

CONSULTATION

The Role and Powers of the
Consumer Advocate

DECEMBER 2009

Consultation on the Role and Powers of the Consumer Advocate

The Government set out its plans to build a consumer policy that will work in years to come in its Consumer White Paper “A Better Deal for Consumers: Delivering Real Help Now and Change for the Future” which was published in July 2009¹. One of the proposals was to appoint a Consumer Advocate to co-ordinate work to educate consumers and be a champion for groups of consumers who have suffered a loss at the hands of a business.

The paper also committed the Government to consult on equipping the Consumer Advocate with the following specific powers: (i) the power to take legal actions on behalf of a group of consumers following a breach of consumer protection law if other routes for obtaining compensation have been tried or judged inappropriate; (ii) the power to distribute compensation to UK consumers from ill-gotten funds seized by overseas enforcement agencies; and (iii) the power to tackle unfairness in consumer credit agreements.

This consultation paper is a package of proposals. It seeks views on the proposed powers and also more generally on the role for the Consumer Advocate when he/she takes up appointment in 2010.

Issued: 2 December 2009

Respond by: 5 March 2010

Enquiries to:

consumeradvocateconsultation@bis.gsi.gov.uk

Or

Heidi Munn (020 7215 5111)

Consumer and Competition Policy
Department for Business, Innovation and Skills
Bay 426, 1 Victoria Street
London SW1H 0ET

This consultation is relevant to: consumer representative bodies, bodies that work with vulnerable groups, businesses, business representative bodies, ombudsmen, the legal profession and those involved in enforcing consumer protection law across the UK.

¹ <http://www.berr.gov.uk/files/file52072.pdf>

Contents

Foreword	4
Executive Summary	5
How to respond	6
Help with queries	6
Confidentiality & data protection	7
Additional copies	7
Chapter 1: Introduction	8
What we have already done	8
The need for a Consumer Advocate	9
Contents of this consultation	9
The power to address unfairness in consumer credit agreements	9
Consultation stage impact assessments	10
Equality impact assessment	10
Chapter 2: The role of the Consumer Advocate	11
Initial role	11
Future role	13
Geographical scope	14
Chapter 3: The power to take collective actions	15
Introduction	15
Scope of power	18
Type of collective action	24
Pre-conditions before the power can be used	26
Other issues	29
Summary	33
Chapter 4: The power to facilitate the return of funds secured by overseas enforcement agencies	34
Chapter 5: What happens next?	35
Annex A: List of consultation questions	36
Annex B: The consultation code of practice criteria	40
Annex C: List of individuals/organisations consulted	41
Annex D: Consultation stage impact assessment of granting the Consumer Advocate the power to take forward collective actions	42
Annex E: Consultation stage impact assessment of granting the Consumer Advocate the power to facilitate the return of funds secured by overseas enforcement agencies	58

Foreword



In a climate where consumers are under pressure it is important that they are empowered with the right information to make the best purchasing decisions possible. It is also important to reduce the cost to the economy of problems after sales have been made. Fair consumer law, sensitively but effectively enforced, helps consumers and honest businesses to buy and sell with confidence. Empowered, confident consumers are good for business because they demand good quality at a fair price which forces businesses to be competitive. They also embrace, and therefore reward, innovation.

The new Consumer Advocate will play a key role in improving consumer confidence and empowerment. When appointed in 2010 he/she will provide a national profile to improving the co-ordination of education and information campaigns and will champion the needs of consumers who have suffered a loss as a result of a breach of consumer protection law.

Our White Paper “A Better Deal for Consumers” which was published in July 2009 set out some detail behind our proposals for the Consumer Advocate. This consultation takes these proposals forward and seeks views on a number of key issues related to the role of the Advocate both in the short term and in the future.

The longer term role and powers for the Consumer Advocate are the main focus of this consultation and I welcome views. I want to ensure that when the Consumer Advocate is equipped with specific new powers, he/she has have the ability to do all that we are asking. In particular I am keen to ensure that the Advocate is given an effective power to obtain compensation for groups of consumers through collective actions. My hope is very much that this power will not be needed, rather that businesses themselves will seek to right any wrongs that may have occurred. However for the few cases where the power may be needed it is important that we get it right.

A handwritten signature in black ink that reads "Kevin Brewer". The signature is written in a cursive, flowing style.

Executive Summary

Consumers are central to the success of the UK economy and we need to ensure that consumer confidence remains high. When consumers suffer at the hands of traders who treat them unfairly, consumers should feel empowered to exercise their consumer rights. Where consumers have lost money through breaches of the law, it is not unreasonable for them to want to get some or all of their money back.

In the Government's Consumer White Paper: "A Better Deal for Consumers: Delivering Real Help Now and Change for the Future"², it was announced that the Government would appoint a Consumer Advocate to work on behalf of consumers across Great Britain. The Advocate will act as a champion for all consumers, improving consumer advice and education and have the power, as a last resort, to take action against traders who have treated consumers unfairly by breaching consumer protection law.

This consultation seeks views on how the Consumer Advocate can successfully deliver real benefits to consumers. A key aspect of this is the proposal that the Consumer Advocate be granted, through new legislation, the power to take collective actions on behalf of consumers to obtain for them compensation when other routes have failed. This power would not create any new rights for consumers but would create a new mechanism through which existing rights could be exercised. This is important as consumers are very reluctant to initiate court action themselves. This consultation seeks views on the detail of how this power could work in practice. In particular it seeks views on:

- The scope of the proposed collective action power
- The right option in terms of the type of collective action
- What conditions should be met before a collective action can be taken

This consultation also seeks views on granting the Consumer Advocate a power to facilitate the return of funds that have been identified as belonging to or due to UK consumers which have been secured by overseas enforcement agencies. Finally, the consultation seeks views on whether the Consumer Advocate needs to be given a specific power to tackle unfairness in consumer credit agreements.

² <http://www.berr.gov.uk/files/file52072.pdf>

How to respond

Responses to this consultation must be received by 5 March 2010. These can be submitted using the consultation response form which is available as a separate document suitable for completion electronically at:

<http://www.bis.gov.uk/consultations>

Please submit consultation responses by letter, fax or email to:

Heidi Munn
Consumer and Competition Policy
Department for Business, Innovation and Skills
Bay 426, 1 Victoria Street
London SW1H 0ET

Fax: 020 7215 0357

Email: consumeradvocateconsultation@bis.gsi.gov.uk

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

A list of those organisations and individuals consulted is in Annex C. We would welcome suggestions of others who may wish to be involved in this consultation process.

The aim is to hold a stakeholder event to discuss some of the issues raised by this consultation in early 2010. If you are interested in attending this event then please send an email to: consumeradvocateconsultation@bis.gsi.gov.uk

Help with queries

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please see Annex B.

Questions about the policy issues raised by this consultation can be addressed to:

Heidi Munn (020 7215 5111)

Consumer and Competition Policy
Department for Business, Innovation and Skills
Bay 426, 1 Victoria Street
London SW1H 0ET

Or they can be sent to: consumeradvocateconsultation@bis.gsi.gov.uk

Confidentiality & data protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide, to be treated as confidential please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Additional copies

You may make copies of this document without seeking permission. Further printed copies can be obtained from:

BIS Publications Orderline
ADMAIL 528
London SW1W 8YT

Telephone: 0845 0150010
Fax: 0845 0150020
Minicom: 0845 0150030
Website: <http://www.bis.gov.uk/publications>

Or by downloading the consultation document from:
<http://www.bis.gov.uk/consultations>

Other versions of the document in Braille, other languages or audio-cassette are available on request.

Chapter 1: Introduction

1. Consumers are central to the success of the UK economy and we need to ensure that consumer confidence remains high. If consumers know they are getting a fair deal, and they are confident that things can be put right when things go wrong, then that is good for business, good for the economy and good for them. We know that families and individuals can ill afford to lose money from shoddy goods, poor services and unfair practices.
2. The Government's Consumer White Paper³ published in July 2009 set out a series of measures to provide Real Help Now for consumers as well as setting out measures to improve the consumer framework as part of the wider Building Britain's Future agenda. In the White Paper it was announced that the Government would appoint a Consumer Advocate to work on behalf of consumers across Great Britain. The Advocate would act as a champion for all consumers, improving consumer advice and education and having the power, as a last resort, to take action against traders who have treated consumers unfairly by breaching consumer protection law.
3. The Consumer Advocate would also help families to understand their consumer rights and where to go for advice and support, and would champion their right to achieve compensation when they have lost money because of breaches of the law. Many consumers are very reluctant to initiate court action themselves, so the White Paper proposed that the Consumer Advocate would also be given the power, as a last resort, to take cases on behalf of groups of consumers through the courts to achieve compensation.

What we have already done

4. In July the Government also published a document titled "Reforming Financial Markets"⁴ which included a number of proposals to support and protect consumers. Several of the proposals from this paper have been included in the Financial Services Bill⁵ which was introduced to parliament on 19 November. The Bill includes the creation of a new Consumer Financial Education Body responsible for promoting and co-ordinating the financial education agenda and for implementing the national rollout of Money Guidance, and the introduction of a mechanism to enable collective actions for financial services claims – see paragraph 47 for more details.
5. The Government has also launched a major new drive to support consumers and help them understand their legal rights, through the 'Know Your Consumer Rights' campaign⁶. Strong and robust consumer protections already exist but we need people to be much more aware and confident of the rights they already enjoy.
6. In October the Government published a comprehensive review of the regulation of credit and store cards together with a consultation⁷. This review recognises that some of the key features of the consumer credit market are not always in the best interests of consumers and can cause already indebted consumers to incur increased costs. This review looks at a range of issues

³ <http://www.berr.gov.uk/files/file52072.pdf>

⁴ http://www.hm-treasury.gov.uk/d/reforming_financial_markets080709.pdf

⁵ http://www.hm-treasury.gov.uk/fin_bill_index.htm

⁶ <http://www.consumerdirect.gov.uk/knowyourrights-landing/>

⁷ <http://www.berr.gov.uk/consultations/page53299.html>

that face consumers such as getting charged different interest rates for different types of borrowing, paying off debt on cards with low minimum payments, and credit limits and interest rates being increased without warning. We have also published a guide to help those already in debt to consider their options and make sensible decisions⁸.

The need for a Consumer Advocate

7. In the past few years there have been a number of cases where the mistake of an honest business or the deliberate flouting of the law by rogue traders have affected large numbers of consumers from across the country. To help prevent such cases occurring, empowering consumers to know how to cope if they find themselves affected in this way and to offer an alternative mechanism to deal with the consequences, the Consumer White Paper proposed that a Consumer Advocate be appointed.

8. The Consumer Advocate will be a high-profile figure who can speak directly to consumers, listen to the concerns they have and take action against injustices. The Consumer Advocate will have the dual role to co-ordinate work to educate consumers and be a champion for groups of consumers who have suffered a loss at the hands of a business. The Consumer Advocate will also be expected to engage directly with consumers through the media to, for example, warn consumers about latest scams and to deliver messages to the least confident consumers about how to protect their interests.

9. The Consumer Advocate will be appointed in 2010 to be a part of the consumer advocacy body, Consumer Focus.

Contents of this consultation

10. This consultation contains a package of proposals. Chapter 2 seeks views on the initial role of the Consumer Advocate before any new powers are available and on some general issues related to the future role of the Advocate. At the end of Chapter 2 there is also a section on the geographical scope of the work of the Consumer Advocate.

11. Chapter 3 considers the specific proposal that the Consumer Advocate should have the power, as a last resort, to take collective court actions to obtain compensation on behalf of consumers if other routes to obtain this compensation have been tried or judged inappropriate. Chapter 4 considers the proposal that the Consumer Advocate should be granted the power to facilitate the return of funds to UK victims of scammers following action by overseas enforcement agencies.

The power to address unfairness in consumer credit agreements

12. The Consumer White Paper also proposed to consult on whether the Consumer Advocate should have a power to challenge unfair relationships in consumer credit agreements through the courts on behalf of consumers. This was following concerns expressed by some consumer organisations that the consumer credit protection regime needed to be strengthened in this area. Following the Consumer White Paper, HM Treasury published a consultation on the introduction of collective actions in respect of financial services claims -

⁸ <http://www.insolvency.gov.uk/pdfs/guidanceleafletspdf/indebt-web.pdf>

see section 2c of Annex A of the HM Treasury paper “Reforming Financial Markets”⁹.

13. On 19 November the Government introduced a form of collective action proceedings for financial services claims in the Financial Services Bill¹⁰. Paragraph 47 explains the proposals in more detail. Claims in respect of credit activities falling under the Consumer Credit Act 1974 are included within the scope of the proposal. This will therefore provide a new mechanism for consumers to obtain compensation if they have suffered a loss because of unfairness in consumer credit agreements.

Question 1: Given the Government’s proposals for a collective action power in respect of financial services claims, is there any need to give the Consumer Advocate a particular power in relation to unfairness in consumer credit agreements? If so, what should the power cover?

Consultation stage impact assessments

14. No impact assessment has been completed for the overall package presented in this consultation document to appoint a new Consumer Advocate. The costs of recruiting and supporting the Advocate in his/her initial role before any new powers are granted are expected to be small and proportionate to the anticipated benefits.

15. Consultation stage impact assessments are included for the proposals to give the Consumer Advocate new powers. The consultation stage impact assessment for granting the Consumer Advocate the power to take collective actions to obtain compensation for groups of consumers is at Annex D. The consultation stage impact assessment for granting the Consumer Advocate the power to return funds to UK consumers that have been secured by overseas enforcement agencies is at Annex E.

Question 2: Do you have any comments on the consultation stage impact assessments included at Annex D and Annex E? If so, where possible please provide supporting evidence.

Equality impact assessment

16. Initial screening suggests, as was noted in the Consumer White Paper Equalities Impact Assessment¹¹, that the proposals are expected to have a positive impact on all consumers, including minority groups. In particular the Consumer Advocate’s role to work with community groups and others to deliver messages to the least confident consumers about how to protect their interests is expected to benefit minority groups.

17. Responses to the 2008 Consumer Law Review¹² showed that some consumers, particularly vulnerable consumers, do not have sufficient understanding of their rights to know when they should receive compensation. This is particularly true of the elderly and those for whom English is not a first

⁹ http://www.hm-treasury.gov.uk/d/reforming_financial_markets080709.pdf

¹⁰ http://www.hm-treasury.gov.uk/fin_bill_index.htm

¹¹ <http://www.berr.gov.uk/files/file52073.pdf>

¹² <http://www.berr.gov.uk/whatwedo/consumers/consumer-white-paper/clr-responses/page51670.html>

language. The Consumer Advocate will have a particular responsibility to vulnerable consumers and will engage directly with consumers through the media, making it easier for all consumers, including minority groups to be aware of consumer issues, such as scams, and how to respond to them. Even if consumers know that they should receive compensation, they may not have the confidence, resource or ability to take an action forward. Here again, the Consumer Advocate will have a positive impact on all consumers, including minority groups given his/her role to champion consumer compensation.

18. In relation to raising awareness of scams and frauds, the benefits of a high-profile Consumer Advocate should also be felt more widely as research from the Office of Fair Trading in 2006¹³ revealed that younger, more affluent consumers can be just as likely to be targeted by scammers. This research identified that nearly half of the population have been targeted by a scam and that the proportion targeted is highest in the middle age ranges. Working people were also more likely to have been targeted than those who were not working. While these groups may be better able to take precautionary action and may be less badly affected by any losses that occur, it does reveal that unfair commercial practices and outright scams are targeted widely across economic and social classes.

Question 3: Do you have any comments on the impact of the proposals contained within this consultation on minority groups?

