

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:	Lewis
Last name:	Walmesley-Browne
Location:	London, UK
Role:	Trade Association Professional
Job title:	Head of Programme: Market Access & Consumer Technology
Organisation:	techUK
Are you responding on behalf of your organisation?	Yes
Your email address:	[REDACTED]

Information provided to the Civil Justice Council:

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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.

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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.

techUK response to the CJC Review of Litigation Funding Consultation

About techUK

techUK is the trade association which brings together people, companies and organisations to realise the positive outcomes of what digital technology can achieve. With over 1,000 members (the majority of which are SMEs) across the UK, techUK creates a network for innovation and collaboration across business, government and stakeholders to provide a better future for people, society, the economy and the planet. By providing expertise and insight, we support our members, partners and stakeholders as they prepare the UK for what comes next in a constantly changing world.

techUK's mission is to champion our members and their technologies, preparing and empowering the UK for what comes next. By doing so, we can deliver a better future for people, society, the economy, and the planet. We are committed to supporting emerging social innovators who are tackling today's most pressing challenges through technology, while also demystifying and unlocking tech's potential, making it approachable and accessible for everyone.

The outcomes of this consultation will have a major influence on the UK's future competitiveness for technology investment, which to date has been a significant contributor to economic growth.

The UK tech sector is a modern economic success story, with its Gross Value Add (GVA) contribution to the economy rising by over 25% from 2010 to 2019 and now exceeding £150 billion per year. techUK's own members employ 1.1 million people and had a combined turnover of £329 billion in 2023 with an estimated annual growth rate of 10%. The UK's tech sector has also consistently grown faster than the wider economy, with the sector reaching a combined market valuation of \$1.1 trillion in Q1 2024.

techUK and its members are available to discuss matters considered as part of this consultation, and the technology sector's experiences with them if that would assist the CJC Working Group.

techUK considers that litigation funders should be subject to statutory regulation

techUK is grateful for the opportunity to respond to this CJC Working Group on third-party litigation funding (TPLF). The TPLF sector is growing very rapidly, as is expensive and expansive litigation, much of which imposes costs on the technology sector. Even aside from the technology sector, lack of regulation of TPLF causes numerous problems in and of itself. This review is therefore timely, and we welcome the thoroughness of the Working Group's approach.

Our submission is based on the experience of techUK's membership. In this response we do not follow the ordering of the questions in the consultation as many of the questions are not apposite to the technology industry. Rather, this response sets out techUK's views on key themes arising from the growth of TPLF and its lack of regulation.

techUK supports statutory regulation of TPLF. This is for the following core reasons:

1. TPLF has now grown into a significant industry in of itself. The 2009 review of litigation costs (the "Jackson Report")¹ considered statutory regulation of TPLF but rejected that approach

¹ [Jackson Report](#)

because at that time the TPLF industry was “*still nascent*”² but that “*if the use of third party funding expands, then full statutory regulation may well be required...*”³ Owing to lack of transparency, the size of the litigation funding is unclear but it is clear that it has grown very significantly.⁴ On this basis alone, TPLF should be regulated.

2. By its nature, litigation brings significant risks. Whilst law firms owe duties to their clients, litigation funders do not owe any duties to funded parties other than those that are negotiated contractually. But many funded claims are brought on behalf of consumers where there is significant asymmetry of negotiating power between the funder and the consumers and no evidence of negotiation. Relatedly, it is incongruous that consumers should have specific statutory protections in almost all areas of commerce but not in funded litigation particularly given that litigation is inherently risky.
3. The current “self-regulation” model and the voluntary code of the Association of Litigation Funders is not fit for purpose. First, the terms of the voluntary code suffer from significant gaps⁵ and so is inadequate even for funders that agree to its terms. Second, many TPLF providers do not subscribe to the code and so are completely outside the remit even of the light touch self-regulation.
4. Lack of regulation of TPLF is bad for the reputation of the English judicial system. This reputation has taken many hundreds of years to establish, but must be carefully protected. Harm to its reputation is bad for the rule of law and therefore commerce as a whole. The TPLF industry should welcome sensible regulation in protecting the interests and reputation of TPLF operators and users of its services.
- 5.

techUK considers that regulation of TPLF should comprise at least the following elements:

- (i) With statutory regulation, a regulatory body must take responsibility for regulating TPLF providers. It seems sensible that this should be the Financial Conduct Authority. Operators of TPLF will require licences and must abide by relevant regulations.
- (ii) Transparency is critical. There is very little publicly available information on the TPLF industry which, in of itself, causes difficulties with regulating it.
- (iii) TPLF providers should be subject to capital adequacy requirements.
- (iv) TPLF providers should be subject to anti-money laundering rules.
- (v) Users of TPLF should take independent legal advice in order for the funding agreement to be legally enforceable.
- (vi) Funded parties should be entitled to a minimum 50% share of any proceeds of litigation (whether in damages or settlement).
- (vii) Funders should owe a fiduciary duty to funded parties.

