



HM TREASURY

Guidance for bodies seeking designation as super-complainants to the Financial Conduct Authority

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Guidance for bodies seeking designation as super-complainants to the Financial Conduct Authority

Introduction

1.1 The Financial Services and Markets Act 2000¹ (“the Act”) gives designated consumer bodies² the right to make a “super-complaint” to the Financial Conduct Authority (FCA) where they consider that there are features of a market in the United Kingdom for financial services, (such as the market structure or the conduct of firms operating within it) that are or which may be significantly damaging the interests of consumers. The market in question may be regional, national or supranational (where the UK forms part of that market). Individual consumers do not often have access to the kind of information necessary to make a judgement about market failure and so the aim of the procedure is to encourage groups who represent consumers to make relevant super-complaints on their collective behalf. The FCA will be obliged to respond to a super-complaint within 90 calendar days.

1.2 The Act enables the Treasury to designate a body only if it appears to them to represent the interests of consumers³ of any description. In addition, the Treasury must publish criteria that they will apply in determining whether to make (or revoke) a designation.

1.3 This guidance is for consumer bodies that wish to apply to be designated as “super-complainants” for the purposes of the Act. Separate guidance on making super-complaints is available on the FCA’s website.

1.4 The FCA super-complaints regime for financial services markets is distinct from the cross-sectoral super-complaints regime provided for in the Enterprise Act 2002. Separate guidance for consumer bodies that wish to be designated as “super-complainants” under the Enterprise Act regime is available on the website of the Department for Business Innovation and Skills. Consumer bodies seeking designation under both regimes should pursue separate applications. However HMT Treasury and the Department of Business, Innovation and Skills will co-operate with the aim of minimising duplication of process where possible (e.g. in co-ordinating requests for further information).

The criteria

1.5 In addition to satisfying the Treasury that in accordance with section 234C of the Act that they represent the interests of consumers of any description, consumer bodies must also demonstrate that they fulfil the following additional criteria:

¹ Section 234C as inserted by s40 of the Financial Services Act 2012.

² “Designated consumer body” means a body designated by the Treasury by order.

³ For these purposes “consumer” does not include authorised persons.

- 1 The body is so constituted, managed and controlled as to be expected to act independently, impartiality and with complete integrity.
- 2 The body can demonstrate considerable experience and competence in representing the interests of consumers of any description.
- 3 The body has the capability to put together reasoned super-complaints on a range of issues.
- 4 The body is ready and willing to co-operate with the FCA. In particular, the body agrees to take account of any guidance issued by the FCA on the making of super-complaints.
- 5 The fact that a body has a trading arm will not disqualify it from being designated provided that the trading arm does not control the body; any profits of the trading arm are only used to further the stated objectives of the body; and the body has established procedures to ensure that any potential conflicts of interest are properly dealt with.
- 6 Where it appears to the Treasury that a body primarily represents the interests of businesses in their capacity as consumers of financial services, the body must be able to demonstrate that it primarily represents the interests of small or medium-sized businesses.

Guidance on the criteria

1.6 Financial Services and Markets Act Section 234C provides that “The Treasury may designate a body only if it appears to them to represent the interests of consumers of any description.”

1.7 Section 234C (4) provides that the definition of consumers which applies for the purposes of this section is the definition provided for in sections 425A and 425B (meaning of “consumers”) of the Act, but the references to consumers in this section do not include consumers who are authorised persons. The definition of consumer of financial services used in these Sections 425A and 425B is relatively broad. In particular, consumers of financial services may include both non-business and business consumers.

1.8 Where the body appears primarily to represent the interests of businesses which are consumers of financial services, the body must demonstrate that it primarily represents the category of business consumers set out in criteria 6.

1.9 This criterion at Section 234C is broad enough to include organisations that represent the interests of the public generally, including in their capacity as consumers of financial services, those who represent disadvantaged groups who might have special needs as consumers of financial services and those who represent consumers of specific products or services.

1.10 However the criterion will not be satisfied if the consumers which the body appears to primarily represent or act in the interest of are authorised persons.

