

# **OFT's response to the EU Green Paper on Consumer Collective Redress**

March 2009

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# 1 INTRODUCTION

- 1.1 The Office of Fair Trading (OFT) is the UK's competition and consumer authority. Our mission is to make markets work well for consumers. Our goal is for competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation.
- 1.2 We adopt a market-informed approach, with a focus on outcomes that support productivity growth and consumer welfare. We believe this approach is in the best interests of both businesses and consumers as well as to the benefit of the UK economy.
- 1.3 We welcome the opportunity to respond to DG SANCO's Green Paper on the future direction of collective redress for consumers.<sup>1</sup> The OFT is supportive of DG SANCO's aim of developing understanding of existing systems and applying the lessons learnt to enhance any changes in this area. We appreciate the effort taken to study the different systems of collective redress already in place in different Member States.
- 1.4 We have made a number of statements in responses to previous consultations by both the UK government and DG SANCO in relation to private rights of action for breaches of competition law,<sup>2</sup> and redress mechanisms for consumers.<sup>3</sup> In these documents we have supported the introduction of representative actions for consumers, both in a UK and a wider European context.
- 1.5 We continue to believe that genuinely empowered and confident consumers are vital to the health and success of markets and the growth

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<sup>1</sup> [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm) adopted on 27th November 2008.

<sup>2</sup> OFT 916: *Private actions in competition law: effective redress for consumers and business* and OFT 1006: *Response to the European Commission's White Paper, Damages actions for breach of the EC antitrust rules*

<sup>3</sup> OFT 867: *Representative actions in consumer protection legislation* and OFT 983: *OFT's response to the EU consultation on consumer collective redress benchmarks*

of the internal market particularly. An effective system for collective redress for breaches of consumer law would greatly enhance consumer confidence in purchasing across national borders and in trying new products (including both goods and services in accordance with definition of products in the Unfair Commercial Practices Directive). This would help to drive efficiency and positive innovation across borders while also reducing judicial costs (one large case in the court rather than many smaller ones) and improving consistency for businesses facing claims by consumers.

- 1.6 We believe that a level playing field is crucial to support the full potential of developments in the area of collective redress. The existence of multiple and fragmented systems within each Member State and wide differences between national systems are obstacles to consumers seeking redress across borders (and indeed potentially even within borders). In order for consumer confidence to grow in gaining redress, consumers need to be aware of the existence of such systems and believe that they will actually be able to obtain redress. In our view it will be much easier to educate and inform consumers about redress if there is a straightforward, accessible system which they can use wherever they shop within the EU.
- 1.7 The OFT is in favour of a binding, effective system that delivers redress to consumers and therefore supports option 4. We believe that the best way of achieving this is through a judicial mechanism with appropriate safeguards. We feel this is likely to provide the only solution that will avoid the inconsistencies and complex problems of differing legal systems and regimes. A common and coherent judicial mechanism with a clear remit, committed to accessibility and transparency, will be able to transcend differences in national systems and achieve economies of scale and clarity that would not otherwise be achievable.
- 1.8 We look forward to being involved in further discussions which will develop the structures and address the issues and complexities that will need to be dealt with before such a system can be effective.

## 2 OPTIONS

### Option 1

- 2.1 We do not support this option. We believe that relying on existing national and EC measures will not address the issue adequately. An effective collective redress system is needed because consumer confidence in cross-border transactions is low.

### Option 2

- 2.2 Whilst we can see the potential benefits in attempting to join-up and enhance the use of existing systems in Member States, we believe this option is unlikely to result in an effective system for use in all cross-border consumer transactions. In our view bilateral agreements may lead to inconsistencies and inequalities for consumers and businesses alike.
- 2.3 Therefore although we support collaboration and mutual understanding, we do not support this option as we believe it is unlikely to make progress quickly. There is also no certainty that the outcome of such collaborations will benefit all EU consumers in terms of clarity and accessibility.

