

## CONSUMER FOCUS BOARD

**PAPER  
15.4B**

<b>Title:</b>	Supercomplaint approach and decision-making process
<b>Purpose:</b>	For decision
<b>Date of meeting:</b>	3 February 2009
<b>Responsible officer:</b>	Ed Mayo
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<b>Attachments:</b>	Annex 1: OFT guidance on evidence which might be provided as part of a supercomplaint

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### **A Overview**

1. Consumer Focus has the power to make 'supercomplaints' about markets that are failing consumers, as a result of our successful application under the Enterprise Act 2002. Possible remedies include: enforcement action by the OFT's competition or consumer regulation divisions; launching a market study into the issue; or making a market investigation reference to the Competition Commission.
2. Our predecessor bodies also had supercomplainant status, which they used with substantial success on issues ranging from energy billing to home credit.
3. This experience suggests that there is power in threatening, as well as making supercomplaints in some markets. It also indicates that although the supercomplaint process does not require us to replicate the work of a regulator, there is usually a reasonable amount of follow-up worked needed once a supercomplaint has been submitted. In any event, we should not exercise these legal powers lightly, given that any submission leads to at least an initial investigation which ties up the resources of regulators and companies.

### **B Action for the Board**

4. The Board is asked to discuss our general approach to supercomplaints and agree the decision-making process for individual supercomplaints.

## **C The key issues**

5. Consumer Focus has the power to make 'supercomplaints' about markets that are failing consumers, as a result of our successful application under the Enterprise Act 2002. Section 11 of the Act defines a supercomplaint as a complaint submitted by a designated consumer body<sup>1</sup> that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'. This covers both market structure and the behaviour of one or more suppliers within it; and the market concerned can be regional, national or supranational (although only UK elements of the latter can be investigated). Supercomplaints can be made to the Office of Fair Trading, Ofcom, Ofgem, Ofwat, the Rail Regulator and the Civil Aviation Authority; and the body concerned is required to publish a reasoned response within 90 days.

6. Possible remedies include: enforcement action by the OFT's competition or consumer regulation divisions; launching a market study into the issue; or making a market investigation reference to the Competition Commission.

7. Our predecessor bodies also had supercomplainant status, which they used with substantial success. Energywatch made a supercomplaint to Ofgem on billing processes in 2005, which led to the creation of an ombudsman. Postwatch threatened an early supercomplaint to Postcomm on the terms and conditions for businesses, which resulted in these being changed. The National Consumer Council made a supercomplaint to the Office of Fair Trading in 2004, which resulted in a Competition Commission inquiry and a series of remedies being put in place to make the market work, and another in 2008 to Ofcom on the price of phone calls from prisons, which led to a series of recommendations on both the current arrangements and the approach to future contracting by the Prison Services in England & Wales and Scotland. NCC also threatened two supercomplaints. One was on car servicing, which directly resulted in the creation of a new self-regulatory scheme, the biggest step forward in 30 years in this area of high consumer detriment. The other was on the dispute between Sky and Virgin Media on provision of the 'Sky basics' channels to Virgin customers, which contributed to the announcement by Ofcom of a wider investigation into the market for Pay TV.

8. We now need to consider how we might want to use this legal power, building on the experience of our predecessor bodies, and agree the decision-making process. Paragraphs 9-15 below consider some of the principles that might guide our approach, while paragraphs 16-18 propose a process for deciding when to exercise our powers.

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<sup>1</sup> Apart from Consumer Focus, other designated supercomplainants are currently Which?, Citizens Advice, the Consumer Council for Water, the Campaign for Real Ale (CAMRA) and the General Consumer Council of Northern Ireland.

9. A supercomplaint might come from any part of our ongoing work programme. It is possible that the Complaints of General Interest programme team will be a particularly important source of possible supercomplaints, and of course we will also draw on complaints to the Extra Help Unit and the work of our policy and public affairs staff. However it is worth noting that we are obliged by the Consumers, Estate Agents and Redress Act 2007 to refer to Postcomm or Ofgem some complaints of general interest or complaints concerning vulnerable consumers i.e. these would not fall within the supercomplaint process.

10. The experience of our predecessor bodies strongly suggests that the power to make a supercomplaint is a tool rather than an end in itself. We should investigate and submit supercomplaints only when they can help us achieve our objectives in particular markets – we should not do them lightly. This includes ensuring that we explore potential remedies before submitting any supercomplaint, so that we are at least reasonably confident that the issues raised could be resolved by some form of action by the OFT, Competition Commission or one of the other regulators. Nevertheless, we should remain alive to the potential for supercomplaints in all areas of our work.

11. We should also recognise the power of threatening as well as actually submitting a supercomplaint. As noted above, our predecessor bodies found this effective in a number of cases. It is worth noting that such threats have value only if the people we are trying to put pressure on – whether an individual business, an entire industry or in some instances the regulator itself - genuinely believe that we might submit a supercomplaint. This suggests a need to submit a valid supercomplaint at least occasionally, to keep the threat real.

12. Each supercomplaint that we submit should be well-argued and backed by evidence. The scale of the work will depend on the nature of the market and the circumstances in which we are submitting the supercomplaint. One of the main attractions of the supercomplaint procedure is that it allows us to achieve high impact with limited investment, by using modest Consumer Focus spending to leverage the much greater resources of the OFT and other regulators. We should not seek to replicate the regulators' roles in the process.

