



## **Consultation on the Role and Powers of the Consumer Advocate**

### **Consultation Response Form**

A copy of the consultation on the role and powers of the Consumer Advocate is available at: <http://www.bis.gov.uk/consultations>.

Responses to the Consultation must be received by 5 March 2010.

Responses can be submitted using the following consultation response form. Please submit completed forms by letter, fax or email to:

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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](mailto:consumeradvocateconsultation@bis.gsi.gov.uk)

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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.

## Consultation on the Role and Powers of the Consumer Advocate

### Consultation Response Form

#### Your details

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Please tick the boxes below that best describe you as a respondent to this consultation:

|                                     |  |
|-------------------------------------|--|
| <input type="checkbox"/>            | Individual   |
| <input type="checkbox"/>            | Charity or social enterprise                           |
| <input type="checkbox"/>            | Consumer body  |
| <input type="checkbox"/>            | Ombudsman  |
| <input type="checkbox"/>            | Trading Standards Service                              |
| <input type="checkbox"/>            | National regulator                                     |
| <input type="checkbox"/>            | Local Government                                       |
| <input type="checkbox"/>            | Central government                                     |
| <input checked="" type="checkbox"/> | Legal representative                                   |
| <input type="checkbox"/>            | Micro business (up to 9 staff)                         |
| <input type="checkbox"/>            | Small business (10 to 49 staff)                        |
| <input type="checkbox"/>            | Medium business (50 to 250 staff)                      |
| <input type="checkbox"/>            | Large business (over 250 staff)                        |
| <input type="checkbox"/>            | Business representative organisation and/or trade body |
| <input type="checkbox"/>            | Other (please describe):                               |

If you are responding on behalf of an organisation, please explain how the views of the members of that organisation were assembled:

We have an internal committee with expertise in litigation, consumer law and consumer collective redress. This is one way in which we are able to advise our clients in relation to these important issues. This response was prepared by that committee.

We have provided responses below to the following questions, these being the most relevant to our work in this field: Q.4, Q.9, Q.11, Q.12, Qs.16-28, Qs. 30-41, Qs.43-46 and Qs.48-51.

**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?**

Yes

No

If so, what should the power cover?

**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.**

Please give us your comments:

It is important that any proposals adopted in relation to the proposed collective action power are consistent with other ongoing developments in this fast-moving area of law (e.g. EU consumer collective redress; the collective proceedings provisions of the Financial Services Bill; and Lord Justice Jackson's review of civil litigation costs). In particular, if such a power was introduced now, there would be a risk that it would need to be amended in due course, in order to comply with with any EU collective redress rules that may be introduced.

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

Please give us your comments:

**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?**

Yes

No

If so, what?

The wording preceding this question in the consultation document refers to the ability of regulators to exercise the new civil sanctions contained in Part 3 of the Regulatory Enforcement and Sanctions Act 2008 ("RESA"). If the question is whether the Consumer Advocate should have access to these, or similar, powers immediately, then our answer is no. Parliament imposed a clear procedure in RESA for determining whether a given regulator should be permitted to exercise civil sanctions (powers to be conferred only by Ministerial Order, following due consultation and, where appropriate, agreement with the Panel for Regulatory Accountability). The pilot projects to test these new powers are not yet underway. It would be potentially unlawful for the Consumer Advocate to exercise powers that had not been conferred on him/her in this way.

We also consider that it would be inappropriate (and potentially unlawful) for the Consumer Advocate to make use of statutory powers that are currently conferred on Consumer Focus, without legislation to permit this.

More generally, we consider that there needs to be a firm legislative basis for any actions taken by the Consumer Advocate; otherwise, its actions will be susceptible to challenge in the courts.

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

Please give us your suggestions:

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

Please give us your suggestions:

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

Please give us your suggestions:

**Question 8: Do the roles of any other organisations need to be amended to ensure the Consumer Advocate is successful?**

Yes

No

If so, in what way?

**Question 9: Should the Consumer Advocate be able to warn consumers about a specific company before the conclusion of any formal enforcement activity?**

Yes

No

If so, under what circumstances?

If formal enforcement activity has not been concluded, and any attendant rights of appeal either not exercised or exhausted, then the guilt of the company in question will not have been determined. It would be inappropriate for the Consumer Advocate to make public statements in such circumstances - even companies are innocent until proven guilty - and doing so might expose the Consumer Advocate to legal action.

