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:	Tony
Last name:	Lewis
Location:	London
Role:	Lawyer
Job title:	Partner
Organisation:	Fieldfisher
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

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?

   Noting the request at paragraph 2.9 of the Interim Report for evidence on the question of third-party funding arrangements promoting unmeritorious litigation, we consider this unlikely as it is not in the interests of funders to take on litigation which does not have reasonable prospects of success. This assessment is supported by the research of Professor Mulheron, referenced at paragraph 2.17 of the interim Report, suggesting only 3-5% of proposed claims pitched to funders ultimately become funded.

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?

   We would support some regulation of commercial third-party funders.

   We agree with paragraphs 4.1 and 4.3 of the Interim Report that the core purpose of regulation has to be to provide protection from harm or unfairness.

   With those purposes in mind, regulation should seek to protect litigants from, in particular, the following risks:

   (a) A third-party funder not in fact having the funds promised – clearly if a third-party funder is not able to produce the monies specified in any agreement at the conclusion of litigation that is harmful to both claimants and defendants;

   (b) Terms and conditions of agreements being unfair or difficult to understand – if third-party funding agreements are to achieve the aim of improving access to justice, the terms of such agreements need to be fair and transparent otherwise litigants may be reluctant to enter into them.

   At present, we do not consider there is need for statutory regulation. Whilst in time there may come a need for statutory regulation, in-line with the Jackson Cost Review recommendations (noted at paragraph 3.6 of the Interim Report) we consider at the current time self-regulation should be developed further.

[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.

We do not have strong views as to who appropriate regulator of third-party funders would be. However, we note: (a) paragraph 3.1 of the Interim Report records 16 of the 44 funders operating in England and Wales are currently members of the Association of Litigation Funders ('ALF'); and (b) ALF has a Code of Conduct. ALF may therefore be well placed to be built upon so as to provide a proportionate level of regulatory oversight which addresses the two risks outlined above. By way of example, we note the contrast drawn at paragraph 3.22 of the Interim Report between the ALF Code and European Association of Litigation Funder's Code of Conduct, with the latter containing a requirement for its members to provide *"clear and comprehensive"* information to funded parties.

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 proceedings[4] 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 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?

[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.

   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.
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?

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

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?

We consider DBAs could be made more readily available so as to promote access to justice. In order to achieve that objective, we suggest DBAs should:

- Be available:
    - in cases where the relief sought is not financial
    - for defendants
    - for opt-out proceedings
- Utilise the success fee model
- Facilitate payments of costs as a matter progresses ('hybrid DBAs')
- Not include a limit on the percentage

Below we outline our rationale for each of these proposals, noting that many of them align with the thoughts emerging from the Damages-Based Agreements Reform Project.

Linking to our comments on regulation, we also consider that increasing the use of DBAs is likely to promote better terms for claimants and defendants entering into them as there will be more competition in the market.

DBAs for non-financial cases

The is no obvious policy rationale as to why DBAs should be confined to cases where the relief sought is financial in nature. Hence, we consider DBAs ought to be available in cases where the descried remedy cannot easily be ascribed a monetary value.

This would enable parties to agree what 'success' in litigation looked like according to the particular circumstances of their case. The consequence of this would be to make DBAs available in a broader range of cases, thereby promoting access to justice.

In this regard we note, the definition of *"financial benefit"* to encompass *"money or money's worth"* within the Damages-Based Agreement Regulations 2019 ('the 2019 Regulations') as part of the Damages-Based Agreements Reform Project. In order to make DBAs available in non-financial cases we wonder if any new regulations should simply refer to *"benefit"* and leave that as a matter to be defined between the parties.

DBAs for defendants

We also support the availability of DBAs for defendants, provided for by Regulation 3(b) of the 2019 Regulations.

As the Explanatory Note to the 2019 Regulations notes, the references in the Damages-Based Agreement Regulations 2013/609 ('the 2013 Regulations') to *"the sums ultimately recovered"* precludes the use of a DBA by a defendant, save where there is a counterclaim.