Chapter 2: The role of the Consumer Advocate

Initial role

19. Following the publication of the Consumer White Paper and discussions with Consumer Focus it has been decided that the first Consumer Advocate will also be the next Chair of Consumer Focus. This decision will give the Consumer Advocate the high profile that was intended and enable him/her, as soon as they are in position, to draw on the powers of Consumer Focus as set out in the Consumers, Estate Agents and Redress Act 2007¹⁴. This avoids the immediate need for new legislation. Combining the new role of the Consumer Advocate with an existing senior position within Consumer Focus also avoids complications of having to determine how a new position should fit within the existing governance arrangements of Consumer Focus. The appointment of the current Chair of Consumer Focus (Lord Whitty) ends at the end of 2010.

20. The initial role of the Consumer Advocate in relation to championing groups of consumers who have suffered a loss at the hands of a business will be informal with the Advocate promoting voluntary compensation offers from business when things go wrong. The Advocate will also take an interest in the use of new powers by public enforcers to secure compensation for consumers.

21. The Regulatory Enforcement and Sanctions Act 2008¹⁵ allows a Minister, by order, to give a regulator/enforcer access to four new civil sanctions as an alternative to criminal prosecution. This includes an option to require a

¹³ <http://www.offt.gov.uk/news/press/2006/31-06>

¹⁴ http://www.opsi.gov.uk/acts/acts2007/en/ukpgaen_20070017_en_1

¹⁵ http://www.opsi.gov.uk/acts/acts2008/en/ukpgaen_20080013_en_1

business to restore the position as if the offence had not been committed, including adequately compensating any affected consumers. As explained in the Consumer White Paper we propose to test these new powers through a series of pilot projects which are expected to start in autumn 2010 or spring 2011. The details of these pilot projects are the subject of a separate consultation which will be issued in the next few months. The Consumer Advocate will be a member of the Monitoring Group for the pilot projects. The Advocate's membership of this Group will allow him/her to gain experience and insight into another form of restorative justice. This experience will be useful to the Advocate when he/she considers using any future power he/she is granted to take collective actions on behalf of consumers.

Question 4: Apart from encouraging voluntary compensation offers from business and monitoring the proposed pilots are there any other ways the Consumer Advocate can initially, i.e. prior to new legislation, champion groups of consumers who have suffered a loss at the hands of a business? If so, what?

22. The initial role of the Advocate in relation to consumer education is expected, primarily, to be to provide a national and co-ordination focus for the consumer education carried out by others. As explained in the Consumer White Paper there are a large number of organisations involved in consumer education. Some are engaged in general consumer education about, for example, consumer rights. Others lead co-ordination of a specific area of consumer education. For example, the new Consumer Financial Education Body as set out in the Financial Services Bill¹⁶ will co-ordinate the financial education agenda. The Consumer Advocate will provide co-ordination across the whole of consumer education working closely with these other organisations. The aim is for the Advocate to provide benefits to all these organisations and, ultimately, to consumers by providing strategic and national co-ordination, identifying synergies and sharing best practice.

23. The first priority of the Consumer Advocate will be to conduct a strategic review of consumer education carried out in England, Wales and Scotland. This will involve the Consumer Advocate travelling around the country to meet the various private and public organisations involved in providing consumer education. The Consumer Advocate will be expected to search for examples of best practice and through this review gain an understanding as to where he/she can add value.

24. We would also welcome your views on how the Consumer Advocate can best fulfil his/her role in consumer education.

Question 5: What can the Consumer Advocate do to make a difference to consumer education which has not already been tried?

Question 6: What do you think are the key elements of consumer education that the Advocate should work towards improving?

¹⁶ http://www.hm-treasury.gov.uk/fin_bill_index.htm

Question 7: How do you think the Consumer Advocate can best add value to consumer education given the roles of other organisations?

Question 8: Do the roles of any other organisations need to be amended to ensure the Consumer Advocate is successful? If so, in what way?

25. The Consumer Advocate is also expected to develop a high media profile to, amongst other issues, warn consumers about latest scams. Clearly it would be appropriate for the Consumer Advocate to publicise successful enforcement activity taken against a particular business if this was in the interests of consumers and if the business in question had not changed its practices.

26. However, it has been suggested that the Advocate should also be able to warn consumers that complaints have been made about a specific company prior to the conclusion of any formal enforcement activity in cases where there has been a significant enough number of complaints or the complaints are serious enough. In such a case, the Advocate would do no more than point to the facts about the number of complaints being made about a particular product or service. However, there are clearly risks with providing even such basic warnings. For example, these may include the risk of prejudicing the fairness of any enforcement activity, the risk of damaging the reputation of honest businesses and the risk of breaching human rights. We would welcome views on whether there are any circumstances where the benefits of providing such warnings would outweigh the risks.

Question 9: Should the Consumer Advocate be able to warn consumers about a specific company before the conclusion of any formal enforcement activity? If so, under what circumstances?

27. Finally the Consumer Advocate will have a particular responsibility to look after the vulnerable. He/she will work with community groups and others to deliver messages to the least confident consumers about how best to protect their interests. We would welcome your views on how you think the Consumer Advocate could best go about doing this.

Question 10: How do you think the Consumer Advocate could best go about delivering messages to the least confident consumers about how to best protect their interests?

Future role

28. The Consumer White Paper said that the Consumer Advocate would be a part of Consumer Focus. The reason for this is that there is no desire to create another consumer body. In addition, it should lead to cost savings as there will be synergies between the work of the Advocate and the work of Consumer Focus. Making the first Consumer Advocate the next Chair of Consumer Focus is the right approach in the short-term before it is possible to amend the governance arrangements of Consumer Focus through new legislation.

29. In the future there will be the opportunity, through primary legislation, to amend both the governance arrangements for Consumer Focus and its structure in order to accommodate the Consumer Advocate. It is therefore right to ask the question whether combining the roles of the Consumer Advocate and the Chair of Consumer Focus is appropriate in the long-term. One alternative would be to establish an independent body as part, probably as a subsidiary, of Consumer Focus. This independent body could itself be the Consumer Advocate, or it could have the Consumer Advocate, as an individual statutory office holder, at its head. Such a solution would ensure a dedicated independent resource focussed on delivering the role of the Consumer Advocate but may be more costly to implement. We would welcome views on the costs and benefits of this alternative approach.

Question 11: What do you think are the costs and benefits of creating an independent Office of the Consumer Advocate sitting within Consumer Focus, as opposed to a team within Consumer Focus supporting a joint Advocate/Chair?

30. In terms of the granting of new powers the Consumer White Paper assumed (as will the rest of this document) that the powers will be granted to an individual statutory office holder - the person of the Consumer Advocate. However, there are a number of arguments against granting the powers to an individual and in favour of granting them to a corporate body: (i) a corporate body may give a more balanced and considered judgement on whether, say, to commence a collective action case; and (ii) in the case of an individual, mechanisms would need to be agreed for a deputy or delegate to have access to the powers to handle any ongoing cases where the Advocate him/herself were indisposed. The corporate body in question could either be Consumer Focus itself or any subsidiary body that is created within Consumer Focus, i.e. an Office of the Consumer Advocate as described in the previous paragraph.

Question 12: Assuming that the powers proposed in this consultation are granted should they be granted to the Consumer Advocate as an individual person or to a corporate body? Why?

Geographical scope

31. As part of Consumer Focus the Consumer Advocate will initially be able to take action only in the same geographical areas as Consumer Focus. This means in England, Wales and Scotland on all consumer issues and on postal consumer issues in Northern Ireland. We expect the combined Advocate/Chair to liaise appropriately with the devolved administrations and Consumer Focus Wales and Consumer Focus Scotland when addressing issues that affect Welsh and Scottish consumers.

32. In the future there will be the opportunity, through primary legislation, to amend the geographical scope of the Consumer Advocate. The Consumer White Paper suggested that the Consumer Advocate should have the power to facilitate the return of funds secured by overseas enforcement agencies to all UK consumers. This is because it would make it easier for overseas enforcement agencies to know that there is a single point of contact for the UK. In cases that affect consumers from Northern Ireland the Consumer

Advocate would be required to liaise with relevant Northern Irish authorities, for example the Consumer Council for Northern Ireland¹⁷.

Question 13: Do you agree that if the Consumer Advocate is granted the power to facilitate the return of funds secured by overseas enforcement agencies then he/she should be able to do this for all UK consumers, liaising as appropriate with the relevant Northern Irish authorities? If not, why not?

33. In relation to the future consumer education role for the Advocate, and the proposed power for the Consumer Advocate to take collective actions on behalf of consumers, the Consumer White Paper envisaged the Advocate not acting in Northern Ireland, where consumer protection is a devolved matter.

Question 14: Do you agree that apart from returning funds from overseas, the Consumer Advocate should not act in Northern Ireland? If not, why not?

34. The Consumer White Paper did envisage that if the Consumer Advocate is granted the power to take collective actions on behalf of consumers that he/she should be able to do so in England and Wales and Scotland. The power would, of course, need to respect and take into account the different legal systems of those jurisdictions. More questions on this issue are included in Chapter 3 but we would also welcome general views.

Question 15: If the Consumer Advocate is granted the power to take collective actions on behalf of consumers then do you agree that he/she should be able to do so in a similar way in Scotland as well as in England and Wales? If not, why not?

35. It is worth noting that where a collective action is being brought by the Consumer Advocate in the English and Welsh or Scottish courts, we consider that that action should, in principle, be capable of being brought on behalf of consumers outside the relevant jurisdiction who have suffered loss in the same way as on behalf of consumers within the jurisdiction. However, this would be subject to any constraints of international law.

Question 16: Do you have any other comments on the geographical scope of the Consumer Advocate?

Chapter 3: The power to take collective actions

Introduction

36. The Office of Fair Trading estimated in April 2008 that consumers had suffered a detriment amounting to £6.6 billion in the previous year as a result of problems with goods or services purchased¹⁸. Consumers can ill afford to lose money in this way. Any failure to reimburse consumers for breaches of

¹⁷ <http://www.consumerCouncil.org.uk/>

¹⁸ <http://www.offt.gov.uk/news/press/2008/49-08>

consumer protection law also risks rewarding the breach and creating a disadvantage for honest businesses which treat consumers well.

37. The Government has been considering for a number of years introducing a mechanism to enable groups of consumers, through a collective action, to obtain compensation when things go wrong. Such a mechanism would provide consumers, in certain circumstances, with another route to obtain compensation. In particular in cases where a group of consumers have all suffered a loss at the hands of the same trader, and where non-court options have failed to provide compensation, it would prevent the need for each individual to take forward separate court action to obtain compensation.

38. In 2006 the Government consulted on the possibility of allowing private bodies to take representative actions for breaches of consumer protection law¹⁹. The conclusion of the consultation was that, although there was support from a number of consumer organisations, there was a lack of clear evidence for introducing representative actions. The Government commissioned further research in 2008 from the Lincoln Law School²⁰ which suggested that there is a gap between successful enforcement action and adequate consumer compensation and that representative actions by an independent publicly-funded figure could be a way to meet this gap alongside attempts to deliver compensation through public enforcement.

39. As explained in paragraph 21 the Regulatory Enforcement and Sanctions Act 2008 introduced a framework of new powers for enforcers/regulators which includes an option to require a business to restore the position as if the offence had not been committed, including adequately compensating any affected consumers. It is hoped that the introduction of these powers will deliver more compensation to consumers. However, the Consumer White Paper recognised that there may be circumstances where enforcers will find it difficult, in practice, to use these new powers to order compensation. Furthermore, these powers are an alternative only to criminal prosecution and could not be used in cases of civil breaches. It was therefore proposed that the Consumer Advocate should be able to take, as a last resort, collective actions to obtain compensation on behalf of a group of consumers.

40. The Government's aim is that by enabling the Consumer Advocate to take such actions businesses will be more willing to make good any harm to consumers either voluntarily or through other suitable mechanisms, e.g. Alternative Dispute Resolution. Indeed this has been the experience in Scandinavia where Consumer Ombudsmen are able to take collective actions. The Finnish Consumer Agency issued a press release in July 2009 explaining that the mere existence of a class complaint procedure in Finland has improved consumers' chances to obtain monetary compensation from businesses²¹.

41. A further key benefit of collective actions is that this is a more efficient way of managing multiple claims with similar or the same issues of fact or law. At present in Scotland there are only informal mechanisms to handle multi-

¹⁹ <http://www.berr.gov.uk/consultations/page30259.html>

²⁰ <http://www.berr.gov.uk/files/file51559.pdf>

²¹ <http://www.kuluttajavirasto.fi/Page/d1bc11a7-7371-4140-8681-eb744f0400c8.aspx?groupId=fc5a839d-cc80-41a9-ad40-65e6a50d16a8&announcementId=608002b4-babb-4063-977a-39ca3f002065>

party claims. In England and Wales a formal mechanism exists for managing multi-party claims: Group Litigation Orders. The problem with these mechanisms is that they require individuals to launch their own court action before the cases are managed together. Research suggests that many consumers find court action too expensive in terms of money, time and anxiety. Paragraphs 4 to 13 of the consultation stage impact assessment at Annex D explain this in more detail.

42. Representative collective action mechanisms allow a person to take forward a claim on behalf of a group of others thus preventing the need for all the individuals to make their own claims in court. Representative actions are possible in England and Wales under Rule 19.6 of the Civil Procedure Rules, but this rule does not enable a person which does not itself have a claim to bring a claim on behalf of others. A strict interpretation of the requirement for claimants to have the “same interest” has also restricted the number of claims brought under this Rule.

43. A procedure does exist in competition cases for a body representing those harmed by an unlawful practice to bring an action on behalf of those who have suffered loss. This was introduced through sections 47A and 47B of the Competition Act 1998 as amended by section 19 of the Enterprise Act 2002. These representative actions are only allowed on a “follow-on” basis, i.e. a representative action may only be brought in the Competition Appeal Tribunal where the Office of Fair Trading (OFT), the European Commission or the Competition Appeal Tribunal has made an infringement decision. To date only one representative action has been brought in the Competition Appeal Tribunal. The details of this case are discussed in paragraphs 68 and 69.

44. Recently reports have been published which have recommended the introduction of procedures to allow collective actions in both England and Wales and in Scotland. In Scotland the Lord Justice Clerk, the Rt Hon Lord Gill, published a report of the Scottish Civil Courts Review in September 2009²². This report includes in Chapter 13 a detailed discussion on the issues surrounding multi-party actions. The report recommended that there should be a special multi-party procedure which includes a procedure for the court to certify a proposed action. This certification should consider whether the multi-party proceedings procedure is appropriate and also include a preliminary merits test. The report mainly focused on non-representative collective actions but does state that any multi-party procedure introduced in Scotland should be designed to permit any authorised representative body to make use of it. The recommendations proposed by Lord Gill are now being considered by Scottish Ministers.

45. In England and Wales the Civil Justice Council (CJC) issued a report in December 2008 on Developing a More Efficient and Effective Procedure for Collective Actions²³ in England and Wales. The CJC recommended that it should be possible for collective actions to be brought by representative bodies in respect of any type of civil law claim. In its response²⁴ the Government explained that it did not support the introduction of a generic right

²² <http://www.scotcourts.gov.uk/civilcourtsreview/>

²³ http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf

²⁴ <http://www.justice.gov.uk/publications/response-civil-justice-report-collective-actions.htm>

of collective action, rather that rights of action should be introduced only in specific “sectors” and only where there is evidence of need.

46. The Government did, however, accept many recommendations made by the CJC on how collective actions could work in practice in England and Wales. One such recommendation accepted by the Government is that no collective claim should be permitted to proceed unless it is certified by the court as being suitable to proceed as such. The Government indicated that issues likely to form part of a court certification procedure include: whether the claim has legal merit, whether the likely benefits justify the likely costs, whether a collective action is the most appropriate route and whether the claim could be achieved more cost-effectively by a non-court mechanism. Following the CJC report the Government is in the process of developing a framework document to assist Government Departments by setting out the issues to be addressed when introducing a right of collective action in England and Wales. This consultation on the role and powers of the Consumer Advocate has been drafted in parallel to this ongoing work.

