

TheCityUK response to the Civil Justice Council review on litigation funding

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About TheCityUK

TheCityUK is the industry-led body representing UK-based financial and related professional services. We champion and support the success of the ecosystem, and thereby our members, promoting policies in the UK and internationally that drive competitiveness, support job creation and enable long-term economic growth. The industry contributes 12% of the UK's total economic output and employs over 2.4 million people – with two thirds of these jobs outside London – across the country's regions and nations. It pays more corporation tax than any other sector and is the largest net exporting industry. The industry plays an important role in enabling the transition to net zero and driving economic growth across the wider economy through its provision of capital, investment, professional advice and insurance. It also makes a real difference to people in their daily lives, helping them save for the future, buy a home, invest in a business and manage risk.

Background

1. TheCityUK's legal services group comprises senior representatives from across the UK legal sector. Its role is to provide a cross-industry perspective on legal policy issues that impact on the financial and professional services industry.
2. In producing this submission TheCityUK has consulted with members with expertise and direct experience in this subject, including law firms which act for claimants, law firms which act for defendants, financial services institutions, and professional associations. Some of these members will also be responding independently to the consultation to set out in detail their perspectives on the issues raised.
3. We do not seek to replicate the detailed submissions of our members. Our consultation response, which follows, aims to provide a cross-industry perspective on the issues.
4. TheCityUK considers that securing access to justice for all is essential to maintaining the UK's international reputation for the rule of law, and the competitiveness of the UK legal services

sector. This reputation is fundamental to the UK's position as an international financial and professional services centre, and to support economic growth across the country.

5. We believe that there needs to be more serious consideration by the government of the broader systemic challenges facing the civil justice system. While this current consultation focuses specifically on the issue of third-party litigation funding (TPLF), this issue should not be seen in isolation. Nor should TPLF be seen as a solution to the high level of costs which makes it very difficult for individuals of ordinary means to access justice through the courts. A change of approach from, and significant investment by, government is required to ensure genuine, cost-effective access to justice for the majority of the population.
6. We would also welcome further clarity on the government's plans as regards the UK Supreme Court's decision in *PACCAR*.

The regulation of third-party litigation funding (TPLF)

7. We welcome the Civil Justice Council's (CJC) interim report and consultation as a positive step in the *TPLF* environment in England and Wales and an opportunity to promote fair and efficient access to justice in the interests of citizens, businesses, the courts and civil justice system, and the wider UK economy.
8. We acknowledge that TPLF plays an important role in litigation in England and Wales and in supporting access to justice. It allows claims to be brought by or on behalf of parties, particularly consumers, SMEs and companies, which may not otherwise have been brought (particularly given the very limited availability of legal aid in civil cases).
9. There has been a significant increase in recent years in the number of third-party funded claims, as well as the size, scope and complexity of those claims. However, it is important to note that higher numbers of litigation cases do not equate to greater access to justice or productivity. Costly litigation should remain a last resort. Much greater focus needs to be given to exploring and developing significantly lower cost judicial alternatives so that more citizens can afford to use the courts. Other routes, such as ombudsmen or redress schemes, may also be less costly and less adversarial, and even offer forms of redress that litigation cannot currently provide (such as an apology).
10. It is equally important to recognise that access to justice is not always the primary consideration of commercial third-party funders or advisors.
11. Despite the increase in third-party funded claims, there is no formal regulation of TPLF in England and Wales. Instead the sector is reliant on voluntary codes of conduct by the Association of Litigation Funders (ALF) and the International Litigation Funders Association (ILFA). However, the ability of the ALF or ILFA to enforce these voluntary codes among their members is very limited. Crucially, the majority of funders operating in England and Wales are not members of either the ALF or ILFA.
12. The current framework of voluntary self-regulation does not provide sufficient safeguards for either claimants or defendants. Third-party funding is effectively, as presently constituted, an unregulated form of lending, often to a consumer audience. Its status is at odds with the

regulatory framework for other significant financial services. There is no principled reason why third-party funders should be exempt from the regulation and safeguards imposed on other providers of financial services.

13. TheCityUK therefore support the introduction of a mandatory regulatory regime for third-party funding, which prioritises access to justice and the interests of both claimants and defendants. Such a regulatory regime should include:

- transparency requirements
- capital adequacy requirements to ensure protection of claimants and defendants
- the introduction of fiduciary or other duties to be owed by the funder to those in receipt of funding
- appropriate constraints on the level of recoveries available to funders to ensure that claimants receive adequate redress, and
- provisions to deal with the risk of funders exercising improper control over the litigation, and with any conflicts of interest that may arise.

14. This new regulatory regime should include greater judicial oversight of funded claims to ensure that the interests of claimants and defendants are protected. This could include ensuring that **all** courts and tribunals in England and Wales have the case management powers they need to scrutinise the funding agreement, control costs and, in certain cases, approve a proposed settlement. It should also enable them to exercise those powers, both at pre-litigation stage and throughout the course of the proceedings if they consider it suitable to do so. In the main, there should be a requirement to disclose the existence and key terms of funding agreements to the court and opposing parties in all legal proceedings, so that there is transparency as to the relevant interests. However, further thought should be given as to whether certain classes of claims (such as insolvency claims) could be exempt from this requirement if it is likely to lead to less access to justice for claimants.

15. There should be no change to the current position in which funders are exposed to the risk of paying adverse costs in proceedings they support, and the costs of funding are irrecoverable as a litigation cost. Any changes to these important principles would risk fuelling unmeritorious claims and pressuring defendants to settle, regardless of merit, due to the cost risks of defending the claims.

16. TheCityUK is also mindful of the need to ensure that any new regulatory regime is proportionate. The UK is a global legal centre, and the availability of third-party funding is part of the ecosystem which attracts international parties to use the UK's courts and alternative dispute resolution services. Any new regulatory regime should, therefore, include secondary objectives for ensuring the international competitiveness of the UK legal sector and promoting economic growth.