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KINGS CHAMBERS

The Civil Justice Council's Interim Report on Litigation Funding Review

Cost Newsletter

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Reports, like omnibuses in Clapham seem to come in threes. Last autumn saw the publication of three major reports on litigation funding, but the most immediate of them and important to readers of this newsletter, is the report emanating from the Civil Justice Council. The Civil Justice Council (CJC) Review of Litigation Funding Interim Report is a high level and preliminary analysis of the third-party funding (TPF) landscape.

The report's real and immediate significance is that it is intended to function as the context to a consultation, appended to the report which may yet reshape that landscape. Because it is released as a consultative document, it invites input from a range of stakeholders on the challenges, benefits, and regulatory possibilities for TPF within the English and Welsh civil justice system.

Context

The impetus for the report arose from the well-known litigation that culminated in the Supreme Court's ruling in **PACCAR Inc v Competition Appeal Tribunal [2023] UKSC 28**, a decision which deliberate understatement can be said to have had significant implications for TPF agreements in the UK.

It will be recalled that **PACCAR** called into question whether TPF agreements—where the funder's payment is calculated as a percentage of damages—should be regulated under the rules for damages-based agreements (DBAs).

Historically, TPF arrangements have operated without such constraints, but the Supreme Court's decision suggested that these agreements may indeed fall within the DBA framework, potentially rendering many existing agreements non-compliant. The rights and wrongs of PACCAR and whether the dissenting judgment of Lady Rose should have been the majority judgment, are unimportant. As the final appellate court, unless and until there is legislative change, then PACCAR is the final word on the matter. But the decision caused serious concern within the TPF industry.

In response to these concerns, the then Conservative Lord Chancellor asked the CJC to conduct a broad review of TPF. The interim report, therefore, not only surveys the current state of TPF but also addresses public policy concerns, such as access to justice and cost-shifting. Its terms of reference, provided in Appendix B, focus on evaluating the self-regulatory framework, the potential for statutory regulation, and TPF's impact on court and arbitration proceedings.

Structure

The report is organised into six parts:

Part One: The Development of TPF in England and Wales

This section outlines TPF's origins, tracing its growth from a once-illegal practice to an established funding method. It explores the erosion of maintenance and champerty prohibitions and the impact of public policy shifts, especially regarding access to justice. This section serves as a historical overview, but its familiar material may be of limited value to seasoned readers.

Part Two: Self-Regulation of TPF

Part Two examines the current self-regulation approach, including the Association of Litigation Funders (ALF), which has developed a voluntary Code of Conduct. The report discusses how this regulatory model addresses funder transparency, capital adequacy, and the independence of legal representation. However, the report suggests that self-regulation may be insufficient to address potential conflicts of interest or enforceability of commitments, an issue increasingly pressing as TPF's role expands.

Part Three: Different Approaches to Regulation

This section explores alternative regulatory models, assessing whether statutory regulation might offer a more robust and enforceable framework than self-regulation. It compares approaches in other jurisdictions, considering options like licensing or mandatory registration for TPF providers.

Part Four: Regulatory Approaches in Other Jurisdictions

Part Four reviews how other countries handle TPF regulation, highlighting jurisdictions with more prescriptive frameworks, such as Australia and the United States. Again, while informative, this comparative section reiterates well-known regulatory methods and is unlikely to hold substantial new insights for practitioners.

Part Five: Costs and Funding

The section examines the interplay between TPF and litigation costs, including most significantly the implications of **Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd [2016] EWHC 2361**. In this landmark case under the Arbitration Act 1996, a successful party recovered TPF costs from the losing party. This development has sparked debate about whether similar cost-recovery practices could apply in civil litigation, a concept that could transform the way TPF is used and its monetary impact on losing parties.

Part Six: Other Funding Options

Part Six briefly surveys other funding mechanisms, including legal expenses insurance (LEI), conditional fee agreements (CFAs), damages-based agreements (DBAs), and crowdfunding. While it provides context, it reiterates existing knowledge about alternative funding arrangements.

The report thus establishes a foundation for understanding TPF's role, its regulatory gaps, and potential reforms. However, as with previous comprehensive reviews like Lord Justice Jackson's Review of Civil Litigation Costs, the report tries to do too much in its pages: it covers a vast area of ground but at limited depth.

Many sections serve as informative rather than directive discussions, which may leave practitioners wondering what the direction of travel is. In this sense Appendix A, may be the most significant part of the report as that contains the 39 questions on which a consultation response is sought, indicating what issues are likely to be of key importance going forward as considered later in this article.

The important stuff

While the report's overview of TPF's historical context and funding alternatives may be of limited value, Parts Two, Three, and Five warrant closer examination.

