

# **Advertising own price discounts**

**Consultation on a guideline for  
businesses that advertise price  
discounts against their own prices**

**June 2006**

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1 June 2006

Dear Sir / Madam

### **Draft guidance on advertising own price discounts**

The Office of Fair Trading (OFT) is sending you, for your views, the enclosed **draft** guidance on advertising own price discounts. We hope that you will be able to respond and we look forward to receiving your comments.

The guidance is aimed at businesses that advertise price discounts against their own previous prices. The OFT recognises that discounting prices may be a prudent response to changes in circumstances, and can be a legitimate promotional tool. Advertising of own price discounts can convey information of value to consumers and therefore help markets work well. However, it can be abused and there are laws in place to prevent such advertising being used to mislead consumers. The guidance explains the relevant consumer protection law and how to comply with it.

The guidance has been produced to help retailers ensure that their advertising does not mislead. However, we also hope that it will assist our partners in consumer law enforcement and promote consistency in the regulation of such advertising.

We would be grateful for any views you may have on the content, style or presentation of the guidance. In particular you may wish to consider the following questions:

- Is the draft guidance sufficiently clear?
- Is the draft guidance comprehensive – what significant omissions are there?



- Does the draft guidance need to be amplified or clarified and, if so, in what respect?
- Are any parts of the draft guidance not needed?
- Do you disagree with any points in the draft guidance and, if so, in what respect, and why?

An electronic copy of the guidance document can be viewed at [www.oft.gov.uk/News/Consultations/advertising + own](http://www.oft.gov.uk/News/Consultations/advertising+own).

### **Responding to this consultation**

This consultation follows the criteria set out in the Cabinet Office's Code of Practice on Consultation (available at [www.cabinetoffice.gov.uk/regulation/consultation/consultation\\_guidance/the\\_code\\_and\\_consultation/index.asp](http://www.cabinetoffice.gov.uk/regulation/consultation/consultation_guidance/the_code_and_consultation/index.asp)). The criteria set out in that code are attached at Annex B.

We are keen to obtain feedback from a wide variety of businesses that may be affected, either directly or indirectly, by this guidance. We would therefore encourage trade associations to invite their members to respond directly to the consultation in addition to any co-ordinated response that may be provided. A list of organisations that have been contacted regarding this consultation has been attached at Annex C.

We ask that any suggested changes or comments on the document be submitted in writing (by email, or alternatively by letter or fax, as indicated below).

### **The consultation period**

The consultation period began on 1 June and will run until **24 August 2006**. This period of 12 weeks is in accordance with the criteria set out in the Cabinet Office's Code of Practice.

## **Next Steps**

We will collate responses to the consultation and publish a formal summary of these, along with a final version of the amended Advertising Own Price Discounts guideline in autumn 2006, taking into consideration comments made in response to the consultation. All responses and comments should be sent to:

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Mis-selling of Goods and Services  
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2-6 Salisbury Square  
London, EC4Y 8JX  
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Email: Richard.taylor@oft.gsi.gov.uk

### **Data use statement for responses:**

Please note that we may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or as the case may be, the legitimate interests of that business (confidential information). If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential. All information received is subject to Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

Yours faithfully

Richard Taylor  
Mis-selling of Goods and Services



## CONTENTS

<i>Chapter</i>		<i>Page</i>
1	Introduction	1
2	Why produce guidance now?	2
3	Relevant legislation: basic information	3
4	Implications of The Officers Club case	5
5	Practical application	10
6	Where to go for further information	12
<i>Annexe</i>		
A	The consultation process	14
B	List of consultees	16