² Jackson Report, paragraph 2.4.

³ Jackson Report, paragraph 2.4.

⁴ The TPLF “*industry in England and Wales has now grown to become the second-largest TPF market in the world.*” (The Third Party Litigation Funding Law Review 2022 (6th Edition), by Simon Latham and Glyn Rees, [The Third Party Litigation Funding Law Review 2022 \(6th Edition\) - Augusta | Litigation Funding | Litigation Finance | Arbitration Funding | Litigation Funder](#)). In 2022, the TPLF market was estimated to be worth £4.5bn and PwC UK predicted growth at a compound annual growth rate of 8.7% over five years to £3.7 billion by 2028. (Strategy&, UK Legal Services Market Report 2022, PwC UK, <https://www.pwc.co.uk/industries/assets/uk-legal-services-market-report-2022.pdf>.)

⁵ For example, there are no provisions imposing any requirements to avoid money laundering.

Access to justice

The rule of law is fundamentally important to all areas of commerce. Investment requires predictability and contracts must be respected and enforceable. Without this predictability investors will not apply their capital and commerce will weaken including from lack of R&D. This would harm both the technology sector but also the broader economy leading to lower competitiveness and fewer employment opportunities.

An essential element of the rule of law is access to justice. This is critical both for individuals and for businesses. Where rights are arguably infringed, there must be an independent adjudicator or court that can efficiently and transparently determine the issues between the parties. Litigation should always be a last resort after ombudsmen and consensual methods have been attempted.

It is not clear whether or not TPLF in fact assists with delivering access to justice. TPLF certainly supports litigation, but increased litigation does not necessarily equate to more access to justice. Most industries and sectors, including the technology sector, are measured by reference to their outputs. TPLF should also be considered by reference to its outputs: do funded claims deliver better outcomes for parties using TPLF? techUK is not aware of any research addressing this question.

TPLF is an investment activity and exists to maximise returns on its investments. Access to justice might be a byproduct of TPLF, but it is not its purpose because TPLF operators are not charitable. Indeed, from the limited public information it appears that TPLF providers are highly profitable.⁶ TPLF providers are therefore incentivised to seek the most profitable investments and will therefore not fund meritorious claims that are not profitable. Unprofitable but meritorious claims would lead to access to justice if funded. None of this is intended to be a criticism of those that operate in the TPLF industry, but rather it is a recognition that it does not exist to provide access to justice. Indeed some claims supported by the TPLF industry achieve very poor results for the funded parties. In the high profile sub-postmasters horizon claim it was reported that only 20% of the gross proceeds went to the funded claimants with 80% going to the funders and lawyers and that each claimant received approximately £20,000⁷ while the funder made a profit of £24 million.⁸ Such outcomes have many causes, but the probability of bad outcomes can be reduced by sensible regulation. Thus, proportionate regulation of TPLF can improve access to justice.

techUK is also concerned by the control that TPLF providers exercise over funded litigation. The high profile Merricks v Mastercard case is a very public example of this issue. It had been reported that the litigation funder in that claim, Innsworth, sought to block the settlement in principle agreed between Mr Merricks and Mastercard. The lawyer for Mr Merricks has issued a number of statements including that, *“The [funder’s] decision to oppose the settlement and to go public with that, attacking Mr Merricks, is the latest in a sustained campaign it has engaged in to inappropriately pressure and seek to influence Mr Merricks’ decision making in order to take control of the litigation... The role of litigation funders, and their ability to seek to influence and control litigation so as to advance their financial position over and above all other considerations, raises important public policy issues that go*

⁶ Burford’s pre tax profit for 2022 was \$97,459,000.

