

**Empowering and Protecting
Consumers: Consultation on
institutional changes for the
provision of consumer
information, advice, education,
advocacy and enforcement**

OFT Response

September 2011

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1 PREFACE

- 1.1 The Office of Fair Trading (OFT) is the UK's national consumer and competition authority. Its mission is to make markets work well for consumers. It achieves this by promoting and protecting consumer interests throughout the UK, while promoting business behaviour that is both fair and competitive. The OFT has a range of tools which enable it to deliver this mission, including powers to enforce consumer and competition law; responsibility for licensing businesses operating in certain sectors; powers to advise, inform and educate consumers and businesses; and analytical, research and policy development capabilities.
- 1.2 The OFT welcomes the opportunity to respond to this consultation. This response also seeks to address a number of the questions and recommendations raised by the National Audit Office (NAO) in its June 2011 report *Protecting consumers – the system for enforcing consumer law*.¹
- 1.3 This response focuses on the implications of the Government's proposals for the laws and institutions which provide protection to consumers in their dealings with businesses across the whole economy. It does not explore in any depth the implications of the Government's proposals for specific sectoral consumer protection regimes. However, there would be merit in considering further the implications of proposed reforms for the consistency of consumer protection across the economy.
- 1.4 The proposals set out in the consultation document come in the context of wider reform proposals. In particular, the Government proposes to merge the OFT with the Competition Commission to create a new Competition and Markets Authority (CMA), which would retain consumer enforcement powers for some purposes and have responsibility for national oversight of the effective functioning of markets – hence this document refers to OFT/CMA throughout. Consultation on those

¹ www.nao.org.uk/publications/1012/protecting_consumers.aspx

proposals closed in June this year² and final decisions are yet to be made. The analysis in this response seeks to take account of these proposals and of the ongoing debate about the future of both the competition and consumer protection regimes. The creation of the CMA would not itself materially affect the key conclusions in relation to the proposals set out in this consultation, but the scope of the CMA's activities would do so. There are strong grounds to believe that the UK's competition regime benefits from exposure to consumer protection issues, and vice-versa, a model emulated by our leading international peers. This broad scope needs to be maintained.

1.5 The Government also proposes that responsibility for the Consumer Credit Act 1974 and the licensing regime it establishes – a significant part of the OFT's current consumer protection work – would go elsewhere. There are important operational linkages between credit and our general consumer protection functions and between these functions and our competition-focused work under the Competition Act 1998 and Enterprise Act 2002. The Government will want to consider the impact and timing of these proposed changes in the round in order to minimise uncertainty and disruption to firms and consumers, support effective delivery throughout any period of change and, where possible, avoid the need for interim solutions.

1.6 It is not always possible to go for the ideal solution, particularly when not starting from a blank slate. However, the OFT has sympathy with the views already expressed by a number of parties (for example, Consumer Focus) that this is a missed opportunity to consider bigger changes that would make consumer protection 'fit for the 21st Century'. In particular, more radical reforms could potentially more directly address challenges posed by the UK's fragmented consumer enforcement structures – which were established to meet the needs of an era before large national and multinational businesses, operating through multiple and sophisticated sales channels, became so prevalent in the UK retail environment.

² www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=open

- 1.7 The OFT recognises that these questions are outside of the scope of the current consultation and would involve a broader look at wider central and local government policy debates, particularly in light of the interface between the Trading Standards Service and other regulatory services. For this reason this response focuses on which of the options set out in the consultation work best, and are most likely to maintain or enhance the strengths the UK system of consumer protection already has. Of the options for consumer enforcement presented in the consultation document, the OFT considers that the Joint Enforcement Board is clearly preferable.
- 1.8 The structure of this response is as follows. Chapter Two provides an Executive Summary. Chapter Three sets out the OFT's view on the cross-cutting elements of an effective framework for consumer protection. Chapter Four considers the Government's proposals for reform of consumer enforcement. Chapter Five deals with the future of linked functions such as international coordination and liaison, business guidance, policy and research and the specific regime for estate agency. Chapter Six covers the future of consumer Market Studies. Chapter Seven covers consumer advice, and Chapter Eight consumer education and information functions. Chapter Nine considers the future of the Consumer Codes Approval Scheme. Finally, Chapter Ten addresses the Government's proposals for reform of publicly-funded consumer advocacy and sets out the OFT's views on the importance of effective mechanisms for consumer redress.

2 EXECUTIVE SUMMARY

The Office of Fair Trading (OFT) supports the objectives which the Government has set out for these reforms, and some of its specific proposals

- 2.1 The OFT welcomes and supports the three objectives set out by the Government for these reforms: reducing complexity in the landscape, strengthening the effectiveness of consumer enforcement and achieving more cost-efficient delivery. As noted by the National Audit Office (NAO) in its report, *Protecting Consumers – the system for enforcing consumer law*,³ the UK's consumer protection regime delivers high levels of consumer confidence, with 78 per cent of consumers reporting that they feel adequately protected, compared to the European Union average of 55 per cent.⁴ However, the regime does have problems. It is facing significant funding cuts, it is institutionally complex and coordination between delivery partners could be better. Supporting consumer confidence in markets and the choices they make will assume increasing importance as government hands more market choice to consumers in areas such as pensions, education, health and social care.
- 2.2 The OFT therefore recognises the need for reform of the consumer protection regime to offer improved value for money and make it more fit for the challenges of the future. In particular, it agrees with the Government's conclusion that a better system of national coordination and prioritisation is needed in order to improve the system's ability to tackle cases which cross local authority boundaries.
- 2.3 The OFT welcomes the acknowledgment in the consultation document that the proposed Competition and Markets Authority (CMA) should take the lead in consumer enforcement actions where this is an appropriate solution to structural market problems. However, this response argues that the CMA's consumer enforcement role should go wider than this and that consumer and competition policy should be joined up across the

³ www.nao.org.uk/publications/1012/protecting_consumers.aspx

⁴ *Consumer Markets Scoreboard 3rd edition* (European Commission, 2010)

regime, ensuring it delivers effective consumer protection which helps create the conditions for economic growth.

- 2.4 The OFT agrees that there may be advantages to bringing together the provision of consumer advice, education and advocacy under a single, well-recognised brand like Citizens Advice, as long as appropriate mechanisms for accountability and coordination are put in place to ensure that these functions support the delivery of national policy objectives and can respond effectively to emerging challenges.

However, the OFT is concerned that the proposed reforms will lead to a weakening of the consumer protection regime's capacity to protect consumers where they need it most, and will place additional burdens on business.

- 2.5 The proposal to transfer most enforcement to Trading Standards Services (TSS) under the oversight of a new Trading Standards Policy Board (TSPB) would fragment capacity to tackle market-wide problems and to pursue nationally significant enforcement cases. This would reduce the system's ability to take on issues which have been of significant collective concern to consumers, for example in relation to bank charges, airline pricing and residential property markets. This gap is unlikely to be offset by a significant increase in regional and national enforcement action by TSS. There is no doubt that TSS, individually and collectively, would seek to rise to the challenges associated with increased responsibility for cross-boundary enforcement. However, there is a strong risk that the proposed TSPB model will not be able to overcome the financial and structural constraints which the NAO notes may already prevent TSS from taking on nationally significant cases.

As the economy develops, the importance of complex market-wide problems, occurring on a national and international scale, is growing. The consumer protection regime must be equipped to respond.

- 2.6 Most consumer detriment no longer occurs at a purely local level. The NAO estimates that detriment from mass market scams, intellectual property crime and doorstep crime crossing local authority boundaries costs consumers a minimum of £4.8 billion annually.

- 2.7 This figure provides only a partial picture of cross-boundary detriment, as consumer detriment comes from a much wider range of sources. For example, it can result from the inclusion of unfair terms in contracts, or from mis-selling, which can lead to consumers making unnecessary purchases, overpaying or getting a poor deal in other ways. Consumers also lose out as a result of complex pricing structures and opaque emerging business models or practices which make it hard for them to get the best deal.
- 2.8 New channels to market and new technologies can also create risks for consumers. For example, the OFT's recent Advertising of Prices Market Study⁵ examined how selling online can facilitate the advertising of prices in ways that make it harder for consumers to compare them, such as through drip-pricing. Such problems are likely to increase as internet-based sales continue to grow, supported by developments in mobile technology. In November 2006 approximately £1 in every £33 spent in retail (excluding automotive fuel) was spent on-line; by August 2011 this had risen to £1 in every £10 spent.⁶
- 2.9 This broad view of detriment is reflected in the introduction of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which enhanced enforcers' ability to take on sharp practices of this kind. They extended existing laws dealing with misleading advertising and other selling practices to introduce a general prohibition, not only on misleading and aggressive practices, but on all unfair practices that fall short of ordinary standards of professional diligence which are likely to materially distort the economic behaviour of the average consumer.
- 2.10 These types of detriment (as opposed to criminal behaviour) are often the result of broadly legitimate businesses pushing the boundaries of the law. Where the business in question is a large national or multinational firm with access to the best legal representation, taking it on requires

⁵ www.offt.gov.uk/OFTwork/markets-work/completed/advertising-prices/

⁶ www.ons.gov.uk/ons/dcp171778_232975.pdf

considerable resources and expertise, as well as the ability to bear significant financial risk.

- 2.11 These types of detriment can also pervade markets where, as a company gains competitive advantage from such practices, competitors are drawn into a race to the bottom. In these cases, unfair practices can affect millions of consumers and have a considerable impact on the economy. For example, estimates have put the scale of mis-selling of payment protection insurance alone at between £3 billion and £9 billion over recent years.⁷ In 2009 an independent evaluation of just one OFT intervention (to secure a voluntary commitment from the airline industry to greater transparency in pricing) estimated annual benefits to consumers of £131 million.⁸
- 2.12 Of course, detriment is not only financial. In 2006 the OFT published two research reports which showed that consumers can experience loss from dealing with a business in many ways including: financial loss, deprivation of important services, loss of confidence in suppliers, inconvenience and stress.⁹
- 2.13 All forms of detriment are potentially important and may need to be tackled. However, given the growing dominance of national and multinational businesses operating through multiple and sophisticated channels to market, most notably retailing on the Internet, the evidence would suggest that the harm from mis-selling, unfair contracts and complex pricing – particularly where they develop into market-wide practices - is probably greater and growing faster than that from local or cross-boundary criminal behaviour.
- 2.14 If the system is to protect consumers today and respond effectively to the problems consumers may face tomorrow, it will be vital to preserve

⁷ See www.fsa.gov.uk/pubs/policy/ps10_12.pdf and www.guardian.co.uk/business/2011/may/08/banking-financial-services-authority-fsa

⁸ www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft1139.pdf

⁹ www.of.gov.uk/news-and-updates/press/2006/detriment

and develop the regime's capacity to respond to non-compliance by big, powerful firms and to emerging market-wide detriment. Whilst the OFT understands and supports the Government's aspiration to empower local enforcers, it is doubtful that the TSPB model will be able to achieve this. These matters are discussed in more detail in Chapters Three and Four.

The distribution of resources must be aligned with where consumer need is greatest, but it is also important that the nature of those resources is appropriate to the task in hand.

- 2.15 TSS and the OFT have evolved specialised and differentiated, but complementary, approaches to tackling different forms of detriment. TSS have led the way in addressing local and overt detriment such as doorstep crime and scams, through localised surveillance and intelligence gathering techniques, effective partnerships with local agencies and in-depth knowledge of local markets and businesses. TSS also run larger criminal investigations into firms that cause detriment regionally and nationally.¹⁰ TSS are experienced in taking prosecutions, often acting directly as prosecutors in local criminal courts. Coupled with their wider fair trading functions, such as business advice on compliance, they are often able to secure quick behavioural change from individual traders and resolution for consumers.
- 2.16 The OFT and the concurrent sectoral regulators,¹¹ in contrast, have developed approaches to tackling nationally significant and market-wide issues, generally at the non-criminal end of the spectrum. They do this through Market Studies and economic analysis of the drivers of business and consumer behaviour, working with trade bodies and firms to develop market-wide solutions, and pursuing multiparty enforcement and litigation, generally in the higher courts. They have developed resources and expertise to take on well resourced parties, such as major

¹⁰ For example the successful action by Surrey TSS against a major energy supplier for misleading selling practices earlier this year.

¹¹ The concurrent regulators are the Civil Aviation Authority, NIAUR (the Northern Ireland Utility Regulator), Ofcom, Ofgem, Ofwat and the Office of the Rail Regulator.

multinational companies. They also take cases on novel issues to create legal precedents which have wider impacts across the economy. In addition, the OFT is responsible for complementary functions (research and analysis, consumer advice and education, international liaison, and business guidance) that support its own enforcement activities as well as those of TSS and concurrent sectoral regulators, and has spearheaded the development of specialised online enforcement capabilities.

- 2.17 Reforms to create a more effective and responsive regime should build on these existing strengths. There is of course some overlap between the OFT and TSS, particularly where intelligence shows clear evidence of problems with a number of traders within a market, or where a case involves a difficult legal issue. There are strong examples of effective joint-working by TSS and the OFT. However, as the consultation document and the NAO highlight, there is room to improve and clarify how cases that cut across TSS and OFT responsibilities are dealt with to minimise the risk of an enforcement gap at the regional or national level. Mechanisms for effective coordination, intelligence sharing and risk assessment could also be enhanced.

The approach to enforcement under the TSPB option carries unnecessary risk and could result in poor value for money and lower standards of protection for consumers.

- 2.18 Chapters Four and Five set out OFT's views on proposed reforms to consumer enforcement, including a number of concerns about the TSPB option.
- 2.19 First, the proposals would separate enforcement activity from the diagnosis of market problems and from the capacity to deliver enforcement alongside other remedies such as voluntary and market-based solutions in a coordinated manner.
- 2.20 Second, the proposed TSPB faces a very significant challenge to develop the resources and capability needed to overcome the disincentives to cross-boundary collaboration highlighted by the NAO, as well as to develop the sorts of specialist legal and economic capability needed to

challenge the behaviour of large, well-resourced businesses with access to the best legal representation.

- 2.21 Making expertise and knowledge that is currently concentrated at the national level accessible to all delivery partners is, in the OFT's view, key to the system's ability to respond to existing and emerging threats to consumers. Dispersing these functions among different delivery bodies, including specialist regional TSS teams, different lead authorities, the proposed TSPB and the Trading Standards Institute (TSI), will make it harder to share experience and coordinate action across functions. The OFT is concerned that the result will be units within those bodies without a sustainable funding basis, too small to form a critical mass of resources, skills and expertise, and unable to bear the costs and risks associated with major consumer litigation.
- 2.22 It has not been demonstrated that the benefits of this change would outweigh the costs, particularly in the absence of specific new funding for the transition. Change could take several years to implement; there would be a diversion of resources and energy away from front-line enforcement towards managing the change and replacing lost expertise, with the risk that consumers are less well protected in the meantime.
- 2.23 Third, this option fails to achieve the Government's objective of reducing institutional complexity. Not only does it fragment functions currently delivered within a single authority, but it envisages the creation of a new body – the TSPB – to coordinate cross-boundary enforcement by TSS. Moreover, the consultation acknowledges that issues which cross organisational boundaries will continue, and that therefore further forums for coordination and exchange must be created in order to avoid duplication and determine who should act in specific instances. This model is therefore potentially more complex than the current system.
- 2.24 Fourth, the TSPB proposal could lead to a patchwork approach to enforcement, with the potential for inconsistent approaches by different local authorities, which will create cost and uncertainty for firms. This problem could be particularly acute in relation to the CPRs - which remain relatively untested. The process of honing these regulations into

a well-understood and legally tested framework is, in the OFT's experience, best supported by the existence of a strong national consumer enforcement body, rather than a piecemeal approach by different authorities across the country. As well as ensuring consumers receive consistent protection, a uniform approach to enforcement is vital to economic growth, supporting business confidence and reducing investment risk for legitimate businesses who may otherwise fear their business models may be undermined by sharp practices.

