

Title: Litigation Funding Agreements (Enforceability) Bill 2024 – Impact Assessment IA No: MoJ007/2024 RPC Reference No: N/A Lead department or agency: Ministry of Justice Other departments or agencies: N/A	Impact Assessment (IA)			
	Date: 18 March 2024			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
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Summary: Intervention and Options	RPC Opinion: Regulatory Provision
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Cost of Preferred (or more likely) Option (in 2024 prices)			
Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status Qualifying provision
N/A	N/A	N/A	

What is the problem under consideration? Why is government action or intervention necessary?

In certain types of cases such as commercial or group claims brought in either the High Court or the Competition Appeal Tribunal where the legal costs are expected to be high, those involved in litigation may use third party sources of finance to help bring their claim via a litigation funding agreement (LFA). However, the UK Supreme Court judgment in PACCAR¹ has rendered third-party LFAs unenforceable. The resulting uncertainty around litigation funding risks a detrimental impact on the attractiveness of the England and Wales jurisdiction as a global hub for commercial litigation and arbitration, and on access to justice more broadly. In order to address these issues, the government has decided to legislate to restore the enforceability of LFAs, so that individuals, groups of individuals and small and medium-sized businesses can get funding to bring big and complex claims which they could not otherwise afford. Government intervention is required as primary legislation is the only way to mitigate the impacts of the judgment in full.

What are the policy objectives of the action or intervention and the intended effects?

The policy objective is to restore the position that existed before the Supreme Court ruling, so that LFAs are enforceable. This will also ensure that claimants can get access to third-party funding to bring big and complex cases against bigger, better resourced corporations which they could not otherwise afford. This Bill will also enhance access to justice and the attractiveness of a thriving UK legal sector which contributes over £34ⁱ billion per annum to the UK economy.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

- **Option 0:** Base case (do nothing). Do not legislate to mitigate the impacts of the UK Supreme Court judgment in PACCAR in all cases, so that LFAs remain unenforceable in closed and new claims.
- **Option 1:** Legislate to mitigate the impacts of the UK Supreme Court judgment in PACCAR in all cases, so that LFAs are no longer unenforceable in closed and new claims.

The Government's preferred option is Option 1 as this best meets the policy objective.

Will the policy be reviewed? The legislation will be reviewed 3-5 years after Royal Assent.					
Is this measure likely to impact on international trade and investment?		No			
Are any of these organisations in scope?		Micro Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)		Traded: N/A		Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: _____ *The Rt Hon Alex Chalk*
KC MP Date: 18 March 2024

¹ R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28. The judgment concerned a claim against truck manufacturers regarding anti-competitive behaviour.

Summary: Analysis & Evidence

Policy Option 1

Description: Legislate to mitigate the impacts of the UK Supreme Court judgment in PACCAR in all cases, so that LFAs are no longer unenforceable in closed and new claims.

FULL ECONOMIC ASSESSMENT

Price Base Year N/A	PV Base Year N/A	Time Period Years NA	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: N/A	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	N/A	N/A
High	N/A	N/A	N/A
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the costs of this option, as the total volume of cases where third-party LFAs are used is unknown due to data limitations. MOJ and HMCTS do not collect specific data on these cases or how they are funded. Furthermore, any use of data from other sources such as the Association of Litigation Funders is very limited, in part due to confidentiality applied to funding arrangements. However, as of September 2023, there were 34 live opt-out collective claims before the CAT which together had been brought in the names of tens of millions of individual consumers and most likely had the benefit of LFAs.

Other key non-monetised costs by 'main affected groups'

None. As a result of this option, funding levels by litigation funders remain on the same or increased trajectory as before the judgment in PACCAR. This will enable individuals and small and medium-sized businesses to get funding to bring big and complex claims, which they could not otherwise afford.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	N/A	N/A
High	N/A	N/A	N/A
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the costs of this option, as the total volume of cases where third-party litigation funding is used is unknown due to data limitations. In most cases the terms of any litigation funding agreements are subject to confidentiality constraints, so the precise nature of the funding arrangements in place are not commonly known.

