would be in the current drafting of s.58B of the Courts and Legal Services Act 1990 , amended to fix the cap at a certain level – e.g., through amendment of Clause 3(f), rather than leaving this at the courts' discretion (as in its current drafting).

(C) At which stage in proceedings should the cap be set?

The members of the Committee consider that, in the theoretical situation where a cap had to be set, this should apply across the market and should not be established in the proceedings. This is important to provide certainty for the funder, when considering whether to fund a claim. If a cap was established in the course of proceedings - e.g., at the CMC, then the funder would need to retain the right to withdraw, in the event that it sufficiently changed the risk profile of the case. This may also increase the risk of claims being started and then withdrawn once a cap had been imposed, potentially to the detriment of all parties (and the court).

(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?

The members of the Committee do not consider this relevant in this instance.

(E) Should there be differential caps and, if so, in what context and on what basis?

The members of the Committee do not consider this appropriate in this instance.

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.

Our comments are based on the experience of members of the Committee and relate to third party funding for commercial litigation and collective consumer claims. Generally, the Committee does not consider that this sort of third party funding promotes the pursuit of unmeritorious or vexatious litigation. Third party funders are commercial entities in the business of making a return for their investors. In the experience of Committee members typically funders undertake careful due diligence, including taking independent legal advice, on merits before funding individual or collective claims.

As set out above, the advantage to claimants of third party funding is to provide a route to pursuing a meritorious claim which might otherwise be unavailable through lack of funding. Whilst this has the effect of imposing litigation on a defendant who would otherwise not face a claim, if it is indeed meritorious this should not be a regarded as a drawback of third party funding. There are safeguards in place for the defendant, as described above, should the claim fail.

A defendant facing a third party-funded claim from an impecunious claimant may be concerned about recovery of its costs if the claim is successful. Security for costs orders reduce this exposure. However, where the claimant is an individual within the jurisdiction of the court there are no grounds for such an application. Defendants will also be exposed if the third party funder is unable to meet a costs order. See our response to question 5. C above for a proposed solution.

To some extent this lacuna is also addressed by the Association of Litigation Funders (ALF) Code of Conduct which provides certain safeguards to funded parties and their opponents. The capital adequacy provisions and obligation to meet an adverse costs orders provide some important protections where the funder is a member of the ALF. Whilst this means of self-regulation is endorsed by the Committee, the Committee recognises that it is a voluntary code only.

However, looking more broadly than the specific funding businesses, the Committee has concerns about certain circumstances where law firms provide funding for mass claims (e.g. data protection) or have funded themselves on the basis of bringing a portfolio of claims. This can result in claims being brought where it appears that there has been limited due diligence on merits (perhaps in the hope that other parts of the portfolio will balance the risks out). There are examples of law firms over-extending and collapsing leaving clients and opponents out of pocket with no proper redress. The regulation of law firms is the responsibility of the SRA and we note in this context the recent report prepared for the Legal Services Board relating to the

SRA's intervention in Axiom Ince. In the context of this consultation, however, the Committee notes that any changes to the regulation of third party funders (or applicable court rules) should not encourage funding to bypass such changes by being routed through law firms.

The possible impact on the courts of the availability of third party litigation funding is addressed above (5.A)

15. **What are the alternatives to third party funding?**

- Damages-based agreements (DBAs), governed by the DBA Regulations 2013 (DBA Regulations). These cap recovery available to the solicitor at 50% of the damages secured in commercial litigation.

- Conditional fee agreements (CFAs). Conditional fee arrangements allow for an element of the law firm's fees to be conditional on success of the claim.

- Crowdfunding.

(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.

DBAs

A DBA is attractive to claimants as it passes on to the law firm all exposure to its fees, although where the claim succeeds the proportion of damages payable to the law firm is likely to be more than a CFA success fee would have been.

The current DBA regime has downsides:

(i) Hybrid DBAs are not permitted – the law firm cannot agree a partial DBA such that an element of fees is payable irrespective of the outcome.

(ii) If the DBA is inadvertently not fully compliant with the DBA Regulations the DBA can be entirely unenforceable (note that this will not necessarily infect other elements of the law firm retainer – see *Zuberi v Lexlaw Ltd [2021] EWCA Civ 16*).

These exposures make the regime unattractive for law firms, particularly in substantial cases, and so not so widely available for clients.

Amendments to the DBA Regulations could overcome these drawbacks and make DBAs a more compelling alternative (at least for law firms to offer) to third party funding.