47. Finally, as part of the Financial Services Bill²⁵ the Government has proposed to introduce collective actions for financial services claims. The proposal is to enable collective actions to be brought by a representative on behalf of a group of consumers who have financial services claims that raise the same, similar or related issues and who would otherwise be entitled to pursue their own case individually. Any person may apply to the court to bring an action and the court will need to satisfy itself as to a variety of matters before authorising the proceedings to go forward. The Financial Services Authority and the Office of Fair Trading will have a right to be heard by the court, for example on the issue of whether there are suitable alternatives to the collective action proceedings.

Scope of power

Introduction

48. The Consumer White Paper proposed that the Consumer Advocate be granted the power to take actions on behalf of consumers. We propose to define consumers in the same way as this term is defined for domestic infringements under the Enterprise Act 2002, i.e. a consumer is an individual who receives, or seeks to receive, goods or services from a supplier. The supplier must be acting in the course of a business, but does not need to have a place of business in the UK. The Enterprise Act definition of a consumer extends to individuals who are setting up businesses but have not yet begun to trade. This is in order to ensure that operations such as scam homeworking schemes and vanity publishers are within scope. Except in this limited regard, business consumers are not proposed to be covered.

Question 17: Do you agree that we should use the same definition of consumer as in the Enterprise Act? If not, why not?

49. The Consumer White Paper also proposed that the collective action power be what is known as “follow-on”; specifically that it can only be used if the claim for compensation relates either through similar or the same facts to

²⁵ http://www.hm-treasury.gov.uk/fin_bill_index.htm

a proven breach of consumer protection law. The Consumer White Paper envisaged this breach being proven following public enforcement action. The advantages of a “follow-on” power are that this should significantly reduce the chance of the Consumer Advocate losing a case that he/she takes forward and help to ensure that businesses are not subject to speculative claims. The disadvantage is that this will limit the number of cases where the Consumer Advocate is able to take action.

50. There could be cases, for example, where the Consumer Advocate would want to act but is unable to do so because the required public enforcement has not occurred. In such cases the Consumer Advocate would be expected to discuss the issues with the relevant enforcer drawing attention, if applicable, to any central funds that might help to resource the necessary action. A possible suitable source of central funds may be the Fighting Fund that was announced in the Consumer White Paper to help enforcers afford to fight cases of “national importance”, e.g. where consumers across local authority boundaries are affected – the very cases that we expect the Consumer Advocate to take an interest in.

51. The sections below look in more detail at how to define the scope of this proposed “follow-on” power. However we would welcome views as to whether the Consumer Advocate should be able to bring a collective action to “follow-on” to an adverse finding against a business before any rights of appeal have been exhausted.

Question 18: Do you think any rights of appeal should have been exhausted before the Consumer Advocate can bring a collective action? Please give your reasons.

52. We would also welcome general views on whether there are any difficulties that have not already been identified with proposing the collective action power be “follow-on”. There may, for example, be different issues in Scotland due to its different legal system.

Question 19: Can you identify any unforeseen difficulties with proposing that the collective action power be “follow-on”? If so, please give details.

53. As has been mentioned previously, granting the Consumer Advocate the power to bring collective actions would not create any new rights for consumers. It would, rather, introduce a mechanism through which existing rights could be exercised. Therefore, the Consumer Advocate could only act where the same (or similar) facts as prompted the breach of consumer protection law also created a cause of action for consumers, which could in principle be enforced by those consumers individually. For example, a trader could be successfully prosecuted for false advertising under the Consumer Protection from Unfair Trading Regulations 2008. If the Consumer Advocate were to take a collective action against this trader to obtain compensation for the consumers then this would need to be based not on the breach of the Regulations in itself, but on a cause of action already available to the consumer, for example in misrepresentation.

Defining scope by breaches of consumer protection law

54. Two options to define what consumer protection law should be included within scope are: (i) a broad definition or (ii) a list of legislation. The 2006 consultation asked a similar question on scope with the majority of respondents preferring option (i) but a significant minority preferring option (ii). A key reason why some stakeholders were in favour of option (i) was that they did not think there should be any exclusions; others thought it would be hard to keep a list of legislation up-to-date. Those who favoured option (ii) thought that this might offer more certainty.

55. A key difference between the 2006 proposals and the current proposal is the “follow-on” nature of the power. This places a greater emphasis on the need for clarity about whether or not a business might be liable to a collective action taking place. It is for this reason that we propose to define scope primarily by a list of legislation which, if found to be breached following public enforcement action, could leave a business open to the possibility of a collective action taken by the Consumer Advocate. This list of legislation would be amendable through secondary legislation so that it could be kept up-to-date.

Question 20: Do you agree that given the “follow-on” nature of the proposed power it makes sense to define scope primarily through a list of legislation? If not, why not?

56. A draft list of consumer protection legislation which could define the scope of this collective action power is included at Box 1 on page 21. The starting point for this list was the list of legislation specified for the purposes of Part 8 of the Enterprise Act 2002²⁶. However certain pieces of legislation have been removed to try to focus the work of the Consumer Advocate in areas where there is most need and some pieces of legislation have been added where it is felt that breaches could lead to cases of the type the Consumer Advocate may wish to bring. Decisions on what to include/exclude were made on the basis of a very preliminary analysis and we would welcome views.

Question 21: Do you have any comments on the draft list of legislation which could define the scope of the collective action power as given in Box 1 on page 21? If so, what?

Widening the scope to include breaches proven without public enforcement

57. The Consumer White Paper envisaged that the Consumer Advocate would only be able to take forward a collective action case if the claim relates to a proven breach of consumer protection law following public enforcement action. It is possible that breaches of the legislation in Box 1 will be proven without the intervention of public enforcement. For example there could be a case where a consumer has successfully brought a private action to establish that there had been a breach of the law and this breach has given rise to potential claims by a large number of other consumers. However, widening the scope to include cases where breaches of the law have been proven without the involvement of public enforcers could provide an incentive for speculative claims and test cases, in the hope of leading to a subsequent collective action by the Consumer Advocate. This would be at odds with the

²⁶ http://www.uk-legislation.hmso.gov.uk/acts/acts2002/ukpga_20020040_en_1

intention of the Consumer White Paper. We therefore do not propose to include within scope breaches of the legislation in Box 1 which have not been proven following public enforcement.

Question 22: Do you agree that the scope of the collective action power should not be widened to breaches of the legislation in Box 1 that are proven without any public enforcement action? If not, why not?

Box 1: Draft list of consumer protection legislation which could define the scope of the collective action power

Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008

Consumer Credit Act 1974*

Consumer Protection Act 1987 - Part II (sections 11 to 19) (consumer safety)

Consumer Protection (Distance Selling) Regulations 2000

Consumer Protection from Unfair Trading Regulations 2008

Estate Agents Act 1979

Fair Trading Act 1973 Part XI

General Product Safety Regulations 2005 (and any product safety regulations made under section 2(2) of the European Communities Act 1972)

Package Travel, Package Holidays and Package Tours Regulations 1992

Prices Act 1974

Property Misdescriptions Act 1991

Protection from Harassment Act 1997

Sale and Supply of Goods to Consumers Regulations 2002 - Regulation 15 (consumer guarantees taking effect as contractual obligation)

Sale of Goods Act 1979

Supply of Goods (Implied Terms) Act 1973

Supply of Goods and Services Act 1982

Timeshare Act 1992

Unfair Contract Terms Act 1977

Unfair Terms in Consumer Contracts Regulations 1999

Weights and Measures Act 1985 - Sections 21 to 23, 25 (requirements to sell goods by particular quantities etc), 28 (short weight etc), 30 (quantity less than stated), 31 (incorrect statements), 32 (offences due to default of third person)

Weights and Measures (Packaged Goods) Regulations 2006

* This would be subject to paragraph 65 below.

Notes:

1. References to primary legislation include any secondary legislation made under powers in that primary legislation
2. References to legislation include breaches of contract in relation to terms implied into contracts by such legislation
3. References to breaches of legislation include cases where contractual terms have been found to be unfair or unenforceable under such legislation

Widening the scope to include other public enforcement actions

58. In addition to any public enforcement actions under the legislation itself listed in Box 1, it is important to consider including within scope alternative public enforcement actions: for example the alternative enforcement approaches provided by the Enterprise Act 2002 and the Regulatory Enforcement and Sanctions Act 2008.

59. Under the Enterprise Act certain public authorities are enabled to apply to the courts for Enforcement Orders on businesses where there is evidence of a breach of the specified legislation and of harm to the collective interests of consumers stemming from the breach. An alternative to seeking an Enforcement Order is to agree undertakings with the business. The aim of both Enforcement Orders and undertakings is to ensure that the behaviour that led to the suspected breach of legislation does not continue.

60. In our view the giving of an undertaking should not, by itself, be sufficient to satisfy the “follow-on” requirement for the Consumer Advocate’s power to take collective actions, as this could deter businesses from giving such undertakings. However the act of obtaining an Enforcement Order should be sufficient to satisfy the “follow-on” requirement. Whilst the Enforcement Order would relate to future behaviour, any action taken by the Consumer Advocate to obtain compensation for past behaviour would be based on the same or similar facts which gave rise to the Order.

Question 23: Do you agree that the scope of the collective action power should also include Enforcement Orders made under the Enterprise Act in relation to breaches of legislation listed in Box 1 but not undertakings? If not, why not?

61. As explained in paragraph 21, the Regulatory Enforcement and Sanctions Act 2008 introduced a framework of new powers for enforcers/regulators. Specifically a Minister, by order, can give a regulator/enforcer access to four new civil sanctions as an alternative to criminal prosecution: fixed monetary penalty notices, discretionary requirements (including variable monetary penalties, compliance notices and restoration notices), stop notices and enforcement undertakings. As these are intended to be alternative enforcement approaches to criminal prosecution it can be argued that if they occur then they too should be able to be counted as sufficient grounds for a “follow-on” collective action by the Consumer Advocate.

62. Unlike under the Enterprise Act one of the main aims of the Regulatory Enforcement and Sanctions Act is to enable enforcers to require businesses to restore the position as if the offence had not been committed. This may include compensating adequately any affected consumers. It is this very mechanism by which it is hoped many more consumers will obtain compensation. Under these circumstances it is clearly inappropriate for the Consumer Advocate to be able to take further action as the consumers in question would already have been compensated. However, our view is that the imposition of other sanctions under the Regulatory Enforcement and Sanctions Act should be sufficient grounds for a “follow-on” collective action by the Consumer Advocate.

Question 24: Do you agree that the scope of the collective action power should also include circumstances in which civil sanctions have been applied under the Regulatory Enforcement and Sanctions Act in relation to suspected breaches of the legislation in Box 1 but only to the extent that these have not already secured compensation for consumers? If not, why not?

Widening the scope to include breaches of contract

63. Part 8 of the Enterprise Act includes within its scope breaches of contract. Including within the scope of the collective action power any breach of contract would bring within scope, for example, a case where a business had expressly promised that it would provide a specified level of after-sales service and then the business reneged on this commitment to a large number of consumers. We believe that widening the scope of the collective action power to this extent (even where the breach had led to an Enforcement Order under the Enterprise Act) would go beyond the intention set out in the Consumer White Paper and therefore do not propose to do so.

64. However, it does seem reasonable to include within scope breaches of terms in contracts which are implied into contracts by any of the legislation listed in Box 1. This is because terms implied into contracts by legislation can be considered to have been sufficiently important and generic in their application to be the subject of specific provisions in legislation. A benefit of taking this approach is that this would potentially enable the Consumer Advocate to bring a collective action in circumstances where a business had, for example, breached the terms implied into contracts by the Sales of Goods Act 1979. These include the implied term that goods supplied in the course of a business are of satisfactory quality. However, breaches of such implied terms would still need to have been the subject of prior public enforcement in order to enable the Consumer Advocate to take a “follow-on” collective action.

Question 25: Do you agree that, in addition to breaches of the legislation itself listed in Box 1, breaches of contractual terms that are implied by that legislation should be included within scope, provided they have been the subject of prior public enforcement; but that breaches of other contractual terms should not be included within scope? If not, why not?

Exclusions from scope

65. As explained in paragraph 47 the Government has introduced a form of collective actions for financial services claims as part of the Financial Services Bill. Eligible claims will arise from the use of financial services in the course of regulated activities falling within the Financial Services and Markets Act 2000, consumer credit activities falling within the Consumer Credit Act 1974, and payment services. Potential defendants are authorised persons, approved representatives, payment service providers and those carrying on consumer credit activities. The causes of action can range from claims for breaches of regulatory rules, breaches of legislation transposing European Directives and any breach of the general law. In order to provide certainty for business as to whether they could be liable to a collective action claim under the power in the Financial Services Bill or by the Consumer Advocate, we propose to exclude

from the scope of the Consumer Advocate's power the scope of the proposed collective actions for financial services claims.

Question 26: Do you agree that there should be no overlap in scope between the Government's proposals for collective actions in respect of financial services claims and the power proposed for the Consumer Advocate? If not, why not?

Question 27: Should there be any other exclusions from the scope of the proposed collective action power for the Consumer Advocate? If so, please give reasons.

Summary

66. In broad terms we therefore propose to define the scope of the proposed collective action in two ways: firstly by setting out a list of legislation which could, if found to be breached following public enforcement action, enable the Consumer Advocate to take a "follow-on" collective action; and, secondly, by also listing certain alternative types of public enforcement activity related to this legislation that (in addition to enforcement under the legislation itself, where available) would be significant enough to enable a "follow-on" collective action, e.g. an Enforcement Order under the Enterprise Act.

Question 28: Do you agree to the proposed approach to define scope both by specific consumer protection legislation and by certain enforcement actions? If not, why not?

Question 29: Do you have any other comments on the issue of scope?

Type of collective action

67. Representative collective actions are often discussed in terms of two basic models: "opt-in" and "opt-out". Under an "opt-in" model individual consumers would have to actively elect to join the action as members of the represented group. An individual who does not "opt-in" would not benefit from the outcome of the collective action, except that it might constitute a precedent were they to bring a separate claim. Under an "opt-out" model all consumers who fall within the definition of the represented group are bound by the outcome of the case whether or not they expressly "opt-in" unless they actively elect not to take part in the action. This can mean that under the principle of *res judicata* they cannot subsequently bring their own action.

68. The existing procedure to take forward representative collective actions in competition cases (see paragraph 43) is a "pure opt-in" model. Only one such action has been brought in the Competition Appeals Tribunal to date. The claim was brought by the Consumers Association (trading as *Which?*) against JJB Sports plc in relation to price fixing arrangements for the sale of replica football shirts in 2000 and 2001. A relatively small number of consumers came forward to join the case, despite *Which?* running an advertising campaign in the media. *Which?* have since been reported as indicating that they do not intend to bring forward any similar actions because of the up-front costs of encouraging consumers to join the action.

69. The experience of *Which?* is one of the reasons why Lord Gill in his report of the Scottish Civil Courts Review said that he was attracted to the option of leaving it to the court to decide whether in the particular circumstances of a case an opt-in or opt-out model would be appropriate in Scotland. This was also the recommendation of the Civil Justice Council (CJC) for collective actions in England and Wales. Indeed the Government's proposals in the Financial Services Bill (see paragraph 47) for collective actions for financial services claims follows this very approach, i.e. it would allow the court to decide whether the claim should go forward on an "opt-in" or "opt-out" basis.

