

'Debt collection'

OFT guidance for all businesses engaged in recovery of consumer credit debts

Supplementary Consultation

December 2011

OFT1399con

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Any enquiries regarding this publication should be sent to us at: Marketing, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or email: marketing@oft.gsi.gov.uk.

This publication is also available from our website at: www.oft.gov.uk.

Scope of this supplementary consultation

Topic and scope of this supplementary consultation	<p>Revised OFT guidance on debt collection (OFT 664) was published in October 2011.¹ Following representations received, the OFT has decided to undertake a supplementary consultation on its position on use of 'continuous payment authority' as a means of recovering monies owed in respect of consumer credit related debts as set out in paragraph 3.9m of that document.</p> <p>We are also taking this opportunity to consult on the specific practice of debiting monies from an account in the absence of having the express authority to do so (including under circumstances in which the lender may have the authority, under a continuous payment authority or otherwise, to recover monies from another account(s)). This practice is dealt with in what could, subject to consultation, become a new paragraph 3.9n of the Guidance. This would replace what is currently the third bullet point of paragraph 3.9m in the revised Debt Collection Guidance.</p>
Geographical scope	UK-wide.
Impact assessment	There is no impact assessment linked to this supplementary consultation. The OFT does not conduct impact assessments when producing explanatory guidance. We work closely with interested parties in preparing guidance and consult on the substantive content.

¹ www.of.gov.uk/shared_of/business_leaflets/consumer_credit/OFT664Rev.pdf

Basic information

To	This supplementary consultation is aimed at all those with an interest in debt recovery. This includes creditors/owners acting to recover their own debts in addition to those businesses whose activities fall within the definition of 'debt collection' in section 145 (7) of the Consumer Credit Act 1974, including businesses such as law firms/solicitors covered by a group licence. The consultation may also be of interest to trade associations, professional bodies, regulators, enforcement agencies, consumer organisations and borrower groups.
Duration	The supplementary consultation will run from 16 December 2011 to 26 January 2012.
Enquiries	By telephone: Ms Nicola Balbier on 020 7211 8823. By email: dcguidance-review@oft.gsi.gov.uk By fax: 020 7211 8604 By post: Ms Nicola Balbier, 1E/16, Consumer Credit Group, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX.

<p>How to respond</p>	<p>We would welcome your comments on the content of this supplementary consultation document. Please provide any suggested changes or comments on the draft in writing (by email, or alternatively by letter or fax, as indicated above). Any evidence that you are able to supply in support of any changes that you propose is likely to add weight to our consideration.</p> <p>When responding to this supplementary consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were collated.</p> <p>We are publishing this supplementary consultation on the OFT website and sending it to a range of interested parties to invite comments.</p>
<p>After the consultation</p>	<p>After the supplementary consultation we will make any amendments/additions to our revised Debt Collection Guidance (the Guidance) as appropriate. We will also, in due course, be publishing a short summary of the responses received to our consultation on the Guidance – which will also address responses received to this supplementary consultation. Both documents will be available on our website at www.of.gov.uk/publications.</p> <p>We will also be updating our Irresponsible Lending Guidance (ILG), following this supplementary consultation, to ensure consistency with other relevant OFT guidance documents published subsequent to the last update of the ILG in February 2011.</p>

**Compliance with
the *Code of
Practice on
Consultation***

This supplementary consultation complies with the Better Regulation Executive's Code of Practice on Consultation. As it is of limited scope, it will not be for the normal 12 week period. A list of the key criteria can be found at Annexe A along with a link to the full Code of Practice document.

Background

Getting to this stage

The Guidance, published in October 2011, was issued in accordance with the duty placed on the OFT under Section 25A of the Consumer Credit Act 1974 (the Act), which requires the OFT to prepare and publish guidance in relation to how it determines, or proposes to determine, whether persons are fit to hold a consumer credit licence.

It updates previous Debt Collection Guidance and sets out overarching principles of consumer protection and fair business practice applying to **all** relevant businesses. It also sets out the types of behaviour the OFT considers may constitute unfair or improper business practices and which would therefore call into question a person's fitness to retain or be granted a licence or to operate under cover of a group licence. As with all OFT guidance issued in accordance with the requirements of section 25A of the Act, we expect businesses to abide by the spirit as well as the letter of the Guidance.

The Guidance also provides a basis against which the OFT can undertake assessments of whether businesses have appropriate skills, knowledge, experience, business practices and procedures to be licensed by the OFT to operate a consumer credit, or ancillary credit business.

Having considered representations received by stakeholders subsequent to the publication of the Guidance, the OFT has decided to invite further views – specifically in respect of paragraph 3.9(m) of the Guidance.

	<p>We are also taking this opportunity to consult on the specific practice of debiting monies from an account in the absence of having the express authority to do so (including under circumstances in which the lender may have the authority, under a continuous payment authority or otherwise, to recover monies from another account(s)). This practice is dealt with in what could, subject to consultation, become a new paragraph 3.9n of the Guidance. This would replace what is currently the third bullet point of paragraph 3.9m in the revised Debt Collection Guidance.</p>
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Feedback about this consultation

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:

Jessica Nardin
OFT Consultation Coordinator
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

Email: jessica.nardin@oft.gsi.gov.uk

A copy of the key criteria from the Better Regulation Executive's *Code of Practice on Consultation* can be found in Annexe A.

Data use statement for responses

Personal data received in the course of this supplementary consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this supplementary consultation in future publications. In deciding whether to do so, we will have regard for the need for the fair and lawful processing of any personal data, and 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 business interests of that business. 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.

