

**BERR**

Department for Business  
Enterprise & Regulatory Reform

**REPRESENTATIVE ACTIONS IN  
CONSUMER PROTECTION  
LEGISLATION**

Responses to the Government  
consultation

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# Representative Actions in Consumer Protection Legislation

## Summary of Responses

### Introduction

This proposal was first discussed in outline in the 'Extending Competitive Markets: Empowered Consumers, Successful Business' (consumer strategy) consultation in 2005. When the strategy was published the Government committed to consulting further on the detail of representative actions in consumer protection cases. The consultation closed on 4 October 2006 and this document summarises the responses to that consultation.

Several significant policy developments have taken place since the initial proposal was published. The Hampton Review has changed how regulators and enforcement officers go about their work and the Macrory Review has also considered more informal mechanisms of redress. For example, Macrory encouraged companies who have infringed regulations to put things right through an approach known as restorative justice – a process in which those most directly affected by a wrongdoing come together to determine what needs to be done to repair the harm and prevent a reoccurrence. This is consistent with the Government's aim of encouraging parties to settle their disputes more quickly, cheaply and effectively so making resort to the courts the option of last resort.

The European Commission has started to look at the role of collective actions for consumers. In the EU Consumer Policy Strategy for 2007-2013, the Commission announced it would consider action on collective redress mechanisms for consumers, both for infringements of consumer protection rules and for breaches of EU anti-trust rules in line with its 2005 Green Paper on private damages actions. The Commission have recently consulted on benchmarks they have defined for effective and efficient collective redress.

This can be found at:

[http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm)

The UK has also undertaken a fundamental review of consumer law focusing in part on consumer redress and enforcement.

Building on the responses to the consultation and these policy developments, we consider that further work is needed to examine the evidence base. Many of the responses to the consultation stated that there was still a lack of evidence for introducing representative actions. One of the main purposes of this consultation was to identify what 'real-life' cases would benefit from representative actions. Some examples of possible cases were provided by consumer groups and enforcement representatives, including Trading Standards officers, but we believe that further work is needed to properly establish an evidence base.

In particular we are keen to further examine with enforcement authorities what sort of case studies would suit representative actions, and to what extent could some of these cases be resolved through a restorative justice approach.

## Background

The premise of the proposal is that periodically groups of consumers lose relatively small sums at the hands of the same trader. Some consumers will have access to various methods offered by businesses, trade associations etc. to resolve disputes. In many cases this is clearly the best option for all concerned; saving time, money and maintaining good relationships between the consumer and the business. Likewise, some may decide that the amount involved is too small to bother taking court action and that is their choice. There are instances where consumers' alternative redress options have been exhausted and court action may be their only recourse.

- Some will make use of the existing court procedures, including the small claims track <sup>1</sup> or group litigation orders.<sup>2</sup> The Ministry of Justice is currently working with Direct Gov to improve the information available to litigants, particularly litigants in person;
- Sometimes the consumer wants redress but does not want to take legal action because they do not know what is involved or are afraid of potential costs. Vulnerable consumers might be particularly reluctant to take court action. In these instances it may make sense to allow a competent representative body to bring a case on behalf of a group of consumers.

Such an action is to recover consumers' losses and is not intended to regulate or punish the business. At the same time the possibility of viable legal action may encourage traders to settle legitimate disputes either directly or through alternative dispute resolution mechanisms.

Fundamental to whether representative actions are introduced for consumers, while recognising business's genuine concerns, is how to ensure it works efficiently and effectively for all concerned. The consultation was essential to establish views and identify issues to enable the Government to consider if and how the proposal for representative actions should be taken forward.

## Consultation responses

The department received over 60 responses to the consultation, many of which contained detailed and technical thoughts on the various issues raised. We received 24 responses from business groups or individual businesses themselves, 17 from legal firms or individual lawyers, 8 from Trading Standards departments and associated bodies, 6 from consumer groups and 4 from members of the judiciary and judicial groups. We are grateful to all the respondents for their time and effort.

