

Unfair relationships

**Enforcement action under Part 8 of the Enterprise Act
2002**

OFT guidance consultation response

December 2006

OFT854resp

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CONTENTS

<i>Chapter/Annexe</i>	<i>Page</i>
1 Introduction	4
2 General remarks	5
3 Summary of responses	9
A List of respondents	21

1 INTRODUCTION

- 1.1 This report is a summary of the responses to the consultation on the draft guidance **Unfair relationships: Enforcement action under Part 8 of the Enterprise Act 2002** (OFT854con), published in June 2006. The final version (OFT854) is being published concurrently with this summary. The guidance can be downloaded from our website at www.ofc.gov.uk
- 1.2 The purpose of the guidance is to indicate how the OFT expects the new unfair relationships provisions in sections 140A to 140D of the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) to interact with enforcement powers under Part 8 of the Enterprise Act 2002. It is intended principally as advice and information for businesses, their legal advisers or representatives, and consumer organisations.
- 1.3 The aim of the consultation was to obtain feedback on the draft guidance with a view to producing an improved version for publication.
- 1.4 We received 31 responses to the consultation. Respondents are listed in the Annexe to this report, with the exception of two respondents who asked that their submissions be treated as confidential.
- 1.5 We would like to thank all those who contributed.

2 GENERAL REMARKS

- 2.1 The respondents welcomed the opportunity to participate in the consultation process.
- 2.2 Reactions to some sections of the draft guidance were mixed, and some respondents commented in general terms rather than by reference to specific consultation questions. Overall, however, nearly all felt that:
- all parts of the guidance were needed
 - it contained sufficient cross-references to other material
 - it had no significant omissions.
- 2.3 The majority also felt that it:
- summarised the legal provisions clearly and accurately
 - indicated clearly the kinds of matters to which the OFT may have regard in considering possible Part 8 action
 - provided an adequate summary of the OFT's approach to enforcement.
- 2.4 However, a majority felt that parts of the guidance were not sufficiently clear and needed amplification or clarification.

Definition of 'unfair relationship'

- 2.5 The most common area of concern was the degree to which the guidance sought to define an unfair relationship. A number of respondents felt that the guidance was unhelpful, both to traders and consumer advisors, in not providing examples of unfair relationships. In their view this made it difficult for traders to implement systems or procedures to avoid unfair relationships or enforcement action, and for advisors to guide clients on appropriate cases to take to court.

- 2.6 One respondent further felt that the OFT had an important role to play in creating precedents for the scope of the unfair relationships provisions through its use of Part 8 action. They felt the guidance should, by providing an initial understanding of what may constitute an unfair relationship, set out a clear vision of fair consumer credit markets that give consumers confidence in the new protection.
- 2.7 Others however felt that for the guidance to say anything about what was or was not an unfair relationship was an attempt to pre-empt the role of the court in interpreting and applying the new legislation.
- 2.8 Most respondents recognised that the issue had arisen because Parliament had decided to keep the unfair relationships test as broad as possible, to ensure flexibility for the courts. A number commented that it would have been helpful to have a clearer definition in legislation, or an indicative list of factors giving rise to an unfair relationship.

Action taken

- 2.9 The revised guidance emphasises that, while it may be helpful to businesses and consumers to indicate the kinds of factors that are likely to influence the OFT's consideration under Part 8, it is not the role of OFT guidance to define what is an 'unfair relationship'. It is ultimately for the courts to determine whether there is an unfair relationship and, in doing so, they are under no requirement to have regard to OFT guidance, although they may choose to do so if they consider it to be relevant. The OFT will act under Part 8 only if it considers that there is a reasonable prospect of success in any court action, which in turn will depend upon how we believe a court would be likely to interpret and apply the unfair relationships test in the particular circumstances.

Rates and charges

- 2.10 Another concern among respondents was the references in the draft guidance to the extortionate credit bargains provisions of the 1974 Act. Some respondents, while acknowledging that rates or charges could be a factor giving rise to an unfair relationship, felt that reference to the

earlier provisions was inappropriate, given that they were being repealed and the new legislation made no reference to excessive payments. Others felt that it was inappropriate because it encouraged the reader to continue to think in the narrower terms of the earlier provisions when in fact the new unfair relationships test was intended to be much broader. Some also expressed concerns about references to the OFT's 1991 report on Unjust Credit Transactions since this was based on an outmoded approach.