- 2.25 Despite the passion, commitment and professionalism of TSS there are very substantial structural challenges to the TSPB model which it will be difficult for them to overcome, such as the existence of 197 separate local enforcement agencies embedded within wider local authority structures and responsibilities and, importantly, the significant cuts in funding due to take place over the next three years. The consultation document does not set out sufficiently clearly how it is envisaged that the TSPB model will address these obstacles.

Proposed reforms to Market Studies risk losing the value which informed market analysis brings to the current system. Transferring consumer Market Studies to Citizens Advice and Citizens Advice Scotland would split the analysis of consumer issues from an understanding of competition issues and risks creating unnecessary burdens on business. Likewise, divorcing responsibility for market analysis from market interventions (particularly enforcement) may lead to unnecessary action, or poorly designed and uncoordinated remedies to consumer problems.

- 2.26 Chapter Six sets out the OFT's views on proposed reforms to the Market Studies regime. Bringing together both demand-side and supply-side perspectives leads to better outcomes for consumers, firms and the economy. In our experience, the key to this is putting robust analysis at the heart of the regime. Divorcing consumer Market Studies from markets-based thinking may result in inappropriate or unduly burdensome interventions, increasing costs for businesses and consumers, and hindering economic growth.

- 2.27 Market Studies facilitate a coordinated response to a consumer problem, often underpinning a range of remedies such as enforcement, consumer education, industry self-regulation or improved guidance to business. Currently, the OFT is able to immediately take forward many of these remedies itself. Under the proposal to transfer consumer Market Studies to Citizens Advice/Citizens Advice Scotland the situation would be more complex. Rather than most recommendations being taken forward in a coordinated manner by a single body, many would have to be referred to other bodies for action, creating the risk that important analytical insights could be lost or that actions would not be carried forward together due to other priorities. That could lead to consumers facing ongoing risks and businesses facing a piecemeal approach to reforms.
- 2.28 In addition, giving Market Study responsibilities to Citizens Advice/ Citizens Advice Scotland - consumer advocacy bodies - risks significantly altering the specific role of Market Studies in the regime and losing some of their considerable benefits. However soundly based the analysis, they will no longer be seen as a neutral means of identifying a coherent and coordinated set of responses to a market problem if they are carried out by an organisation that also lobbies for consumers. Business in particular may lack confidence in the conclusions of such studies.
- 2.29 This response argues that it is in the interests of the overall effectiveness of the regime that Market Studies and Super-complaints - whether they are initially begun as a response to consumer, competition or mixed issues - should continue to be dealt with by the OFT/CMA. This is not to say that analytical capability should not be highly valued right across the regime. Research and analysis by bodies such as Citizens Advice, Consumer Focus and Which? makes a vital contribution to the collective understanding of consumer issues, and it is important to retain and develop such capability on a wide basis going forwards.

Of the options as presented, that of improving collaboration and cooperation within existing structures (the Joint Enforcement Board model) offers greater potential to improve outcomes for consumers than a transfer of most enforcement responsibilities to a network of local enforcers (the Trading Standards Policy Board model).

- 2.30 A modern and forward-looking consumer regime requires a strong national enforcer. The OFT therefore urges the Government to give OFT/CMA broader responsibility for nationally significant consumer enforcement cases, particularly precedent-setting cases and tackling market-wide issues. The OFT/CMA needs to retain powers to conduct consumer Market Studies and respond to Super-complaints, to ensure that consumer problems are looked at in the round, drawing on an understanding of the drivers of both consumer and firm behaviour, and that proportionate and appropriate remedies are selected which do not place unnecessary burdens on business. It should continue to act as a national hub for enforcement expertise, housing specialist functions such as Internet enforcement capability and the single focal point for international enforcement coordination and liaison offers greatest scope to build on the existing strengths of the regime and deliver value for money.
- 2.31 However, the benefits of this specialist capability should be more widely shared than is currently the case. There should be greater TSS involvement in decisions about how such resources are deployed, and the national infrastructure for sharing intelligence, knowledge and skills should be enhanced to help local enforcers develop their capacity to take on difficult cross-boundary cases and to ensure that resources are deployed to the areas of greatest need.
- 2.32 Therefore the OFT supports the creation of a Joint Enforcement Board (JEB), bringing together representatives of TSS and the OFT/CMA (and potentially other interested bodies) to set national priorities, choose which are the most important cross-boundary enforcement cases and agree responsibilities for taking them forward, including through joint enforcement by the OFT/CMA and TSS. Chapter Four provides more detail on how such a model might work.

- 2.33 It makes sense to build upon existing expertise and capacity rather than break it up and build replacements elsewhere. Joining up enforcers would be more efficient, less risky and, crucially, would divert less energy and resource away from front line enforcement, which is vital at a time of significantly reduced budgets. The JEB could become a reality quickly and at a far lower cost than the TSPB approach, without all the associated risks.
- 2.34 This is not a call to retain the status quo. Meaningful change is required to address the challenges identified in the consultation and the NAO report and to ensure that the consumer protection regime is forward looking, taking account of and anticipating new challenges faced by consumers in a changing world. Making the JEB model a success will require a commitment by all partners, including the OFT/CMA, to greater pooling of resources and capability across the regime, coupled with genuinely shared decision-making and joint responsibility for results.

Further thought should also be given to proposed changes to business education, consumer information and education, codes and advocacy.

- 2.35 The OFT has concerns about transferring business-facing education activities to the TSPB and TSI (see Chapter Five). It considers that this creates increased risk of uncertainty for firms. In line with our conclusion that the OFT/CMA should retain a significant role in national consumer enforcement action and coordination, it should also retain the complementary tools enabling it to provide guidance and information to business in line with statutory guidelines on good regulatory practice.
- 2.36 While consumer advice, information and education functions can be transferred to CitA/CAS, the OFT considers that mechanisms are required to ensure accountability for their performance and to enable other organisations – notably regulators – with a strong interest in the messages that consumers receive to influence how and when public consumer information and education funding is spent. It also strongly supports the NAO's recommendation that enforcers must continue to have appropriate access to consumer complaints data given its

significance as a source of intelligence, of evidence in investigations and as an input to prioritisation mechanisms. (Chapters Seven and Eight).

- 2.37 The OFT welcomes the Government's support for self-regulation and co-regulation. In considering options for the future, it is right that the benefits of the existing Consumer Codes Approval Scheme should be retained, whatever form a future model may take (Chapter Nine).
- 2.38 The OFT supports the principles behind the Regulated Industries Unit as proposed by BIS – joining up common themes across sectors, looking forward for future issues and holding regulators and government accountable. It does not take a view on the specific organisational structure or home but would agree that it should minimise duplication and there should be a strong economic analytical function (Chapter 10).
- 2.39 The OFT notes that the consultation paper considers consumer redress primarily in relation to proposed statutory redress schemes in the water and transport sectors. The OFT urges the Government to consider further the role of wider consumer redress mechanisms in the consumer protection regime. Effective redress mechanisms encourage the resolution of consumer problems and incentivise businesses to provide satisfactory goods and services (Chapter 10).

3 SETTING THE SCENE: CREATING THE FRAMEWORK FOR AN EFFECTIVE CONSUMER PROTECTION REGIME

SUMMARY

Changes to the consumer protection regime must be consistent with an effective regime which empowers and protects consumers and supports economic productivity and growth.

Several things are required for this consistency:

- Preserving the link between protecting consumers and promoting competition right across the consumer protection regime so that those carrying out consumer protection functions benefit from an understanding of how firms think and behave.
- Ensuring that the regime is appropriately equipped to deal with the full range of consumer detriment, from criminal activities (for example, scams and doorstep crime) through to unfair behaviour by legitimate businesses testing the boundaries of the law (for example, misleading pricing practices, unfair contract terms, or misleading marketing which can cause consumers to waste money or undermine confidence in markets), particularly where this becomes widespread across a market.
- Making best use of existing resources and skills, and ensuring that the benefits outweigh the costs where change in institutional structures is proposed.
- Ensuring that important synergies between functions are preserved and that there is effective, consistent coordination and information-sharing among the institutions that carry them out.
- Ensuring that institutions which carry out consumer protection functions are accountable to Ministers, Parliament and local communities, and that both consumers and businesses have confidence in the regime.

The link between protecting consumers and promoting competition

- 3.1 The OFT's experience strongly suggests that competition and consumer policy are linked. Good consumer outcomes rely on competitive markets to provide choice and value, while vibrant competition relies on consumers confidently shopping around. Competition problems can often manifest themselves in businesses failing to properly comply with consumer protection laws, which in turn can prevent consumers driving effective competition and lower prices through the exercise of informed choice.
- 3.2 The links between consumer and competition interventions mean that there are advantages for both businesses and consumers to aligning them in policy and practice. Box 3.1 summarises some of the benefits of taking an integrated approach to consumer protection and the promotion of competition. Losing this connection risks poor outcomes for consumers, firms and the economy as a whole.

Box 3.1 Benefits of an integrated Consumer-Competition approach

What does consumer policy gain from competition policy?

- Without a competition influence, consumer agencies can sometimes be tempted towards over-enforcement and intervention, or to believe that the answer to a problem is to reach for a new rule, law or licensing regime. Competition thinking is a counterweight, and shows that market processes can solve consumer problems, and that over-regulation carries risks such as pushing consumers away from making active, informed choices and learning from experience.
- Diagnosis of the market origins of a consumer problem often points to a more effective, light-touch remedy than case-by-case enforcement and in some cases may enable us to get closer to the root cause.
- Firm's strategies to set and raise standards can be examined to see if they stop new firms coming in, discourage innovation or make it easier for firms to rip off consumers.

- A better understanding of private sector market responses, including regulatory gaming and unintended economic side-effects (whereby the gains from reduced prices in one area are offset by increases in another) means that intervention outcomes can be predicted more accurately.
- Consumer detriment can be analysed with additional economic rigour and regulatory arguments can be scrutinised from the perspective of the harm they may do to consumers.

What does competition policy gain from consumer policy?

- Decision-making on competition cases is more likely to be based on a richer understanding of consumer detriment and customer interaction with firms.
- Lessons from experience of how consumers actually behave, rather than reliance on economic assumptions about 'rational consumers', promote more effective remedies.
- Intervention thinking is more likely to take account of perverse effects – for example, aggressive price competition that erodes quality – and to look at evidence of how remedies work in practice.
- Useful alternative or additional remedies can sometimes be found in the consumer toolkit. For example, activating consumer choice by increasing suppliers' obligations to disclose information in combination with consumer awareness programmes can kick-start markets where there is a lack of competition.

3.3 The OFT therefore considers it essential that the new CMA should have a strong consumer protection role. Some have expressed concerns that this could dilute the focus of the new organisation, but these concerns are misplaced. An exposure to the interests, needs and behaviour of consumers, and the difficulties which they can face day-to-day in dealing with firms of all kinds, is, in our experience, a source of strength to competition authorities. It helps ensure analysis that takes account of obstacles to the exercise of 'rational' choice by consumers and remedies which work with the grain of consumer behaviour and biases. The most

successful international comparators, such as the US Federal Trade Commission (FTC) and the Australian Competition and Consumer Commission (ACCC) apply this joined-up model, and other jurisdictions such as Ireland, Denmark and the Netherlands are moving in this direction.

- 3.4 It is also important that wider consumer protection functions be informed by an understanding of the competitive pressures on firms and wider market dynamics. As Box 3.1 highlights, this can help avoid unsuccessful interventions where the benefit to consumers is offset by gaming or by increased prices elsewhere, and it can help avoid over-regulation and over-enforcement where the market can deliver a better solution.
- 3.5 **OFT welcomes the Government's proposal that the CMA should retain powers to take consumer enforcement action where this is an appropriate solution to a structural market problem. However, it needs to go further than this and avoid separating the treatment of consumer problems from markets-based thinking. All functions within the consumer protection regime should be informed by an understanding of markets in the round, from the perspective of both the demand and supply sides. As noted above, without this there is a risk that interventions are ineffective, unnecessary or unduly burdensome. Ministers should give careful consideration to these points in reaching final decisions on the shape of the regime.**

Meeting the needs of tomorrow's consumers: tackling the full range of detriment

- 3.6 Most consumer detriment no longer occurs at a purely local level. The NAO estimates that detriment from mass market scams, intellectual property crime and doorstep crime crossing local authority boundaries costs consumers a minimum of £4.8 billion annually.
- 3.7 Evaluation of recent interventions and other data suggest that this figure provides only a partial picture of cross-boundary detriment, as consumer detriment comes from a much wider range of sources. For example, it can result from the inclusion of unfair terms in contracts, or from mis-

selling, which can lead to consumers making unnecessary purchases, overpaying or getting a poor deal in other ways. Consumers also lose out as a result of complex pricing structures and opaque emerging business models or practices which make it hard for them to get the best deal.

