



Civil Justice Council Review of Litigation Funding

A response by
The Chartered Institute of Legal Executives
(CILEX)

January 2025

Introduction

- 0.1. CILEX would like to take the opportunity to respond to the Civil Justice Council's consultation in relation to litigation funding. CILEX represents a substantial number of both civil and personal injury practitioners within the legal sector.
- 0.2. The Chartered Institute of Legal Executives (CILEX) is the professional association and governing body for Chartered Legal Executive lawyers (commonly known as 'CILEX Lawyers'), other legal practitioners and paralegals. Under the Legal Services Act 2007, CILEX acts as the Approved Regulator (AR) and delegates these regulatory powers to the independent regulator, CILEx Regulation Ltd (CRL).
- 0.3. CILEX represents over 17,500 members of which 77% of the membership are female, 16% of members are from an ethnic minority background, 4% are LGBT and 6% have a disability. Additionally, in terms of social mobility, 77% of CILEX members attended a state-run or state-funded school and 41% have an undergraduate university degree (of which 63% of those members were the first to attend university).
- 0.4. CILEX surveyed both civil and personal injury practitioners as part of this response.

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

- 1.1. CILEX recognises the key advantages of third party funding (TPF) in securing effective access to justice. Financially, particularly where there are complex litigation matters, TPF enables all (i.e. individuals through to corporate entities) the opportunity to secure justice where it may have previously been unaffordable.
- 1.2. However, without regulatory protective measures for Claimants, CILEX is concerned that due to the current financial climate, the cost-of-living crisis means that a significant number of individuals are entering financial hardship. Therefore, Claimants are left to find themselves a party to funding agreements that are not in their best interests. Additionally, those encountering financial hardship are left vulnerable with no other option. CILEX notes that section 9 of the Code of Conduct for Litigation Funders¹ is a solution to this; however, without mandating the Code, the door is still open for exploitation, negating effective access to justice.
- 1.3. Additionally, CILEX notes concerns surrounding the impact on case selection through third party funding. CILEX appreciates that there is no limitless pot for funding litigation; however, TPF could result in funders investing in claims that will reap the most reward. CILEX is concerned that this could contradict the current advantages of TPF, as those with smaller scale, but still meritorious claims, are unable to secure effective access to justice.

¹ Association of Litigation Funders, 'Code of Conduct for Litigation Funders', January 2018.

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

- 2.1. CILEX believes that TPF somewhat promotes equality of arms. Funded parties can access high quality legal representation and access expert witnesses. However, CILEX believes that this is relative to the gain that the funder seeks to achieve should the claim be successful.
- 2.2. Moreover, CILEX notes that there will remain, on balance, wealthier parties to litigation who ultimately may still hold an advantage in controlling or accessing more advanced resources in litigation.

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

- 3.1. CILEX understands that there are many benefits to TPF in litigation. For example, TPF encourages the advancement of meritorious claims. Additionally, TPF promotes resolution and swift settlement to litigation, ensuring that cases do not continue unnecessarily post-issue.
- 3.2. There are clear examples of the benefits of TPF in litigation. Notably, in *Bates & Others v Post Office Limited*², TPF played a vital role in encouraging public interest litigation. Further class action and group litigations are now becoming more available due to the risk mitigated by TPF.

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

- 4.1. CILEX notes and appreciates the work already done in relation to imposing a regulatory framework surrounding TPF. However, CILEX believes that self-regulation is no longer enough for TPF. CILEX believes that TPF requires strengthened regulation and mandated guidance to ensure that dubious practices do not remain ongoing in litigation.
- 4.2. CILEX recommends promotion of the current voluntary Code of Conduct for Litigation Funders. It is a clear and concise starting point for regulation of TPF. CILEX believes that mandating the Code would cause the least impact for funders, as many already comply with the Code when acting in litigation and there is significant sector support.
- 4.3. However, CILEX notes that the Code does require review. Part 9 of the Code references Barristers and Solicitors only. This is no longer representative of a diverse legal sector; therefore, CILEX recommends the inclusion of CILEX or other qualified and regulated legal representatives. CILEX is aware that section 58(A)(5) of the Courts and Legal Services Act 1990 has an already established line for this:

² *Bates & Others v Post Office Limited*² [2019] EWHC 3408.

'Before making an order under section 58(4), the Lord Chancellor shall consult –

- a. The designated judges;*
- b. The General Council of the bar;*
- c. The Law Society;*
- d. Such other bodies as he considers appropriate'*

CILEX acknowledges that this is beyond the context of the Code; however, hopes that prescribed legislation could be used as a starting point for consideration as to amending and updating the Code.

