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# Representative Actions and Restorative Justice:

***A Report for the Department for Business Enterprise and Regulatory Reform (BERR) – December 2008***


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**Att. Mr.G. Horsington**

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# 1. INTRODUCTION

## 1.1. Overview

This research is into the need for, and mechanisms to achieve satisfactory compensation for groups of consumers where they have suffered detriment. The research was commissioned by the Department for Business, Enterprise and Regulatory Reform (BERR) following consultations in 2006 on the issues of representative actions for consumers and regulatory justice. The research considers the need for such measures and the mechanisms by which these options might be applied to consumer cases.

Changes to the consumer protection regime in the UK should be considered within the context of a policy environment which sees the Government aiming to encourage parties to settle their disputes more quickly, cheaply and effectively and with court action the option of last resort. The Hampton Review (2005) on regulatory inspections and enforcement concluded that the regime for achieving compliance with business regulations was complex and ineffective. Recommendations made by the review changed the way that regulators and enforcement officers go about their work. The Macrory Review (2006) into improving compliance among business looked in detail at sanctioning regimes and mechanisms for securing compliance with regulations. The Macrory Review made a number of recommendations for improving the regulatory sanctioning system including recommendations that the Government should introduce pilot schemes involving the use of Restorative Justice techniques to cases of regulatory non-compliance, regulators should have an increased range of sanctions available to them including Fixed and Variable Monetary Administrative Penalties, and alternative sentencing options in the criminal courts should be introduced for cases relating to regulatory non-compliance.

Both the Hampton and Macrory Reviews identified that the regulatory sanctioning regime is complex, ineffective and often fails to achieve redress for consumers. The aim of the proposed reforms was to reduce the regulatory burden on business while introducing a more streamlined enforcement regime for regulatory infringements providing regulators with a wider range of enforcement options that went beyond simply punishing offenders. The Government's consultations on Hampton and Macrory were supplemented by a 2006 BERR consultation on representative actions

for consumers. The premise of the proposal was that periodically groups of consumers lose relatively small sums at the hands of the same trader and that while some consumers have access to means that will resolve disputes there are many instances where alternative redress options have been exhausted and court action may be the only choice for the consumer. However, vulnerable consumers might be reluctant to take court action, some consumers might be unaware of their rights or consider that the amount is too small to bother taking court action, and some consumers may simply be unable to navigate the legal process themselves or afford the legal fees necessary to do so. In such cases, representative actions might provide a means for resolving the complaint by allowing a suitable body to bring an action on behalf of consumers. However while the BERR consultation resulted in opinions on how such actions might work and some evidence that there may be support for making the option for representative actions available to consumers it did not provide compelling evidence of need for this option.

This research therefore investigates the types of consumer cases that might be suitable for collective actions, and conducts an analysis of how representative actions would have to work to deliver results. The research also looks at whether Restorative Justice would be an effective means of achieving redress without recourse to the court system in consumer cases and assesses the evidence of need for both options by looking at the areas where consumers currently have difficulty in achieving redress.

This report attempts a synthesis between the two approaches of collective action (either by individuals acting as a group or through a representative body) and restorative justice, showing how they differ; how they may occupy different places in a scheme of redress for consumers and how they might effectively be engaged together when appropriate.

### 1.2. Research Outline

The research was designed to achieve the following outcomes:

- Identify types of consumer cases (not including competition cases) where groups of consumers are suffering detriment and where representative actions might realistically deliver redress;

- Assess the approximate likely number of such cases in the UK every year and the approximate amounts of money at stake;

- Offer an initial analysis of the broad benefits of formal court action under a representative action for such cases, and explore how to operate effective systems that avoid a litigious culture;

- Analyse whether alternative mechanisms such as non court-action under Restorative Justice or other forms of ADR would bring about resolution of cases where consumers have suffered detriment and have not received redress;

- Identify whether Restorative Justice could work in consumer protection cases if public enforcers were offered the flexible remedies proposed in the *Regulatory Enforcement and Sanctions Bill* (now passed as the *Regulatory Enforcement and Sanctions Act 2008*) and were prepared to use them to impose restorative remedies.

The Hampton Review concluded that regulators do not give enough emphasis to providing advice to business to secure compliance with regulations. The review also concluded that regulators lack effective tools to punish persistent offenders and reward compliant behaviour by business.

Representative actions and Restorative Justice represent two different mechanisms for resolving consumer complaints and disputes with traders. Representative actions provide for a means through which aggrieved consumers can pursue court action (together with other consumers who have suffered similar detriment) while Restorative Justice provides a means through which companies who have infringed regulations can put things right, often through dialogue with the affected party and by offering a solution that, where possible, repairs the harm caused by the trading or business practice.

In carrying out this research project we have considered a number of issues relating to consumer redress and Restorative Justice. Collective redress in consumer cases often relies on the input of lawyers who have sufficient interest in the case but in theory at least consumer groups and/or regulators might also be able to take cases

on behalf of consumers to resolve disputes that affect large numbers of consumers. The BERR consultation on representative actions identified; concerns among business about a move towards a more litigious culture and American style class actions, that consumer organisations and the Office of Fair Trading (OFT) consider that representative actions should be for both named and unnamed consumers, that legal firms were divided on whether there was a need for representative actions and that trading standards authorities generally supported confining representative actions to named consumers and supported permission stages to remove unwarranted claims. Trading standards also had concerns about resource implications and we consider this issue within the research.

Given the relatively short period in which this research was conducted there are inevitably limitations on what could be achieved and we make no pretence that the research findings offer a complete solution to the problem of consumer detriment. But we consider that the research aims have been broadly met and set out our reasoning below.

## 2. EXECUTIVE SUMMARY

The remit of this research is to consider the evidence of need for representative actions and restorative justice to be introduced into consumer cases and how such measures might need to work to achieve consumer redress. To achieve this, the research has sought to identify the types of consumer cases (not including competition cases) where groups of consumers are suffering detriment and where representative actions might realistically deliver redress and to assess the approximate likely number of such cases in the UK every year and the approximate amounts of money at stake. The research has also evaluated how representative actions would need to work through formal court action, whether alternative mechanisms such as non-court action under restorative justice and other forms of ADR could bring about resolution of cases where consumers have suffered detriment and has evaluated whether restorative justice operated by public enforcers could achieve effective consumer redress. We are aware that some of the issues raised in this research report may be considered as part of the consumer law review being carried out by BERR but we include them here as part of our consideration of representative actions and restorative justice where appropriate.

The evidence of the OFT and case examples provided by Trading Standards officers indicate that there is a significant number of cases where consumers suffer detriment and do not receive redress. It is regrettably difficult to provide a precise figure for the number of cases because a range of factors can influence whether a case is reported to enforcement agencies for action. The enforcement agency or regulator may also decide not to pursue a case and at the conclusion of the case records may not be kept of whether a remedy has been provided for the consumer or whether the consumer has needed to take civil action to resolve the matter.

This research has, however, identified that even where enforcement action is effective and successful (including where a prosecution results in a conviction) this does not mean that consumers achieve redress. Indeed trading standards officers, consumer representatives and the OFT agree that in the majority of cases consumers will still need to take civil action in order to obtain compensation or to achieve some other form of redress. This being the case, the need for some form of restorative justice or other form of non-court ADR could be justified by the sheer

number of cases that do not result in an effective remedy for the consumer if the intent is to make it easier for them to do so. While court action may provide for punishment of offenders and ultimately may result in changes to business behaviour consumers may still be left without adequate redress at the conclusion of the regulatory enforcement process and in the majority of cases will need to take civil action in order to obtain compensation or achieve some other forms of redress. This puts individual consumers (or an affected group of consumers) at the disadvantage of having to seek legal advice and to bear the costs of their own legal action. While there is an identifiable gap where consumers are not receiving redress the role of consumers is also an issue to be considered. Significant numbers of consumers may choose not to take legal action for a variety of reasons. The individualistic nature of cases also means that a wider problem that affects a number of consumers may not be resolved and that similarly affected consumers are not always identified.