- 3.8 New channels to market and new technologies can also create risks for consumers. For example, our recent Advertising of Prices Market Study¹² examined how selling online can facilitate the advertising of prices in ways which make it harder for consumers to compare them, such as through drip-pricing. This work supported our recent action to tackle unfair credit and debit card surcharges for consumers buying flights online in response to a Super-complaint by Which? (the OFT estimated that consumers spent around £300 million pounds on surcharges in 2010 with the 10 major airlines operating in the UK).¹³ Such problems are likely to increase as Internet-based sales continue to grow, supported by developments in mobile technology. In November 2006 approximately £1 in every £33 spent in retail (excluding automotive fuel) was spent online; by August 2011 this had risen to £1 in every £10 spent.¹⁴
- 3.9 Detriment also arises where consumers are tripped up by complicated terms and conditions which are not obvious to them at the time they enter into a contract. For example, successful OFT litigation led to the High Court prohibiting the use of terms and conditions used by a residential lettings agency governing sales and third party renewal commissions, and the Court Order also provided that where renewal commission is charged, this must be clearly brought to the consumer's attention at the outset.¹⁵ A recent evaluation of this intervention found benefits to consumers of at least £4.4 million a year.¹⁶

¹² www.offt.gov.uk/OFTwork/markets-work/completed/advertising-prices/

¹³ www.offt.gov.uk/OFTwork/markets-work/super-complaints/which-payment-surcharges

¹⁴ www.ons.gov.uk/ons/dcp171778_232975.pdf

¹⁵ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/foxtons/

¹⁶ www.offt.gov.uk/news-and-updates/press/2011/82-11

- 3.10 This broad view of detriment is reflected in the introduction of the CPRs, which enhanced enforcers' ability to take on sharp practices of this kind. They extended existing laws dealing with misleading advertising and other selling practices to introduce a general prohibition, not only on misleading and aggressive practices, but on all unfair practices that fall short of ordinary standards of professional diligence which are likely to materially distort the economic behaviour of the average consumer.
- 3.11 These types of detriment (as opposed to criminal behaviour) are often the result of broadly legitimate businesses pushing the boundaries of the law. Where the business in question is a large national or multinational firm with access to the best legal representation, taking it on requires considerable resources and expertise, as well as the ability to bear significant financial risk.
- 3.12 These types of detriment can also pervade markets where, as a company gains competitive advantage from such practices, competitors are drawn into a race to the bottom. In these cases, unfair practices can affect millions of consumers and have a considerable impact on the economy. For example, estimates have put the scale of mis-selling of payment protection insurance alone at between £3 billion and £9 billion over recent years.¹⁷ In 2009 an independent evaluation of just one OFT intervention (to secure a voluntary commitment from the airline industry to greater transparency in pricing) estimated annual benefits to consumers of £131 million.¹⁸
- 3.13 Of course, detriment is not only financial. In 2006 the OFT published two research reports which showed that consumers can experience loss from dealing with a business in many ways including: financial loss, deprivation of important services, loss of confidence in suppliers, inconvenience and stress.¹⁹ This was most likely to occur where: the

¹⁷ See www.fsa.gov.uk/pubs/policy/ps10_12.pdf and www.guardian.co.uk/business/2011/may/08/banking-financial-services-authority-fsa

¹⁸ www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1139.pdf

¹⁹ www.offt.gov.uk/news-and-updates/press/2006/detriment

goods and services being supplied have a technical element making the consumer reliant upon the suppliers' integrity, dubious marketing methods or direct selling through cold calls are involved, the supplier is remote and pays insufficient attention to after-sales service, or irregular purchases of high value goods and services are made and not enough is known about the business involved.

- 3.14 All forms of detriment are potentially important and may need to be tackled. However, given the growing dominance of national and multinational businesses operating through multiple and sophisticated channels to market, most notably retailing on the Internet, the evidence would suggest that the harm from mis-selling, unfair contracts and complex pricing – particularly where they develop into market-wide practices - is probably greater and growing faster than that from local or cross-boundary criminal behaviour.
- 3.15 **The OFT is concerned that under the preferred options in the consultation, the consumer protection regime may not be able to meet the full range of challenges faced by consumers. Finite, and reducing, public resources may not be configured so as to be able to tackle the areas of greatest need. In particular, if the system is to protect consumers today and respond effectively to the problems consumers may face tomorrow, it will be vital to preserve and develop the regime's capacity to respond to emerging market-wide detriment. It is therefore a matter of concern that proposed reforms to the enforcement of consumer law and consumer Market Studies in particular may weaken this capacity. These matters are explored in greater detail in Chapters Four (enforcement) and Six (Market Studies).**

Preserving and building on existing strengths and synergies

- 3.16 The Government's proposals for reform of the consumer protection regime focus on the institutions delivering particular functions within the system and how these might be differently configured in order to reduce complexity and maximise efficiencies. Some of these proposals seek to take advantage of the likely benefits of co-locating functions and building on existing capacity and strengths, for example in bringing

together advice and advocacy services under a single institution with a well-recognised brand.

- 3.17 These benefits must be weighed against the costs of potentially disruptive change, particularly in the absence of specific new funding for the transition. The proposals under consideration would also involve the disruption of existing synergies and information flows within the regime and the potential loss of existing experience and expertise which would need to be rebuilt within the proposed structure over time. There would also be costs arising from the need to create new coordination and support structures. Change could take several years to implement; there would be a diversion of resources and energy away from front-line enforcement towards managing the change and replacing lost expertise, with the risk that consumers are less well protected in the meantime. At a time when public finances are extremely stretched, the OFT would also question the value for money of making experienced and skilled staff within existing institutions redundant only to seek to rebuild this capacity elsewhere. Businesses would also face familiarisation costs in adapting to the new regime.
- 3.18 **The OFT urges Ministers to conduct further detailed assessment of the costs and benefits of proposed reforms and, in particular, a full assessment of the risks associated with transition, including whether and how these can be effectively mitigated without damage to front-line delivery.**

Accountability

- 3.19 An effective consumer protection regime must create the right incentives for decision-making and ensure those that make decisions are accountable for them. The new structure, both political and financial, of the consumer protection regime must provide for clear lines of accountability: to Ministers and Parliament for the delivery of national consumer policy objectives, and to local communities for tackling local

priorities. There also needs to be accountability to business in line with legislation based on Sir Philip Hampton's recommendations.²⁰

- 3.20 Shared issues, cross-boundary cases and overlapping concerns are inevitable in the consumer protection system. There need to be effective mechanisms for ensuring genuinely shared accountability on shared issues, as well as systems for allocating tasks to avoid duplication or gaps in delivery. It is thus essential to build trust through regular information sharing and exchange, and for there to be appropriate mechanisms for this information sharing to occur.
- 3.21 All of this requires an effective performance management framework, as highlighted by the NAO in its recent report on consumer enforcement. This should be founded on clear shared objectives for the regime as a whole, clarity about roles and responsibilities and a commitment to work together towards the achievement of shared aims. It also needs to ensure appropriate incentives are in place to ensure resources are matched to risk.
- 3.22 Chapter Four argues that the proposal to transfer most responsibilities for cross-boundary enforcement to TSS, under the oversight of a new TSPB, does not directly address the difficult questions around accountability raised by the NAO in its report. In particular, it raises the concern that the TSPB will ultimately lack the hard tools needed to guarantee that national policy objectives will be met in the face of ongoing disincentives to cross-boundary working by TSS.
- 3.23 It is also vitally important that both consumers and business have confidence in the regime and its ability to deliver consistent, timely and fair results. Institutions involved in delivery must therefore be outward-looking organisations with the capacity to engage widely with other bodies, public and private, to ensure that they understand the broader public and policy agenda and are responsive to external needs and

²⁰ Legislative and Regulatory Reform Act 2006, section 21(2)(a) and the Regulators' Compliance Code section 9, and Part 4 of the Regulatory Enforcement and Sanctions Act 2008. The latter applies directly to the OFT (and national sectoral regulators) but not to TSS.

concerns. Arrangements for effective governance, transparency and due process will therefore be important elements in the design of the new regime.

- 3.24 Fairness and balance are also key underpinnings of business and consumer confidence in the system. In some instances this may require an organisational separation of certain functions. For example, Chapter Six raises concerns that placing Market Studies with consumer advocacy bodies may undermine business confidence in them. It may also require appropriate checks and balances, particularly where enforcers or other delivery partners may in some circumstances act as undertakings which are themselves subject to consumer laws, as, for example, local authorities may be in relation to their role as landlords. Apart from fairness considerations, this conflict of roles also potentially gives rise to significant legal difficulties unless any new specialist enforcement units at local level are clearly separated from the local authorities in which they are located.
- 3.25 **The OFT welcomes the emphasis placed on effective performance management by the NAO and the importance the Government places on clarity of roles and responsibilities and effective partnership working. However, it considers that further work is needed by all interested parties to establish a clear and effective framework for national and local accountability across the consumer protection regime. In addition, further thought must be given to how changes in the way certain functions are delivered may impact on business and consumer confidence in the regime.**

4 ENFORCEMENT

SUMMARY

The present consumer enforcement system has specialised and differentiated but complementary approaches to tackling different forms of detriment. Reforms to create a more effective and responsive enforcement regime should build on these existing strengths.

There is a lot of good partnership working within the current system. However, more could be done to improve coordination and front-line enforcement, particularly the prioritisation of cases which cut across OFT and TSS responsibilities.

The OFT considers that the TSPB option is risky and could result in lower standards of protection for consumers, loss of capability, poor value for money and greater complexity:

- Divorcing national consumer enforcement from market analysis and breaking up expertise in legislative interpretation and civil litigation risks creating an enforcement gap, weakening the system's capacity to deal with nationally significant issues.
- The TSPB would face a very significant challenge to develop the resources and capability needed to address national threats of the type the OFT has historically tackled, for example, through complex and costly multi-party litigation. In the meantime, consumers will be less well protected.
- The TSPB proposals under consideration would involve considerable cost and disruption and the need to build new coordination mechanisms. The change would divert resources and energy away from front-line enforcement.
- Under the TSPB option enforcement functions would be fragmented and there would be more bodies involved in delivering enforcement and its associated elements than at present.
- The TSPB option risks a patchwork approach to enforcement, which will create cost and uncertainty for firms. A level playing field is vital to economic

growth, supporting business confidence and reducing investment risk for legitimate businesses.

A better approach would be to retain existing roles and responsibilities for enforcement, but make more effective use of them through the creation of a JEB. This would be more efficient, less risky and, crucially, would divert less energy and resource away from front line enforcement, which is vital at a time of significantly reduced budgets. The JEB could become a reality quickly and at a far lower cost than the Government's preferred approach.

The existing consumer enforcement system

- 4.1 In order to compare the options set out in the consultation document, it is important to understand the way existing enforcers work and their respective roles and expertise.
- 4.2 TSS and the OFT have evolved specialised and differentiated, but complementary, approaches to tackling different forms of detriment. TSS have led the way in addressing local and overt detriment such as doorstep crime and scams, through localised surveillance and intelligence gathering techniques, effective partnerships with local agencies and in-depth knowledge of local markets and businesses. TSS also run some large criminal investigations into firms that cause detriment regionally and nationally, for example the successful action by Surrey Trading TSS against a major energy supplier for misleading selling practices earlier this year. TSS are experienced in taking prosecutions, often acting directly as prosecutors in local criminal courts. Coupled with their wider fair trading functions, such as business advice on compliance, they are often able to secure quick behavioural change from individual traders and resolution for consumers.
- 4.3 The OFT and the concurrent sectoral regulators,²¹ in contrast, have developed approaches to tackling nationally significant cases and market-wide issues, generally at the non-criminal end of the spectrum.

²¹ The concurrent regulators are the Civil Aviation Authority, NIAUR (the Northern Ireland Utility Regulator), Ofcom, Ofgem, Ofwat and the Office of the Rail Regulator.

They do this through Market Studies and economic analysis of the drivers of business and consumer behaviour, working with trade bodies and firms to develop market-wide solutions, and pursuing multiparty enforcement and litigation, generally in the higher courts. They have developed resources and expertise to take on well-resourced parties, such as major multinational companies. They also take cases on novel issues to create legal precedents which have wider impacts across the economy. In addition, the OFT is responsible for complementary functions (research and analysis, consumer advice and education, international liaison, and business guidance) that support its own enforcement activities as well as those of TSS and concurrent sectoral regulators, and has spearheaded the development of specialised online enforcement capabilities.

- 4.4 TSS and the OFT have developed different legal areas of substantive and procedural legal expertise over the years and these overlap very little. They generally act in different ways and in different courts. The OFT takes largely civil cases, often relying on legislation such as the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs) which can only be used in the civil courts. It acts mainly in the High Court and above, supported by the specialist advisory and litigation resources that are needed for such cases. By contrast the very large workload carried by the TSS consists overwhelmingly of criminal action in the magistrates and Crown courts. While TSS take hundreds of criminal prosecutions under consumer protection law each year, since 2006 only four cases have been taken by TSS solely under the UTCCRs. In comparison the OFT's cases have often sought to clarify law through the higher courts and even the European Court of Justice.

Example: The OFT took a test case with seven banks and one building society²² to clarify the application of UTCCRs to unarranged overdraft charges. The case, which went all the way to the Supreme Court, clarified that those terms could not be assessed for fairness under the regulations. Although the test case effectively ruled out enforcement action, the investigation (and the Market Study on personal current accounts that accompanied it) highlighted concerns about unarranged overdraft charges and enabled the OFT to agree voluntary initiatives with the industry to address them.

The OFT's approach to enforcement

4.5 The OFT operates on the basis that enforcement action should be taken only where there is no better route to securing compliance, in accordance with the principles of good regulation. Our approach to enforcement is set out in our annually updated Statement of Consumer Enforcement Principles,²³ which is designed to meet our obligations under statutory provisions reflecting the recommendations of Sir Philip Hampton,²⁴ and particularly the Regulators' Compliance Code 2007.

4.6 Between 1 April 2010 and 31 March 2011, the OFT accepted 43 undertakings under the Enterprise Act 2002 (EA02) in 20 cases and issued four prohibition or warning orders under the Estate Agents Act 1979 (EAA). A further 20 cases were closed, either because the firm in question ceased trading, a misleading website was taken down without need for further action, the firm took voluntary action to address the non-compliance, or because the case was transferred to a more appropriate enforcer. There were a further 17 cases ongoing as at March 2011.

²² www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/UTCCRs/

²³ www.of.gov.uk/OFTwork/policy/policy/statement-consumer-enforcement

²⁴ Reducing Administrative Burdens, March 2005. The relevant legislation based on Hampton's recommendations is the Legislative and Regulatory Reform Act 2006, under which the 2007 Compliance Code was made, and the Regulatory Enforcement and Sanctions Act 2008, particularly Part 4.

- 4.7 The OFT's most recent impact estimate report shows average yearly direct benefits to consumers arising from OFT consumer enforcement of £36 million over the three years to 2011. This estimate is based on a detailed evaluation of only a small proportion of OFT consumer enforcement actions and understates the total benefit. It excludes cases where, for example, there was still potential for further legal challenge to a successful action, or where quantification would be speculative because of poor quality available data. Based on the cost/benefit ratios of specific cases, and other evidence from our in-depth ex-post evaluations, the OFT is confident that the real impact of our work in 2010/11 is much greater, particularly when wider impacts – such as greater deterrence or the impact on consumer confidence – are taken into account.
- 4.8 The OFT seeks to target enforcement action where it can secure wide-ranging changes to markets and tackle significant consumer detriment, particularly emerging trends. OFT interventions are considered in the context of our broader market analysis, and cases are informed by clear theories of harm which take account of dynamic economic analysis where necessary. This helps ensure that our interventions are proportionate to need and do not impose unnecessary burdens on business but, on the contrary, help create a framework in which competitive business can thrive.
- 4.9 The OFT also aims to clarify areas of consumer law and set legal precedents to help ensure that consumers get adequate protection and that businesses have a clear understanding of how to comply. For example, the OFT has taken action to help develop and embed the new CPRs, helping to ensure that these regulations are honed into a well-understood and legally tested framework in which both businesses and consumers can have confidence.

Example: The OFT has taken cases which establish how the law applies in areas affecting large numbers of consumers. The OFT's action against Purely Creative Ltd and others²⁵ (on misleading prize promotions) resulted in the first substantive High Court ruling on the CPRs and has now become the first UK reference to the European Court of Justice on CPRs.