5. Question 5: Please state the major risks or harms that you consider may arise or have arisen within third-party funding

- 5.1. CILEX agrees with the points raised in the interim report produced by the CJC. The major risks or harms are the association of TPF commercialising justice, and the promotion of under-settlement.

6. Question 5a: State the nature and seriousness of the risk and harm that occurs or might occur

- 6.1. CILEX believes that there is risk that TPFs lead to the commercialisation of justice whereby the main aim is to create a money-making business venture rather than gain justice. Where litigation becomes commercialised, TPF may encourage litigation on the basis of financial gain, as opposed to accessing justice. The subsequent harm that follows is that all parties, legal representatives through to the Courts are facing immense pressure from the increase in cases being brought. The current pressures on the Court, and on legal practitioners in litigation are not unknown, therefore, the encouragement of such claims may impede justice further as opposed to promoting it.
- 6.2. Furthermore, CILEX concurs with the view that the promotion of under-settlement in TPF can cause exploitation of vulnerable Claimants, specifically due to the high likelihood of financial hardship. CILEX recognises that under-settlement can both impede justice and undermine the justice system, but also restricts the recovery of the Claimant. A clear example of this in practice, is the ongoing fallout in *Merricks v MasterCard*³. CILEX is aware that the Competition Appeal Tribunal has recently approved the £200 million settlement; however, CILEX believes it is important to recognise the seriousness of concerns of premature settlement or under settlement. CILEX acknowledges that the judgment is yet to be published, and notes that following judgment, the need for substantial regulation in the litigation funding market is made clear.

³ *Merricks v MasterCard* [2024] EWCA Civ 759.

7. Question 5b: State 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

- 7.1. For the commercialisation of justice, CILEX understands that the current self-regulatory framework safeguards against excessive or speculative litigation funding. Additionally, the Code of Conduct cites clear reference to discouraging or prohibiting funders from taking advantage of vulnerable Claimants where there is financial hardship. CILEX believes that the commercialisation of justice could be controlled through stronger regulatory provisions against speculative funding. The prevention of funders financing high-risk with lower merit claims ensures that funders are supporting the broader interests of justice. Alternatively, incentivising other areas such as public interest litigation via tax benefits for funders may also see an increase in other areas of litigation, as opposed to strictly commercial or high value litigation.
- 7.2. Additionally, the current self-regulatory model does not cater to the risks associated through the promotion of under-settlement. It is dependent on the funder to comply with the voluntary Code of Conduct, and as a result this does not mitigate the harm that can be caused through under-settlement. The current regulatory frameworks that assist the avoidance of under-settlement are often through other regulatory bodies, such as the SRA, CRL and BSB for legal professionals. The oaths taken as legal practitioners, along with the ethical regulations, provide the advice that can be provided to funded Claimants should the funder seek to settle prematurely. However, this is not a guaranteed protection, especially where vulnerable Claimants are facing financial related pressures, and fear losing the funding for their claim. CILEX recommends clear and consistent regulation on settlement provisions for funders specifically in litigation to avoid this.

8. Question 5c: For each possible mechanism 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.

- 8.1. CILEX understands that stronger regulation is not favoured by those who currently are able to act freely. This would be viewed as a significant disadvantage to litigation funders, especially third-party funders. However, there are clear advantages to aligned regulatory objectives across litigation. CILEX notes that where regulatory objectives are aligned, funded litigation could become more streamlined, and all parties can work in collaboration without relationship breakdown in the centre of proceedings. CILEX notes that clear and concise regulation for all reduces potential grey areas and could furthermore relieve pressure from the Courts in having to establish whether premature settlements were in the best interests of the Claimant.

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

- 9.1. CILEX believes that the same regulatory Codes of Conduct and ethical regulations could be applied the same across all types of litigation. Examples include: acting in the best interests of the Claimant, avoiding conflicts of interest and not exerting unreasonable control over proceedings. However, there are practical functions that mean that the same regulatory mechanism is not a 'one size fits all'. Therefore, CILEX believes that for all types of litigation, there needs to be tailored approaches based on the types of disputes or forms of proceedings.
- 9.2. CILEX also believes that the same regulatory mechanism should apply to all English seated arbitration.

10. Question 6b: If so, which types of disputes and/or form of proceedings should be subject to a different regulatory approach, and which approach should be applied to which type of dispute and/or form of proceedings?