# 1 INTRODUCTION

- 1.1 This guidance explains the law applicable to retailers' advertisements of products at discounts from their own previous prices (own price discounts).
- 1.2 Retailers are of course generally free to set their prices. Discounting prices may be a prudent response to changes in circumstances, and can be a legitimate promotional tool. Advertising of own price discounts can convey information of value to consumers and therefore help markets work well. However, it can be abused and there are laws in place to prevent the use of such advertising to mislead consumers. This guidance explains the relevant consumer protection law and how to comply with it.
- 1.3 The guidance deals with the relevant provisions of the Control of Misleading Advertisements Regulations 1988 (CMARs); the Consumer Protection Act 1987 (CPA) and the statutory Code of Practice for Traders on Price Indications made by the Secretary of State under the CPA; and the Enterprise Act 2002 (EA2002).
- 1.4 This legislative framework is likely to be substantially revised by December 2007, as new legislation implementing the Unfair Commercial Practices Directive (2005/29/EC) is brought into force. The Department of Trade and Industry (DTI) is consulting on possible legislative changes separately. However, misleading promotions of own price discounts will continue to be prohibited.
- 1.5 The guidance has been produced by the Office of Fair Trading (OFT) and is concerned with non-broadcast advertising only. Broadcast advertising is regulated by the Advertising Standards Authority (ASA) under contract from the Office of Communications (Ofcom). Further information on the role of the ASA can be found on page 12.
- 1.6 Please note that this document is only a guide and should not be relied on as a complete statement of the law. To understand your rights and obligations fully, you should study the relevant law or consult a solicitor.

## 2 WHY PRODUCE GUIDANCE NOW?

- 2.1 The DTI published the latest revision of its *Code of Practice on Price Indications* (the Code) under the CPA in October 2005 (see [www.dti.gov.uk/ccp/topics1/guide/pricecodetraders0905.pdf](http://www.dti.gov.uk/ccp/topics1/guide/pricecodetraders0905.pdf)). The OFT, which under the CPA has to be consulted in preparing revisions of the Code, gave advice to the DTI on this revision. The revision also benefited from an extended period of public consultation.
- 2.2 The new Code [at paragraph 1.2.4] takes account of a landmark case that the OFT in 2005 won in the High Court against a retailer that published advertisements claiming misleading price discounts from its own higher prices (*OFT v The Officers Club Limited and David Charlton* [2005] EWHC 1080 (Ch.)). The OFT brought its case under the CMARs and the EA2002.
- 2.3 In *The Officers Club* case, the retailer's own price discount advertisements took the general form '70 per cent off everything'. The Court found that the advertisements were misleading as the higher prices used as the basis for the comparison (reference prices) were not 'genuine' prices. The judgment clarified the criteria that are relevant when deciding whether or not advertising of own price discounts is misleading. Although the case was not brought under the CPA and the Code, the judgment also commented on their application to own price discounts.
- 2.4 This guidance deals with the application of both the CMARs and the Code to the specific issue of advertising of own price discounts.

### **3 RELEVANT LEGISLATION: BASIC INFORMATION**

- 3.1 When considering advertising own price discounts, two key pieces of legislation are relevant: the Control of Misleading Advertisements Regulations 1988 and the Consumer Protection Act 1987, including the Code of Practice on Price Indications, which is published under it. In addition, Part 8 of the Enterprise Act 2002 confers additional enforcement powers on the OFT and a number of other enforcers, including Trading Standards, to take action against infringements of a wide range of consumer protection law, including the CMARs and CPA, which harm the collective interests of consumers.
- 3.2 The CMARs enable action to be taken against misleading advertising and unacceptable comparative advertising in general, including misleading price advertising. They implement European Council Directive 84/450/EEC, as amended by 97/55/EC. The relevant part of the CPA is Part III, which deals with price indications. These indications may include price tags on goods and price displays on shelves, for example. The CPA makes it a criminal offence to give a misleading price indication.

#### **Control of Misleading Advertisements Regulations 1988 (CMARs)**

- 3.3 The CMARs define an advertisement widely, as 'any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of goods or services, immovable property, rights or obligations' (Regulation 2(1)). The CMARs therefore cover, for example, representations made orally, in in-store advertising, in print and broadcast media and on the Internet. As mentioned above, this guidance document is concerned with non-broadcast advertising only.
- 3.4 For the purposes of the CMARs an advertisement is misleading 'if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for

those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote (Regulation 2(2))<sup>1</sup>.

