

The consultation closes on **Friday 03 March 2025 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to [CJCLitigationFundingReview@judiciary.uk](mailto:CJCLitigationFundingReview@judiciary.uk). If you have any questions about the consultation or submission process, please contact [CJC@judiciary.uk](mailto:CJC@judiciary.uk).

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

**You must fill in the following and submit this sheet with your response:**

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### Information provided to the Civil Justice Council:

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

The full list of consultation questions is below:

- Please give reasons for your answers. Please do so by reference, where applicable, to the guidance given in the footnotes.
- All answers should be supported by evidence where possible to enable evidence-based conclusions to be drawn.
- It is not necessary to answer all the questions.

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

1. To what extent, if any, does third party funding currently secure effective access to justice?<sup>1</sup>

*Based on our observations, there is a lack of capital for smaller claims, where the costs of providing funding are high relative to the value of the claim. This could be mitigated by encouraging more capital to enter the litigation market.*

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

*Third party funding helps impecunious claimants to progress meritorious claims, however it has limitations — in some instances the defendants adopt a strategy of using relatively expensive lawyers and using procedural tactics to make the litigation as long and as difficult as possible, so as to worsen the economics of the claimant. This tactic is more effective when funders are involved since the returns to the funders and the claimant are more challenged if the defendants seek to inflate the legal costs for both sides. The courts should have increased scrutiny of the cost budgets of both sides to mitigate this issue.*

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

*The UK has a comparative advantage in third party funding and it is therefore a potential opportunity for economic and trade growth. Litigation funding is a new asset class for investors who are interested in generating potentially attractive returns on their capital while also improving the rule of law.*

4. Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?<sup>2</sup> If not, what improvements could be made to it?

*There appear to be close relationships between some law firms and funders based on the announcements in recent years of general funding line arrangements. Solicitors should be required,*

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<sup>1</sup> 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.

<sup>2</sup> This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.

*by law, to formally ask claimants if they wish the solicitor to approach a number of funders and insurers so as to get the most competitive terms.*

5. Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:

- a. The nature and seriousness of the risk and harm that occurs or might occur;
- b. The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;<sup>3</sup>
- 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.

*Risk of close relationship between funders and solicitors.*

- a. *Funding is potentially more expensive than it otherwise would need to be and solicitors cash fees are potentially higher than they would otherwise need to be.*
- b. *Solicitors are currently required to act in the best interests of their clients but there is a degree of subjectivity on this duty. Incentives matter. A new regulated role Litigation Consultant (“**Consultant**”) should be created who is paid a relatively low<sup>1</sup>-time fixed fee (£500-1,000) and a share (0.5-7.0% depending on the claim size) of the claimants net share of the proceeds after all parties have been paid (the Net Proceeds). Ideally the Consultant would be appointed before a solicitor was appointed, to avoid an inappropriate solicitor being appointed (with respect to area of specialism; hourly fees; willingness to work on a full or partial contingency and expertise in dealing with funders and insurers).*
- c. *Paying a Consultant a share of the **Net Proceeds** (e.g. up to 7.0% on a sliding scale), would create alignment of incentives. For many claimants, litigation is a ‘one-shot-game’ while for their solicitors and funders it is a ‘repeated game’ (to use game theory terminology), as a consequence there is often severe information asymmetry in the relationship. The establishment of a regulated<sup>4</sup> panel of Consultants who are incentivised to get the best possible net outcome for the claimant would mitigate this issue. Solicitors are not well placed to provide this service because their own costs are often the largest part of the legal costs budget and they are likely to have a preference to maximise the cash component of their own fees and also have a conflict of interest vis a vis their ongoing relationships with funders. A Consultant would increase the overall legal costs somewhat, but the benefits would outweigh the costs in our view. The Claimant should have the opportunity but not the obligation to engage a Consultant. All other parties to the litigation (funder, funding broker, insurer, insurance broker and solicitor) get paid*

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<sup>3</sup> 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.