- 10.1. CILEX acknowledges that certain forms of proceedings or types of disputes do require additional practical guidance. For example, class action litigation requires comprehensive regulation due to the complexity of collective interests. Moreover, due to the size of the Claimant party, regulations governing the management of the fund, as well as approaching conflicts of interests are required. CILEX believes that for class action litigation, stronger oversight of funders through mandatory disclosure of the funding agreement in the first instance would create a positive outcome. CILEX notes that transparency in litigation proceedings is vital in obtaining a positive funder-party relationship.

11. Question 6c: 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?

- 11.1. CILEX believes that different regulatory approaches are required depending on the nature of the funding relationship.
- 11.2. Where cases involve different types of funding relationship between the third-party funder and the funded party, CILEX believes that various regulatory approaches are required. For example, in ascertaining risk allocation between various types of funding relationships, each type (whether financial, non-financial or hybrid) involves different risk-sharing dynamics. CILEX believes that varying regulatory approaches based on the types of funding relationship is essential to ensure that the terms of any funding agreement are fair and equitable for all involved.
- 11.3. Alternatively, where cases involve different types of funded party, the approach will vary depending on the levels of negotiating powers. Individual litigants often do not possess the knowledge and experience of litigation and may be more vulnerable to exploitation. CILEX believes that stronger safeguards are required when funders are funding individual litigants.

- 11.4. On the other hand, CILEX notes that sophisticated commercial litigants may possess a greater bargaining power and connection to a variety of funding sources. The knowledge in comparison to an individual litigant may mean that a different regulatory approach is required to ensure that funders do not prioritise their potential returns over the Claimant's best interests.
- 11.5. CILEX believes that considerations for small and medium-sized businesses (SMB) include the need for financial resourcing. Whilst SMBs have a higher negotiating power over individual litigants, CILEX notes the need for protection where there is no in-house legal expertise.
- 11.6. Additionally, commercial litigants and SMBs are more likely to be better equipped in handling more complex funding arrangements in comparison to individual litigants; therefore, clearer transparency rules may be required.

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

- 12.1. In a previous response, CILEX noted that transparency, independence (conflict of interest management), maintaining the best interests of the funded, and keeping costs reasonable, proportionate and fair throughout the litigation process. CILEX still agrees with this position and would be interested to see what other principles are presented to the CJC.

13. Question 8: What is the relationship, if any, between third-party funding and litigation costs?

- 13.1. CILEX notes that there are a variety of outcomes from the relationship between TPF and litigation costs. Where TPF is present, there is a reduction in the upfront financial burden for the Claimant, promoting access to justice. This coincides with the risk allocation of litigation costs where TPF is available, as the funder assumes the financial risk. The Claimant is therefore no longer concerned of bearing the financial burden of costs should they not be successful.
- 13.2. However, CILEX notes that the relationship between TPF and litigation costs can have adverse effects on litigation proceedings. For example, where TPF is present, there may be pressure on the Claimant to settle prematurely. Settling early can reduce the total cost of litigation and still financially satisfy funders, although this can leave the Claimant at a significant disadvantage.

14. Question 8a: What impact, if any, have the level of litigation costs had on the development of third-party funding?

- 14.1. CILEX believes that the continuous increase in litigation costs has meant that the demand for TPF has significantly increased. In turn, the TPF industry has had to expand dramatically and over a short period of time. The increase in litigation costs has meant that litigation funding has developed to adapt a wider variety of needs, such as complex litigation where there are large quantities of upfront costs

associated. CILEX believes that the diverse development of TPF has meant that funding has become more accessible for Claimants and allows them to pursue litigation in a way that aligns with their financial resources.

15. Question 8b: What impact, if any, does third-party funding have on the level of litigation costs?

- 15.1. CILEX believes that TPF overall increases the level of litigation costs. Due to the accessibility of expert resources, Claimants can select more experienced (and therefore more expensive) resources that they may not have if they had to fund litigation themselves. Additionally, the cost of the funder's reward is considered in the overall litigation costs, immediately increasing the cost of litigation for the Claimant.
- 15.2. However, where premature settlement is pressured by TPF, CILEX recognises that this would reduce the overall litigation cost. This is at a detriment to the Claimant seeking adequate recovery and is not in their best interests.

16. Question 8c: To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?

- 16.1. The Association of Litigation Funders Code of Conduct highlights key references to the relationship between litigation funding and litigation costs. CILEX notes that at section 10: the funder is liable to meet any liability for adverse costs that result from settlement, pay any premium for adverse costs insurance, provide security for costs, and meet any other financial liabilities⁴. CILEX believes the Code encourages cost control, which is essential in litigation. Furthermore, CILEX reiterates that the Code be mandated, with a comprehensive regulatory framework to balance access to justice with fair financial return. Thus, encouraging a consistent market approach to litigation funding and litigation costs.