70. In its report the CJC noted that the distinction between "opt-in" and "opt-out" is not necessarily clear cut. In order to receive any compensation a consumer would have to step forward at some point. There are three clear cut-off points for when a consumer could join an "opt-in" action: (i) before the action is taken and a claim is issued; (ii) before the common issues on liability are decided; and (iii) after the decision on liability but before the quantification of damages. Only under an "opt-out" model could a consumer obtain compensation by coming forward after the quantification of damages.

71. The options for a collective action model proposed by the Government in its response to the CJC report²⁷ are:

- a. **Pure opt-in:** The collective action would be taken solely on behalf of identified group members.
- b. **Pre-liability opt-in:** The action would be brought initially in terms of a defined group with a minimum number of identified members. Other members of the group could opt-in (confirm participation) at any time before the decision on liability and could therefore be included in any judgment or settlement. Individuals who have not opted-in before the decision on liability would not benefit from or be bound by the outcome.
- c. **Pre-damages opt-in:** The action would be brought initially in terms of a defined group with a minimum number of identified members. Other members of the group could opt-in (confirm participation) at any time before the damages are quantified. The issue of liability would be **res judicata** (determined) for any individual who had not expressly opted-out before it was decided. But individuals who had not opted in or out of the action could still bring separate claims for damages if the liability decision was favourable.
- d. **Pure opt-out:** The action would be brought on the basis of an estimation of the total size of the group with claimants coming forward after the quantification of damages to claim their share. Failure to opt-out would make the outcome of the collective action binding on the individual.

72. We propose a "pre-damages opt-in" model for the collective action power to be granted to the Consumer Advocate. The "pre-damages opt-in" model has a significant advantage over the "pure opt-in" model because, with appropriate case management, there should be sufficient time and opportunity for the Consumer Advocate to bring the action to the attention of the majority of affected consumers. It is expected that there would be significant media opportunities surrounding the case first being brought to court and that any

²⁷ <http://www.justice.gov.uk/publications/response-civil-justice-report-collective-actions.htm>

successful finding of liability would provide a key incentive for consumers to come forward.

73. Although favoured by many we do not propose to allow the Consumer Advocate to seek compensation for consumers at large, i.e. unidentified consumers, as would be the case under the “pure opt-out” model, because we believe that the “pre-damages opt-in” model will deliver the maximum benefit to consumers without the difficulties associated with assessing and dealing with damages when consumers have not been identified. These include: the need to estimate the overall size of the group accurately without double-counting consumers that have already been compensated and what to do with any surplus caused by not all the affected consumers coming forward to claim their share.

74. A more detailed analysis of the costs and benefits of the different types of collective actions, as described above, is set out in full in the Impact Assessment at Annex D.

Question 30: What do you think are the pros and cons of the “pre-damages opt-in” model when compared to other options for collective actions taken by the Consumer Advocate?

75. As explained above, under the “pre-damages opt-in” model consumers would be able to join the case up and until the quantification of damages. We think it should also be possible with the consent of the court for consumers who have opted-in to an action to choose to opt-out up and until the determination of liability. This might be, for example, if they are unhappy with the way that the Consumer Advocate is managing the case.

Question 31: Do you agree that consumers should be able, subject to the consent of the court, to opt-out of a case after they have opted-in up and until the determination of liability? If not, why not?

Pre-conditions before the power can be used

Introduction

76. As explained in paragraph 40 the main intention of granting this power to the Consumer Advocate is to encourage business to voluntarily compensate consumers when things go wrong. The aim is for the power to be used only as a last resort. We therefore intend to require the Consumer Advocate to be satisfied that certain pre-conditions are met before a case can be taken forward. These proposals are given in the sections below.

77. Some of these pre-conditions may also be addressed in, and may overlap with, any court certification procedure for collective actions - see paragraphs 44 to 46. For example, we would expect both the Consumer Advocate and any court certification procedure to consider whether a collective action is appropriate for the case in hand. However, we cannot be sure at the moment precisely what will be the generic conditions for certification by the court and we consider there to be some pre-conditions that will be specific to the use of the collective action power by the Consumer Advocate.

78. The Consumer Advocate will not be under any obligation to take forward a case, even if it meets all of the proposed pre-conditions. As the Consumer Advocate will be resource-constrained he/she will have to decide from a

number of potential cases any cases to actually take forward. In making this decision we expect the Consumer Advocate to be open and accountable. We also expect the Consumer Advocate to undertake an analysis of costs and benefits before taking forward any case. This would include the likely impacts on consumers and the business facing the case, as well as the risks of the Advocate losing the case. We would expect the Consumer Advocate to prioritise cases where the expected benefits are significantly in excess of expected costs. We would welcome views on what general principles the Advocate should follow when deciding whether to take forward a particular case, apart from likely costs and benefits.

Question 32: Apart from considering the likely costs and benefits are there any other general principles the Consumer Advocate should follow when selecting cases to take forward under the collective action power? If so, what?

Requirement that a significant number are willing to join the case

79. The “pre-damages opt-in” model described in paragraph 71 notes that the action needs to be brought initially in terms of a minimum number of defined members. We only want the Consumer Advocate to take forward cases where there is a clear desire from consumers for compensation. We therefore propose that the Consumer Advocate should actually only take forward a case if, at the time of commencing proceedings, he/she is satisfied that a significant number of consumers are willing to join the case. We do not think it is possible to define for all cases what “significant” might mean and so propose leaving this to the Advocate’s own judgement on a case by case basis.

Question 33: Do you agree that before the Consumer Advocate can use this power to take a collective action he/she must be satisfied that a significant number of consumers have agreed to join the case? If not, why not?

Requirement that a case be in the public interest

80. As the Consumer Advocate will be publicly funded it is important that he/she only takes forward cases that can be considered to be in the public interest.

Question 34: Do you agree that before the Consumer Advocate can use this power to take a collective action he/she must be satisfied that taking forward the case is in the public interest? If not, why not?

81. We propose that the Consumer Advocate be given guidance setting out what factors he/she should consider when forming a view on whether taking a case forward is in the public interest. A draft list of factors is given in Box 2 on page 28.

Question 35: Do you agree that the Consumer Advocate should be given guidance on what factors to consider when deciding if taking a case is in the public interest? If so, do you have any comments on the proposed list of factors in Box 2 on page 28?

Box 2: Proposed list of factors to be considered by the Advocate when deciding if taking a collective action case is in the public interest

- Whether a collective court action is the best means to pursue consumer compensation for the particular case
- The desirability in the particular case of redress for the affected consumers
- The extent to which the business in the particular case has already responded to enforcement action and/or individual claims
- The desirability in the particular case of not allowing a business to profit from illegality
- The cost-effectiveness of taking forward a particular case taking into account the total amount of compensation being sought, the amount per claimant and the anticipated administrative costs of distributing any compensation awarded

Requirement to use the power as a last resort

82. The Government believes that litigation should, in general, be used as a dispute resolution system of last resort. The Consumer White Paper explained that we would only want the Consumer Advocate to use the power to take collective actions as a last resort. In particular we do not want the existence of this power to in any way discourage enforcers and regulators to use whatever public law and non-court mechanisms they have at their disposal to obtain compensation for consumers. To that end we propose restricting the Consumer Advocate so that he/she can only use this power when he/she believes it truly is a last resort.

Question 36: Do you think that restricting the Consumer Advocate to only use the collective action power to when he/she believes it is a last resort will encourage enforcers/regulators to use what powers they have to obtain compensation for consumers? If not, what would?

83. The Consumer White Paper also made it clear that the power should only be used when other routes for obtaining compensation have either been tried or judged inappropriate. These other routes would include Alternative Dispute Resolution mechanisms, where available, or enforcers/regulators using powers that they have to order compensation to consumers, for example the new civil sanctions that can be given to a regulator/enforcer under the 2008 Regulatory Enforcement and Sanctions Act – see paragraph 21. We believe that it should be for the Consumer Advocate to decide if other routes to obtain compensation have either been tried or are inappropriate.

Question 37: Do you agree that before the Consumer Advocate can use this power to take a collective action he/she should be satisfied that other routes for the consumers to obtain compensation have been tried or are inappropriate? If not, why not?

Requirement to consult relevant enforcers/regulators

84. In order to ensure the Consumer Advocate is well-placed to take decisions whether other routes to obtain compensation for consumers have been tried or judged inappropriate (see previous section) we propose requiring the Consumer Advocate to consult relevant regulators/enforcers before taking forward an action. This requirement, together with the requirement that the Consumer Advocate use his/her power only as a last resort, should also guard against any business facing more than one action at the same time to obtain compensation in respect of the same matter.

Question 38: Do you agree that before the Consumer Advocate can use this power to take a collective action he/she should have consulted appropriately with relevant enforcers/regulators? If not, why not?

Question 39: Do you think any other measures are needed to prevent a business facing more than one action at the same time to obtain compensation in respect of the same action? If so, what?

Other issues

85. The sections below set out proposals on a number of detailed issues related to how a collective action will be taken forward by the Consumer Advocate. It is expected that many of these issues will be addressed by the framework document being developed by the Government for departments seeking to introduce a right of collective action in England and Wales – see paragraph 46. The final decision on each of these issues will need to consider what the framework sets out.

The basis of claims

86. Clearly for the Consumer Advocate to be able to take forward a collective action there needs to be a group of consumers who have claims that are in some way related. It will be necessary to define how closely related these claims need to be to be taken forward as a collective action. We propose that these claims must be based on the same or similar issues of law or fact. An example where claims are based on the same or similar issues of law would be where a business had provided misleading information about a number of different products. An example where claims are based on the same or similar issues of fact would be where a business had sold the same, dangerous product to a large number of consumers.

Question 40: Do you agree that for a collective action to be taken forward individual claims must be based on the same or similar issues of law or fact? If not, why not?

Suspending limitation periods

87. As indicated in paragraph 71 under the proposed “pre-damages opt-in” model, the issue of liability would be *res judicata* (determined) for any individual who had not expressly opted out before it was decided. For the purpose of limitation periods, there is therefore a case for treating consumers who have not opted out as having commenced proceedings when they are commenced on their behalf by the Consumer Advocate. It may operate unfairly towards a consumer if a limitation period is treated as running, i.e. not suspended, during the period when the Consumer Advocate was bringing proceedings on his/her behalf. For example, a consumer might decide not to bring an individual claim because they were represented by the Consumer Advocate in an action that had already commenced. It might be that for reasons outside the control of the individual consumer, the Advocate’s action could not then proceed: for example, the court might refuse certification. It would operate unreasonably towards that consumer if, in the meantime, their individual limitation period had continued to run and had expired.

88. We therefore propose that relevant limitation periods are suspended for all potential claimants from the issue of proceedings by the Consumer Advocate, unless and until: (i) they opt-out of the action or (ii) court certification is refused or (iii) the case is dropped by the Consumer Advocate for some other reason.

Question 41: Do you agree that there should be a suspension of relevant limitation periods of the type proposed? If not, why not?

Costs and liability

89. The principle of costs shifting (or the ‘loser pays’ rule) is at the heart of UK litigation. This rule helps to ensure unmeritorious cases are not brought before the court as, if they lose a case, the claimant could be required by the court to pay the defendant’s costs. Many commentators believe that the absence of costs shifting in the USA has led to their litigation culture. We do not propose any changes to costs shifting, i.e. if the Consumer Advocate took a case and lost then the court would be able to require the Advocate to pay the costs of the defendant as well as his/her own costs. However, we believe that the risk of the Advocate losing a case is small given the fact that this action will be “follow-on” to successful public enforcement action.

90. We also do not propose that consumers who have joined the action should face any liability for costs ordered by the court to be paid by the Consumer Advocate. Rather we propose that liability should fall entirely on the Advocate and therefore indirectly on public funds. This is because otherwise consumers who join the action at a later stage would face lower risk than those who join before the action is taken. This might make it hard for the Consumer Advocate to meet the proposed condition (see paragraph 79) that a significant number of consumers must have agreed to join the case when commencing the action.

Question 42: Do you agree that consumers joining the action should not face any liability for costs ordered by the court to be paid by the Consumer Advocate? If not, why not?

91. We propose that before taking forward a case the Consumer Advocate would have to be satisfied that there were sufficient public funds to pay the defendant's costs should he/she lose the case. In the event of the Consumer Advocate winning a case then it is possible that the defendant would not pay all of the Consumer Advocate's costs. Under such circumstances we propose the Advocate have the power to recover the deficit from any compensation award before it is distributed to the consumers who have joined the action, although the Advocate would have the discretion not to use this power if this seemed inappropriate.

Question 43: Should it be possible for the Consumer Advocate to recover his/her costs from any compensation that is paid before it is distributed to consumers? If not, why not?

Advertising and/or notice requirements

92. Under the "pre-damages opt-in" model (see paragraph 71) consumers who do not actively engage in the case and have not expressly opted-out before the decision on liability is made would not be able to take their own case forward if there was an unfavourable decision on liability. We think this is appropriate as most passive consumers would be unlikely to consider taking their own case unless there was a high probability of success, in which case one would expect the Advocate to be able to secure a favourable finding.

93. However, it does raise a question as to how these potential claimants will be made aware of the action taking place. Clearly it will be important that reasonable steps are taken to make consumers who are included in the relevant class aware of the claim so that they can decide whether to opt-in or opt-out. Equally, the costs of taking these steps should not be allowed to become disproportionate. We expect the Consumer Advocate to advertise any case that he/she intended to take quite widely in order to get as many consumers with legitimate claims to come forward as possible. We think there are advantages in leaving much of the detail to the discretion of the Advocate case by case but there may be an argument that some specific, minimum advertising and/or notice requirements be placed on the Consumer Advocate.

Question 44: Do you think that the Consumer Advocate should be under any specific minimum requirements to advertise or give notice of potential or ongoing collective action cases? If so, what?

Appeals against decisions of the Consumer Advocate

94. When a consumer opts-in to an action they are giving responsibility over to the Advocate to manage the litigation. As explained in paragraph 75 we are proposing to allow consumers who initially agreed to join the action to opt-out at a later stage subject to the consent of the court. A consumer might wish to do this if he/she felt unhappy at the manner in which the Advocate was taking forward a case. If he/she did so before any decision on liability then they would not be bound by any finding in the collective action case. This provision should help to limit any claims against the Advocate for mis-handling of the case.

95. However, we want to go further and protect the Consumer Advocate against claims for damages by consumers except for cases where the

Advocate has acted in bad faith or for cases based on a breach of human rights. Such consumer claims might otherwise be based, for example, on alleged negligence by the Consumer Advocate in the management of a claim. We do not think it would be desirable or a good use of public resources for the Consumer Advocate, as a public office holder, to have to defend such claims.

Question 45: Do you agree that, in the context of the power to bring collective actions, the Consumer Advocate should have immunity from claims except for cases where the Consumer Advocate has acted in bad faith or for cases based on a breach of human rights? If not, why not?

96. We do not propose to create any appeals mechanism in relation to decisions by the Consumer Advocate as to whether or not to take forward a specific case. As explained in paragraph 78 the Consumer Advocate will not be under any obligation to take forward a case and will have to ruthlessly prioritise. In addition, the decision of the Consumer Advocate not to take forward a case as a collective action in no way prevents an individual from taking their own case through the court if they so wish.

97. There are likely to be a number of points within the life-cycle of a collective action where decisions need to be taken on whether to appeal a decision of the court. For example: (i) whether to appeal a decision on court certification; (ii) whether to appeal interim court rulings; and (iii) whether to appeal a final judgement on liability or quantification of damages. We propose to only allow the Consumer Advocate to make appeals on behalf of the group of consumers represented in the collective action against court certification decisions, interim court rulings or final judgements. We think that this approach is simpler than allowing individual consumers to appeal themselves as this would lead to a number of complications, including whether they are appealing on behalf of the entire group or a subset. If an individual consumer is unhappy with a decision made by the Consumer Advocate then they may be able to seek a judicial review of that decision.