In *PACCAR* the court found that a litigation funding agreement which provided for the funder's potential profit to be calculated by reference to damages was a DBA. However, DBAs are not enforceable in opt-out collective proceedings in the CAT. The Committee understands that this caused significant concern amongst funders as many such agreements would not satisfy the requirements of the DBA Regulations and so have had to be re-negotiated. This is an ongoing unsatisfactory state of affairs. The Committee notes that the Government will take a more comprehensive view of any legislation to address this in the round once this CJC review is concluded.

CFAs

CFAs enable a claimant who cannot afford/does not wish to pay full legal fees to transfer some or all its litigation risk to its law firm which is willing to take on the risk. The success fee is an uplift on the fees which would otherwise be payable on a successful case. That success fee will almost always be less than the return a third party funder would have required.

Crowdfunding

Crowdfunding is suitable for claims that have a public interest or social justice element. Examples of such cases appear on the fundraising platform CrowdJustice. It is not suitable for commercial corporate claimants, and will not be a viable option for many individual claimants who are unlikely attract any or any adequate funding. Campaigning, not for profit entities and the like may use it. There is inevitable uncertainty at the outset as to whether any particular claim will garner sufficient funding, or will do so in time to meet any limitation deadline.

(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.

See above.

(C) If so, when and how?

See above.

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?**

For cases with strong merits, CFAs offer a better solution for claimants than third party funding because of (1) the lower proportion of damages to be paid away, as described above, and (2) there is likely to be a wider selection of law firms willing to take the CFA risk as opposed to the greater risk of a DBA.

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?**

We refer to the response to question 15. The current DBA Regulations (and, to the extent required, s58AA of the Courts and Legal Services Act 1990) should be amended to broaden their applicability and overcome the current disincentive to law firms to enter into DBAs. The Committee proposes amendments to:

- Permit hybrid DBAs.
- Relax the DBA Regulations such that the party and its law firm have more freedom to agree financial terms within limited constraints only.
- Provide protection to a party paying adverse costs so that, for example, its costs liability was capped (eg extend the precedent H process in such cases).
- Permit DBAs in opt-out collective proceedings in the CAT.

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?**

There is a mature insurance market for ATE Cover which complements the third party funding market. The court has discretion to require disclosure of ATE Cover. The Committee does not endorse introduction of a mandatory legal expenses insurance scheme to meet adverse costs. However, to afford protection to a defendant who has secured a costs award against a funded party there could be a mechanism whereby:

- A claimant whose third party funder has not subscribed to the ALF Code of Conduct should be required to have ATE cover; and

- The policy should provide for the opposing party to have direct access to the ATE Cover to protect against the policyholder failing to respond to an adverse costs claim.

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?**

In the Committee members' experience, it is not unusual for a party to have concurrently third party funding, a CFA and ATE cover. Whether the claimant is funded only through either a CFA or third party funding ATE cover is an important safeguard for the defendant – see above on safeguarding defendant exposure in the absence of ATE cover (ie extending the security for costs regime).

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

[Not answered – not relevant to commercial litigation]

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

[Not answered – little or no experience of members of the Committee, and the question would be more appropriately addressed by the Legal Services Board]

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?**

The Committee members' view is that self-regulation is adequate to ensure that third party funding market operates effectively. Mechanisms for encouraging universal membership (or discouraging non-membership) of the ALF (or any equivalent body) could be established eg extending grounds for making security for costs orders such that funders who do not subscribe to the ALF and do not provide adequate ATE cover are exposed to the risk of having to provide security.

Law firms, funders, litigating parties, and the court (to the extent it became involved) would benefit if the ALF and the legal profession could together agree a standard Litigation Financing Agreement (LFA) which would set out market norms. This would be a starting point for any LFA and would accelerate the establishment of the LFA in any particular case.

The Committee recognises that, a law firm's ability to profit from litigation with a contingent fee arrangement is more limited than that of funders. If the DBA reforms we have suggested above were implemented, this would allow law firms to participate further in the risks and rewards of litigation, which would broaden the options available for claimants.

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?**

See the answer to question 5(C) above re security for costs.

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?**

[Not answered].

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?**

No, though please see comments above on other possible changes to the CPR and enhanced transparency.

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?**

A class representative seeking a CPO will be required to provide details of their funding arrangements to the CAT for its review. This does not apply in the court. The distinction is founded in the nature of collective proceedings. See above on a possible change to the rules for collective proceedings in court. For commercial litigation, whilst there should be adequate mechanisms to protect a defendant who is awarded costs against a funded party (as outlined above), the Committee does not consider that court should play a role in controlling third party-funded litigation (pre action or after commencement of 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?**

The Committee considers that a party should be required to disclose that it has third party funding (although not the terms of such funding). This enables the opponent to seek appropriate adverse costs protection. As a further possible consequence of this a signal of a funder's confidence of the prospects of success of the funded claim disclosure may promote early settlement.