1.11 Typically the kind of activities carried out by such organisations might include all or some of (but are not limited to):

- promoting high standards in the quality of goods and services provided to consumers;
- promoting public knowledge and understanding of consumer rights and how to get redress;
- providing help and advice to consumers on how to get redress when things go wrong;

- providing information and advice to help consumers decide which goods and services to buy, for example, through impartial product research and comparative surveys;
- encouraging businesses to present complex information clearly and simply so as to make it easier for consumers to assess options;
- promoting consumer self-confidence through the advancement of consumer education;
- promoting high standards of safety in goods and services;
- giving specific objective advice to individual consumers about any consumer problems they may encounter;
- representing the interests of socially or economically vulnerable consumers; and
- promoting the general welfare of disadvantaged groups who may have special needs as consumers.

Additional criteria

Criterion (1)

The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity.

1.12 Bodies should be able to demonstrate that they have sufficient management and control structures to ensure that in pursuing a super-complaint they are motivated by the interests and detriment suffered by the group of consumers in the market being investigated and not, for example, by the wider interests of the organisation or a part of it. An example of the pursuit of a wider interest would be the bringing of a super-complaint solely for its publicity value rather than a realistic chance of improving the working of the market for the benefit of consumers.

1.13 Where a designated consumer body primarily represents or acts in the interests of small businesses, an example of the pursuit of the wider interest might be to damage the reputation of a participant in a market to gain a competitive edge for some or all of the businesses represented.

1.14 In order to be able to assess whether or not an organisation meets this criterion, applicants are required to provide the Treasury with the following information:

- details of the constitution of the body including its legal or statutory status, its board and/or management structure and affiliations to other bodies;
- the current list of directors (including non-executive directors), partners or principal officers of the organisation and any other person who could be said to exercise control of the body;
- Curriculum vitae (CVs) of the directors, partners or principal officers of the organisation; where this is not included on the CVs, a current list of directorships, shareholdings and any other substantial interests in other companies held by directors, partners or principal officers of the organisation and any other person who could be said to exercise control of the body;
- at least two years accounts, or where this is not possible an explanation of why these accounts are not available;

- details of any shareholdings in the organisation or its trading arm; and
- details of the sources and extent of funding of the organisation by other bodies including private enterprises.

1.15 The past conduct of the individuals (directors, partners, or principal officers) who manage or control the organisation may impact on the way in which it would make super-complaints under the Act if it were to be designated. This will depend on the circumstances, including the degree of influence of the individual concerned. In appropriate cases the Treasury will take into account evidence of the integrity of such individuals and of the extent to which the decisions that individual may take in relation to the organisation could be influenced by financial or other improper considerations. Applicant organisations should therefore disclose any information which they think may be relevant, particularly with regard to those issues listed below in paragraph 1.16.

1.16 The Treasury will take into account all relevant circumstances in reaching a view including (but not necessarily limited to) where appropriate, whether the organisation, if it has separate legal personality, or the individuals who manage or control it:

- has committed any offence involving fraud or other dishonesty or, in the case of an individual, any offence which might cast doubt on the suitability of an organisation controlled or managed by that person and which is not a spent conviction under the Rehabilitation of Offenders Act 1974;
- is subject to winding up proceedings or, in the case of an individual, an undischarged bankrupt or disqualified director;
- has practised unlawful discrimination on grounds of, for example, sex, colour, race, or ethnic or national origins in, or in connection with, the carrying on of any business; and
- has engaged in business practices that appear to the Treasury to be deceitful or oppressive, or otherwise unfair or improper (whether lawful or not).

1.17 Designated consumer bodies will not be permitted to make super-complaints in areas where they have trading arms.

Criterion (2)

The body can demonstrate considerable experience and competence in representing the interests of consumers of any description.

1.18 This criterion builds on section 234C of the Act, which requires applicants to demonstrate that they represent the interests of consumers of any description. Applicant organisations should provide the Treasury with a comprehensive description of their purpose and activities, the sectors they cover, and evidence of how long the organisation has been in existence. This should be as concise as possible and is intended to ensure that the organisation has a track record demonstrating experience and competence in representing the interests of consumers.

1.19 In assessing this experience and competence the Treasury would expect the track record to be for a minimum of 2 years, but would consider a shorter period if it can be demonstrated by the applicant that it fulfils the other criteria. The Treasury will, therefore, require all applicants to provide evidence demonstrating:

- experience of acting in the interests of consumers – whether generally or particular groups of consumers, and over what period; and

- competence within, or available to, the organisation – for example, legal advisers or case officers familiar with consumer law and/or dealing with consumer problems.

Criterion (3)

The body has the capability to put together reasoned super-complaints on a range of issues.