4.10 The OFT has also worked with enforcement partners (both in the UK and overseas) to improve markets for consumers, by sharing investigative resource and expertise and by employing the full range of tools available to us to tackle problems.

4.11 There are a large number of strong examples of effective joint-working by TSS and the OFT. Around two thirds of OFT-led enforcement cases have some TSS involvement, and the OFT responds to an average of 90 TSS requests for advice and guidance per month. Box 4.1 sets out some examples of joint-working which have recently come to fruition.

Box 4.1 Joint working by the OFT and TSS

Holiday Clubs: The OFT has obtained enforcement orders against two companies and seven individuals to stop the use of misleading sales and marketing practices.²⁶ Cases were referred to the OFT by Scambusters team. Four TSS conducted onsite inspections to gather evidence.

Used car buying: Assisted by a number of TSS, the OFT took enforcement action against used car buying company webuyanycar.com²⁷ over concerns that its online valuations were misleading.

Gold buying companies: The OFT took enforcement action against five companies²⁸ who purchased gold from consumers by post following concerns

²⁵ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/prize-draw-promoters/

²⁶ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/holiday-products/

²⁷ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/we_buy_any_car/

about practices including: unfairly pressuring consumers into selling their gold; misleading price advertising; and a lack of transparency. A number of TSS assisted the OFT with its investigations, including the home authorities for each of the companies and other TSS who carried out mystery shopping and studies.

Premium Rate Prize Draw mailings: The OFT investigated prize draw promoters²⁹ which used trading names liable to mislead consumers about their status, following key intelligence provided from an individual TSS.

Security systems: An individual TSS did not have the resource to fight a case against a company which had the potential to set an important legal precedent on the interpretation of 'transactional decision'. The OFT agreed to work with TSS and provided legal advice and guidance. Undertakings were secured from the company.

TSS have also played an increasingly important role in OFT Market Studies and research work, for example:

Home Repairs:³⁰ TSS were involved in the research development stage, assisting in the design of consumer surveys and stakeholder workshop and focus groups. Three TSS are represented on the steering group for the project, a further 12 have been consulted at various stages and two were interviewed as experts by a research agency.

Second hand cars:³¹ The OFT and TSS have collaborated in a drive to secure improved compliance in the sector. This has involved the publication of OFT guidance on compliance by used car dealers with the CPRs and other relevant legislation, supported by a programme of TSS engagement with major second-hand car dealers to advise on compliance, improve customer service, and reduce

²⁸ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/goldpost/

²⁹ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/prize-draw-promoters/

³⁰ www.offt.gov.uk/OFTwork/markets-work/othermarketswork/home-repairs/

³¹ www.offt.gov.uk/OFTwork/markets-work/completed/cars

³² www.offt.gov.uk/OFTwork/markets-work/current/mobility-aids/

complaints. The OFT and several TSS have also worked closely on identifying enforcement priorities.

Mobility aids:³² We have set up an OFT/TSS Working Group on mobility aids to share best practice and to help shape possible solutions to the problems identified in the course of our Market Study. The OFT is also working on an enforcement case in this sector (which was referred to the OFT by TSS). The OFT is committed to producing new enforcement guidance and will be organising a joint OFT/TSS enforcement summit as part of its development.

The OFT's Internet enforcement capabilities

4.12 The importance of online markets to the UK economy continues to grow. In 2011, 32 million people in the UK (66 per cent of all adults) purchased goods or services over the Internet – an increase from 62 per cent in 2010. Social networking was also a popular Internet activity in 2011, with 57 per cent of Internet users engaged in social networking, via sites such as Facebook and Twitter, and 40 per cent posting on online forums, blogs, and so on.³³ These new channels have already had significant implications for consumer law enforcement and will do so increasingly in the future.

4.13 In 2009 we established, with seed funding from BIS, a fully equipped forensic Internet lab. This facility undertakes a wide range of forensic tasks relating to online evidence capture (for example, website imaging), online investigation and analysis (for example, investigating links between websites and the individuals behind them). It also has the capability to forensically analyse digital evidence (for example, emails and smartphones) captured as part of OFT investigations. Specially trained staff have been recruited to undertake this work and we are now embedding these skills across the OFT.

³³ www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/historical-internet-access/index.html

4.14 Developing trust in online markets is one of the OFT's key themes across its work. In order to achieve this goal, it prioritises investigations against online trading practices that pose a threat to consumer confidence in online markets. This Internet enforcement activity is organised around five themes:

- Promoting awareness of consumers' rights when making purchases online.
- Reinforcing the integrity of online choice tools (that is, sources of online information, discussion, and comparison that help consumers compare and choose between alternative service and product offerings).
- Action to nudge emerging or significant online business models in a positive direction for consumers.
- Targeted, timely enforcement action and disruption activity where there is a specific threat to online consumer confidence.
- Action to test the law as it applies to online markets.

4.15 Box 4.2 describes some of the OFT's recent online enforcement actions.

Box 4.2 Recent OFT online enforcement actions

Promoting awareness of consumers' rights when making purchases online: The OFT secured an enforcement order against an online retailer of computer software, hardware and other electronic goods³⁴ who failed to deliver goods or provide timely refunds and took steps ensure that UK consumers are aware of their chargeback rights in relation to online purchases, so that they could get

³⁴ www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/shop4tek/

refunds where they were entitled to them.

Reinforcing the integrity of online choice tools: The OFT took landmark enforcement action against the operator of a commercial blogging network³⁵ that was paying bloggers to promote its clients' products and services on blogs and microblogs such as Twitter, without ensuring that consumers were aware of the 'paid for' status of this activity.

Action to nudge emerging or significant online business models in a positive direction for consumers: The OFT took enforcement action against the operator of a Penny Auction Website³⁶ who was using 'auto bidder' software to introduce computer generated bids against genuine consumers bidding in the course of online auctions. It has also taken enforcement action against the operator of a group buying website (where a deal is advertised at a price which activates once a certain number of consumers respond to it) in relation to the use of bait advertising.

Targeted, timely enforcement action and disruption activity where there is a specific threat to online consumer confidence: The OFT took enforcement action (including the removal of websites) in relation to the unlawful sale of tickets and/or travel packages that included tickets to 2010 FIFA World Cup matches.³⁷

Action to test the law as it applies to online markets: The OFT prioritised investigations into different types of Internet Intermediaries (online businesses that give access to, host, transmit and index content originated by third parties or provide Internet-based services to third parties) which consider the obligations that apply to these important participants in online markets.

³⁵ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/handpicked_media/

³⁶ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/penny-auctions-scriptmatix/ Penny auctions are a popular online shopping method where players pay a small non-refundable fee each time they place a bid on an item. We also took enforcement action against the company supplying the software components that facilitated the illegal use of artificial bids in this way.

³⁷ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/fifa/

- 4.16 The OFT actively seeks to share its knowledge and experience where possible. For example, it works closely with TSS, by sharing information and best practice in relation to online investigations as well as the technology we have at our disposal. It has established a secondment scheme for Trading Standards Officers to spend time working in the OFT's Internet enforcement team.
- 4.17 Given the global nature of the Internet, international co-operation is an important element of our online enforcement activity and OFT regularly liaises with overseas agencies during our work, via the European Union Consumer Protection Co-operation (CPC) network and also the International Consumer Protection Enforcement Network (ICPEN).³⁸ The OFT has taken a leading role on these issues within the EU and is currently chairing a wide-ranging CPC project on establishing an effective Internet enforcement capability (given that many other Member States do not have the skills and experience that the UK has in this area), which will help deal with overseas companies targeting UK consumers. This activity is partly funded by the European Commission. The OFT has also set up the ICPEN Internet investigations wiki, through which international enforcement agencies are able to share information and best practice relevant to online enforcement.
- 4.18 Our online enforcement action is informed by our wider research and analysis of online markets. For example the OFT's Internet Shopping Market Study³⁹ completed in June 2007 found that awareness of online shoppers' rights was low, among both consumers and online retailers. The OFT has taken enforcement action to address this, and more is in the pipeline. Likewise, the misleading advertising of pricing practices as identified in the Advertising of Prices Market Study has a particular reach across to online markets.⁴⁰ We have taken enforcement action subsequent to this study, and again more is in the pipeline. In April 2011

³⁸ For example www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/online-trader-investigation/

³⁹ www.offt.gov.uk/shared_offt/reports/consumer_protection/oft921.pdf

⁴⁰ www.offt.gov.uk/news-and-updates/press/2010/124-10

the OFT published a paper on how effective use of choice tools can empower consumers.⁴¹ Enforcement in this area underpins our objective to ensure that effective use of choice tools helps to make online markets work well for consumers. Our experience is that Internet enforcement is an increasingly vital complement to more conventional enforcement and needs to be kept together with it and strengthened further.

Concerns about the effectiveness of the current system

- 4.19 Concerns have been raised about the effectiveness of the current enforcement system by BIS in its consultation document, by the NAO in its recent report *Protecting Consumers*,⁴² by participants in the regime and by the wider stakeholder community.
- 4.20 The OFT welcomes the Government's timely focus on the enforcement regime and agrees that the current system is not as effective as it could be, particularly in tackling regional and national threats. In part, this is due to structural challenges. TSS are not a homogenous body, but a group of 197 bodies involved with Local Authority services with differing priorities and resources, supported by regional and national representative bodies. Many individual TSS are too small to benefit from economies of scale and can struggle to sustain the often considerable resourcing implications of taking on large-scale cross-boundary enforcement activity. These challenges are likely to be exacerbated by significant funding cuts. BIS estimates that annual funding for TSS will fall from its current level of £213 million to between £140 million and £170 million by 2014.⁴³
- 4.21 In addition, despite many important examples of collaboration and exchange between TSS and the OFT (including those mentioned above at Box 4.1), coordination between enforcers could be significantly

⁴¹ www.oft.gov.uk/shared_oftr/reports/consumer_protection/oft1321.pdf

⁴² *Protecting consumers – the system for enforcing consumer law*, NAO, June 2011

⁴³ *Protecting consumers – the system for enforcing consumer law*, NAO, June 2011 p9
www.nao.org.uk/publications/1012/protecting_consumers.aspx

improved. The NAO highlights a number of areas – for example the protocol for case referrals from TSS to the OFT and the implementation of the National Intelligence Model – where coordination has been insufficiently effective.⁴⁴ The OFT recognises that there needs to be better prioritisation of cases, particularly nationally significant cases which cut across both OFT and TSS responsibilities. There also needs to be better and clearer communication between partners.

Proposals for improving the enforcement of consumer law: the OFT's view

- 4.22 The OFT supports the Government's intention to strengthen the capacity, leadership and coordination of TSS to support more effective action against cross-boundary threats. However, the TSPB model of enforcement is risky and, far from improving the situation, could result in decreased efficiency and lower standards of protection for consumers.
- 4.23 In transferring resources and capability from a national agency to strengthen cross-boundary working by local enforcers, the Government risks creating enforcement gaps. In particular it risks weakening the system's existing capacity to deal with market-wide detriment or to take cases against large powerful businesses on issues of significant consumer concern – issues such as airline pricing, bank charges and rising motor insurance premiums which affect very large numbers of consumers every day. This sort of detriment is significant and growing.
- 4.24 The proposal to place consumer Market Studies away from the consumer enforcement system and from wider markets-based analysis (with Citizens Advice and Citizens Advice Scotland) would weaken the system's existing capacity. The proposed split could lead to inadequate understanding both of the causes of consumer detriment and of the most efficient tools with which to tackle them. It will also make it harder to take enforcement action as a part of a coordinated set of remedies to a consumer problem. This could lead to less effective consumer protection and greater burdens on business.

⁴⁴ See *Protecting consumers* paragraphs 3.14-3.18, NAO, June 2011

- 4.25 Making expertise and knowledge that is currently concentrated at national level accessible to all delivery partners is, in the OFT's view, key to the system's ability to respond to existing and emerging threats to consumers. The OFT houses specialist advisors, including financial analysts and statisticians. Its dedicated Litigation Unit supports both competition and consumer enforcement and is practised at dealing with a wide range of cases, including precedent-setting cases that test the meaning of the law in the highest courts in the land and at the European level. All the early cases on new legislation such as the CPRs and all the cases that have gone to the higher courts have been led by the OFT using this expertise. Such cases often carry considerable risk. The bank charges test case alone cost the OFT more than £950,000 in external legal fees.⁴⁵
- 4.26 Dispersing these functions among different delivery bodies, including specialist regional TSS teams, different lead authorities, the proposed TSPB and the TSI, will make it harder to share experience and coordinate action across functions. The OFT is concerned that the result will be units within those bodies without a sustainable funding basis, too small to form a critical mass of resources, skills and expertise, and unable to bear the costs and risks associated with major consumer litigation.
- 4.27 This is particularly so in light of the significant funding cuts expected over the next few years. There is no doubt that TSS will seek to rise to the challenge of increased responsibility for cross-border enforcement. But with limited resources, a small secretariat, and without supporting economic and legal functions, the TSPB model will be ill-equipped to take on significant cross-boundary cases on the scale of the bank charges test case, to undertake joint enforcement work with

⁴⁵ In 2007 the OFT took a test case with seven banks and one building society to clarify the application of UTCCRs to unarranged overdraft charges. The case, which went all the way to the Supreme Court clarified that those terms could not be assessed for fairness under the regulations. This figure represents only the OFT's external legal costs. By agreement between the parties, the OFT was not required to meet the banks' costs. Further information can be found at www.of.gov.uk/shared_of/freedom_of_information/FoIAresponses/IAT-FOIA-76649.pdf

international partners or to support cutting edge online investigation and enforcement work.

4.28 The OFT does not believe that a transfer of funding from the OFT to the TSPB would be enough to address these concerns. The OFT's spend on consumer enforcement – estimated at £8.5 million⁴⁶ in 2010-11 – is relatively small and delivers greater value for money for the taxpayer in one place than if it were distributed by the TSPB and BIS to a number of lead authorities and specialist teams. The OFT's current budget for consumer enforcement is not a discrete pot of money. Rather, it is tied up in staffing, equipment and other resources which are integrated with other consumer and competition functions. These resources are not easily transferrable, and breaking up these functions to recreate them elsewhere will carry significant transition costs, particularly if staff redundancies are involved. Meeting these costs and managing the change would result in the diversion of resources and energy away from front-line enforcement, with the risk that consumers are less well protected in the meantime.

4.29 It is not clear from the consultation how the TSPB model would deliver the national performance framework envisaged by the NAO, provide greater accountability than the current system or strike an appropriate balance between local autonomy and national priorities. In principle it would be possible to legislate to enable TSS to take cases in the interests of consumers outside of their locality. However, it does not appear that the Government envisages a requirement to provide a minimum level of service or to act across boundaries and no detail is provided about the scale of any possible indemnity fund or how schemes for pooling risk might operate. Without these the TSPB is ultimately likely to lack the hard tools needed to guarantee that national objectives will be met.

⁴⁶ This figure includes direct enforcement casework as well as wider support functions, such as policy development, business guidance, operation of the Consumer Codes Approval Scheme, international liaison and coordination and engagement with TSS.