13. The OFT has issued useful guidance on what is required to support a supercomplaint, emphasising this point:

*'When making a complaint the super-complainant should provide a paper setting out the reasons why in its view a UK market for goods or services has a feature or combination of features which is or appears to be significantly harming the interests of consumers and should therefore be investigated. This paper should be supported, wherever possible, by documented facts and evidence... Supercomplainants are not expected to provide the level of evidence necessary for the OFT or a Regulator to decide that immediate action is appropriate. However, they should present a reasoned case for further investigation. Complaints that are, or that appear to be, frivolous or vexatious will be rejected.'*

14. Annex 1 sets out the OFT guidance on the kind of evidence which it might expect to be provided as part of a supercomplaint – this list is intended to be non-exhaustive.

15. The decision about the nature of any proposed work should be taken on a case-by-case basis, bearing in mind the degree of proof needed by the regulator and our own research quality standards. This should include an assessment of our own capabilities, in terms of any necessary expertise that we either have in-house or can buy in, and our ability to access the market data that we might need to support a complaint.

## **D Proposal**

16. The Board is asked to agree the general approach as set out above and decide the process for deciding whether to submit potential supercomplaints.

17. It is proposed that the Board should decide in principle whether to make an individual supercomplaint, with the final detailed text agreed by the Senior Management Team. In exceptional instances, a supercomplaint might need to be submitted within a tight timescale – if this is the case, we would propose agreeing a suitable process with the Chair, ensuring that there is Board involvement.

18. Where the market concerned includes Scotland, Wales and/or (for mail) Northern Ireland, the relevant national Board will also need to be involved in the decision. We propose that the Board delegates to the relevant national Board the ability to submit supercomplaints, subject only to reporting the fact to the Consumer Focus Board in advance, where the market is confined to one of these nations. Where there are separate but parallel markets in one or more of the nations, we may want to consider branding the supercomplaint as a joint initiative by Consumer Focus and one or more of Consumer Focus Scotland, Consumer Focus Wales and Consumer Focus Post (Northern Ireland), to emphasise the geographic scope of the different markets and achieve impact within the relevant nations. This is for example what NCC, SCC and WCC did with regard to phone calls from prisons, where there were two separate markets, one covering England and Wales and the other covering Scotland.

## **E Resources**

19. As noted above, supercomplaints need not be resource intensive, as the point is not to replicate the work of a regulator and we should submit them only when they fit into our existing agenda of work.

20. However it is worth noting that the experience of our predecessor bodies has been that, even given the points made in paragraph 8 and 9 above, the supercomplaints process can be relatively time consuming, not least once the supercomplaint has been submitted as regulators tend to come back with requests for further details and discussions. Normal planning is likely to under-estimate the time involved; although this may become less likely as both we and regulators become more used to the supercomplaint process.

**F Next steps**

21. Once the Board has agreed the general approach and process for supercomplaints we will brief staff across the organisation and train new staff as and when they join us. We will report to the Board on a quarterly basis if we believe we have any potential supercomplaints, as well as providing an update on any supercomplaints which are planned or have been submitted.

## **Annex 1: OFT guidance on evidence which might be provided as part of a supercomplaint**

1. Details of the market (nature of the good or service) to which the complaint relates and whether there are particular aspects of the good or service relevant to potential problems for consumers such as infrequency or high cost of purchase.
2. Details of the nature of the complaint.
3. Whether the complaint relates to the market as a whole or only to certain suppliers or parts of the market.
4. How consumers' interests are harmed and an indication of the scale of detriment.
5. Whether all or only certain consumers of the relevant good or service are affected by the aspect(s) of the market to which the complaint relates.
6. Whether there is disproportionate purchase of the good or service by particular vulnerable groups of consumers such as the elderly or those on low incomes.
7. Available information on market shares by volume and value of suppliers in the relevant market for the good or service. Any information on changes in market shares over the past few years.
8. Evidence of barriers to entry to the market by existing or new suppliers.
9. Information on the level and impact of buying power in the relevant market and whether any benefits from exercising buyer power are passed onto consumers.
10. Details or information on:
  - current retail/wholesale prices (as relevant) for the good or service
  - discounts to some or all customers
  - different prices charged to different classes or categories of customer
  - levels of price dispersion in the market more generally
  - price trends over the past few years
  - comparative information on different suppliers' prices and the timing of price changes.
11. Information (if available) on the general level of profitability of suppliers in the relevant sector for the good or service.
12. Any evidence of practices by suppliers in the sector that may be restricting or distorting competition.
13. Any evidence of high-pressure selling techniques or other sales practices that could be having detrimental effects on consumers.

14. Whether there are complex contractual terms for the good or service.
15. Whether the relevant good or service is only supplied together with other goods or services (rather than separately).
16. Details of any costs incurred by consumers as a direct result of switching to alternative suppliers of the relevant good or service. Evidence of the degree of switching.
17. Any available indicators of the general level of quality of goods or services in the relevant sector.
18. Any available indicators showing how well-informed consumers in the sector are relative to suppliers about the quality and prices of goods and services offered by different suppliers.
19. Information relating to whether complex aspects of the good or service, the way in which it is supplied, or difficulties in assessing quality, presents particular problems for consumers
20. Details of means of redress available to consumers of the good or service who have complaints, and their effectiveness.
21. Details of any codes of practice, whether or not approved by the OFT, that apply to the good or service.
22. Details of relevant policies and legislation undertaken by local or central government, EU or other public bodies.
23. Details of organisations, such as governing bodies, interest and lobby groups that may affect and/or be affected by the market in question.