17. Question 8d: How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?

- 17.1. CILEX believes that formally regulating funding practices would overall reduce litigation costs. As an example, mandating transparency and accountability in funding agreements through disclosure, provide clearer understanding of the total financial costs associated with the type of dispute or litigation. CILEX believes that this helps create better informed decisions surrounding the overall costs and the risks associated in litigation.

18. Question 8e: Should the costs of litigation funding be recoverable as a litigation cost in Court proceedings?

- 18.1. CILEX believes that the costs associated with litigation funding should be recoverable as part of the litigation costs in proceedings. CILEX believes that in

⁴ The Association of Litigation Funders, 'Code of Conduct for Litigation Funders', 2018, p4.

doing so, this will make litigation more affordable for Claimants. Moreover, this will encourage investment in meritorious claims and promote access to justice overall. CILEX notes that recovering the cost of litigation funding also ensures that there is consistency in recoverable expenses. For example, if costs related to specialist expert witnesses and legal representation is recoverable, allowing the cost of litigation funding would be aligned with the other disbursements, and creates a more consistent approach.

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

- 19.1. CILEX recognises the positive impacts of the recoverability of adverse costs on access to justice; notably, adverse costs encourage responsible litigation, meaning that Claimants can assess the merits and risks of their claim more carefully.
- 19.2. However, CILEX notes the potential deterrence for Claimants with limited resources. Third party funding is a vehicle for Claimants in financial hardship to promote access to justice; therefore, the risk of having to pay the opposing party's costs if they don't succeed can discourage both individuals and businesses from pursuing litigation.
- 19.3. Additionally, adverse costs may reduce the availability of TPF, as it introduces a level of complexity for the funding structure. The funder may be required to cover the additional cost of adverse costing as part of the funding arrangement, increasing the amount needed to fund the claim. Particularly for smaller and/or public interest claims, security for costs and the threat of adverse costs can have a negative effect where there are limited financial resources.

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

- 20.1. CILEX believes that funders should remain exposed to paying the costs of the proceedings they have funded, regardless as to whether there is success or loss.

21. Question 11: How do the Courts and how does the third-party funding market currently control the pricing of third-party funding arrangements?

- 21.1. CILEX believes that the current judicial oversight of TPF pricing is enhanced by the current disclosure requirements under the Civil Procedure Rules (CPR). Under Rule 44.4(3), the Courts require parties to disclose the existence and terms of agreements in cases where TPF is involved to have regard to the amount or value of any money involved, as well as the receiving party's last agreed or approved budget. Whilst this is not directly related to pricing, third party funders need to ensure that their pricing terms are clear and reasonable to avoid judicial scrutiny.

- 21.2. The TPF market promotes competition between various funders. CILEX believes that due to the increasing demand of TPF in litigation, there is downward pressure on pricing due to competition for higher value cases.

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

- 22.1. In a previous response, CILEX noted that TPF arrangements are fundamental and promote access to justice, and as such, any returns should be recoverable without any restriction.
- 22.2. CILEX does not, at present, have a consensus view amongst members as to whether a cap should or should not be imposed on a funder's return. As such, CILEX welcomes views following publication of the CJC's response.

23. Question 13(a-c): If a cap should be applied to funders return, what level should it be set at and why? Should it be set by legislation and at which stage should a cap be set?

- 23.1. CILEX is aware of the ongoing controversy that the ruling in *PACCAR*⁵ held, noting that third party litigation agreements should be viewed in line with damages-based agreement regulations. Although CILEX believes that TPF should have regulations in isolation, if a cap were to be applied, the current damages-based regulations (DBA regulations) could be used as a precedent for calculating the level of cap that should be applied.

- 23.2.** DBA regulation 4(2)(b) and 4(3) are examples that could be used in assessing the level a cap could be set:

(b)subject to paragraph (4), a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 25% of the combined sums in paragraph (2)(a)(i) and (ii) which are ultimately recovered by the client.

(3)Subject to paragraph (4), in any other claim or proceedings to which this regulation applies, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client.⁶

- 23.3.** Furthermore, in ascertaining when a cap should be applied in proceedings, CILEX believes that this is at the discretion of the Court. The judiciary have the knowledge and sufficient training to assess the return on investment from a funder, and whether this should be subject to a cap.

