

Investigating, consulting and enforcing

An OFT guide to Part 8 of the Enterprise Act 2002

England and Wales version



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Disclaimer

Make sure you get proper legal advice

This CD is an outline framework only dealing with one fictional case and therefore it should not be regarded as a definitive explanation of the processes involved in seeking a court order in every case. The letters and documents should not be treated as templates for other cases nor should the content in the CD be regarded in any way as a substitute for legal advice.

Paid-for training

The contents of this CD, including accompanying examples of letters and legal documents, may **not** be used in paid-for training programmes.

An introduction from Christine Wade

We are very pleased to be able to offer this new training video on CD.

It has been specially made to help you through the processes of investigation, consultation and enforcement under the Enterprise Act 2002 (the Enterprise Act). We hope you find the content interesting and informative.

The OFT's aim is to make

markets work well for consumers and in order to achieve that aim it is important for us to continue developing strong partnerships with the enforcement community.

The OFT not only has a key role in coordinating action under the Enterprise Act but we also provide case support and training and development. In the past this has usually involved us

coming to see you to do training – and we shall certainly continue our programmes. But we also want to develop our training remit by offering this CD because it has many obvious benefits. It enables many more people to see how to proceed with a case and it can also act as a basic reference point. You can review the material and documents at your own pace; pausing to look

at the relevant documents. You can also print them if that is helpful.

The pack offers material that will allow all of us in the enforcement community to start from a common and consistent base.

The CD is an example of what is involved in the investigation, consultation and enforcement processes. It is closely based on a real

case which a trading standards department successfully took to court under the Stop Now regime. We have modified the details to show you how such a case might be handled under the Enterprise Act and you will see that it is, in essence, a clear and straightforward process.

This CD is mainly concerned with Part 8 of the Enterprise Act. Parts 8 and 9 are reproduced on the CD.

We also give details of who at the OFT can help with any queries.

We shall look forward to your comments.

A handwritten signature in black ink, appearing to read 'Christine Wade', with a long horizontal flourish underneath.

Christine Wade

Director –
Consumer Regulation
Enforcement Division,
Office of Fair Trading

The CD

What is it for?

The CD has a dramatised court hearing, in which a local authority seeks an Interim Enforcement Order against a trader under Part 8 of the Enterprise Act. The CD explains:

- how and why this particular case was brought to court
- what preparation you will need to do
- what happens during a hearing in court

- the key issues during the processes of investigation, consultation and finally going to court.

You can stop the CD at any time to examine the documents mentioned in more detail – and print them off.

Who is the CD for?

- The CD is for general and designated enforcers and their legal advisers.

How can it help you?

The CD explains how Part 8 of the Enterprise Act can work in practice.

- Part 8 empowers the civil courts to make Enforcement Orders or Interim Enforcement Orders compelling traders to comply with a wide range of Domestic and Community legislation.
- Enforcement Orders replace and expand the scope of what were called Stop Now Orders¹ – though both are similar in terms of the application procedures.

1. The Stop Now Orders (EC Directive) Regulations 2001.

There will be an expectation by the courts that attempts will have been made by enforcers to consult – and perhaps negotiate – with traders about their alleged misconduct before seeking an Enforcement Order.

- It is obviously in the interests of honest traders to obey the law and most are expected to comply readily with informal approaches from the enforcers long before there is any question of asking the court to intervene
- It is with those who will not change their ways of doing business that we are concerned here.



The video case in a nutshell

The video deals with the fictional case of Ian Radcliff who runs his own business called R & F Security, in the county of Westshire.

R & F Security specialises in the installation of domestic closed-circuit TV cameras and security lights. Ian Radcliff likes to identify housing where elderly people live before cold calling them.

Mr Radcliff gives them

a presentation on the doorstep about the crime rate in the area and how this is giving great cause for concern among local residents. He implies he is working with the police trying to reduce crime.

