

The consultation closes on **Friday 31 January 2025 at 23:59**.

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

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

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

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

Your response is (public/anonymous/confidential):	Public
First name:	Kate
Last name:	Fox
Location:	113 Chancery Lane, London
Role:	
Job title:	Civil Justice Policy Adviser
Organisation:	Law Society of England and Wales
Are you responding on behalf of your organisation?	Yes
Your email address:	<div style="background-color: black; width: 100%; height: 1.2em;"></div> <div style="background-color: black; width: 100%; height: 1.2em;"></div>

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?¹
2. To what extent does third party funding promote equality of arms between parties to litigation?
3. Are there other benefits of third party funding? If so, what are they?
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?
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;³
 - 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.
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 proceedings⁴ 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
 - 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

¹ When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.

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

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.

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.

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?
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?⁶
 - e. Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?
 - i. If so, why?
 - 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.
10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?

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?
12. Should a funder’s return on any third party funding arrangement be subject to controls, such as a cap?
 - a. If so, why?
 - b. If not, why not?
13. If a cap should be applied to a funder’s return:
 - a. What level should it be set at and why?
 - 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?
 - c. At which stage in proceedings should the cap be set?
 - 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?
 - e. 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.

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

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

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

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?
 - 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?
 - 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?

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

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



Law Society response to the Civil Justice Council's Review of Litigation Funding Consultation

March 2025

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Executive Summary

The Law Society recognises third party litigation funding as a niche, yet key, part of the civil justice ecosystem which has an important role to play in assisting some litigants in accessing legal services when they would otherwise not be able to.

We await the evidence to underpin any policy proposals that may be recommended in future, but summarise our initial points as follows:

- As a first step, a stronger regime of self-regulation of the sector seems the most proportionate and effective way to combat perceived issues with litigation funding.
- Consumer protection should be at the heart of any recommendations, but we would be cautious of any measures that restrict the ability of funders to operate in England and Wales, in either litigation or arbitration. We would be concerned if any measures introduced would prevent litigants from being able to access justice through the inability to access funding when it is most needed.
- Caution should be exercised when considering one-size-fits all rules for funded cases. Individual cases should be assessed on their own merits, and powers granted to the courts to ensure proper conduct of litigation, including proportionality of costs, and recoverability where appropriate.

Introduction

The Law Society is the independent professional body for solicitors in England and Wales. We are run by our members, and our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard access to justice and the rule of law.

The Law Society welcomes the chance to comment on this consultation and appreciates the efforts of the working group to bring together a comprehensive synopsis of the history and types of litigation funding currently existing in the civil litigation space.

We note that there are no recommendations being put forward as part of this consultation, and that evidence is being sought to shape the Civil Justice Council's future report. As the membership body for solicitors who represent both claimants and defendants in civil cases, we are aware that there are considerably mixed views on third party funding, especially considering recent high profile court cases and the increased public awareness of what has traditionally been a niche area of the civil justice system.

We would defer to law firms, litigants, and stakeholders with first-hand experience of third-party funding to provide the information that is being sought, and we look forward to monitoring the evidence that emerges from this consultation exercise. However, considering the wide-ranging nature of the consultation, and the likely long-term knock-on effects to other parts of the civil justice ecosystem of any changes, we have highlighted points of principle that should be considered when the Civil Justice Council is analysing responses.

Access to Justice

The Law Society supports measures that may increase a litigant's ability to access the civil justice system and increase equality of arms. We recognise that litigation funding can assist litigants in accessing legal representation in some cases where they would otherwise be unable to do so, but we are acutely aware of the debate around the proportion of damages resulting from a successful case being returned to the funder rather than staying with the litigant.

Given the rapid growth in the market in recent years, we would be particularly interested in any data that shows the proportion of third party funded cases that are now used to support consumer cases as opposed to corporate cases. While the principle of introducing a measure that requires funders to declare that funding can only be provided in genuine cases where access to justice would otherwise be denied, is a potentially admirable one on the face of it, we would urge caution in imposing arbitrary thresholds on potential recipients of funding. We wonder how this test would work in practice, and whether there would be a likelihood of increased satellite litigation to understand whether a case meets the 'access to justice' threshold.

There is no doubt a compelling argument around litigation funding increasing equality of arms for consumers, whether as part of a class action or not, but the wider civil justice ecosystem should also be considered. England and Wales is a global legal centre for commercial litigation and arbitration, contributing £60 billion to the UK economy each year through its legal services. The ability of parties to access third party funding in high value commercial disputes brings immense financial and reputational value to the jurisdiction, and we would be cautious about introducing any regulations or rules that make England and Wales less attractive to the international market. Furthermore, the Law Society supports measures that bolster and provide financial certainty to law firms, which litigation funding undoubtedly contributes to. If changes are to be introduced that would have the effect of preventing some cases being funded, an answer is needed to the question of how else those litigants would be able to secure justice.

