

Representative actions in consumer protection legislation

**A consultation response by the
Office of Fair Trading**

October 2006

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1 INTRODUCTION

- 1.1 We are grateful for the opportunity to comment on the proposals set out in **Representative actions in consumer protection legislation**.
- 1.2 In line with the broader aim of empowering consumers to exercise their rights, we support the overall proposal to introduce representative actions for consumers. We strongly endorse the view that representative actions would be beneficial to groups of consumers who have been unable to settle their disputes through direct settlement or third party dispute resolution.
- 1.3 The current system of group litigation orders is useful in this regard but it requires consumers with equal interest to represent themselves. The introduction of representative actions could build on this, allowing organisations to bring actions on behalf of consumers. It may also be reasonable to expect that the possibility of a representative action could provide non-compliant businesses with further incentive to adhere to agreed standards and to operate more responsibly in the competitive marketplace.
- 1.4 We acknowledge that there are many genuine and perceived concerns about the introduction of further group litigation routes within the UK legal system, and we think that it is very important for the operations of markets as a whole that spurious or vexatious litigation is prevented and that fair dealing businesses and sparse court resources should not be tied up with any such unnecessary litigation.
- 1.5 However, while we agree that there is a need to safeguard against incorrect actions being taken, our view is that the model currently proposed in the consultation paper is not the optimum model and that it contains an overly large number of safeguards which are likely to render the system ineffective and could prevent many valid actions from being brought.

- 1.6 We therefore propose an alternative model which we think provides a more balanced approach to the introduction of representative actions – allowing for increased consumers' access to justice whilst also safeguarding the interests of legitimate businesses.
- 1.7 We suggest that this alternative model is explored in order to ensure that the proposal really fulfils all policy objectives. We suggest that the benefits of all models should be fully assessed on merits with a view to ascertaining which model will widen consumers' access to justice, yet provide sufficient safeguards to businesses.
- 1.8 The current consultation is not an exercise being taken in isolation. There are a number of parallel live policy issues concerning redress, such as: the implementation of the Unfair Commercial Practices Directive (UCPD); OECD's draft recommendation on consumer dispute and redress; and the European Commission's review of the Consumer Acquis.
- 1.9 In addition, representative actions already exist under UK competition law, and we have used our experience gained from work and research carried out by the Office of Fair Trading (OFT) in all of these areas, as well as direct discussions with international competition and consumer law agencies, and other interested parties such as academics and law firms, in putting together this response.
- 1.10 For ease of reference we have set this response out to cover: a brief overview of the OFT; redress in general; the linkages between enforcement and redress; our proposed model for representative actions; and finally, direct answers to the questions set out in the consultation. We look forward to working with DTI on the next stage of developing the detail of the proposals.

2 THE OFT MARKET MISSION

2.1 The OFT is the UK's competition and consumer authority. Our mission is to make markets work well for consumers. Our vision 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.

2.2 We adopt a market-based approach, with a focus on outcomes that support productivity growth and consumer and business 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.

2.3 We aim to ensure that markets are competitive and working well for consumers not only through enforcement action, by us and by our partners, but also by:

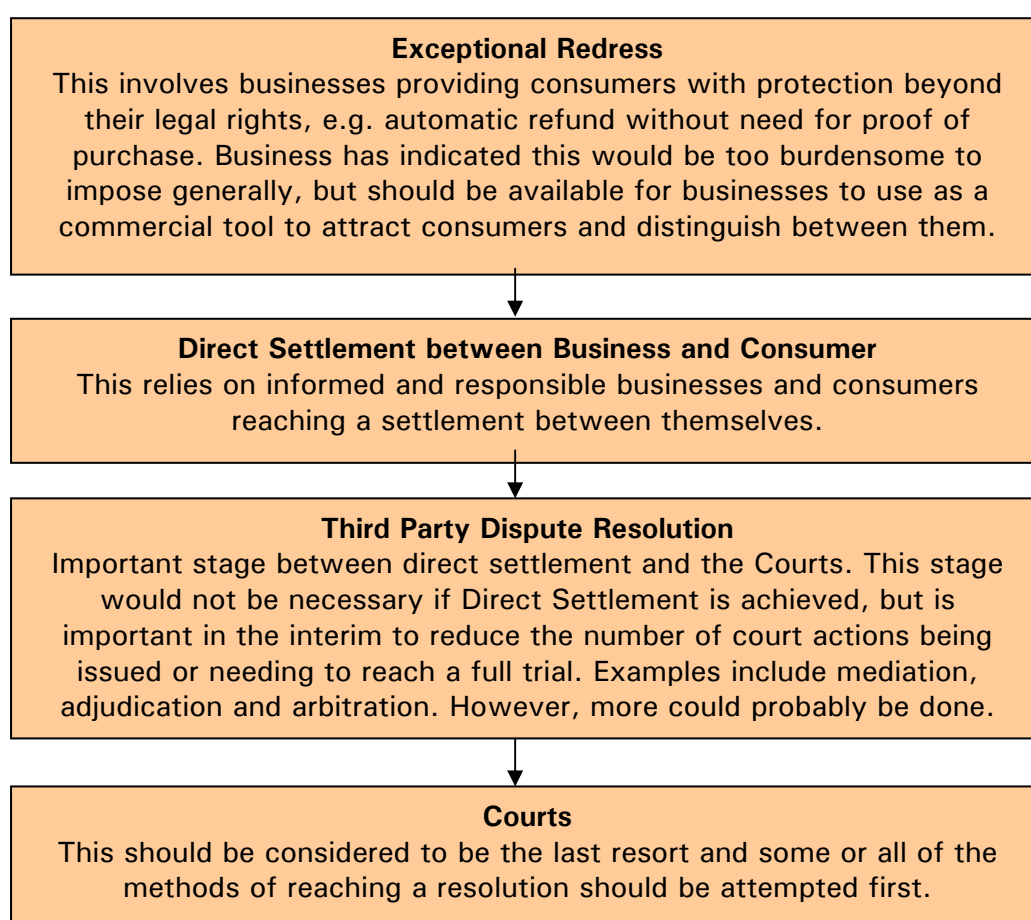
- empowering consumers by explaining their rights in many ways, including guidance and roadshows – our Consumer Education Strategy is central to supporting this objective¹
- running the Consumer Codes Approval Scheme (CCAS), which aims to promote and safeguard consumers' interests by helping consumers to identify those businesses which have committed to aim for higher standards of customer service, and
- making it easier for consumers to resolve problems by seeking advice from Consumer Direct (telephone advice service).

¹ Consumer education, a strategy and framework. October 2004 (OFT753).

3 REDRESS

3.1 The most efficient way of settling a dispute is a direct settlement between the business and the consumer. Where this fails, we support the provision of ombudsman style schemes and Alternative Dispute Resolution (ADR). However, as both types of scheme rely upon both parties being willing to enter into discussions and reach agreement as to a resolution, it is important for consumers to have access to independent legal adjudication where this has not been possible.

