



Which? Super-complaint – Industry briefing

14th January 2016

Legal background

- Super-complaints are made under **section 11 of the Enterprise Act 2002**
- They can only be made by a '**designated consumer body**' which means a body designated as such by Order of the Secretary of State – Which?
- The complaint can be served on the CMA or a regulator designated to receive such complaints again by Order of the Secretary of State.
- The process is intended to be a **fast-track system** for designated consumer bodies to bring to the attention of the CMA / Regulators, **market features** that appear to be significantly harming the interests of consumers
- A market feature could be **structure** of the market and/or the **conduct** of those in the market;
- ORR must, within **90 days** from the day after the complaint is received, publish a response stating how we propose to deal with the complaint , and in particular:
 - (a) whether we have decided to take any action, or to take no action, in response to the complaint, and
 - (b) if we have decided to take action, what action we propose to take.
- Our response must state our reasons for our proposals.

Previous super-complaints

- **Misleading and opaque practices in the grocery market (2015)** - Which? to CMA
- **Travel Money (2011)** – Consumer Focus to OFT
- **Credit and debit surcharges (2010)** - Which? to OFT
- **Supply of beer in UK pubs (2009)** - Campaign for Real Ale to OFT (no action taken)
- **Restrictions on business structures & direct access in the Scottish Legal Profession (2007)** - Which? to OFT
- **Credit Card Interest calculation methods (2007)** - Which? to OFT
- **ISAs (2010)** - Consumer Focus to FSA
- **Energy billing (2005)** – energywatch to Ofgem
- **Payment Protection Insurance (2005)** – Citizens Advice Bureau to OFT
- **Northern Ireland Banks (2004)** - Which? to Competition Commission
- **Care home sector (2003)** - Which? to OFT
- **Mail consolidation (2003)** – Postwatch to OFT (not progressed)
- **Doorstep Selling (2002)** - Citizens Advice Bureau
- **Private dentistry market (2001)** - Which? to OFT

Process

- Carry out wider enquiries with a view to **testing the evidence provided and obtaining any further information we consider necessary in order to form a reasoned view** on whether the super-complaint justifies further action.

Exactly how it does this will be determined on a case by case basis but may involve:

- ✓ internal research
- ✓ public requests for information
- ✓ approaching any relevant businesses or trade associations for information
- ✓ approaching consumer organisations, government departments and/or other public bodies for information, or any other necessary action.
- ✓ the super-complainant will be kept informed of progress and may be contacted for clarification of issues or for further information as appropriate.

Overview of the complaint

Which? has asked ORR to launch an investigation which addresses the following:

- 1. The extent to which TOCs are contributing to a low proportion of passengers securing their rights to compensation for delays (Section 2 – evidence of conduct);**
- 2. The drivers of TOCs' behaviour, and the pervasiveness of these drivers within the sector (Sections 3, 4, 5 – market / regulatory structure & detriment caused);**
- 3. Changes that are needed in regulation, and ultimately by TOCs, to ensure that passengers are aware of and are able to secure their rights to compensation (Section 6 -Remedies).**

Key evidence presented

1. $\sum_{\text{ALL TOCs}}$ (No. of TOC passenger journeys X TOC proportion of CaSL trains) = **~47 million** (Which? calculation)
2. Latest ORR **complaints data** – punctuality/reliability = **27.9%**
3. ORR research (2014) - **Passenger compensation and refund rights for delays and cancellations**
<http://orr.gov.uk/publications/reports/rail-passenger-compensation-and-refund-rights>
4. Transport Focus research (2013) - **Understanding rail passengers - delays and compensation** (updated due 2016) <http://www.transportfocus.org.uk/research/publications/understanding-rail-passengers-delays-and-compensation>
5. **Which? Train Satisfaction Survey** (November 2015) – 6,986 members of the public surveyed about train journeys in the last 12 months;
6. **Which?** review of **TOC Passenger Charters** (November 2015)
7. **Which? Mystery Shopping Exercise** (September 2015) – Which? fieldworkers visited 103 manned rail stations in England and Wales (TOC and NR managed stations)
8. Regulatory evidence from other sectors – **air travel and ferries**
9. Emergence of commercial 3rd parties to inform passengers of eligibility for compensation and to assist claims e.g. Delay Repay Sniper, Delay-Repay.com, TrainRefunds.co.uk
10. Network Rail breakdown of attributed fault for delays (in year to November 14th 2015) & **Which?** estimates of passenger journeys affected [Performance and punctuality \(PPM\) - Network Rail](#)

Remedies proposed

1. New **licence condition** requiring TOCs to raise **PASSENGER AWARENESS** of their compensation rights:
 - Consequently a new regime of monitoring and enforcement – monitoring outcomes for passengers & monitoring TOC actions (inputs such as train announcement)
2. New **licence requirements** on the **PROCESS** for claiming compensation
3. ORR monitoring of **complaints data** to clearly identify levels of complaints about delay compensation
4. Revision to **Schedule 8** compensation arrangements
5. TOC licences to become principal means of implementing & enforcing consumer related requirements on TOCs (**replacing roles of franchises and NRCoC in this area**)