Part Two scrutinises the efficacy of self-regulation, highlighting the ALF Code of Conduct as the main regulatory instrument. Introduced following recommendations from the Jackson Review and subsequent CJC consultations, the ALF Code seeks to standardise funder practices. It mandates funders to maintain capital adequacy, uphold lawyer independence, and avoid undue influence on litigation strategies. Yet, with only 16 funders subscribing to the ALF and around 44 funders active in England and Wales, the report questions whether the ALF's voluntary framework suffices to safeguard parties' interests.

Part Three considers whether statutory regulation could enhance TPF accountability, referencing the more structured approaches adopted internationally. In Australia, for example, funders must register and meet licensing requirements, which may serve as a model for the UK. Statutory regulation would address key issues with the voluntary model, including funder oversight and conflict-of-interest management. However, statutory regulation could also deter some funders from entering the market, potentially restricting access to funding for claimants.

Part Five contains one of the report's most controversial topics, namely the cost implications of TPF considering **Essar**, where the court allowed a funded party in arbitration to recover TPF costs from the losing party.

The report acknowledges the argument that TPF promotes access to justice by levelling the financial playing field in litigation, particularly in cases involving significant power imbalances between corporate defendants and individual claimants.

However, applying the **Essar** principle to civil litigation, which is floated as a potential course, raises complex questions. If successful litigants could recover TPF costs from the losing side, the financial stakes for defendants could increase dramatically, potentially leading to a "costs arms race" that would make civil litigation even more daunting and expensive. Furthermore, allowing TPF costs to be recoverable would mark a stark departure from the philosophy of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which barred the recovery of success fees and after-the-event (ATE) insurance premiums from losing parties. Reintroducing recoverable TPF costs might logically necessitate the return of success fee and ATE recoverability, as there would be little conceptual basis to exclude one form of funding cost while allowing another.

Allowing TPF cost recovery would provide a significant

advantage to funded claimants, who could litigate without bearing full financial responsibility for their funding arrangements if successful. This could increase access to TPF for lower-value claims or claimants with limited resources. However, this benefit would come at a cost to defendants, who could face substantial additional financial exposure upon losing, making settlement pressures even greater. Critics of recoverable TPF costs argue that such an approach could also lead to satellite litigation around what constitutes a fair and reasonable TPF cost—a question that courts would need to adjudicate, inevitably complicating costs assessments and protracting litigation.

Appendix A and Key Consultation Questions

The report's most interesting component is Appendix A, with its 39 consultation questions aimed at collecting public and professional input on TPF's future. Three groups of question stand out for their potential to provoke proposals for significant change.

The first group comprises, questions 4, 5, and 6: These questions ask whether the current self-regulation model is adequate or if statutory oversight is necessary. They probe stakeholders' views on conflicts of interest and the sufficiency of existing protections for claimants.

This is important: regulation of litigation funders is plainly on the agenda, but the consultation is trying to provoke a debate as to what form that regulation might take, and particularly whether any such regulation would necessarily be statutory.

Question 8(e): As discussed, this question addresses whether TPF costs should be recoverable in litigation, a concept that could fundamentally reshape civil litigation financing. The question's implications for costs fairness, litigation access, and regulatory consistency make it one of the consultation's most consequential issues.

The consultation's Question 8(e)— "Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?"—brings the **Essar** debate into focus, prompting stakeholders to consider how recoverable TPF costs might reshape civil litigation in a very wide range of cases.

The third area of that I identify, is Questions 11, 12, and 13: These questions focus on whether caps should be imposed on the cost of funding: the debate rumbles on as to whether litigation funders are making excessive returns, due to market failure and lack of competition.

High profile cases where substantial sums from damages are used to pay funding costs, provoke interest in whether the funder's return should be capped, and whether this would have a positive impact or an adverse effect on litigation funding and its availability. Litigation funders could potentially place their "hot money" anywhere in the world, if the UK imposes caps which make it more profitable to fund cases in jurisdictions which are not subject to such caps.

Conclusions

The consultation period closes on 31 January 2025, and it provides an opportunity for stakeholders to influence the CJC's recommendations which will in turn shape the direction that TPF takes over the next 5 years.

During this phase, respondents can submit views via email, and the CJC will host public forums, including a National Forum on 29 November 2024, to facilitate wider debate. Following this consultation, the CJC will compile responses, and a Final Report with recommendations is expected by summer 2025.

By next summer it should be clear whether the recommendations for reform include new and extensive regulatory measures, caps on returns, and the recoverability of litigation funding costs in the litigation.

My blog on costs and litigation funding can be found at *www.costsbarrister.co.uk*

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