⁷ Post Office and Horizon - Compensation: interim report, House of Commons Business, Energy and Industrial Strategy Committee (22 February 2022)

< <https://publications.parliament.uk/pa/cm5802/cmselect/cmbeis/1129/report.html> >

⁸ “Therium’s fee was in fact slightly less than £24 million”: [Litigation funding cap can only help defendants with deep pockets.](#)

to the integrity of the collective action regime.”⁹ Clearly an effort to block a settlement is an effort to exercise control, but this statement refers to far broader conduct, of “a sustained campaign... to take control of the litigation...”.

TPLF and the innovative tech sector

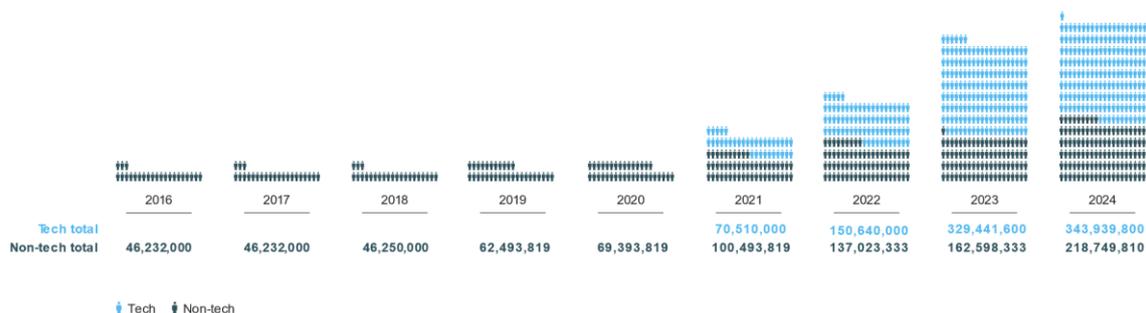
TPLF is an extractive industry. It invests in litigation to achieve a return. The return is typically calculated by reference to a multiple of the funder’s investment or a percentage of the settlement or damages sum. Like litigation TPLF is zero sum: it transfers capital as between the parties to the litigation and in the journey both parties must pay their advisors. This does not contribute to economic growth. That is not to say that dispute resolution does not serve a purpose. As noted above, the rule of law is essential for commerce and this requires a method for dispute resolution. But the process of dispute resolution and investment by TPLF providers does not contribute to economic growth.

This can be contrasted with the technology sector which, as described in our introduction, employs 1.1 million people from techUK’s members alone, with a combined turnover of £329 billion in 2023 and an estimated annual growth rate of 10%

The tech sector is particularly targeted by “opt-out” class actions and it is questionable whether “opt-out” class actions deliver access to justice

The tech sector is the main target of opt-out competition class actions. As indicated in figure 1, competition class actions encompassing nearly 350 million class members have been filed in the UK since 2015. The UK tech sector, and investors in the UK tech sector, are increasingly grappling with overseas competition and regulatory change. But the exponential growth in opt-out class actions is a particularly British concern, and techUK is seriously concerned about its impact on the UK’s competitiveness relative to other jurisdictions that are competing to attract investment.

Figure 1: Cumulative Class Size in UK Competition Appeal Tribunal Collective Proceedings



⁹ Tinson A, “Willkie hits back at litigation funder over Merricks/Mastercard settlement” *The Lawyer* (December 4, 2024) <<https://www.thelawyer.com/willkie-hits-back-at-litigation-funder-over-merricks-mastercard-settlement> | The Lawyer >

Not only is the technology sector disproportionately targeted by opt-out class actions, but it is highly questionable whether these claims will – or can – deliver any meaningful access to justice.

At settlement or after a damages award opt-out class actions have a distribution stage and most claims require class members to opt-in at that point, i.e., they must come forward with the necessary evidence to show they are class members and are entitled to a share of the proceeds. Because the per capita damages are often very small there is limited incentive to opt-in and so distribution levels are low. In 2019 the U.S. Federal Trade Commission published a comprehensive study showing that the median take-up rate for consumer class actions was just 9%.¹⁰ The UK's CPO regime has seen very few settlements to date, but settlement documents filed in the Merricks v Mastercard claim show that the claims administrator Epiq anticipates a distribution rate of just 5%.

Thus, these incredibly expensive class actions that are targeting the technology sector at the expense of investment are completely ineffective at delivering access to justice.

techUK's proposals for regulating TPLF

In this section, we provide a little more detail on the proposals for regulation set out in the summary above.