⁵ *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others*

⁶ *The Damages-Based Agreements Regulations 2013, regulations 4(2)(b) and 4(3).*

24. Question 13d: Are there any factors which should be taken into account in determining the appropriate level of cap, and if so, what should be the effect of the presence of such factor?

24.1. When asking members what factors should be taken into account when determining the appropriate level of cap (should one be applied), the following were noted:

- Size and complexity of the case
- Access to justice and public interest
- Risks involved in the funding arrangement
- Competitive market and fairness
- Transparency and disclosure throughout litigation

25. Question 13e: Should there be differential caps and, if so, in what context and on what basis?

25.1. CILEX reiterates the point raised at question 13(a-c). Establishing a cap or differential caps should be for the judiciary to comment on due to the knowledge and training they possess in the area of costs and funding.

26. Question 14: What are the advantages or drawbacks of third-party funding?

26.1. CILEX reiterates the points raised in questions 3 and 5 in relation to advantages and drawbacks of TPF.

27. Question 15 & 15a: What are the alternatives to third-party funding? & How do the alternatives compare to each other? How do they compare to third-party funding? What advantages or drawbacks do they have?

27.1. CILEX recognises that there are many alternative methods to TPF; however, for ease of simplicity and to summary, CILEX notes the following:

27.2. Contingency Fee Agreements & Damages-Based Agreements (CFA & DBA): CILEX notes the similarities between CFA and TPF, noting the risk management and avoiding upfront costs for the Claimant. However, CILEX recognises that TPF can fund other litigation costs such as expert witnesses, which CFA may not, leaving Claimants open to Court fees or other disbursements. Additionally, both CFAs and DBAs are commonly only used when there are high prospects of success, therefore, funders can be more selective in funding claims in comparison to TPF, and are more likely to settle earlier to avoid further litigation costs.

27.3. Civil Legal Aid: as identified in the report, CILEX notes that civil legal aid can no longer provide the same level of funding in which private funding bodies can in

litigation. Furthermore, larger class action or corporate litigation is limited due to civil legal aid not being eligible for businesses.

- 27.4. Trade Union Funding: CILEX recognises the many benefits in trade union funding, for an individual, trade union membership exceeds litigation funding and can often be viewed as 'perk' to their membership as opposed to an independent funding vehicle. Similarly with civil legal aid, trade union membership is often limited to individuals, and is not applicable to corporate entities.
- 27.5. Legal expenses insurance (BTE and ATE): CILEX notes that BTE and ATE are key funding vehicles for litigants in accessing justice. However, CILEX also notes that for BTE insurance specifically, Claimant's are limited to resources and do not benefit from consumer choice. Furthermore, CILEX understands that due to the reactive purchasing of ATE insurance may mean that premiums are significantly higher in comparison. TPF provides the Claimant the freedom of choice for legal representation, as well as mitigating the costs for the Claimant.

28. Question 15(b-c): Can other forms of litigation funding complement third-party funding? If so, when and how?

- 28.1. CILEX believes that there are many other forms of litigation that can complement third party funding; however, also that this is case specific and cannot be commented with certainty.

29. Question 16: Are any of the alternatives to be encouraged in preference to third-party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?

- 29.1. When surveying members, CILEX civil and personal injury practitioners noted that the following were more favourable are encouraged in preference to third party funding:
- Conditional Fee Agreements
 - Damages-Based Agreements
 - Trade Union Funding
 - Legal Expenses Insurance
- 29.2. CILEX notes that the following are held to more controlled regulatory frameworks, which in turn protects all parties in litigation. Additionally, some feedback suggested that the above funding vehicles were much more efficient at obtaining access to justice for a diverse group of individuals, as opposed to selecting the most interesting or the highest returning case which typically attract similar types of Claimants. CILEX would be interested to see any data that supports this view.

30. Question 17: Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for the CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreements?

- 30.1. CILEX understands the advantages and benefits of CFAs and DBAs in litigation, especially for Claimants who are unable to afford to pursue their claims. Additionally, CILEX appreciates that CFAs and DBAs are strongly regulated in comparison to other litigation funding vehicles, using the Courts and Legal Services Act 1990 and the Damages-Based Agreement Regulations 2013.
- 30.2. However, CILEX notes throughout this response that Claimants who often rely on funding vehicles to support their claim, such as CFA and DBA, are often vulnerable or facing financial difficulties. It is not uncommon that CFAs and DBAs are complex arrangements and difficult for the average layperson to understand. Whilst navigated by legislation and regulations, CILEX recommends that clearer terms for clients via clear disclosure requirements will assist Claimants to make an informed decision before entering into the agreement. CILEX believes the potential for a more simplified contract could provide clarity to legal representatives and the Court should a potential issue arise.
- 30.3. Whilst CILEX can, in principle, see the benefits of introducing a single regulatory regime applicable to all forms of contingent funding agreements, without clearer understanding of the proposed regulations through consultation, it is difficult to convey a position with clarity. CILEX welcomes proposals from the CJC following publication of response to this consultation.