- 3.5 Therefore, an advertisement that creates a false impression may infringe the CMARs, even if everything in the advertisement is literally true.<sup>1</sup>
- 3.6 In deciding whether the persons to whom an advertisement is addressed are likely to be misled, the test under the CMARs is whether an ordinary, reasonable consumer, typical of the group to whom the advertisement is addressed, is likely to be deceived. This question is for the court to decide. It is not necessary to present evidence from actual consumers that they have been, or would be likely to be, misled for the purpose of proving that an advertisement is misleading.

### **Consumer Protection Act 1987 (CPA)**

- 3.7 Section 20 creates a criminal offence where, in the course of any business of his, a person gives (by any means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available.
- 3.8 Section 21(1) defines what is misleading for this purpose. It is particularly relevant that a price indication is misleading if the consumers to whom it is given might reasonably be expected to infer from it that the facts or circumstances by reference to which they might reasonably be expected to judge the validity of any relevant comparison made or implied by the indication are not what in fact they are.
- 3.9 The DTI-approved Code referred to above gives practical guidance and promotes desirable practices in giving price indications.

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<sup>1</sup> *Director General of Fair Trading v Blinkhorn* 7.11.1989 (unreported)

## 4 IMPLICATIONS OF THE OFFICERS CLUB CASE

### *The Office of Fair Trading v The Officers Club Ltd and David Charlton*<sup>2</sup>

- 4.1 This is an important test case which clarifies the law in the area of own price discount advertising. It was brought under the CMARs and the EA 2002, but the judgment also throws light on the application of the CPA and the Code.
- 4.2 The Officers Club Ltd (TOC) operated a permanent '70 per cent off' advertising strategy over a number of years. This consisted of marketing small quantities of goods at 'full price', labelled 'Red Star' items, for 28 days in a small number of TOC's stores. Immediately after expiry of the 28 day period, much larger quantities of the goods were offered for sale throughout all of TOC's stores at the '70 per cent off' price, and the 'Red Star' items were reduced to the same discounted price.
- 4.3 Disclaimer notices were displayed in TOC's stores explaining that all the discounted goods had been for sale at the higher price at six or more of its branches for a minimum of 28 days in the preceding six months. The purpose of these notices was to seek to comply with the wording of the Code as it then stood.
- 4.4 The OFT has no difficulty with retailers cutting their prices and recognises that advertisements of own price discounts can legitimately convey information of value to consumers. Unnecessary restrictions on advertising can impair the working of markets. However, advertisements of own price discounts can mislead consumers into thinking that the value for money represented by the discounted price is better than it really is.

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<sup>2</sup> [2005] EWHC 1080 (Ch.)

- 4.5 The substance of the OFT's claim was that an ordinary and reasonable consumer, reading TOC's advertisements that the prices of its products were discounted by 70 per cent, would inevitably have drawn inference that the discounts were from reference prices that were 'genuine'. This inference was not removed or diminished by TOC's 'disclaimer notices'. TOC and founder and director Mr Charlton contended in their defence that the '70 per cent off' strategy always complied with the Code and so there could not have been any contravention of the CMARs.

## **The Judgment**

### **Significance of the Code**

- 4.6 The Judgment made clear that the Code does not unduly qualify or restrict the meaning of 'misleading' in the CMARs or the CPA. While compliance with the Code may assist in determining whether a price indication is misleading, the Code is given specific statutory relevance only in proceedings for an offence under section 20 of the CPA. Even in that context, whether the practice complained of contravenes or complies with the Code is not determinative of the matter.
- 4.7 The CMARs, the CPA and the Code together provide a regulatory framework that gives retailers some certainty, but leaves the regulatory authorities sufficient flexibility to prevent misleading price indications irrespective of strict compliance with the letter of the Code.

### **Compliance with the Code**

- 4.8 The Judgment then turns to whether TOC's '70 per cent off' strategy complied with the Code. It was common ground that the majority of TOC's stores did not offer goods for sale at the reference price and so did not satisfy the criteria set out in paragraph 1.2.2 (c) of the Code. In those circumstances, according to paragraph 1.2.3 of the Code, the crucial questions were whether TOC's comparison with its previous prices was fair and meaningful and whether TOC had given a clear and

positive explanation of the period for which and the circumstances in which the higher price applied.