3.2 A consumer obtaining redress would follow the 'redress ladder':



- 3.3 The purpose of redress litigation is to compensate individual harms. This is two sided – on the one hand there is a need to recompense those who have suffered detriment as a result of breaches of the law, on the other hand there is a need to charge the wrongdoer with the obligation to pay compensation for their harm and therefore to prevent profits being made from illegal behaviour.
- 3.4 The availability of effective redress can build consumer confidence in transactions by influencing the weighting consumers give to different assumptions when faced with imperfect information. Accessibility of redress mechanisms should things go wrong may reduce consumers' assessment of the risks of transacting with a supplier they do not know or trust (or have imperfect information about) because they are aware they can seek a remedy if things go wrong.
- 3.5 Confidence is self-reinforcing: if market participants believe the market works well, they act with confidence and that tends to reinforce confidence and further strengthen the operation of the market.
- 3.6 Redress is therefore an integral part of the consumer regime, however, as the DTI acknowledge, many consumers do not take up their individual rights to redress, often because the monies involved are small and it is seen as not cost-effective to litigate, often because consumers are not aware that these rights exist, or are not sufficiently empowered in order to be able to make use of these rights of action.
- 3.7 It is in these situations that group litigation can be of use. It serves a number of particular purposes:
- Firstly it affords greater access to justice. The costs of litigation are such that claims of modest amounts, and even those of significant amounts, are often not economically feasible to pursue on an individual basis, this can be due to the direct cost of pursuing the litigation itself, but also fear of future costs incurred should the litigation be unsuccessful and the losing party must pay a large part of the winning party's legal fees.

- Secondly it improves judicial efficiency. Where the alternative to a group action is repetitive litigation relating to the same events, the result is judicial inefficiency. The filing of individual claims results in numerous trials without significant plaintiff-wide settlements. Such individual actions often cover the same ground time and again; they are not only inefficient, but can lead to inconsistent decisions. This may therefore doubly increase the judicial workload and thereby decrease judicial efficiency.
- The third policy objective is to achieve behavioural changes. When manufacturers and other entities can inflict small amounts of damage on a large number of people who cannot afford to litigate individual claims, the deterrent function of the law is lost. In many cases, subjecting potential defendants to the risk of a group action will modify their behaviour and prevent others from pursuing the same course of action. It is possible that as a result of a group of consumers seeking redress, a trader (and others in the same or other markets) may change their behaviour and therefore all consumers that transact with that trader may benefit.

Representative actions

3.8 There is currently a gap in the UK regime which means that it can be too difficult for consumers who suffer collective grievances to achieve redress.² Group litigation orders allow for direct action by individuals who have suffered equal harm, however they do not address the two fundamental issues which arise in the consumer context – funding of group actions, and appropriate damages.

² Comparative report on consumer policy regimes, DTI, October 2003: 'The UK appears to be behind the best in more effective mechanisms for obtaining redress for consumers where there is individual or collective harm'.

- 3.9 The proposal for representative actions should be set within this broad policy area of redress. We believe that there is a need for greater clarity around the objectives for representative actions and their role within the broader markets framework.
- 3.10 The proposals seek to provide redress for identifiable harm through increasing the access to justice through the intervention and facilitation of third parties with a view to providing financial compensation, or possibly facilitating replacement or repair of faulty products.³
- 3.11 The possibility of effective representative actions could provide businesses with further incentive to adhere to agreed standards and operate in the competitive marketplace.
- 3.12 It is also worth noting that in any industry most businesses will not breach consumer protection legislation, because it is clearly not in their long term interests to alienate the consumer. By closely observing the legislation such businesses experience higher costs. However they face competition from businesses which are operating at lower standards. Such businesses seek to lower their costs by lowering the standard of service they provide to the consumer – and possibly to the extent that they will breach consumers' rights. In the short term, this may provide them with a competitive advantage. Currently the sanction faced by these businesses is an injunctive order, which do not impose a penalty for past breaches.⁴
- 3.13 This creates an environment in which there are frequent calls for regulation to force the standards of all businesses up to some defined minimum level of service. Such regulations can be very costly to implement, could be ineffective, and can also contribute to making

³ A court cannot order repair/replacement; this is only possible through agreement between the parties as settlement (or part of it).

⁴ This is an issue being considered by the Better Regulation Executive. Regulatory Justice: Sanctioning in a post-Hampton World, consultation document, May 2006.

markets less competitive. They impose costs on those businesses that would have observed consumer protection legislation in the absence of regulation, because they want to develop a good reputation with their customers. Permitting representative actions would therefore raise the costs of breaching consumer legislation, and address the behaviour of businesses operating at a lower standard – whilst avoiding the distortion caused by regulation. Representative actions would seek to punish undesirable behaviour and thereby promote desired behaviour.

- 3.14 The proposals could go further, if broadened to allow representative actions on behalf of unnamed consumers, so that traders do not gain an economic advantage from their unscrupulous actions. In such cases, the potential threat of a representative action could therefore act as a deterrent. These objectives are further discussed below.

4 ENFORCEMENT AND REPRESENTATIVE ACTIONS

- 4.1 Representative actions are not new to the OFT, indeed the Competition Act 1998 has a provision allowing specified bodies to bring claims following infringement decisions by the OFT. At present, there have been no representative actions taken under competition law. However, the representative actions provision in competition law has been enacted relatively recently.
- 4.2 In competition cases, the OFT may, acting on its own initiative, submit written observations to a national court on issues relating to the application of Article 81 or 82 of the EC Treaty. With the permission of the court in question, it may also submit oral observations. We have stated our intention to use this power to submit written and oral observations in a way which will best assist the courts and the development of competition law.⁵
- 4.3 The position under consumer law would be different to that under competition law, as there is no equitable administrative decision-making in the consumer process. Our action under consumer law is primarily carried out under the injunctive regime provided by Part 8 of the Enterprise Act 2002, the Consumer Credit Licensing regime, and the 'negative licensing' of Estate Agency.
- The Part 8 regime is designed to be effective at bringing about the cessation and prohibition of individual infringements. We tend to initially use persuasive techniques and consultation to gain compliance and only if this fails, do we go to court for an Enforcement Order to prevent future breaches. It is only in successful cases that reach a final judgment that there will be a definitive finding that the trader has breached the legislation.

⁵ Enforcement, December 2004 (OFT 407)

- Under the Consumer Credit licensing system we have a duty to ensure that all those engaged in credit activities are fit persons.⁶ If there are sufficient doubts as to fitness, an OFT adjudicator will decide whether a licence should be refused or revoked.
- Where an estate agent breaches certain provisions of the Estate Agency Act or has been convicted of a certain criminal offence they can be banned by the OFT from doing estate agency work (Prohibition Order). The OFT can also issue a Warning Order against an agent who has breached certain provisions of the Act, where such a failure is not serious enough to cause him to be prohibited but if repeated will be. A Prohibition or Warning Order is also considered by an OFT adjudicator.