31. Question 18: Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?

- 31.1. CILEX has previously commented on before the event (BTE) and after the event (ATE) insurance. CILEX notes that the expansion of BTE insurance could undermine freedom of choice for Claimants, which would not be in the best interest of the individual or group. Due to the increasing accessibility of litigation funding, including BTE insurance, CILEX recommends that these insurance policies could be reformed to offer broader and more comprehensive coverage, including choice of legal representative that fit a criterion as an example.
- 31.2. Additionally, CILEX notes that due to the reactive nature of ATE, it can be marginally more expensive in comparison to other insurance-based litigation funding. CILEX believes that the reduction on insurance premiums for ATE insurance could open the gates for individuals to access justice without the need for a third-party funder. There are a variety of ways that could reduce the cost of ATE premiums, including introducing tiered pricing structures based on the complexity and risk of litigation, or introducing caps on ATE insurance.

- 31.3. CILEX does not believe that a public mandatory legal expenses insurance scheme should be considered. Due to the regulatory oversight that is required, CILEX believes that the priority should remain in effectively regulating current forms of litigation funding before expanding further.

32. Question 19: What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third-party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?

- 32.1. CILEX believes that ATE insurance and CFAs are complementary to one another. For example, where CFAs cover the cost of legal representation, ATE insurance can fund the other disbursements and the risk of adverse costs.
- 32.2. CILEX believes that ATE insurance and TPF agreements are more effective when used in isolation. Whilst CILEX acknowledges that there can be a hybrid funding mechanism using both ATE and TPF, TPF encompasses most of the benefits to individuals/collectives that ATE can provide and more. CILEX notes a successful use of ATE and TPF in collaboration would be where ATE is used as a tool to mitigate the risks for the third-party funder, especially where adverse costs are concerned.
- 32.3. CILEX believes that there is a risk with both relationships of overlap and can place the Claimant at a significant disadvantage in relation to the portion of damages recoverable. Each mechanism can recover a portion of damages from the Claimant, which could hinder recovery and is not in the best interests of the Claimant. CILEX recommends that to avoid double recovery, there be clear and comprehensive guidance on the sharing of costs and recovery in litigation.

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

- 33.1. CILEX believes that one of the concerns surrounding crowdfunding is the currently regulatory oversight, as CILEX notes that crowdfunding platforms are not subject to the same regulations as traditional financial services, and this could expose vulnerable Claimants to exploitation. CILEX recommends introducing regulatory standards, like the Association of Litigation Funders Code of Conduct, to promote transparency and fairness for consumer protection.
- 33.2. CILEX welcomes other views on reforms to crowdfunding following the publication of responses.

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

- 34.1. CILEX recognises that portfolio funding has many advantages for mass claims and class action litigation, noting the contribution in accessing justice portfolio funding has for Claimants.

- 34.2. CILEX recommends that clearer transparency reforms are required in portfolio funding. CILEX notes that portfolio funding can be ambiguous when ascertaining how claims are assessed within the portfolio, as well as how the distribution of returns will be calculated and allocated across cases. Increased transparency assists both Claimants and legal representatives in advising their clients throughout the litigation process.

35. Question 22: Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?

- 35.1. CILEX notes that following the reforms to funding in April 2013, the sharing of risk being imposed onto law firms, clients, litigation funders and insurers has increased. Due to the sharing of risk, CILEX recommends that adequate regulation and/or Codes of Conduct be mandated to ensure that the litigation process can be streamlined. Litigation often relies on all parties to act in line with their professional and regulatory obligations to ensure proceedings can run as efficiently as possible; therefore, without regulation, the stress on Claimants, legal representatives, insurers and funders continues without adequate resolution.