- 4.9 The Judgment concluded that the price comparisons advertised by TOC were not fair and meaningful and that TOC had not complied with the requirements of the Code.
- 4.10 These observations, while incidental to the case in question, give useful guidance on the application of the Code.

### **Compliance with the CMARs: unnecessary to adduce evidence from individual consumers**

- 4.11 Turning to the case under the CMARs, the Judgment says it is clear that an advertisement may be misleading for the purposes of the CMARs as a result of an implied statement as much as an express one. It was reiterated that a document may be misleading, though literally everything in it is true, if the way in which what it says is presented carries with it implications and inferences which the ordinary reader would certainly draw. The touchstone of whether an advertisement is misleading is the view of the ordinary, reasonable consumer characteristic of the class to whom the advertisement is addressed. The court must reach a conclusion on this issue regardless of whether or not there is actual evidence from consumers. Empirical evidence of this nature is unnecessary and indeed may be unhelpful. There may be a lack of complaints from consumers, as the very nature of a misleading or deceptive advertisement means that the consumer is left unaware of the true facts. Further, many consumers, even though aware of the deception, and even though aggrieved, may not have the time, ability or inclination to make a complaint.

### **Genuine price**

- 4.12 The Judgment suggests that the question of whether an advertisement representing an own price discount is misleading turns on whether or not the reference price is a genuine one. It was found that, taking into

account all the notices typically found in TOC's stores, including the disclaimer notice, the ordinary, reasonable consumer would consider TOC's '70 per cent off' advertisements to be making implied representations that the higher price was a genuine price as distinct from an artificial price.

4.13 A genuine reference price has a number of facets to it:

- The seller must honestly believe that the price is an appropriate sale price for the goods. In other words, he must honestly believe that the goods could be sold in significant numbers at that price.
- The seller must have placed a significant quantity of the goods on sale at the higher price. In this context, a significant quantity for sale at the higher price involves a snapshot comparison at a particular moment in time between what had previously been offered for sale at the higher price and what at that later snapshot moment was offered for sale at the discounted price.
- The goods must be offered for sale at the higher price for a period at least sufficient to be a genuine offer of sale to the section of the public likely to be interested in purchasing such goods, that is, sufficient time for knowledge of the availability of the goods to be acquired by that section of the public, and sufficient time for them to view the goods, make up their minds whether to purchase them, and, if so, to complete the purchase of them.

4.14 'Significant quantity' and 'sufficient time' are not defined in the black letter of the law and the Code. This is to allow retailers, regulators and the courts a measure of flexibility to apply common sense in judging whether or not the law has been complied with.

**To which factors will the court have regard in deciding whether a 'belief' is 'honest'?**

4.15 In determining whether a belief was honestly held that goods could be sold at the higher price in significant numbers, the reasonableness of the belief is a factor that is likely to be taken into consideration by the court. For example a reference price which is not comparable to prices offered

by competitors or at which no or relatively few items are sold may indicate that the retailer did not honestly believe that the goods could be sold at that price in significant numbers.

## **Revision of the Code**

- 4.16 The revised version of the Code published in October 2005 includes a new paragraph (1.2.4) that reflects the key findings of the OFT's case against TOC. It says:

'a previous price used as a basis of a price comparison should be a genuine retail price. It should be a price at which you offered the goods for sale in the reasonable expectation that they could be sold by you at the higher price. In any case where a sale price is compared to a price that is higher than the usual retail price in the particular outlet, that fact should be made clear'.