He tells his customers that he can install a camera, connecting it to their televisions, so they can see who is at their front door without opening it – a facility he knows is

particularly appealing to the elderly. He then tells them that if they buy the security system that day, he can offer a substantial discount.

Customers often agree, handing over cash. The amount might be several hundred pounds – even though the identical security system can be bought at a High Street retailer for considerably less. Radcliff then calls his

associate, who is waiting around the corner, to install the system, which frequently breaks down within a few days.

How Part 8 of the Enterprise Act is being breached

The Enterprise Act says that a wide range of Domestic and EC consumer legislation should not be breached and that enforcers can take action in the civil courts if it is. This is in addition to the existing powers under the legislation listed in the Statutory Instruments covering those Domestic and Community infringements.

Ian Radcliff's business methods break the Consumer Protection (Cancellation of Contracts concluded away from Business Premises) Regulations 1987 which state that consumers have certain rights following a trader's unsolicited visit.



Consumers must be:

- told in writing that they have the right to cancel the agreement within seven days of the agreement being received
- given clear details of how they can cancel.

Ian Radcliff has also breached section 13 of the Supply of Goods and Services Act 1982, which states that work should be carried out with reasonable care and skill.



Consultation first

A court will want to see that there has been a period of consultation with the trader and that the enforcer has tried to get the trader to comply with the law.

Consultation may start with informal approaches through phone calls, visits and informal letters. If these actions do not achieve the desired result, the enforcer might then

consider seeking a formal Undertaking from the trader.

Consider all contact with the trader, whether formal or not, as part of an audit trail which a court can follow to determine how reasonable you have been.

In the Radcliff case there are examples of oral and written attempts to communicate with the trader.

The case timetable – investigation and consultation

We have set out this fictional case study month by month to give you some idea of what happened and when. But it's important to remember that each case is different and you should not use the Radcliff case as a set template for the particular cases you encounter.

You will be able to see the full text of key documents on the CD.

September 2002

Ian Radcliff first came to the attention of Mary Rajes, a trading standards officer for Westshire Council. She was receiving a growing number of complaints about Radcliff.

October 2002

Mary Rajes then tracked him down to his home address, where she told him:

- how he was breaking the law
- that he must give his customers written notice of cancellation in his contracts
- that he must improve the standard of his work.

Radcliff would not accept that he had done anything wrong but he assured the trading standards officer that in future he would comply with the regulations.



May 2003

Nothing further was heard until Mary Rajes received a further 13 complaints in the space of one month.

- These complaints later formed a Schedule of Complaints, which were submitted to the court as an exhibit

Mary also collected seven invoices, handed by Ian Radcliff to his customers.

- These invoices were also later submitted to the court as an exhibit to Mary Rajes' Witness Statement.



June 2003

Mary Rajes tried to contact Ian Radcliff again by visiting him at his home address on 16 and 17 June but she did not get any answer. A neighbour had Radcliff's mobile number, which Mary called. She reached a voicemail and the voice identified himself as Ian Radcliff.

- Mary left him a message with her business address and contact number.

At the same time, Carol O'Brian from West Town trading standards department, the neighbouring local authority, also wrote a letter to Ian Radcliff on 17 June. In the Ian Radcliff case, three different local authorities receive complaints about Ian Radcliff as do the local police. This is not that unusual and if you end up taking enforcement action, you can use evidence from

all of the authorities regardless of where the alleged breaches of the law took place.

- The letter from Carol O'Brian, West Town's trading standards officer, is also an exhibit submitted to the court
- Mary Rajes describes the phone call she had with the police in her witness statement.

July 2003

Undertaking for the purpose of Part 8 of the Enterprise Act 2002

At this stage Westshire Council decide that their more informal approaches to communicate and consult with Mr Radcliff were simply not working. They decided to proceed with a more formal approach and seek an

Undertaking from Mr Radcliff that he would stop the practices causing consumer detriment.