However this need for separate civil action to be taken as part of the process for achieving redress for consumers while identifying a clear inadequacy in the effectiveness of the regulatory enforcement regime should not be taken to mean that there is solely a need for new measures. Trading Standards officers and business representatives have indicated flaws in the existing regime that means that even where the possibility for compensation to be awarded by the courts is available in consumer cases it is seldom used. The lack of willingness by the courts to award compensation and redress to consumers may, therefore, be an issue that requires further study as it may offer an opportunity to provide for more effective redress for consumers under the existing consumer protection regime. The use of conditional cautioning under the *Criminal Justice Act 2003* has also been proposed as a means of achieving consumer redress and is an issue that has been pursued by LACORS.

Our review of the responses to the 2006 BERR consultation on *Representative Actions* and interviews and evidence collated for this research indicate general agreement that representative actions *could* provide for more effective consumer redress by allowing a representative group to take on such actions on behalf of consumers. However enforcers and regulators indicate that they do not wish to take responsibility for pursuing these cases and identify practical difficulties in taking representative action cases even if a mechanism to make this option more widely available is introduced. (It should also be noted that business is not yet persuaded that there is a need for any additional measures). In addition there are difficulties with consumer groups taking on representative action cases due to the lack of in-

house legal expertise to bring such cases the cost of obtaining outside legal expertise and the current costs regime for such cases.

Regulators and enforcers have concerns about having to take action to obtain redress for the consumer and effectively becoming 'judge, jury and executioner'. They consider that the purpose of their enforcement action is to secure compliance with legislation rather than to punish business for causing harm to consumers. In particular, enforcers consider that it is not their role to obtain compensation for consumers and explain that providing advice to business to achieve compliance is a legitimate means of resolving complaints. Prosecution is often the last resort and a mechanism that regulators and enforcers accept frequently does not resolve things for the injured consumer. Enforcers and regulators do not wish to take responsibility for taking representative action cases on behalf of consumers and there is a general reluctance to apply for powers to do so. Enforcers and regulators would also be opposed to these powers being imposed on them and have concerns that cases that might achieve easy redress could result in unrealistic expectations on the part of consumers that regulators and enforcers can routinely achieve redress and there is no need for the consumer to take actions themselves.

But if regulators are unlikely to take on representative actions on behalf of consumers there are also difficulties in consumer groups doing so. With the exception of Citizens Advice Bureaux and Law Centres there does not currently exist a national network of consumer groups/centres potentially capable of taking on representative actions on a regional basis. Resources, the need to employ lawyers and the costs regime in civil cases are all factors that would prevent national organisations such as the NCC (now Consumer Focus), Which? and Citizens Advice from taking on representative actions at a national level. There does not, therefore, appear to be an easy solution to the problem of who would be able to take on representative action cases on behalf of consumers even if the option were available. This does not, however, mean that the option for representative actions should not be attempted and we propose a model for introducing representative actions that would allow consumer groups to work with lawyers to bring cases and a means through which consumer groups at a local and national level could also bring cases on behalf of affected consumers. There are difficulties in doing so but a number of case models are presented in this research which identify the issues that may be suitable for representative actions.

This research also identifies that understanding of exactly what restorative justice is varies among enforcers, regulators, business and consumer groups with knowledge of the principle of victim-offender dialogue and compensation frequently shown by respondents. But restorative remedies for complaints need not consist solely of financial compensation and can involve other means of making reparation; primarily aimed at putting the consumer back in the position that they would have been in had the fault not occurred while also recognising the inconvenience to which consumers have been put and in some cases providing some remedy that recognises this element of a complaint or dispute. We consider that the reliance on financial compensation in debates about restorative justice in consumer cases is potentially misleading as there is scope for enforcers and regulators to implement a wider range of remedies which truly reflect the harm caused to consumers. Where it is not possible to put the consumer back in the position they would have been in had the fault not occurred 'compensation' could mean some other means of addressing or recognising the harm caused to consumers. For example payment of 'time and trouble' compensation, an apology or the taking of remedial measures that address the wider harm caused by a business practice such as; providing an enhanced or discounted service, funding a consumer education programme or environmental improvements or initiating a product replacement scheme. Business representatives have also provided examples of where business voluntarily does this which indicates that the undertaking provisions contained within the *Regulatory Enforcement and Sanctions Act 2008* might provide a means through which business and regulators can work together to apply restorative principles and achieve redress for consumers, even where no formal victim/offender dialogue is carried out as part of finding a remedy.

However the *Regulatory Enforcement and Sanctions Act 2008* also provides for restorative penalties to be applied by regulators and enforcers but this research identifies that there is no clear consensus on how and when such penalties would be used. Some trading standards officers have indicated that they consider that restorative justice would be more suitable for 'low level' non-criminal offences and should not be used across the board in consumer cases.

The view of regulators and enforcers expressed in this research was overwhelmingly that any restorative penalties should be subject to criminal rather than civil enforcement. The reason given for this is the difficulty in enforcing civil sanctions,

with enforcers and regulators indicating that the payment of civil penalties and compliance with court judgements is relatively low and that little attention is paid to ensuring that traders and businesses convicted at court and required to provide redress actually do so. Enforcers indicate that because of this they would be reluctant to use any new powers (other than fixed penalty fines) unless there was a clear process in place for ensuring that any remedies are carried out. This also makes the use of the small claims court undesirable.

Lack of knowledge of their rights by consumers may hamper the level of opt-in to representative action cases and so mechanisms to ensure either that consumers are actively sought out to join in a representative action or to provide for redress for other consumers similarly affected in the event of a successful case are essential.

While both restorative justice and representative actions may in theory provide a solution to the problem of consumer redress the evidence is that despite some evidence of need there are a number of problems with introducing restorative justice and representative action measures and that there are specific case models where problems may occur and effective consumer redress may not be achieved. We outline some of the difficulties in this research and discuss specific case examples that illustrate both how representative actions and restorative justice could work in consumer cases but also where they are unlikely to be successful and the reasons for this. For example there are significant difficulties in pursuing either representative actions or restorative justice in cases where traders are based overseas, simply disappear to avoid enforcement action and litigation or in those cases involving multiple small amounts of money (i.e. a large number of consumers suffering a small amount of financial loss or detriment) where the trader would not realistically be able to pay any compensation or costs or lacks the resources to carry out any other form of redress identified as suitable for resolving a dispute.

One proposal put forward during interviews, in the academic literature and considered by this research is that of an independent Consumer Ombudsman along the lines of the Nordic Ombudsmen who could consider representative actions and implement restorative justice to deliver effective and efficient enforcement, compensation and redress for consumers. Having such an independent, publicly funded adjudicator could result in a considerable saving on the cost of private collective actions, eliminate the concerns of regulators and consumer groups about the costs of these actions and also address the concerns of business about the

changed enforcement regime. We consider the role of Ombudsmen as representative bodies in this research but acknowledge that such a move would require fresh legislation. But the development and costing of pilot approaches on restorative justice and representative actions is an issue that needs consideration in addressing these issues and we highlight those areas where further research and/or pilot approaches may yield benefits.