Please note that information provided in response to this supplementary consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000 (FOIA). In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002 before reaching a decision on whether we can release such information under the FOIA.

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

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THE SUPPLEMENTARY CONSULTATION

The primary purpose of this supplementary consultation is to obtain further views on the use of continuous payment authority as a means of recovering consumer credit debts. We are also taking this opportunity to consult on the specific practice of debiting monies from an account in the absence of having the express authority to do so (including under circumstances in which the lender may have the authority, under a continuous payment authority or otherwise, to recover monies from **another** account(s)). This practice is dealt with in what could, subject to consultation, become a new paragraph 3.9n of the Guidance.

Next steps

The supplementary consultation closes on 26 January 2012.

3 UNFAIR OR IMPROPER BUSINESS PRACTICES

Deceptive and/or unfair methods

3.9 Examples of unfair or improper practices are as follows:

- m. misusing a continuous payment authority, including by (this is a non-exhaustive list):
- debiting a debtor's account other than on a date or dates as expressly set out in the relevant agreement, unless otherwise **specifically agreed** with the debtor subsequent to the agreement having been concluded (for example, where an alternative repayment plan has subsequently been agreed between the creditor and the debtor).
 - debiting lesser or greater amounts than those expressly set out in the relevant agreement unless the debiting of such amounts has been **specifically agreed** with the debtor subsequent to the agreement having been concluded (for example, where an alternative repayment plan has subsequently been agreed between the creditor and the debtor).

The OFT considers that while it is not unfair or improper for a creditor or a debt recovery business acting on its behalf to use continuous payment authority to recover 'recurring repayments' (for example, repayments of £100 per month, on the first day of the month, over 10 months, to recover a loan of total cost to the debtor of £1,000) it is unfair and improper to seek to use it to make recurring attempts to recover a 'SINGLE repayment' (for example, making numerous consecutive attempts to recover, in full or in part, a single repayment of £100 on a loan of total cost to the debtor of £1,000).

If a debtor is, or appears as if he may be, experiencing difficulties meeting repayments (for example, because an attempt by the creditor to recover a repayment is unsuccessful), we would expect the creditor, or the business seeking to recover repayment on the creditor's behalf, to **exercise forbearance**, and, if appropriate to do so, amend or suspend any continuous payment authority (or any other means of recovering repayments) in order that a more sustainable repayment plan might be agreed with the debtor.

Continuing to seek to extract any or all monies from a debtor's account, where a debtor has failed to make a full or partial repayment, by repeated attempts to exercise a continuous repayment authority would, in the OFT's view, constitute an irresponsible lending practice for the purposes of section 25 (2B) of the Act since such a practice facilitates 'failing to treat borrowers in default or arrears difficulties with forbearance'.

The OFT considers the inclusion of a term in a contract that facilitates the misuse of a continuous payment authority in this way, **in itself**, to constitute an irresponsible lending practice.² Legal processes exist whereby, where necessary and appropriate, the courts can exercise their discretion as to how the rights of each party to a contract should be addressed under circumstances in which one party has failed to, or been unable to, meet all or part of its obligations under the contract.

² Depending on the circumstances, a contractual term in a regulated agreement that is inconsistent with a provision for the protection of a debtor contained in the Act may be void in accordance with section 173(1) of the Act.

In the OFT's view, it is not appropriate for creditors or businesses acting on their behalf in pursuit of recovery of debts, in pursuance of their own interests, to seek to bypass such systems which are designed to give balanced consideration to the interests of **both** parties.

Where borrowers are using continuous payment authority (but not 'misusing' as described above) we would still expect creditors to set out clearly to borrowers in pre-agreement explanations that this is the case and that:

- Where borrowers are using continuous payment authority (but not 'misusing' as described above) we would still expect creditors to set out clearly to borrowers in pre-agreement explanations that this is the case and that continuous payment authorities are not covered by bank guarantees (unlike direct debits).

Where applicable, we consider that a failure to include this information in a pre-agreement explanation, in such a way that it would be brought to a borrower's attention, would be a breach of section 55A(1)(a) of the Act by failing to refer to matters of the kind set out in section 55A(2) (c) of the Act. Such a breach would constitute an irresponsible lending practice for the purposes of section 25(2B) of the Act.³

n. debiting a bank account or credit card account of a borrower or a third party **without express authority from the account holder.**

For example, using a third party's credit card, without consent, to repay the debt of a borrower where the third party had previously consented to the use of such card to repay a previous debt of the borrower. A further example would be

³ See paragraph 3.23 of the OFT's Irresponsible Lending Guidance.
www.of.gov.uk/shared_of/business_leaflets/general/oft1107.pdf

debiting sums from a borrower's account which the borrower has not **expressly** authorised the creditor to seek repayment from in respect of the particular debt.

Questions

Q1 Are there any substantive aspects of the above paragraphs with which you disagree?

Q2 Do you consider that there are any significant omissions?

Q3 Do you have any other suggestions for improvement?

ANNEXE A CONSULTATION CRITERIA

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

- A.1 **When to consult** – formal consultation should take place at a stage when there is scope to influence the policy outcome.
- A.2 **Duration of consultation exercises** – consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- A.3 **Clarity of scope and impact** – consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- A.4 **Accessibility of consultation exercises** – consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- A.5 **The burden of consultation** – keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- A.6 **Responsiveness of consultation exercises** – consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- A.7 **Capacity to consult** – officials running consultations should seek guidance in how to run effective consultation exercises and share what they have learned from the experience.
- A.8 The full *Code of Practice on Consultation* can be found on the website of the Department for Business, Enterprise and Regulatory Reform:
www.berr.gov.uk/files/file47158.pdf.