The two trading standards officers from the neighbouring authorities, Mary Rajes and Carol O'Brian, visited Ian Radcliff's business premises.

The door was answered by Mrs Doris Radcliff, who said her husband had left the house 20 minutes ago.

Mary then gave Mrs Radcliff a letter, dated 29 July, telling her it was imperative she give the letter to Mr Radcliff as soon as possible.

- This letter is also an exhibit, forming part of the bundle of documents submitted to the court.

The letter is important because it outlined formally:

- precisely how Ian Radcliff was in breach of the law

- which laws he was in breach of
- the powers that Part 8 of the Enterprise Act gives to enforcers.
- the terms must make it clear that by signing, the defendant agrees to obey its requirements i.e. to obey the law

Attached to the letter was the Undertaking for the Purpose of Part 8 of the Enterprise Act, which required Ian Radcliff to sign stating that he agrees to abide by its terms. In all cases where Undertakings are sought:

- the terms must be unambiguous and clear
- the terms must make it clear that the defendant has 14 days to sign (or seven days where interim action is proposed)
- the terms must make it clear that if the defendant continues to breach the legislation, an Enforcement Order may be sought from the court.

As soon as you have decided to seek an Undertaking, make sure that you have spoken to your legal advisers and that they have advised that you have a strong enough case to proceed. Their help is essential in drafting the content of the letter and the terms of the Undertaking. You should communicate with your legal advisers early on so that they can advise you on the appropriate steps you need

to take on difficult points of law or procedure.

You should not consider such a step unless there is sufficient evidence that would support an application to the court anyway.



Always take a brief objective note of meetings / discussions with a trader highlighting any significant points – these can be useful when drafting statements later and also strengthen your case when the trader disputes what happened.

Notifying the OFT

It is also important that you notify the OFT about your intention to seek an Undertaking. There is more about notifying us on page 37.

August 2003

Mary Rajes returned from holiday. She checked her mail to find that there was no response from Ian Radcliff. She also checked with her colleagues to see if they had heard anything from him – but they had not.

Mary consulted with the OFT to discuss the most appropriate way of bringing about Radcliff's compliance.

The case timetable – enforcement

At this stage Westshire Council decided that reasonable attempts at consultation had failed. They felt that in order to protect vulnerable consumers the only way forward was to seek the intervention of the court and that interim action was justified.

In the meantime, Mary received two further complaints about Radcliff – one from Westshire Police and another from a trading standards colleague in the neighbouring area of Eastshire, who collected a Witness Statement from the complainant, Nigel Pearson in September.

Evidence of consultation

The Enterprise Act requires enforcers to consult properly with the trader.

Mary and her colleagues in neighbouring authorities have investigated the complaint, tried to consult with the trader and laid a clear audit trail for the court to see. They have:

- tried to consult informally with Ian Radcliff

- visited him three times
- made phone calls and left messages
- written letters
- sought an Undertaking.

Being able to show that efforts have been made to consult with the trader is vital before taking court action.

September 2003

Mary Rajes, having spoken with her legal advisers, writes her witness statement for court. In it:

- she explains who she is and her role as a trading standards officer working for a General Enforcer – Westshire Council
- she outlines what has happened since she first received the complaints about Ian Radcliff in September 2002

- she describes her exhibits – the correspondence, the schedule of complaints from consumers and the invoices Ian Radcliff gave his customers.

Another complainant, Audrey Allwood complained to Westshire Council and Mary writes a second Witness Statement.

In it she:

- outlines Mrs Allwood's complaint

- includes a further receipt in which Ian Radcliff has failed to advise Mrs Allwood of her cancellation rights.

The solicitor for Westshire Council looks over the statements to ensure that they satisfy court rules on procedure and also are strong enough to support the case that a breach has been committed.

The solicitor for Westshire Council drafts the Particulars

of Claim for the court. This outlines:

- that the Claimant, Westshire Council, is a General Enforcer under the terms of the Enterprise Act
- why the claimant, is taking the defendant, Ian Radcliff to court
- how the defendant has broken the law
- what the applicant enforcer is seeking.

