

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:	Nicola
Last name:	Critchley
Location:	Manchester
Role:	Partner
Job title:	Partner
Organisation:	DWF Law LLP
Are you responding on behalf of your organisation?	Yes
Your email address:	

Information provided to 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.

DWF Response to the CJC Litigation Funding Consultation

DWF Law LLP is a leading global provider of integrated legal and business services, with over 4,000 people within the DWF Group working globally across over 30 locations. We carry out substantial litigation and advocacy services in all types of proceedings. We have one of the largest dedicated insurance practices in the UK with over 1600 members of staff, providing us with a market-leading capacity to help insurers, loss adjusters, corporate clients, local authorities, and police forces.

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

DWF accepts that third party funding (TPF) has a role to play in securing access to justice enabling cases to be brought which otherwise might not have been possible.

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

As mentioned above TPF allows a claim to be brought that might otherwise not have been possible and so the availability of TPF allows the litigant to bring their claim, fund disbursements and the availability of TPF does promote equality of arms.

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

Different types of funding arrangements including TPF can mean increased access to justice to those with legitimate claims, especially in large group actions, where upfront investment is required as the claimants themselves cannot personally fund the claim, or their solicitors cannot afford the outlay, without any guarantee of monetising claims. There is also benefit that TPF investment can support legal sector growth.

4. 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?

No, the current voluntary regulatory framework for TPF is not sufficient. It is interesting to note that only 16 funders out of 44 TPF in England and Wales are signed up to the Association of Litigation Funders' Code of Conduct. It is also noted that no ALF has been expelled and the sanction fine is £500 so there is no financial deterrent. It should also be noted that the ALF is not an independent body so is essentially self-regulating itself and its members. Other concerns with the current voluntary code is the capital inadequacy in that funders must maintain access to a minimum of £5 million of capital, even funders themselves recognise that this sum is low against a backdrop of increasingly costly collective actions. There are also no provisions in relation to anti-money laundering which needs to be addressed.

Sir Rupert Jackson in his 2009 Review of Civil Litigation Costs report noted that the expansion of TPF may prompt the need for full statutory regulation – particularly so if funders are supporting group actions brought by consumers on any scale. This has occurred. In the circumstances self-regulation is no longer fit for purpose and changes are required.

We would recommend improvements as follows:-

- Regulation by the Financial Conduct Authority (FCA) whilst appreciating that any regulation cannot be too prescriptive and demanding that disproportionately affects the litigation funding market and negatively impacts on access to justice. This should include anti- money laundering obligations in line with all other financial providers.
- SRA need to work in conjunction with the independent TPF regulator to ensure consumer protection.
- The requirement of third party funders to hold a licence issued by an independent regulator to carry out TPF investment in England and Wales.
- More awareness for consumers of the types of funding available and proper guidance and transparency on the funding agreements terms and standardisation like there is with conditional fee agreements. There should also be notice given to the defendants as soon as an LFA is entered into.
- It is important that the consumer is protected. There is potential harm to the consumer including the consumer not getting any explanation of the terms of the funding, the Claimant being at the mercy of Solicitors who have a financial interest in the case and the

funders who want a return on their investment. Claimants may be exposed to adverse costs risks. Settlements can be taken out of Claimant's hands, rights compromised without consent, which can be a feature of mass claims. The Claimant can lose majority of their damages to offset costs.

- There have been some recent high profile cases including *Bates v The Post Office*, the collapse of the SSB Group and the adverse costs consequences of cavity wall claims on their former clients. The headlines surrounding the settlement in *Merrick v Mastercard* have all highlighted the issues with the current regime in not providing sufficient safeguards for the litigants receiving the funding.

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;

There are a number of risks and harms in relation to TPF which include:

- Lack of transparency and understanding on the part of the Claimant.
- Claims being pursued for the funders recovery rather than the individual Claimants as can be seen by the press releases in the Mastercard litigation.
- The availability of TPF allows weak claims to be brought in the hope that the Defendant will settle because the costs exposure of defending is too great.
- Amount of compensation received by the litigant – it can be seen from a number of the high profile cases that very limited damages are actually received by the litigant and that the majority of the compensation is paid to the funder.