### Option 3

- 2.4 We believe that some progress could be made by adopting some of the suggestions in this option. However we believe that none of the different solutions suggested are likely to provide complete, effective and consistent solutions in themselves. Alternative dispute resolution, the handling of cross-border enforcement, small claims work and complaint-handling by traders are all important parts of an effective system, and OFT would support more study and discussion of these areas.
- 2.5 However, we do not feel that any of these options will provide a short- or medium-term solution to the problems facing consumers seeking redress. This is partly because of the additional complexity of adjusting and accommodating existing mechanisms that were not designed or implemented with mass representative cross-border claims in mind. We

believe the effort required in these areas could be better directed at designing and implementing a purpose-built system that can avoid or address many of the limitations and complications of the existing systems. Therefore whilst we support many of the ideas in this option, we do not recommend it be adopted as the only solution.

#### Option 4

- 2.6 We believe that option 4 – a judicial system for consumer collective redress – is the best way of achieving the objective of an effective system. However, it is important to strike the right balance between the need for an effective, accessible system, and the need to discourage unnecessary and unmerited legal claims. We have previously responded to the Commission's consultation on collective redress benchmarks, supporting the ideas put forward and suggesting some possible changes.<sup>4</sup>
- 2.7 A key reason for supporting option 4 is to ensure that whatever system is introduced will be applied consistently in all Member States. Inconsistencies in approach would complicate the situation for both consumers and businesses. Unscrupulous traders may be able to benefit from inconsistency by targeting those Member States where redress systems are weak.
- 2.8 We think that claims being brought by well-resourced and focused consumer representative bodies of all types would be an effective way of achieving this goal. We are supportive of opt-out claim systems although we accept that safeguards need to be in place to prevent unsuitable claims and the costs they may impose on businesses.
- 2.9 Our support for option 4 does not exclude making progress with some of the areas or issues discussed in option 3. We think that the range of issues and suggestions contained in option 3 are worth further exploration and discussion for the future development of collective

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<sup>4</sup> OFT 983: *OFT's response to the EU consultation on consumer collective redress benchmarks*

redress, although this does not change our view that option 4 represents the best long-term solution for European consumers and markets. Building collaboration and mutual understanding between Member States' public institutions, and mechanisms for exchanging information, expertise and practical lessons will be vital in ensuring the success of this and other key projects.

- 2.10 The Consumer Protection Co-operation (CPC) network continues to be successful in developing this mutual understanding and collaboration, as well as playing an important role in supporting effective cross-border enforcement. However, the network and the enforcers will be more effective if they are able, at least in the medium-term, to focus on their enforcement role, and on the exchange of information relating to that enforcement.
- 2.11 We believe that empowered consumers seeking redress through representative bodies, in stand-alone or follow-on actions in conjunction with robust enforcement and other compliance-seeking actions by national enforcement agencies, will both be vital drivers of productivity and growth. Enforcement mechanisms and the ability to seek redress are complementary systems, not alternatives. We would not wish to see the opportunities for effective collective redress actions to be limited to the cases dealt with by the CPC as this would not provide confidence for consumers that the mechanism was accessible or comprehensive. Given its enforcement focus, consumers are unlikely to view the CPC as a mechanism which directly empowers them to gain redress and, if the CPC was used for redress, this could result in low confidence in the system, impacting on support for both the CPC and for consumer redress.

### **3 DISCUSSION**

3.1 The OFT supports action on collective redress for consumers at a European level, through a European Directive (option 4). We believe this would give the following benefits:

- clarity of obligations (for Member States, courts, and businesses)
- a level playing field for business
- enhanced consistency for consumers
- minimised effects of differing legal systems / processes

3.2 The OFT is not convinced that optional schemes and changes will in themselves produce an effective cross-border mechanism for redress. Without such a mechanism, consumers who shop across borders will continue to be left to deal with the vagaries of differing legal systems when trying to obtain redress. This could harm consumer confidence and restrict growth of the internal market. Those Member States with more effective systems of redress may find their businesses disadvantaged in terms of fair competition with other Member States' businesses with less effective, inaccessible or non-existent redress mechanisms. Potentially consumers may limit themselves to trading only with businesses where robust redress mechanisms exist.