Other key non-monetised benefits by 'main affected groups'

The key benefit of Option 1 is to restore the position to that which prevailed before the decision of the Supreme Court, so that LFAs are no longer unenforceable in closed and new claims. The legislation would uniformly remedy the impact of the judgment in all cases, by enabling small and medium enterprises, individuals and groups of individuals to continue to have access to third-party litigation funding. In addition, the legislation would also enable new claimants to continue to utilise LFAs.

Key assumptions/sensitivities/risks	Discount rate (%)
A key assumption made to estimate the impact of Option 1 is that litigation funders continue to fund cases at the same (or increased level) as before the judgment in PACCAR.	

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: N/A	Benefits: N/A	Net: N/A	
			N/A

Evidence Base

A. Background

Litigation Funding

1. In cases where the costs of litigation are expected to be high, and especially in cases where there is a significant difference in the resources available to the parties (e.g., the cases brought by those adversely affected by the use of the Horizon system by the Post Office), litigants may seek funding for their case through Litigation Funding Agreements (LFAs).
2. LFAs involve a third-party litigation funder, typically an independent financial institution. The funder will finance all or part of the legal costs of a claim, in return for a share of any damages awarded. LFAs support a wide range of cases, particularly higher value commercial cases and arbitration, and especially opt-out collective proceedings before the Competition Appeal Tribunal (CAT), which provides access to justice for consumers and SMEs harmed by anti-competitive conduct by well-resourced corporations. Until recently, LFAs were unregulated and not considered in scope of the Courts and Legal Services Act 1990 (CLSA) and the Damages-Based Agreement Regulations 2013.
3. By contrast, Damage-Based Agreements (DBA) are a type of 'contingency fee' arrangement between a client and their legal representative or claims management company (CMC) whereby the lawyer or CMC is not paid if they lose a case but may take a percentage of the damages awarded to their client as their fee if the case is successful. Unlike LFAs, DBAs are governed by section 58AA of the CLSA and the Damages-Based Agreement Regulations 2013.

Problem Under Consideration

4. Prior to the Supreme Court judgment in PACCAR, LFAs worked generally well and enabled claimants to obtain funding to bring claims against well-resourced corporations and others which they could not otherwise afford. However, on 26 July 2023, in the case of PACCAR, the Supreme Court held that LFAs were DBAs. This overturned the finding of the CAT and Divisional Court, and the commonly held view that LFAs were not DBAs. LFAs do not generally comply with the DBA Regulations 2013 and are therefore made unenforceable by the PACCAR judgment. The judgment means LFAs will need to comply with the DBA Regulations 2013 and the CLSA.
5. As a result of the judgment, there is a risk to litigation funders' investments in closed cases as a result of the relevant agreements now being unenforceable. The risk to previous investments in turn creates risk for future investments, as litigation funders may have less capital to commit to claims and less motivation to do so in a market that is judged unpredictable and unfavourable to litigation funders. While this is not yet evidenced as the post PACCAR-funding landscape is relatively new, any threat to investments is likely to have a negative impact on the willingness of funders to continue investing, and thus remains an access to justice concern.
6. Because the Supreme Court judgment rendered third-party LFAs unenforceable, the associated uncertainty around litigation funding risks a detrimental impact on the attractiveness of the England and Wales jurisdiction as a global hub for commercial litigation and arbitration, and on access to justice more broadly.
7. To remedy the above issues, the government is introducing the Litigation Funding Agreements (Enforceability) Bill to remove this risk of uncertainty and allow Government to

deliver a return to a funding regime so that claimants can continue to get funding from litigation funders to bring big and complex claims, against bigger, better-resourced corporations, which they could not otherwise afford. This Bill will enhance access to justice and the attractiveness of a thriving UK legal sector which contributes over £34 billion per annum to the UK economy. The Bill will also have retrospective effect and early commencement, so that previous cases are unaffected. This will remove any uncertainty about the enforceability of closed LFAs and enable litigation funders to continue to fund cases, including existing cases, with confidence.

8. In reaching this decision, while no formal consultation has taken place, the Government engaged with experts both in support of the judgment and against it. The views of the judiciary have also been sought. Following these discussions, the Government firmly believes that restoring the position that existed before the judgment is the best way forward to enhance access to justice.