1.20 In order to demonstrate this capability, organisations should submit examples of previous papers and research.

1.21 The range of issues required by the criterion might be across a number of markets or in relation to different features of a particular market.

1.22 Bodies will need to demonstrate that they are able to deal with any competition and economic issues involved in super-complaint cases, whether through in-house experience or using external advice.

1.23 Bodies wishing to be designated should also refer to FCA's guidance on how to make a super-complaint to ensure they are able to comply.

Criterion (4)

The body is ready and willing to co-operate with the Financial Conduct Authority (FCA). In particular, the body agrees to take account of any guidance issued by the FCA.

1.24 Applicants will be required to indicate a readiness and willingness to cooperate with the FCA. Failure to co-operate may result in the removal of designated status. This criterion also requires designated bodies to take account of any guidance issued by FCA on how to put together reasoned super-complaints. The Treasury will have regard to any representations from the FCA that a body has failed to co-operate with the FCA, or to take account of their guidance, in considering whether to withdraw designation.

Criterion (5)

The fact that a body has a trading arm will not disqualify it from being designated provided that the trading arm does not control the body, and any profits of the trading arm are only used to further the stated objectives of the body and the body has established procedures to ensure that any potential conflicts of interest are properly dealt with.

1.25 It is not intended that designated bodies with commercial interests should be able to use the super-complaints procedure to boost the competitive position of their trading arms. The Treasury wishes to prevent this happening without excluding organisations from designation simply because they have an ancillary trading arm. The Treasury will need to be satisfied that, in such cases, the trading arm does not control the organisation and that the profits of the trading arm are used to fund the main organisation's stated objectives. Applicants should submit a copy of the constitution of the trading arm and details of the sectors within which it operates. Additionally, applicants must present copies of accounts showing how the trading arm's profits are used and information about the procedures the body has established to identify and deal with conflicts of interest.

1.26 Designated bodies will have to agree not to make super-complaints about markets in which their trading arms have a commercial interest.

Criterion (6)

Where it appears to the Treasury that a body primarily represents the interests of businesses in their capacity as consumers of financial services, the body must be able to demonstrate that it primarily represents the interests of small or medium sized businesses.

1.27 The Treasury believes that individual small and medium-sized businesses may face the same challenges in obtaining information and identifying market failures as non-business consumers. Larger businesses do not face the same co-ordination challenges and are able to access the regulator efficiently by existing channels.

1.28 Where a body, such as a trade organisation, primarily represents the interests of businesses they must be able to demonstrate that they primarily represent small or medium sized businesses, i.e. business which:

- a employ fewer than 250 persons; and
- b whose annual turnover does not exceed €50 million; or
- c whose annual balance-sheet total does not exceed €43 million.

1.29 If the membership of an organisation which represents small or medium-sized businesses includes some authorised persons, the information supplied in support of an application must demonstrate that the body does not primarily represent or act in the interests of those persons.

1.30 In determining whether or not an organisation primarily represents small or medium sized persons (as described in paragraph 1.28) and in determining whether an organisation whose membership included authorised person does not primarily represent or act in the interests of those persons (as described in paragraph 1.29), the Treasury will examine (among other things):

- the membership of the organisation;
- the membership of its board;
- details of the body's constitution (for example, its memorandum and articles of association); and
- the body's experience of acting in the interests of business consumers other than larger businesses or authorised persons, as the case may be.

Review of designation

1.31 The Treasury may from time to time review the designation of any organisation as a designated consumer body under section 234C of the Act, in order to ensure that it continues to meet the criteria for designation.

1.32 If during the review and having consulted the body it is found that the organisation no longer meets the criteria then the Treasury will withdraw its designation.

1.33 Applicants should undertake to formally notify the Treasury of any material changes to the information supplied which could be relevant to meeting any of the criteria. This might include, for example, changes to directors, partners or principle officers of the organisation, or changes in the activities or sectors covered the organisation.

Withdrawal of designation

1.34 Designated status will be removed from any designated consumer body that the Treasury believe has abused the super-complaints process. This might be by using the super-complaints process for competitive advantage or commercial gain, or by making frivolous super-complaints.

1.35 In considering whether an organisation should have its designation withdrawn, any consequences of the breach will be taken into account.

1.36 Designation can also be withdrawn at the request of the organisation.

1.37 However, designated status will not be removed simply because a body does not submit any super-complaints. The emphasis is on ensuring that bodies put forward well thought out super-complaints rather than submitting them merely in an attempt to retain designation.