## 3. METHODOLOGY

This research was carried out using a combination of qualitative and quantitative data. Structured questionnaires were used (see appendixes) which included questions designed to obtain quantitative data relating to the number of consumer protection cases reported and prosecuted each year. Qualitative questions were also designed to obtain views on restorative justice and representative actions and evidence from enforcers, regulators and consumer groups on cases where consumers continue to suffer detriment.

### 3.1. Data Collection and research stages

Our methodology for the research included a combination of questionnaires, interviews and electronic survey methods together with extensive use of documentary evidence. The survey design was tested with trading standards officers and our own research staff to identify the survey design most likely to yield meaningful results but recognised that the response rate was likely to be low. The primary data collection was supplemented with a review of the literature and best practice on restorative justice and representative actions and also a review of the responses to previous consultations on regulatory justice, representative actions in consumer protection cases and on the draft *Regulatory Enforcement and Sanctions Bill*. The primary data collection was carried out in the following stages:

- **Stage 1** consisted of a preliminary questionnaire to enforcers in the East Midlands and Eastern Regions and to a small number of selected regulators such as the OFT. The objective of Stage 1 was to produce a sample of responses that would provide interim data on the types and number of consumer protection cases that might be suitable for restorative justice and representative actions. Data collected in Stage 1 also provided responses that identified issues to be explored in the next stages of the research. The responses also identified changes that needed to be made in the research questionnaires or specific issues to be explored in the research interviews. For example, early responses at Stage 1 identified that there was no shared understanding of what restorative justice was and so the questionnaires and research covering letter needed to reflect the possible lack of understanding

of the issue under consideration.

- **Stage 2** consisted of a questionnaire to consumer groups and consumer representatives such as the NCC, Which? And Citizens Advice to identify their views and obtain evidence on the types of cases, number of cases and the value (to the consumer) of cases that they would wish to see pursued via representative actions.

- **Stage 3** consisted of a roll out of the questionnaire to a wider group of trading standards officers and enforcers to provide greater coverage in England and Wales. This aspect of the project was intended to identify any difference in views between trading standards officers, enforcers and regulators and to ensure that a sufficient number of responses were obtained to produce a meaningful sample of responses for the research.

- **Stage 4** consisted of interviews with trading standards officers, other enforcers and regulators, consumer groups and consumer representatives and some business representatives.

The primary data collection exercise was carried out alongside a review of:

- Consultation responses on *Regulatory Justice in a post-Hampton World*

- Consultation responses on *Representative Actions in Consumer Protection legislation*.

- The enforcement policies of trading standards offices in the East Midlands and Eastern regions.

Analysis of this documentary information helped to identify issues to be pursued in the interviews and for consideration in developing case models.

### 3.2. Response to the research

There was a 25% response to the Stage 1 ‘pilot’ questionnaires. While this represented a low response level to the 20 questionnaires sent out at Stage 1 it was

not entirely unexpected. It was anticipated that busy enforcement offices would not immediately respond and might require some encouragement to do so. In addition, the imminence of the Trading Standards Institute (TSI) Conference which took place within three weeks of the questionnaires being despatched was thought to be a factor that might affect the responses with authorities either waiting to hand in their questionnaires at the conference or wishing to raise questions or request interviews at the conference where a BERR workshop on Restorative Justice was held. Indeed at this workshop at the TSI conference a number of authorities requested interviews and presentations on the research and indicated that questionnaires had been received within their offices but had not yet been completed. Officers in three authorities expressed some concern that their managers might not respond to the research and requested additional questionnaires to be sent direct to them to ensure that a response was submitted by their office. One consumer group (the NCC who had received a questionnaire as part of Stage 2 of the research) also requested an interview which took place within three weeks of the TSI Conference.

Pressure of work was cited by a number of officers as a reason for not responding to the research. This was anticipated as a potential problem and we also anticipated that a number of officers would not view completion of a questionnaire or a response to the research letter as a priority. To address the issues the following steps were carried out:

- The handing out of an additional 25 questionnaires at the TSI conference. Some trading standards offices also provided business cards requesting that an electronic version of the questionnaire be sent to them;
- Carrying out a 'focus group' exercise as part of the BERR Restorative Justice Workshop which allowed us to establish whether trading standards officers attending the conference shared the views of others that had already been raised during the research;
- Follow-up emails, telephone calls and letters to those offices that were sent a questionnaire in the original sample of questionnaires but who had not responded; and
- Commencing the formal programme of interviews.

Despite the programme of follow-up work, responses from trading standards officers and consumer groups remained low but where possible, documentary evidence was

used to identify relevant views on the research issues.

### 3.3. Nature of the responses

Not all respondents elected to complete the questionnaire when responding to the research and a number of interviews were arranged for those that preferred to provide information in this way. Organisations approached to take part in this research were given a choice of whether to complete a research questionnaire or take part in an interview. Interviews proved to be the most popular mechanism for individuals to provide evidence for the research. The number of organisations approached to take part in the research and the number of interviews subsequently undertaken is shown below:

| **Type of Organisation** | **Sample approached (n)** | **Interviews achieved (n)** |
|---|---|---|
| Enforcer/Regulator | 50 | 8 |
| Consumer Group or Representative | 10 | 2 |
| Other[1] | 10 | 4 |
| **TOTAL** | **70** | **14** |

Some 15 Trading Standards Offices (TSOs) indicated that they would respond to the questionnaire but did not do so. The short timescale allowed for this research and other business pressures are factors in this and two regional trading standards organisations have indicated that they require presentations on the research at which they might submit further evidence. Due to their already agreed meetings calendars these presentations are outside the timescale allowed for this research. However the willingness of officers to discuss issues during telephone interviews helped to ensure that information was received. Officers also referred to their previous consultation responses on *Representative Actions, Regulatory Justice* and the draft *Regulatory Enforcement and Sanctions Bill* as adequately reflecting their current views even though some changes had been made to the draft Bill which addressed some early concerns.

[1] The 'Other' category in this table includes business representatives and representative bodies such as LACORS and the TSI

The relatively low level of questionnaire responses from TSOs was a concern as interview responses while providing valuable qualitative data and casework examples did not always provide the required quantitative data on numbers of cases and the value of cases in terms of consumer detriment. However, the OFT provided a comprehensive response which in addition to a completed questionnaire also included:

- Evidence on the number of cases taken by Trading Standards across England – trading standards are required to inform the OFT of intended and actual prosecutions and OFT data supplied as part of its response provides data on numbers of cases and the total amount of fines by category of offence (e.g. second-hand cars) and area of legislation (e.g. *Trade Descriptions Act 1968*);
- Consumer Complaints data – the OFT has provided more detailed data on numbers of complaints received by Consumer Direct, data from its consumer law casework and data on consumer credit casework;
- The Consumer Detriment Report – the OFT has supplied a copy of this report which assesses the overall value of detriment in the consumer sector and the frequency with which consumers experience problems with goods and services;
- Mass Market Scams – The OFT supplied a copy of its (2004) research report into mass marketed scams which estimates the direct cost to UK consumers of scams to be at least £1 billion a year; and
- Enforcement priorities – The OFT has also provided information on its enforcement principles and enforcement priorities and this evidence is helpful in identifying how regulators determine which cases will be pursued and where this might differ from the views of enforcers such as trading standards.

In addition the OFT provided some examples of enforceable undertakings accepted by the Australian Competition and Consumer Commission (ACCC) and this supplemented our own research into the enforceable undertakings model in operation in Australia. Case information and the issues of the research were also explored further in an interview with representatives from the OFT.

The views of business were also considered in this research. In addition to an analysis of the previous consultation responses on the issues referred to above, a meeting was arranged with the CBI's Legal Advisor, a representative from the British Retail Consortium and a representative from Boots PLC (also the Chair of the CBI's

Consumer Affairs Panel). This joint interview provided much useful information on the views of business and was supplemented with policy information from the CBI on Collective Redress.