3.3 The OFT believes that mutual recognition of overseas decisions may not solve the problems that consumers face in obtaining redress, because of the complications of cross-border judicial mechanisms and jurisdictional concerns. Further research in this area by the Commission would be useful as it will help highlight the differences and synergies between the various existing systems. There are linguistic and other barriers, apart from the legal and geographical ones, to creating an effective redress system.

3.4 The OFT recognises that imposing a system on all Member States could be a complex process, given Member States' differing legal systems. We therefore suggest that a number of different options could usefully be

explored in achieving the desired objectives, including some of the ideas raised by the Commission in relation to options 1) to 3). However, the final system implemented would need to be consistent and clear for all concerned.

- 3.5 An effective system or systems need to enable access to justice and recompense for consumers with legitimate grievances, and they should also seek to ensure that any monies are awarded to the relevant consumers, rather than being 'lost' in court or legal fees. Critically, they ought to enable the bringing together of claims resulting from the same abusive behaviour, in order to speed up claims and reduce the amount of time and money spent in court. There are various methods by which this could be achieved (see below).
- 3.6 The OFT also understands the concern of the Commission, the UK and other Member States to avoid an overly litigious consumer redress system that would encourage spurious and unnecessary claims. Safeguards need to be put in place to protect legitimate traders from such claims.
- 3.7 We also strongly believe that court action ought to be a last resort, and that alternative dispute resolution (ADR) and other mechanisms are often a far cheaper and more effective way of addressing consumer redress problems.
- 3.8 However, it is important that the use of ADR schemes should not be mandatory for consumers or representative groups before collective actions can be instigated. This may be because no suitable route can be found, or one or more of the parties are deliberately obstructive, or the dispute is such a more direct intervention is preferable. The ADR route should be explored further and actively promoted to business and consumers, but it should not be imposed on consumers.
- 3.9 The OFT has commented previously on many of the issues raised in the Green Paper, and we suggest that this response be read in conjunction

with our comments on benchmarks,<sup>5</sup> and our views on representative actions in consumer protection.<sup>6</sup>

## Overlaps

### Consumer Rights Directive

3.10 The OFT has responded to the recent UK Government consultation on the EU proposal for a Consumer Rights Directive.<sup>7</sup> Alongside developments in this area, the objective of the review of the consumer acquis to simplify consumer legislation should complement the development of effective collective redress mechanisms by providing greater clarity on consumer rights and remedies across the EU.

### Restorative justice

3.11 Developments in the field of collective redress have continued alongside changes or possible changes in relation to restorative justice. In the UK, the government enacted the Regulatory Enforcement and Sanctions Act in 2008, which, among other issues, created a number of administrative tools including the ability to order restoration or compensation where criminal offences had occurred. The OFT is considering whether and how it might make use of these powers, which might be available for use in 2010.

### Maximum harmonisation

3.12 We believe that in the long-term, consistency is best delivered by all Member States implementing the same systems and rules. Therefore we are broadly supportive of the concept of maximum harmonisation. This means that consumers and business would avoid the costs and complications (and the consequent loss of confidence) that dealing with different regulatory, legal or other systems can cause.

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<sup>5</sup> OFT 983: *OFT's response to the EU consultation on consumer collective redress benchmarks*

<sup>6</sup> OFT 867: *Representative actions in consumer protection legislation*

<sup>7</sup> OFT 1051: *Consultation on EU proposals for a Consumer Rights Directive*

3.13 However, we believe that harmonisation should apply where Member States are in agreement, and that areas on which agreement cannot be obtained should be excluded either from the scope of any change altogether, or exempted from full harmonisation. These areas need to be carefully defined. Clear drafting and precise definitions are needed to ensure the system can be easily used and to create confidence amongst consumers that it is a viable and accessible solution to problems.