It would, of course, be less problematic for the Consumer Advocate to issue general warnings about the conduct in question in these circumstances. For example, rather than naming a specific trader who is alleged to have dealt unfairly with consumers in a specific region of the UK, the Consumer Advocate could warn consumers in that region to be on their guard against rogue traders offering the same service as the specific trader.

In issuing any such warning, the Consumer Advocate would need to coordinate his/her activities with the wide range of other organisations, statutory and otherwise, who provide information to consumers (and in particular with local Trading Standards Services).

**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?**

Please give us your views:

**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?**

Please give us your views on the costs and benefits:

The Consumer Advocate should be independent of Consumer Focus, which is a campaigning organisation whose statutory role is to fight for the rights of consumers. The Consumer Advocate, on the other hand, will - if the proposed collective action power is granted to him/her - be required to make objective decisions as to the need for litigation, and in some circumstances this may lead him/her to decide that action should not be taken, to the detriment of consumers (e.g. for cost-benefit reasons). There is thus a clear potential for conflict between these statutory roles.

The White Paper refers to various Scandinavian countries' experience in creating roles similar to that proposed for the Consumer Advocate. We understand, in this

regard, that the consumer advocate figure in e.g. Denmark is completely independent, with no affiliation to consumer advocacy bodies (he or she is typically a lawyer appointed by the Government).

**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?**

an individual person                       corporate body

Why?

Given the wide range of proposed powers, it is preferable for the Consumer Advocate to be properly accountable to a board. The use of an appropriate corporate structure for the Consumer Advocate (e.g. a limited company) might also have implications in terms of potential civil liability. By contrast, concerns over potential personal liability, which might attract to an individual, may in turn assist with recruiting a suitable candidate for the role.

The incorporation of the Consumer Advocate as a corporate body would not preclude the Chair of the organisation from taking the type of high-profile campaigning role that is currently envisaged for an individual fulfilling the Consumer Advocate role.

**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?**

Yes     No

If not, why not?

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

Yes     No

If not, why not?

**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?**

Yes     No

If not, why not?

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

Please give us your comments:

If the proposed collective action power is conferred on the Consumer Advocate, care will need to be taken to ensure that any decision to initiate such an action is consistent with the jurisdictional rules of the European Union. For example, if a consumer elsewhere in the EU had initiated a claim against a company in relation to the issue in question, then legal action in the UK might not be permitted under the Brussels Regulation regime (see further: [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33054\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm)).

**Question 17: Do you agree that we should use the same definition of consumer as in the Enterprise Act?**

Yes

No

If not, why not?

The definition of consumer should be consistent with that used in recent EC legislation such as the Unfair Commercial Practices Directive. Otherwise, the Consumer Advocate's powers may not be properly aligned with the EU consumer acquis, including the legislation permitting him/her to bring the proposed follow-on collective action power.

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

Yes

No

If so, please give us your reasons:

As described below (see Q.24), we believe that the proposed collective action power should be exercisable only where the guilt of the trader in question is no longer in issue. That determination will not be final until appeal rights in the trigger prosecution have been exhausted (or until it is clear that the trader has decided not to pursue any avenue of appeal open to it).

Any other result might also lead to severe practical difficulties. For example, if the Consumer Advocate were to initiate a collective action before the trigger prosecution had been finally determined, and the collective action led to an award of damages against the trader, then this civil damages award could not properly stand if the trader's criminal conviction was ultimately overturned. How

would damages (which might already have been distributed to class members) be returned in those circumstances?

Moreover, there is a real risk premature civil proceedings might prejudice the course of any criminal appeal (e.g. if new evidence came to light in the context of the civil proceedings). This could give rise to difficult issues surrounding sub judice and contempt of court.

**Question 19: Can you identify any unforeseen difficulties with proposing that the collective action power be “follow-on”?**

Yes

No

If so, please give details:

We consider that the proposed power should be follow-on, if it is granted. As specified below, we believe that the proposed power should moreover be limited to cases where the defendant's guilt has been proven in a court of law.

**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?**

Yes

No

If not, why not?

**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?**

Please give us your comments:

The draft list of legislation should be exhaustive, for reasons of legal certainty. This is not currently the case. For example, the list refers to "product safety regulations made under section 2(2) of the European Communities Act 1972" and it is more generally noted that "[r]eferences to primary legislation include any secondary legislation made under powers in that primary legislation."