Regulation of the Sector

It is noted in the consultation document that the Law Society previously took the view, in 2010, that statutory regulation of the sector was required and that the CJC should press the Government to introduce legislation.

Given the time that has passed, we recognise that, on balance, self-regulation of the sector seems to have worked well. Having said that, we would welcome measures to strengthen protections for consumers, such as through the requirement for funders to sign up to umbrella organisations such as the Association of Litigation Funders (ALF) and adhere to their codes. There is also potentially scope to introduce tougher sanctions for non-compliance with the code.

The statistics in the consultation document indicate that only a third of litigation funders who are active in England and Wales are signed up to the ALF. Notwithstanding the potential issues of compliance with competition law that are noted, we see merit in there being a stronger self-regulatory framework, with funders being compelled to join an umbrella organisation such as ALF, with tighter principles, codes of conduct and complaints procedures. Sanctions for non-compliance with the code should be increased (for example, the current ALF limit being £500 seems a token amount with no real punitive consequence), and a system of self-regulatory checks and audits could be established to monitor ongoing compliance. We also see merit in strengthening the requirements around capital adequacy.

As already noted in the document, members of the Law Society who work either for, or with, litigation funders, are already heavily regulated by the SRA regarding conduct and their duty to the client. However, we would see merit in introducing stronger guidance around the clarity that is provided to inexperienced litigants when entering into a litigation funding agreement, so the risks and opportunities are made as transparent as possible from the outset.

This is not to say that statutory regulation of the sector, whether by the Financial Conduct Authority or another body, is undesirable if the evidence shows otherwise, but as an initial step there seems to be much that could be done at a self-regulatory level that would deliver the same outcomes, but with less expense and duplication.

The Role of the Court

The Law Society would welcome, through this consultation, further analysis of the role that the courts can play in providing safeguards to litigants who are reliant on third party funding.

Due to the varied nature of cases that rely on funding, we would be wary of applying blanket rules to either the conduct of litigation, or the make-up of individual funding agreements. However, there is a strong argument that utilising existing, or reinforced powers, through the courts could be crucial in managing costs and possibly the poor behaviour of either party. An emphasis on tightly controlled case management and proportionality of costs would appear to be a crucial step in enhancing protection of the parties, and we would be keen to understand from the evidence gathered as part of this

exercise (and taking account of relevant case law), whether consideration should be given to the recoverability of the costs of funding in civil litigation, as it is in arbitration.

Capping the Return on a Funder's Investment

Imposing caps on a funder's return should be treated with caution, but we see merit in allowing the courts to impose such a cap on a case-by-case basis, as part of the principles mentioned above regarding tightly controlled case management and proportionality of costs.

We would be cautious at this stage of pre-empting the ongoing work of the Civil Justice Council looking at the remuneration provisions under the *Solicitors Act 1974* and the ability of a client to challenge their solicitor's bill. This has direct relevance to the role of Conditional Fee Agreements (and particularly the role of the 'cap' that exists within a CFA). We have however, historically, taken the position that the regulations underpinning the regime for Damages Based Agreements (DBAs) are ready for review. This might be an opportune time to revisit that issue.

Reversing 'PACCAR'

We would welcome steps that increase certainty for both consumers and funders, and while we acknowledge that the *PACCAR*¹ decision is outside the remit of this consultation, if the evidence shows that reversing the outcome of *PACCAR* would provide that level of certainty, then we would be supportive in principle. However, anecdotally we are also aware (and this is referenced in the consultation paper) that many funding agreements since the judgment have inevitably moved away from DBA-style caps towards multiples of investment. If funding agreements are being amended to take account of the *PACCAR* judgment, and if access to justice is not being impeded, then we would view introducing legislation to address *PACCAR* as a low priority².

¹ *PACCAR Inc and others v Competition Appeal Tribunal and others* [2023] UKSC 28
https://supremecourt.uk/uploads/uksc_2021_0078_judgment_ea84838f1b.pdf

² We are aware of the upcoming Court of Appeal case which will consider the validity of litigation funding agreements in the Competition Appeals Tribunal that have moved away from DBA-style caps and now consist of returns based on multiples of investment. The outcome of the case, due to be heard in summer 2025, will undoubtedly impact on the government's appetite for legislative reform to address *PACCAR*, and the Law Society will monitor any developments with interest.