The solicitor for Westshire Council drafts the Skeleton Argument on behalf of the Claimant. A Skeleton Argument is always prepared by the lawyer who presents the case in court. It needs to be a clear and succinct summary of the case and should:

- outline why there is an application for an Interim Order – and the merits of the application
- outline the attempts at consultation that have been made with the trader
- list the relevant documents for consideration by the court
- point out the relevant legislation affecting the case
- summarise why there is consumer detriment
- outline the defendant's conduct in relation to the case so far.

The court considers the application for an Interim Enforcement Order. You can see what happens in the courtroom on the video. The Interim Enforcement Order:

- forbids the defendant to contravene the relevant legislation
- reminds the defendant that he may be guilty of contempt if the order is not obeyed.

The Interim Enforcement Order stays in place until the full hearing. In this case this is expected to be within six weeks of the Order being granted – but this will vary from case to case.

Notifying the OFT

- It is essential that you keep the OFT fully informed. You must notify the OFT if you intend to seek an Undertaking and you must consult with the OFT before proceeding to court
- Details of how to notify us can be found on the CD and the OFT's website at www.oft.gov.uk

Useful documents

On the CD you will find documents mentioned during the investigation, consultation and enforcement process. These include:

- An example of an informal letter
- The letter accompanying an Undertaking
- The terms of the Undertaking itself
- The Particulars of Claim
- Witness Statements by an enforcer

- Witness Statement by a complainant
- Schedule of Complaints and other exhibits
- Skeleton Argument on behalf of the claimant
- Interim Enforcement Order by the court.

You will also find

- a useful commentary about the key legal and procedural issues
- interim guidance on Parts 8 and 9 of the Enterprise Act
- Statutory Instruments.

Where to go for more help

If you want further information about the material contained on the CD please contact:

Alan Conroy

**Head UK Consumer Enforcement Co-Ordination & Liaison Team
Office of Fair Trading**

**Fleetbank House, 2-6 Salisbury Square
London EC4Y 8JX**

Telephone: 020 7211 8972

e-mail: alan.conroy@oft.gsi.gov.uk

For information about the EETSA pack which guides Enforcer's through the early stages of taking action under the EA2002 contact:

Emma Head

**EETSA Policy Co-ordinator, EETSA Office,
c/o Trading Standards Department**

St. Edmund House, County Hall

Rope Walk, Ipswich IP4 1LZ

Telephone: 01953 857528

e-mail: emma.head@tradstan.suffolkcc.gov.uk

The OFT website

The website has a wealth of information about consumer regulation and the Enterprise Act 2002

www.oft.gov.uk

Enterprise Act publications

The OFT has issued a series of guidance booklets on various aspects of the Enterprise Act. New guidance may be published and the existing guidance revised from time to time.

For an up-to-date list of guidance booklets:

visit

www.oft.gov.uk/enterpriseact

email

enterpriseact.enquiries@oft.gov.uk

or telephone Enterprise Act enquiries on

020 7211 8181

All guidance booklets can be ordered or downloaded from the OFT website or you can request them from the OFT's mailing house by:

Telephone 0870 60 60 321

Fax 0870 60 70 321

Email oft@eclogistics.co.uk

Post EC Logistics,
Swallowfield Way,
Hayes, Middlesex
UB3 1DQ

There are two leaflets summarising the changes brought about by the Enterprise Act –

‘Practical Information, Everything you need to know about the Enterprise Act’ (OFT530).

‘How will the Enterprise Act 2002 change the Competition Act 1998 regime?’ (OFT441).

The OFT and publicity

The OFT’s publicity policy is on the CD. It is for the guidance of other enforcers as a possible example of best practice. It is not intended as the definitive guide to publicity and each enforcer should develop their own policy in line with the needs of their own organisation.

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