Action taken

- 2.11 The statutory wording requires the court to have regard to all relevant matters and these could include the cost of the credit agreement or any related agreement. However, we accept that references in the consultation draft may not have been sufficiently clear, and we have sought to clarify. We have also removed reference to the 1991 report. The revised guidance emphasises that rates or charges, whether taken on their own or in conjunction with other terms or business practices, will be among the factors the OFT may consider when looking at possible Part 8 action, but that we will keep this section of the guidance under review in the light of relevant court judgments.

Format of the guidance

- 2.12 Another theme among several respondents was the need for more 'user-friendly' guidance which was written in a simpler and easier to read style or contained visual aids such as diagrams, charts, coloured text boxes or tables. Alternatively, separate material should be produced which is more suitable for consumers or small traders.

Action taken

- 2.13 The guidance is intended primarily as a statement of OFT policy to assist businesses and consumer advisors on the circumstances in which we might consider taking Part 8 action. It is not intended as general guidance on the unfair relationships provisions, or as information for consumers. The guidance will however be reviewed and amended as

case law develops. We are considering separately the issue of other material for use by consumers or consumer advisors.

Conclusion

- 2.14 Answers to the consultation questions are summarised in chapter 3 of this report. The points raised in the responses, including a number of detailed drafting suggestions, have been taken into consideration, and many have been reflected in the final version of the guidance.
- 2.15 The consultation has helped us understand more about what the industry and consumer advisors needed from the guidance. This informed a number of revisions. We believe that the changes made to the guidance address many of the concerns raised and improve the final document.

3 SUMMARY OF RESPONSES

- 3.1 The respondents to the consultation included consumer and money advice organisations, industry trade associations, individual traders, court organisations, and other regulators and Government departments.
- 3.2 The comments of most respondents were even-handed in considering the merits of the draft guidance for both traders and consumer advisors and several made similar observations from different points of view. Consequently this summary does not attribute comments to particular consultees or groups of consultees. For example, no distinction is drawn between comments made by the industry and those made by enforcers or consumer bodies.
- 3.3 The consultation document asked 12 questions, as set out below. Seven (Questions 1 to 6 and 8) were specific questions with 'yes' or 'no' answers, four (Questions 9 to 12) asked for general comments or suggestions, and one (Question 7) combined both elements.

Statistical analysis of responses to specific questions

- 3.4 We received a total of 31 responses to the consultation – see the Annexe for a list of respondents.
- 3.5 Not all respondents directly answered the specific questions raised in the consultation document, and several expanded on their responses with further comments or suggestions or raised issues beyond the scope of the guidance.
- 3.6 A simple statistical analysis of the direct responses to Questions 1 to 6, the specific element of Question 7, and Question 8, is given in the table below:

Table 3.1 Statistical analysis of responses to specific questions

Question	Direct respondents	Of all respondents ...	Of those who responded directly ...	
1	61%	23%	37%	... felt the draft guidance was sufficiently clear
2	61%	45%	74%	... felt it summarised the relevant legal provisions clearly and accurately
3	61%	42%	68%	... felt it provided an adequate summary of the OFT's approach to enforcement
4	65%	45%	70%	... felt it indicated clearly the kinds of matters to which the OFT may have regard in considering possible Part 8 action
5	61%	55%	89%	... felt it contained sufficient cross-references to other material
6	65%	55%	85%	... felt the draft guidance had no significant omissions
7	74%	32%	43%	... felt there were no parts which need amplification or clarification
8	61%	58%	95%	... felt all parts of the draft guidance were needed

Summary of detailed comments

3.7 Most respondents made detailed comments or suggestions in relation to the issues raised by the questions in the consultation paper. These are summarised below. Where comments related to issues raised in other questions, or reiterated a concern within several questions, these have been summarised under the appropriate question.

Question 1: Is the draft guidance sufficiently clear?