In both licensing instances (consumer credit and estate agency) an adjudicator's decision is not a definitive finding that the trader has breached the legislation.

- 4.4 Compensation for individual consumers detrimentally affected by the action of a trader is not currently part of consumer enforcement action.⁷ At the moment enforcement action by the OFT can restrict a trader's future actions, but the monies already gained from their activities are not returned to the consumers and therefore from the consumers' perspective the money is lost.

⁶ Section 25 of the Consumer Credit Act 1974. The Consumer Credit Public Register holds information on the licences that have been refused or revoked, along with a summary of reasons for such action.

⁷ If the OFT were to gain criminal powers/sanctions as part of the forthcoming UCPD implementation, we would be able to seek compensation directly for consumers using Compensation Orders, as part of a successful prosecution.

- 4.5 Thus even following OFT or Trading Standards' enforcement action, those consumers involved may understandably feel that whilst the trader has been restrained, and future breaches prevented, they have not received any redress for the losses which they have personally sustained.
- 4.6 As the primary objective of representative actions is to provide redress for a collective group of consumers, rather than to bring about the cessation or prohibition of infringing behaviour, we suggest that enforcement action by the OFT and other consumer protection law enforcers should be 'at arm's length' from representative actions.
- 4.7 Representative actions would not replace enforcement action, but sit alongside such action. They would allow an additional right of access to the courts for consumers and should therefore be without prejudice to public enforcement. Representative actions will simply be a more useful tool for consumers to recover their money and stop profiteering.
- 4.8 A successful action by the OFT may be determinative in a representative action. If the OFT was notified of all representative actions when issued, then we could notify the court of any related enforcement action that may have an impact.

4.9 Equally, if the right of notification was given alongside a right of intervention, then this would provide us with an opportunity to make submissions to the court in cases where points that could have an impact on the enforcement work of the OFT are being considered, such as statutory interpretation.⁸

4.10 Given our role in the consumer protection regime, it follows that there could be a suggestion of a more central possible role for the OFT in representative actions. For example, possible roles for the OFT could include:

- if the OFT **were** to be designated, there could be a direct role for the OFT in taking precedent-setting or other high-impact cases;
- if Trading Standards Services were to be designated bodies, there may be a co-ordination role for the OFT parallel to Part 8 of the Enterprise Act, where we have responsibility for the coordination of action by all enforcers; or
- there could be no direct role for the OFT, but instead the OFT would provide guidance for courts and others involved in representative actions, equally there could be procedures to link any representative action with any related OFT or Trading Standards' enforcement action that has taken place (see below).

⁸ For example, in appropriate cases The Australian Competition and Consumer Commission (ACCC) may seek leave of the court to intervene in private proceedings. The ACCC will consider intervention in private proceedings in one or more of the following circumstances: issues of significant public interest; construction of the Act – in untested areas or to clarify its operation; and international conduct.

Equally, Rule 15(3) of the Modernisation Regulations (1/2003) allows the Competition Authorities of the member states, on their own initiative, to submit written observations to the national courts of their member state on issues relating to the application of Art 81 or Art 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national court of their Member State.

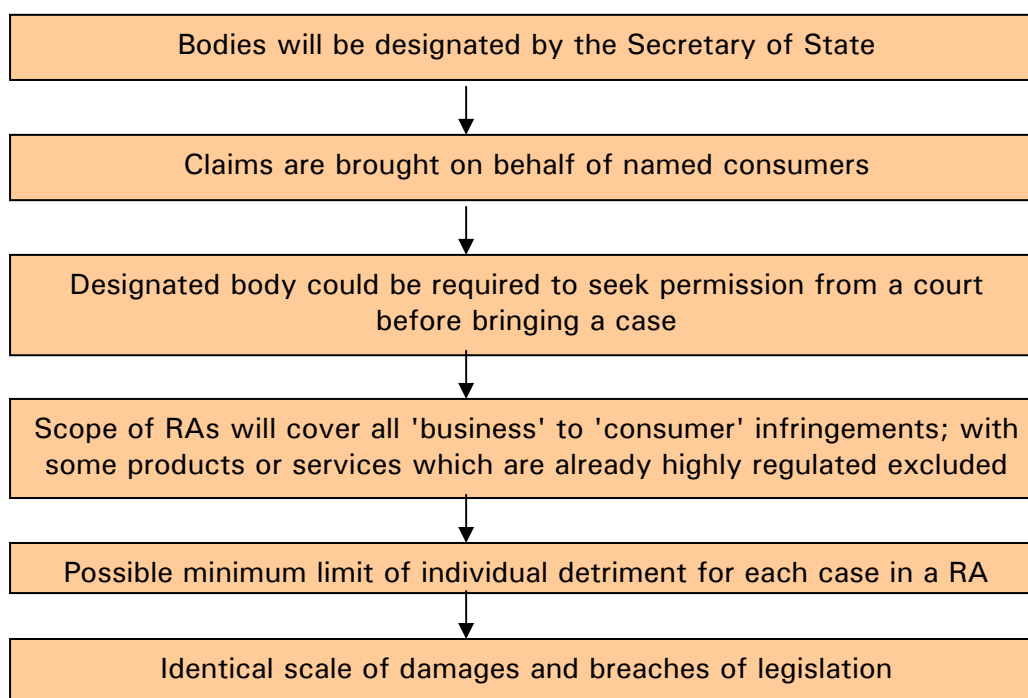
It should be noted however that these are merely initial thoughts on the subject and we would need to consider any future OFT role in much more detail and with full regard to the OFT policy aims and our overall strategy, including our aim of working in partnership with others. We will await the outcome of this initial consultation before discussing internally and with the DTI to define any possible role.

5 THE REPRESENTATIVE ACTION MODEL

- 5.1 The consultation paper refers to consumers being generally reluctant to bring civil cases on their own (because they perceive the system to be complex or the level of detriment is small compared to costs). However, the model proposed in the consultation paper places an emphasis on introducing measures to avoid inappropriate or spurious cases, and recommends a number of safeguards (designated bodies, consumer being named in actions, and a permission stage) – 'to protect decent firms from unwarranted action'. It should be considered whether such measures will act as additional barriers to consumers bringing warranted actions.

Current proposed model

- 5.2 We have re-produced the model proposed in the consultation paper for ease of reference and comparison:



5.3 The barriers to any representative action model include access to evidence, burden of proof and costs. Our specific points in respect of the representative action model are discussed below, in response to the questions raised in the consultative document. In summary, some of the disadvantages of the above model proposed in the consultation paper are as shown below.