We also note that it is proposed that "[r]eferences to legislation include breaches of contract in relation to terms implied into such contracts by such legislation" and that "[r]eferences to breaches of legislation include cases where contractual terms have been found to be unfair or unenforceable under such legislation". We understand this to mean that the Consumer Advocate would have the power to bring a follow-on collective action in circumstances where a trader had breached implied terms (e.g. as to satisfactory quality or fitness for purpose) in individual consumer contracts. If so, we have doubts as to whether this would be

compatible with common law doctrines of privity of contract. Primary legislation might be required to permit such claims.

**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?**

Yes

No

If not, why not?

**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?**

Yes

No

If not, why not?

**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?**

Yes

No

If not, why not?

The initiation of a collective action by the Consumer Advocate may have severe consequences for the defendant who believes that it is innocent of the allegations made against it, both in terms of direct costs (e.g. litigation costs) and adverse publicity.

This power, if granted to the Consumer Advocate, must be exercised with extreme care. We consider that limiting the Consumer Advocate's ability to initiate such a claim to situations where a court of law has determined the guilt of the trader in question will help ensure that its use is proportionate and appropriate (and will reduce the susceptibility to legal challenge of the Consumer Advocate's decision to initiate proceedings).

We note, moreover, that certain of the RESA powers are summary in nature. For example, FMPs are intended to be used in respect of low level, minor instances of regulatory non-compliance. The application of other RESA powers (e.g. VMPs) requires the regulator in question to take due account of mitigating factors, and may therefore lead to a relatively small award in some cases. The costs imposed by the initiation of a collective action by the Consumer Advocate in such cases

would likely be disproportionate to the penalty imposed under RESA or the seriousness of the underlying offence, once mitigation has been taken into account.

In any event, if our views are not followed on this point, we agree that there should be the amount of any award made in a collective action should be discounted for the amount of any compensation already obtained for consumers under RESA. This aligns with ordinary rules of law preventing double recovery from defendants.

**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 that they have been the subject of prior public enforcement; but that breaches of other contractual terms should not be included within scope?**

Yes

No

If not, why not?

Please see our comments to Q.21, above.

**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?**

Yes

No

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?**

Yes

No

If so, please give details and your reasons:

We consider that claims giving rise to complex individualised issues of proof (particular, personal injuries claims and claims concerning consumer deception) should be excluded from the proposed collective action power. The current proposals would allow such claims to be brought, e.g. by way of follow-on to breaches of the General Product Safety Regulations 2005 and/or the Consumer Protection from Unfair Trading Regulations 2008 (both of which are named in Box 1 at Q.22 of the consultation). However, such actions are inappropriate for determination via a class action mechanism, since, in order to protect defence rights, they require evidence at the individual level (e.g. as to whether a safety

issue with a product in fact caused an individual consumer's harm, whether an individual consumer in fact relied upon a misleading statement, etc.). Such actions would also not satisfy the ordinary requirement for commonality of issues of fact and law (see Q.40, below).

**Question 28: Do you agree to the proposed approach to define scope both by specific consumer protection legislation and by certain enforcement actions?**

Yes

No

If not, why not?

We agree, provided that the enforcement actions in question are properly defined so as to exclude enforcement actions of a summary nature (see Q.24, above).

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

Please give us your comments:

**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?**

Please give us your views on the pros and cons:

A "pre-damages opt-in" model would represent a fundamental departure from current law and practice in the UK. Defendants have the right to know the identity of the claimants they are facing and the size of the claim against them, so that (for example) they may challenge the level of damages sought, make properly informed decisions on settlement and make adequate provisions for payment in the event of a negative decision on liability. Only a "pre-liability opt-in" model achieves this.

The adoption of a "pre-damages opt-in" model would, conversely, pose practical difficulties for the courts. A large volume of consumers could be expected to join a claim following the announcement of any negative verdict on liability. The possibility of fraudulent claims would be a very real one, since the prospect of obtaining a payout would be high. Claims farmers would likely become involved in assembling claimants at this stage. It follows that robust procedures would be needed to allow the court to verify that each consumer joining the action following the verdict on liability did, in fact, have a valid claim against the defendant.

**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?**

Yes No

If not, why not?

**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 be taken forward under the collective action power?**

 Yes No

If so, what?