## 4 ISSUES TO BE CONSIDERED UNDER OPTION 4

- 4.1 The OFT is not committed to any specific solutions in respect of how Option 4 might work and is not offering definitive proposals at this stage. However, we would like to highlight some of the issues relevant to Option 4 and explore how they might be approached. Developments in this area would need to consider and take account of the costs and other burdens that might be placed on business, national courts, consumer bodies and other organisations as a result of new systems. We would welcome firm proposals on these issues from the Commission which will enable the OFT and other interested parties to take an informed position on how best to progress Option 4.
- 4.2 A **single European level representative body** could be a way of avoiding inconsistency of application under Option 4 and ensuring that only the worst and most damaging breaches were subject to claims for redress. It could allow a concentration of resources and legal expertise to address the many obstacles discussed below.
- 4.3 The Parliament could fund an independent body to bring cases on behalf of European consumers. This could be part-funded by a percentage cut of successful claims, an uplift on claims, or by the taxpayer. The body could have rights of audience in every EU court, and have powers to recover costs, seek damages on behalf of consumers, and return that money to those consumers.
- 4.4 An alternative would be to create a **network of national bodies** bringing representative claims. This approach could mean that more cases might be brought, and each jurisdiction could make easier use of its own law. However the total costs could be higher than those associated with a single European body and the results could be far less consistent, given the number of different bodies and courts involved.
- 4.5 This could require each Member State to set up or appoint a representative body capable of seeking redress. This could need to include the ability to return money to individuals both within the jurisdiction and in other Member States. This could be supported by

either or both the Consumer Protection Co-operation network and ECC-net.

- 4.6 A further option could be to set up a **Europe-wide legal process accessible by consumers and consumer groups**. This option could be less expensive for Member States and the European Union as it could simply facilitate existing groups and bodies to make use of a new pan-European process. However, it might lead to less consistency and be less effective generally than the other options, depending on how much and by whom it was accessed. Opening up the process beyond specific bodies could carry the risk of encouraging weaker or less appropriate claims. However, if it proved to be effective, it might increase the total amount of successful and appropriate claims.
- 4.7 This could involve a court process (compare with the Injunctions Directive) which could be used in all jurisdictions, and accessible to competent bodies bringing legitimate cases on behalf of consumers. It might be usable by self-run groups relevant to the sector of the market, including ad hoc groups (public or private) that met certain criteria. Such groups might form to deal with a particular practice or product, such as one especially poor holiday experience or to reclaim unfair charges levied by a trader.
- 4.8 Some safeguards would be necessary to avoid spurious or malicious claims reaching the court stage. Overall, this might be more complex than the other options but could also be the most flexible if it worked effectively.

#### **Cross-border cases only or all cases?**

- 4.9 The application of each of these possible systems under Option 4 could be limited to cross-border redress only, at least initially. This might be particularly appropriate if a single European representative body was chosen as Member States, particularly from a business perspective, might be more willing to support such a body if its role was limited to cross-border actions only.

- 4.10 The advantage of this approach would be to limit the impact on national contract law systems and allow Member States to more easily preserve the minor differences in the implementation of minimum harmonisation Directives. It would allow the body/bodies or process to concentrate on a narrower band of cases and complaints.
- 4.11 A disadvantage could be that domestic consumers might feel aggrieved if they are not included within a redress action. It might also discourage traders from selling cross-border, especially new entrants, who might wish to avoid potential actions being brought against them. Should they be discouraged, this could actively work against the EU's internal market objectives.
- 4.12 Limiting the application of any initiative to cross-border redress in the first instance, with a period of review before an assessment is made about the potential for wider applicability, would allow the process to become established and for any difficulties to be resolved. However, this would mean a delay before a single consistent system was introduced and possibly that the number of cases or actions brought were low.