Changes to the criteria against which consumer bodies are assessed

1.38 It may be that experience will show that the criteria need to be amended. If it is proposed to change the criteria, the Treasury will consider how the changes affect the designation of bodies that then hold designated status and whether it would be appropriate to consult on the changes.

Application process

1.39 Applications should be sent to:

James Aitken
Financial Services Group
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

1.40 Applications may also be sent via email to super-complainants@hmtreasury.gsi.gov.uk.

1.41 Applicants may wish to refer to the checklist at the end of this guidance which summarises the information to be included in the application. An acknowledgement of the receipt of an application will be sent out within five working days.

1.42 To provide a transparent application process, all applications will be placed on the Treasury website for a period of 12 weeks. Interested parties are invited to submit responses to applications during that period, to which the Treasury will have regard. Personal information relating to Directors and other relevant individuals that would not normally be in the public domain will not be put on the website. Applicants should indicate on their applications any information which they consider ought not to be made public.

1.43 If an organisation considers there is any material information missing or that the information provided in the application is factually incorrect, they should inform the Treasury within the 12-week period.

1.44 Applicants who are seeking designation under the Enterprise Act 2002 must make an application to the Department of Business Innovation and Skills.

1.45 Any questions about the designation process or individual applications should be directed to James Aitken at the address in paragraph 1.39, Tel: 020 7270 6152, e-mail: super-complainants@hmtreasury.gsi.gov.uk

SUMMARY OF INFORMATION APPLICANT ORGANISATIONS SHOULD SUPPLY:

- Name and address of the organisation and a contact point for correspondence.
- Nature of the organisation, purpose, activities and sectors covered and how long in existence (also for any trading arms) – **paragraph 1.18**.
- Details of the organisation's constitution (e.g. Memorandum and Articles of Association), including its legal or statutory status, its board and/or its management structure (also for any trading arms) – **paragraph 1.14**.
- The current list of directors (including non-executive directors), partners or principal officers of the organisation and any trading arms and any others who could be said to exercise control – **paragraph 1.14**.
- *Curriculum vitae* (CVs) of the directors, partners or principal officers of the organisation and any trading arms and any others who could be said to exercise control – **paragraph 1.14**.
- A current list of directorships, shareholdings and any other substantial interests in other companies held by directors, partners or principal officers of the organisation (including any trading arms) and any others who could be said to exercise control – **paragraph 1.14**.
- At least two years accounts, or where this is not possible an explanation of why two years accounts are not available. Where there is a trading arm, the accounts should show the sources of income and the purpose for which the income is used – **paragraph 1.14**.
- Any relevant information on the past conduct of the individuals who manage or control the organisation (including any trading arms) – **paragraph 1.15**.
- Evidence demonstrating experience of acting in the interests of consumers/particular groups, with examples and over what period – **paragraph 1.19**.
- Evidence of expertise within or available to the organisation – e.g. legal advisers or case officers familiar with consumer law/dealing with consumer problems – **paragraph 1.19**.
- Evidence of the capability to put together reasoned super-complaints on a range of issues (e.g. examples of previous papers and research) – **paragraph 1.20**.
- Evidence of being able to deal with any competition and economic issues involved in super-complaint cases – **paragraph 1.25**.
- A statement of willingness to co-operate as per criterion 4 – **paragraph 1.22**.
- If the organisation has a trading arm – an assurance that organisation will not make super-complaints about markets in which they have a commercial interest – **paragraph 1.24**.
- If the organisation primarily represents or acts in the interests of businesses, evidence that it primarily represents or acts in the interests of small or medium-sized businesses. If such a body's membership includes authorised persons, evidence that the body does not primarily represent or act in the interests of those

persons, for example details of its membership or relevant features of its constitution – **paragraph 1.30**.

- A formal undertaking to notify the Treasury of any material changes to the information supplied which could be relevant to meeting any of the criteria – **paragraph 1.33**.
- Information which is considered personal and not normally in the public domain, which the organisation wishes to be omitted when its application is placed on the Treasury website must be clearly identified – **paragraph 1.42**.
- Any information which the organisation considers is relevant to whether the organisation meets the criteria for designation – **paragraph 1.2**.

HM Treasury contacts

This document can be found in full on our website: <http://www.hm-treasury.gov.uk>

If you require this information in another language, format or have general enquiries about HM Treasury and its work, contact:

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