

OFT's response to the EU consultation on consumer collective redress benchmarks

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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 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.
- 1.2 We adopt a market-informed 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.

BACKGROUND

- 1.3 The OFT has a keen interest in the area of collective redress and we strongly endorse the view that representative actions would be beneficial to groups of consumers who have been unable for whatever reason to resolve their disputes through direct settlement with the trader or by third party alternative dispute resolution mechanisms (ADR).
- 1.4 We are however aware that there are a number of significant issues including funding, type of damages, and scope of cases, which need further consideration in the area of collective redress particularly in relation to cross border transactions. We support the concept of benchmarks for effective collective redress mechanisms and the EU's consultative approach.

Representative Actions on behalf of consumers

- 1.5 The main focus of the OFT's work in this area has previously been on the use of representative organisations to take actions on behalf of consumers rather than on collective actions where individual consumers themselves take the lead. We consider that representative actions may be more useful in providing both consumers and businesses with the confidence that a relatively neutral third party is taking the lead in a

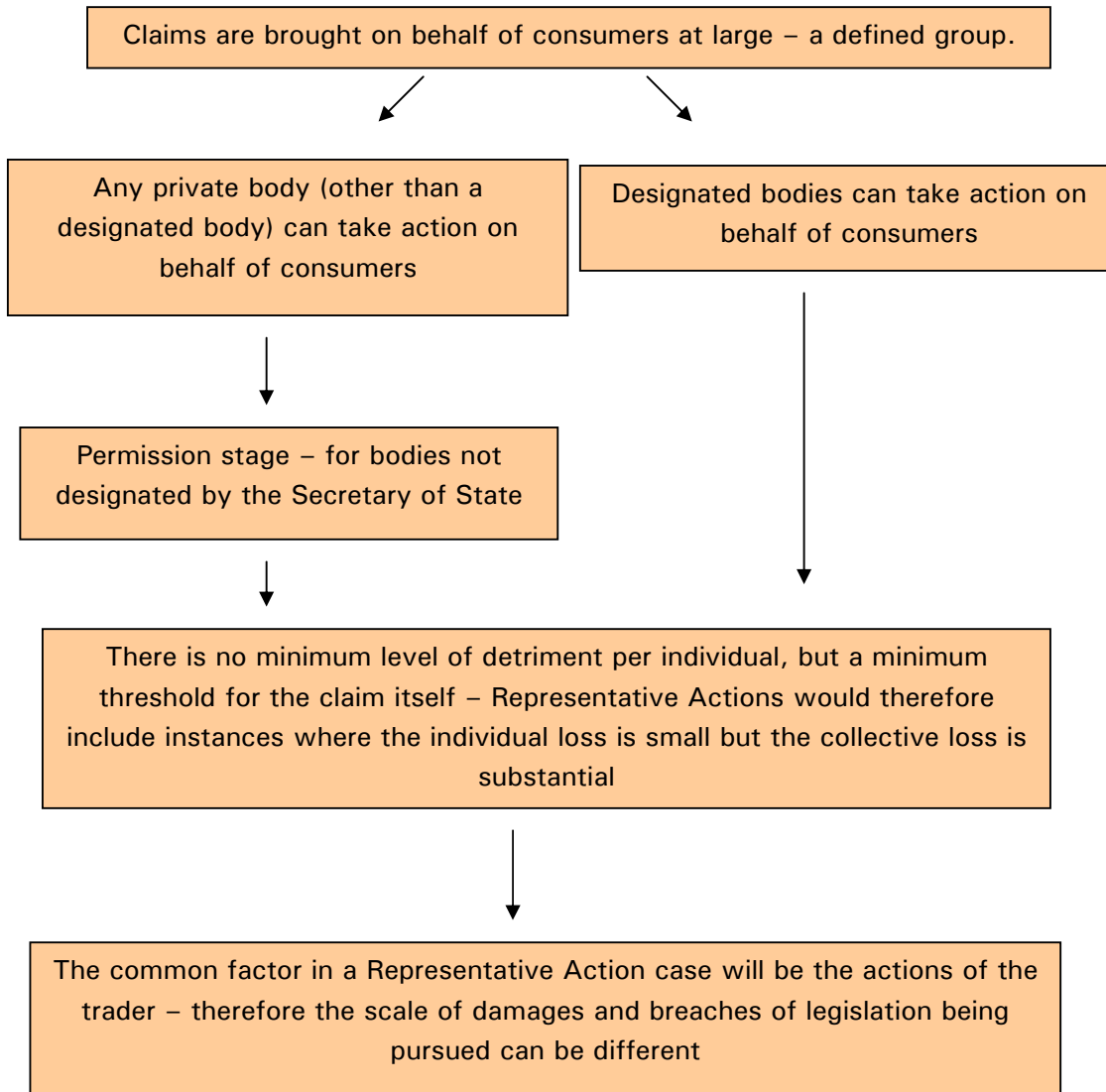
case. However we do not discount the value that a group action led by an individual would provide particularly where no representative organisation is available or appropriate to take on the case.