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<sup>1</sup> A civil claim, once defended is allocated to one of three tracks, normally for those under £5,000 the small claims track, for those under £15,000 the fast track and for higher value, more complex cases the multi track.

<sup>2</sup> Where a number of claims are made against the same defendant about common or related issues of fact or law the court can decide that they should be grouped so they can be managed more efficiently and effectively.

## Overview of the responses

In general, business representatives were opposed to the proposals. They cited lack of evidence of need for representative actions and raised concerns that they could be the first step towards American style class actions and a much more litigious culture.

Consumer organisations and the Office of Fair Trading tended to support the overall proposition but suggested that to be properly effective the mechanism should be for the entire class i.e. both named and unnamed consumers.

Trading standards authorities generally supported confining representative actions to named consumers and supported permission stages to remove unwarranted claims. There was some support for Trading Standards to act as designated bodies although there were concerns about resource implications.

Legal firms were divided on whether there was a need for representative actions. Some considered that the policy objective could be achieved through changes to procedures without wide scale reform where others cited a gap in evidence of need.

Members of the judiciary who responded considered that sufficient powers existed to weed out unmeritorious claims therefore making a permission stage unnecessary. There was a mixture of views on whether consumers should be named and whether only designated bodies could bring a representative action.

## Consumers at large, or named consumers

### Q1. Should representative action cases be for consumers at large, or named consumers?

50 respondents answered this question. 42 thought that representative actions should be for named consumers. 8 thought the policy should apply to consumers at large, or unnamed consumers.

#### Commentary

Most respondents suggested a preference that representative actions should be brought on behalf of named consumers, rather than 'consumers at large' or 'consumers as yet unnamed'.

Respondents considered that it was important that there was a direct connection with those consumers alleged to have suffered losses and suggested that the defendant company had a right to know its accuser. This would enable the defendant to assess their likely liability and to properly investigate the complaints. Business groups preferred the idea of named consumers because it made the calculation of potential damages more straight forward.

Consumer groups tended to support resolving the matter for whole classes of consumers who had suffered detriment, rather than just named consumers who had become aware of the action. They put forward the view that vulnerable consumers were among the most likely to benefit from the proposed mechanism but the least likely to become aware of an action in time. The OFT favoured resolving the whole class of affected consumer at the same time, as this would be most efficient economically.

There were suggestions that while named consumers were preferable, efforts should be made to include as many affected people as possible. The Consumer Council for Water suggested that cases should be advertised properly to ensure people had time to come forward.

(Senior) Master Whitaker suggested that an alternative could be a two-stage process. The first stage would be a case to determine liability for the offending action. The second a procedure for making claims, citing the liability already established. Consumers would be able to make individual claims after the initial case had proven liability.

There are a number of benefits to a system of representative actions brought on behalf of named consumers. The consumers have made a conscious decision to take part in the litigation and defendants can consider each consumer's case and take steps to recompense the consumers. Named consumers make it easier to quantify damages and, assuming that the representative body wins the case, easier to distribute the damages to the named consumers. Consumers who do not participate can make their own claim in their own right.

At the same time, resolving the whole class can have a number of advantages: if the representative body wins the case for the consumer there is the prospect of

receiving redress with minimum involvement in the litigation and of finality for the defendant.

Bringing a case on behalf of consumers as yet unnamed also introduces complications. Once damages have been calculated and awarded some way to return compensation to the as yet unnamed consumers must be agreed. In some jurisdictions a fund is created and consumers must come forward and prove entitlement to the claim. This can result in costly administration and sometimes leads to questions about what should be done with unclaimed funds or where the funds are inadequate. In some jurisdictions any unclaimed funds are used to fund consumer awareness activities or even to fund further representative cases, although this outcome does not directly provide full or sometimes any damages for the consumers who suffered harm.