The Consumer Advocate should consider whether claims in relation to the same or materially similar issues of fact or law are already underway. If so, claimants in the existing action would be within their rights to seek a stay of any proceedings initiated by the Consumer Advocate pending resolution of their own claim (on the basis of the principle of *lis alibi pendens*). In some countries that have adopted class action mechanisms, there is a formal requirement on potential class action claimants to check claims registers in this regard before commencing proceedings.

This requirement might need to extend to include claims initiated in other EU Member States, given EU jurisdictional rules (see response to Q.16, above).

**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?**

 Yes No

If not, why not?

The defendant to a collective action will incur substantial litigation and other costs, whatever the outcome of the proceedings (see Q.24, above). A claim brought on behalf of an insignificant number of consumers would likely not satisfy requirements as to proportionality.

**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?**

 Yes No

If not, why not?

**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?**

Yes

No

If so, please give your comments on list of factors in Box 2 on page 28:

As well as the factors in Box 2 on page 28, the Consumer Advocate should also be required to consider the existence of pending litigation in relation to the same or materially similar issues of fact or law - see Q.32.

**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?**

Yes

No

If not, what would?

**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?**

Yes

No

If not, why not?

**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?**

Yes

No

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?**

Yes

No

If so, what?

See Q.35, above.

**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?**

Yes

No

If not, why not?

**Question 41: Do you agree that there should be a suspension of relevant limitation periods of the type proposed?**

Yes

No

If not, why not?

Ordinary limitation rules should apply. This will help ensure that any claim brought by the Consumer Advocate is commenced promptly and will provide business certainty. In addition, it is hard to see why consumers who join a collective action brought by the Consumer Advocate should be placed in a better position, from the perspective of limitation, than those who choose not to do so.

**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?**

Yes

No

If not, why not?

**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?**

Yes

No

If not, why not?

That said, in order to protect the interests of class members, the costs recoverable from damages should be assessed by the court as being reasonable in all the circumstances (in the same way that legal costs would ordinarily be assessed). Moreover, should any collective action by the Consumer Advocate not succeed, the defendant's costs should be recoverable from the Consumer Advocate in the normal way ("loser pays").

**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?**

Yes

No

If so, what?

However, the Consumer Advocate should be limited to incurring reasonable costs when advertising or giving notice of any such claim. It would not be fair for the Consumer Advocate to engage (for example) in a lengthy and expensive TV advertising campaign and then to be able to recover the costs of doing so in full from damages or otherwise from the defendant.

**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?**

Yes

No

If not, why not?

The decisions of the Consumer Advocate to initiate proceedings, like those of any public authority, should be susceptible to judicial review on the usual grounds. For example, a decision by the Crown Prosecution Service to prosecute or not to prosecute may currently be judicially reviewed (see [http://www.cps.gov.uk/legal/a\\_to\\_c/appeals\\_judicial\\_review\\_of\\_prosecution\\_decisions/](http://www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions/)). Why should the Consumer Advocate receive special protection in this regard?

**Question 46: Is it appropriate to allow only the Consumer Advocate to appeal court decisions made in relation to a collective action case?**

Yes

No

If not, why not?

**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?**

Yes

No

If not, why not?

**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?**

Yes

No

If not, why not?

**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?**

Please give us your views on the pros and cons:

The fact that BIS has not already formulated a view on this issue suggests that this element of the consultation may be premature. In any event, we do not believe that aggregation of damages is necessary in the event that an opt-in model (whether pre-liability or pre-damages) is chosen, since the number of consumers in the class and the value of each of their claims will be certain before any assessment of damages is made by the court.

**Question 50: Do you agree that the proposed power to take collective actions should be granted given the associated conditions proposed?**

Yes

No

If not, why not?

This is subject to our view that the power should be granted only if the additional conditions and safeguards that we have suggested above are put in place.

**Question 51: Can you foresee any unintended consequences from granting this power to take collective actions?**

Yes

No

If so, please provide details:

Unless there is consistency with other ongoing developments in this fast-moving area of law (see response to Q.2, above) then there is a risk of a multiplication of claims, proceeding on different legal/procedural bases.

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

Please give us your comments:

**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?**

Yes

No

If not, why not?

**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?**

Yes

No

If not, what should happen?

**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?**

Yes

No

If so, why?

**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?**

Yes

No

If so, why?

**Do you have any other comments that might aid the consultation process as a whole?**

Comments:

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes

No