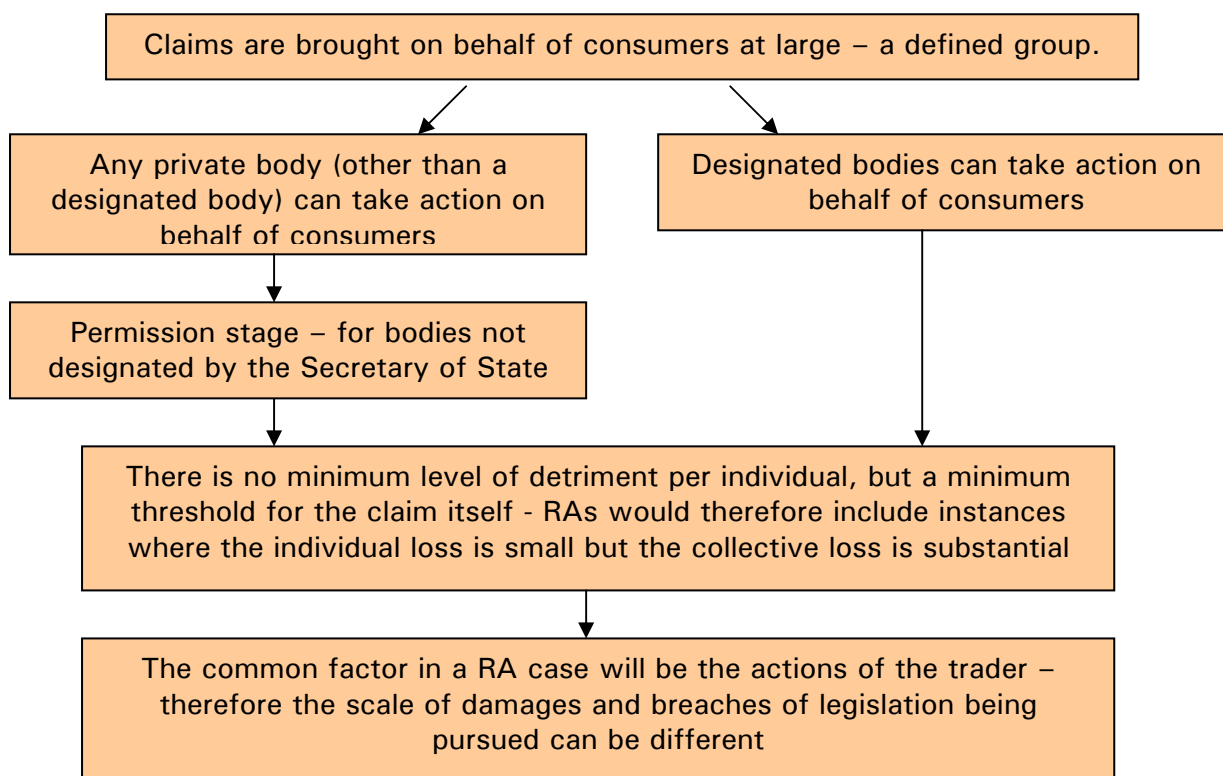
- The model would remove from scope cases where individual consumers cannot be identified, or where the amount of damage claimed by each consumer is so small, as not to make returning such amounts practically possible. In such cases a model which allows for claims to be brought on behalf of unnamed consumers generally could be more appropriate (see paragraphs 6.1 to 6.7 and 6.20 to 6.22).
- Certain designated bodies may not have the resources to bring such actions (see paragraphs 6.8 to 6.10).
- The permission stage adds an additional layer of bureaucracy if designated bodies have already been vetted and approved as being responsible to bring appropriate actions. Any inappropriate or spurious claims that were made could be dealt with through appropriate cost sanctions by the court. Alternatively, if there was to be a permission stage, any checks and balances should be proportionate to the aims of representative actions. We therefore think that one of these safeguards i.e. pre-designated bodies or a permission stage is sufficient, as both will be unduly restrictive (see paragraphs 6.11 to 6.14).
- The types of cases are too restrictive, as a trader's business practice could lead to claims for multiple breaches of the same or different legislation (see paragraphs 6.25 to 6.29).

5.4 As such we do not believe that the model proposed in the consultation paper will effectively fulfil the policy aims of representative actions.

A possible alternative model

5.5 We would like to propose that alternative models are explored. Whilst we agree that there is a need to safeguard against vexatious actions being brought, our view is that the number of safeguards proposed within the consultation paper are likely to render the proposals less effective than they otherwise could be and could in fact act as a significant disincentive to bringing valid actions.

5.6 We suggest that the benefits of other models should be assessed with a view to ascertaining which model will widen the consumer's access to justice, whilst providing sufficient safeguards. We suggest an alternative model below:



- 5.7 We would see this alternative model operating within a strict framework of public guidance and legal rules of procedure.
- 5.8 This model raises different questions, and further consideration would need to be given to:
- the procedure for opting-out of the action and the consumers' awareness of litigation relating to them – some consumers may have no desire to litigate
 - the level of costs incurred by consumers in obtaining financial recompense if damages are awarded by the Court
 - how the group would be defined and limitation periods
 - which organisation would have the right to act for the group
 - if the individual harm cannot be identified this raises evidential issues, particularly in relation to causation and the quantification of damages
 - where the overall amount of loss is greater than the amount of loss that can be allocated to identified individuals, whether the court should have discretion to award damages but have the monies paid elsewhere, for instance as funding for consumer education or research. For example, (although this is not a representative action case) the OFT agreed a settlement with 50 independent schools where the schools agreed to make an ex-gratia payment totalling £3 million into an educational, charitable trust.

Reputable businesses and representative actions

- 5.9 In considering any representative action model due attention should be given to the effect on respectable businesses and the need to prevent vexatious claims. We believe that allowing representative actions would not affect respectable businesses because, given suitable permission/designation stages and good existing systems in place for

direct settlement or third party dispute resolution, there will be no actions against them.

- 5.10 We would recommend that all businesses which do not yet have in place good systems for direct settlement or third party dispute resolution should look further into this as it is beneficial to businesses as well as consumers. For example, our experience of operating the OFT Consumer Codes Approval Scheme (CCAS) suggests that such schemes act as an impetus for best-practice, encouraging traders to raise standards of behaviour above the legal minimum requirement and thereby boosting consumer confidence in markets and adding to the competitiveness levels of those business involved.⁹
- 5.11 The representative action model should focus on achieving collective redress for groups of consumers and also eliminating the financial gain of businesses that work outside of the law. The necessary safeguards to prevent opportunistic vexatious claims, which may force reputable businesses into settlement, should include a robust permission stage along with guidance for the courts in order to enable them to understand the context of representative actions. For example, the Better Regulation Executive's penalties review sets out general principles for the use of penalties in the enforcement of regulation.¹⁰ These principles can also be

⁹ The OFT's Consumer Codes Approval Scheme aims to promote and safeguard consumers' interests by helping consumers to identify those businesses which have committed to aim for higher standards of customer services by meeting the OFT's core criteria and delivering on the promises enshrined in them.