<sup>4</sup> *Ideally, but not required to be regulated.*

*from gross proceeds, **before** the claimant gets paid. The Consultant would be the only engaged party financially incentivised to maximise the Net Proceeds to the claimant.*

6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?
  - a. If not, why not?
  - b. If so, which types of dispute and/or form of proceedings<sup>5</sup> should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?<sup>6</sup>
  - 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?
7. What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?

*The promotion of a transparent market with equal information for all parties.*

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?
  - b. What impact, if any, does third party funding have on the level of litigation costs?
  - c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?
  - d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?<sup>7</sup>
  - e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?
    - i. If so, why?

*The court should have the ability but not the obligation to make litigation funding costs recoverable.*

*Some Defendants deliberately choose expensive lawyers and drag out the litigation (via unnecessary hearings) in order to increase the costs for the claimant, increase the adverse cost risk for the claimant and reduce the commercial attractiveness of pursuing the claim. This is most obvious when defendant's cost budget is high relative to the claim value. In such instances, the court should be able to award litigation funding costs to the claimant — to discourage this tactic by Defendants and also*

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<sup>5</sup> Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.

<sup>6</sup> Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.

<sup>7</sup> Please explain your answer by reference to a specified regulatory mechanism or mechanisms.

*to attract capital for claimants who otherwise might be unable to fund their case due to a low prospective expected net recovery.*

ii. If not, why not?

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.

*In some instances, Defendants (apparently deliberately- based on anecdotal evidence) use a legal team that is so expensive that the claimant is unable or unwilling to obtain the required ATE insurance to cover the adverse cost risk. This in turn has the knock-on consequence (see question 10) that funders are unable to fund the case, since they would be exposing themselves to a prohibitively high level of adverse cost risk. In particular, Defendants appear to employ this 'high legal costs' strategy with respect to 'test cases' that could lead to follow on claims with a similar set of facts.*

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

*Third party funders should only be exposed to adverse costs up to the amount they have invested in the case. Otherwise, where funders have backed a claim for which the lawyers are working on a full contingency basis, and the insurance premium is fully deferred and contingent, they could have a situation where they have contributed less than 10% of the total costs of pursuing the case but are potentially liable for the entire cost budget of the defendant. So, in this example, the adverse costs could be 10 times the amount of funding required, which would be prohibitive in many instances. These low probability high severity scenarios tend to lead to market failures. We have on at least one occasion declined to fund a case for precisely this reason.*

*Lawyers working on the claim on a contingent basis should be liable for adverse costs up to their base costs (excluding VAT) — since this is analogous to payment-in-kind funding of the case. Similarly insurers should be liable for adverse costs up to the upfront-equivalent<sup>8</sup> premium for insuring the claim. In this way, all the contributors of capital (both direct and otherwise) to the claim would share the adverse cost risk, in the unlikely event that the claimant is unable to pay (e.g. due to repudiation of the ATE policy) .*

**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?

Competition between funders reduces the price for funding. However in some situations, (see answer to question 4), it seems likely that lawyers have tied / quasi-tied relationships to funders and therefore only 1 quote for funding is obtained (see announcements of funding line partnerships between law firms and funders). Solicitors should be required to ask the claimant if they would like

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<sup>8</sup> This could be computed with input from insurance brokers. E.g. 50% of the maximum deferred contingent premium

to seek at least 2 or more quotes for funding, or indeed to run a 'request for proposal' process to get the best possible funding terms.

12. Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?
- If so, why?
  - If not, why not?