## 4. CONSUMER GROUPS/REPRESENTATIVE ACTIONS

### PARALLEL TRACKS: SANCTIONS & CIVIL ACTIONS

### 4.1. Sanctions

Part Three of the *Regulatory Enforcement and Sanctions Act 2008* ('The Act') by offering an enhanced sanctions regime to local authority regulators will, in accordance with the recommendations of the Macrory Review, shift attention from criminal proceedings against those who have breached regulatory requirements to a regime based on civil penalties, including fixed and discretionary penalties. Whilst, the nature of the legislation is that the details will emerge as secondary legislation it is clear that the emerging regime of fixed and variable monetary penalties; compliance notices; restoration notices and enforcement undertakings will give regulators a subtle and powerful range of enforcement tools.

The Act changes the underlying philosophy of local authority regulators, particularly, TSOs from 'neutral' prosecutors putting evidence before a third party tribunal for an independent decision to a body much more involved in tailoring the sanction to the offence and to the wider public interest subject, of course, to an appeal to an independent tribunal. It seems inevitable that this wider role will bring regulators into a more direct relationship with complainants as they will be responsible for the whole process of sanctioning rather than simply evidence gathering and if a decision is made to prosecute putting the matter before the court. In particular the discretionary penalties procedure which involves receiving representations and/or objections from the regulated person might well evolve in appropriate cases (particularly group cases) to a tripartite arrangement whereby the victim is also consulted about the process and its destination. This seems in harmony with regulatory principles including the transparency and accountability requirements of Section 5(2) of the Act and the concept of consistency. While, the legislation is focused on regulated persons, e.g. traders, there seems no reason why the regulatory philosophy cannot encompass the relationship with the injured person. Indeed there are many reasons why this should be so. Certainly it would be in accordance with the current Consumer Law Review which in Section 3 calls for reform to assist consumer empowerment and at Section 3.1 (a) calls for consumers who: 'have knowledge and means to exercise their rights and adequate support to resolve disputes proportionately'.

A difficult question is whether, in accordance with the BERR approach as outlined in the Consumer Law Review (at 3.25) and in accordance with wider government policy, the objective to encourage Alternative Dispute Resolution (ADR), for example by mediation by a neutral mediator whose task is to bring the parties together and attempt to produce a settlement often by suggesting a 'creative' solution,[2] fits into the approach outlined above. The regulatory enforcer under the Act will act as prosecutor and determiner of penalty, subject to appeal. While the Act sets out an approach of dialogue between the regulator and the regulated person[3] this report suggests that dialogue could, in appropriate cases, be widened to include an injured party.

Here there is potential conflict between the regulator in a prosecutorial/adjudication role with a public duty to do justice impartially[4] and the concept of ADR with its philosophy of attempting to create space for agreement between parties. As stated above ADR attempts not just to slice up the amount claimed in a zero sum game but to 'make the cake larger' so that 'nobody loses'. Classic examples of this occur in commercial disputes for example a contractual dispute over the quality of goods supplied by a manufacturer to a retailer. This might be resolved by the manufacturer agreeing to guarantee quality and offer a price discount in return for the retailer placing a larger order. In this way the commercial relationship is preserved. (There are obvious comparisons in other situations where continuing relationship is important e.g. within the family, at work etc) This type of situation may occur in the context of consumer/retailer. For example, a settlement relating to defective goods may involve both the replacement of the goods and discounts on further purchasers to enhance consumer loyalty. However, there are many cases with a dispute over a major one off purchase where the consumer wants redress and, possibly an apology, but has no great desire or need to continue in relationship with the retailer or manufacturer.

[2] Section 27 of the Act (Guidance and the Acceptance of Undertakings)
[3] Department for Business Enterprise & Regulatory Reform, (2008) *'Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act'*, London:BERR

[4] The role of prosecutor and initial tribunal is an unusual one in English law but will borrow from these roles the impartiality in relation to the injured person (victim) and regulated person that is found in the Prosecutor's Code and the duty to act impartiality laid on courts and tribunals (http://www.cps.gov.uk/publications/docs/code2004english.pdf )

It is important to note that ADR is not a 'free lunch'. Whilst rates for ADR vary most mediators charge an hourly or daily rate and in complex cases the charges can be high.

Although in some sectoral ADR schemes the retailer/manufacturer pays the costs of ADR in any event this is not always so. Thus, whilst settlement of consumer cases will normally include the retailer/manufacturer paying these costs the consumer cannot be sure going into the ADR process that some of the bill might have to be paid by the consumer in any event. Sorting this charging issue in advance of the ADR process will simply add to the charges of any lawyer involved.

It may be that a more appropriate approach is that of restorative justice which as stated at Section 5.8 below provides that

> 'Potentially it is in the area of achieving reparation for consumers that restorative justice can best be applied to consumer cases. The core values of restorative justice are to secure healing for the victim, responsibility on the part of offenders and making amends for the offence. In consumer cases, this can be achieved as long as enforcers and designated regulators have the power to make binding awards and pursue negotiated settlements for complaints. Where legislation provides that regulators can decide not to take enforcement action if they can achieve compliance through negotiation and settlement with potential offenders; this option could be used by applying restorative principles.'

This argument is expanded in Section 5 of this report but it is clear from the analysis in this report that, in this context, restorative justice has more in common with *negotiation* in the context of a sanction regime between a public regulator and a regulated person or organisation than the approach of ADR, in particular mediation, which envisages parties resolving a dispute between them *without* the wider public interest necessarily being involved.

### 4.2. Civil Action

The parallel track to enforcement albeit of the subtle and dynamic approach envisaged in the Bill is civil action between individual consumers or groups of consumers and a defendant or defendants who are alleged to have harmed the consumer. ADR continues to have influence as part of a settlement process or when 'suggested' by a judge.[5]

### 4.3. Lessons from Competition Damage Cases

This research deals with consumer cases excluding competition damage cases. The work in that area is well advanced and subject to a White Paper from DG Comp[6]. However, there are important lessons to be learned from that area because in relation to some aspects of competition damages e.g. individual consumers damaged by cartel activity there are areas of close comparison. A consumer may be damaged by being overcharged by a cartelist or by buying goods on a false description from a single trader not acting anti-competitively in a classic sense (e.g. in a cartel or by exploiting a dominant position) but by exploiting asymmetry of information 'persuading' a consumer to purchase a product at an overprice. Most importantly there are procedural and practical examples that can be read across to consumer redress. These include issues of 'equality of arms' and the use of a regulatory finding of bad behaviour in the context of follow on civil action (effectively 'pleading a conviction' in a civil case which makes the task of proving the case very much easier)

### 4.4. A Brief Overview of Individual Litigation

This section is not addressed to practicing litigation lawyers who will find it superficial but to those stakeholders and policy makers with expertise in the regulatory/criminal enforcement area rather than in acting as agents for individuals in civil cases. As noted in Section 4.9 and elsewhere in this report many agencies in the field of consumer redress, including TSOs, have not historically been much engaged in the civil courts.