¹⁰ Regulatory Justice: Sanctioning in a post-Hampton World, consultation document, May 2006. The review proposes a number of ideas for longer-term policy reform designed to ensure that regulatory bodies are equipped with a toolkit which will enable flexibility, efficiencies and responsiveness in line with Hampton's recommendations. It aims to achieve outcomes which should result in better deterrence options for regulators, better compliance for business and better outcomes for society as a whole.

used as a framework to guide representative actions. The principles are that sanctions should:

- change the behaviour of the offender
- ensure that there is no financial benefit obtained by non-compliance
- be responsive and consider what is appropriate for the particular offender and the particular regulatory issue
- be proportionate to the nature of the offence and harm caused
- aim to restore the harm caused by regulatory non-compliance
- aim to deter future non-compliance.

5.12 We believe that allowing representative actions would maximise the impact of civil interventions by addressing past harm, and therefore having a much greater impact across markets and the economy as a whole, for example, by providing sufficient deterrent to other businesses from carrying out similar behaviour and by reinforcing consumer confidence.

5.13 When considering any representative action model comparisons are made with the US class actions model, and in turn criticisms. However, any representative action model has to be designed with attention to the existing legal system. For example, Prof. Hodges observes that multi-party litigation exists as a phenomenon in some jurisdictions but not others, and his analysis reveals the importance of a range of different factors:¹¹

¹¹ Multi-party Actions: A European Approach, Christopher Hodges, Uni. of Oxford, 2001.
<http://www.law.duke.edu/journals/djcil/articles/djcil11p321.htm>

- the ability of lawyers to advertise
- the need for claimants to fund their action – under a US contingency fee system there is no need for claimants to pay anything towards their own costs
- the extent of any financial risk for the claimant if he loses – there is no risk of a claimant being ordered to pay a defendant’s legal costs if he loses in almost all US states (in the UK, an unsuccessful claimant must in the vast number of cases pay the defendant's costs)
- the predictability of the court's decision
- level of damages that might be awarded. In the US, damages awarded by the courts are generally higher than in the European jurisdictions, as awards are able to contain an element for punitive damages. This therefore means that this risk has to be factored into settlement agreements, which therefore contributes to the trend for settlements in the US to be generally higher as well. No European jurisdiction routinely awards punitive damages.

5.14 In terms of the US Class Action 'threat', Prof. Hodges concludes that:

'... the root causes of the problem lie in the legal system's unpredictable potential for arbitrary variation in liability decisions, in the potential for very large damages awards (again unpredictable and arbitrary), and in the disproportionate size of the commercial incentive to the plaintiffs' lawyers... One of the most important balancing controls is a rule that whomever loses should pay most (but not all) of the winner's legal costs'.

5.15 We understand that aside from the US, Australia is the next most likely jurisdiction in which a class action would be taken. At a conference in Australia (December 2005), Chief Justice Black of the Federal Court of Australia revealed, that 166 proceedings have been commenced in the Federal Court, as class proceedings, since Part IVA came into operation

in March 1992. Two commentators noted that the introduction of class actions in Australia 'has not resulted in the opening of the litigation floodgates. Indeed, there has barely been a ripple. The number of proceedings instituted has been small indeed'¹² . In Australia the courts restrict lawyer's fee and the losing party is liable to pay the legal costs (two important balancing controls). We understand that seven out of ten new class action lawsuits are shareholder-related, and an important change in Australia has been the emergence of financiers prepared to fund class actions.¹³

¹² International Class Actions Conference, Melbourne.

http://www.mauriceblackburncashman.com.au/areas/class_actions further reference to D Grave and K Adams, Class Actions in Australia (Lawbook Co; 2005), 13.

¹³ Class action culture spreads across Australia, Financial Times, 8 March 2006

<http://search.ft.com/searchArticle?page=2&queryText=class+actions&y=0&javascriptEnabled=true&id=060308009091&x=0>

6 RESPONSE TO QUESTIONS

Named consumers

Question 1: Should representative action cases be for consumers at large, or named consumers?

6.1 The Lord Chancellor's Department (now the Department for Constitutional Affairs) initially consulted on Representative Claims.¹⁴ This consultation paper explores the issue of 'identifying the group to be represented', and it presents the various types of representative claims that could arise:

- representing named and therefore identifiable individuals – for example a trade association on behalf of its members
- representing unnamed but identifiable individuals – for example all the purchasers of a product or service who have been overcharged, that is a large group where it would be impracticable to name individuals;
- representing unnamed and non-identifiable group, but a direct cause of action can be identified – for example where a consumer group has difficulty finding individuals to run a test case, but a case could be taken by the consumer group for 'all consumers'.

The consultation paper concludes that representative claims on behalf of these identified groups could provide a useful mechanism to deal with individual instances of harm affecting a large number of people.

¹⁴ Representative Claims: Proposed New Procedures. A Lord Chancellor's Department Consultation Paper. February 2001.

- 6.2 Our proposed model suggests that consumers should be able to opt out of an action, rather than opt-in.¹⁵ We recognise the preference expressed in the consultation paper for bringing actions on behalf of named consumers, however there are advantages with an opt-out system, which are discussed below.
- 6.3 Consumers may 'hold back' from participating in any original action as the outcome may be uncertain and instead wait to see the outcome. If it is favourable, then the consumers that held back may then bring secondary litigation, relying upon the original decision, to minimise the risk they face (so-called 'satellite litigation').
- 6.4 Such action may increase uncertainty for business as it may not be clear when all matters will have been resolved.¹⁶ It may also decrease the likelihood of any settlement of the original action being achieved because settlement could be seen as a sign of weakness, which may encourage other parties to pursue the business.
- 6.5 If the matter could be dealt with on behalf of all consumers in one action, then it would help to ensure that the full extent of damage is calculated within a single action, and the matter is brought to an end. It would also mean that the true damages figure is more likely to be known, than if calculated in a piecemeal fashion across various actions, and publicity of large figures are likely to act as a deterrent to some businesses.

¹⁵ Lord Chancellor's Departments' paper proposes that 'where practicable the applicant should provide the court with the names of those they represent and demonstrate that they consent to being represented by the applicant. Alternatively, where they can be easily notified, individuals could be given the opportunity to opt out. Where it is not possible to name the individuals they should be identified as clearly as possible' (proposal 4). Overall there was support for this proposal (Department for Constitutional Affairs, consultation response, April 2002).

¹⁶ Except once the limitation period has passed, as all actions beyond this point will be statute barred.