- Claimants may be exposed to adverse costs orders if the funder is unable to meet its capital adequacy requirements.
 - Conflict of interests between the funder and the litigant with the funder exerting control over the litigation/settlement negotiations.
- 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;

As mentioned above, independent regulation is required and we consider the FCA is best placed to regulate and the regulator should issue licences to enable funders to operate in England and Wales. In addition there should be regulated capital adequacy requirements, transparency/disclosure requirements around the funding agreement.

- 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.

As detailed above, given the expansion of the litigation funding market we do not consider that voluntary regulation is appropriate. In terms of the FCA, it is already an established body and providing the regulation is not too prescriptive we cannot see that there are any adverse consequences to regulation; in fact it will provide protection to the TPF litigant.

6. Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?

Yes, we consider that the same regulatory mechanism should apply to all litigation funders operating in England and Wales and that our recommendations for transparency and disclosure of funding arrangements together with capital adequacy requirements and consumer protection should apply to all funders.

a. If not, why not?

b. If so, which types of dispute and/or form of proceedings should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?

There should be the same regulatory framework in place for all forms of dispute/proceedings and a mechanism in place for funding arrangements to be clear and transparent e.g. in complex large group litigation cases, cases brought via the Competition Arbitration Tribunal etc, there remains a lack of transparency and no mechanism to request funding details unless requested through the Court and a Judge approves the disclosure of this information.

A system which includes requirements for TPFs to hold licences, caps on return on investment, prohibiting TPFs to control litigation, requires disclosure of funding, and also at the court's request, disclosure to it of an unredacted copy of the funding agreement; funders should be subject to fiduciary duties to funded parties and funders to be jointly liable, with the funded party, for any adverse costs.

- d. 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?

Whilst there should be one overarching regulation for all TPFs, we appreciate that there is a difference in consumer protection required for an individual Claimant vis a vis a large corporate Claimant as is recognised by the distinction in other regulatory obligations, e.g. consumer duty; so it may require additional measures to protect the unsophisticated and/or vulnerable Claimant from risk and harm.

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

It is noted that the European Law Institute recently published its report in December 2024 on principles governing the third party funding of litigation and that could be used as a guide to underpin the 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?

There needs to be transparency when claims are funded by a TPF and the Court could actively control costs of litigation by proactive costs management in the form of costs budgeting. That said, costs budgeting only applies to cases up to £10 million and only in claims that reach a CCMC. A large amount of costs are incurred in the pre issue space. The changes proposed to the PAPs requiring dispute resolution and stocktake may help claims settle earlier and help control costs.

There is a concern that the relationship between the level of costs and third party funding is self-perpetuating in that as litigation costs rise so does the need to secure TPF to finance the costs and proceed with the claim and that in turn drives inflation in both costs and damages to ensure a sufficient return for the funder and should at the same time ensure sufficient recovery of damages for the Claimant.

- b. What impact, if any, does third party funding have on the level of litigation costs?

The level of impact differs dependent on the type of claim and the defendant involved in proceedings, and if backed by Insurers. When there is uncertainty regarding funding arrangements, there can be a lack of appetite for defendants to want to enter into protracted and expensive litigation if there is no guarantee any costs could be paid out on conclusion of the claim. If backed by funders, this provides security for costs, however, this will likely drive more claims into expensive litigation, especially as the funders will want a return on their investment. Self-funded defendants, or public bodies may not want to take defend costly litigation and therefore settle non-meritorious claims to save costs, or due to any public perception of spending public money.

- c. To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?

As above, the current regime provides a lack of transparency, and therefore an uncertainty as to the total cost of litigation a defendant is faced with. This uncertainty may lead to a decision to settle cases which lack merit as there is commercial benefit to settling a claim. If a claim is funded, as stated above, the funder will want a return on investment so claims values may be driven up to increase returns, leading to an overall increase of costs and claims value.