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

- 36.1. CILEX raises the need for regulation in litigation funding, whether this is enshrined through the Civil Procedure Rules, Competition Appeal Tribunal Rules or through alternate mechanisms, i.e. Codes of Conduct. CILEX believes that regulation is specifically required when considering the extent of the funder's control over the litigation.
- 36.2. CILEX notes that mandated Codes of Conduct would use less financial and time resources, due to a precedent model already available for review. Additionally, as litigation funding continues to evolve, a Code of Conduct would be more manageable than the amendment of rules through CPR or CATR.
- 36.3. Furthermore, CILEX believes that it is for the role of the judiciary to establish whether litigation funders are exercising excessive control over litigation proceedings. The judiciary have adequate knowledge and training in the area of costs and litigation funding, and the circumstances can change on a case by case basis.

37. Question 24: Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules to cater for other forms of funding such as pure funding, crowd funding or any alternative forms of funding you have referred to in answering question 16? If so, in what respects are rule changes required and why?

- 37.1. CILEX refers to the question above.

38. Question 25: Is there a need to amend the Civil Procedure Rules in light of the Rowe case? If so, in what respects are rule changes required and why?

- 38.1. CILEX maintains the view that it is for the role of the judiciary to establish the position in relation to cross-undertakings, where funded Claimants seek to recoup the costs associated in their litigation funding agreement. As established in *Rowe*⁷, cross-undertakings should only be required 'in rare and exceptional cases'⁸ and CILEX believes that this can only be decided on a case-by-case basis.

39. Question 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?

- 39.1. CILEX notes that the current pre-action protocols are well established in navigating the conduct of litigation pre-issue. CILEX hopes that wider promotional opportunities regarding the use and adherence of such protocols are made available to the public and litigation funders to better their understanding of how they can achieve swifter resolution in certain cases.
- 39.2. As in other areas of law, CILEX understands that conduct is assessed throughout the course of litigation in respect of orders in relation to costs. CILEX believes that this model currently works well in deterring excessive control or dubious practices in proceedings. It is for the discretion of the Court to impose costs orders where conduct in litigation is impeding justice. CILEX believes that the same criterion can be applied whether a party is funded or not. Evidently, this is for either party to raise an issue in relation to litigation conduct during proceedings.

40. Question 27: To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the Court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?

- 40.1. CILEX believes that transparency in litigation funding agreements is essential in obtaining access to justice. CILEX recognises that where funding agreements are disclosed in proceedings, there is additional judicial oversight in litigation conduct. CILEX notes that disclosure allows the judiciary to assess the costs and security of costs throughout proceedings. As previously referenced, CILEX believes that full transparency of funding agreements can assist the court in determining whether there has been excessive control over litigation, and whether pre-mature settlement is due to pressure from funders.
- 40.2. CILEX believes that where adequate regulatory frameworks are imposed on litigation funders, there may not be a need for disclosure of funding agreements. However, noting the current self-regulatory framework, disclosure may be a viable

⁷ *Rowe v Ingenious Media Holdings Plc & Others* [2021] EWCA Civ 29.

⁸ *Ibid.*

alternative to ensure that funders are acting in the best interest of the funded party without exerting excessive control over litigation.

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

- 41.1. CILEX believes that all funders exercise a degree of control over litigation. Depending on the circumstances, it is arguable whether such control is reasonable or unjust. CILEX notes the extent in which funders should control litigation is subjective and case specific.

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

- 42.1. CILEX believes that the different funding mechanisms ultimately seek the settlement of litigation. However, there are increased pressures to settle where certain funding mechanisms are present, which can influence either party. For example, in class action or group litigation, there is an increased pressure on Defendants due to the scale and collective nature of the claims. In comparison, CFAs and DBAs may impose pressure on Claimants to settle quickly, due to the funders only receiving payment upon successful settlement, which could lead to under compensation.

43. Question 30: Should the Court be required to approve the settlement of proceedings where they are funded by third-party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?

- 43.1. CILEX understands that the case of *Merricks v MasterCard*⁹ remains ongoing, and the answer to this question may be provided by way of case law following judgment. However, noting the significant detriment under-settlement can have, particularly in the recovery of personal injury claims, CILEX believes that this proposal is reasonable, but would require disclosure of funding agreements to the Court.
- 43.2. Should this proposal come into fruition, CILEX recommends that instead of approving settlement in a similar way to infant approval hearings, another example may be more appropriate as taken from different areas in law. In family proceedings, it is for the Judge or Recorder to seal agreed orders created by the legal representatives for settlement, CILEX notes that this method could be efficient in saving judicial time that could be used for other matters.

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

- 44.1. CILEX believes that such determination should be at the discretion of the Court due to the comprehensive training received in costs, funding and settlement. As a

⁹ *Merricks v MasterCard* [2024] EWCA Civ 759.

primary position, CILEX hopes that the protection of the interests of the Claimant is prioritised in consideration of approving settlement.