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?**

Insofar as the Committee members work with litigation funders, they tend to prefer to work with reputable, mainstream funders who are members of ALF. ALF members have agreed to be bound by the CJC's Code of Conduct for Litigation Funders, which (amongst other things) prohibits funders from taking control of litigation or settlement negotiations. The members who work with those funders report a strong level of compliance with the Code.

We are, however, aware of some instances of mainstream funders conducting themselves in a manner which might be argued to amount to, at the very least, indirect or subvert control over aspect of a case. First, we are aware of at least one mainstream funder, through the imposition of certain funding terms, making the release of certain funding tranches contingent on certain outcomes being achieved which require certain litigation steps being taken, e.g. applications being brought. In practice, that conduct forces a claimant to adopt a particular course which may not necessarily be in its best interests but rather serves the interests of the funder. Second, we are aware that some funders take a very proactive approach to bookbuilding claimants and then seek to interpose themselves between client and solicitor during the currency of the case. Any regulation that is introduced should, we suggest, address instances such as this as well as the more obvious, direct means by which a funder might seek to control litigation (e.g. seeking to direct a settlement negotiation).

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

Members of the Committee do not have any direct experience of Trade Union funding, legal aid funding or crowdfunding. The Committee is unable, therefore, to comment on the effect (if any) that those funding mechanisms have on the settlement of proceedings.

As regards the effect on the settlement of proceedings of what the report describes as 'pure' funding and legal expenses insurance, in the Committee's view it is impossible to say with any certainty whether those funding mechanisms encourage or discourage settlement. Every case is different, and every funded case is different. Moreover, settlement dynamics and pressures often change over the course of a case.

That said, funding and legal expenses insurance can - and often do - influence settlement. They can encourage early settlement because (i) the terms tend to discourage claimants (for example by termination provisions) from rejecting good settlement offers, (ii) the existence of funding and legal expenses insurance can send a powerful signal to a defendant both of the claimant's ability to pursue the case to trial and the (independently assessed) strength of the underlying merits, and (iii) the terms on which returns are calculated under these arrangements (which typically increase over time and, in the case of funding as further costs are incurred) tend to focus claimants' minds on early settlements when a greater share of the proceeds can be retained by the claimant.

Equally, however, the Committee is aware that certain cases may be harder to settle by reason of litigation funders' and legal expense insurers' returns having to be accounted for, thereby disincentivizing a claimant from accepting a discount on the full claimed amount and sometimes forcing the case to judgment in the hope of a full recovery. The Committee members' experience of applying for litigation funding suggests, however, that the latter risk tends to be adequately addressed in practice (i) early in the funding application process by funders and legal expense insurers only accepting cases where the realistically recoverable damages are sufficiently high to support returns to third parties and (ii) later in the case by litigation funders and legal expense insurers accepting discounts on their full contractual entitlements in order to facilitate a settlement. Put simply, it is rarely in third party funders' interests to impose or refuse to amend terms which have the effect of preventing a case from settling for a meaningful sum.

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 Committee notes that opt-out collective proceedings before the CAT (the costs of which are typically paid by third party funders) are already subject to an approval regime, and that the Tribunal applies a "just and reasonable" test when considering settlements.

For other types of case, particularly those involving commercial claimants, the Committee does not believe that the court should be required to approve the settlement of proceedings simply by reason of those claims being funded by third party funders or other providers of litigation funding. The Committee believes that sufficient checks and balances already exist, including through market forces, and that a further level of court approval is likely to prove unnecessary, unduly burdensome on parties, and potentially a barrier to settlement.

The Committee is also concerned that a mandatory court approval process will place a further burden on an already stretched judiciary. Questions also arise as to whether judges have the necessary expertise and practical experience of funded litigation to be able to approve or reject settlements in funded cases, particularly if courts are asked as part of the approval exercise to determine whether a funder's return is fair / reasonable.

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?**

The Committee suggests that the starting point ought to be the "just and reasonable" test that is currently applied in claims before the CAT. However, the test would need to be sufficiently flexible to cater for the wide range of cases which are subject to third party funding. For example, there may be a case for applying a more stringent test (with a greater focus on returns to claimants) in cases involving groups of individuals/consumers – particularly opt-out cases where the individual claimants have not had an opportunity to review and approve funding terms

– as compared to cases brought by sophisticated individual commercial claimants who have contracted with the funder on an arms-length basis and have received advice on the funding terms.