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[5] English judges cannot force parties to mediate but by reminding them of the cost danger of unreasonably refusing to mediate they can 'persuade' them. *Halsey*

[6] Commission of the European Communities, (2008) *'White Paper on Damages for breach of the EC antitrust rules: COM (2008) 165 Final'*, Brussels: Commission of the European

Individual consumers who suffer loss through the wrongful acts of businesses have a range of substantive law remedies (breach of contract; tort; statutory duty etc) which can be pursued through the courts. If these claims are of sufficient importance to the individual – normally equated with monetary loss – disappointment and aggravation not normally being recoverable heads of damage – then there are grounds to proceed in a 'good case'. A 'good case' in this context is a complex matrix of risk assessment of the certainty of the substantive law; the quality of the evidence; the ability to prove the loss; the procedural regime; the tenacity of the prospective claimant and, most importantly, the chances of the prospective defendant satisfying a judgment. These factors are never wholly certain and wronged parties in the UK (as compared to other areas of Europe such as Germany[7]) are generally reluctant litigators.

The key problem & the key advantage for individual litigants is the cost of going to law, the price of entering the court arena. The problem relates to the currently open ended and unpredictable nature of lawyers' charges (normally calculated on an hourly paid basis in excess of £200 for civil work). If a case is brought by an individual and *lost* then the claimant pays the defendant's costs: if the case is *won* then the defendant pays all or a high proportion of the claimant's costs.

Litigation in the Small Claims track of the County Court (for non personal injury claims of less than £5000) is less of a financial risk because the loser does not normally pay the winner's lawyer's fees. However, in a 'good case' this cost protection might not be in the interest of a claimant as if the claimant instructs a lawyer then the lawyer's fee will have to come out of recovered damages rather than be paid by the loser. The headroom between a recovery of £5,000 or less and the likely lawyer's bill may well be insufficient to make bringing the case economic.

Costs include court fees and out payments (disbursements) such as expert fees. Historically court fees have been relatively low in the United Kingdom, certainly as compared with the rest of Europe. However, this is somewhat of a false comparison

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Communities. Professor Peysner was part of the expert group co-ordinated by the Centre for European Policy Studies (CEPS) which contributed to this white paper.

[7] Stuyk, J. Terryn, E., Colaert, V., Van Dyck, T., Peretz, E., Nele Hoekx, N. and Tereszkiewicz, P., (2007) *'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings***:** Final Report*'*, Katholieke University Leuven/European Commission

as in European (Civil Law) countries the civil judge carries out tasks (such as interviewing witnesses) which in the UK would be carried out by the lawyers who will charge for it. In any event court fees in England and Wales have been rising at an accelerating rate in recent years.[8] In the Small Claims Track fees are not inconsiderable and may act as a dis-incentive.[9]

However, if litigants do proceed the conditional fee (no win: no fee) system (CFA) introduced under the *Access to Justice Act 1998* which effectively replaced legal aid for civil money claims, offers a viable way forward, particularly for personal injury claims. Many CFAs for individuals are now on a no win; no fee/win:no fee basis. That is the lawyer will rely on what is recovered from the defendant if the case is lost, not charging their client any irrecoverable hourly charges and take a hit if the case is lost. This obliges lawyers to carefully risk manage what cases they take on including the risk of whether the defendant is 'judgment proof'. It follows that this type of offering by lawyers is most likely in areas such as personal injury or housing disrepair where defendants are 'judgment proof' insurance companies or public authorities rather than in consumer law.[10]

This system protects the individual against their own lawyer's fees but not the risk of paying their own disbursements or the winning defendant's legal fees and disbursements. Litigation insurance covers this risk. This can be either 'after the event insurance' or 'before the event'/'legal expense cover'.

'After the Event' (ATE) insurance is purchased on a case by case basis to support a CFA and the premium is normally recoverable from the losing defendant. Although, the insurance applies to the individual case its calculation (rating) will be influenced by the pool of similar cases in the insurer's book and their success rate. Prior to the credit crunch the premium would often be paid *after* the case either by the losing

[8] 'The Council remains very concerned about the high level of fees, driven by the policy of full cost recovery'. Annual Report of the Civil Justice Council 2007 Section 1.11

[9] £108 to issue a case in the court; £35 for allocating money claims between £1500 and £5,000 (no fee below) and £300 for the hearing fee if the claim is over £3,000 (less below) i.e. to claim for, say, £4000 costs £443.

[10] As many individual consumer claims will be under the small claims track limit they will benefit from the more user friendly procedure of this track in the County Court. However, winning cases with a simple procedure does not guarantee that the enforcement means available are satisfactory to recover damages and fees. See J Baldwin, *Evaluating the Effectiveness of Enforcement Procedures in Undefended Claims in the Civil Courts*, London: Lord Chancellor's Department Research Series 3/03 (2003).

defendant alongside other disbursements or out of the proceeds of the policy.[11] Nowadays individuals will increasingly be asked to pay the premium in advance or take out a Consumer Credit Agreement to cover the premium as a way of reducing the insurer's risk (e.g. that the case is won but the defendant goes insolvent.)

Before the Event (BTE) insurance is generally sold to individuals as an add-on to household or motor policies. As the premiums are for generic cover they are not recoverable in a single case. In principle the insurer pays the individual's lawyer whether the case is won or lost but in practice lawyers who do this type of work cannot recover their fees from the BTE insurer and so they carefully risk manage their case load to ensure that they lose as few cases as possible.

Third Party Funding is a relatively new type of litigation support and is currently unregulated.[12] Essentially it involves selling a share in the prospects of damages to an external party (often a venture capitalist) in return for financial support from that third party for the legal and other costs of bringing the case and an indemnity against having to pay costs if the case is lost. This type of funding cannot benefit from the pooling of risk involved in BTE insurance and to a lesser extent in ATE insurance. As such the cost of support can be very high: figures of up to 40% are mentioned.

None of the above funding methods are predicated on the assumption that litigation is resolved by a judge at trial: less than 2% of civil cases issued in England and Wales reach trial. The most powerful procedural device to produce settlement is Part 36 of the Civil Procedural Rules which ratchets up the cost risk of litigation. The rule is a highly sophisticated system of risk transfer which allows both a claimant or defendant (or any multiple of them) to make offers to settle. For example, the claimant offers to settle for a given figure. If the defendant declines and the claimant matches or beats the figure then the claimant will be awarded additional costs and interest. The defendant can also make an offer to settle which if the claimant fails to 'beat' will, effectively, reduce the cost recovery the claimant can make leaving the claimant out of pocket. These are very effective ways of bringing to parties' attention the transaction costs of litigation.

[11] This so called 'magic bullet' is an accounting device to post a notional premium as a cost to an insurer's account which in due course is either paid by the other party as part of the cost of losing the case or is absorbed into the insurer's overall payment out to the insured if the case is lost. In effect the insurer lends the premium to the insured.
[12] Napier, J., Hurst, P., Moorhead, R Musgrove R and Stutt, C., (2007) '*Improved Access to Justice:Funding Options and Proportionate Costs*', Civil Justice Council

Civil litigation in England and Wales is governed by the Civil Procedural Rules which while preserving the judge as a neutral referee and arbiter of the substantive issues in the case as advanced by the parties gives the judge the leading role in deciding procedural issues by the exercise of case management powers. For example the extent of documentary evidence and the use of experts will be ultimately determined by the judge. A party cannot simply 'outspend' another by demanding the production of masses of documents: the judge will determine if the documents are relevant and that the costs of their identification and production are proportionate.

This overview of the system for individuals suggests a carefully risk managed system as the following table suggests:

| **RISK** | **MANAGEMENT OF RISK** |
|---|---|
| Substantive law or procedural problems | Use of a lawyer as adviser/representative |
| Need to identify recoverable damages | Ditto |
| Risk of winning case but having to pay own lawyer & disbursements because defendant cannot pay | CFA for own lawyers or ATE/BTE insurance/Third Party Funding |
| Risk of winning case but not recovering sufficient costs from Defendant to pay own lawyer's fees | CFA on no win: no fee/win: no fee basis |

The above analysis whilst not suggesting that litigation is a pursuit to be taken on with equanimity does suggest that a careful deployment of risk management techniques can allow litigation risk to be assessed and catered for.