3.8 Several respondents felt that greater clarity was required on which guidance traders should have regard to and how this would be published and maintained. Some felt that, without this, it would be difficult for traders to predetermine what procedures or strategies they should adopt to avoid unfair relationships or enforcement action.

3.9 Additionally:

- several respondents felt that illustrative examples or visual aids (such as diagrams or charts) or summary sheets of the legal provisions or the processes the OFT would follow in taking enforcement action would assist readers. One commented that the guidance would be difficult for most consumers to follow
- some felt that further explanations of certain terms such as 'related agreement', 'associate', 'collective interest', 'harm' and 'relevant trade body' were required, or sought clarification on specific drafting points
- some commented that the term 'irresponsible lending' should be clarified either by definition or by typical example – particularly in the current climate where attention is focussed on overindebtedness.

3.10 Other comments concerned issues summarised in relation to other questions.

Action Taken

- 3.11 The revised guidance expands on the description of the legal provisions and the references to OFT guidance and other material.
- 3.12 We have expanded the references to existing guidance on non-status lending and debt collection, and the general UTCCRs guidance, to include additional examples of unfair business practices or terms. These may be helpful in illustrating the kinds of factors that might give rise to an unfair relationship and that might prompt the OFT to consider Part 8 action. The guidance emphasises however that an unfair term or practice may not be sufficient in itself to give rise to an unfair relationship – this will depend upon the individual facts and circumstances.
- 3.13 Although we do not feel an enhanced visual style is appropriate for this document we are considering separately the development of more 'user-friendly' material for use in other contexts (see chapter 2 above).
- 3.14 The guidance indicates that we will be consulting separately on revised fitness guidance. We may also issue specific guidance with regard to the new element of irresponsible lending and what this may mean in different market sectors or circumstances, or may incorporate such guidance as part of more general guidance.

Question 2: Does it summarise the relevant legal provisions clearly and accurately?

- 3.15 One respondent suggested that more information should be included on why the previous extortionate credit bargains provisions were replaced, in order to provide context for the new approach. They also felt that the description of how an unfair relationship might arise in relation to interest rates and charges did not accord with the policy intention and may lead to too narrow an interpretation. In particular, the emphasis should be on the lender's justification for charging a rate above the market norm, rather than the differential between the market norm and the contractual rate.

Action Taken

3.16 We do not feel it is appropriate, in the context of guidance material, to provide a detailed analysis of the earlier provisions and the reasons behind Parliament adopting a broader approach. However, some of the detailed drafting suggestions have been taken into account, and the revised guidance clarifies the OFT's view that the courts can take rates and charges into account in the context of an unfair relationship. See also chapter 2 of this report.

Question 3: Does it provide an adequate summary of the OFT's approach to enforcement?

3.17 Of those who responded:

- one respondent felt that more detail on the enforcement processes the OFT would follow, and which legislation would be used in which circumstances, would be helpful
- another felt that there were inconsistencies in the way the circumstances in which OFT might take Part 8 action was described
- one expressed concerns about adequate co-ordination between enforcers
- one felt that there were contradictions in the references to 'collective harm' – in particular between the need to establish collective harm and the suggestion that this may include potential harm which may impact differently on individual consumers. They agreed that there should be no lower limit on the number of cases which might trigger action, but felt that the OFT should have regard to the proportion of the trader's customers affected.

Action Taken

3.18 In the light of these comments a number of amendments have been made to the guidance to clarify the description of the procedures we will adopt. The guidance also makes it clear that we intend to establish

appropriate co-ordination mechanisms with Local Authority Trading Standards Services (TSS) and other enforcers.

- 3.19 In addition, we have amended references to the application of Part 8 to unfair relationships, including the collective interest test, and the possible interactions between use of Part 8 and credit licensing.

Question 4: Does it indicate clearly the kinds of matters to which the OFT may have regard in considering possible Part 8 action?

- 3.20 One respondent expressed concern that remedies which were intended to remove harm from one group of consumers could result in harm to others, citing as an example the recent OFT action on credit card default charges. They felt it was important that any action should be based on evidence from the majority of consumers affected.

Action Taken

- 3.21 This comment relates to the detail of how the OFT might exercise its judgement in taking enforcement action in the circumstances of a given case. The guidance emphasises that we will act in a reasonable and proportionate manner, having regard to the risk of detriment to consumers, and with the overarching aim of making markets work well for consumers.

