

SUPER-COMPLAINTS

Guidance for bodies
seeking designation as
super-complainants

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GUIDANCE FOR BODIES SEEKING DESIGNATION AS SUPER-COMPLAINANTS

Introduction

1.1 The Enterprise Act 2002 (the Act) gives certain designated consumer bodies¹ the right to make a “super-complaint” where they consider that there are market features, (such as the market structure or the conduct of firms operating within it) that may be significantly harming the interests of consumers. The market in question may be regional, national or supranational (where the UK forms part of that market). Individual consumers do not often have access to the kind of information necessary to make a judgement about market failure and so the aim of the procedure is to encourage groups who represent consumers to make relevant super-complaints on their collective behalf. The OFT, or where appropriate the relevant sectoral regulator²; will be obliged to respond to a super-complaint within 90 calendar days.

1.2 The Act enables the Secretary of State to designate a body only if it appears to her:

- to represent the interests of consumers of any description, and
- to meet such other criteria that she must publish

1.3 The designation will be made by statutory instrument and is subject to the negative resolution procedure. From 31 December 2006 any new designations will be made once yearly, in October, and applications for designation in October of any year must be submitted by 30 April of that year at the latest. Further details can be found at paragraph 1.30.

1.4 This guidance is for consumer bodies that wish to apply to be designated as “super-complainants”. Separate guidance on making super-complaints is available from the OFT at www.oft.gov.uk.

The criteria

1.5 In addition to satisfying the Secretary of State in accordance with section 11(6)(a) of the Act that they represent the interests of consumers of any description, consumer bodies must also demonstrate that they fulfil the following additional criteria:

- (1) The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity.
- (2) The body can demonstrate considerable experience and competence in representing the interests of consumers of any description.

¹ “Designated consumer body” means a body designated by the Secretary of State by order.

² A sectoral regulator designated by order under section 205 of the Act.

- (3) The body has the capability to put together reasoned super-complaints on a range of issues.
- (4) The body is ready and willing to co-operate with the Office of Fair Trading (OFT), and/or with any other authority, body or person having responsibility for responding to super-complaints. In particular, the body agrees to take account of any guidance issued by the OFT on the making of super-complaints.
- (5) The fact that a body has a trading arm will not disqualify it from being designated provided that the trading arm does not control the body; any profits of the trading arm are only used to further the stated objectives of the body; and the body has established procedures to ensure that any potential conflicts of interest are properly dealt with.

Guidance on the criteria

Enterprise Act Section 11(6)(a)

“The Secretary of State may designate any body which appears to him to represent the interests of consumers³ of any description.”

1.6 This is a broad criterion, which encompasses the interests of consumers generally, or specific groups of consumers. This could include organisations that protect the welfare of the public generally, including in their capacity as consumers, those who represent disadvantaged groups who might have special needs as consumers and those who represent consumers of specific products or services (although within this the body must have the capability to put together reasoned super-complaints on a range of issues as set out in criterion 3).

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

- promoting high standards in the quality of goods and services provided to consumers;

³ A “consumer” means any person who is -

(a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them;
or

(b) a person for whom services are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them;

and who does not receive or seek to receive the goods or services in the course of a business carried on by him.

Definition taken from section 183 of Enterprise Act as provided in section 11 (6)(b)

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

Additional criteria

Criterion (1)

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

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

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

- details of the constitution of the body including its legal or statutory status, its board and/or management structure and affiliations to other bodies

- the current list of directors (including non-executive directors), partners or principal officers of the organisation and any other person who could be said to exercise control of the body;
- *Curriculum vitae* (CVs) of the directors, partners or principal officers of the organisation; where this is not included on the CVs, a current list of directorships, shareholdings and any other substantial interests in other companies held by directors, partners or principal officers of the organisation and any other person who could be said to exercise control of the body;
- at least two years accounts, or where this is not possible an explanation of why these accounts are not available.
- details of any shareholdings in the organisation or its trading arm
- details of the sources and extent of funding of the organisation by other bodies including private enterprises

1.10 The past conduct of the individuals (directors, partners, or principal officers) who manage or control the organisation may impact on the way in which it would exercise powers under the Act if it were to be designated. This will depend on the circumstances, including the degree of influence of the individual concerned. In appropriate cases the Secretary of State will take into account evidence of the integrity of such individuals and of the extent to which the decisions that individual may take in relation to the organisation could be influenced by financial or other improper considerations. Applicant organisations should therefore disclose any information which they think may be relevant, particularly with regard to those issues listed below in paragraph 1.11.

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

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

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

Criterion (2)

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

1.13 This criterion builds on section 11(6)(a) of the Act, which requires applicants to demonstrate that they represent the interests of consumers of any description. Applicant organisations should provide the Secretary of State with a comprehensive description of their purpose and activities, the sectors they cover, and evidence of how long the organisation has been in existence. This should be as concise as possible and is intended to ensure that the organisation has a track record demonstrating experience and competence in representing the interests of consumers.