- 1.6 In our response¹ to a consultation exercise on representative actions in consumer protection legislation undertaken by the UK's Department for Business, Enterprise and Regulatory Reform (BERR)² in 2006, we set out our preferred model as to how we would see a representative action mechanism operating.
- 1.7 This model would allow both designated and non-designated bodies to bring claims on behalf of consumers. It is based on the assumption that cases would be taken on an 'opt-out' basis, which is our preferred option as it provides the greatest number of consumers with the benefits of this type of collective action. We recognise however that 'named consumer' and opt out models both have merits and further consideration of how this could work in individual cases is necessary.

¹ *Representative actions in consumer protection legislation, A consultation response by the Office of Fair Trading* October 2006. OFT 867.
www.offt.gov.uk/advice_and_resources/publications/reports/oft_response/

² *Representative actions in consumer protection legislation: Department of Trade and Industry* July 2006.

OFT's Proposed Model for Representative Actions Procedures



Private actions in competition law

- 1.8 The OFT has been proactively involved in the debate within the UK and EU on the issue of how to make redress for consumers and business for breaches of competition law more effective. Representative actions already exist under UK competition law as a follow on action and we have experience of one claim under the existing legislation which resulted in an out of court settlement in January 2008.³
- 1.9 We published a discussion paper in April 2007⁴ to encourage debate on a number of issues including representative actions, costs and funding arrangements. We followed this by publishing recommendations to government⁵ as to the steps which, in its view, should be taken at the domestic level to make private actions in competition law more effective. A full consultation on private actions in competition law, among other things, is expected later this year.

³ JJB Sports PLC v Office of Fair Trading. Which? brought a claim against JJB Sports PLC following a decision by the OFT that JJB Sports PLC had breached competition laws by agreeing to fix the sale price of replica football kits.

⁴ *Private actions in competition law: effective redress for consumer and business*. Discussion Paper April 2007. OFT 916
http://www.offt.gov.uk/advice_and_resources/publications/reports/competition-policy/

⁵ *Private actions in competition law: effective redress for consumers and business*. Recommendations from the Office of Fair Trading November 2007. OFT 916resp

http://www.offt.gov.uk/advice_and_resources/publications/reports/competition-policy/

2 OFT RESPONSE TO CONSULTATION QUESTIONS

Do we agree with the benchmarks?

- 2.1 Overall we consider that the benchmarks cover the key areas to ensure an effective collective redress mechanism. We do, however, have some comments on a number of the individual benchmarks as follows:

The mechanism should enable consumers to obtain satisfactory redress in cases which they could not otherwise adequately pursue on an individual basis.

- 2.2 We agree with the purpose and intention of this overarching benchmark although we have a concern that as drafted it may not provide sufficient clarity for business and consumers. In our view it may be interpreted to suggest that all other avenues of redress must have been exhausted before such an action is undertaken. While we agree that ADR mechanisms are key in assisting consumers to achieve redress where direct negotiation with a trader has failed, we do not agree that it should be a requirement before a collective action can proceed. In many cases there may not be a suitable ADR mechanism available or the trader may not agree to engage in the process. It would therefore be unreasonable to require each consumer to have individually pursued their complaint before joining a collective claim.

Sufficient opportunity for adequate out-of-court settlement should be foreseen.

- 2.3 We have similar concerns regarding the benchmark relating to out of court settlements which we believe may also lack clarity. Consumers and businesses should certainly be made aware of the opportunities which exist for settling disputes through ADR, but there should be no requirement for consumers to exhaust this route before considering taking part in a collective redress action. Such mechanisms are often voluntary in nature, provided by trade associations or similar and require the consent of both parties before proceeding. A requirement could potentially create a significant barrier because a trader could effectively

stifle a claim by refusing to participate in ADR or accept any outcome of the process. Should the amount in dispute be fairly small it is also unlikely that many consumers would wish to pursue this route as an additional step.