Question 5: Are there sufficient cross-references to other material?

- 3.22 Of those who responded:
- one felt that specific references to legislation would be helpful. Another felt that this might be helpful later as case law on unfair relationships developed and the guidance should be kept under review
 - one made a cautionary point that some of the material referred to (particularly the FSA's Treating Customers Fairly guidance) was still in the process of being adopted by traders

- one felt that the guidance might be easier to use if relevant passages were reproduced in full rather than referred to - in particular, schedule 2 to the UTCCRs and Articles 6 to 9 and Annex 1 of the UCPD.

Action Taken

3.23 Where appropriate, the revised guidance contains more detailed and consistent references to other legislation and guidance. We have also included additional cross-references and explanatory footnotes.

Question 6: Does the draft guidance have any significant omissions?

3.24 One respondent felt it would be helpful for the guidance to provide information on any timescales for an action to be brought.

3.25 Another felt that the guidance did not adequately encourage parties to try to settle cases before taking court action, and that the guidance should encourage consumers to contact the Court Services for information on bringing a claim.

Action Taken

3.26 Timescales for an initial approach under Part 8 are summarised in chapter 5 of the guidance, and in the OFT's general guidance on Part 8.

3.27 The guidance makes it clear that, in practice, the OFT anticipates that most consumers will be likely to seek out-of-court resolution of disputes rather than initiate court proceedings, which may be costly and time-consuming. Nevertheless, the unfair relationships provisions are an important additional protection for consumers, and may be especially useful for borrowers facing court proceedings for enforcement or repossession.

3.28 The guidance also notes that information on the relevant court procedures may be found on the websites of the various Court Services.

Question 7: Are there any parts which need amplification or clarification, and if so, in what respects?

- 3.29 Most consultees who responded specifically to this question were concerned that there was insufficient information about what constituted an 'unfair relationship' and what might trigger an OFT investigation under Part 8, although several acknowledged that this was inherent in the broad definition in the legislation and the absence of precedents. This is considered further in chapter 2 of this report.
- 3.30 One respondent sought clarification of the circumstances in which the OFT might consider publicising details of a case where no breach had been established or which was not yet completed.
- 3.31 Two other respondents:
- sought greater clarification on the proposed working relationships between the OFT and the Financial Ombudsman Service (FOS) and supported discussion with the industry in such cases
 - sought clarification on the likely impact of the UCPD .

Action Taken

- 3.32 The revised guidance makes it clear that publicity will not normally be given to cases where we consider that no breach could properly be established, or where the case has not yet been completed, unless there are sound reasons for doing so.
- 3.33 The guidance also notes that we are drawing up a memorandum of understanding with the FOS, setting out our respective responsibilities and how best we can work together. This will be published next Spring. The draft legislation implementing the UCPD is also due to be published in the Spring, together with draft guidance on the new requirements.

Question 8: Are any parts of the draft guidance not needed?

3.34 Several respondents felt that the guidance should not refer to the previous extortionate credit bargains provisions or the OFT's 1991 report. This is discussed in chapter 2 of this report.

Action Taken

3.35 The revised guidance retains references to the extortionate credit bargains provisions but makes it clear that these are to be repealed. We have also removed reference to the 1991 report.

Question 9: Do you have any other suggestions for improvement to the guidance?

3.36 Comments made under this question have been summarised under the appropriate questions.

Question 10: Do you have any views on how the final guidance should be disseminated to those who may need to see it?

3.37 In relation to the method of distribution:

- almost all respondents felt that the document should be available on the OFT website and some offered to provide links on their own sites or suggested that links should be available on the sites of other regulators, trade associations and advice organisations
- some suggested email distribution and one offered to distribute copies with their own email distribution lists
- several respondents felt that hard copies should also be available (particularly for those without easy internet access) and that these should be available through TSS, citizens advice bureaux, debt advice services, trade associations and the courts.

- 3.38 In relation to the scope of distribution, some respondents suggested circulating the guidance to all licensees. Others suggested that it be sent to trade associations, consumer organisations and other regulators.