Question 46: Is it appropriate to allow only the Consumer Advocate to appeal court decisions made in relation to a collective action case? If not, why not?

98. There is one further instance where the Consumer Advocate would be required to take a decision on behalf of all those he/she represents: the decision on whether to accept a settlement. This is probably the decision that will be of most interest to consumers as it will directly affect the amount of compensation that they receive. Requiring a settlement to be approved by the court would provide assurance to consumers that the settlement was fair but it would also impose additional costs on any settlement and may therefore act as a disincentive to settle. We believe that the Consumer Advocate should be well-placed to judge whether a settlement is appropriate and we do not think he/she will be persuaded to settle for too little. We therefore propose not to require court approval for any settlement but we would welcome views.

Question 47: Do you agree that any settlement of a collective action case taken by the Consumer Advocate should not have to be approved by the court? If not, why not?

99. In relation to taking key decisions on behalf of the group of consumers that he/she represents, we do not propose placing any requirements on the Consumer Advocate to consult the consumers that he/she represents. This is because we are concerned that making such a requirement could be very burdensome for the Advocate and we do not think it is necessary.

Question 48: Do you agree that the Consumer Advocate should not need to consult consumers that he/she is representing before he/she takes key decisions on managing the case? If not, why not?

The quantification of damages

100. The CJC recommended that the court should have the power to aggregate damages if this is warranted in a particular case. Under our proposals consumers would be required to opt-in to the Advocate's claim prior to the quantification of damages. Therefore, there would be certainty about the total number of consumers who are part of the action at the time of quantification.

101. However, in circumstances where there might be thousands of small claims represented before the court, the question still arises of whether the court should be given the power to aggregate damages. This would mean that, rather than quantifying and adding up each individual claim, the court could treat the group of consumers who had opted-in as a unitary entity and assess the damage suffered by that entity. Members of the group would then obtain a share of the damages, based on the evidence that they have provided. Aggregation would not be suitable in every case, but there may be advantages in giving the court flexibility to take this approach in an appropriate case.

Question 49: What do you think are the pros and cons of granting the court the ability to aggregate damages in a collective action case brought by the Consumer Advocate?

Summary

102. This chapter has described in some detail a proposal for a power to take collective actions that would be a tool of last resort available to the Consumer Advocate, if certain specific conditions are met, to obtain compensation for groups of consumers who have suffered a loss in circumstances where a business has broken certain consumer protection legislation.

Question 50: Do you agree that the proposed power to take collective actions should be granted given the associated conditions proposed? If not, why not?

Question 51: Can you foresee any unintended consequences from granting this power to take collective actions? Please provide details.

Question 52: Do you have any further comments on the granting of a collective action power to the Consumer Advocate?

Chapter 4: The power to facilitate the return of funds secured by overseas enforcement agencies

103. Research on the impact of mass marketed scams commissioned by the Office of Fair Trading²⁸ estimates that 140,000 adults fall victim to foreign lottery scams every year costing the UK public an estimated £260 million a year. These foreign lottery scams involve consumers receiving a letter, telephone call or email telling them that they have won a major cash prize in an overseas lottery. They send money, sometimes by post, to cover administration costs but the winnings do not exist and are never received.

104. There have been a handful of cases in the past few years where overseas enforcement agencies have taken action against such scammers and have retrieved money that has been identified as belonging to UK consumers. Some overseas enforcement agencies have the power to return funds to UK consumers but others do not.

105. Funds could be secured by overseas enforcement agencies in a number of different ways:

- a. The funds could be part of consumer compensation following court action; or
- b. The funds could be awarded to UK consumers after assets of scammers have been seized; or
- c. The funds could be contained within mail intercepted en route to a known scammer.

106. In some cases there may be details of exactly which consumers should receive funds, for example where the overseas enforcer has retrieved a list of victims from the scammer, but in other cases funds might simply be earmarked for affected UK consumers, rather than named consumers. Even if an overseas enforcement body has the power to return funds to UK consumers they may decide not to do so if this would involve the cost of identifying exactly which UK consumers should receive compensation. One example was in 2003 when Canadian authorities identified monies to be returned to UK consumers following a telemarketing fraud. The Canadian authorities had no power to return this money to UK consumers and there was no designated authority within the UK with the necessary powers to receive the funds, identify the affected consumers and distribute to them the funds.

107. In order to ensure that an appropriate body within the UK has the necessary powers to handle funds secured by overseas enforcement agencies it is proposed to give the Consumer Advocate the necessary powers to receive, hold and distribute any such funds. (As explained in paragraph 32, where cases involved Northern Irish consumers the Consumer Advocate would be required to liaise with relevant Northern Irish authorities.)

Question 53: Do you agree that the Consumer Advocate should be granted the powers necessary to facilitate the return of funds to UK consumers secured by overseas enforcement agencies? If not, why not?

²⁸ http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft883.pdf

108. In cases where the Advocate receives a lump sum earmarked for unidentified UK consumers, he/she (probably through a third party) would need to identify affected consumers and verify their claims. In any given case it may not be possible to identify all affected consumers in a cost-effective manner. If funds cannot be returned to consumers in a cost-effective manner we propose, as stated in the Consumer White Paper, that the Consumer Advocate have the power to use the compensation to instead finance, for example, relevant consumer awareness/education activities.

Question 54: Do you agree that if funds cannot be returned to consumers in a cost-effective manner then they should be used to finance relevant consumer awareness/education activities? If not, what should happen?

109. The proposed power is aimed at funds secured by overseas enforcement agencies but it has been suggested that it would be useful to extend this power to also apply to funds that originate in the UK. If the Consumer Advocate establishes an effective mechanism to identify consumers affected by overseas scams then it may be possible that a UK business would be interested in paying a fee to access this mechanism in order to make compensation payments. It might also be possible that courts would welcome the option of ordering a lump sum payment to be made to the Consumer Advocate to distribute, rather than a very complex order to large numbers of potential victims.

Question 55: Is there a case to widen any power given to the Consumer Advocate to facilitate the return of funds secured by overseas enforcement agencies to funds that originate within the UK? If so, why?

110. Finally, it may be useful to widen the proposed power to include the provision of a clear legal mechanism for the return of funds in mail intercepted en route to scammers by UK enforcers. We would welcome views on this.

Question 56: Is there a case to widen any power given to the Consumer Advocate to facilitate the return of funds in mail intercepted by overseas enforcement agencies to also apply to funds in mail intercepted by UK enforcement agencies? If so, why?

Chapter 5: What happens next?

111. The Consumer Advocate is expected to be appointed to be a part of Consumer Focus in 2010. They will be invited to consider the responses to this consultation. The Government will respond to this consultation by summer 2010. If the decision is to go ahead and grant the powers described in this consultation then the Government will seek to introduce primary legislation when parliamentary time allows.

Annex A: List of consultation questions

- Question 1: Given the Government's proposals for a collective action power in respect of financial services claims, is there any need to give the Consumer Advocate a particular power in relation to unfairness in consumer credit agreements? If so, what should the power cover? 10
- Question 2: Do you have any comments on the consultation stage impact assessments included at Annex D and Annex E? If so, where possible please provide supporting evidence. 10
- Question 3: Do you have any comments on the impact of the proposals contained within this consultation on minority groups? 11
- Question 4: Apart from encouraging voluntary compensation offers from business and monitoring the proposed pilots are there any other ways the Consumer Advocate can initially, i.e. prior to new legislation, champion groups of consumers who have suffered a loss at the hands of a business? If so, what?..... 12
- Question 5: What can the Consumer Advocate do to make a difference to consumer education which has not already been tried? 12
- Question 6: What do you think are the key elements of consumer education that the Advocate should work towards improving? 12
- Question 7: How do you think the Consumer Advocate can best add value to consumer education given the roles of other organisations? 13
- Question 8: Do the roles of any other organisations need to be amended to ensure the Consumer Advocate is successful? If so, in what way? 13
- Question 9: Should the Consumer Advocate be able to warn consumers about a specific company before the conclusion of any formal enforcement activity? If so, under what circumstances?..... 13
- Question 10: How do you think the Consumer Advocate could best go about delivering messages to the least confident consumers about how to best protect their interests?..... 13
- Question 11: What do you think are the costs and benefits of creating an independent Office of the Consumer Advocate sitting within Consumer Focus, as opposed to a team within Consumer Focus supporting a joint Advocate/Chair? 14
- Question 12: Assuming that the powers proposed in this consultation are granted should they be granted to the Consumer Advocate as an individual person or to a corporate body? Why?..... 14
- Question 13: Do you agree that if the Consumer Advocate is granted the power to facilitate the return of funds secured by overseas enforcement agencies then he/she should be able to do this for all UK consumers, liaising as appropriate with the relevant Northern Irish authorities? If not, why not?.. 15
- Question 14: Do you agree that apart from returning funds from overseas, the Consumer Advocate should not act in Northern Ireland? If not, why not? 15
- Question 15: If the Consumer Advocate is granted the power to take collective actions on behalf of consumers then do you agree that he/she

should be able to do so in a similar way in Scotland as well as in England and Wales? If not, why not?.....	15
Question 16: Do you have any other comments on the geographical scope of the Consumer Advocate?	15
Question 17: Do you agree that we should use the same definition of consumer as in the Enterprise Act? If not, why not?	18
Question 18: Do you think any rights of appeal should have been exhausted before the Consumer Advocate can bring a collective action? Please give your reasons.....	19
Question 19: Can you identify any unforeseen difficulties with proposing that the collective action power be “follow-on”? If so, please give details.	19
Question 20: Do you agree that given the “follow-on” nature of the proposed power it makes sense to define scope primarily through a list of legislation? If not, why not?.....	20
Question 21: Do you have any comments on the draft list of legislation which could define the scope of the collective action power as given in Box 1 on page 21? If so, what?.....	20
Question 22: Do you agree that the scope of the collective action power should not be widened to breaches of the legislation in Box 1 that are proven without any public enforcement action? If not, why not?	21
Question 23: Do you agree that the scope of the collective action power should also include Enforcement Orders made under the Enterprise Act in relation to breaches of legislation listed in Box 1 but not undertakings? If not, why not?.....	22
Question 24: Do you agree that the scope of the collective action power should also include circumstances in which civil sanctions have been applied under the Regulatory Enforcement and Sanctions Act in relation to suspected breaches of the legislation in Box 1 but only to the extent that these have not already secured compensation for consumers? If not, why not?	23
Question 25: Do you agree that, in addition to breaches of the legislation itself listed in Box 1, breaches of contractual terms that are implied by that legislation should be included within scope, provided they have been the subject of prior public enforcement; but that breaches of other contractual terms should not be included within scope? If not, why not?	23
Question 26: Do you agree that there should be no overlap in scope between the Government’s proposals for collective actions in respect of financial services claims and the power proposed for the Consumer Advocate? If not, why not?.....	24
Question 27: Should there be any other exclusions from the scope of the proposed collective action power for the Consumer Advocate? If so, please give reasons.....	24
Question 28: Do you agree to the proposed approach to define scope both by specific consumer protection legislation and by certain enforcement actions? If not, why not?	24
Question 29: Do you have any other comments on the issue of scope?....	24

Question 30: What do you think are the pros and cons of the “pre-damages opt-in” model when compared to other options for collective actions taken by the Consumer Advocate? 26

Question 31: Do you agree that consumers should be able, subject to the consent of the court, to opt-out of a case after they have opted-in up and until the determination of liability? If not, why not? 26

Question 32: Apart from considering the likely costs and benefits are there any other general principles the Consumer Advocate should follow when selecting cases to take forward under the collective action power? If so, what?..... 27

Question 33: Do you agree that before the Consumer Advocate can use this power to take a collective action he/she must be satisfied that a significant number of consumers have agreed to join the case? If not, why not? 27

Question 34: Do you agree that before the Consumer Advocate can use this power to take a collective action he/she must be satisfied that taking forward the case is in the public interest? If not, why not? 27

Question 35: Do you agree that the Consumer Advocate should be given guidance on what factors to consider when deciding if taking a case is in the public interest? If so, do you have any comments on the proposed list of factors in Box 2 on page 28? 28

Question 36: Do you think that restricting the Consumer Advocate to only use the collective action power to when he/she believes it is a last resort will encourage enforcers/regulators to use what powers they have to obtain compensation for consumers? If not, what would? 28

Question 37: Do you agree that before the Consumer Advocate can use this power to take a collective action he/she should be satisfied that other routes for the consumers to obtain compensation have been tried or are inappropriate? If not, why not? 29

Question 38: Do you agree that before the Consumer Advocate can use this power to take a collective action he/she should have consulted appropriately with relevant enforcers/regulators? If not, why not? 29

Question 39: Do you think any other measures are needed to prevent a business facing more than one action at the same time to obtain compensation in respect of the same action? If so, what?..... 29

Question 40: Do you agree that for a collective action to be taken forward individual claims must be based on the same or similar issues of law or fact? If not, why not?..... 29

Question 41: Do you agree that there should be a suspension of relevant limitation periods of the type proposed? If not, why not? 30

Question 42: Do you agree that consumers joining the action should not face any liability for costs ordered by the court to be paid by the Consumer Advocate? If not, why not?..... 30

Question 43: Should it be possible for the Consumer Advocate to recover his/her costs from any compensation that is paid before it is distributed to consumers? If not, why not? 31

Question 44: Do you think that the Consumer Advocate should be under any specific minimum requirements to advertise or give notice of potential or ongoing collective action cases? If so, what? 31

Question 45: Do you agree that, in the context of the power to bring collective actions, the Consumer Advocate should have immunity from claims except for cases where the Consumer Advocate has acted in bad faith or for cases based on a breach of human rights? If not, why not? 32

Question 46: Is it appropriate to allow only the Consumer Advocate to appeal court decisions made in relation to a collective action case? If not, why not?..... 32

Question 47: Do you agree that any settlement of a collective action case taken by the Consumer Advocate should not have to be approved by the court? If not, why not?..... 32

Question 48: Do you agree that the Consumer Advocate should not need to consult consumers that he/she is representing before he/she takes key decisions on managing the case? If not, why not?..... 33

Question 49: What do you think are the pros and cons of granting the court the ability to aggregate damages in a collective action case brought by the Consumer Advocate? 33

Question 50: Do you agree that the proposed power to take collective actions should be granted given the associated conditions proposed? If not, why not?..... 33

Question 51: Can you foresee any unintended consequences from granting this power to take collective actions? Please provide details. 33

Question 52: Do you have any further comments on the granting of a collective action power to the Consumer Advocate?..... 33

Question 53: Do you agree that the Consumer Advocate should be granted the powers necessary to facilitate the return of funds to UK consumers secured by overseas enforcement agencies? If not, why not? 34

Question 54: Do you agree that if funds cannot be returned to consumers in a cost-effective manner then they should be used to finance relevant consumer awareness/education activities? If not, what should happen? 35

Question 55: Is there a case to widen any power given to the Consumer Advocate to facilitate the return of funds secured by overseas enforcement agencies to funds that originate within the UK? If so, why? 35

Question 56: Is there a case to widen any power given to the Consumer Advocate to facilitate the return of funds in mail intercepted by overseas enforcement agencies to also apply to funds in mail intercepted by UK enforcement agencies? If so, why?..... 35

Annex B: The consultation code of practice criteria

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Tunde Idowu,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Tunde on 020 7215 0412
or e-mail to: Babatunde.Idowu@bis.gsi.gov.uk

Annex C: List of individuals/organisations consulted

ABTA – the Travel Association
Age Concern
Association of HM District Judges
Aviva
British Bankers' Association
British Chamber of Commerce
British Retail Consortium (BRC)
Confederation of British Industry (CBI)
Citizens Advice
Citizens Advice Scotland
City of London Law Society
Civil Justice Council
Civil Sub-Committee of the Council of Her Majesty's Circuit Judges
Clifford Chance
Consumer Focus
Consumer Focus Wales
Consumer Focus Scotland
Convention of Scottish Local Authorities (COSLA)
Court of Session (Scotland) Lord President's Office
Dr Christopher Hodges
Dr Rachael Mulheron
Faculty of Advocates
Federation of Small Business
Financial Ombudsman Service
Financial Services Authority
Forum for Private Business
Freshfields Bruckhaus Deringer
Help the Aged
Herbert Smith
HM Courts Service
Institute of Credit Management
Institute of Directors
Local Authorities Coordinators of Regulatory Services (LACORS)
Law Society
Law Society of Scotland
Lord President
Mind
National Fraud Authority
National Association of Estate Agents
Northern Ireland Consumer Council
Office of Fair Trading (OFT)
Ofgem
Royal Institute of Chartered Surveyors
Society of Chief Officers of Trading Standards in Scotland (SCOTSS)
Serious Organised Crime Agency
The Bar Council
Trading Standards Institute (TSI)
Which?