It should be possible to finance the actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party. Plaintiffs' costs for bringing an action should not be disproportionate to the amount in dispute.

- 2.4 In our view the issue of funding is one of the most significant barriers to consumers being able to bring a collective action. In follow on representative actions in competition law, the infringement of competition law has already been proven therefore the representative action does not have to deal with this point. However, this will not be the case in consumer actions, which will mean that consumers will face the additional burden of proving breach of the law, which will also increase costs.
- 2.5 In a representative action case it is anticipated that the organisation representing the consumers will bear the costs, thus making such actions very suitable for individual low-value but high volume cases.
- 2.6 We have identified some possibilities regarding funding in the UK which could be applicable to group actions and which may be suitable for further consideration in the EU context:
- Conditional Fee Arrangements (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 can be used for such actions and they agree to charge a set rate.

- A more developed after the event insurance market.
- A fund to finance representative actions, where successful cases pay a percentage into the fund, which is then used to help finance future cases. However, cases that receive support would probably need to be processed through some form of selection process rather than automatically receive assistance.
- 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 the client loses. If the claimants are successful and awarded costs, then the loan amount would be recoverable from the other party.

The costs of proceedings for defendants should not be disproportionate to the amount in dispute. On the one hand, this would ensure that defendants will not be unreasonably burdened. On the other hand, defendants should not for instance artificially and unreasonably increase their legal costs. Consumers would therefore not be deterred from bringing an action in member states which apply the 'loser pays' principle.

- 2.7 We agree with the aim of this benchmark to not place an unjustified burden on businesses. However if it is too stringently applied this may restrict the wider objective of providing consumers with access to redress by this mechanism. In cases where the potential number of claimants may not be easily identifiable at the start of the case it may appear that the amount in dispute is relatively low compared to the costs likely to be incurred by the defendant trader. We therefore consider that the court should take into account all potential claims which may come to light in the case before giving a view as to the reasonableness of the action in relation to the defendant's costs.

The compensation to be provided by traders/service providers against whom actions have been successfully brought should be at least equal

to the harm caused by the incriminated conduct, but should not be excessive as for instance to amount to punitive damages.

- 2.8 We agree that punitive damages are not appropriate but believe that this should not restrict the payment of compensatory damages which includes factors such as stress and inconvenience suffered by the consumers as a result of the defendant's actions. We do however accept that such damages can be difficult to measure and there may be issues in determining the appropriate level of such payments.

One outcome should be the reduction of future harm to all consumers. Therefore a preventative effect for future potential wrongful conduct by traders or service providers concerned is desirable – for instance by skimming off the profit gained from the incriminated conduct.

- 2.9 We would support this as a deterrence measure and consider this should work alongside any enforcement action undertaken by a regulatory body.

The introduction of unmeritorious claims should be discouraged.

- 2.10 While we support the objective of this benchmark we consider that as it stands it does not provide sufficient guidance as to what constitutes an unmerited claim, how such discouragement could be achieved, nor who would decide such matters.
- 2.11 Under the model we have proposed as a possibility for representative actions in the UK, we have suggested that third party organisations should be either designated by the Secretary of State as being suitable to bring any case and can therefore automatically bring a claim, or specific court permission would be necessary on a case by case basis for non-designated bodies. This would ensure that only reputable, pre-vetted organisations could take the case straight to the court (reducing the hurdles for organisations that regularly bring such actions) and other bodies would need to show they are not using the mechanism to publicise or sensationalise issues not related to the detriment caused to the consumer.

2.12 There are also existing UK Court rules which provide defendants with a degree of protection from unmeritorious or vexatious claims:

(a) Under Part 24 of the Civil Procedures Rules, 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, than an application for summary judgement on the claim can be made

(b) Under Part 3 of the Civil Procedure Rules if a claim:

(i) discloses no reasonable grounds for bringing a claim, or

(ii) 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 can apply for it to be struck out by the court

then the court can strike out the statement of case either on application by the other party or of its own volition.