Action Taken

- 3.39 The guidance is being published on the OFT's website, and consultees and other stakeholders are being notified by email. Hardcopy versions will be available on request.

Question 11: Do you have any views on how the OFT might access details of court judgments in individual cases?

- 3.40 Several respondents felt that the imposition of a reporting requirement on licensees was an appropriate solution, however one other felt that this would impose an undue burden on licensees.
- 3.41 One respondent stated that judgments were a matter of public record while another understood that they were not and questioned OFT having privileged access to such information without the consumer's consent.
- 3.42 One respondent commented that first-instance decisions of Circuit or District Judges would not normally be published, but that it may be possible to arrange for brief reports on cases to be sent to the OFT.
- 3.43 One respondent emphasised the need for common recording practices given the importance of early cases in the development of case law.
- 3.44 Other respondents made a number of specific suggestions, including using powers under the Enterprise Act to access court files, or publicising the OFT's role in the legal press to encourage submissions from lawyers. Other suggestions included monitoring law reports in legal and other journals.

Action Taken

3.45 We are grateful to respondents for the information and suggestions they provided on this issue. We intend to explore the various possible ways of becoming aware of relevant court judgments.

Question 12: Do you have any views on how the OFT should publicise such information or details of Part 8 enforcement actions?

3.46 In relation to publicising details of court judgments and Part 8 action, respondents suggested:

- using the OFT's website – some suggested a specific area should be dedicated to information on unfair relationships, with one respondent suggesting that licensees should be notified directly of updates
- using OFT press notices, particularly in the case of actions against large companies or involving large numbers of consumers
- using trade publications or the Consumer Credit Bulletin, or via TSS.

3.47 One respondent stated that they had been unaware of the Consumer Regulations Website (CRW) and questioned whether the general public would be aware of its existence.

3.48 One respondent cautioned that the OFT needed to exercise restraint and care in this area by, for example, notifying the relevant business in time for them to prepare a response to any press notice. Reporting should be balanced and accurate and give numbers and proportions of consumers giving rise to the complaint and the numbers actually harmed.

Action Taken

3.49 Our general approach to publicity is set out in chapter 5 of the guidance. We are grateful to respondents for the information and suggestions they provided on this issue.

Other Comments and Suggestions

3.50 Some respondents provided additional comments and suggestions, which are outside the scope of the guidance.

3.51 Two respondents emphasised that it is important that regulators take the opportunity to crack down on loan sharks who prey on the vulnerable.

3.52 One respondent commented that:

- placing the burden of proof that a relationship is not unfair on the lender is in itself unfair and could lead to an large number of vexatious cases which traders would find simpler to settle than defend
- unfairness should be judged on the circumstances at the time the agreement was made, not those prevailing when the case is brought.

3.53 Finally, one respondent expressed concerns that legislation which is over-protective of consumers can lead to a restrictive market which is, ultimately, uncompetitive, lacks innovation and is more costly to consumers.

A LIST OF RESPONDENTS

A.1 In alphabetical order:

Advice UK
Anthony Sharp
Association for Payment Clearing Services (APACS)
Association of District Judges
Association of Finance Brokers (AFB)
Association of Mortgage Intermediaries (AMI)
British Bankers Association (BBA)
British Vehicle Rental and Leasing Association (BVRLA)
Building Societies Association (BSA)
Citizens Advice
Confederation of British Industry (CBI)
Direct Marketing Association (DMA)
East of England Trading Standards Association Limited (EETSA)
Finance and Leasing Association (FLA)
Finance Industry Standards Association (FISA)
Financial Ombudsman Service (FOS)
First Trust Bank
Her Majesty's Courts Service (HCMS)
Institute of Credit Management (ICM)
Lloyds TSB
Local Authorities Coordinators of Regulatory Services (LACORS)
Mail Order Traders Association (MOTA)
Money Advice Trust (MAT) and National Debtline
National Consumer Council (NCC)
Northern Ireland Courts Service
Pinnacle Insurance
Scottish Consumer Council (SCC)
Scottish Courts Service
Trading Standards Institute (TSI)

A.2 Plus two responses where names have been withheld because of confidentiality restrictions.