45. Question 32: What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of Claimants whose litigation is funded by third-party funding?

45.1. CILEX maintains the view that a comprehensive regulatory approach ensures the protection of funded Claimants.

46. Question 33: To what extent does the third-party funding market enable Claimants to compare funding options different funders provide effectively?

46.1. CILEX believes that the TPF market enables Claimants to somewhat compare funding options; however, CILEX is of the view that more can be done to promote consumer awareness.

46.2. CILEX believes that the promotion of an unbiased, centralised information portal or website can assist Claimants to make informed decisions surrounding litigation funding. This can in turn prevent exploitation and can assist Claimants in finding the right funding mechanism for them and their claim. CILEX believes that this could be provided in line with regulation requirements for funders, or by legal representation throughout the litigation process to ensure that funders do not excessively control the proceedings.

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

47.1. CILEX notes that the context of conflicts of interest varies depending on the type of funding and case facts. Where there are various parties involved such as class action or group litigation, the opportunities are significantly higher for conflicts of interest to arise in comparison to other TPF mechanisms.

47.2. CILEX recommends data collection to see where conflicts of interest are being most reported and through which funding mechanism, what types of claims are being reported and the types of funders.

48. Question 35: Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third-party funding? If so, what reforms are necessary and why?

48.1. CILEX notes that where there is class action or group litigation funding, due to the multiple Claimants, enhanced disclosure requirements in the funding agreement may be required.

48.2. Additionally, CILEX reiterates the requirement for more controlled regulation for TPF in resolving issues in relation to conflicts of interest.

49. Question 36: To what extent, if any, does the availability of third-party funding or other forms of litigation funding encourage specific forms of litigation?

- 49.1. CILEX recognises that the availability of TPF and other funding vehicles support a variety of litigation cases. More specifically, the pursuit of low value personal injury litigation has significantly increased with the assistance of funding vehicles like CFAs, DBAs and Trade Union funding.
- 49.2. CILEX notes that other areas including class action litigation, especially after the promotion of *Bates & Others v Post Office Limited*¹⁰ across various media channels. The public awareness of such funding has assisted the litigation of various high risk and collective litigation proceedings.

50. Question 36a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?

- 50.1. CILEX believes that litigation funding vehicles moderately encourage meritorious litigation. Whilst not applicable for all funding vehicles, CILEX recognises that CFAs, for example, support likely successful litigation on the premise that they only receive rewards should the claim be successful.

51. Question 36b: 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?

- 51.1. Whilst CILEX recognises that litigation funding can be a positive method to promote meritorious funding, certain funding vehicles, such as trade union funding, can promote an increase in vexatious litigation, or cases without merit. CILEX is aware that this is often due to the relationship between union and Claimant, as opposed to the role of the legal representatives. Additionally, other BTE insurance providers are examples of increasing litigation which on the balance of probabilities, would not succeed in Court.

52. Question 36c: Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?

- 52.1. CILEX believes that both TPF and alternative forms of funding moderately encourages group litigation, collective and/or representative actions. CILEX notes that due to the cost associated with funding multiple claims at one time, TPF and other funding vehicles such as class action funding can positively contribute and carry the risks associated with group litigation. Furthermore, the rewards from a

¹⁰ *Bates & Others v Post Office Limited*¹⁰ [2019] EWHC 3408

funder's perspective are dramatically higher in consideration of the value of multiple claims.

53. Question 37: To what extent that third-party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary?

53.1. CILEX understands that due to the commercial view of litigation from the funder's perspective, commercial litigation is likely to be encouraged as opposed to public interest litigation. CILEX appreciates that there are clear benefits for funders to opt for claims that carry high risk, high reward benefits as opposed to lower value public interest claims. CILEX notes that tax incentives could be introduced for funders when considering public interest litigation in lieu of the immediate financial gain that commercial litigation provides.

53.2. CILEX reiterates that any reforms may not be effective without the implementation of a comprehensive regulatory framework.

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

54.1. CILEX refers to the response submitted at question 33.

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

55.1. CILEX does not wish to raise any further comments at this stage.

56. Conclusion

56.1. CILEX believes that TPF and other litigation funding vehicles are vital in promoting access to justice and achieving equality of arms for those conducting litigation. However, CILEX believes that TPF requires a comprehensive regulatory framework to protect Claimants, as well as preserving the justice system from being viewed as a business venture. CILEX hopes that the resources readily available in relation to litigation funding can assist in creating a mandated Code or framework can be of assistance when carrying out this work.