

The consultation closes on **Monday 3 March 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:	Lucy
Last name:	Anderson
Location:	London
Role:	In-house lawyer
Job title:	Senior Lawyer
Organisation:	Which? (Consumers' Association)
Are you responding on behalf of your organisation?	Yes
Your email address:	

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.

3 March 2025

Consultation response

Which? response to Civil Justice Council Review of Litigation Funding Consultation

Introduction and background

Which? is pleased to respond to this consultation and to contribute to the work of the Civil Justice Council on this review, which we see as important as part of securing better access to justice and effective redress for consumers whose legal rights have been infringed and deterring infringements in the first place.

Which? (now headed by The Consumers' Association, a UK charity) was founded in 1957 to further the interests of consumers. We are the largest independent consumer group in the UK, with over half a million members and paid subscribers to our services, as well as nearly three million newsletter recipients. The charitable objectives of the Consumers' Association include to, "uphold and promote compliance with consumer laws, regulations and public policies ... for the benefit or protection of the rights of consumers". We have been taking a close interest in issues relating to litigation funding, collective actions and access to justice for many years, including on the development and implementation of many relevant aspects in this field, including the collective actions regime in competition law cases, data protection rights, and the enforcement and dispute resolution provisions of the Digital Markets, Competition and Consumers Act 2024.

The Consumers' Association also undertakes strategic litigation for the benefit of consumers where appropriate and feasible, including through formal interventions in the higher courts. We are currently the class representative in the case of Consumers' Association v Qualcomm Incorporated¹ and the proposed class representative in the case of Consumers' Association v Apple², which are both funded by third party litigation funders. In addition, we recently intervened in a key case that was heard by the Supreme Court regarding consumers who have fallen victim to payment scams³.

¹ <https://www.catribunal.org.uk/cases/13827721-consumers-association>

² <https://www.catribunal.org.uk/cases/16897724-consumers-association-which>

³ In [Phillip v Barclays Bank UK PLC](#), [2023] UKSC 25.

We are an active member of the European Consumer Organisation, BEUC, which is participating in related EU discussions about litigation funding.

Summary

Especially in the absence of other means of supporting litigation for public interest reasons, such as funding grants or statutory protection against adverse legal costs, third party litigation funding should provide a crucially important mechanism to facilitate consumer cases. In our experience, without access to third party litigation funding, consumers' already limited ability to access justice and assert their legal rights will be curtailed, if not effectively extinguished in many cases.

Within the current legal framework, large-scale consumer redress through the courts is most efficiently achieved through collective proceedings. However, we agree with, and our experience supports the conclusion of, Professor Mulheron that at present there are 'no ready alternatives available' to fund collective proceedings to enforce consumer rights⁴.

Any further regulation of litigation funding should therefore seek to maintain, or better still, enhance, its role facilitating access to justice, and in particular, bear in mind the desirability of its continuing availability for consumer groups, reputable consumer representatives and other charitable or 'public interest' organisations. We see third party litigation funding as a necessary part of supporting certain types of litigation and so we support a regulatory approach that encourages this. It would also be helpful to provide greater certainty where possible that funding will in principle be available for the duration of a claim, and the terms on which the funding is procured remain constant.

In addition, third party litigation funding will only help achieve the important goal of supporting access to justice if the litigation is well managed, with the courts playing an important role in ensuring that cases are run effectively and efficiently, and that funded parties have equality of arms against those able to self-fund. This may need to include deep pocketed defendants being curtailed from tactics which unnecessarily lengthens litigation or pushes up a claimant's costs and prevents access to legitimate information required for a claimant to make out their claim.

The concept of consumer law breaches is broad in nature and includes many different causes of action. For this reason, it is important to design any framework surrounding third party funding with this variety in mind.

⁴ Mulheron, 28 March 2024, '[A review of litigation funding in England and Wales](#)', at p. 17.

There should be better and more systematic data gathering by the courts and the Ministry of Justice about types of claims, sources of funding, and the value and terms of that funding (including adverse costs protection), at all levels of the civil justice system - it is crucial that any changes imposed on the UK litigation funding market are supported by evidence, as opposed to unsubstantiated assertions.

