



Informing Progress - Shaping the Future

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Alignment of FOIL's Consultation Response and the CJC's Final Recommendations on Litigation Funding

Responding to a request from the Lord Chancellor for guidance on clarifying the distinction between litigation funding agreements (LFAs) and damages-based agreements (DBAs) following the UK Supreme Court ruling in *R (PACCAR) v Competition Appeal Tribunal (2023)*, the Civil Justice Council's (CJC) final report on the Review of Litigation Funding is an important moment in the evolution of third-party funding (TPF) in England and Wales.

In assessing the future of TPF, the CJC working party had to consider concerns related to the access to justice, potential overreach of funders and limited consumer protection raised by the current framework whilst seeking to maintain the scale, flexibility and sustainability of the litigation funding market.

Following a consultation period between October 2024 and March 2025, which attracted 84 responses from key stakeholders, including funders, legal practitioners, consumer bodies and regulators, the published reforms represent a balanced, evidence-led approach that allows continued support from funders while recommending greater accountability and oversight.

Additionally, the final report echoes many of the key themes, proposals and concerns highlighted by FOIL in its consultation response submitted in February 2025, underscoring the influence of stakeholder feedback on the CJC's thinking and reinforcing the legitimacy of

its proposed reforms. The key areas in the FOIL response that aligned with the final report include:

Reflection of the ELI Principles

The CJC draws heavily on the European Law Institute (ELI) *Principles Governing the Third Party Funding of Litigation (2024)*. In its response, FOIL endorsed these Principles as a sound basis for balancing consumer protection with market viability. The CJC recommends a new regulatory framework and standard terms for LFAs developed in line with Principles 4 to 12 of the ELI framework, indicating agreement around a principles-based approach that fosters proportionality, transparency and fairness without overburdening the market.

Support for a Light-Touch, Statutory Regulatory Regime

FOIL's response emphasised the inadequacy of the existing voluntary self-regulatory regime, highlighting weaknesses in the oversight and enforcement capabilities of the Association of Litigation Funders (ALF). It supported a shift towards statutory regulation that was proportionate, flexible and sensitive to market dynamics. The CJC's view is nearly identical, recommending a light-touch formal regulatory framework administered via statutory instrument by the Lord Chancellor. Notably, it rejects full Financial Conduct Authority (FCA) oversight at this stage, opting instead for a measured approach with a five-year review period, a position FOIL strongly advocated.

Transparency and Disclosure Requirements

FOIL called for enhanced transparency regarding the terms of LFAs, particularly related to funder fees, risk exposure and capital adequacy. The CJC has endorsed these recommendations in full, with its final report promoting early disclosure of the existence of litigation funding, the identity of the funder and the ultimate source of funding. These disclosures are to be made to both the court and other parties to the litigation; measures FOIL viewed as essential to market integrity and trust.

Codification of the Post-Chapelgate Approach to the Arkin Cap

FOIL supported codifying the post-Chapelgate case law on the Arkin cap to give clarity and consistency regarding a funder's liability for adverse costs. This recommendation is adopted in the CJC's report and calls for formal codification in the Civil Procedure and CAT Rules, aiming to preserve judicial discretion while ensuring greater predictability for all parties engaged in funded litigation.

Enhanced Consumer Protections

The CJC report supports additional regulatory safeguards for consumers, SMEs, and parties involved in collective proceedings, including independent legal advice before entering LFAs, standardised agreement templates and binding dispute resolution procedures.

These are consistent with FOIL's position that unsophisticated litigants require greater protection, particularly given recent high-profile failures that left claimants exposed to costs or receiving only modest damages post-settlement.

Application of Anti-Money Laundering Rules

FOIL's response raised concerns about the absence of anti-money laundering (AML) controls within the current TPF framework. The CJC reforms recommend that AML regulations be formally applied to all funders to address the compliance gap and improve confidence in the market's integrity.