- 6.6 An opt out system would benefit those consumers who are initially unwilling to come forward and join an action, perhaps due to a fear of the process and costs, but subsequently wished they had. All consumers would be represented. For example, Irwin Mitchell solicitors represented approx. 400 consumers, who had lost money, in their class action against convicted timeshare fraudster, John Palmer. However, this is a very small proportion of the 16,000 people the criminal court found that John Palmer had defrauded.¹⁷ In both an opt-in and opt-out system there is the issue of reaching all the interested parties; however, the opt-out system has the benefit that it would represent the entire group and in particular those consumers who are less aware of their rights.
- 6.7 The consultation paper states that representative actions on behalf of named consumers could avoid the problems of companies paying damages to consumer's at large as well as individual cases pursued privately. In our response to the Commission's Green Paper (regarding competition law) we were not averse to some double recovery (or the risk of double recovery), as this would improve the effect of the deterrence.¹⁸

¹⁷ Irwin Mitchell Solicitors, guide to John Palmer timeshare fraud:
<http://www.irwinmitchell.com/Personal/GroupAction/Guides/GuideToJohnPalmerTimeshareFraud.htm?P=3>

¹⁸ Response to the European Commission's Green Paper, Damages actions for breach of the EU antitrust rules, May 2004 (OFT844)

Designated bodies

Question 2: Are the criteria of reputation, ability to handle the case & consumer focus sensible factors?

Question 3: Should we consider any other factors?

Question 4: Is designation necessary at all? Should any body, or firm, be able to bring a case?

6.8 Although we can appreciate the proposal for bodies to be designated – so that they are pre-vetted and so should have automatic standing to bring a claim – there are a number of factors which would need to be taken into account if this proposal were to be adopted:

- Will such bodies have the funding, in-house legal function or willingness to take on this role? With limited funding, only the strongest cases, which are most likely to win, will be taken forward, which are also most likely to be the cases that individuals would be prepared to bring in their own right.
- How many bodies would apply for designated status, and would they represent consumers in a range of consumer protection legislation? Is it possible that some consumers would have no organisation to approach?
- Will such bodies have the competency and/or objectivity to be responsible for bringing such actions?
- In contrast to the Competition Act 1998 provision where there is a decision of the OFT/EU as to a breach, the designated body in a consumer protection case would have the burden of having to prove the infringement, as well as causation and quantum of damages. Before bringing an enforcement action the OFT will often seek information and evidence from both the trader and third parties in order to assess the facts and decide whether there is a case to

answer. Much of the information is obtained through powers such as section 224 of the Enterprise Act. Such powers would not be available to the designated bodies, so their ability to collate evidence will be restricted. More generally, by having to prove the actual breach of the legislation, the proceedings are likely to become quite complicated and time consuming, particularly if done on a large scale or contested by the trader, which would have an effect on the level of legal fees incurred.¹⁹

6.9 Some of these concerns are reflected in Which?'s response to the European Commission's Green Paper, which states:²⁰

'With respect to National initiatives toward recovery of competition damages for consumers', Which? applied for, and was granted 'specified body' status pursuant to section 47b of the Enterprise Act UK 2002, by the Secretary of State in October 2005.

Which? has for some time been consulting widely with Government officials, economics experts, and members of the private bar in the UK, and in international jurisdictions including Australia, Canada and the US. This has been necessary to ensure we frame our case strategy, and potential damages claims, in a way that will maximise compensation to direct purchasers who have been affected by unlawful cartel practices.

¹⁹ The resource requirements for designated bodies could be reduced if there was prior action by the OFT, taking into account that any disclosure of evidence is subject to Part 9 of the Enterprise Act 2002.

²⁰ Consultation response, Which? 12 April 2006.
http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/O21.pdf

Given our limited resources and the competing number of topical issues affecting consumer enforcement and redress in the EU at this time, the information gathering exercise for this innovative development in law, legal process, and for consumers, has been under some pressure. There is now an expectation that Which? will bring actions to test the process, and to this end we have enjoyed enormous support from the UK legal profession.

It is as equally important for Which? as it is for the wider community however, that we ensure that we have as much information and good advice before the first claim is issued, so that we do not in any way inadvertently limit the range of possibilities this type of action may offer.'

- 6.10 In turn, the success of representative actions may depend on risk-taking and lawyer-entrepreneurs to establish precedents and develop the law. Our model proposes that certain bodies are designated as being able to bring proceedings and therefore these bodies would not have to go through the court permission stage. At the same time, any private body, which had not been designated, could still bring an action, but could be required to go through a court permission stage to show that they have a well-founded case and the ability to bring the action. For example, the court would consider whether: the body was using the mechanism to publicise or sensationalise issues for reasons not purely related to the detriment caused to consumer; and if it had a sufficient interest in the issue concerned.

Court permission

Question 5: Is a permission stage necessary to avoid inappropriate cases?

Question 6: If anyone, not just designated bodies, can bring a claim should a permission stage be used?

Question 7: If necessary, are there any other factors that should be considered at the permission stage?

Question 8: If necessary, how should the permission stage be implemented in Scotland?

Question 9: Even if the permission stage were considered unnecessary to prevent spurious cases, would it have value from a case management point of view?

6.11 As stated above, we disagree that a permission stage is necessary as it adds an additional layer of bureaucracy if designated bodies have already been vetted and approved. In addition to this, unsuccessful claims may result in the designated body paying the defendants costs which would discourage weak and/or inappropriate cases.

6.12 If representative actions were however open to private bodies, and as such they will not have undergone a vetting stage to become a designated body, we would recommend that a permission stage is necessary to show that the private body has a worthy motive for bringing the action.

6.13 The Court rules themselves will also provide defendant traders with a degree of protection from unmeritorious or vexatious claims. For example, if the trader can show that the claimant has no real prospect of succeeding on the claim and there is no other compelling reason why the case or issue should not be disposed of at trial, then an application for summary judgment on the claim can be made.²¹ Alternatively, if a claim: (a) discloses no reasonable grounds for bringing a claim or (b) the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings, then a trader could apply for it to be struck out by the court.²² In the second case, the court is also required to consider whether the claim is totally without merit. If

²¹ Part 24 CPR

²² Part 3.4 CPR.

this is the case, then the court must consider whether to make a civil restraining order (CRO) against the claimant.

- 6.14 CROs vary in scope and duration, but in effect a CRO is an order restraining the actions of vexatious litigants either within a specified set of proceedings or more generally. The subject of the CRO is required to seek permission from the Court before issuing specified types of applications or proceedings. The aim being to restrict the subject's ability to issue only claims/applications which have merit. Defendants can also make an application to the court for a claimant to be made the subject of a CRO. A trader could therefore make such an application if it were to be the subject of attention from a vexatious litigant.

The scope of representative actions

Question 10: How should the scope of representative actions cases for breaches of consumer protection legislation be defined?