Annex D: Consultation stage impact assessment of granting the Consumer Advocate the power to take forward collective actions

Summary: Intervention & Options

Department /Agency: BIS	Title: Impact Assessment of granting the Consumer Advocate the power to take forward collective actions	
Stage: Consultation	Version: 1.0	Date: 2 December 2009
Related Publications: the July 2009 Consumer White Paper: “A Better Deal for Consumers: Delivering Real Help Now and Change for the Future” (see: http://www.berr.gov.uk/files/file52072.pdf) and associated economic narrative (see: http://www.berr.gov.uk/files/file52074.pdf)		

Available to view or download at:

<http://www.bis.gov.uk/consultations>

Contact for enquiries: Heidi Munn

Telephone: 020 7215 5111

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

Consumers that have suffered a loss as a result of a business breaking the law often struggle to obtain the compensation that they deserve. One of the reasons for this is that for many consumers the costs of legal action outweigh the private benefits. This is often the case where a large number of consumers have suffered a relatively small loss at the hands of the same business. The proposed policy would greatly reduce the costs of access to justice for harmed consumers. Compared with introducing collective actions the “do nothing” option constitutes a regulatory failure in that it imposes costs that exceed the benefits from consumer redress.

What are the policy objectives and the intended effects?

The policy objective is to increase pursuit of redress, or more likely, enhance the credibility of the threat of redress, driving deterrence towards a socially optimal level and thereby reduce the number of incidents of firms transgressing consumer protection law. Over time, improved mechanisms for redress should improve consumer confidence in markets, thus supporting competition and innovation.

What policy options have been considered? Please justify any preferred option.

The “do nothing” option and four different types of collective actions which the Consumer Advocate could be granted the power to take have been considered: Option (i) pure opt-in, Option (ii) pre-liability opt-in, Option (iii) pre-damages opt-in or Option (iv) pure opt-out. Option (iii) is the preferred option as it balances the benefits of maximising the number of members of an affected group joining an action with the potential risks associated with an pure opt-out procedure.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Should the Consumer Advocate initiate collective actions, data will be readily available to monitor their efficacy. The legal costs of initiating collective actions would be readily identifiable within Consumer Focus’ accounts and the level of damages awarded would be collated by the Consumer Advocate. Therefore, the costs associated with the Consumer Advocate’s collective actions, and the attendant benefits, could be monitored over time. BIS will undertake a Post Implementation review 3 to 5 years after any new powers are granted to the Consumer Advocate.

Ministerial Sign-off For consultation stage Impact Assessments:

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

Signed by the responsible Minister:



Date: 02/12/2009

Summary: Analysis & Evidence

Policy Option iii	Description: To give the Consumer Advocate the power to take forward, as a last resort, collective actions on the basis of a “pre-damages opt-in” model
--------------------------	--

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by ‘main affected groups’ Costs to the publicly-funded Consumer Advocate for initiating collective actions in the courts.	
	One-off (Transition)	Yrs		
	£ 0	10		
	Average Annual Cost (excluding one-off)			
	£ 0.75m		Total Cost (PV)	£ 6.4m
Other key non-monetised costs by ‘main affected groups’ Costs to the Consumer Advocate of monitoring breaches of consumer protection law leading to losses for large number of consumers, negotiating out of court settlements and publicity of cases.				

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by ‘main affected groups’ Consumer benefits are associated either directly with collective actions taken by the Advocate or indirectly, for example from pre-court settlements and consumer savings associated with the deterrent effect.	
	One-off	Yrs		
	£ 0	10		
	Average Annual Benefit (excluding one-off)			
	£ 15m		Total Benefit (PV)	£ 129.1m
Other key non-monetised benefits by ‘main affected groups’ Enhanced consumer confidence resulting in improved competition, and hence productivity and innovation. Psychological benefits to consumers of having harm redressed.				

Key Assumptions/Sensitivities/Risks
 One collective action per year, a settlement ratio of 5:1 and a deterrence ratio of 2:1. The main risk is that actions taken are unsuccessful and therefore do not realise the expected benefits.

Price Base Year 2009	Time Period Years 10	Net Benefit Range (NPV) £ 122.7m	NET BENEFIT (NPV Best estimate) £ 122.7m
-------------------------	-------------------------	---	---

What is the geographic coverage of the policy/option?		England, Wales & Scotland		
On what date will the policy be implemented?		When parliamentary time allows		
Which organisation(s) will enforce the policy?		N/A		
What is the total annual cost of enforcement for these organisations?		£ N/A		
Does enforcement comply with Hampton principles?		N/A		
Will implementation go beyond minimum EU requirements?		N/A		
What is the value of the proposed offsetting measure per year?		£ N/A		
What is the value of changes in greenhouse gas emissions?		£ 0		
Will the proposal have a significant impact on competition?		Yes – competition enhancing		
Annual cost (£-£) per organisation (excluding one-off)	Micro £0	Small £0	Medium £0	Large £0
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase of	£ 0	Decrease of	£ 0
		Net Impact	£ 0

Key:	Annual costs and benefits: Constant Prices	(Net) Present Value
------	---	----------------------------

A. Strategic overview

1. The Government set out its plans to build a consumer policy that will work in years to come in its Consumer White Paper “A Better Deal for Consumers: Delivering Real Help Now and Change for the Future” which was published in July 2009²⁹. This set out a number of proposals aimed at increasing levels of compensation paid to consumers when they have suffered a loss because a business has broken the law. One of these proposals was to consult on giving a new public figure, the Consumer Advocate, the power to take legal actions on behalf of a group of consumers following a breach of consumer protection law if other routes for obtaining compensation have been tried or judged inappropriate.

B. The issue

2. Criminal proceedings, and sanctions such as fines, which are imposed as a result of enforcement activity are an important deterrent to infringements of consumer protection law. However, criminal proceedings and sanctions usually provide little help to those who have been harmed either physically or financially by the infringement.
3. The quickest path to redress for consumers should be through direct representation to the business concerned. Should the business, however, not satisfactorily redress the harm, the consumer must typically pursue remedies individually on a case-by-case basis. Such cases may be taken, in the first instance to an Alternative Dispute Resolution (ADR) scheme if available or, as a last resort, a court of law. Remedies, when granted, act as a further deterrent to firms from engaging in behaviour which causes detriment to consumers while at the same time compensating consumers for the harm done.
4. There are three major reasons why consumers may not pursue individual claims in the courts:
 - Information asymmetry
 - Rational apathy
 - Free-riding
5. In the first instance consumers may not even consider pursuing a claim because they are unaware that they have been victims of a consumer protection law infringement. This information asymmetry can result in sub-optimal pursuit of redress by consumers.
6. Yet, even where consumers are aware that they are victims of a consumer protection law infringement they may exhibit ‘rational apathy’ and fail to pursue redress. Individual consumers often have little incentive to bring about private actions against firms as the costs of such legal action often outweigh the benefits, particularly as the expected benefit must be discounted by the probability that the firm is not found liable. Citizens Advice reports that while going to court is a potential final option, many of their clients find court action can be too expensive in terms of money, time and anxiety³⁰. Hence, the likelihood of an individual consumer bringing about a legal action for a small loss is low. This is a form of regulatory failure in that the current legal framework imposes costs that outweigh the benefits to consumers from seeking redress.

²⁹ <http://www.berr.gov.uk/files/file52072.pdf>

³⁰ <http://www.berr.gov.uk/files/file52071.pdf>

7. Consumers who are aware that they are the victims of a consumer protection law infringement may attempt to take a free-ride on the efforts of other victims of the infringement, waiting for a precedent to be set before taking action themselves.
8. A recent EU survey indicates that only 40% of UK consumers find it easy to resolve disputes through the courts (down 9% on 2006)³¹. Research conducted by the EU Commission-DG Sanco³² suggests that citizens of the EU 15 would be much more inclined to go to court for losses suffered in the region of €500 to €1000 than for lesser amounts. Yet it would appear that the majority of individual problems suffered by UK consumers comprise small individual claims which fall below these thresholds. The OFT in its Consumer Detriment report³³ found that 55% of the consumer problems surveyed related to detriment of £5 or less, 83% related to detriment of £100 or less and 96% related to £1000 or less. Problems related to individual detriment of £100 or less constitute total detriment of £218m while problems related to individual detriment of £1,000 or less constitute total detriment of £1.4bn.
9. Due to the thresholds for detriment required by most consumers to bother pursuing a claim, even where public enforcement action is brought against firms in relation to low value claims, consumers are likely to remain uncompensated, whatever the outcome of enforcement action. This point, combined with the fact that resource constrained enforcement bodies target high detriment activity, reduces the deterrent power of enforcement and redress mechanisms at low values of individual detriment. Indeed this could even create an incentive for those individuals and firms which infringe consumer protection law in a knowing and pre-meditated fashion to target their activities at goods and services which fall below consumers' detriment thresholds for seeking redress.
10. A further consequence of consumers not pursuing redress is that it forgoes the positive externality or 'spillover' of a precedent being set for parties in similar circumstances who have also suffered detriment as a result of a firm's behaviour – the very outcome some consumers may attempt to free ride on. The benefits resulting from the positive externalities of precedent setting and deterrence, which constitute public goods, are not taken into account in the individual consumer's decision on whether to take legal action, leading to a socially sub-optimal level of deterrence due to insufficient pursuit of redress.
11. This socially sub-optimal pursuit of redress is particularly acute where firms' infringements of consumer protection law cause a low level of detriment to a large number of consumers; in other words in situations where individual detriment is low but aggregate detriment is very high. Further, as the number of consumers with a legitimate claim increases, individual consumers will be less inclined to bring about an action. This is because the firm, wary of the large amounts of money at stake if a precedent is set in the individual action, will be willing to invest more money in fighting the case, which will in turn raise costs of the plaintiff.
12. Collective actions can overcome the problems described above. Collective actions, if taken by a high profile representative body such as the Consumer Advocate, can overcome the problem of information asymmetry as they can both monitor public enforcement actions and publicise any findings of consumer protection law infringement. By exploiting economies of scale associated with fighting a case for an aggregated value of damages, reducing the cost per £ of expected payment in damages, collective actions can tip the balance of individual costs and benefits in favour of the latter. Therefore collective actions can reduce the extent of rational apathy. Under a regime where a representative individual or body pays the cost of litigation on the basis that the expected sum of individual benefits exceeds the expected cost of litigation, joining a collective action is near costless and rational apathy is all but eliminated. Representative collective actions also undercut incentives to free-ride as the

³¹ http://ec.europa.eu/consumers/strategy/docs/2nd_edition_scoreboard_en.pdf

³² http://ec.europa.eu/public_opinion/archives/ebs/ebs_195_exec_fr.pdf

³³ http://www.offt.gov.uk/shared_offt/reports/consumer_protection/of992.pdf

representative body meets the costs of litigation. As well as benefiting individual consumers by allowing them to be compensated, collective actions can credibly increase the threat of litigation thereby raising the expected costs facing firms which infringe consumer protection law, and hence raise the level of deterrence.

13. Research conducted by EU Commission-DG Sanco³⁴ suggests that 88% of UK consumers would be more willing to defend their rights in court if they could join a collective action.

C. Objectives

14. The policy objective is to increase pursuit of redress, or more likely, enhance the credibility of the threat of redress, driving deterrence towards a socially optimal level and thereby reduce the number of incidents of firms transgressing consumer protection law. Over time, improved mechanisms for redress should improve consumer confidence in markets, thus supporting competition and innovation.

D. Options identification

15. The status quo and four policy options have been identified:

- **Status quo** – this is the “do nothing” option, i.e. the power to take forward collective actions on behalf of consumers is not granted to the Consumer Advocate
- **Pure opt-in** – collective actions could be brought on behalf of a group of members identified before court action commences.
- **Pre-liability opt-in** – collective actions could be brought on behalf of an identified group of members above a minimum size before court action commences with other members able to opt-in before a decision on liability is made.
- **Pre-damages opt-in** – as ‘pre-liability opt-in’ above but claimants could join the action after the decision on liability but before quantification of damages.
- **Pure opt-out** – damages would be quantified for all claimants who had not expressly opted-out before that point.

16. Common to all of the policy options above is that collective actions could only be undertaken by the Consumer Advocate and could only be taken as ‘follow-on’ to a breach of consumer protection law. (For more details on these policy options and the ‘follow-on’ requirement see the consultation document.) A number of other pre-conditions are proposed to prevent the filing of unmeritorious claims: a significant number of consumers must join the case up-front, the Consumer Advocate must have judged the case to be in the public interest, other routes to compensation must have been tried or judged inappropriate and the relevant regulators/enforcers must have been consulted. (Again, for more information see the consultation document.)

E. Options analysis

17. General costs and benefits for conferring the power to take collective actions on the Consumer Advocate are described below. Qualitative arguments for how each option affects these costs and benefits are given thereafter.

Benefits

18. At a general level giving the power to take collective actions to the Consumer Advocate will increase awareness among consumers that they have been victims of a consumer protection law breach, overcome rational apathy in some cases and eliminate the free rider

³⁴ http://ec.europa.eu/consumers/strategy/docs/2nd_edition_scoreboard_en.pdf

problem. Ultimately levels of redress should increase above current levels either through pre-court settlement or, as a last resort, litigation in the courts.

19. Consumers exercise their purchasing preferences in a manner which maximises their utility. However, when consumers exercise their preferences in good faith *ex ante* but are victims of consumer protection law violations *ex post*, they are likely to suffer losses either in the form of physical harm or financial loss. If such losses go uncompensated, consumers derive less utility from the purchase than was originally anticipated, contributing to a loss in overall consumer welfare.
20. The main economic benefits of providing a means for consumers to be compensated will accrue as a result of the deterrence effect. Collective actions both increase the probability of being found liable for financial damages and raise the costs associated with liability being found. Therefore collective actions increase the expected costs facing a potential infringer of consumer protection law. Where these costs are raised above the expected benefits associated with the breach of consumer protection law, the potential infringer will be deterred from committing the breach. This deterrence should help to raise the average quality of goods and services available to consumers, raising potential consumer welfare, and send signals to producers to produce goods that consumers want, at levels of quality that are aligned with their valuation, eventually leading to a potential increase in allocative efficiency.
21. The public enforcement action which a collective action would follow would itself have a deterrent effect through reputational, legal and punitive costs. The compensation paid in damages from a collective action and the reputational costs associated with the enhanced publicity would raise expected costs to infringing firms over and above the costs associated with public enforcement. Therefore there is a deterrent effect related to collective actions in addition to the deterrent effect related to public enforcement.
22. Another benefit of providing a means for consumers to be compensated is enhanced consumer confidence. One of the key economic problems caused by breaches of consumer protection law is a loss of confidence on the part of consumers making further purchases. Hence affected consumers may opt for more expensive, less risky, better known brands where cheaper ones may have provided an optimal match for their preferences. This could then adversely impact on innovation, new entry to markets and may also reduce overall price competition. On top of this any psychological harm caused to consumers suffering detriment may well be alleviated or even totally offset by disincentivising traders from breaching consumer protection law in the first place.
23. As the objective of giving the Consumer Advocate the power to take collective actions is to provide redress to consumers suffering losses as a result of breaches of consumer protection law, the cost benefit analysis below uses a consumer detriment saved measure rather than a measure of economic efficiency gain.