- 4.30 There are a number of questions regarding the working of the proposed 'lead authorities'. For example, suppose a given TSS is made the national centre for UTCCRs, what would happen if a change of local priorities meant that the local council no longer wished to be the national centre? Or, if a TSS has been appointed lead authority, what in practical terms can the TSPB do to hold it accountable? And, who would be responsible for redundancy costs if the TSPB decided that a given lead authority was no longer performing to the standard expected and wished to move the function to another authority?
- 4.31 There are also concerns about different legislation being housed with different lead authorities. Large national consumer cases are often taken on the basis of two or more different pieces of legislation, or involve a choice between parallel provisions which could have different benefits to consumers or place different burdens on business. So having separate centres of excellence for each piece of legislation would add complexity to the system. For example, it may be unclear which authority would take a case such as the OFT's recent High Court action against Ashbourne Management Services Ltd,⁴⁷ which was brought under three separate pieces of legislation – the CPRs, the UTCCRs and the Consumer Credit Act 1974.
- 4.32 Furthermore, this option fails to achieve the Government's objective of reducing institutional complexity. Not only does it fragment functions currently delivered within a single institution, but it envisages the creation of a new body – the TSPB – to coordinate cross-boundary enforcement by TSS. Moreover, the consultation acknowledges that issues which cross organisational boundaries will continue, and that therefore further forums for coordination and exchange must be created across the system in order to avoid duplication and determine who should act in specific instances. This model is therefore potentially more complex than the current system. This could lead to confusion and damage business confidence in the regime.

⁴⁷ www.offt.gov.uk/news-and-updates/press/2011/92-11

- 4.33 As well as ensuring consumers receive consistent protection, a uniform approach to consumer enforcement is vital to economic growth, supporting business confidence and reducing investment risk for legitimate businesses who may otherwise fear their business models may be undermined by sharp practices. The TSPB proposal could also lead to a patchwork approach to enforcement, with the potential for inconsistent approaches by different local authorities, which will create cost and uncertainty for firms. This problem could be particularly acute in relation to the CPRs, which came into force in 2008 and therefore remain relatively untested. The process of honing these regulations into a well-understood and legally tested framework is, in the OFT's experience, best supported by the existence of a strong national consumer enforcement body, able to take precedent-setting cases (such as the OFT's recent action on misleading prize promotions), rather than a piecemeal approach by different authorities across the country. Nor will it be possible under the TSPB model to ensure that the regime is equipped to embed any new legislative requirements in future, for example changes which may arise as a result of the recently announced Consumer Bill of Rights.
- 4.34 Despite the passion, commitment and professionalism of TSS there are very substantial structural challenges to the TSPB model which it will be difficult for them to overcome. A number of these are highlighted by the NAO in its report.⁴⁸ The consultation document does not set out sufficiently clearly how it is envisaged that the TSPB model will address these obstacles.
- 4.35 Improving collaboration and cooperation within existing structures offers greater potential to improve outcomes for consumers than a wholesale transfer of roles and responsibilities for enforcement to the local level. To that end the OFT/CMA should retain broad responsibility for nationally significant consumer enforcement cases, and continue to act as a national hub for enforcement expertise, housing specialist resources

⁴⁸ See *Protecting consumers* paragraphs 3.3 – 3.6, NAO, June 2011

and functions such as Internet enforcement capability and the single focal point for international enforcement coordination and liaison.

- 4.36 This role should go further than the ability to take consumer enforcement actions in response to structural problems in markets envisaged in the TSPB option. Nationally significant consumer detriment is not always the result of a structural market problem. It may occur because of the actions of a single powerful firm. Or it may happen where an unlawful practice is adopted across a whole market. In such cases it is perfectly possible that the market in question is experiencing strong competition and barriers to entry are low. Consequently, a requirement that an agency like the CMA must identify a structural or competition problem in a market before it could exercise consumer enforcement powers would be unduly restrictive.
- 4.37 More should be done to support more and better cross-boundary enforcement. The benefits of nationally-held specialist capabilities should be more widely shared than is currently the case. There should be greater TSS involvement in decisions over how such resources are deployed, and the national infrastructure for sharing intelligence, knowledge and skills should be enhanced to help local enforcers develop their capacity to take on difficult cross-boundary cases and to ensure that resources are deployed to the areas of greatest need.
- 4.38 Therefore the OFT supports the creation of a JEB, bringing together representatives of TSS and the OFT/CMA (and potentially other interested bodies) to set national priorities, choose which are the most important cross-boundary enforcement cases and agree responsibilities for taking them forward, including through joint enforcement by the OFT/CMA and TSS.
- 4.39 The JEB would select cases based on the National Intelligence Model and the processes which support it. Rather than simply providing a mechanism for referring cases between TSS and the OFT/CMA, we believe this approach would offer a more comprehensive and joined-up assessment of the issues from national, through regional, to the local level. The JEB would give TSS a degree of control over national

enforcement resources, and make the OFT/CMA more accountable to local communities for its enforcement activities. Box 4.3 provides more details on how the JEB might work in practice. This is initial thinking to provide a starting point for debate – to be successful the principles governing the operation of the JEB must be worked out through dialogue and signed up to by all partners.

Box 4.3 How the JEB might work in practice

The Board

- **Membership:** the JEB would comprise both TSS and OFT/CMA representatives. TSS representatives could be the English regional representatives and national equivalents from Scotland, Wales and Northern Ireland. The JEB could also involve wider delivery partners such as Citizens Advice, Which? and sector regulators. It could also take on board wider stakeholder views, such as representative groups of vulnerable consumers and business interests.
- **An independent chair** could be appointed.
- **Monthly meetings** would make decisions on enforcement cases, joint work and referral of cases and issues.
- **Decisions on enforcement cases:** the JEB would consider the full range of potential national and cross-boundary cases and decide who is best placed to take them on. Intelligence analysis would inform JEB discussions.

Enforcement and other interventions

- **Expected leads:** TSS lead on local issues, CMA and TSS share lead on national issues, with cases taken by whoever is best placed, as decided by the JEB, depending on the history, nature and complexity of the case, and whether there is a home/primary authority relationship.
- **Joint casework:** some large and complex cases would be run jointly by the OFT/CMA and TSS with dedicated support from the OFT/CMA, and based within the relevant local authority where necessary.
- **Market analysis:** Market Studies of consumer problems would be carried out

by the OFT/CMA. The JEB would help select the subjects for studies.

- **Super-complaints:** Which?, Citizens Advice and other bodies would continue to bring Super-complaints to the OFT/CMA.

Resources

- **The OFT/CMA** would retain its consumer enforcement responsibilities, expertise and resources - part of which would be under the direction of the JEB.
- **Additional enforcement funding** could also be provided by the OFT/CMA to assist regional TSS teams.
- **The OFT/CMA would provide direct support for TSS** through joint enforcement teams, legal advice on cases, and secondments on emerging, higher profile and more complex issues and cases. This would also help TSS to develop capacity, skills and expertise.
- **Enforcement resources would be pooled** and the OFT/CMA and TSS would provide reciprocal support on issues and cases they jointly agree to take forward.
- **Cases with high litigation risks** would continue to be taken by the OFT/CMA and there would be no need for a separate indemnity fund.

4.40 It is of course difficult to describe in detailed terms how any proposed model would work in practice before its design has been discussed and agreed with those to be involved. However, drawing on experience, Box 4.4 seeks to provide some hypothetical examples of regional, national and international threats which could arise and alternatives for addressing them which the JEB model would offer.

4.41 **It makes sense to build upon existing expertise and capacity rather than break it up and build replacements elsewhere. Joining up enforcers would be more efficient, less risky and, crucially, would divert less local energy and resource away from front line enforcement, which is vital at a time of significantly reduced budgets. Giving local TSS more control over national resources would be a better way to ensure that the system**

responds to concerns at all levels. Additionally the JEB could become a reality quickly and at a far lower cost than the TSPB approach, without all the associated risks.

Box 4.4 How the Joint Enforcement Board could improve outcomes for consumers

The JEB gives TSS and the OFT/CMA equal voices in selecting cross-boundary and national cases, deciding how resources should be allocated, and who should lead and be responsible for case delivery. The JEB would improve outcomes for consumers by joining up local and national decision-making and giving case teams access to pooled resources, expert capacity and direct support. As a result, any 'enforcement gap' would be closed and there would be an increased number of cross-boundary and national cases.

Hypothetical examples where JEB model would lead to a better outcome

Regional supplier of glazing products

The case - A small TSS brings a case to JEB with evidence of high levels of complaint and detriment for a company based in its area. Vulnerable consumers often targeted. Complex issues under various legislation (high pressure selling, unfair terms, lack of cancellation rights, misleading price information and credit licence issues). Intelligence network has confirmed the widespread nature of the problems.

Action - JEB supports TSS to take enforcement and business engagement. OFT/CMA provides direct support for the case through allocation of lawyers to assist on complex legal points, particularly unfair terms, and secondment of OFT/CMA investigators to help with evidence gathering. JEB asks OFT/CMA to produce guidance on compliance to supporting TSS engagement with major businesses in other regions on compliance, how to improve customer service, and reduce complaints.

Large online retailers of electrical products

The case – TSS aware of consumer complaints about three large online retailers supplying defective products and poor after sales customer service. Likely high

level of detriment, and complex unfair contract terms issues raised.

Action - JEB agrees whether home/primary authorities take enforcement action or it makes sense to run a single investigation (either a lead TSS or CMA) against the online traders. JEB considers benefit in a wider market study led by OFT/CMA which uncovers evidence of widespread sector non-compliance with Distance Selling Regulations.

To support the enforcement action, the OFT/CMA uses its Internet enforcement team and economists from the Market Study team (to assist with the unfair contract terms analysis). On the back of the Market Study, OFT/CMA works to raise general compliance levels in the market.

Emerging threat in run up to worldwide sporting event in UK

The case – Citizens Advice bring an urgent case to JEB with high levels of complaints about a number of traders: online sale of fake event tickets and hotel packages including to overseas customers. Not a high priority for police, but large numbers of consumers being affected and unclear from or through which country or countries some of the sellers are operating.

Action - JEB identifies OFT/CMA as appropriate lead. OFT/CMA takes case against well resourced national trader and works with international partners on cross-border compliance issues. OFT/CMA investigators and money allocated to regional TSS to assist with further enforcement work around hotel package advertising and to work with the Citizens Advice service on tailored advice and information provision for consumers.

4.42 This is not a call to retain the status quo. Meaningful change is required to address the challenges identified in the consultation and the NAO report and to ensure that the consumer protection regime is forward-looking, taking account of and anticipating new challenges faced by consumers in a changing world. To this end the OFT is stepping up its visible high impact enforcement and has made it one of two themes of

its Annual Plan for 2011-12;⁴⁹ we aim to devote the maximum amount of resources to activities that produce direct market outcomes and achieve maximum deterrence. To support this, the OFT established a new Pipeline and Performance Group, responsible for driving through improvements in the way we track delivery, make effective use of resources and gather intelligence, as well as supporting the development of new project proposals and assessing remedies.

- 4.43 Making the JEB model a success will require a commitment by all partners, including the OFT/CMA, to greater sharing of resources and capability across the regime, coupled with genuinely shared decision-making and joint accountability for results. More work needs to be done to explore how such a model would work in practice. The OFT has initiated conversations with TSS partners around developing a shared model, and looks forward to deepening those discussions and extending them to other interested parties.

⁴⁹ www.oft.gov.uk/about-the-oft/annual-plan-and-report/

5 OTHER ENFORCEMENT-RELATED FUNCTIONS

SUMMARY

The TSPB model would have important implications for a number of wider functions which play an important role in supporting the consumer enforcement system. We believe that these merit further careful consideration.

International functions. Under the TSPB model it will be harder for international functions to be performed effectively, economically, coherently and in line with the principles of good regulation. The OFT urges the Government to consider keeping responsibility for international enforcement, coordination and liaison with the OFT/CMA, alongside its national consumer enforcement role.

Estate Agency. Further consideration should be given to which organisations should fulfil the OFT's current functions under the Estate Agents Act 1979. Greater TSS involvement in the investigation and preparation of prohibition cases is to be welcomed. However, it is important to guard against introducing unnecessary additional burdens either on businesses or on the public purse. In light of this, the CMA may be best-placed to retain these functions alongside duties to keep the market sector under review.

Coordinating enforcers. More detailed consideration must be given to the future of coordination mechanisms, such as the coordination powers under the Enterprise Act and the Consumer Regulations Website, to avoid placing unnecessary burdens on business from duplicative approaches by enforcers.

Policy and research. Under the TSPB model there is a risk that existing consumer policy skills and experience will not be easily replaced. Consideration should be given to the CMA retaining a leadership role for enforcement policy, integrating its knowledge of markets, enforcement experience and international role, sharing the benefits of this more widely through a JEB.

Business education and guidance. The coordination of business education and guidance is part of an overall compliance toolkit and must be closely linked to direct enforcement experience. There are logical arguments in favour of this function being joined to a national leadership role in consumer enforcement.

5.1 The Government's proposals would have important implications for a number of linked functions currently undertaken by the OFT as a corollary of its role as the national cross-economy consumer enforcement authority. The most important of these are:

- International enforcement, coordination and liaison.
- Responsibility for the licensing regime contained in the Estate Agents Act 1979 (EAA) and associated responsibilities for Anti-Money Laundering (AML) supervision of estate agents.
- Coordination and 'backstop' enforcement.
- Wider policy and research capabilities.
- Business education and guidance.

5.2 This chapter outlines the implications of proposed reform for each of these functions.

International enforcement, coordination and liaison

5.3 Two important international roles are currently performed by the OFT:

- tackling immediate international threats via direct enforcement action or working with other authorities, and dealing with longer term issues through strategic input to improve international consumer enforcement frameworks
- ensuring the UK's compliance with EU obligations to protect its own and other Member States' consumers.

These roles are explained in more detail in Annexe A.

5.4 Under the TSPB model the Government proposes that:

- enforcement cases with an 'international dimension' should be taken forward by the TSS network, with the TSPB allocating responsibility amongst different local authorities (p85)

- the OFT's international liaison functions should be transferred to TSS via the TSI, acting on behalf of a lead local authority answerable to the TSPB or on behalf of BIS (p73), and
 - the TSPB would act in support of 'whichever local authority was nominated as the Single Liaison Office (SLO) under a mandate from BIS or a lead local authority... This role would require it to allocate requests to relevant authorities' (p64).
- 5.5 The consultation document notes that this approach may require the Government to (i) change the Local Government Act 1972 to allow an individual authority to take action independently of the interests of local residents, (ii) provide national funding to support such action, and (iii) to ring-fence this funding, so as to prevent it being diverted to local purposes.
- 5.6 There is a risk that the TSPB proposals will make it harder for international functions to be performed effectively, economically, coherently and in line with the principles of good regulation. If the OFT's current international work is delegated to multiple geographically separate and independent bodies, it will inevitably be a demanding challenge to ensure join-up, consistency and accountability. There will be a need for initial investment in systems, and there will be ongoing additional resource costs associated with coordination, knowledge sharing and cost-control.
- 5.7 The greatest risk is that the TSPB proposals may diminish the regime's effectiveness in protecting UK consumers. These international functions require the capability to:
- take large and complex cases across the whole range of consumer legislation and in courts up to and including the UK Supreme Court and the European Court of Justice
 - engage in international coordination and liaison, continuing to provide strong strategic leadership.