#### **Methods of managing group or collective claims**

- 4.13 The aim is to achieve the right balance between facilitating access to claims and ensuring that claims are genuine. There is no single 'right' answer here.

#### **Opt-in vs. Opt-out**

- 4.14 Consumer groups are strongly in favour of opt-out systems where consumers who have been affected by an unfair or otherwise illegal practice can be automatically included in a collective claim, unless they explicitly opt-out. Business groups are generally more supportive of opt-in systems where consumers need to explicitly ask to be involved. There are arguments in favour of both systems.
- 4.15 A possible solution might be to allow certain specific designated representative groups to bring opt-out claims, but other groups to only bring opt-in. This may help strike the right balance, as only those groups

with sufficient expertise and resources, who are more likely to have regard for the potential reputational effects of bringing spurious claims, can bring the more complex and potentially wider type of representative action.

- 4.16 Were such a system to be adopted, there could be a minimum threshold for the total potential value of claims before the (non-designated) opt-in scheme was triggered. Opt-out claims could be limited to those brought by specified or authorized bodies. Claims brought by non-designated bodies might also be subject to a court 'permission' stage, thus ensuring that only credible claims could be brought. Additionally, the same stage could also decide if opt-out or opt-in was more suitable for the circumstances of the case. See Annex A for a representation of how such a system might work.

#### Costs

- 4.17 It is important that steps are taken to protect vulnerable and other consumers from being deterred by high court costs and the fear of having a defendant's high legal costs imposed on them. This needs to be balanced by the need to ensure adequate levels of adverse consequences for loss – the restriction on bringing unsuitable cases because of the risk of loss. Options could include placing a cap on the amount of costs that can be imposed or to make a small one-off fixed charge for such claims (instead of costs).

#### Content of claims

- 4.18 There must be a level of commonality between the claims, but they should not need to be identical. The claims would have to relate to the same behaviour by the trader. Additional defendants also could be capable of being 'joined' together and thus treated collectively if the trader's behaviour is the same.
- 4.19 This could lead to differing levels of monetary claims between different consumers, but the process ought to be sufficiently flexible to distinguish between, and perhaps categorise claims, so that the right level of any redress is awarded to individuals.

## Qualifying bodies

- 4.20 These might include consumer bodies, enforcement agencies, private companies or temporary associations of customers. Each Member State will have different considerations and structures in place that would need careful consideration before systems for qualifying or recognition could be put in place.

## Funding

- 4.21 It is vital that representative bodies be adequately funded to ensure the success of the scheme as funding is one of the most significant barriers to consumers being able to bring a collective action. We have raised some possible solutions to the funding issue in our response to the Commission's consultation on benchmarks,<sup>8</sup> including Conditional Fee Agreements, special fees or rates, a special fund for actions, or the provision of loans.
- 4.22 Another solution would be to increase the damages awarded to cover the costs of the representative body, but this would need to be carefully structured to avoid abuse by bodies or individuals seeking profits rather than redress for consumers. Protective costs orders, which we discuss in our response to the then UK Department of Trade and Industry (now the Department for Business, Enterprise & Regulatory Reform), or a similar scheme, might be another alternative. These could protect claimants from the full cost implications of a failed action.<sup>9</sup>