Such a restriction does not appear to have been the intention of section 58AA of the Courts and Legal Services Act 1990, which contains no express restriction on the availability of DBAs for defendants. Nor is there any obvious policy rationale for such a limitation.

DBAs for opt-out proceedings

Noting the specific request at paragraph 7.29 of the Interim Report, for comments on the prohibition of DBAs in opt-out collective proceedings before the Competition Appeals Tribunal, we suggest DBAs ought to be available for opt-out proceedings.

We note the comments in the Explanatory Note to the 2019 Regulations which expands, *"for the purposes of consistency"*, the existing prohibition on DBAs in the context of competition law (at section 47C(8) of the competition Act 1998) to representative action under CPR 19.6.

We cannot see a clear policy rationale for the prohibition on the use of DBAs in the context of either category of opt-out proceedings.

Prohibiting DBAs increases the need for, and cost of, litigation funding for opt-out actions because few solicitors will act on full CFAs for opt-out actions when the maximum uplift is limited to 100% of fees given the length of proceedings to date and the risk involved in what are still novel actions (there having been no award of damages to date). If DBAs were available, experience suggests that the return required by solicitors would be much lower than required by professional funders.

The increased need for funding absent DBAs makes it harder to get funding and means that funders become gatekeepers. It is difficult to bring smaller claims even if meritorious.

Accordingly, noting that lifting the prohibition in competition law would require legislative reform, we suggest there are positive reasons to provide for the use of DBAs in opt-out proceedings.

DBAs – Success model

We also support the drafting of regulation 4(1)(a) of the 2019 Regulations which has the effect of moving from the Ontario to success fee model.

The 2013 Regulations, utilising the Ontario model, require a DBA payment to include recoverable costs. The success fee model adopted in the 2019 Regulations is preferable because, as the Explanatory Note observes, it:

> (a) *"… is far easier to explain to clients, particularly those who have had no prior experience of litigation"*;
>
> (b) *"… [removes the risk of] a significant windfall to the losing opponent, by enabling that losing opponent to escape the consequences of an award of recoverable costs against that opponent … [because under the success fee model] recoverable costs are paid in addition to the DBA payment"*
>
> (c) *" … [reduces] the prospect of satellite litigation surrounding DBAs"*; and
>
> (d) *" … is likely to enhance access to justice in low-value claims …"*

This approach may also enable law firms to fund at a lower percentage of damages, if confident the other side is credit worthy and able to pay recoverable costs, thereby enabling a greater number of people to benefit from representation.

Hybrid DBAs

We support the provision of hybrid DBA, allowing legal representatives to enter into agreements with clients for the payments of costs as a matter progresses.

Whilst *Zuberi v Lexlaw Limited* [2021] EWCA Civ 16 confirmed that the 2013 Regulations do not prevent termination payments being made to legal representatives, we support the availability of hybrid DBA being put onto an express legislative basis.

We concur with the comments in the Explanatory Note to the 2019 Regulations that hybrid DBAs:

> (a) *"ensure that, for long-running matters, the solicitor can at least keep some money coming in, albeit at a discounted rate (which money is paid on account, and offset against the DBA payment if it turns out to be irrecoverable in the event of success; and which money is partially retainable if there is no success in the claim)"*; and
>
> (b) *"circumvent the need for solicitors to enter into 'side agreements' with third party funders who pay the law firm the WIP as the case progresses under 'hybrid DBAs', but who then may take percentage cuts from both the solicitor and from the client too."*

We also consider this would be likely to increase the use of DBAs thereby widening access to justice. In turn, this is likely to promote litigants being properly compensated

DBA's not to include a % limit

With some increased regulation and further competition in the market, we consider the restrictions on the amounts to be paid under the DBAs would not need to be prescribed in legislation.

With more competition, the market would decide the appropriate percentage in light of the potential value of the claim, and the prospects of that claim succeeding.

We acknowledge this might be something to consider after the reforms outlined above, when there is greater confidence that there has been an increased use of DBAs.

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.