- 5.8 Under the TSPB model, building this capability will take time and investment, particularly because TSS and the OFT currently have different and non-substitutable strengths as enforcers. In the meantime, there is a risk that UK consumers will lose out, and that the UK will be unable to effectively support international partners.
- 5.9 Separating international enforcement liaison and partnership activity input from case-work also involves longer term risk. The lack of a single UK enforcer would mean overseas enforcement authorities having to deal with different units at different times and for different purposes, leaving little scope to build working relationships. This could lead to poorer outcomes and instances of opportunities to protect UK consumers being missed.
- 5.10 Further, there could be damage to the strong reputation of the UK as a leader in international consumer protection debates and the potential for the UK perspective to be overlooked in new international initiatives. The OFT often adds value in international enforcement discussions on the strength of its own extensive enforcement and markets experience. TSI as a non-enforcement body could not do this on a first hand basis. It would need in each discussion to take steps to draw on the enforcement experience of the staff of local TSS, and on the markets experience of Citizens Advice. This would impede its ability to contribute to fast-moving discussions.
- 5.11 There are also issues around information sharing; the TSI is not at present a public authority, and – to act as SLO - would either need to be brought within Part 9 of the EA02 and subject to criminal sanctions for inappropriate disclosure, or it would not be able to participate substantively in information sharing between enforcers but could only act as a postbox for transmission of encrypted or otherwise secured data.
- 5.12 Overseas enforcers may be prohibited by law from sharing information with a non Government agency, limiting the UK's access to information which is vital to protect consumers. For example, the OFT has been assisting the FTC with an ongoing investigation into an online operation

that allegedly scammed more than \$450 million from consumers in the United States, Canada, the United Kingdom, Australia, and New Zealand by luring them into 'free' or 'risk-free' offers, and then charging them for products and services they did not want or agree to purchase. Given this international dimension, intelligence sharing and effective cooperation across national borders (for example in relation to sharing consumer complaints) have been particularly important.⁵⁰

- 5.13 The TSI is highly-regarded as the professional representative body of the TSS. But its status as such, and its funding – mainly from subscriptions and commercial activities, including sponsorship – are relevant to the question of its suitability to take on a role as in effect an international agency of the UK government.
- 5.14 **In light of these concerns, and given the Government's preference that the OFT/CMA should retain national consumer enforcement powers, there is a strong logic for CMA assuming responsibility for international enforcement, coordination and liaison. Building on existing expertise and broadening TSS engagement in international enforcement through a JEB offers the best means to sustain and enhance the UK's reputation and links with overseas enforcement partners, to meet our European obligations and to ensure UK consumers are adequately protected against growing international threats.**

Estate Agency: Licensing and Redress

- 5.15 The EAA imposes a negative licensing system on those doing estate agency work (consumer and business). Those found unfit to do estate agency work can be banned from all or parts of such work. Currently, only the OFT has the power to question and decide on an estate agent's fitness. The EAA also places other duties on the OFT, including to maintain a register of all the orders, variations and revocations it has

⁵⁰ Details of the FTC's investigation can be found at www.ftc.gov/opa/2011/05/jessewillms.shtm

made. The OFT is also currently the body that approves (and can revoke approval from) estate agents' redress schemes.

- 5.16 The consultation document sets out the Government's view that, subject to a power to act outside their authority and access to the necessary legal expertise and development of specialist procedures, these roles could be carried out by a lead TSS using evidence provided by other TSS, with oversight undertaken by the TSPB.
- 5.17 The consultation document would also suggest that the proposed remit of the OFT/CMA would fit with its retaining an overview of the overall functioning of the estate agency market. The OFT welcomes this, but believes that further detailed consideration needs to be given to how this role interacts with the specific powers and duties created under the EAA, including the assessment of fitness and approval of redress schemes. For example, information from the redress schemes and prohibition decisions can highlight trends and issues within the sector which are relevant to a judgement about how well the market is functioning.

Assessment of Fitness

- 5.18 Currently, both the OFT and TSS can investigate cases, but the OFT alone can formally issue and determine proceedings. The different roles of investigation, preparation of the case and the final adjudication all need to be provided for in any new regime.
- 5.19 Under the current regime, although there is in principle scope for local TSS to take responsibility for preparing the evidence and the necessary documents themselves and to pass the file to the OFT Adjudication Unit, in practice the ultimate preparation of the file for adjudication (and often the investigation stage itself) has fallen to the OFT. Under the current arrangements, the OFT has sought to work together with TSS to investigate fitness cases, and any future arrangements should make adequate provision for the specialist skill required in preparing these cases as well as the arrangements for adjudication itself.

- 5.20 Currently, the process of questioning and adjudicating upon an estate agent's fitness to practise is essentially administrative, but it includes strong safeguards to ensure fairness – for instance a right to see all relevant evidence and to make oral representations. It benefits from being co-located with the similar administrative processes for credit licensing and civil financial penalties for breaches of the Money Laundering Regulations 2007.
- 5.21 Although the decoupling of credit regulation from general consumer protection enforcement (which is the subject of separate institutional changes contemplated by the Government) may in any case result in the loss of the synergies and efficiencies generated by current arrangements at the OFT, the Government should consider carefully the practicalities of how a new process could operate effectively. Any new arrangement would have to meet the requirements of good regulation, including targeting, proportionality and consistency of action across the regime.
- 5.22 Creating a new case preparation and adjudication function from scratch elsewhere would obviously carry costs and would not benefit from the expertise and experience that the OFT has built up in running the regime. In any case, it is unlikely that the number of fitness cases would be sufficient to sustain an adjudication unit unless it had other suitable work streams or functions.
- 5.23 An important additional factor to bear in mind is the potential impact on business. The EAA confers in essence a single very severe sanction – loss of professional livelihood. Any new arrangements will need to ensure that it is used in line with the principles of good regulation and proportionality. In particular, that proceedings are issued only where action is really needed, and only when a less severe sanction is not more appropriate. These considerations are currently addressed by the EAA powers being located along with the OFT's market scrutiny function, and its powers to take other less burdensome enforcement actions. They could also be addressed through the operation of a JEB, but the OFT is not persuaded that devolving the administration of the EAA in isolation to a single authority linked to others only via the TSPB would offer sufficient safeguards.

- 5.24 An alternative would be more radical modifications to the EAA regime. For example, the adjudication mechanism could be replaced with a courts-based process. However, the Government would want to weigh carefully any identifiable benefits of such a change against the loss of a relatively inexpensive and well-established arrangement for questioning and adjudicating on the fitness of estate agents.

Redress Schemes

- 5.25 The OFT currently approves estate agent redress schemes, although the EAA also provides that the Secretary of State can designate a redress scheme as approved and either run it or have it administered on his behalf.
- 5.26 The EAA sets out in principle the requirements which must be satisfied before a scheme can be approved. The OFT consulted widely including with industry and ombudsmen in setting up its approval criteria and processes to meet the statutory requirements. The body fulfilling this role in the future would need the capacity to consider any new applications that could arise, and to maintain the ability to review and potentially revoke approval of current schemes.
- 5.27 **In light of these complexities, the OFT urges that further consideration be given to which organisations should fulfil functions under the EAA before a decision is taken. It is important to guard against introducing unnecessary additional burdens either on businesses or on the public purse, and that the costs/benefits of any changes are assessed.**
- 5.28 **Without a radical overhaul of the negative licensing and redress scheme regimes for estate agents, the CMA may be best-placed to retain these functions alongside duties to keep the market sector under review. However, as the OFT has advocated under the current regime, it does not follow that the CMA should investigate and prepare all prohibition cases – the preparation of cases should be conducted wherever possible by local TSS.**

Anti-Money Laundering

- 5.29 Responsibility for the Money Laundering Regulations 2007 and policy on AML supervisory responsibilities rests with HM Treasury. The OFT was given the AML supervisory role for estate agents and consumer credit financial institutions by HM Treasury because it had existing regulatory functions in relation to such firms. That principle would appear relevant to the future regime. A key issue which Government will wish to consider is to ensure that any future supervisory authority has the appropriate legal powers and the ability to properly fund AML supervisory activity.

Coordination and 'backstop' enforcement

- 5.30 The consultation document notes that under the TSPB option the Government is inclined to remove the formal requirement for direction by a central body. Coordination of use of the EA02 would fall to the TSPB as for all other enforcement coordination. The future of the Consumer Regulations Website and Central Register of Convictions is not specifically discussed.
- 5.31 Such coordination is important to ensure efficient use of resources by enforcers through avoiding duplication of effort, possible disputes over jurisdiction, and to ensure businesses do not have the burden of having to deal with multiple approaches from enforcers. That can be achieved in different ways, for example through coordinating or directive powers and through databases and other mechanisms for the exchange of intelligence.
- 5.32 **It is essential that a coordination role should continue to be performed, supported by appropriate legislation and funding. More detailed consideration must be given to the future of such coordination mechanisms before a change is made. The OFT does not have a fixed view as to which organisation should perform this role, but it would fall naturally to any central national enforcement agency with a coordination role, such the proposed TSPB, or JEB. However, the JEB model has the benefits of retaining the expertise built up by the OFT over a number of**

years, whereas it is currently unclear as to how the TSPB would perform this role.

Policy and research

- 5.33 The OFT carries out policy development and research in support of its Market Studies work and to help provide both BIS and the European Commission with evidence and analysis – particularly from a practitioner's perspective – to support national and international policy debates. The OFT is of the view the JEB model benefits from clarity over who would continue to play this role in the new consumer protection regime, complementing the national policy leadership provided by BIS, thus reducing the risk of loss of expertise in creating and implementing Government policy and legislation.
- 5.34 Dispersal of national enforcement functions under the TSPB model to multiple authorities at local level risks reducing the scope for making links between enforcement and policy development. There is a strong likelihood that expertise will be lost, with a consequential risk of impoverishing the legislative process, reducing the system's capacity to give well-founded consumer and business guidance and advice, and damaging the responsiveness of enforcement work to new developments in policy.
- 5.35 **The OFT believes that the JEB model will better provide the leadership needed for enforcement policy, integrating knowledge of markets, enforcement experience and the international role. The increasing output of consumer legislation from the EU requires input from an organisation able to offer a national perspective together with expertise in EU law and experience of the practicalities of enforcement. This is crucial to ensure implementation produces an effective regime which works for both enforcers and business. The case study at Box 5.1 illustrates how the OFT's current ability to offer this sort of approach has contributed to the UK's engagement in European policy debates. There is a risk under the TSPB model that extensive experience of consumer policy work and skills across the piece will not be easily replaced.**

Box 5.1 Case Study: Consumer Rights Directive

In October 2008, the Commission published a draft Consumer Rights Directive proposal, which amalgamated the Unfair Contract Terms, Consumer Sales, Doorstep and Distance Selling Directives. The proposal was for a fully harmonised directive which would require all Member States to implement the directive into their own national legislation at the same level of consumer protection.

The OFT has played a key role in the development of the UK position on the proposed Consumer Rights Directive by providing support for BIS based on our extensive practical experience and knowledge of all of the areas of legislation under consideration. In particular the OFT recognised a number of significant concerns about the impact of the draft proposal on the UK's consumer protection regime including the loss of the 'right to reject and liability periods' and harmonisation of the unfair contract terms legislation.

As part of this work the OFT:

- Provided a comprehensive response to the UK consultation on the draft proposal in 2009, highlighting the impact of full harmonisation on the scope of the directive, the potential loss of the ability to make information based recommendations in the UK's market investigation references regime, and the restrictive impact on existing national law in relation to unfair contract terms legislation.
- Directly alerted the European Commission and the European Parliamentary committee (Internal Market and Consumer Protection – IMCO) about our concerns.
- Supported BIS through the progress of the draft directive at the European Council Working Groups by advising on key risks based on its enforcement experience particularly in relation to the unfair contract terms provisions.
- Contributed to ongoing discussions and debate on progress and content of the proposal as a member of the BIS Consumer Rights Directive Stakeholder Group.
- Prepared extensive oral and written evidence to the House of Lords European

Union Social Policy and Consumer Affairs Sub-Committee for its inquiry into the Consumer Rights Directive proposal.

- Responded to the BIS call for evidence on allowing contingent or ancillary charges to be assessed for fairness to inform the UK negotiating line on the Consumer Rights Directive proposals. For this it drew upon extensive knowledge of not only the banks and other unfair contract terms cases, but also work on behavioural economics/consumer behavioural biases.

Business guidance and education

5.36 Businesses need to be both aware of and compliant with the law. Business education and information complement the deterrent effect of enforcement and offer an alternative, sometimes more proportionate response to negative business behaviours. It is important for businesses to understand how the law will be applied by its enforcers. They need to have confidence in how that guidance is produced and that enforcers will have regard to it. If the enforcers produce the guidance this is achieved more effectively and accountably, and the risk that there may be discrepancies between the guidance and the enforcers' interpretation of the law is minimised. Transferring business information and education to the TSPB and TSI – not themselves direct enforcers - risks damaging this connection between enforcement and guidance, thereby reducing businesses' confidence and losing the synergies which are a strength of the current regime.

5.37 The importance of providing such information to business is highlighted by the Better Regulation Executive in its Code of Practice on Guidance on Regulation.⁵¹ The need for guidance to be intimately linked to enforcement is underlined in the existing legislation. The OFT currently has a number of statutory duties to provide such information - each of its enforcement powers includes a dedicated function to give businesses advice and information about that power. The Regulators' Compliance

⁵¹ www.bis.gov.uk/files/file53268.pdf

Code requires the OFT to have regard to the need of businesses' for 'general information, advice and guidance to make it easier for [them] to understand and meet their regulatory obligations'.⁵²

- 5.38 In line with its view that the OFT/CMA should retain a significant role in national consumer enforcement action and coordination, the OFT believes it should also retain the complementary tools enabling it to provide guidance and information to business in line with statutory guidelines on good regulatory practice. This would reduce the risk of discrepancies between the guidance and the OFT/CMA's interpretation of the law, providing a consistent picture at the national level which gives certainty and confidence to firms.**

⁵² Paragraph 5.2 of the Code

6 MARKET STUDIES AND SUPER-COMPLAINTS

SUMMARY

It is important that all parts of the consumer protection system develop strong analytical capabilities in order to ensure that activities of every kind are founded in evidence. Market Studies, however, are a very specific type of investigation which provide an analysis of a market problem, whether it be a consumer problem, a competition problem, or a mix of the two. Evaluation shows that they result in substantial consumer benefits.

The proposal to place consumer Market Studies away from the consumer enforcement system and from wider markets-based analysis (with Citizens Advice and Citizens Advice Scotland) could lead to inadequate understanding both of the causes of consumer detriment and of the most efficient tools with which to tackle them. It will also make it harder to take enforcement action as part of a coordinated set of remedies to a consumer problem.