The tension when considering whether opt-in (named consumers) or opt-out (consumers at large) is the uncertainty of the scale of liability in the opt-out example. In cases where it is easy to establish the likely number affected and the scale of damage is similar for each party it might be fair and reasonable to allow a case to proceed on an opt-out basis. However, where damages vary widely from consumer to consumer despite similar cause of liability the opt-in approach is probably more likely. The second key issue is matching recovered funds to the individuals who have legitimate claim to them.

There is a clear difference of opinion in the responses to the consultation about the issue of allowing claims for named only or for all those affected. Much may depend on the individual circumstances of the case as to which option is most appropriate. Other countries provide interesting examples of how the relationship between opt-in and opt-out is managed. In the scheme introduced in Denmark this year, for example, the consumer Ombudsman can decide whether a particular action should be 'opt-in' or 'opt-out' and there is an upper-limit threshold for the loss suffered by a consumer for an opt-out action.

## Should representative actions only be brought by designated bodies?

**Q2. Are the criteria of reputation, ability to handle the case and consumer focus sensible factors when considering whether a body should be designated to bring a representative action?**

All of the 45 respondents answering Q2 were in agreement.

**Q3. Should we consider any other factors? If so what are they and why should they be considered?**

There were 40 respondents to Q3. 36 thought that additional factors should be considered.

**Q4. Is designation necessary at all? Should any body, or firm, be able to bring a case on behalf of a group of consumers?**

There were 46 respondents to Q4. 40 thought that only designated bodies should be able to bring representative actions.

### Commentary

A high proportion of respondents answered this set of questions with the vast majority favouring the option that would require bodies to be designated. This was considered important to ensure that the bodies were reputable and had the interests of consumers as their reason for bringing the case.

This general view is supported by the responses to question 2, where all those who answered agreed with the proposed criteria, though many respondents also believed there should be other criteria as well. A number believed that the body should be able to show that it had the financial and legal resources to take on such cases, including being able to bear any costs against it. Some respondents, including the CBI, the Association of British Insurers and LACORS, thought that designated bodies should include those identified in s11 of the Enterprise Act 2002 or those with designated enforcement powers under Part 8 of the Act.

Business groups were concerned that ad hoc groups could be formed with the sole intention of making profit from complaints and that this could conflict with the requirement that the body should act in the best interest of consumers. There were a number of suggestions that the ability to meet cost orders in the event of losing a case should also be one of the criteria. Business groups commented that designated bodies must have no conflicts of interest with the case at hand.

Consumer organisations and some legal firms suggested that designation by the Secretary of State was inappropriate and should instead be assessed by the courts at the permission stage, according to criteria set down in statute. The NCC/SCC went beyond this and suggested that designation by the SoS in this regard could be undue interference in the civil court process:

“First, there is an important constitutional principle that the legal system should be independent of government...This principle is compromised if government can effectively veto the right of consumer organisations to access the courts.”

Consumer groups also suggested that the body under consideration should demonstrate that it has some history of acting for consumers. In terms of funding, Citizens Advice suggested that not only should the body demonstrate that it had the ability to meet any cost orders, but also that it should be able to show that it would not be relying on funds earmarked for other essential services, such as consumer advice.

Legal groups warned that existing consumer groups would not be sufficiently resourced for this type of work and that designation in advance could take time and may result in cases being lost under the statute of limitations. They suggested that it also raised questions about how their performance would be monitored by the Government. They pointed out that a well-motivated single action group could be formed quickly and would perform well for its represented consumers as long as suitable criteria were used at the permission stage. This is the view of Irwin Mitchell who thought that the ability to bring cases should not be restricted only to those bodies designated by the Secretary of State:

“In many consumer claims, single issue support or action groups are quickly formed. We see no reason why, given proper checks undertaken by a court, such a body, or an individual member should not be permitted to lead a representative action.”

The OFT also believed that, in addition to bodies designated by the Secretary of State, any private body should be able to take action, with an assessment of their fitness to bring a case taking place at the permission stage.

## Should permission be sought from a court before bringing a case?

Questions in this section asked whether a permission stage is necessary as a prelude to court action.