- 4.17 **This addition reflects what is clear from the Judgment, namely that the Code does not place an undue gloss or limitation on the definition of 'misleading', and that complying with the Code does not automatically mean that a trader is innocent of contravening the CPA, still less CMARs. An own price discount advertisement will also need to be consistent with the principles set out in the TOC Judgment.**

## 5 PRACTICAL APPLICATION

### Common problems

5.1 The general points were made in the Introduction that retailers are generally free to set prices and that discounting prices may be a prudent response to changes in circumstances. For example:

- Technological progress or shifts in global trading patterns can lead to significantly lower prices at the same or better quality than before. Familiar examples can be found in electronic equipment such as DVD or MP3 players.
- Changes in fashion can sharply reduce demand. Retailers can honestly guess wrongly what customers will want to buy and be left with unsold stocks.
- Seasonal prices can be the result of predictably fluctuating demand (for example, garden furniture or Christmas merchandise).

5.2 However, the relevant law and the principles described in the Judgment apply in any of these circumstances, undiminished. They constitute a flexible set of criteria that must be applied intelligently, in the light of the evidence, to achieve the legal objectives. Thus, for example in the case of a fashion good, if a former price was pitched so high or offered for such a short period or over such a restricted part of the merchandise that no sales took place, then it is unlikely to be a genuine price.

## Obtaining evidence

5.3 The authorities have strong powers under the relevant statutes to require the production of evidence necessary to investigate a suspected infringement and, if appropriate, to take a case to court. These are contained in Regulations 7 and 9 of CMARs, Part IV of the CPA and Sections 224 and 225 of the EA 2002. The information that might be requested to ascertain whether an advertised own price discount is misleading could include the following details:

- the total number of shops in the chain
- the number and location of shops in the chain that offer goods for sale at the higher prices, that is, before the application of discounts
- for each of the shops in the chain that offer goods for sale at the higher prices:
  - the number of product lines, and the number of items on offer within each of those product lines, available at the higher prices, and
  - the number of product lines, and the number of items on offer within each of those product lines, available at the discounted prices
- the total number of goods offered for sale at the higher prices compared to the aggregate number of goods offered for sale at the discounted prices
- the volume and value of sales by the business of like-for-like goods at the two different prices, and
- the period of time that the goods have been offered for sale at the higher prices and the length of time that like-for-like goods are offered for sale at the discounted prices.

## **6 WHERE TO GO FOR FURTHER INFORMATION**

### **Office of Fair Trading (OFT)**

For further details on the CMARs and the EA 2002, as well as other pieces of legislation that the OFT are responsible for administering, please visit:

[www.oft.gov.uk](http://www.oft.gov.uk)

### **Trading Standards Service (TSS)**

For further advice on price indications, including advertising own price discounts, you should contact your local TSS. Details of the location of your local TSS can be obtained at the main Trading Standards website:

[www.tradingstandards.gov.uk](http://www.tradingstandards.gov.uk)

### **Department of Trade and Industry (DTI)**

For comprehensive background information and guidance on all aspects of running a business please visit the DTI's website: [www.dti.gov.uk](http://www.dti.gov.uk)

### **The Advertising Standards Authority (ASA)**

The ASA is the independent body that endorses and administers the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code). The CAP Code lays down rules with which advertisements should comply. It is created, revised and enforced by the Committee of Advertising Practice (CAP), a body that represents the advertising, sales promotion, direct marketing, and media businesses. The CMARs provide that the OFT may require a person making a complaint that an advertisement is misleading to satisfy it that 'established means', such as the ASA, have been given a reasonable opportunity to deal with the complaint in question. Advertisers who refuse to cooperate with the ASA can then be referred to the OFT, which acts as a legal backstop. Further information on the role of the ASA is available at, [www.asa.org.uk](http://www.asa.org.uk)

CAP provides a pre-publication advisory service to help ensure that marketing communications do not breach the CAP Code. The CAP Copy Advice team gives advice to marketers, their agencies, the media and others on the likely conformity with the CAP Code of marketing communications before they are published or distributed. For further information the Copy Advice team can be contacted by telephone on 020 7492 2100, by fax on 020 7404 3404 or by email at [advice@cap.org.uk](mailto:advice@cap.org.uk) or you may wish to use AdviceOnline, a database that is regularly updated and is available on the CAP website, [www.cap.org.uk](http://www.cap.org.uk).