Giving Market Study responsibilities to consumer advocacy bodies risks significantly altering their role in the system, with consequent risks that business may lack trust in their findings and recommendations.

There are also practical difficulties in making the transfer option workable; it is often hard at the start to identify whether an issue is a consumer, a competition or a mixed problem, leading to the potential for delays and loss of accountability where work must be referred between different bodies in the regime.

Where appropriate, the OFT starts enforcement action rather than awaiting the final outcome of Market Studies and Super-complaints. This ability risks being lost in the Government's preferred structure, which would require Citizens Advice to make referrals to the TSPB.

- 6.1 The OFT investigates markets that may not be working well for consumers by means of Market Studies or in response to Super-complaints from designated bodies.

Market Studies

6.2 The OFT uses the term 'Market Study' to describe the process and methodology for the analysis of a market, or practices across a range of goods and services, with the aim of identifying and addressing any aspects of market failure, whether competition issues or consumer detriment, as well as the effect of government regulations. The OFT has developed a standard approach to the management and delivery of Market Studies which has become well-understood by business and consumer organisations, as well as a body of experience in the analysis of market problems which provides for a consistent and structured approach to consumer issues. The Government is committed to responding to the recommendations made in the course of a Market Study or Super-complaint response within 90 days.⁵³

6.3 Possible outcomes of Market Studies include:

- improving the quality and accessibility of information for consumers
- encouraging businesses in the market to self-regulate
- making recommendations to Government to change regulations or public policy
- taking competition or consumer enforcement action
- making a market investigation reference (MIR) to the Competition Commission
- a clean bill of health.

6.4 Up to end-2009, of the 30 Market Studies the OFT had completed, 62 per cent arose from OFT own initiatives, 23 per cent from Super-

⁵³ The OFT can also conduct other pieces of research outside the established market studies framework, in particular where the outcomes do not directly affect stakeholders (see paragraph 2.13 of OFT519 www.oft.gov.uk/shared_of/business_leaflets/enterprise_act/oft519.pdf)

complaints and 15 per cent from suggestions from Government.⁵⁴ For more details see www.offt.gov.uk/OFTwork/marketswork/OFT1335

- 6.5 The OFT has evaluated the impact of several of its Market Studies and the evidence suggests they have produced benefits that are many times their cost. For example, the OFT's car warranties Market Study in 2006⁵⁵ cost the OFT £300,000 to complete. Total benefits to private consumers attributable to resulting action are estimated to be £30 million. For fleet and business customers estimated total benefits are in the range £90-140 million. The OFT also commissioned a formal evaluation of our Market Study into care homes, conducted in 2011.⁵⁶ The cost to the OFT was £416,000. There are several areas of benefit but the only one where it was possible to derive financial estimates of impact was in relation to quality improvements. The OFT estimates that they resulted in cumulative consumer benefits of between £30-50 million over the period 2005-2010 (likely to be at the lower end of this range).
- 6.6 The OFT considers that linking intervention to robust analysis which draws on an understanding of both business and consumer behaviour is critical to the success of the consumer protection regime. The most successful international peers, such as the FTC and the ACCC, apply this joined up model. Divorcing consumer Market Studies from markets-based thinking may result in unduly burdensome interventions which fail to take account of market realities, increasing costs for businesses and consumers, and hindering economic growth.
- 6.7 Market Studies harness insights from research and analysis of a market or set of practices in order to drive a balanced and coherent programme of complementary interventions. They facilitate a coordinated response to a consumer problem, often underpinning a range of remedies such as enforcement, consumer education, industry self-regulation or improved guidance to business. For example, the OFT's Market Study into the

⁵⁴ Page 45 of Frontier Economics *Evaluation of the Impact of the Enterprise Act 2002 Provisions Covering Market Studies and Market Investigations* March 2010

⁵⁵ www.offt.gov.uk/shared_offt/about_offt/oft852.pdf

⁵⁶ www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/OFT1322.pdf

second-hand car market, published in March 2010,⁵⁷ found that more should be done to ensure dealers are aware of the law, consumers are aware of their rights, and dealers who fail to comply face a real threat of effective enforcement action by TSS and the OFT. The Study, which was the product of close collaboration with TSS, resulted in:

- clear OFT enforcement priorities to take forward investigations, a number of which are now in train
- new guidance for second-hand car dealers on compliance with the CPRs and the Sale of Goods Act 1979
- the launch of a 'Know Your Consumer Rights' campaign to increase awareness of consumer rights when buying a used car
- the launch of a new module of 'Skilled to go'⁵⁸ about buying and running a car
- a recommendation to Government that consideration be given to the introduction of legislation to outlaw illegitimate mileage correction services and their advertising
- recommendations to the Vehicle and Operator Services Agency and to the industry that more mileage data should be shared with vehicle check companies to make it easier for traders and consumers to verify a vehicle's mileage and to deter the falsification of odometer readings.

6.8 The OFT was able to immediately take forward many of the study's recommendations itself. Under the proposal to transfer consumer Market Studies to the Citizens Advice service, the situation would be more

⁵⁷ www.offt.gov.uk/OFTwork/markets-work/completed/cars

⁵⁸ Skilled to go is a free online consumer education resource toolkit designed for use in further and adult education settings. Young people are a key target audience for this module.

complex. Rather than most of these actions being taken forward in a coordinated manner by a single body, many would have to be referred to other bodies for action, creating the risk that important analytical insights could be lost or that actions would not be carried forward together due to other priorities. That could lead to consumers facing ongoing risks and businesses facing a piecemeal approach to reforms.

- 6.9 In addition, giving Market Study responsibilities to Citizens Advice and Citizens Advice Scotland - consumer advocacy bodies - risks significantly altering the specific role of Market Studies in the regime and losing some of their considerable benefits. However soundly based the analysis, they will no longer be seen as a neutral means of identifying a coherent and coordinated set of responses to a market problem if they are carried out by an organisation that also lobbies for consumers. Business in particular may lack confidence in the conclusions of such studies.
- 6.10 There are also practical problems in making the proposal to transfer 'pure consumer' Market Studies to Citizens Advice/Citizens Advice Scotland workable. It will often be impossible to know at the outset of a Market Study whether a given issue is a consumer, a competition or a 'mixed' problem. Once the underlying causes do become clear, a requirement to transfer studies between delivery partners could result in delay in remedying consumer problems leading to continuing consumer detriment whilst they clarify who has responsibility. It could even result in some initiatives not being taken forward at all if they do not fit with the priorities of the receiving bodies.

Super-complaints

- 6.11 Section 11 of the EA02 enables consumer bodies, designated by the Secretary of State, to submit 'Super-complaints' to the OFT (or other sectoral regulators) where they consider that there is any market feature, or combination of features, such as the structure of a market or the conduct of those operating within it, that is or appears to be significantly harming the interests of consumers. Section 205 of the EA02 enables specified sectoral regulators also to receive and handle Super-complaints.

- 6.12 The Super-complaints process was set up with the aim of strengthening the voice of consumers, who are unlikely to have access individually to the kind of information necessary to judge whether markets are failing. Consumer groups can access individuals' complaints to form a judgment on whether there is a problem and then take the necessary action.
- 6.13 The receiving body must, within 90 days, publish a reasoned response stating how it proposes to deal with the Super-complaint, whether it has decided to take action and, if so, what action it proposes to take. Annexe B provides a summary of Super-complaints received by the OFT to date and their outcomes.
- 6.14 The consultation document notes that the majority of Super-complaints highlight market failings where further analysis is necessary, and, as a result, should continue to be made to the CMA. The Government also seeks views on whether it may be appropriate to have a fast-track process by which the designated bodies could request enforcement action from the TSPB or a response as to why it will not be taken.
- 6.15 As noted above, joining up research and analysis of market issues with the broadest possible suite of remedies is key to ensuring that consumer protection interventions are considered, coordinated and proportionate. It is important at the outset to keep an open mind about the causes of a problem and the most appropriate remedies. It is important, therefore, that Super-complaints remain a mechanism for ensuring balanced and dispassionate review and analysis. This makes it particularly essential that there should be a separation between the bodies responsible for conducting research and analysis and those with the right to make a Super-complaint on behalf of consumers.
- 6.16 However, it is extremely important that all institutions within the system should be responsive to emerging issues and to the concerns of consumer organisations. It may therefore be worth considering whether greater transparency can or should be introduced so that, subject to appropriate safeguards, complainants understand how and whether their complaints will be acted upon and receive updates on their progress. In this context, it is worth noting that the OFT does not wait until it has

completed consideration of a Super-complaint, but starts the enforcement action as soon as is appropriate. This further benefit of the current integration of functions within the OFT could be lost under the TSPB model.

- 6.17 **In the OFT's view it is in the interests of the overall effectiveness of the regime that Market Studies and Super-complaints - whether they are initially begun as a response to consumer, competition or mixed issues - should continue to be dealt with by the OFT/CMA. However, analytical capability should be highly valued right across the regime. Research and analysis by bodies such as Citizens Advice, Consumer Focus and Which? makes a vital contribution to the collective understanding of consumer issues in the UK. This sort of capability should be retained and developed on a wide basis going forwards.**

7 CONSUMER ADVICE

SUMMARY

The OFT strongly supports the recommendation of the NAO that BIS should ensure any reorganisation of the consumer complaints service maintains or enhances its value as an intelligence database for enforcers.

The OFT welcomes engagement with BIS, Citizens Advice and Citizens Advice Scotland on this point and remain committed to working closely with them and with TSS in support of this recommendation.

The OFT, Citizens Advice and Citizens Advice Scotland are working together to manage the risk that there could be a drop in quality of advice during the transition, including development of a joint transition plan and the establishment of a 'shadow service' before formal launch.

- 7.1 The OFT notes the Government's intention to integrate existing publicly-supported advice services into a single public offering delivered through the Citizens Advice Service. As part of this, the decision has been taken to transfer the OFT's responsibility for delivering consumer advice and information to Citizens Advice in England and Wales and to Citizens Advice Scotland. Citizens Advice have chosen to develop a new advice service, while in Scotland the OFT understands the service will be based, at least in part, upon the existing Citizens Advice Direct service. As a consequence, Consumer Direct (CD) will close, most likely at the end of the current financial year. The OFT is working closely with Citizens Advice/ Citizens Advice Scotland to ensure a seamless transition to the new service for consumers and organisations that depend upon CD, such as TSS.
- 7.2 Consumer Direct is the government funded telephone and online service offering information and advice on consumer issues. Advisers are trained in all aspects of consumer rights and help people to take the best course of action when they have a consumer problem by giving legally correct advice. CD is delivered through seven contact centres across Great Britain, one handling issues relating to energy and post only. Handling

around 1.5 million contacts per year, CD's performance is measured against key performance indicators (KPIs) relating to service level, customer satisfaction and call abandonment. Quality is incentivised through a bonus scheme. The service has consistently met its KPIs. Since taking responsibility for CD in 2006, the OFT has maintained the quality of the service and customer satisfaction levels whilst reducing the annual budget from £19 million to less than £9 million in the current financial year.

- 7.3 The service is delivered in partnership with TSS. Approximately 95 per cent of TSS divert their consumer advice calls to CD. In accordance with protocols agreed with individual TSS, CD advisors refer more complex or criminal issues to them for detailed advice and possible enforcement action. Additionally, some local authorities are involved in delivering the service as contractors.
- 7.4 The CD database is a valuable source of data to TSS, the OFT and other partners in shaping enforcement priorities, feeding directly into prioritisation and pipeline mechanisms, and as evidence in cases. For example, the OFT launched a Market Study into second hand cars as a direct consequence of analysis of CD data, which recorded 72,000 complaints about used cars in 2008. Similarly, the 'Just Tick It' consumer awareness campaign which started in 2009 was motivated by the level of complaints to CD about an Internet ticketing scam.
- 7.5 The OFT notes the NAO's conclusion in its recent report that 'Consumer Direct is a highly regarded source of data on the prevalence and nature of consumer detriment'. One of the biggest risks of the transfer is that the access of the OFT, TSS and others to this valuable data will be constrained. This would threaten the effective operation of the wider regime.
- 7.6 **The OFT therefore strongly supports the recommendation of the NAO that BIS should ensure that any reorganisation of the consumer complaints service maintains or enhances its value as an intelligence database by preserving the current level of access given to enforcement professionals. The OFT welcomes engagement with BIS and Citizens**

Advice/ Citizens Advice Scotland on this point. The OFT is working closely with them and TSS to ensure that appropriate mechanisms for enforcers to access, interrogate and analyse complaints data are maintained, and to examine ways in which its value as an intelligence tool could be enhanced.

- 7.7 The new structure will also need to ensure that there is consistency between the guidance given to businesses and that given to consumers (which is a big concern to business). This will require effective joining up across the regime. This point is addressed in greater detail in Chapter Eight.
- 7.8 At an operational level, the main risk is that service quality will drop as CD advisors begin to seek work elsewhere in the run-up to closure. The OFT is managing this by developing a joint transition plan with Citizens Advice/Citizens Advice Scotland. The launch of a 'shadow service' before formal launch of the new service forms a vital component of this.

8 CONSUMER INFORMATION, EDUCATION AND AWARENESS RAISING

SUMMARY

A number of issues will need to be addressed in transferring the consumer information function to the Citizens Advice service in order to ensure the new approach works effectively and retains key strengths of the current regime.

Critically, consumer advice, information and education must: (a) remain fully aligned and consistent with guidance to businesses and (b) respond to the needs of regulators and other organisations which need to inform and educate consumers in the public interest.

Citizens Advice will need to develop consumer information and education campaigns which are based upon broad partnership working and are demonstrably effective in cutting detriment.

Additionally, the Government will need to establish accountability mechanisms which ensure consumer information and education are delivered in support of national policy objectives and offer value for money.

Consumer information

8.1 The OFT currently provides information to increase consumers' awareness and knowledge of the law and to indicate appropriate courses of action if they need to take it. This information is available online and, where appropriate for audience needs, in a printed format. Consumers who demonstrably need to be made aware of their rights in specific areas are also targeted by proactive campaigns.

8.2 Recent campaigns include:

- 'Just Tick It',⁵⁹ a campaign to raise consumers' awareness of the risks of scam websites when buying tickets online. This campaign integrated engagement from TSS, ticketing organisations and event promoters and involved around 105 participating partners to ensure consistent messaging, maximise reach and strengthen credibility. Evaluation of this campaign indicates a 2.54:1 return on investment.⁶⁰
- 'Doorstep selling',⁶¹ a campaign to increase awareness of rogue doorstep trading amongst UK residents over 70 years old and their friends, families and carers. This campaign brought together TSS, Neighbourhood Watch and Home Watch, and Age UK and involved around 170 other partners, and followed a recommendation from the OFT Market Study on doorstep selling.

8.3 The OFT supports the view that consumer information should be available from an authoritative source, in an easily usable format and in a cost-efficient manner. The OFT also supports the intention that consumers seeking advice from the Citizens Advice service about consumer rights should receive this information via integrated face-to-face, telephone, online and printed formats to enable information to be accessed in a way which meets individual consumer needs.