Costs

24. Enforcing redress through litigation is not a costless exercise. The following costs would be incurred through the consumer advocate bringing about a collective action:
 - Court costs
 - Claimant legal costs
 - Defendant legal costs

However, it is envisaged that the majority of cases which could warrant collective action would likely be settled before court action. The Consumer Advocate would work to strict

guidelines, only taking cases in which the expected benefits from litigation exceed expected costs to a fairly large extent. Essentially the Consumer Advocate would only take on cases relating to large value of aggregate detriment identified and where there was a good chance of establishing liability. In such instances there are strong incentives for potential defendants to settle before court action in order to mitigate legal and reputational costs associated with liability being established.

25. This assertion is backed up by evidence from Scandinavian countries which have conferred similar powers to representative bodies or individuals. For example, in Finland, where the Consumer Ombudsman has had the right to pursue collective actions since 2007, while no collective actions have been brought before the courts the availability of this option has increased companies' willingness to compensate consumers³⁵. Settling before court action will lower legal costs for both the plaintiff and defendant but, at the same time, could lower the level of damages awarded.

Quantification

26. Central to quantifying costs and benefits is the number of representative collective actions which are likely to be brought by the Consumer Advocate each year. Evidence from jurisdictions which currently operate a regime similar to that proposed in the consultation document suggests that the number of cases will be small.

27. For example in Sweden collective actions for claiming compensation have been possible since the enactment of the Group Proceedings Act in 2003. After 3 years of operation of the opt-in scheme there had been seven cases, 6 of which were initiated by private parties (which will not be possible in the UK under these proposals).

28. In the UK only one representative collective action has been brought following a breach of competition legislation under Enterprise Act 2002. This was a collective claim following competition enforcement action by the Office of Fair Trading against a cartel of retailers by *Which?* on behalf of consumers who over-paid for football shirts. The case eventually settled out of court and *Which?* has since stated a reluctance to take on cases in future due to the difficulty it has in assembling a class of members under the pure opt-in approach.

29. DECO (the Portuguese Association for Consumer Protection) has instituted three opt-out actions for damages since the inception of the Portuguese opt-out regime in 1995. According to Mulheron (2008), "the small number of actions commenced for damages is largely due to the reality that DECO has finite resources with which to prosecute collective actions of this sort, rather than due to the efficacy of the regime itself"³⁶. It is worth noting that one particular case initiated in 1998 against Portugal Telecom to compensate consumers for the payment of overcharges involved damages of about €120m. Portugal Telecom and DECO reached a settlement that allowed consumers to make free phone calls every Sunday for a year.

30. In both Australia and Ontario, Canada, where opt-out collective actions operate and where there are strong parallels with the litigious landscape and substantive law of England and Wales, there have been three collective actions under consumer protection law between 2000 and 2007.

31. On the basis of experience in other jurisdictions which operate collective actions, the much larger population of the UK, the type of consumer complaints identified in the UK which

³⁵ <http://www.kuluttajavirasto.fi/Page/d1bc11a7-7371-4140-8681-eb744f0400c8.aspx?groupId=fc5a839d-cc80-41a9-ad40-65e6a50d16a8&announcementId=608002b4-babb-4063-977a-39ca3f002065>

³⁶ http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf

could be taken forward as collective actions under consumer protection law³⁷ and the likely budget of the Consumer Advocate, it is assumed that the Consumer Advocate will initiate an average of 1 case per year.

32. The costs related to each collective action would vary from case to case. There is, however, a greater degree of certainty over the average length of a case given that a breach of consumer protection law will have been established prior to the collective action being brought. One source of evidence is the length of time taken by the Competition Appeal Tribunal (CAT) to hear follow-on private actions under competition law. Cases have typically lasted 9 months and taken 2-4 hearing days with total variable costs for each case in the region of £8-10k.
33. A study for the European Union carried out by Ashurst³⁸ has estimated the likely average cost of an action brought by a third party in respect of a violation of competition law to be £200k to £300k. In its review of the OFT, "The Office of Fair Trading: Enforcing Competition Law" (November 2005)³⁹ the National Audit Office reported that the CBI had told it that in some major cases some of their members had incurred fees in excess of £200k on OFT investigations and that if a case went to appeal, then the costs would escalate further.
34. It is therefore assumed, on the basis that plaintiff (Consumer Advocate) and defendant legal costs are similar, that each collective action would cost between £450k and £750k. This includes an allowance for expenditure incurred by the Consumer Advocate in mobilising members of the affected group to opt-in to the action as well as costs incurred in disseminating awarded damages to members of the group.
35. The Consumer Advocate will monitor enforcement actions under consumer protection law to determine whether any established breach of consumer protection law would represent a viable case for follow-on representative collective action. In doing so the Consumer Advocate will carry out his or her own cost-benefit analysis, weighing up the expected benefits (the level of damages quantified multiplied by the probability of establishing liability) against the expected costs (the Consumer Advocate's expected litigation costs and costs associated with forming the group of affected individuals).
36. The Consumer Advocate would not want to take on cases where the expected benefits merely exceed costs but cases in which expected benefits are significantly in excess of expected costs. The Consumer Advocate is expected to prioritise on the basis of which cases offer the largest differential between expected benefits and expected costs. However, the Consumer Advocate would still need to determine what constitutes a 'viable' case; in other words what the minimal differential between expected benefits and costs would need to be in order to consider bringing an action.
37. The Consumer Advocate is likely, among other considerations, to attempt to maximise the expected benefits relative to expected costs which any action would realise. The OFT has agreed with HMT that the OFT should bring about consumer benefits which are five times greater than its costs. Although it is not a proposed policy, it is plausible that the Consumer Advocate could work to a similar ratio and we therefore use this as a base assumption. However, we stress here that this is merely a working assumption for the purposes of this impact assessment and in reality the ratio of benefits to costs of any particular action could be very different from this. Given that the average cost per action facing the Consumer Advocate is assumed to be £250-300k, an upper bound for the expected consumer benefit, in the form of damages which would serve as a threshold of viability would be £1.5m.

³⁷ http://www.offt.gov.uk/shared_offt/reports/offt_response_to_consultations/offt1100.pdf

³⁸ http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/united_kingdom_en.pdf

³⁹ http://www.nao.org.uk/publications/0506/the_office_of_fair_trading.aspx

38. It has been assumed that the Consumer Advocate would bring, on average, one action per year. However, it is possible that many more cases in which a breach of consumer protection law has been established through public enforcement could result in redress being awarded to affected consumers on threat of litigation by the Consumer Advocate. Given a breach of consumer protection law will already have been established, with attendant reputational and punitive costs, many firms may be willing to redress consumers rather than incur further litigation costs, reputational costs and damages in excess of what could be offered in a settlement. It is assumed that the ratio of settled cases to actions brought will be at least 5:1.
39. Actions brought by the Consumer Advocate and pre-action settlements will have a deterrent effect on firms considering committing a breach of consumer protection law. This is because the threat of a collective action raises the expected costs associated with a breach of consumer protection law. Where these costs are in excess of the expected benefits the potentially infringing firm will be deterred from breaching consumer protection law. Independent research conducted by Deloitte on behalf of the OFT⁴⁰ suggests a deterrent ratio of between 4:1 and 7:1 for its competition enforcement work. A similar ratio could be applied to consumer enforcement by the OFT and Trading Standards Services.
40. It is difficult to estimate the deterrent effect of collective actions and pre-action settlements over and above the deterrent effect associated with punitive and reputational costs associated with consumer protection law enforcement. Collective actions and, to a lesser extent pre-action settlements, carry a significant reputational cost and damages could be of similar orders of magnitude to punitive fines under public enforcement. However, only a small proportion of public enforcement would be followed by collective action or pre-action settlement. Conversely the Consumer Advocate is likely to have a significant media presence, so any actions taken by him or her, and the resultant settlements or award of damages, will probably be well publicised. A deterrence ratio for collective actions and pre-action settlements of 2:1 is assumed.
41. In the central case, which is reported in the “Summary of Analysis and Evidence” above, total benefits per action can thus be calculated by multiplying the average benefit per action (£1.5m) by the settlement ratio (5:1) by the deterrence ratio (2:1). Total benefits per action are therefore estimated to be £15m. Given the assumption that there will be one action taken per year this results in estimated annual benefits of £15m. This is based on a number of reasonable assumptions and constitutes a central case. Sensitivities are applied to these assumptions to derive a range of benefits below. As noted above the Consumer Advocate will always attempt to ensure consumer benefits exceed its costs, although there is a very small risk that this may not be borne out for a particular case.

Settlement ratio	Deterrence ratio	CB Ratio applied by Advocate	Cost (p.a.)	Benefit (p.a.)
3:1	1:1	2:1	c. £750k	£3.6m
5:1	2:1	5:1	c. £750k	£15m
7:1	2:1	5:1	c. £750k	£21m

Status Quo

42. No costs or benefits.

⁴⁰ http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft962.pdf

Pure opt-in

43. Under any type of collective action there is a chance that if the Consumer Advocate takes forwards an action it may not result in a finding of liability in the civil courts. This would present a risk to the Consumer Advocate under the 'loser pays' rule which makes the loser in any civil action liable for the legal fees of the other party. The risk of the Consumer Advocate not obtaining a finding of liability should be reduced by making any action 'follow-on' to a proven breach of consumer protection law.
44. The benefits of bringing forward a collective action is that, if successful, this will result in damages being awarded to the individuals included within the collective action. The lower the number of individuals represented in the action the lower the expected damages that will be awarded. If expected damages are too low then the deterrent effect of the Consumer Advocate's power to take collective actions will decrease. Also if the size of the group is too small, even if the Consumer Advocate is near certain of winning a collective action, the expected benefits may not exceed the Consumer Advocate's non-recoverable costs.
45. The difficulty with a 'pure opt-in' model for collective actions is that only consumers who opt-in to (confirm participation in) the case before it starts will benefit if the case is successful. There are a number of reasons why individuals may not be willing to opt-in to a case initially. Even if individuals who are part of a collective action do not have to meet any legal costs, they do still incur costs. These include the costs of correspondence and the cost of proving membership of the affected class. Although these costs are expected to be small they may still provide a sufficient disincentive to prevent individuals joining the action. Further, consumers may also factor in the possibility that the action may not be taken forward due to an insufficient number of individuals joining the action when making their decision on whether to join, essentially a self fulfilling prophecy if a sufficient number of individuals take this view.

Pre-liability opt-in

46. Under a 'pre-liability opt-in' model for collective actions the action would be brought initially in terms of a defined class with a minimum number of identified members but other members of the class could opt-in to (confirm participation in) the case at any time before the decision on liability.
47. The initiation of court proceeding would be likely to bring significant publicity to the case thereby increasing the Consumer Advocate's ability to draft in members of the affected group into the collective action. By providing more time to join and greater awareness of an action a 'pre-liability opt-in' model has a significant advantage over a 'pure opt-in' model. The number of individuals joining a collective action is likely to be bigger making the potential damages facing a transgressing firm potentially greater thereby enhancing the deterrent effect of the Consumer Advocate's power to take collective actions.

Pre-damages opt-in

48. Under a 'pre-damages opt-in' model for collective actions the action would be brought initially in terms of a defined class with a minimum number of identified members but other members of the class could opt-in to (confirm participation in) the case at any time before the quantification of damages.
49. A favourable decision on liability, together with the associated publicity this will bring, will further increase the Consumer Advocate's ability to draft in members of the affected group into the collective action. A 'pre-damages opt-in' model therefore has a significant advantage over both a 'pure opt-in' model and a 'pre-liability opt-in' model. The number of individuals joining a collective action is likely to be bigger making the potential damages facing a

transgressing firm potentially greater thereby enhancing the deterrent effect of the Consumer Advocate's power to take collective actions.

50. Under a 'pre-damages opt-in' model the issue of liability would be *res judicata* (determined) for any individual who had not expressly opted out before it was decided. Some stakeholders have expressed concern that, if members of the affected group are unaware that the collective action had been initiated, they could fail to opt-out and thereby lose their right to bring an individual case if the decision on liability was not favourable. (If the decision on liability is favourable then consumers who have not opted in or out of a claim could take their own action.) It is likely that under a 'pre-damages opt-in' model the Consumer Advocate will promote awareness of any collective action being initiated widely, particularly among the members of the affected group, in order to maximise the number who opt-in. Further, the rationale for collective actions under consumer protection law, and hence the circumstances under which they would be initiated, make it highly unlikely that a member of the affected group would want to pursue individual action. It is precisely the circumstances where there is a limited incentive for consumers to take individual action that collective actions are being proposed. It is also unlikely that an individual consumer would consider that they had a better chance of securing a favourable finding on liability than the Consumer Advocate.

Pure opt-out

51. Under a 'pure opt-out' model for collective actions damages would be assessed for all claimants who had not expressly opted-out of (confirmed that they do not want to participate in) the case on the basis of an estimation of the total size of the class. After the case has concluded claimants who have not opted-out can still come forward to claim their share of the damages. Later claimants may not receive any damages if the pot proved inadequate. More likely, insufficient claimants would come forward leading to a surplus which, after a defined period, would either be distributed through a *cy-pres* mechanism or surrendered to the Treasury. A 'pure opt-out' model would, relative to 'opt-in' models, increase the incentive for members of the class to come forward and claim their portion of the damages as the cost of proving membership would be offset by a definite, quantifiable benefit.

52. A 'pure opt-out' model for collective actions may also increase the incentive, relative to 'opt-in' models, of defendants to settle before any court action as the defendant will be liable to pay a sum relating to harm inflicted on the whole of the affected group rather than a subset of it. Settlements before court action, by mitigating court costs and parties' legal fees, could reduce the cost per £ of benefits accruing to members of the affected group.

53. Research by Mulheron (2008)⁴¹ which compares a number of jurisdictions which operate some form of collective action regime suggests that opt-in rates are much lower than opt-out rates. On the basis of this evidence it could be assumed that an 'opt-out' model, notwithstanding the issues described above, would result in greater consumer benefits than an 'opt-in' model. However, data pertaining to opt-in rates is thin and highly variable and it is not clear from the data how the cut-off point in the judicial process at which consumers can no longer opt-in affects participation rates.

54. Under a 'pure opt-out' model members of the affected group who do not opt-out of the action, for example, because they were unaware that collective action had been initiated, would lose their right to bring an individual case to court. Some stakeholders have suggested that this could result in harm to such members of the affected group if they felt that they were entitled to a greater level of damages than was awarded through the collective action.