B. Policy Rationale and Objectives

Rationale for Intervention

9. The conventional economic approaches to Government intervention are based on efficiency or equity arguments. Governments may consider intervening if there are strong enough failures in the way markets operate (e.g., monopolies overcharging consumers) or there are strong enough failures in existing Government interventions (e.g. waste generated by misdirected rules), where the proposed new interventions avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and distributional reasons (e.g., to reallocate goods and services to more vulnerable groups in society).
10. The primary rationale for intervention in this case is equity: reform is required to ensure that access to justice is maintained for litigants in high-cost cases. Intervention will also promote efficiency by reducing the current uncertainties relating to the litigation funding market. Intervention will also benefit claimants in closed cases so that the terms of their LFAs are no longer unenforceable, which puts them back to where they were before, and enables new claimants to continue to utilise LFAs.

Policy objectives

11. The key policy objective is to restore the position that existed before the Supreme Court ruling in all cases, so that LFAs are no longer unenforceable in closed and new claims. This will also ensure that claimants can get access to third-party funding to bring big and complex cases against bigger, better resourced corporations which they could not otherwise afford. This Bill will also enhance access to justice and the attractiveness of a thriving UK legal sector which contributes over £34 billion per annum to the UK economy.

C. Affected stakeholder groups, organisations and sectors

12. The following groups are expected to be most affected by the options assessed in this Impact Assessment (IA). In the costs and benefits assessment for each sub-option (section E), if a particular group is considered to be unaffected they have not been included. A brief description is included below outlining the role of each group in this area:
 - Litigation Funders: these are financial institutions who agree to fund litigation in exchange for a share of any damages awarded.

- Individual claimants, SMEs and other businesses: these are litigants involved in cases against bigger, better-resourced corporations who may seek funding via a third-party funder.
- Legal profession: these are professionals who represent those claimants who make use of LFAs;
- HM Courts and Tribunals Service (HMCTS): HMCTS provides the courts and tribunals where legal disputes funded by LFAs are adjudicated.

D. Description of options considered

13. To meet the Government's policy objectives, the following options are considered in this IA:

- **Option 0:** Base case (do nothing). Do not legislate to mitigate the impacts of the UK Supreme Court judgment in PACCAR in all cases, so that LFAs remain unenforceable in closed and new claims.
- **Option 1:** Legislate to mitigate the impacts of the UK Supreme Court judgment in PACCAR in all cases, so that LFAs are no longer unenforceable in closed and new claims.

14. The government's preferred option is Option 1 as this best meets the policy objectives.

Option 0: Base case (do nothing)

15. Under the "do nothing" option, the continued uncertainty around the viability of the litigation funding market will continue, which may have a negative impact on the willingness of litigation funders to continue to fund such cases. This may negatively impact access to justice for claimants and the attractiveness of this jurisdiction.

Option 1: Legislate to mitigate the impacts of the judgment

16. This option will deliver a return to a funding regime by amending the definition of a DBA in section 58AA(3)(a) of the CSLA 1990, to provide that an agreement, to the extent that it is an LFA, is not a DBA. This change will bring certainty to the litigation funding market, so that claimants can continue to get funding from litigation funders to bring big and complex claims, against bigger, better-resourced corporations, which they could not otherwise afford. This will promote access to justice as well as enhancing the competitiveness of the England and Wales jurisdiction.

17. The Bill will have retrospective effect and early commencement, so that previous cases are unaffected. This will remove any uncertainty about the enforceability of closed LFAs and enable litigation funders to continue to fund cases, including existing cases, with confidence.

E. Cost and Benefit Analysis

18. This IA follows the procedures and criteria set out in the Impact Assessment Guidance and is consistent with HM Treasury Green Book guidance.

19. Where possible, IAs identify both monetised and non-monetised impacts on individuals, groups and businesses in Great Britain with the aim of understanding what the overall impact on society might be from the proposals under consideration. IAs place a strong focus on monetisation of costs and benefits. There are often, however, important impacts which cannot sensibly be monetised.

20. In this case, however, the impacts of the option considered in this IA have not been monetised. This is because there is only limited information in the public domain as to the number of cases which make use of litigation funding and of the costs of litigation met through such sources. As a result, only a qualitative assessment is provided in the following analysis.