- Option 1. To cover all 'business' to 'consumer' infringements, with the possibility of some products or services which are already highly regulated excluded.
 - Option 2. According to legislation listed in secondary legislation – subject to revision by Order.
 - Option 3. According to broad areas defined in secondary legislation – subject to revision by Order? If so, which areas should be included?
- 6.15 The consultation is limited to consumer protection law. It should be noted that, in terms of option 1, if a broad definition of 'consumer cases' is adopted (which includes any consumer versus business action) then it would appear to also cover competition law claims by consumers. It would seem logical to have a joint regime, rather than keeping competition cases separate, and we would therefore suggest that the scope for aligning the regimes should be explored. Any general definitions of 'consumer' would need to be in line with any definitions in

the Unfair Commercial Practices Directive (UCPD). Also, a clearer more specific definition of 'highly regulated' is required, in order to understand which products and services would actually be excluded and assess the impact on consumers. For example, financial services could be defined as a highly regulated area. The Financial Ombudsman Service provides a strong model. However, there may still be certain cases in this sector where a representative action would be suitable.

- 6.16 However, defining the scope of representative actions in a manner similar to the Enterprise Act 2002, by reference to the statutes/statutory instruments deemed to be covered also has advantages (option 2). When a representative action is brought, the designated body will have to shown why it is entitled to bring the claim.
- 6.17 If there is a clear list of the statutes/statutory instruments covered by representative actions, then the designated body would simply have to show that its claim relates to one or more of the listed provisions. If the scope of representative actions is simply defined as business to consumer infringement the designated body will have to show that its case falls within the definition.
- 6.18 This will require detailed legal argument until there is a relevant body of case law built up. However, there still may be the need for legal argument in situations that are novel, where there have been amendments to legislation, there is new legislation such as UCPD or unclear precedent. It is also by no means certain that a court would find that a particular breach that intended to be caught by the definition will actually be covered.
- 6.19 It is understood that listing all the relevant legislation is time consuming as it has to be continually monitored and updated. However, this has to be balanced against trying to make the process as user friendly as possible and any (potentially unnecessary) additional layer of legal argument will add to the burden and costs risk faced by the designated bodies.

Small claims

Question 11: Should cases below the small claims limits have to be dealt with individually as a small claim?

Question 12: Do you think that a minimum limit should be set for each case in a representative action?

- 6.20 We disagree with a model which would propose a minimum level of detriment to individual consumers, because this would remove cases involving low individual value and high-volume activity, for example in certain scams cases. An estimated five million people lose money to low-cost mass-marketed scams in the UK every year,²³ at a cost of up to 1 billion per year to the victims.²⁴
- 6.21 Representative actions should be suitable for claims that involve claims by large numbers of people, where the individual amount claimed is small, so the cost of litigation would not make an individual claim worthwhile. It is suggested that a more appropriate consideration would be the total value of the damages being claimed. For example, two people claiming fifty pounds would seem low, but one thousand consumers claiming fifty pounds would indicate a much larger issue.
- 6.22 For matters where the individual claims are below a certain amount (for example ten pounds), the loss to each consumer could be considered small, but the profit for the trader is still potentially substantial. In such

²³ Prevalence figure taken from Which? report Scams: don't get sucked in (January 2006). Early results from OFT research show 59 per cent of the population aged over 15 has been targeted by mass-marketed scams.

²⁴ The estimate of the loss to UK consumers is based upon data from a variety of sources. These include PhoneBusters, the Canadian national call centre for reporting telephone scams; seizures from PO boxes by enforcement bodies; complaints to ICSTIS about unexpected premium-rate call charges; and statistics provided by the National Criminal Intelligence Service. Estimates are based on 2004-05 figures.

cases it may be difficult to ensure that everyone receives their share of the damages, so there is an argument that the court should have discretion to decide where any damages are paid, for example they could be paid to a relevant charity. However, this is a double edged sword, because individuals are less likely to get involved in the action at the outset if they are not going to personally benefit from the outcome. In this type of case, a model which allows actions on behalf of unnamed consumers would be preferable and more practical to administer.

Handling cases

Question 13: Would it be adequate to amend the primary legislation to allow a representative body to bring a case in England and Wales?

Question 14: Would it be more appropriate to amend primary legislation to allow consumers to assign their rights or action to a designated body? The resulting court case could then be handled using existing court procedures in England and Wales or in Scotland.

6.23 We have no specific comments on the amendments required to primary legislation. However, an important consideration is that if representative actions were allowed they will be very restricted due to the courts power in relation to consumer legislation. For example, under Part 8 of the Enterprise Act 2002 the court only has the power to order Enforcement Orders; it does not have the power to award compensation to consumers. Therefore the ability of consumers to obtain compensation through a representative action is very limited given that there is no underlying legislation to bring such an action.

6.24 The implementation of the Unfair Commercial Practices Directive (UCPD) may introduce both civil and criminal offences for serious breaches. If the OFT were to gain criminal powers/sanctions as part of the forthcoming UCPD implementation, we would be able to seek compensation directly for consumers using Compensation Orders, as part of a successful prosecution.

- 6.25 In discussing the handling of representative actions cases, the consultation paper suggests that all consumers within the action should have suffered 'identical detriment and breaches'.²⁵ In our view, this limits the usefulness of the proposal. Our experience suggests that the number of cases where the detriment and nature of breach is identical for each consumer affected are very rare.
- 6.26 In Canada a class action cannot exist without a core element of commonality. However, the court cannot refuse to certify a class proceeding solely on the basis of:²⁶
- individual assessment would be required following the determination of common issues
 - the claim relates to separate contracts involving different class members
 - different remedies are sought for different class member
 - the number of class members or identity of each class member is not known.
- 6.27 We suggest that the common factor in a representative action case should be the actions of the trader. The scale of damages being pursued and breaches of legislation could therefore be different and encompass a wider class of consumers. Restricting cases to identical detriment and breaches will limit the benefits of representative actions and could lead to a situation where there are separate actions for different breaches. In

²⁵ The consultation paper model excludes cases where the problems may be more complex and slightly different for example a kitchen fitting company where each case is different (for example no supply or fitting, supplied but not fitted, or faulty workmanship) because this would be 'very difficult for the representative body and court to manage, and more costly to process'

²⁶ www.classactionlaw.ca/

turn, it would also present problems for those who have suffered from multiple breaches.

- 6.28 The OFT will institute a single action against a trader for breaches of different legislation, on the basis that all the breaches are related by the fact that they stem from actions by the same trader. We are therefore of the view that breaches all stemming from actions by the same trader should be allowed to be brought together.
- 6.29 In some cases there are traders that use multiple corporate (or otherwise) identities, so any definition would have to be drafted in such a way as to prevent a trader from forcing multiple actions by having various or unclear identities. The ordinary rules on joining additional defendants should apply to representative actions as they do to any other court action.