The above conclusion relates to generic individual litigation. In some areas of disputes, such as contract disputes between established businesses, civil action will be one of the methods of dispute resolution routinely considered if negotiations fail – although arbitration and ADR may be preferred. However, in the area of individual consumer redress civil action is rare. One study found that less than 1% of

consumer actions led to court action.[13] There may, of course, be an ongoing cost benefit analysis here reflecting the fact that most consumer claims are modest and that grossing up modest claims in collective action would be, all things being equal, more attractive to individuals in a sort of 'herd' instinct. However, when individual cases are aggregated as groups the risk management measures outlined above become much less effective. While the damages recoverable may simply be the aggregate of individual claims the *risks* are likely to be much higher and this, together with some residual procedural problems, explains why in England, as compared to the USA, collective actions are rare. The question of risk is the *lieitmotif* for considering collective consumer redress by way of civil litigation.

### 4.5. Collective Actions

From a common sense point of view dealing with cases that share characteristics by litigating them together is plainly right. It saves money and resources, particularly judicial resources, by preventing the same issues being litigated and re-litigated in individual actions in different courts. (This is vividly illustrated in the ongoing litigation concerning bank charges which have been mired in complications involving thousands of cases proceeding independently.) Costs continue to 'follow the event' but the costs of generic issues are shared between the parties in the group and, it is assumed, the lawyer's work benefits all the group without having to be repeated. It seems to have the same comparative advantage that Adam Smith found in mass production. Regrettably, the history of group actions in the UK reveals quite as many disadvantages as advantages and some cases, such as the pharmaceutical cases (Ativan etc) have been disastrous.

It is currently impossible to make any sensible estimate of the cost of any type of complex action proceeding in the Multi-Track (the case managed track) of the civil courts in England. While, estimates of costs have to be filed they are not generally regarded as robust or necessarily represent the actual costs of the final outcome. However, in it would be normal for the joint costs of collective actions to run well into six figures. Cases involving pharmaceuticals or industrial disease will have joint costs running into millions.

[13] H.Genn , Paths to Justice, Hart, Oxford, 1999 p. 156

In considering collective actions three interwoven themes emerge in relation to procedure and finance:

- Procedural Issues: The Opt In/Opt Out Debate
- Funding Issues & Cost Mitigation
- Collective actions proceeding by way of a representative/specified body

Collective actions have been a matter of great concern for at least a decade in England and of increasing interest in Europe. One off litigation — business against business; individual against individual etc — remains the bedrock of dispute resolution and litigation. However, the process of globalisation; national and international mass marketing and production inevitably leads to an increasing emphasis on 'massification' the emergence of groups of victims of actionable disease or injury or civil wrong.[14] This is reflected in a series of reports which have attempted, not wholly successfully, to address the question of access to justice in relation to collective issues. The main reports which have informed our work are:

- Lord Woolf's Access to Justice Final Report (Chapter 17)[15]
- OFT's response to the EU consultation on consumer collective redress benchmarks[16]
- EU Commission re Third Party damage claims in competition[17]
- Civil Justice Council Reports [18]
- Reports to the Northern Ireland Legal Services Commission on development of a Contingency Legal Services Fund (CLAF)[19]
- Professor Mulheron's research[20] into class actions and collective redress.

[14] Mulheron, (2004) The Class Action in Common law Legal Systems, Hart Publishing
[15] http://www.dca.gov.uk/civil/final/contents.htm

[16] http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft983.pdf

[17] See footnote 10 for reference
[18] See footnote 12 for reference. (This report builds on an earlier report ' Improved Access to Justice - Funding Options & Proportionate Costs' http://www.civiljusticecouncil.gov.uk/publications/pr_0905.htm) of which Professor Peysner was co-author)
[19] See J.Peysner 'Follow the Money: Money Damage Cases in Northern Ireland' in the anthology , Transforming Lives: Law and Social Process, Legal Services Research Centre, London, 2007

Dr. Christopher Hodges' work on regulation enforcement and compensation[21] which looks at the better regulation agenda and the implications of this and the Macrory report, Hodges work on regulation and civil justice[22] and his work on regulating consumer protection.[23]

The essential difficulty in most cases, particularly personal injury cases, is that cases may be both similar and different. They may share a common basis on which to establish liability but the damage claims, the quantum, may be quite different or there may be issues of contributory negligence that divides one case from another. Time saved by trying the cases together may be lost by arguments over these aspects.

### 4.6. Procedural Issues: The Opt In/Opt Out Debate

The Civil Procedural Rules instituted a specific set of rules for the aggregation and case management of cases which in accordance with the overriding objectives of the rules are more cost effective and justly tried together rather than separately: a Group Litigation Order (GLO). However, assuming that, as stated above, a modern consumer society is marked by mass production and mass consumerisation the fact that many individuals or small businesses share potential claims is not reflected in the number of group actions/claims actually brought – some 62 since 2000. A key reason for this is that a GLO requires a positive step by a prospective claimant to 'opt in' to join the 'club' to obtain all the benefits and suffer any detriments. This compares with the US style Opt Out system which establishes a judicially approved class of potential claimants, of which only a few may be actively involved at this stage. Many claimants are effectively 'in' the class action without having to take a

[20] Mulheron (2008) 'Reform of Collective Redress in England & Wales: A Perspective of Need', a report for the Civil Justice Council (http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf)

[21] C. Hodges 'Encouraging Enterprise and Rebalancing Risk: Implications of Economic Policy for Regulation, Enforcement and Compensation' *European Business Law Review* (2007) 6: 1231 and C. Hodges *The Reform of Class and Representative Actions in European Legal Systems*, Hart, Oxford, 2008.

[22] C. Hodges, 'Competition enforcement, regulation and civil justice: what is the case?' *Common Market Law Review* 43: 1-27, 2006.

[23] C. Hodges, 'Collectivism: Evaluating the effectiveness of public and private models for regulating consumer protection' in W. van Boom and M. Loos (eds), *Collective Consumer Interests and How They Are Best Served in Europe* (Kluwer, 2007).

step and may become actively involved to claim their share of damages or benefits at a later stage.

The Opt Out system might appear unfair: why should a citizen with a contingent claim have it resolved with other claims without the individual's full and free consent? The main justification is that if efficiency suggests that issues should be dealt with together then opt out remains possible (if difficult) and, in any event, the whole process is carried out under judicial control. Most importantly, the claimants' actual or prospective membership of a class does not have financial consequences. The general pattern in the USA is that cases can be brought by claimants with only limited exposure to paying the other side's costs and fees if the case is lost. Their liability for their own expense is limited by the wide availability of contingency fee arrangements by claimant lawyers[24] and the fact that expert fees and other outgoings may be absorbed by these lawyers. This approach which offers a 'free ride' to claimants is particularly prevalent in class actions.

It would be wrong to assume that this system guarantees complete involvement by all prospective victims in the claim and thus offers the most just and, subject to a threshold of harm necessary to enter the class, the most efficient approach. General inertia; suspicion of lawyers even if they are offering a 'free lunch' and opportunity cost (even the most efficient system will require the claimant to do something in connection with the claim when they could be doing something else) will cap involvement.

Whatever, the limitations, it seems in accordance with common sense that 'opt out' procedures are likely to maximise involvement in a class action while involvement in an 'opt in' group actions will inevitably be limited. Mulheron's report reviews the limited empirical evidence in both common law and civil law systems and reports on a very striking difference between rates of participation between the two regimes with 'opt in' being markedly less inefficient in involving claimants with potentially good claims. Mulheron suggests that a move towards 'opt out' i.e. a class action of some nature, is a necessary solution to resolve the 'unmet need' for reform of collective redress mechanisms in English civil procedure.