Option 1: Legislate to mitigate the impacts of the UK Supreme Court judgment in PACCAR in all cases, so that LFAs are no longer unenforceable in closed and new claims

Costs of Option 1

21. As this Option will restore the legal situation prior to the recent Supreme Court judgement, there are no costs associated with this option.

Benefits of Option 1

Litigation Funders

22. Option 1 will remove any uncertainty about the viability of the litigation funding market and enable funders to continue to invest in cases with confidence. Data is not available to accurately measure the size of the UK market for litigation funding, however industry sources estimate the size for 2023 to be between £1.5bn to £4.5bn.ⁱⁱ

Claimants, SMEs and other businesses

23. By removing any uncertainty each group will benefit so that they can continue to get funding to bring big and complex claims against bigger, better-resourced corporations. This will support access to justice, particularly for consumers and SMEs.

Legal profession

24. Removing any uncertainty about the viability of the litigation funding market will assist lawyers who represent both claimants (e.g., SMEs, consumers etc.) and defendants (e.g., corporations) to bring and defend claims with confidence. The litigation funder will bear the risk of paying costs, including adverse costs, if the case is lost. This will bring certainty to the payment of legal fees for law firms undertaking work where litigation funding is used.

25. This option will restore certainty to the litigation funding market by ensuring that LFAs between the litigation funder and the funded party will be enforceable, which means, in turn, that the payment of costs to a successful funded party will be enforceable against a losing party. This will enhance access to justice and the attractiveness of a thriving UK legal sector which contributes over £34 billion per annum to the UK economy.

HMCTS

26. The retrospective effect and early commencement of the legislation will ensure that previous cases are unaffected. This will remove any uncertainty about the enforceability of closed LFAs and enable litigation funders to continue to fund cases, including existing cases. This will reduce demands on the courts' time and resources to hear any disputes about LFAs in closed cases.

F. Risks and assumptions

27. As the preferred option will re-establish the legal position prior to the Supreme Court judgment, there are no significant assumptions or risks associated with the option considered in this IA.

G. Wider Impacts

Equalities

28. Please see the equalities statement at Annex A for more information.

Competition Assessment

29. The options assessed in this IA should have no influence on competition in the litigation funding market as they would impact all litigation funders that undertake this activity.

Family Impact test

30. There would be no impact on strong and stable family relationships as a result of the options assessed in this IA.

International Trade

31. There are no implications for international trade from the preferred option.

Better Regulation

32. This measure is classed as a regulatory provision.

Small and Micro Business Assessment

33. The preferred Government option would benefit all small and micro businesses by enabling them to get funding to bring big and complex claims, which they could not otherwise afford.

Environmental impact

34. No impacts on the environment have been identified with the options assessed in this IA.

H. Monitoring and evaluation

35. If implemented, the impacts of the preferred option will be kept under review. The evaluation process shall follow appropriate guidelines. It is the intention that the legislation will be reviewed 3-5 years after Royal Assent.

EQUALITIES STATEMENT – LITIGATION FUNDING AGREEMENTS (ENFORCEABILITY) BILL 2024

Policy summary

1. This Equalities Statement considers the likely equality impacts of the Litigation Funding Agreements (Enforceability) Bill. It should be read alongside the Impact Assessment, to which this statement is an annex.
2. On 26 July 2023, in the case of PACCAR, the Supreme Court held that litigation funding agreements (LFAs) were damages-based agreements (DBAs). This overturned the finding of the Competition Appeal Tribunal (CAT) and Divisional Court, and the commonly held view that LFAs were not DBAs.
3. LFAs do not generally comply with the DBA Regulations 2013 and are therefore made unenforceable by the PACCAR judgment. LFAs support a wide range of cases, particularly higher value commercial cases and arbitration, and especially opt-out collective proceedings before the CAT.
4. The Supreme Court judgment in July 2023 rendered third-party litigation funding agreements unenforceable. Uncertainty around litigation funding risks a detrimental impact on the attractiveness of the England and Wales jurisdiction as a global hub for commercial litigation and arbitration, and the importance of third-party litigation funding for access to justice more broadly.
5. The Litigation Funding (Enforceability) Bill returns to the pre-judgment funding regime, with retrospective effect.