⁴¹ http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf

55. It is likely that the Consumer Advocate, who will aim to have a significant media presence, will promote awareness of any collective action being initiated, particularly among the members of the affected group, although there would be less of a motivation for the Advocate to do so under a 'pure opt-out' model as compared to a 'pre-damages opt-in' model. Further, the rationale for collective actions under consumer protection law, and hence the circumstances under which they would be initiated, make it highly unlikely that a member of the affected group would want to pursue individual action. It is precisely for circumstances where there is a limited incentive for consumers to take individual action that collective actions are being proposed. It is unlikely that, where the level of individual damages is smaller than the expected individual legal costs of seeking those damages, a consumer would want to pursue individual actions.
56. Nonetheless there could be sub-groups of the affected class for which the expected individual damages which could be pursued through another court mechanism would exceed the individual legal costs. It is possible that these sub-groups may want to opt-out of the collective action being taken forward by the Consumer Advocate because members of the sub-group believe they can win a higher level of damages than is due to be pursued by the Consumer Advocate. The total amount of any damages awarded through a 'pure opt-out' collective action would be reduced if individuals opt-out of the action.
57. A significant risk associated with a 'pure opt-out' model for collective actions is that estimates of the total number of consumers affected may prove inaccurate. There is also a risk that consumers may be double-counted as some individuals may have already received redress from the defendant business. This could result in an over-estimation of the amount of harm caused by businesses through a breach of consumer protection law and in turn the level of damages awarded by the courts. Under a 'pure opt-out' model resources would be required to identify victims and disseminate funds, which could be significant. Identifying all members of the identified class could become prohibitively expensive resulting in surplus damages being given over to the Treasury or distributed through a *cy-pres* mechanism. While this could enhance the deterrence effect of collective actions it would not fully meet the objective of the policy which includes provision of redress to consumers and improved allocative efficiency.

F. Risks

58. The main risk is that cases are brought and are unsuccessful. This would reduce the credibility of the threat to infringing businesses, undermining the Consumer Advocate's ability to promote pre-court settlements and eroding the deterrence effect of the power. This would undermine the extent to which collective actions contribute to the objectives stated above and any costs incurred by the advocate would be wasted.

G. Recommendation

59. The Consumer Advocate is granted the power to take collective actions on behalf of consumers using a 'pre-damages opt-in' model. A 'pre-damages opt-in' model for collective actions maximises opt-in rates while obviating the difficulties arising from a 'pure opt-out' model.

H. Implementation

60. The Consumer Advocate is expected to be appointed to be a part of Consumer Focus in 2010. They will be invited to consider the responses to this consultation. The Government will respond to this consultation by summer 2010. If the decision is to go ahead and grant the powers described in this consultation then the Government will seek to introduce primary legislation when parliamentary time allows.

I. Monitoring and evaluation

61. The main outcomes which would serve as indicators of whether or not the policy objectives have been met are:
- Increased willingness of business to settle claims before court action;
 - Increased deterrence of consumer protection law infringements, particularly where small individual detriment falls on a significant number of consumers and therefore a lower incidence of breaches of consumer protection law.
62. These outcomes are difficult to translate in to measurable outputs because a number of other policies announced in the Consumer White Paper will contribute to these objectives, and disentangling the extent to which each policy contributes to the overall effect is difficult. However, the EU Consumer Markets Scoreboard, collated annually, provides valuable measures of consumer confidence in firms, the public authorities and redress mechanisms. Consumer Direct data will also provide valuable insight in to the changing nature of complaints and Trading Standards data will give insight in to the level of deterrence generated by measures including the Consumer Advocate's power to pursue collective redress.
63. Once the Consumer Advocate begins to initiate collective actions data will be readily available to monitor their efficacy. The legal costs of initiating collective actions would be readily identifiable within Consumer Focus' accounts and the level of damages awarded would be collated by the Consumer Advocate. Therefore, the costs associated with the Consumer Advocate's collective actions, and the attendant benefits, could be monitored over time.
64. However, it could be that collective actions themselves are rarely if ever pursued, the threat of collective action being sufficient for businesses to settle before any court action or indeed not to breach consumer protection law. This has been the case both in Scandinavian countries which operate a similar model and under similar powers within the UK competition framework.
65. BIS will undertake a Post Implementation review 3 to 5 years after any new powers are granted to the Consumer Advocate.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Competition Assessment

The measures described above will be competition enhancing by reducing the extent to which consumer protection law breaches occur at the expense of fair dealing businesses and by improving consumer confidence to purchase new and innovative products from less established firms.

Small Firms Impact Test

The measures described above are essentially neutral to the size of the firm. However, large firms are able to invest in their reputation and so are less reliant on the law to signal their quality to consumers. Therefore, enhanced consumer confidence would likely be of greater benefit to smaller, less established firms.

Race, Disability and Gender Equality

The measures described above are expected to have a positive impact on all consumers, including those from minority groups. In particular the policy will benefit consumers who do not have sufficient understanding of their rights and on how to obtain compensation. For example, the elderly and those for whom English is not a first language. Minority groups are expected to be over-represented in this category of consumers although quantifying the impact on these specific groups is difficult. (See consultation document for more details.)

Other specific impact tests

Other specific impact tests have been considered, including Legal Aid, Sustainable Development, Carbon Assessment, Other Environment, Health Impact Assessment, Human Rights and Rural Proofing.

After an initial screening it has been concluded that no significant impact is anticipated in any specific cases above.

Annex E: Consultation stage impact assessment of granting the Consumer Advocate the power to facilitate the return of funds secured by overseas enforcement agencies

Summary: Intervention & Options

Department /Agency: BIS	Title: Impact Assessment of granting the Consumer Advocate the power to facilitate the return of funds secured by overseas enforcement agencies	
Stage: Consultation stage	Version: 1.0	Date: 2 December 2009
Related Publications: the July 2009 Consumer White Paper: "A Better Deal for Consumers: Delivering Real Help Now and Change for the Future" (see: http://www.berr.gov.uk/files/file52072.pdf) and associated economic narrative (see: http://www.berr.gov.uk/files/file52074.pdf)		

Available to view or download at:

<http://www.bis.gov.uk/consultations>

Contact for enquiries: Heidi Munn

Telephone: 020 7215 5111

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

At present there is no body in the UK with the necessary powers to facilitate the return of funds secured by overseas enforcement agencies to UK consumers. In the past few years there have been a handful of cases, often foreign lottery scams, where secured funds have been earmarked for UK consumers but no legal mechanism has existed to facilitate the return of those funds. This impact assessment shows that the benefit of returning funds to UK consumers exceeds the costs. The market cannot provide this facility for legal reasons. A public body needs to acquire powers to discharge it.

What are the policy objectives and the intended effects?

To provide a mechanism for UK victims of overseas scammers to obtain funds that rightfully belong to them which have been secured by overseas enforcement agencies.

What policy options have been considered? Please justify any preferred option.

Two options have been considered: Option (i) to maintain the status quo and Option (ii) to give the Consumer Advocate the power to facilitate the return of funds secured by overseas enforcement agencies to UK consumers. Option (ii) is the preferred option: to grant the proposed power.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The Consumer Advocate will be part of Consumer Focus and therefore his or her actions will be monitored by Consumer Focus' normal governance arrangements. The Advocate would also carry out work to ensure any contractors that he or she hired provided value for money. BIS will undertake a Post Implementation review 3 to 5 years after any new powers are granted to the Consumer Advocate.

Ministerial Sign-off For consultation stage Impact Assessments:

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

Signed by the responsible Minister:



.....Date: 02/12/2009

Summary: Analysis & Evidence

Policy Option: ii

Description: To grant the Consumer Advocate the power to facilitate the return of funds to UK consumers that have been secured by overseas enforcement agencies

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' On the basis of anecdotal evidence of jurisdictions approaching UK authorities to distribute secured funds the cost is likely to be of the order of tens of thousands per year. The figure of £50k is illustrative, acknowledging that there is a degree of uncertainty. These costs will be recovered from the secured funds.
	One-off (Transition)	Yrs	
	£	10	
	Average Annual Cost (excluding one-off)		
	£ 50k		Total Cost (PV)
			£ 430k
Other key non-monetised costs by 'main affected groups' The Advocate's time in administering the disbursement of funds.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' On of anecdotal evidence of jurisdictions approaching UK authorities to distribute secured funds the benefits to consumers is likely to be of the order of hundreds of thousands per year.
	One-off	Yrs	
	£	10	
	Average Annual Benefit (excluding one-off)		
	£ 500k		Total Benefit (PV)
			£ 4.3m.
Other key non-monetised benefits by 'main affected groups' Where the cost of distributing the secured funds is prohibitively high funds will be used to finance relevant consumer awareness/education activities.			

Key Assumptions/Sensitivities/Risks

Benefits will always exceed costs as otherwise the Consumer Advocate will not seek to incur the costs of distributing the secured funds and will instead use these to finance relevant consumer activities.

Price Base Year N/A	Time Period Years N/A	Net Benefit Range (NPV) £ N/A	NET BENEFIT (NPV Best estimate) £ 3.9m.
---------------------	-----------------------	---	---

What is the geographic coverage of the policy/option?	UK			
On what date will the policy be implemented?	When parliamentary time allows			
Which organisation(s) will enforce the policy?	N/A			
What is the total annual cost of enforcement for these organisations?	£ N/A			
Does enforcement comply with Hampton principles?	N/A			
Will implementation go beyond minimum EU requirements?	N/A			
What is the value of the proposed offsetting measure per year?	£ N/A			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro £0	Small £0	Medium £0	Large £0
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)	
Increase of	£ 0	Decrease of	£ 0	Net Impact
			£ 0	

Key:	Annual costs and benefits: Constant Prices	(Net) Present Value
------	--	---------------------

A. Strategic overview

1. The Government set out its plans to build a consumer policy that will work in years to come in its Consumer White Paper "A Better Deal for Consumers: Delivering Real Help Now and Change for the Future" which was published in July 2009⁴². This explained how there have been a handful of cases where overseas enforcement agencies have secured funds that they have identified as belonging to or due to UK consumers but they have been unable, legally, to return the funds. The paper set out a proposal to consult on giving a new public figure, the Consumer Advocate, the power to facilitate the return of such funds to UK consumers.

B. The issue

2. There is currently no legal mechanism to return money to UK victims of overseas scams. The return of secured funds would compensate some consumers who have been scammed and would be a benefit to the UK. There is no market solution to this problem without a change in the law. A body has to be legally empowered to discharge this function and, that body would have a monopoly of the power. Requests for assistance from overseas enforcers to facilitate the return of funds could occur where:
 - i) a consumer compensation payout by a court is made in the form of a sum of money to be distributed to UK victims of the scam or cheques made out to named UK victims; or
 - ii) a scammer's assets have been seized and the authority/court has awarded a specific amount to UK scam victims; or
 - iii) mail has been intercepted en route to known scammers which includes funds.
3. Some overseas enforcement agencies are equipped to obtain compensation for UK consumers who are victims of overseas scams falling within their jurisdiction. For example the Federal Trade Commission (FTC) in the USA has the power to recompense redress monies to UK victims (in fiscal year 2006 the FTC had a total of 1,451 UK claimants who were paid \$31,694.75). However, while some overseas enforcement agencies such as the FTC have the power to reimburse consumers in other countries this can be difficult in practice, particularly if the agency does not have the details of those to whom compensation is owed. Other overseas enforcement agencies such as Canada do not have a power to reimburse funds to overseas victims and therefore rely on the domestic authorities to carry out this activity.
4. At present there is no body in the UK with the necessary powers to facilitate the return of funds secured by overseas enforcement agencies to UK consumers. If such a body existed it could overcome the practical difficulties faced by those overseas enforcement agencies which have the power to reimburse money to UK consumers, while at the same time providing a legal mechanism for reimbursement where no such mechanism exists in an overseas jurisdiction.
5. Scams based overseas that target UK residents are a large and growing problem. Research commissioned by the OFT found that scams cost UK consumers an estimated £3.5 billion per annum, of which foreign lottery scams account for an estimated £260 million⁴³.

⁴² <http://www.berr.gov.uk/files/file52072.pdf>

⁴³ http://www.of.gov.uk/shared_of/reports/consumer_protection/of883.pdf

Consumers receive a letter, telephone call or email telling them they have won a major cash prize in an overseas lottery. They send money to cover administration costs but the winnings don't exist and are never received.

6. There have been case examples where money has been secured by overseas enforcement agencies from scammers and identified as belonging to UK consumers but there has been no readily available mechanism to return these funds to their rightful owners.

C. Objectives

7. The objective is to allow money secured by overseas enforcement agencies which was illegally obtained from UK consumers to be returned to them as efficiently as possible.

D. Options identification

8. There are only two viable options: either to maintain the status quo and "do nothing" or to grant the Consumer Advocate the power to facilitate the return of funds secured by overseas enforcement agencies to UK victims of overseas scams.

E. Options analysis

Status Quo

9. There are no costs or benefits.

Consumer Advocate granted the power to facilitate return of funds

Costs

10. Resource requirements are likely to vary on a case by case basis depending on whether the Advocate receives from overseas enforcement agencies:
 - A lump sum for distribution among already known individuals
 - A lump sum for distribution to unknown individuals
 - Compensation cheques made out to individuals
11. The Consumer Advocate will not commit his/her own funds to redistributing money secured by overseas enforcement agencies. The costs associated with distribution functions such as tracking down victims (possibly via any records that the defendant holds, by advertising widely or using a provided consumer list), inviting claims supported by relevant documentation and assessing the level of payments each victim should receive would be met from the secured funds. This could be offset to some extent by interest which accrues on the funds while these functions are being carried out. Anecdotal evidence from overseas enforcement agencies approaching the UK authorities suggests the distribution costs are likely to be of the order of tens of thousands per year.
12. While the Consumer Advocate would probably be involved in advertising due to his or her media profile, he or she will probably contract out many of the distribution functions described above to a Receiver or any other type of firm competent to carry out the functions. The Consumer Advocate would commit a negligible amount of resource to facilitate the contractor, for example, drafting guidance and monitoring performance.
13. Where the cost of distribution is prohibitive the Consumer Advocate would instead use the returned funds to finance relevant consumer education activities. The appropriate course of

action would be up to the Consumer Advocate's discretion, based on the size of expected costs relative to the eventual benefit to consumers.

Benefits

14. Benefits will always exceed costs as the Consumer Advocate would only seek to distribute the funds if the benefits of doing so outweighed the costs. It is difficult to predict the future flow of funds in to the UK from seizures by overseas enforcement agencies. However, anecdotal evidence from overseas enforcement agencies suggests the benefits could be of the order of hundreds of thousands per year.

F. Risks

15. The Consumer Advocate could receive complaints should the amount of money returned be significantly lower than the original loss. This is the main complaint received by the FTC although the overall volume of complaints is low, particularly when an explanation for the differential between the original loss and returned funds is given. However, this risk is far outweighed by criticism of the authorities should large sums of money belonging to UK consumers be retained by overseas agencies due to the lack of an appropriate mechanism to distribute funds.

G. Recommendation

16. The Consumer Advocate is granted the power to facilitate the return of funds secured by overseas enforcement agencies to UK consumers.

H. Implementation

17. The Consumer Advocate is expected to be appointed to be a part of Consumer Focus in 2010. They will be invited to consider the responses to this consultation. The Government will respond to this consultation by summer 2010. If the decision is to go ahead and grant the powers described in this consultation then the Government will seek to introduce primary legislation when parliamentary time allows.

I. Monitoring and evaluation

18. The Consumer Advocate will be part of Consumer Focus and therefore their actions will be monitored by Consumer Focus' normal governance arrangements. The Advocate would also carry out work to ensure any contractors that he/she hired provided value for money. BIS will undertake a Post Implementation review 3 to 5 years after any new powers are granted to the Consumer Advocate.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Competition Assessment

There is no competition impact of the measure described above.

Small Firms Impact Test

There is no small firm impact of the measure described above.

Race, Disability and Gender Equality

The measure described above is expected to have a positive impact on all consumers who fall victim to overseas lottery scams. Research suggests that these scams target consumers from a variety of backgrounds. Losses from scams are, however, more important to consumers on a low income as they represent a larger proportion of their income. It is difficult to quantify the benefit to specific groups among those on low incomes. (See consultation document for more details.)

Other specific impact tests

Other specific impact tests have been considered, including Legal Aid, Sustainable Development, Carbon Assessment, Other Environment, Health Impact Assessment, Human Rights and Rural Proofing. It has been concluded that no significant impact is anticipated in any specific cases above.