- d. How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?

Any regulation will have an impact. The current system has led to a large increase of group actions without any regulation or oversight. This means there are more claims, some without merit

impacting the court's time and resources and leading to large legal spends for insurers and self-funding defendants, and not always providing the necessary consumer protection needed for the funded litigant. This could be reduced or avoided if regulation was in place.

- e. Should the costs of litigation funding be recoverable as a litigation cost in court?

No they should not be recoverable as the litigation cost.

- (i) If so, why?
- (ii) If not, why not?

This would unravel the LASPO reforms which have removed the Claimant's ability to recover success fees and after the event insurance premiums in order to level the playing field between Claimants and Defendants whilst recognising access to justice. Permitting recovery of third party funding costs would result in significant disproportionate levels of costs payable by the losing Defendant and would cause significant injustice. It would also result in a significant financial interest in the litigation and potential gaming, with the TPF controlling the litigation, conflicts of interest and poor behaviours and bad outcomes for consumers.

- 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.

There has to be balance and fairness to both parties in the litigation in order to achieve access to justice and the Defendant must be protected from unmeritorious or vexatious claims. The Defendant's ability to recover its costs and/or seek security for costs provides a level playing field between the Claimant and the Defendant and this right of recovery should remain unchanged.

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

Yes. Third party funders should remain exposed to paying the costs of proceedings in full.

11. How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?

We have no visibility on this and cannot comment on this question.

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

If so, why?

Yes, to ensure the litigant is protected, they receive an appropriate amount of compensation and to ensure that costs are proportionate.

13. If a cap should be applied to a funder's return:

- a) What level should it be set at and why?

This would need proper review and careful consideration but guidance could be taken from other funding financing which is subject to caps; the conditional fee agreements (100% of base fees) or damages based agreements (50% of damages).

- 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?

Yes, this should be dealt with by legislation.

c. At which stage in proceedings should the cap be set?

The cap should be set at the earliest opportunity in the pre-litigation stage.

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?

The Claimant should be compensated appropriately and protected to ensure they are not at harm or risk.

e. Should there be differential caps and, if so, in what context and on what basis?

It may be appropriate to have differential caps dependent on the type of Claimant, i.e. unsophisticated Claimant v. corporate entity.

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.

Advantages:

Supports access to justice by enabling claims to be brought that might otherwise not have been possible in the absence of TPF.

Facilitates collective actions.

The drawbacks are:

Might not always protect the unsophisticated or vulnerable Claimant.

Potential conflicts of interest between litigants and funder.

Portfolio litigation can result in weak claims being pursued and Claimants left exposed to adverse costs (e.g. SSB cavity wall litigation).

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.

There are various alternative methods of funding including:

BTE cover.

Trade Union membership.

CFAs.

DBAs.

Crowd funding.

All of the above have a role to play in providing access to justice, some will require a reduction of damages in the form of a success fee and others, such as legal expense insurance often have a cap on indemnity of £100,000. One of the drawbacks of litigation funding is the cost of it to the Claimant and the limited amount of damages that the Claimant may recover compared to some of the alternative options.

- 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.

Yes. All of the options listed can complement TPFs. There is an obligation on the solicitor to discuss alternative methods of funding with their client.

- c. If so, when and how?

At the outset of the case when funding is considered.

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?

As mentioned above, TPFs are the most costly to the Claimant as they receive significantly less in compensation than the other forms of funding referenced above. We consider that litigation funding should be the last resort when other funding options have been exhausted/are not available.

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?

Review the success fee cap in mesothelioma claims as with inflation and the change in the value of claims generally the £250,000 limit is too low and a success fee of 100% should not apply to damages at that level but the cap should be increased to damages of £500,000.

As a general observation the CFAs and to a lesser extent DBA regimes are effective ways of funding claims. DBAs haven't been as popular and the proposals for reform should be looked at again in this area.