Responses to consultation questions

We have taken account of the consultation questionnaire's footnotes and guidance when answering the questions below, but have concentrated only on the questions most relevant to the remit and activities of Which?. If there is sufficient time available, we would also suggest that the CJC Working Group considers consulting further on any proposed recommendations following consideration of views received in response to this consultation.

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

Third party litigation funding is currently instrumental to bringing legal claims to assert individual consumers' rights and seek large-scale redress. Without third party litigation funding consumers' access to justice will be curtailed, if not effectively extinguished in many cases.

It is very difficult in the UK for individual consumers to enforce their legal rights, for example in relation to unfair contract terms, defective products or services, anti-competitive conduct, data breaches and misuse or compensation claims against airlines or travel companies. In most cases such claims will not be of high value, which can deter potential claimants, nor be subject to enforceable alternative dispute resolution schemes; they may involve complex legal issues and/or require costly and complicated expert evidence. Even for those who are willing and able to go to a county court, the most recent data, for the third quarter of 2024, shows that the average time taken for small claims to go to trial is still almost a year, and more complicated cases will take much longer⁵.

Where a large number of consumers are affected by a particular legal breach, third party funding will be instrumental if the mechanism to assert their rights and obtain redress requires court or other adversarial proceedings. But contrary to how some

⁵ <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-july-to-september-2024>

discuss funding, it is difficult and time-consuming to obtain. In reality, unless aggregate claim values are high - typically in the tens or even hundreds of millions of pounds - funding will not be available because third party litigation funders require a commercial return on their investment and the costs of litigating in the UK are so high (also typically in the millions of pounds for complex claims, such as competition collective actions in the Competition Appeal Tribunal).

In addition, many factors will impact on the commercial assessment, such as likely take-up by claimants, prospects of success, availability and costs of adverse costs protection, as well as factors internal to the proposed funder which may not all be transparent to the claimant. However, the commerciality threshold is more likely to be met in opt-out cases, such as those that can be brought in the Competition Appeal Tribunal for breaches of competition law, than in opt-in cases because the class is larger and more certain, and does not require the very costly step of conducting a bookbuild (the process of advertising and registering claimants to a claim). Indeed, we have investigated and been presented with multiple cases where the commerciality threshold has not been met, despite the merits. As a result, and based on our experience and visibility of issues affecting consumers, funded cases only reflect a small portion of potential large-scale consumer infringement cases. Meaning that even though third party litigation funding exists in the UK, many meritorious claims still go unaddressed.

Having said that, third party funding does provide the potential for access to justice in many of those high-value cases, which would not otherwise be brought. To help address the issues discussed above, Which? has long maintained that 'opt-out' collective redress rights similar to those established in competition law cases should at a minimum be extended to breaches of consumer protection laws. This would provide in many cases a better and more efficient mechanism for addressing widespread instances of consumer detriment resulting from legal breaches than thousands of individual complaints or actions.

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

For collective proceedings cases involving consumers, third party funding may assist in promoting equality of arms, but it is by no means assured. This dynamic is exacerbated in circumstances where funded claimants are not industry participants (with reference to the defendant(s)) and reliant on disclosure from defendants to help substantiate their claims - a common feature of competition collective actions. Access to funding can

enable those bringing claims on behalf of consumers to instruct experienced, high quality legal advisers and experts, that the consumers individually would not have the financial means to engage. It can also fund adverse costs protection so as to protect consumers or their representatives from what would otherwise be an unacceptable level of financial risk given the extremely high costs of litigating in the UK courts. This therefore helps level the playing field between consumer claimants and well resourced defendants.