If the court strikes out a claimant's statement of case and it considers that the claim is totally without merit, the court must also consider whether it is appropriate to make a civil restraint order (CRO) against the claimant.

2.13 CROs vary in scope and duration depending on the scope and circumstances of the case, but in effect a CRO is an order restraining the actions of 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 carrying out the specified actions (such as issuing proceedings). The aim is to restrict the subject's ability to be vexatious.

2.14 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 information networking preparing and managing possible collective redress actions should allow for effective 'bundling' of individual actions.

- 2.15 We consider 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 wide range of consumers. If the intention of this benchmark is to restrict cases to those of identical detriment we consider that this would limit the benefits of such actions and could lead to a situation where there are separate actions for different breaches arising from fundamentally the same actions by the same trader.
- 2.16 When considering enforcement cases, the OFT will generally institute a single action against a trader. We are therefore of the view that breaches all stemming from actions by the same trader should be allowed to be brought together as far as possible.

The length of the proceedings leading to the solution of the problem in question should be reasonable for the parties.

- 2.17 We agree with the intention of this benchmark and believe that lengthy proceedings could add to any stress for consumers and may even deter them from participating in order to avoid additional stress. We consider that the definition of 'reasonable' may need to vary between cases depending on their complexity and whether there are any cross border or jurisdictional issues.
- 2.18 For ordinary court cases in the UK, cases are assigned (after the claim form and defence have been filed) to one of three tracks: Small Claims Track, Fast Track or Multi Track.
- 1) The Small Claims Track provides a simple and informal way of resolving disputes, where no costs are usually awarded in order to discourage the use of legal representatives. The amount in dispute should be no more than £5000.

- 2) Claims are allocated to the Fast Track if the amount in dispute is between £5000 and £15,000; the trial will not last more than one day therefore only limited witness evidence will be required; costs are limited; and the process aims to take no more than 30 weeks from allocation to trial.
- 3) All claims that do not fall within the other two categories are allocated to the Multi Track. This will therefore usually cover cases that are complex, high value, will require a trial of more than one day, and/or a significant amount of witness evidence.

Do we consider other benchmarks to be more important? Are more or fewer benchmarks necessary?

- 2.19 We would suggest that there should be an additional benchmark relating to how the funds recovered by a successful action should be distributed. It is possible that in a case which is taken under the opt out model, there could be funds which are not distributed to consumers because not all of the potential claimants came forward or were found. A collective redress mechanism will need to ensure that all reasonable attempts are made to alert the relevant consumers about the fund, and to have in place guidelines for the timescale and distribution of any money that remains.
- 2.20 We also consider that information for consumers is crucial if they are to make the correct choices when considering whether to participate in an action. They may need information for example on the relative merits/disadvantages of using a particular mechanism. An additional benchmark could be a requirement to inform consumers at each stage of the procedures.

Do we have experience with existing mechanisms of collective redress, especially in relation to specific sectors and/or in relation to cross-border disputes?

2.21 While we have no direct experience of existing mechanisms for consumer cases, we have, in the context of our enforcement work, considered a number of areas of consumer detriment where we believe they would be of particular assistance for UK consumers. These are:

- Scams, for example:
 - prize draw/sweepstake mailing scams
 - premium rate telephone prize scam
 - work at home and business opportunity scam
 - pyramid selling and chain letter scams
- A building contractor takes advance payment for work and provides little or no service in return. He trades under various entities.
- A national company supplying orthopaedic beds engages in high pressure selling tactics against vulnerable consumers.
- A business trading over the internet purchases and imports vehicles from other member states. Consumers who 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 has increased. Consumers complain they are subjected to long delays for delivery and in turn cancel their orders. However, those that did so say they had difficulty in obtaining a full refund.

2.22 Within the UK there is the possibility of using Group Litigation Orders (GLOs) which are subject to specific rules and may only be made on application to specified judges. The purpose of a GLO is to provide a

framework for the case management of claims which give rise to common or related issues of fact or law (Part 19 of the Civil Procedure Rules). Each claimant has to file a claim separately, which would not be the case with the representative action system where the representative body acts as the claimant filing one claim on behalf of all consumers. A GLO is primarily a case management procedure and is likely to provide limited assistance for the type of claims likely to be encountered under consumer protection requirements and therefore a new dedicated process would be more effective.

3 CONTACT DETAILS

3.1 For further information regarding this response please contact:

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