- (i) With statutory regulation, a regulatory body must take responsibility for regulating TPLF providers.

With mandatory regulation it will be important to have a regulator in place to ensure TPLF regulations are complied with. We think it both unlikely and unnecessary to establish an entirely new body. We think the most logical body to regulate is the Financial Conduct Authority. As its activities are funded by the parties it regulates, this can be achieved without increasing the burden on taxpayers.

It is important that users of funded litigation are able to complain to the regulator and that the regulator will investigate. In funded litigation, the court is adjudicating between the funded claimant(s) and the defendant(s). In the currency of claims, the courts are not there to adjudicate as between the funded parties and the funder. Those disputes "might" arise, but funded parties, particularly consumers, may be very cautious about taking highly litigious TPLF providers to court. Thus it is essential for the credibility of any regulatory regime that funded parties can complain to the regulator and that it will investigate.

- (ii) Transparency is critical. There is very little publicly available information on the TPLF industry which, in of itself, causes difficulties with regulating it.

Where a party is using TPLF that fact, and the litigation funding agreement, should be disclosed to the court and to the other party. It will be permissible to make minor redactions to elements of such agreements if such information could be used by a defendant in the defence of its claim. Lack of transparency is a frequent complaint and techUK is not aware of any reason why it should continue.

¹⁰ Federal Trade Commission, "Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns" (2019) <https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf>

- (iii) TPLF providers should be subject to capital adequacy requirements.

techUK considers this to be an uncontroversial proposal because the voluntary code of the Association of Litigation Funders has requirements for capital adequacy. Capital adequacy is important to protect the funded parties and also to avoid wasted court time if a funder collapses.

- (iv) TPLF providers should be subject to anti-money laundering rules.

techUK considers this an important issue. Many TPLF providers are based in offshore and low transparency jurisdictions, some of which are used to launder money. Solicitors are subject to anti-money laundering rules but in litigation the TPLF provider is not the client of the solicitor and so the solicitors' duties are not directed to the TPLF provider.

techUK is not aware of any reason why TPLF providers should not be subject to anti-money laundering rules and application of such rules may reduce financial crime and certainly will reduce the risk of reputational damage to the UK's judicial system.

- (v) Users of TPLF should take independent legal advice in order for the funding agreement to be legally enforceable.

techUK is aware that the voluntary code of the Association of Litigation funders permits the funded party to take legal advice on the implications of the funding agreement from the lawyer that will represent the funded party in the claim. techUK does not consider this to be an adequate safeguard. The solicitors bringing the claim are not disinterested, they can only make money if the claim proceeds. Litigation is serious and has serious risks and so, in order for funding agreements to be legally enforceable, techUK considers that the funded party must take truly independent legal advice. This will come at a small cost, which can be paid for by the litigation funder if necessary.

- (vi) Funded parties should be entitled to a minimum 50% share of any proceeds of litigation (whether in damages or settlement).

techUK considers that in order to improve the correlation between use of TPLF and access to justice, those that use funded litigation should be entitled to a minimum of 50% of any settlement or award of damages. Claims where smaller proportions are returned to funded parties do not deliver access to justice in any event, so techUK does not think there can be sensible resistance to this proposal.

techUK prefers a minimum return to funded parties rather than a cap on the return to TPLF providers. One problem with the latter is that the TPLF provider is not the only financial stakeholder on the claimant side. If a cap of 50% was imposed but only on the TPLF provider, the gross return could also be reduced by payments to the claimant law firm and possibly also the TPLF provider (e.g., the sub postmaster case). With a minimum return to the funded party the TPLF provider, claimant law firm and ATE provider may need to negotiate between themselves but they are well used to those discussions.

- (vii) Funders should owe a fiduciary duty to funded parties.

techUK considers that a way to improve the challenge of conflicts of interest as between funders and funded parties is for the funders to owe a direct fiduciary duty to the funded party. Imposing a fiduciary duty on funders would require they act in the best interests of the funded parties, thereby reducing the likelihood of conflicts of interest and enhancing the credibility of the judicial system.

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In conclusion, statutory regulation of TPLF is essential to protect consumers, enhance transparency and accountability and maintain the reputation of the English judicial system. We do not consider that the proposals above to be particularly onerous, and – in fact – having well designed regulations also benefits the TPLF industry as a whole. techUK urges the Civil Justice Council to consider these recommendations to ensure a fair and balanced approach to litigation funding