However, funding is not unlimited and funded claimants are constrained by their litigation budgets agreed with their funder(s). As a result, they are vulnerable to defendants (often large multi-national companies) with seemingly unlimited litigation budgets weaponising this during litigation by seeking to delay and increase claimant costs, for example through appeals, extensions of time and refusing to concede or negotiate on issues capable of resolution by agreement (and which ultimately are resolved). That is not to say that a defendant's actions will always be inappropriate, but that they put pressure on litigation budgets and may therefore create leverage to extract an outcome more beneficial to the defendant than if claimant funding matched the defendant's. Even absent that strategic approach, well-resourced defendants still have more freedom as to how the litigation is to be conducted (including pursuing any procedural application or appeal options) without the constraints of funding and adverse costs arrangements, subject of course to the usual judicial oversight. In addition, funders and insurers may sometimes act in a way which is not beneficial for the claimants as a group.

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

In cases where third party funding may be feasible, this may help to ensure rigorous assessment of the merits of the case at an early stage, and to encourage careful pre-planning on all aspects of managing the case, including in relation to process, budgets and strategy. This is because it is not in commercial litigation funders' interests to fund unmeritorious claims (nor is adverse costs protection, in particular, 'after-the-event' insurance, likely to be available for such claims for the same reason). However, we agree that cases involving large collective actions are very challenging to manage, including on costs budgeting, and we note the findings of the research undertaken by Professor Mulheron for the Legal Services Board in this respect. These highlighted the tensions that can arise between law firms and funders about own-side costs management, whilst recognising that funders should be flexible particularly around events, such as unexpected hearings or disclosure requests.

It should also be recognised that private enforcement of the law by individual claimants, including with the assistance of third party litigation funding, can help complement enforcement by regulators, who will not have the resources, flexibility or capability within their own priority work areas to deliver redress for consumers. For example, while the Competition and Markets Authority may fine an undertaking for anti-competitive behaviour, it cannot usually deliver compensation for individual consumers who have been harmed by the same legal breach.

The market for litigation funding is a growing one, which may be said to be beneficial for economic growth. However, it will only help achieve the important goal of supporting access to justice if the litigation is well managed with the courts playing an important role in ensuring that cases are run effectively and efficiently, in particular, that costs are managed. This may need to include deep pocketed defendants being curtailed from tactics which both push up a claimant's costs and prevent access to legitimate information required for a claimant to make out their claim.

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? (Question 4)

We agree that, and as also emphasised by BEUC⁶, whatever the position regarding voluntary good practice or regulatory solutions regarding third party funding, there are a number of important points that should be addressed explicitly from a consumer interest perspective. These should include the right for representative funded parties (rather than just their lawyers) to make any significant decisions about the litigation, procedures for management of conflicts of interest, transparency regarding information about funders (including on their governance and standing) and assurance as to adequacy of funding capital, if necessary subject to confidentiality obligations. Similar conclusions have been arrived at by the European Law Institute in their recently published report on principles that should govern third party funding for litigation, who also highlighted that the concept of consumer law breaches is very broad⁷ and covers a wide variety of possible causes of action⁸. For this reason, it is important to design any framework surrounding third party funding with this variety in mind.

It would also be very helpful to have better and more systematic data gathering by the courts and the Ministry of Justice about types of claims, sources of funding of claims,

⁶ BEUC, 21 November 2024, '[Justice unchained: BEUC's view on third party litigation funding for collective redress](#)'.

⁷ Many relevant consumer rights enactments are set out in Schedule 15 to the Digital Markets, Competition and Consumers Act 2024.

⁸ European Law Institute, December 2024, '[Principles Governing the Third Party funding of Litigation](#)', at p. 56.

and the value and terms of that funding (including adverse costs protection), at all levels of the civil justice system. This would enable more evidence-based decision making about the regulation of third party litigation funding, as well as how the costs of litigating in the UK impact litigants or potential litigants.

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

In general, we support the Government's Better Regulation Framework⁹ and the National Audit Office Principles of Effective Regulation¹⁰, particularly as regards ensuring meaningful and timely engagement and consultation with stakeholders. In this context, it is important that any proposed regulatory changes (or recommendations for self-regulation) on third party litigation funding are fully consulted upon, including with any consumer or other civil society organisations supporting individuals with legal actions or conducting strategic litigation.