### **The Office of Communication (Ofcom)**

Ofcom has subcontracted the handling of complaints concerning broadcast advertising to the ASA. However, in instances where broadcasters persistently break the ASA's rules, the matter can be referred to Ofcom for further action. Additional information on the role of Ofcom can be found at, [www.ofcom.org.uk](http://www.ofcom.org.uk)

# ANNEXES

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## A THE CONSULTATION PROCESS

**Public bodies are required to perform consultations in accordance with the following criteria wherever possible.**

- A.1 Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- A.2 Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- A.3 Ensure that your consultation is clear, concise and widely accessible.
- A.4 Give feedback regarding the responses received and how the consultation process influenced the policy.
- A.5 Monitor your Department's effectiveness at consultation, including through the use of a designated Consultation Co-ordinator.
- A.6 Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.
- A.7 Further information on the Code can be found on the Cabinet Office's website: [www.cabinetoffice.gov.uk/regulation/consultation/consultation\\_guidance/the\\_code\\_and\\_consultation/index.asp](http://www.cabinetoffice.gov.uk/regulation/consultation/consultation_guidance/the_code_and_consultation/index.asp).

## Comments or complaints about the consultation process

A.8 If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mike Ricketts  
OFT Consultation Co-ordinator  
Room 5C/07  
Fleetbank House  
2-6 Salisbury Square  
London EC4Y 8JX

Phone: 020 7211 8267

Email: [mike.ricketts@oft.gsi.gov.uk](mailto:mike.ricketts@oft.gsi.gov.uk)

A.9 Responses and comments regarding the **consultation document** should be sent to:

Richard Taylor  
Mis-selling of Goods and Services  
Room 1N/01  
Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
London, EC4Y 8JX

Fax: 020 7211 8465

Email: [Richard.taylor@oft.gsi.gov.uk](mailto:Richard.taylor@oft.gsi.gov.uk)

## **B LIST OF CONSULTEES**

### **Trade Associations**

Advertising Association

British Retail Consortium

Scottish Retail Consortium

Alliance of Independent Retailers

Association of British Furniture Manufacturers

Association of Master Upholsterers and Soft Furnishers

Energy Retail Association

Incorporated Society of British Advertisers

Radio, Electrical Television Retailers' Association  
(RETRA) Ltd

Retail Motor Industry Federation

Scottish Motor Trade Association

The Kitchen and Bathroom Specialists Association

British Shops and Stores Association Ltd

Northern Ireland Independent Retail Trade Association

The British Audio-Visual Dealers Association

Direct Selling Association

Mail Order Traders

## **Business organisations**

British Chambers of Commerce

Scottish Chamber of Commerce

Advice UK

Business Link Cumbria

Business Link Devon and Cornwall

Business Link Berkshire and Wiltshire

Business Link Essex

Business Link Greater Manchester

Business Link London

Business Link Northumberland

Business Link South Yorkshire

Business Link Black Country

Business Link Hertfordshire

Business Link Humber

Business Link Kent

Business Link Leicestershire

Business Link Norfolk

Business Link Lancashire

Business Link Bolton and Bury

Business Link Nottingham  
Business link Somerset  
Business Link Suffolk  
Business Link Tees Valley  
Business Link Tyne and Wear  
Business Link Wessex  
Business Link West Yorkshire  
Business Link West Yorkshire  
Business Link York and North Yorkshire  
CBI East Midlands  
CBI East of England  
CBI London  
CBI North West  
CBI Northern Ireland  
CBI Scotland  
CBI South East  
CBI Wales  
CBI West Midlands  
CBI Yorkshire and the Humber  
Federation of Small Businesses

Federation of Small Businesses (Scotland)

### **Consumer Organisations**

Citizens Advice

Citizens Advice Scotland

National Consumer Council

General Consumer Council for Northern Ireland

Scottish Consumer Council

Welsh Consumer Council

National Consumer Federation

Which?

Which? (Scotland)

Direct Marketing Association

### **Government departments**

Better Regulation Commission

Department of Trade and Industry

Department of Enterprise Trade and Investment  
in Northern Ireland

Advertising Standards Authority

OFCOM

LACORS

COSLA

Trading Standards Institute