[24] A contingency fee like a CFA is dependent on the result of the claim. However, a contingency fee is not based on a multiplier of normal fees but a *percentage* of damages

### 4.7. Funding Issues & Cost Mitigation: the Key Issue

The difficulty with this debate is that it only takes the argument so far, 'opt out' (Class Actions) may be more efficient in aggregating good claims than 'opt in' (Group Actions) but this is far from the end of the matter. The concerns over costs noted above go to the heart of the argument between proponents of class actions and group actions and has not yet been comprehensively addressed.

Class actions take place in the USA in an effective regime of no cost peril for members of the class. Entrepreneurial lawyers act as agents for the class at their own risk (at least in respect of opportunity costs and outgoings). To create a new 'opt out' class action procedure in England without addressing the question of costs would create a massive anomaly. If the normal 'costs follow the event' rule were maintained then this is satisfactory if the case is won. However, if the case is lost who pays the costs? While the claimant class might be insured against liability this is theoretical as ATE insurance has proved to be very difficult to obtain in group actions because of the greater and more unpredictable risk. Third Party Funding might be available but at a high cost. Is it just to force a party who might be willing to 'opt in' and take the cost risk into a class where the funder will take 40%?[25]

It seems that creation of an 'opt out' system would require a comprehensive limitation to the 'cost follows the event' rule. There are two approaches that could be adopted within the current civil procedural environment: neither are satisfactory for this purpose.

Protective cost orders[26] allow claimants bringing cases against public authorities or public authorities without funds to apply to the court for the costs of the action to be capped or for them to be indemnified against costs entirely. These orders are intended to be exceptional and to recognise that some types of litigation are in the public interest and should not be constrained by cost pressures.

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recovered. This type of fee is not currently legal in England where a case has been issued in the court.

[25] This is, of course, similar to the position in the USA where claimant lawyers take their costs out of the damages pot before it is shared amongst the class. However, their cut is contractually and judicially controlled and likely to be lower as there is no requirement to obtain an indemnity against costs if the case is lost.

[26] *R (Corner House Research) v Secretary of State for Trade & Industry [2005] EWCA Civ 192* and *R v Lord Chancellor ex p Child Poverty Action Group [1999] 1 WLR 347*

Cost capping is available to the courts in a wider range of civil litigation where there is a danger that costs are likely to be disproportionate.[27] In effect they impose a budget on the case so that parties know the extent of their cost risk. The courts have been reticent in ordering them and they are unlikely to be ordered before or at the start of litigation. As such they leave an uncertain cost risk.

Outside public interest litigation it must be questioned whether it is just for defendants, such as manufacturers in a collective consumer case, to face a case in which, even if they win, they cannot recover their costs. In a sense this could appear to decide the case before it starts as no economically rationale defendant would defend a case if the costs of winning are disproportionate. This threat of 'losing even if winning' was a concern of defendants under the legal aid system and this might be seen to have been resolved by the introduction of CFAs backed by ATE insurance or other methods of funding. However, in a major collective action, assuming that insurance or funding can be obtained, there must be a fear that at the conclusion of the case cost protection is not available when it is called upon.[28]

A partial solution to this issue might be to extend the security of cost jurisdiction[29] to certain group actions. While, it is axiomatic that individuals cannot be debarred from issuing proceedings on the ground that it is suspected that they could not meet an adverse cost order[30] this does not apply to companies if there is evidence that they are in financial difficulties; for example, that they are in administration. There may be an argument that the court should be able to inquire into the bona fides of a group's insurance or funding support before allowing the group to proceed or to proceed on terms.

Alternatively, actions brought by representative bodies might be protected from the normal liability of paying the other party's case if the case is lost *in any event*. This would be an effective way of increasing civil access to justice but as stated above the balance between the rights of claimants and defendants would be disturbed. This

[27] *Smart v East Cheshire NHS Trust [2003] EWHC 2806 QB* "that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred; and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial; and it is just to make such an order"
[28] Some litigation insurers are based on jurisdictions outside the UK where regulation may not be as strict. As stated Third Party funders are currently unregulated and do not have capital requirements.
[29] A requirement that a claimant has to deposit funds or a guarantee by way of a bond so that in the event they lose the case they can meet the other party's costs.
[30] Reflecting the Article 6 right to a fair trial.

problem can be addressed in various ways including the use of cost capping. The more effective shield of a protective cost order is legitimate in public interest litigation because of the potential engagement of human rights and the regulatory function of judicial review. Very few consumer cases, even of collective interest, necessarily have such a strong public interest. For those that do, perhaps involving product safety or financial scams, there may be an emerging model in the court's attitude to environmental cases. Mr. Justice Sullivan in a recent report[31] draws the conclusion that the cost of procedures impede access to justice and there is some suggestion that protective costs orders are becoming more common.[32] Ultimately either cost protection must be available to protect the representative body (assuming it indemnifies the individual claimants) or in the process of registering representative bodies they must pass a test of financial viability. Outside the public sector this will be a high hurdle.

### 4.8 Cost Incentives

The other side of the coin of worrying about mitigating costs is whether costs are enough? In the method of funding under a CFA lawyers will be paid on a basis that is affected by the result as the following table demonstrates:

| **Nature of Cost Arrangement with Client** | **Effect of Success/No Success (As defined in Arrangement)** | **Recoverable from Losing Party** |
|---|---|---|
| Hourly Rate of Charge | Variable according to success usually with a minimum charge. May be reduced to nil if no success and no recovery from the other party | All or part may be recoverable (Subject to Court Assessment and/or negotiation between parties) |
| Success Fee | Variable as a multiplier of hourly charge. Not chargeable if no success. | All or part may be recoverable in addition to hourly charges(Subject to Court Assessment and/or negotiation between |

[31] Ensuring Access to Environmental Justice in England & Wales. http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf
[32] *Litigation Funding* Issue 56, August 2008, page 17.

| | | |
|---|---|---|
| | | parties) subject to a maximum of 100% of the hourly charges |

It follows that the law firm's reward for taking on a case is an increase in its normal charges *not* as in the USA contingency fee system a percentage of the damages recovered. In some group actions this may operate as a dis-incentive as the work involved may be relatively limited and therefore the success fee will be limited but the *chance* of success may also be limited. This reduces the firm's propensity to take the risk because of the risk/reward ratio. Conversely if the damages at stake were high and the work to achieve them was relatively limited then under a contingency fee system the risk (of unrecoverable legal charges by the firm) might be worthwhile. This is not to suggest that lawyer's will not take on cases but simply to note that the decision to do so is a complex one and the merits of the case are only part of a complex matrix.

### 4.9. Collective Actions Proceeding by way of a Representative/Specified Body

An alternative to groups of consumers acting together is for a body to act for them in bringing cases. It is anticipated that such bodies in taking on cases and in deciding how to resolve them would take into account both the claimants interests and the wider public interest. In this way some of the mechanics of the 'opt in/opt out' debate can be avoided. A representative body while not bringing cases in respect of theoretical losses could be more flexible in recognising that both individuals *and* the wider community may have suffered from a defendant's default.