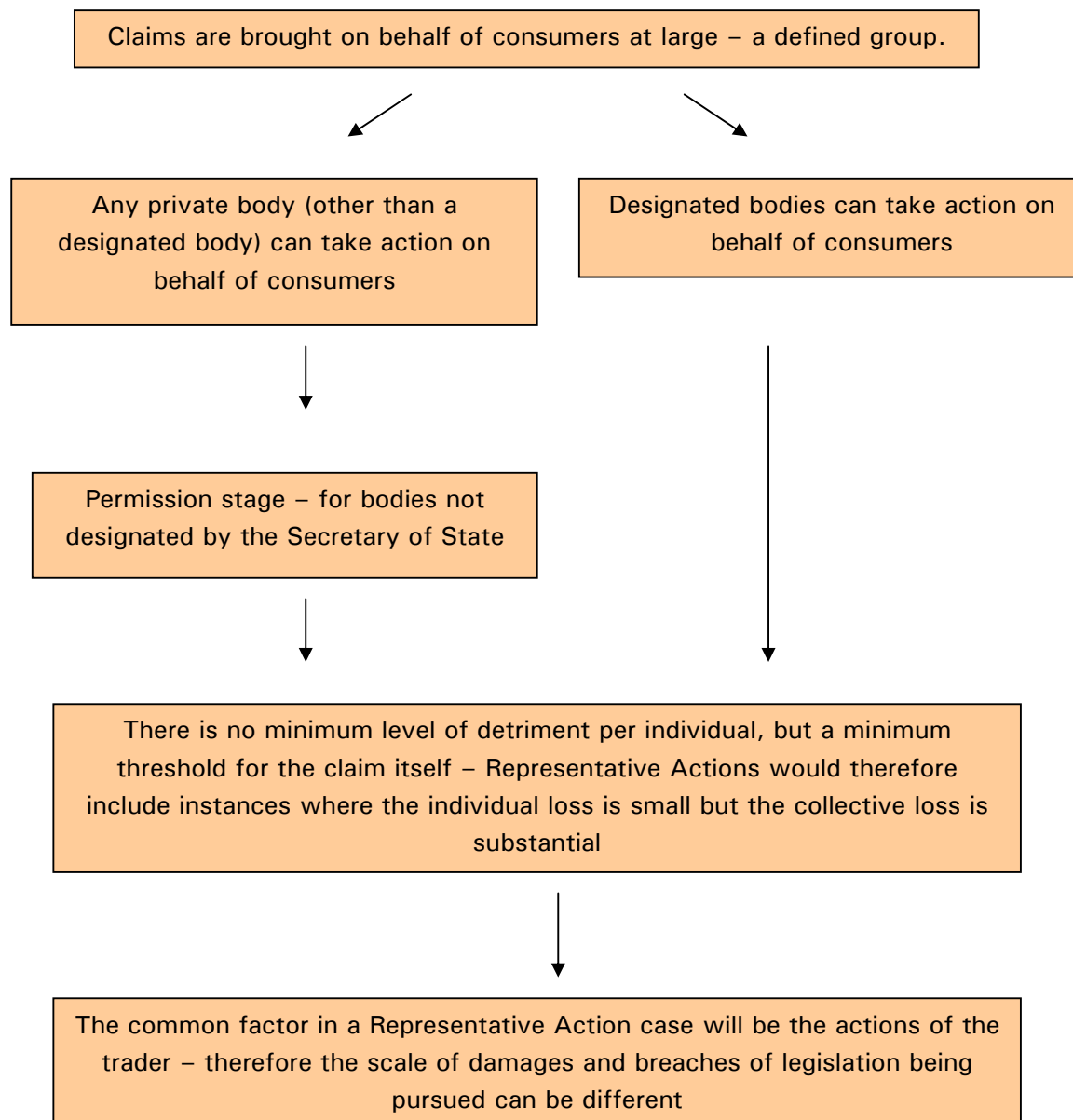
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<sup>8</sup> OFT 983: *OFT's response to the EU consultation on consumer collective redress benchmarks*

<sup>9</sup> OFT 916: *Private actions in competition law: effective redress for consumers and business*

## 5 ANNEXE A

### OFT's proposed model for Representative Actions Procedures<sup>10</sup>



<sup>10</sup> Taken from OFT 983 OFT's response to the EU consultation on consumer collective redress benchmarks, p.6.

## **6 CONTACT DETAILS**

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