*A cap would reduce the availability of (already scarce) funding. Some claims are much more risky than others and therefore the return if the claim wins needs to be high enough to attract capital. A claim can be high risk for a variety of reasons: the legal analysis may be complex, it may be unclear whether the defendant has the ability to pay any damages, or recoverability of amounts due may be uncertain (e.g. if the defendant is overseas). Further, the claim value may be highly uncertain (due to lack of disclosure or complexity). The current PACCAR prohibition on the funder charging a % of the damages is detrimental to the availability of and cost of funding. Being able to charge a % of the damages would have the attractive feature that the returns from outcomes with a high level of damages, would help to subsidise outcomes with a low level of damages awarded — in this way the net proceeds paid to the defendant will be higher in a larger number of outcomes. If the funder cannot charge a % of the damages then the multiple charged on capital would need to be higher and indeed many cases would not be fundable, since the net recovery after the funder has applied an appropriate multiple would be too low.*

*We have funded claims where the probability of success was estimated at only 35% (despite having a KC estimated probability of winning at trial of over 65%). Once the funder's fees are added in, the return multiple clearly needed to be higher than normal to compensate for the speculative aspect of the claim, otherwise the claim would have remained unfunded.*

13. If a cap should be applied to a funder's return:
- What level should it be set at and why?
  - 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?
  - At which stage in proceedings should the cap be set?
  - 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?
  - Should there be differential caps and, if so, in what context and on what basis?

**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.

*Litigation funding helps to ensure the rule of law and helps to protect property rights.*

15. 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?

Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

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

*Conditional Fee Agreements (CFAs) and damages-based agreement are often lower cost for the claimants. This is in part due to lower friction costs. The lawyers involved in the case already know the strengths and weaknesses of the case (and the legal team) and can therefore decide efficiently whether to invest their fees in the case. Put differently, it often reduces the need for an expensive team of funders to spend time analysing the claim and in any event reduces the amount of third party funding that is required.*

*The 100% max uplift allowed on CFAs should be increased (e.g. to 150%) to encourage this approach to funding claims. Funders often charge a return of 200-300% on capital, therefore CFAs are relatively cost effective. In addition if solicitors become liable for adverse cost risk (see answer to question 10), then the potential upside should be increased to compensate for this increased risk.*

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

*Crowdfunding litigation enables high risk claims to proceed that other funders would view as too speculative, since the risk can be distributed more widely among informed investors who are willing speculate, relatively small amounts, on the outcome for an appropriate return. A cap on funders' returns would be detrimental to the funding of these high-risk claims. Crowdfunding can be a useful way to provide high risk pre-issuance seed capital for the initial counsel's opinion, to see whether a claim is potentially viable.*



*Crowdfunding allows a degree of flexibility, if for example the claimant requires a portion of the capital raised for living expenses (some funders, due to institutional constraints, will not allow this use of any of the proceeds). Further, crowdfunding allows a broader group of individuals (including claimants) to benefit from investing in the claim.*

*Litigation crowdfunders should ensure that once a claim is issued, the claim is already fully funded to the end of the trial, is meritorious, and that the adverse cost risk for the claimant and investors have been fully mitigated either via ATE insurance, or ring-fenced- capital. Similarly, security for cost risks need to be considered as part of any for-profit litigation crowdfunding approach (typically addressed via the availability of an anti-avoidance endorsement from an investment-grade insurer)*

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

**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?
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?
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?
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?
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?

*If the Defendant knows about the funding arrangements and its terms, then it enables them to reverse engineer the net returns of the Claimant under different scenarios which is useful when determining whether to settle the claim or to continue to defend the claim. Unless there is a corresponding level of disclosure from the Defendant in terms of how their legal fees are being funded, there is increased inequality of arms. (For example in some shareholder disputes a defendant who is an individual is inappropriately funded by the company without this being disclosed to the court.)*

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



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?
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?
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 answer to question 5. Risk of close relationship between funders and solicitors creating a conflict of interest.*

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

*See answer to question 5.*

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?

*See answer to question 5*

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 answer to question 5*

#### **Questions concerning the encouragement of litigation.**

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

*There is a shortage of capital for smaller meritorious commercial claims.*

- 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?

*Litigation is expensive. Investing in vexatious claims would be likely to lose money.*

- c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?  
When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.
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.

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?

*See answer to question 5: A Litigation Consultant would be a useful addition to the litigation market structure.*

#### General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?<sup>9</sup>

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<sup>9</sup> Please note that the Working Party is not considering civil legal aid.