Closer to home actions can now be brought under the *Enterprise Act 2002* for damages for anti-competitive actions. This requires an organisation to apply to be recognised as a specified body of which the Consumer Association ('Which?') is the only current example. The difficulties that the Consumer Association met in obtaining specified body status and the challenges that it met in bringing its first case (in respect of overpriced football shirts) are important exemplars.[33] The involvement of

[33] It is understood that third party funding was not available in this case because there were insufficient claimants joining the claim by opting in.

the Consumer Association in trading activities, although ultimately resolved, did raise difficulties. The case itself was a 'follow on' case in which a finding had already been made that there had been anti-competitive conduct. The following news reports, repeated at length to make the point clear, suggest that even where liability is manifest there will still be difficulties:

> *Philippe Ruttley, a partner at City firm Clyde & Co, acted for consumer group Which? in settling the first representative action brought at the Competition Appeal Tribunal. It was against JJB Sports, which had already been found to have fixed the prices of certain football shirts, including England shirts. There were an estimated two million affected consumers, and Mr Ruttley said plenty opted in to the action – they cut off the list of named claimants at 400 to make the case controllable. Though Mr Ruttley recognises that opt-out can make the complaint much larger, and thus easier to get off the ground, 'opt-in makes it more manageable, if more cumbersome'. The case was run on a CFA, but after-the-event insurers balked, even though liability was not an issue.*[34]

This was followed by:

> *I write regarding the recent news article … in which you reported comments from Philippe Ruttley of Clyde & Co about the representative action taken by Which? against JJB Sports.*
>
> *The article states that 'plenty' of affected consumers opted in to the action but that Clyde & Co 'cut off the list of named claimants at 400 to make the case controllable'. This is not in fact correct. All claimants who came forward to join the action were represented in the case, and there was no point at which we, or Clyde & Co, 'cut off' the list of claimants.*
>
> *As your article reports, there were an estimated two million consumers affected by the price-fixing of football shirts by JJB Sports and others. The fact that the participants in the case were numbered in the hundreds is a direct result of the difficulties in bringing these types of compensation claims. The passage of time between the overcharging and the action, and the relatively small amount of compensation, being just two examples.*

[34] 'Class Actions will make claims easier' Law Society Gazette, 2008

*Despite this, the agreement reached with JJB Sports was a good deal for all of the affected consumers. Those who did not join the case still have the opportunity to claim £10 compensation by taking their shirt or proof of purchase into a branch of JJB Sports.*

*Dr Deborah Prince, head of legal affairs, Which?*[35]

These reports vividly illustrate the very real difficulties of group litigation in what can be seen as the clearest type of case where liability is not in issue.

How far could this model be adapted to be used for consumer redress? Here we must speculate in uncertain territory. Assuming that the costs and funding issues could be resolved and appropriate powers were available (which does not appear to be currently the case) then could and should representative bodies be available to take up the cudgels on behalf of consumers. The advantage of this approach is that representative bodies will take into account the wider public interest in deciding whether or not to bring a case and therefore this type of litigation will be less likely to attract an accusation of excessive litigation and 'fat cat lawyers' exploiting 'class actions' as is currently hotly debated in the USA.

The coverage of representative bodies should be such that both national and regional redress can be addressed. A trader using bad practices and causing injury in one region should not be able to avoid redress simply because there is no national dimension. Further, in so far as restorative justice marches hand in hand with civil action it is likely to be just as appropriate on the local stage. Indeed if the model involves consumers identifying themselves as an injured group and seeking restoration then this may often be based on a community.

Who might such representative bodies be? The obvious answer would seem to be TSOs who are in the front line of identifying and regulating bad practices; collect evidence and liaise with the public. They also routinely co-operate nationally and regionally.[36] As such they could act both in respect of redress for bad practice that affects the whole country or is limited to a local area. However, our research

[35] A touch of Class' Law Society Gazette, 13 March 2008
[36] E.g. Staffordshire TSO took the lead as regulator for the Claims Management Sector. Regional scambuster teams bring together a number of TSOs and other organisations. See: http://www.berr.gov.uk/whatwedo/consumers/enforcement/trading-standards/scambusters/index.html

suggests that they are unlikely to wish to add to their regulatory burden and their concern over being 'judge, jury and executioner' under the new regulatory regime might be reflected in not wishing to be 'debt collectors' as well. Further, they are under resource pressure and are unlikely to be prepared to enter into a novel and challenging jurisdiction without fresh resources.

Additionally, TSOs are not law firms. Their normal model is to enter into arrangements with local authority legal services to act for them in cases which they choose or are unable to prosecute themselves. If TSO's were to act as representative bodies then it is unlikely that they would instruct those local authority bodies as they in turn are not law firms in the traditional sense but in house lawyers acting for a constrained group of clients in the same 'business' (local public services) and not for the general public. It is likely that TSOs would tender out the legal work to entrepreneurial lawyers prepared to conduct cases on a conditional fee basis on behalf of the ultimate client/consumer.

If not TSOs are there other bodies that might fit the bill? While there is no network of local consumer associations as such there are a number of bodies such as law centres, CABs regional advice agencies and issue specific charities which might wish to offer themselves as representative bodies. Many will have a national and local reach. However, they differ in their resources and cannot be said to be capable of being a network of representative bodies offering the same access to justice to the public in each and every area of the country. Again, very few local organisations (apart from law centres) employ lawyers and those lawyers are unlikely to have the resources to bring large civil actions. It seems that private law firms would have to be engaged on the same basis as above.

The identification of representative bodies does not produce an answer to the question who funds the cases? While, the law firms will be prepared to act on conditional fees in appropriate cases this still leaves the liability for expenses (expert fees; forensic accountants etc) which must be met and the potential liability for another parties costs if the case is wholly or partly unsuccessful. As discussed above the insurance market is not attracted to ATE cover in group cases. Third Party Funders might wish to be involved. As discussed at the European level in relation to competition damage claims a Contingency Fee Legal Aid Fund to indemnify

claimants and instruct lawyers in return for a top slice from damages has its attractions and is being discussed at EU Commission level.[3738] This model has the merit of acting in the public interest but without calling on the public purse (except for pump priming) but would almost certainly require legislation to introduce it.[39]

In so far as all the models suggested above will inevitably involve entrepreneurial law firms acting under conditional fees it does suggest that consideration should be given to firms acting not just as agents for agents (the representative bodies acting for consumers) but directly for consumers. This would mirror the US approach of private attorneys' general enforcing public good through private action[40]. So far this approach has not been attractive to policy makers and the public because of the fear of a 'compensation culture' and law firm activity has been limited for funding reasons. However, in our view such an alternative cannot be excluded from the mix of possible outcomes.

### 4.10 Ombudsmen as Representative Bodies

Ombudsmen are increasingly becoming more active and creative in dispute resolution. Examples of such active agencies are the ACCC in Australia, the Nordic Consumer Ombudsmen and the public sector Ombudsmen in the UK who in their consideration of complaints can also recommend remedies that consider the effect of a practice or decision on others. This issue is explored further in the analysis of restorative justice measures contained in Section 5 of this report.

Further, the Nordic Consumer Ombudsmen (Denmark, Norway, Sweden & Finland) in different ways are empowered to act as representative bodies on behalf of groups of victims in civil courts. This approach has much to commend it and would allow the public interest to be acknowledged in limiting litigation costs; encouraging mediation and adopting opt in or opt out arrangements as appropriate. Certainly, a consumer ombudsman with full or partial protection against adverse costs if the case is won would be in a very powerful position to negotiate a settlement with a defendant company or companies. However, such a development in England would require

[37] See A.Riley & J.Peysner, 'Damages in EC Antitrust Actions: Who Pays the Piper', *European Law Review*, 2006, pp 748-761

[38] See footnote 6

[39] There is some suggestion that the Legal Services Commission may have the powers to offer such an approach.

[40] See article referred to in footnote 32