### Q5: Is a permission stage necessary to avoid inappropriate cases?

There were 48 responses to this question. 33 respondents considered that a permission stage was necessary to avoid inappropriate cases. 15 disagreed.

#### Commentary

The majority of respondents were in favour of a permission stage. Reasons cited included:

- Should help save judicial time;
- May weed out weak cases and those not suitable for a representative action at an early stage;
- Will avoid inappropriate or spurious cases before significant costs incurred;
- Will mean able to assess whether there are similar cases (can help join up);
- Will give additional consumers the chance to come forward (through additional publicity);
- Can determine whether potential damages outweigh expense of group litigation;
- Will reassure defendants (that won't be swamped with spurious claims they feel forced to settle) and consumers (give confidence that case has merit);
- May encourage earlier resolution;
- Could act as useful point for court to consider how claim is to be funded and whether costs should be capped.

There were some concerns that this stage was unnecessary, especially if cases could only be brought by designated bodies, when it was thought that designation then rendered the permission stage superfluous. One respondent felt there could be two procedures, whereby designated bodies would avoid this stage but non-designated bodies should have to go through it.

Additionally, there were concerns that any permission stage should not duplicate the main case, render it too expensive or be a substantial burden in itself. It should not be a test of the evidence (a trial in itself), or be too complex and cause undue delay. One respondent highlighted a concern that defendants may be able to manipulate permission criteria – so there would be need for a suitable procedure. Some thought a permission stage could in fact run up costs.

There were also worries that legal time could be wasted unnecessarily through running a permission stage. Many respondents thought existing court rules and judicial powers could already offer sufficient protection from unmeritorious cases.

**Q6: If anyone, not just designated bodies, can bring a claim should a permission stage be used?**

There were 35 responses to this question. 32 agreed that if any body were able to bring a case then a permission stage should be used. 29 respondents did not express an opinion.

The vast majority of those who responded to this question thought that a permission stage was essential if non-designated bodies could bring cases. However many were clear that non-designated bodies should not be able to bring a case at all. Many thought that if they were not able to do so, then a permission stage was either not so important or not necessary at all (although many thought a permission stage was important regardless of who brought claims).

**Q7: If necessary, are there any other factors that should be considered at the permission stage? If so, what are they?**

25 respondents suggested that additional factors should be considered at the permission stage.

Most respondents had no opinion on this matter, or thought no other factors were needed. However the majority of those who did respond to this question thought other factors should be considered. Most thoughts revolved around costs and proportionality, namely:

- Whether the representative body is able to meet costs of unsuccessful action (parties should also have to provide costs estimates and if required court could cap costs or grant security for costs);
- Should consider whether costs are kept to a minimum for all parties and not disproportionate to the damages;
- Whether the claim amount is high enough to merit court action;
- Whether provision for distributing monies won is in place.

Other thoughts included:

- Whether other means of addressing the complaint might be suitable;
- Whether case can be dealt with through existing provisions;
- Whether other efforts have been made before bringing the action;
- Should be element of public interest;
- Whether sufficient number of consumers involved;
- Whether named consumers involved have sufficiently similar cases to answer;
- Likelihood of action succeeding (merits test);
- Any issues of law that need to be considered;
- That case is not vexatious;
- Potential double jeopardy;
- No vested interest or conflict of interest;
- One respondent thought the defendant should have the chance to review case material to assess the claim's validity.

**Q8: If necessary, should the permission stage be implemented in Scotland?**

Most responses were silent on this matter, although those that did express an opinion were in favour of a similar system operating in Scotland as in the rest of Great Britain. There was recognition that this could need a change in primary legislation or amendment to court rules. However others thought there was already provision in Scotland for dealing with unwarranted cases. Another suggestion was a preliminary hearing before a Sheriff to decide whether a case can proceed, or that the Sheriff should merely be satisfied that it can proceed.

**Q9: Even if the permission stage were considered unnecessary to prevent spurious cases, would it have value from a case management point of view?**

20 respondents thought that the permission stage would have value from a case management point of view, while 10 disagreed. 34 submissions did not express a point of view on this issue.