Public Sector Equality Duty

6. In line with our Public Sector Equality Duty (PSED) requirements under section 149 of the Equality Act 2010, the Ministry of Justice must pay “due regard” to the need to:
 - Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act;
 - Advance equality of opportunity between people who share a protected characteristic and those who do not; and
 - Foster good relations between people who share a protected characteristic and those who do not.
7. In carrying out this duty, Ministers and the Department must pay ‘due regard’ to the nine ‘protected characteristics’ set out under the Act, namely: race, sex, disability, sexual orientation, religion or belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.
8. The Ministry of Justice has a legal duty to consider how the legislation is likely to affect people with protected characteristics and, in particular, to take proportionate steps to mitigate or justify the most negative effects and advance the most positive ones.

Summary

9. Consideration has been given to the likely impact of the Litigation Funding Agreements (Enforceability) Act on claimants against the statutory obligations under the Equality Act.

The Bill will affect individuals and Small and Medium-sized Enterprises (SMEs) with existing LFAs for ongoing and closed cases, and those who enter into LFAs in the future.

10. As the Litigation Funding Agreements (Enforceability) Act reverts to the prevailing funding regime prior to the July 2023 Supreme Court judgment, with retrospective effect, it is considered unlikely to create new negative effects.
11. Rather, we consider that, by re-opening an avenue to funding which enables claimants to bring big and complex claims against bigger, better-resourced corporations, which they could not otherwise afford, we are improving access to justice for everybody. This may enhance fairness and equality of opportunity for people who are disproportionately affected by certain issues which their claims are attempting to redress.
12. Litigation funding agreements are used for a wide range of consumer, competition and other civil proceedings, which vary in nature from claim to claim and often have a high number of claimants. It is therefore not possible to assess whether litigation funding agreements in general benefit groups with particular protected characteristics. However, in advancing access to justice for all, it is certainly possible that a case funded by third-party litigation could have positive effects for a specific group.
13. The consideration of the impact of the legislation is an ongoing duty. We will continue to consider any data relevant to the equalities impact of the Litigation Funding Agreements (Enforceability) Bill.

Limitations of evidence base

14. There is insufficient data on the use of litigation funding agreements in general due to their confidentiality. HMCTS do not record how claims are funded. Some very limited information has been provided by the Association of Litigation Funders (ALF), an independent body responsible for delivering self-regulation of litigation funding in England and Wales, on the use of litigation funding agreements in the CAT. This includes estimated claim size and number of claimants.
15. There is no data available on the protected characteristics of claimants who use third-party litigation funding, either from HMCTS or the funders themselves. According to the limited figures provided by the ALF, many of the claims brought in the CAT have in excess of ten million claimants. It is reasonable to assume that proceedings in other courts or which data is not available, are also large.
16. Without data on the protected characteristics of the claimants that use third-party litigation funding, it is not possible to assess the impact of the Litigation Funding Agreements (Enforceability) Bill with regard to specific protected characteristics. There may be certain claims which involve consumers or other claimants groups in which individuals with specific protected characteristics are over-represented. For example, it has been reported in press coverage of the Post Office Horizon scandal that a disproportionately high number of sub-postmasters of an ethnic minority background were wrongfully convicted. Given third-party litigation funding was used to bring the sub-postmasters' claim, this may suggest that returning to the funding regime in which they secured that funding could enhance access to justice for other groups that have similar over-representations of certain protected characteristics. However, we do not hold data on protected characteristics in relation to the Post Office Horizon case, and all claims are

distinct, meaning we are limited both in our ability to assess that case and to extrapolate any assessment to other claims. Data on the sub-postmasters who claim compensation may be instructive in future and will be taken into consideration if appropriate.

17. Based on the limited data available, we do not consider the Litigation Funding Agreements (Enforceability) Bill is likely to result in any unlawful direct or indirect discrimination for claimants, including those who share one or more protected characteristics. We also consider it likely that the proposals may be of benefit and, therefore, could advance equality of opportunity and foster good relations for some users with protected characteristics who are over-represented in particular claims funded by third-party litigation funding.

ⁱ : <https://www.thecityuk.com/media/0didtzlm/legal-excellence-internationally-renowned-uk-legal-services-2023.pdf>

ⁱⁱSource: [Third Party Litigation Funding: United Kingdom - England & Wales - Lexology](#)