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?

We cannot see a public mandatory legal expense insurance scheme being feasible due to the public funding required through taxation or levy to establish the scheme. We do, however, agree that there should be promotion of the benefits of legal expense insurance for individuals and businesses.

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?

After the event insurance provides protection to the insured against adverse costs orders. It should be noted that in personal injury litigation the introduction of QOCS limits the recovery of adverse costs orders to offset against the Claimant's damages and/or costs.

Whilst we believe that ATE has a role to play to protect against adverse costs orders, the costs of the ATE should not be recoverable from the paying party.

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

We do not have experience of this so are unable to comment.

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

In terms of portfolio funding the recent collapse of SSB on the cavity wall insulation claims highlights the need for regulation and also scrutiny by the SRA.

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?

No

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?

The CPR rules should be amended so that the Defendant is notified of the existence of TPF and this should be a requirement in the Pre-Action Protocols. As highlighted above, costs in TPF cases can be disproportionate to the nature of the case and there needs to be closer scrutiny and active costs management by the Courts of the costs of claims funded by TPFs with a costs budgeting process extended to TPA funded group litigation.

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?

Any funding arrangements should be disclosed.

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?

The funding arrangement should be disclosed and there needs to be greater awareness and transparency for the Claimant as to their funder's financial security.

The court also has an important role to play in controlling costs and in group litigation there should be greater emphasis on the representatives and funders to evidence why the claimant pool has been chosen.

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?

The Court has a vital role to play in controlling the pre-action and post litigation conduct and can do so through active case management and costs control including costs budgeting in all high value claims and class actions.

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?

This should be disclosed as soon as they have been entered into. This is crucial for a Defendant to understand their potential exposure, risks and opportunities to settle.

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?

Whilst third party funders should exercise no control over litigation, we do not know if that is in fact the case. The role of the funder should be very much like a legal expense insurer in that they are kept informed of the prospects of success and costs incurred.

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

It can be seen from the pre LASPO CFA and ATE regimes that recoverability of costs can have a direct result on behaviours and settlements.

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?

If there is a legislative framework for TPFs then Court approval may not be needed. Our concern with this proposal is that it will add another layer of costs. Whilst there may be some benefit to safeguard Claimants specifically in relation to the apportionment of recovery between the Claimant/their funders if, as detailed above, there is clear legislation, transparency and an understanding by the claimants as to what they have signed up to then Court approval may not be needed. In cases where a party lacks capacity then any award should already be subject to Court approval.

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

Dependent on the nature of any reforms the apportionment between the Claimant and funder.

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?

As detailed above this requires independent regulation.

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

We have no visibility on this and given the limited information in the public domain anticipate that there is a lack of transparency, guidance and easy to digest information to enable the consumer to make informed decisions on the various funding options.

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?

We have no direct knowledge of this as we act for defendants against TPF actions but given some of the high profile cases of late including SSB and Merrick one assumes that matters of conflict will arise.

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.

Regulation as detailed above should help address issues arising from conflicts of interest as will greater transparency of the various funders and their terms and consistency of LFAs⁵

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.

It is difficult to answer this question as there is a lack of transparency as to the nature of the Claimants funding arrangements but high profile cases such as SSB and cavity wall claims are an example of unmeritorious claims being pursued by way of portfolio funding.

Hopefully the changes recommended to the PAPs which will include an obligation on the parties to undertake dispute resolution pre issue and thereafter carry out a stocktake coupled with the courts actively managing breaches of the PAPs with sanctions that have teeth may weed out any unmeritorious claims.

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.

Any form of funding arrangement should be disclosed to the parties as soon as entered into.

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?

There is already an obligation on the solicitor to discuss alternative funding arrangements with their client. As detailed above there is often a lack of understanding on the part of the claimant as to what they have or have signed up to so better guidance and awareness is needed as to what might be available. The legal regulators could support an awareness campaign on this.

General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?¹

No