The majority of those that responded to this question felt that a permission stage would have value from a case management point of view, although most did not answer this question and a sizeable minority responded in the contrary.

## Types of cases that should be open to representative actions - scope of 'consumer cases'

### Q10. How should the scope of representative actions for breaches of consumer protection legislation be defined?

There were 42 responses to this question. 30 expressed a preference for a broad definition of consumer cases. 9 stated a preference for a list of legislation while 3 respondents expressed a preference for confining cases to broad areas of legislation.

#### Commentary

Most respondents to this question preferred the first option, a broad definition of a business to consumer transaction. Option one was preferred by nearly all consumer groups, who said that it offered the broadest consumer protection and the greatest flexibility. Other supporters suggested that the definition of 'consumer' should be as similar as possible to existing legal definition, such as that contained in the Sale of Goods Act.

A number of respondents expressed a preference for option two, listing legislation open to representative actions. Supporters of this option tended to cite clarity as the main driver for their preference or the ability to limit the new procedure to just a few Acts until there was some certainty that it was performing as intended.

Businesses, and business groups, tended to prefer a comprehensive list of legislation and regulation to which a representative action might be applied. They tended to cite reasons of clarity for this position. Some respondents suggested that small businesses suffer from the same disadvantages as consumers and would also benefit from representative actions, should they be introduced.

Respondents from highly regulated sectors such as, energy and financial services, supported the suggestion that sectors with independent ombudsmen or other third party ADR should be excluded from the scope of representative action. They asserted that existing levels of dispute resolution in those sectors should be sufficient to resolve outstanding consumer problems without resorting to court action.

## Should small cases have to follow the small claims track, rather than join a representative action?

This section asks questions around small claims and the associated small claims procedure; and whether there should be a minimum limit on what should constitute a representative action.

### Q11: Should cases below the small claims limits have to be dealt with individually as a small claim?

10 respondents agreed that cases below the small claims limit should have to be dealt with individually as a small claim. 36 disagreed, while 18 respondents did not express an opinion.

#### Commentary

The majority of respondents thought that cases below the current small claims limits should not have to be dealt with individually as a small claim, although business groups were more divided on this, with 7 business organisations agreeing with this assessment and 8 not.

Some of those who responded in the negative to the question nonetheless considered that the use of the small claims procedure should be encouraged, or suggested that the small claims limit should be the minimum representative actions limit.

Points made by those disagreeing with treating smaller claims under small claims procedures included:

- Small value claims affecting many consumers are the cause of much consumer detriment;
- May be important points of law in a small claim that should be heard in a higher court;
- Small claims can be those most suited to representative actions – low value, high volume cases perfect for this proposal;
- Avoids individual small claims being bought off;
- Potential saving of judicial time in considering one case representing many;
- Whole point of representative actions is to get all cases in front of one judge.

Various reasons were conversely provided by those who thought claims should be handled under small claims procedures:

- Procedure seems to work well;
- Procedure is fast and effective;
- Prevents courts being tied up in cases;
- Offers additional protection to small businesses;
- Might keep costs down for relatively minor cases;
- No evidence that procedure is inadequate;
- Procedure can be decided by court at a permission stage.

Some respondents thought the courts should consider the aggregate of the claims and then determine which procedure should be followed. The reasoning being that if several consumers suffer small financial loss each, but the aggregate value of these reaches a certain level, then there may be merit in treating these small claims as a group representative action.

One respondent thought litigation was not appropriate for this type of case and that a consumer tribunal should be established to deal with them.

There was some opinion that the small claims limit for Scotland [The Scottish small claim limit is now £3,000] should rise to equal that for England as there is currently an inequality in the limits. In any case, the implications of this inequality would need to be considered for this proposal overall.

**Q12: Do you think that a minimum limit should be set for each case in a representative action?**

13 respondents agreed that a minimum limit should be set for each case in a representative action. 29 disagreed while 22 respondents did not have an opinion on this issue.