Moreover, Which? as well as a number of industry voices, would make the case that carefully considered and appropriate regulation relating to consumer protection (including the funding of claims or enforcement of rights) helps provide greater legal certainty and a level playing field, and therefore enables fair competition, innovation and growth¹¹. Consumers will also benefit from having express safeguards by way of regulation or agreed criteria that are based on due diligence standards and value for money to a group of claimants.

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? (Question 9)

Even where the merits of a claim seem good, for organisations like Which? the adverse costs risk of losing a case will be a significant deterrent factor in seeking justice for consumers, and we are usually not in a position to pay large upfront 'after-the-event' insurance premiums without additional funding. In terms of the impact on third party funding, the recoverability of adverse costs makes the funding more expensive because of the need to factor in the cost of premiums for 'after-the-event' insurance (some proportion might be deferred but not 100%). In some cases, initial premiums may need to be supplemented later in the proceedings, which might impact the funding budget and can be a time sensitive process. Disputes between parties in legal proceedings

⁹ <https://www.gov.uk/government/publications/better-regulation-framework>

¹⁰ <https://www.nao.org.uk/insights/principles-of-effective-regulation/>

¹¹ For example, in our recent essay collection, November 2024, '[Consumer Protections for Economic Growth](#)'.

about sufficiency of adverse costs cover have the potential to be used as a tactical lever which might unnecessarily increase the costs of claims or leverage an outcome more favourable to the defendant(s) than would otherwise be the case. In the competition collective actions regime in particular, where class representatives are not private litigants but performing a public function, there is justification for questioning whether the current costs regime should be re-considered so as to better manage the costs of these claims and support the success of the regime.

Should a funder's return on any third party funding arrangement be subject to controls, such as a cap? (Question 12)

We agree that it is important for cases involving consumer claims to be conducted so as to ensure that consumers are able to keep as much of the compensation that they are legally entitled to as feasible and fair. However, having a cap on funders' returns may be a blunt instrument with unintended consequences, and so if any limitations are imposed then flexibility is required, and this is best administered by the applicable court or tribunal.

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 (Question 14)

Please see our answers to various other questions, in particular questions 1 - 4 above, and questions 15 and 16 below.

What are the alternatives to third party funding? (Question 15)

There are currently very limited, and often no, alternatives to third party litigation funding.

We have concerns about attempting to encourage or require 'before the event' insurance in a wider context than currently, especially as it may not be as useful as it appears. For example, the official data from the Financial Conduct Authority shows a low uphold rate on legal expenses claims under home insurance policies¹², and it is not clear that merits assessments processes on claims are fair. Standard 'before the event' policies will not provide sufficient cover for litigating complex issues and are not likely to

¹² 56.5% acceptance rate according to the latest data (FCA, 21 August 2023, '[General Insurance Value Measures Data](#)').

be suitable for cases involving harms suffered by large numbers of consumers. In particular, managing possibly thousands of policies individually held by claimants in a group litigation does not seem feasible, and in opt-out claims the individuals concerned are not identified at the outset.

As a charitable organisation with limited resources, funding any strategic legal cases on behalf of consumers is generally not feasible without substantial subsidy arrangements and some means of certainty in advance regarding budgets. This is due particularly to the extremely high costs of litigating in the UK (including costs of instructing external lawyers and experts) and the need to protect against the otherwise unacceptable risk of bearing the other side's costs if the case is unsuccessful.

Potential alternatives such as crowdfunding for donations for cases raise particularly difficult ethical and management issues for charities. Grant funding for strategic litigation is not widely available. Neither are likely to provide sufficient funds to cover the multi-million pound budgets necessary to bring cases on behalf of large groups of consumers. Currently only one organisation is prescribed to receive undistributed funds in competition collective action proceedings. But as no claim has reached this point, this mechanism remains untested. In any event, we consider it important for undistributed funds to be used to promote access to justice in a wide sense and in a way that maximises the benefit to society, including through seeking to achieve systemic change. It may therefore be useful to review the operation of this mechanism to deal with undistributed funds in due course, including the Legal Services Act 2007¹³.