Possible outcomes

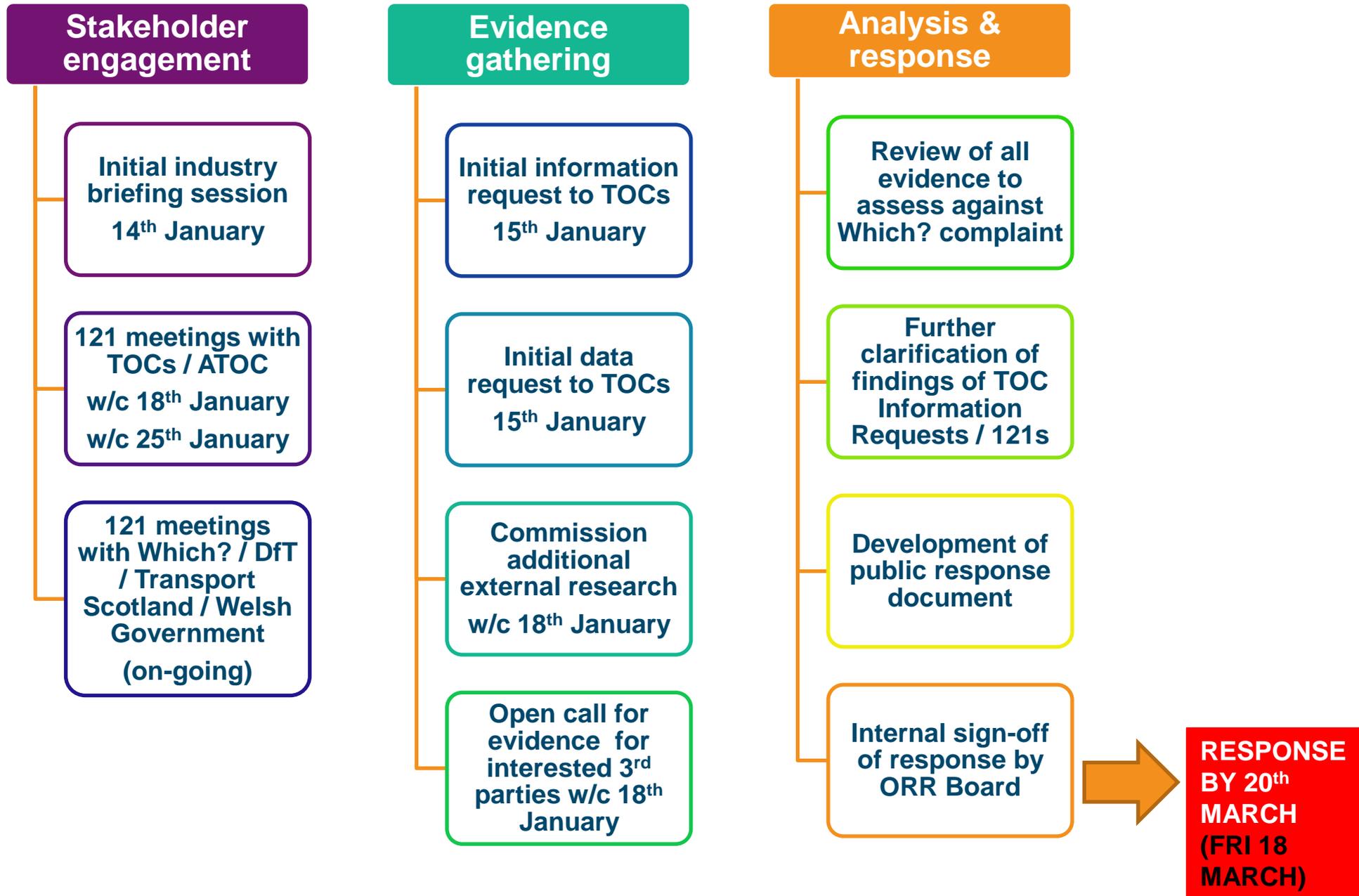
- **Enforcement action** by the ORRs competition or consumer team
- Launching a **market study** into the issue with a potential market investigation reference to the CMA if there is a competition problem
- **Regulatory action** of some other kind e.g. proposals for a new licence condition
- Robust **Industry Self-Regulation (ISR)** in lieu of formal regulatory action
- A **combination of measures** e.g. regulatory / self-regulatory / research / on-going monitoring
- Finding the complaint requires **no action** or is **unfounded**

This list is NOT exhaustive.

What do we mean by Industry Self-Regulation (ISR)? ⁹

FOUNDATION	What is the basis of the initiative? Where do the obligations that the industry are committing to “live” and what is the key document setting out what to expect.
SCOPE	Are all TOCs “signatories” to the initiative – is it binding. For self-regulation to be effective it is not optional and not simply a statement of best practice. It involves binding commitments.
TRANSPARENCY	Is the initiative publicised by all parties, accessible to passengers and stakeholders and does it enable signatories to be held to account if they fail to deliver.
MEASURABLE STANDARDS	Can progress against the initiative be measured and tracked. Are there clear standards of performance or commitments to passengers (drafted in non-industry language)
GOVERNANCE	Has the initiative a clear and sustained governance structure enabling discussion (e.g. independent Chair), review, change control, and external challenge e.g. by the regulator, consumer groups.
INDEPENDENT AUDIT / REVIEW	Is there a publicised process of independent audit / review to demonstrate parties are compliant with the initiative / commitments to passengers e.g. mystery shopping.
REPORTING	Is there regular, formal and transparent reporting of performance at a TOC by TOC level
SANCTIONS	Is there a process for bringing about behavioural change if non-compliance or poor performance is identified.

ORR approach to the super-complaint



Immediate actions & next steps

- Detailed Information Request to be sent to all TOC by cop tomorrow – response requested by **5pm on Friday 29th January**
- Separate Information Request (IR) to open access operators
- Dates and available time slots for 121 meetings will also be circulated tomorrow.
- Responses to ORR website review letter of 17th December (**due 22nd January**) will form part of our analysis of the issues raised in the super-complaint
- Previous TOC communications with Which? – will TOCs share letters with ORR?
- TOCs to send ORR copies of online / station / on-board compensation claim forms – can we receive copies of these by cop **Monday 18th January**