The majority of respondents thought a minimum level should not be set, although business organisations were again more favourable than other groups, with 8 in favour of a minimum limit, 5 against and others expressing no opinion.

Of those respondents not in favour of a minimum limit, the following reasons were given:

- Would be unfair to set a limit;
- Much consumer detriment occurs in cases of small value affecting many consumers;
- The model is perfect for low value claims;
- Businesses should not be able to evade their responsibilities just because each consumer has suffered a relatively small loss;
- Collective detriment may be high and public interest must be considered;
- There is no minimum level of detriment in the Competition Act provisions;
- To do so would minimise if not destroy the proposal's intended benefits.

Many respondents felt it would be better for the court to decide (possibly at a permission stage) what was appropriate for the particular case

One respondent suggested using innovative awards when dealing with small value claims, such as charging the defendant for the distribution or making an award to a suitable charity.

Of those who thought that there should be a minimum limit, some reasoned that this would be a way of assessing the seriousness of the case. No respondent suggested a specific value for a minimum limit, three thought that it should be over the small claims limit, and others thought that the court should decide. One respondent thought that designated bodies should have to act for all non-spurious

actions and not be able to pick and choose between profitable and non-profitable actions.

### Handling representative actions cases

**Q13. Would it be adequate to amend the primary legislation to allow a representative body to bring a case in England and Wales?**

11 respondents considered that it would be adequate to amend primary legislation to allow a representative body to bring a case in England and Wales. 7 disagreed.

**Q14. Would it be more appropriate to amend primary legislation to allow consumers to assign their rights or action to a designated body? The resulting court case could then be handled using existing court procedures in England and Wales or in Scotland.**

22 respondents suggested that it would be more appropriate to amend primary legislation to allow consumers to assign their rights of action to a designated body, and then follow existing court procedures. 7 respondents disagreed with this proposal.

### Commentary

These questions were included in the consultation in an attempt to expose any weaknesses in assigning rights to the designated body or to determine whether detailed primary legislation would be preferable.

Some respondents pointed out that if rights were assigned but the case was not taken forward by the chosen body the individual could be left without the ability to bring his own case. Other respondents preferred the clarity offered by detailed primary legislation which would set out new criteria and procedures.

## Funding representative actions cases and payments of damages

**Q15. Do you think that a written agreement of how damages will be distributed in the event of winning a case should be signed at the outset? Should consumers also be able to agree an amount, proportion or percentage of any such award to cover the legal and administrative costs of the representative action?**

39 respondents considered that there should be a written agreement setting out how damages would be distributed at the onset of a case. 2 disagreed.

### Commentary

Most respondents answered this question and almost all agreed with the proposal that there should be a written agreement signed at the outset. MyTravel proposed that the supplier should also be aware of the terms of such an agreement so it knows whether the interests of the consumer or the designated body is being pursued.

Those respondents who did not agree with the proposal for a written agreement believed that it should be for the court to direct as to distribution of an award or settlement. Others pointed out that this approach would not work where the case involved unnamed consumers.

The CAB also concerned that it must be clear in the agreement what percentage of damages would be available to cover legal and administrative costs:

“We are concerned that where many are harmed but for small sums there may be very little leeway for paying costs if any money is to be returned to consumers.”

Consumer bodies questioned what should happen in cases where the overall damages may be large but the amount for individual cases was relatively small. In such cases the NCC/SCC suggested the Government should consider allowing distributions that indirectly benefit consumers as a whole, for example by funding a consumer education campaign or reducing prices over a defined period.

In addition to the question about whether a written agreement should be signed, many respondents covered the general point about how representative actions should be funded.

Some businesses thought there should not be any public funding for representative actions. The OFT suggested that alternative ways to alleviate the funding problems and financial disincentives need to be considered.

Consumer bodies were concerned about the lack of direct public funding for representative actions and whether this would restrict the number of cases taken forward. The NCC/SCC wanted assurance that the Government would allow publicly-funded consumer bodies to fund cases from their budgets. They and other bodies also wanted the Government to consider whether such cases would be eligible for legal aid.

End