Guideline rates are currently up to £566 per hour for the most experienced solicitors in London, and can substantially exceed that amount in some cases.¹⁴ Barristers are currently not subject to guideline hourly rates at all. It has been well known for many years that the costs of litigating in the UK are extremely high in absolute terms and high by comparative international standards, exceeded only by litigation costs in the USA¹⁵. Whilst some lawyers will be prepared to act pro bono or on discounted arrangements to a certain extent in particular cases, this can not be relied upon generally, and in long-running, complex litigation, even legal advisers acting on conditional fee arrangements are highly likely to require funding to cover the portion of fees not deferred.

¹³ See in particular <https://www.legislation.gov.uk/ukpga/2007/29/section/194C>.

¹⁴ See <https://www.gov.uk/guidance/solicitors-guideline-hourly-rates>.

¹⁵ For example, using liability costs as a benchmark, US Chamber Institute for Legal Reform, June 2013, '[International Comparisons of Litigation Costs](#)'.

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? (Question 16)

In general, we believe it is important to prioritise finding ways to reduce the costs of litigation where reasonable and to provide alternative means of consumer redress, especially through more effective and enforceable dispute resolution options. We also support the greater use of regulators' redress scheme and enhanced consumer measures powers to achieve justice for consumers.

In addition to that, costs capping orders are only now available in exceptional cases¹⁶, and are subject to particularly restrictive rules in judicial review cases, under sections 88 and 89 of the Criminal Justice and Courts Act 2015. Many 'public interest' charities might wish to bring judicial review cases where justified as a result of unlawful governmental or regulator decisions, but these cases are highly unlikely to be of interest to a third party funder as they lack a commercial return.

In this context, it would be helpful if greater consideration could be given to costs reforms, including for example, allowing for costs capping orders to be made more often in appropriate cases, both in judicial review and other legal actions, or for a greater presumption that each side can bear its own costs (therefore moving away from the 'loser pays rule' as a starting point), as for many formal interventions in the higher courts. This could be particularly useful for Which? in High Court enforcement cases, as we are a private designated enforcer of consumer law under Part 8 of the Enterprise Act 2002, and an unfair contract terms enforcer under Schedule 3 to the Consumer Rights Act 2015.

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? (Question 24)

Please see answer to question 16.

¹⁶ See Practice Direction 3E and Part III of the Civil Procedure Rules. The CAT rules do not include a specific costs capping power, and this could be considered.

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? (Question 27)

We support the approach of the Competition Appeal Tribunal under its current rules, including in relation to disclosure and transparency issues, and assessing the strategic sensitivity risk involved¹⁷.

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? (Question 30)

We are supportive of this approach in the Competition Appeal Tribunal rules, as it is a check and balance in circumstances where there might be a conflict of interest/differences between the funder and the proposed class representative (and its legal representatives), and where members of the class are not present. The Tribunal will determine whether the terms are just and reasonable, so there is an independent assessment of the terms of the settlement¹⁸.

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

It is important to recognise that litigation funding is not a homogenous product, nor are funders a homogeneous group. What one funder may be prepared to fund, another may not. Funding discussions between a funder and prospective claimant are also likely to be the subject of confidentiality obligations, and may take place within a time sensitive environment. These can create barriers between comparing, or even obtaining, different funding options, assuming options exist.

There are some possibilities for comparing funding through specialist funding brokers, but this is likely to add extra costs or commissions to the process overall, and again it assumes that more than one funder is prepared to fund a particular claim.

Comparability would be improved if template litigation funding agreements could be made more widely available (and were used), whilst acknowledging that actual agreements will vary depending on the circumstances of the parties and claimants, and

¹⁷ As applied for example, in [a ruling in the case of Kent v Apple in 2021](#).

¹⁸ A procedure recently tested in detail in [Merricks v Mastercard](#).

types of action involved. More transparency of funding options and arrangements would also help deter sharp practices and ensure more of a level playing field.

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