Funding

- Q15. Do you think that a written agreement of how damages will be distributed in the event of winning a case should be signed at the outset? Should consumers also be able to agree an amount, proportion or percentage of any such award to cover the legal and administrative costs of the representative body?
- 6.30 The costs surrounding representative actions present a major barrier to the usefulness of the proposal. Alternative ways to alleviate the funding problems and financial disincentives need to be considered in order to present an attractive funding package. Discussions with all interested parties including the private sector are important to assess the feasibility of the various possibilities, which we understand are:
- Conditional Fee Agreements (CFA), whereby solicitors and counsel may agree to receive no payment or less than normal payment if the case is lost, but normal or higher than normal payment if the case is won

- a form of pro-bono scheme or special rates that counsel and/or solicitors would charge. For example, there could be a designated panel of approved solicitors and barristers that have to be used for such actions and they agree to charge a set rate, perhaps the same as the Treasury Solicitors approved rates
- a more developed insurance market
- a fund to finance representative actions, where successful cases pay a percentage in to the fund, which is then used to help finance future cases
- a loan which is taken out by the claimants to fund the disbursements, the expert witnesses' fees, and the premium of the after the event insurance. The loan may be on terms that it is not repayable in the event that the client loses. The interest on the loan is not recoverable from the other party and may be deducted from the damages recovered.

Protective costs orders

6.31 In Judicial Review cases, it is possible for small/public interest parties to make applications for protective costs orders ('PCO') which provide protection for the party in relation to costs. For example, the party may not be liable to pay their opponents costs regardless of the outcome, or the costs that either party can claim from the other are capped at a specified figure that both parties can afford. The criteria applied are set out below.²⁷ It is acknowledged that the test would not suit the needs of a designated body as it currently stands, but it could be used as a starting point to develop a more appropriate test.

- the issues in question have to be of general public importance

²⁷ The leading authority is *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192

- the public interest requires that those issues should be resolved
- the Claimant has no private interest in the outcome of the case²⁸
- having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order
- if the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in doing so
- other points: if those acting for the Claimant are doing so under pro-bono, then it is likely to enhance the merits of the PCO application. It is the Court's discretion to decide if it is fair and just to make the order in light of the above considerations.

Champerty

6.32 Finally, we refer to 'maintenance' and specifically 'champerty':

- 'a person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse'²⁹
- champerty 'occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit'.³⁰

6.33 Depending upon the exact terms under which the representative action system is established, the funding of any action by a designated body or private body on behalf of consumers with the intention of recovering their costs or costs plus an uplift, in the event of the proceedings being

²⁸ Under the proposals a designated body would fulfil this criterion.

²⁹ Chitty 28 Ed Vol 1 17 – 050

³⁰ Chitty 28Ed Vol 1 17-054

successful, could be held to be champertous. In representative actions this would be relevant either:

- to applications by unsuccessful traders that the agreements between the designated/private body and the consumers are champertous and therefore unenforceable, in order to minimise the amount paid out by the trader in costs, or
- to applications by successful traders that the agreement between the unsuccessful consumers and the designated/private body should give rise to the trader being able to pursue the designate/private body for costs.

6.34 In such cases the Court has to balance various competing public policy objectives such as: (1) the general rule that a successful party to litigation should be entitled to recover his costs; (2) facilitating access to justice; and (3) discouraging interference by funders in the proper and responsible management and conduct of litigation. Depending upon the circumstances of each case or the general rules regulating the system, it may be possible for designated/private bodies to recover their costs and/or any uplift if the claim is successful. Equally, a successful trader may be able to seek recovery of his costs from the designated/private body. However, in both cases the opposite may be true.

Case examples

- Do you have examples of cases that you think would benefit from the ability to use a representative action?
- Can you suggest an order of magnitude for how many cases might occur in a year?
- Do you think this would replace some of the existing individual claims or would this increase the overall number of cases?

- 6.35 The product goods and service category accounting for the largest number of consumer complaints in Q3/2006 was 'house fittings and appliances' (62,421) followed by 'other household requirements' (27,470). The largest cause of complaint according to trading practices was defective goods (46,805) and substandard service (23,887).³¹ The vast majority of these complaints are of course solved directly between the consumer and the business involved, however this complaints data and other data available to the OFT through Consumer Direct may be expected to act as a suitable guide to which areas would see representative actions.
- 6.36 As detailed above, we take action under Part 8 of the Enterprise Act 2002. Action can be taken against breaches (for example certain laws on consumer credit, package holidays and unfair terms in consumer contracts) which harm the collective interests of consumer. The breach must effect or have the potential to affect consumers generally or a group of consumers. However, there is no obligation to establish a specific number of individual complaints. In the last financial year we obtained two Court Orders and ninety-five Undertakings.³² It cannot be deduced that these are all representative action cases, but they can act as a guide to the number of 'formal' enforcement action we take.
- 6.37 The following are just a few examples of the types of cases, based on OFT enforcement work, which we would consider would fit into the scope of representative actions, where direct settlement and ADR have failed:

³¹ Data obtained from Consumer Direct

³² <http://www.of.gov.uk/News/Annual+report/resource.htm>. Annexe A - Summary of OFT consumer law casework in 2005-06 excluding consumer credit cases. The statistics are only given for court orders, and undertakings; this excludes the total number of complaints and enquiries dealt with (approx. 3200).

- scams, in general, for example:³³
 - **prize draw/sweepstake mailing scam** - mailings or emails telling recipients that they have won a major prize in a competition such as cash, a car or a holiday and that they only need to send an administration or registration fee. The prize may never materialise or is of low value.
 - **premium rate telephone prize scam** - these notify people by post, telephone or text message that they have won a major prize in a competition, but need to ring or text an expensive premium rate telephone number to claim the prize. There are high call charges and the prize may never materialise, is of very low value, or has many strings attached.
 - **work at home and business opportunity scam** - offers to earn large amounts from working at home (for example 'stuffing envelopes'), or investing in a business and requests for money up front for more information. The work involved or the nature of the business is often mis-described and people can end up investing their money and time, but earn little or nothing in return
 - **pyramid selling and chain letter scams** - these promise high earnings for recruiting new members. People pay to join but the claims of earnings are unrealistic. There are no real products or services involved and the schemes can eventually collapse as new recruits dry up.
- A roofer takes advance payment for roofing work and providing little or no service in return. He trades under numerous entities.
- A national company which supplies orthopedic beds engages in high pressure selling tactics against vulnerable consumers.

³³ See OFT press release: A scam for everyone, 8 February 2006 (24/06).

- A debt collection company falsely represents its authority, in order to enforce payment from debtors. The company also pressures debtors to sell property or to raise funds by further borrowing.
- A motor dealer sells or offers vehicles which are not of a satisfactory quality or fit for their purpose, he also misrepresents the specification and history of the vehicles.
- A business, trading over the internet, purchases and imports vehicles from Europe. Consumers that order cars from the company, pay for them in full and are then told that delivery would be later than previously indicated and/or the price of the vehicle had increased. Customers complain that they are subjected to long delays for delivery and in turn cancel their orders. However, those that did so say that they had difficulty in obtaining a full refund.
- A number of estate agents include a standard term in their contracts which require sellers to pay disproportionately high default charges on late payment of the agent's fees.

7 CONTACT DETAILS

7.1 Should you have any enquiries regarding this response, in the first instance, please contact:

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