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?**

See the answers to questions 4 to 7 above. As explained, the Committee believes that the current self-regulatory framework is functioning well at protecting claimants whose litigation is funded by third party funding, and that further regulation to protect claimants is unnecessary.

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

Committee members' experience suggests that claimants can, if they wish, compare funding options effectively. There is, for example, a growing market for funding brokers who can, if claimants wish, obtain terms from a range of funders quickly and at nil upfront cost to claimants. Solicitors firms also tend to have extensive links with a range of funders, and in members' experience claimants can (and usually do) 'shop around' before deciding on a particular funder or funding package.

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?**

There is, the Committee suggests, an inherent potential conflict of interest in any arrangement between a funded claimant, their legal representatives and the third party funders. At its most basic level it is in the funder's interests to maximise its own financial return in the case which, in light of the *PACCAR* decision, may require deploying as much capital as possible so as to maximise the returns which are typically now based wholly or partly on the extent of that deployment. The funded claimant, on the other hand, will wish to drive an early settlement which maximises its share of the proceeds and minimises the recovery for the funder.

The Committee considers, however, that those potential conflicts of interest are already adequately addressed through existing checks and balances, including those identified elsewhere in this response (see, for example, the responses to questions 4 and 5 above). The legal market ecosystem in this jurisdiction is mature and well-functioning, typically involving experienced advisers and commercially aware and well-advised claimants. In the Committee's experience, the developing third party funding market therefore engages with well established practitioners, mitigating the conflicts risk. Legal expense insurers also provide an effective balance; it is not in their interests to underwrite risks in disputes where conflicts of interest have not been adequately addressed. The market is, in practice, a self-policing one and (save as mentioned below) the Committee does not believe that further regulation is required in order to protect claimants, at least not in the types of case that its members typically handle.

The Committee takes this opportunity, however, to point to the benefits – if not the need – for contractual freedom between a funded claimant, their legal representatives and the third party funders. That contractual freedom has, to some extent, been curtailed by the decision in *PACCAR*, leading to the potential consequences outlined in the first paragraph to this answer (i.e. funders being restricted in the calculation of their returns to a multiple of capital invested, potentially leading to funders wishing to delay when settlements are achieved). In order for potential conflicts of interest to be properly addressed in funding agreements, the parties should (the Committee suggests) have the flexibility to agree different profit mechanisms, ensuring alignment of interest between all relevant stakeholders.

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.**

See the answer to question 34 above.

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:**

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

a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?

Yes, but to a limited extent. There are a large number of meritorious claims which are unsuitable for funding, for example because the budget to manage the case to trial cannot be sustained by the realistically recoverable damages, or because the putative defendant lacks the financial means to satisfy any judgment obtained. The Committee therefore believes that, whilst litigation funding has enabled various meritorious claims to be brought where otherwise they may not have been brought, the resulting uptick in claims being brought is relatively modest.

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?

The Committee is not aware of data that supports the suggestion that litigation funding has encouraged an increase in vexatious litigation. In members' experience, funders apply very strict criteria to cases before agreeing to fund. Often that criteria serves as a barrier to meritorious claims being brought (see the answer to question 36(a) above).

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

Yes, and significantly so, because these are claims which are unlikely to be capable of being brought without third party litigation funding. The Committee notes in particular the marked increase in claims before the CAT in recent years. Absent third party funding many, if not most, of those claims may not have been brought.

The Committee also notes that, in many respects, Government policy in recent years has focussed on driving positive market conduct through civil litigation rather than through regulatory intervention. The introduction of section 90A of the Financial Services and Marks Act 2000 (designed to deter the publication of misleading information to the market by allowing investors to prosecute claims), and the establishment of the CAT (designed to enable private users of a market to bring claims for loss from anti-competitive conduct) are cases in point. However, those mechanisms are only effective if parties are able in practical terms to bring claims, and third party funding has played a vital role in this respect. The Committee therefore urges the CJC to avoid any steps which could have the effect of providing further barriers to redress in group litigation, collective and representative actions.

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**.

See the answer to question 5 above, and in particular the suggestions to address the current risk of exposure to defendants in circumstances where a claimant is potentially unable to meet a costs ruling from the court.

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?**

Members of the Committee rarely represent individuals seeking litigation funding. Other interested groups are likely, therefore, to be better placed to answer this question.

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]

No.

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