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

- experience of acting in the interests of consumers – whether generally or particular groups of consumers, and over what period;
- competence within, or available to, the organisation – for example, legal advisers or case officers familiar with consumer law and/or dealing with consumer problems.

Criterion (3)

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

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

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

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

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

Criterion (4)

The body is ready and willing to co-operate with the Office of Fair Trading (OFT), and/or with any other authority, body or person having

responsibility for responding to super-complaints. In particular, the body agrees to take account of any guidance issued by the OFT.

1.19 Applicants will be required to indicate a readiness and willingness to cooperate with bodies such as the regulators that will be designated by order under section 205 of the Act. Failure to co-operate may result in the removal of designated status.

1.20 This criterion also requires designated bodies to take account of any guidance issued by OFT on how to put together reasoned super-complaints.

Criterion (5)

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

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

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

Review of designation

1.23 The Secretary of State shall when he considers necessary review the designation of any organisation as a designated consumer body under Section 11 of the Act, in order to ensure that it continues to meet the criteria for designation.

1.24 If during the review it is found that the organisation no longer meets the criteria then the Secretary of State will withdraw its designation.

Withdrawal of designation

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

activities or sectors covered the organisation. Designated status will also be removed from any designated consumer body that she believes has abused the super-complaints process. This might be by using the super-complaints process for competitive advantage or commercial gain, or by making frivolous super-complaints.

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

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

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

Changes to the criteria against which consumer bodies are assessed

1.29 It may be that experience will show that the criteria need to be amended. If it is proposed to change the criteria, the Department will consult on the proposed changes. If changes are made to the criteria, the Secretary of State will consider how the changes affect the designation of bodies that then hold designated status.

Application process

1.30 Applications should be sent to:

Marie Cawley
Consumer and Competition Policy Directorate
Bay 417
1 Victoria Street
London SW1H 0ET

1.31. Applicants may wish to refer to the checklist at the end of this guidance which summarises the information to be included in the application. An acknowledgement of the receipt of an application will be sent out within 5 working days.

1.32 Designations will be made once yearly, in October. To provide a transparent application process, all applications will be placed on the DTI website for a period of 12 weeks. To allow time for processing applications and the making of the requisite Statutory Instrument, applicants should ensure that applications are received by 30 April at latest. Personal information relating to Directors and other relevant individuals that would not normally be in the public domain will not be put on the website. Applicants should indicate on their applications any information which they consider ought not to be made public.

1.33 Should any organisations wish to be notified of any applications added to the website then they should inform the DTI. If an organisation considers there is any material information missing or that the information provided in the application is factually incorrect, they should inform the DTI within the 12-week period.

1.34 Any questions about the designation process or individual applications should be directed to Marie Cawley at the address in paragraph 1.30, Tel: 020 7215 6771, e-mail: marie.cawley@berr.gsi.gov.uk.

SUMMARY OF INFORMATION APPLICANT ORGANISATIONS SHOULD SUPPLY:

Name and address of the organisation and a contact point for correspondence

Nature of the organisation, purpose, activities and sectors covered and how long in existence (also for any trading arms) – **paragraph 1.2**

Details of the organisation's constitution (e.g. Memorandum and Articles of Association), including its legal or statutory status, its board and/or its management structure (also for any trading arms) – **paragraph 1.9.**

The current list of directors (including non-executive directors), partners or principal officers of the organisation and any trading arms and any others who could be said to exercise control– **paragraph 1.9.**

Curriculum vitae (CVs) of the directors, partners or principal officers of the organisation and any trading arms and any others who could be said to exercise control – **paragraph 1.9.**

A current list of directorships, shareholdings and any other substantial interests in other companies held by directors, partners or principal officers of the organisation (including any trading arms) and any others who could be said to exercise control – **paragraph 1.9.**

At least two years accounts, or where this is not possible an explanation of why two years accounts are not available. Where there is a trading arm, the accounts should show the sources of income and the purpose for which the income is used – **paragraph 1.9**

Any relevant information on the past conduct of the individuals who manage or control the organisation (including any trading arms) – **paragraph 1.10.**

Evidence demonstrating experience of acting in the interests of consumers/particular groups, with examples and over what period – **paragraph 1.14.**

Evidence of expertise within or available to the organisation - e.g. legal advisers or case officers familiar with consumer law/dealing with consumer problems – **paragraph 1.14.**

Evidence of the capability to put together reasoned super-complaints on a range of issues (e.g. examples of previous papers and research **paragraph 1.15.**

Evidence of being able to deal with any competition and economic issues involved in super-complaint cases – **paragraph 1.17.**

A statement of willingness to co-operate as per criterion 4 – **paragraph 1.19**

If the organisation has a trading arm – an assurance that organisation will not make super-complaints about markets in which they have a commercial interest – **paragraph 1.22**

Any information which the organisation considers is relevant to whether the organisation meets the criteria for designation

A formal undertaking to notify the Secretary of State of any material changes to the information supplied which could be relevant to meeting any of the criteria – **paragraph 1.25**

Information which is considered personal and not normally in the public domain, which the organisation wishes to be omitted when its application is placed on the DTI website must be clearly identified– **paragraph 1.32**