No Regulation of Arbitration Funding

FOIL adopted the view that TPF for arbitration did not exhibit the same systemic risks as litigation funding, which often involves sophisticated commercial parties rather than consumers. The CJC adopts the same view and explicitly excludes arbitration funding from its regulatory proposals, recognising the distinctive characteristics and existing safeguards within arbitral frameworks.

The CJC's final recommendations reveal a strong alignment with FOIL's consultation response and touch upon several other areas of interest to its members:

Recoverability of Litigation Funding Costs

The report acknowledges stakeholder concerns and recommends that litigation funding costs may be recoverable in exceptional circumstances and "*should not be the norm*", ensuring fairness and avoiding the inflation of defendants' cost liabilities. Importantly, it restates the principle outlined in the Jackson Reforms that funding should not shift financial burdens onto opposing parties, something that will be welcomed as a proportionate safeguard that maintains cost predictability in defendant-led litigation.

Conditional Fee Agreements (CFAs) and Damages-Based Agreements (DBAs)

While the CJC proposes no substantial overhaul of existing frameworks, it does recommend a single, simplified contingency fee regime. Furthermore, it advocates for a shift in responsibility for regulation from the Ministry of Justice (MoJ) to the Civil Procedure Rule Committee (CPRC). A review of CFA success fees, especially in mesothelioma claims, is also proposed in the report.

Further recommendations are for the indemnity principle to be legislatively abrogated for CFAs, DBAs, and LFAs, with built-in protections for paying parties to prevent disproportionate cost exposure. This represents a significant shift, particularly in terms of the potential impact on defendants' liabilities and the structure of cost orders.

Portfolio Funding

The report recommends that portfolio funding be treated as a regulated loan product and, as such, be subject to FCA oversight. In addition, it calls for the Government to explore

whether regulatory reform of the legal profession is needed in response to the increased use of such funding models. This may be considered a crucial development, particularly if portfolio-backed firms gain unfair procedural or financial advantages in litigation.

Data Collection and Ongoing Reform

The creation of a Standing Committee on Litigation Funding under the CPRC is proposed with a remit to include collecting data on CFAs, DBAs, LFAs and crowdfunding, monitoring litigation funding trends and making evidence-led recommendations. This points toward a more adaptive regulatory framework that supports an evidence-based and sector-informed approach to regulatory change.

Legal Expenses Insurance (LEI)

The report strongly encourages the promotion of LEI, primarily through home insurance and employment-linked policies, and calls for the Government to re-engage with the insurance industry to increase uptake. For FOIL members, particularly those advising insurers, this represents a growth opportunity and aligns with efforts to improve access to justice while preserving underwriting discipline.

Mass Claims & Pre-Action Protocols

The CJC proposes a Pre-Action Protocol (PAP) for Mass Claims and greater use of pre-action budgeting and costs management in funded litigation. Both proposals aim to increase transparency and control costs early in proceedings and are likely to gain support, particularly from firms engaged in group and consumer claims where defendant costs risks can escalate rapidly.

Access to Justice Fund

One potentially controversial recommendation is the creation of an Access to Justice Fund, to be financed by a small percentage of profits from funding, CFAs and DBAs. These funds would support early legal advice and alternative dispute resolution (ADR). Firms, including FOIL members, may question the practicality and fairness of this proposal, especially given concerns about how 'profit' would be defined and apportioned.

In addition to supporting FOIL's principal belief that regulation must preserve access to justice while protecting vulnerable parties and maintaining a viable funding market, the CJC report broadly aligns with many of the positions outlined in its response. This indicates FOIL's influence in shaping a more accountable and sustainable funding environment and how seriously the Council reviewed the views of key industry stakeholders. However, other proposals in the CJC report perhaps warrant further scrutiny. FOIL members may, therefore, wish to continue engaging with policymakers to ensure reforms remain balanced and mindful of defendants' rights and obligations.

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