8.4 As the consultation highlights, consumers currently seek information from many sources beyond Citizens Advice; they look to Which?, central and local government (including Directgov), relevant charities and other trusted intermediaries including families, friends, carers, businesses, trade bodies and websites. This will continue and consumers will need messages to be consistent across the broad range of different sources

⁵⁹ www.offt.gov.uk/OFTwork/consumer-protection/campaign11-12/scams/just-tick-it/

⁶⁰ www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1323.pdf

⁶¹ www.offt.gov.uk/OFTwork/consumer-protection/campaign11-12/doorstep/

they use. This creates a clear requirement for Citizens Advice to have strong and effective partnership-working across the diverse range of bodies in the provision of consumer information.

- 8.5 Consumer advice and business guidance are both derived from the same law. Often, the OFT seeks to include in its consumer information campaigns a business element which complements the consumer campaign. For example, the Sale of Goods Act (SOGA) Hub⁶² provides information on legal compliance and customer rights to businesses and is complemented by the 'Know Your Consumer Rights' campaign for consumers. This hub also provides materials for businesses to give directly to consumers which ensures that messages are integrated. Having one organisation to do this has ensured consistency, but if the new regime is to have different providers new mechanisms will be needed to ensure that consumer and business guidance are fully aligned and consistent.
- 8.6 OFT information and advice campaigns are frequently an outcome of Market Studies or of national consumer law enforcement. For example, the OFT Market Study into the mobility aids market gave rise to the inclusion of specific information on mobility aids in the OFT's Doorstep Selling campaign. It is important that those organisations – notably regulators – which have a strong interest in what messages are communicated to consumers are involved in deciding how and when public consumer information and education funding is spent and in joining up with wider initiatives in order to maximise their impact.
- 8.7 Furthermore, in addition to protecting consumers, information campaigns also work to drive economic growth by improving market functioning. To achieve this effectively, consumer information needs to be directed at the full range of detriment and Citizens Advice will need to broaden its communication beyond its historical focus on vulnerable consumers. For example, the OFT's 'Just Tick It' campaign tackles a consumer need which is not specific to vulnerable consumers.

⁶² www.offt.gov.uk/business-advice/treating-customers-fairly/sogahome

- 8.8 **The OFT therefore believes that further thought should be given to how the provision of information, advice and education to consumers will work in practice. In particular, consideration should be given to the establishment of mechanisms for determining national consumer information priorities and messages, engaging the range of organisations which have a strong interest in what messages are communicated to consumers. The provision of consumer information will need to continue to be closely linked with the provision of information to business to avoid inconsistencies and uncertainty.**

Consumer education

- 8.9 Education, delivered face-to-face, increases consumers' skill levels to ensure they have the ability to find and research information sources and make confident, effective and responsible choices.
- 8.10 Launched in 2008 for use in Further Education settings, the OFT's 'Skilled to go' toolkit develops consumer skills, knowledge and confidence. Skilled to go currently has over 8,000 registered users from a range of education settings across the UK – there are tailored versions of the toolkit for England and Wales, Scotland and Northern Ireland. Evaluation of Skilled to go in 2010 indicated an almost 5:1 return on investment, estimating that this will increase to 13:1 by 2014/15.⁶³
- 8.11 In taking on this work, as well as working closely with TSS, the Citizens Advice service will need to develop strong links with the educational community to ensure the provision of educational materials and programmes remain relevant and fit for purpose.
- 8.12 Educational activities need continuous development to be sustainable over the long-term. In addition, teachers need time to familiarise themselves with the materials and incorporate them into their lesson plans. Ongoing updates to materials ensures that teachers continue to

⁶³ www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1323.pdf

utilise the materials over a period of years, reaching larger number of learners.

- 8.13 As for consumer advice, the OFT believes that consideration should be given to the establishment of mechanisms for prioritising education activities based on market research. Educational activities must be clearly linked to the national curriculum and other relevant education curricula.**

- 8.14 For both consumer information and consumer education functions, further consideration should be given to the structures which will ensure effective accountability and value for money. In particular, the OFT would support the continuation efforts to evaluate the impact of these activities and learn from the findings.**

9 CONSUMER CODES APPROVAL

SUMMARY

The OFT welcomes the Government's support for self-regulation and co-regulation.

In considering options for the future, the OFT believes the value of the Consumer Codes Approval Scheme should be retained as far as possible. Particular benefits include: government endorsement, an approval process founded on proof of effectiveness and protection for consumers via independent redress and pre-payment protection.

The OFT is keen to encourage constructive dialogue with Code sponsors and other stakeholders.

- 9.1 The OFT welcomes the Government's support for self-regulation and co-regulation. The OFT believes that self-regulation offers benefits for consumer protection and adds real value to the functioning of markets.⁶⁴

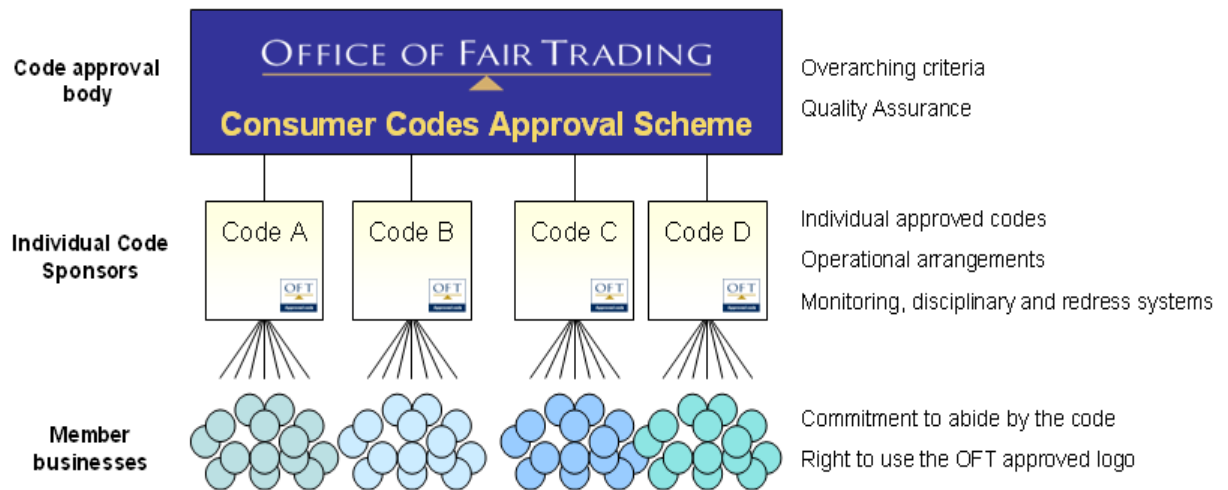
The OFT's Consumer Codes Approval Scheme

- 9.2 The Consumer Codes Approval Scheme (CCAS) is designed to promote effective self-regulation. It is entirely voluntary. It aims to encourage the business community to take the lead in solving consumer protection problems, particularly where there are known problems in specific sectors.
- 9.3 CCAS is an umbrella scheme which brings together industry bodies undertaking self-regulatory activity, through a common approach and common standards. It has overarching criteria and provides quality assurance through the approval of individual sector-specific codes, which are mainly sponsored by trade bodies. The individual code

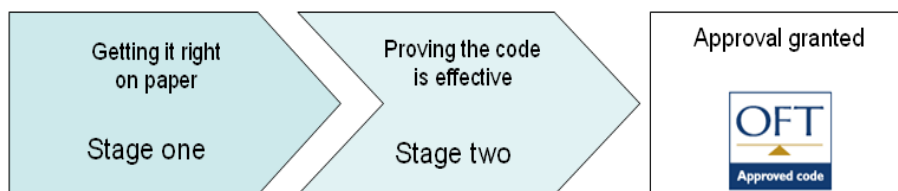
⁶⁴ *OFT Policy statement – The role of self-regulation in the OFT's consumer protection work* (OFT1115) September 2009

sponsors are responsible for drafting their own code and creating the appropriate infrastructure to support it.

The diagram shows the two tiers of accreditation in place for individual businesses which become members of code schemes, whose codes are approved by OFT under CCAS.



9.4 Code approval is a two stage process. At the first stage the code sponsor produces a code that fulfils the OFT CCAS core criteria.⁶⁵ At stage two code sponsors have to prove that their code operates effectively, improves the consumer experience and deals effectively with problems.



9.5 Currently the OFT offers code approval free of charge. Prior to the consumer landscape review, we had started to consider the possibility of moving to a self-funding model, as a long term option to both reduce public funding and improve sustainability.

⁶⁵ *Consumer Codes Approval Scheme – Core criteria and guidance* (OFT390) March 2008

- 9.6 There are currently 10 OFT approved codes in a wide range of sectors; motor, property, home removals, carpets, direct-selling, healthcare products, debt management and will-writing. More than 16,500 businesses (including branches) have signed up to abide by an approved code of practice. A further five codes are at the second stage, with another 12,458 businesses signed up to one of these codes that have successfully completed stage one (codes that meet OFT criteria on paper).

Preserving the benefits of CCAS

- 9.7 Mindful of the BIS objective of preserving or recreating the full value of the CCAS in the new regime, the OFT would highlight the following factors that distinguish the scheme and which generate benefits for consumers and businesses:

The two-tier structure harnesses business efforts to raise standards within sectors

- 9.8 The OFT sets overall standards, provides oversight and quality assurance but its relationship is with the code sponsors rather than individual firms. Code sponsors take ownership of their individual code processes and have a direct relationship with their member businesses. This is an efficient division of responsibility between individual self-regulatory bodies and the code approval body. The individual market sector codes can directly address the specific consumer protection issues of that sector including treatment of vulnerable consumers, truthful advertising, high-pressure selling, cancellation rights and terms and conditions.

Government endorsement

- 9.9 Providing a credible signal of commitment to consumer protection can be particularly valuable to good businesses in market sectors with poor reputation or to small businesses who find it hard to build reputation.⁶⁶ Of the 10 approved codes, eight have significant SME membership.

⁶⁶ *The economics of self-regulation in solving consumer quality issues* (OFT1059) March 2009

- 9.10 Recognition by a government body is important for alerting shoppers to the codes' high standards of customer care, in a way that they trust. Code sponsors tell us that visible accreditation can convince member businesses that the commitment to improve standards will provide a competitive advantage.
- 9.11 The OFT brand itself, which is the predominant feature of the CCAS logo, has high levels of recognition, currently estimated at 83 per cent. Branding will be an important consideration for any potential successor scheme.

Approval granted only on proof of effectiveness

- 9.12 An essential feature of CCAS is its insistence that code sponsors must demonstrate that their codes are working before they can gain approval. This is to ensure consumers get what they are promised, and meet the persistent general criticism that self-regulatory codes can look good on paper but often fail to deliver in practice. CCAS approval is government accreditation of outcomes, not just promises. However, these processes are not quick and easy, especially coupled with the high standards required by the core criteria. Real changes to business behaviour take both time and commitment.

Ongoing monitoring and disciplinary systems

- 9.13 Active and continuous monitoring is important to ensure that the aims of any code of practice are met. Reliance on complaints is not enough, as consumers may not complain for a variety of reasons. Well designed sanctions that are actively used underpin successful self-regulation through their deterrence value. CCAS requires that codes have robust mechanisms for dealing with non-compliance by members.

Relationship with the OFT, consumer bodies and independent representation

- 9.14 CCAS gives codes sponsors access to direct advice and assistance from the OFT and other consumer bodies. This helps businesses address common problems and comply with legal requirements. Procedures for

dealing with issues of non-compliance with the code should have independent involvement or scrutiny.

Conciliation and redress

- 9.15 Protection is important in instances where things do go wrong, either when a rogue business slips through or an honest business makes a mistake and fails to respond appropriately. The opportunity to access both a conciliation service (often provided by the code sponsor) and a low-cost, independent redress scheme ensures that where problems do occur consumers are not disadvantaged. A significant number of Alternative Dispute Resolution (ADR) schemes have been introduced, or amended in sectors such as household removal, mobility aids and car repair, in order to meet the criteria for approval.

Prepayment protection

- 9.16 A requirement for protection of prepayments guards against consumer losses when firms go out of business. This criterion is strongly supported by consumer groups and it addresses a key issue of consumer confidence, although some sponsors find it the most difficult requirement to meet. CCAS encourages sponsors to find appropriate solutions for their sector; examples include insurance or bonds, ring-fenced accounts and arrangements for other members to complete consumer contracts.

Alternative to enforcement

- 9.17 Sponsors of approved codes can play an important role as a compliance partner, providing an alternative to direct enforcement action by central or local government. Where the OFT receives intelligence or direct complaints about a trader belonging to an approved code, responsibility for resolving the issue can be passed directly to the code sponsor in the first instance.
- 9.18 For self-regulatory initiatives to succeed in promoting compliance it is important that there remains an effective statutory enforcement back-stop, to take action when appropriate, and providing deterrence signals

to businesses that persistently fail to comply with consumer protection legislation gaining a competitive advantage over fair trading businesses.

- 9.19 **The OFT welcomes the BIS objective of preserving or recreating the full value of the OFT CCAS in the new consumer protection regime. Whatever the eventual outcome of the consultation, the OFT believes the value of the CCAS to consumers, business and code sponsors should be retained in some form, having regard to the particular benefits of the current scheme. If the CMA has a strong consumer leadership role it may wish to consider addressing consumer protection issues through a self-regulation scheme.**
- 9.20 The OFT is keen to hear the views of Code sponsors and other stakeholders on the options to preserve the benefits of the CCAS. We hope this is the start of a constructive debate.

10 ADVOCACY AND REDRESS

SUMMARY

The OFT supports the principles behind the Regulated Industries Unit as proposed by BIS. The OFT does not have a view on the specific organisational structure or home but would agree that it should minimise duplication and there should be a strong economic analytical function.

The OFT urges the Government to consider further the role of wider consumer redress mechanisms in the consumer protection regime – effective redress mechanisms encourage the resolution of consumer problems and incentivise businesses to provide satisfactory goods and services.

Advocacy

- 10.1 The OFT's role in advocacy is a limited one. There are two principal definitions of advocacy (aside from the legal context) which are:
- i) informing public-policy and resource allocation decisions within political, economic, and social systems and institutions
 - ii) pleading or arguing for a particular cause, including media campaigns, public speaking, and so on.
- 10.2 The OFT has a role in doing the first of these, as outlined in Section 7 of the EA02, in respect of its competition function. This work has two broad objectives:
- i) Encouraging government to meet its wider policy objectives in a way which is least distortive to the effective functioning of markets.
 - ii) Making recommendations to government which will typically relate to a specific market, or particular market features, and are directly aimed at achieving one of the OFT's two broad objectives.
- 10.3 However, the OFT is not a 'campaigning' organisation which publicly pleads or argues a particular cause. The OFT does not therefore engage in consumer advocacy.

- 10.4 The OFT is therefore not directly affected by the BIS proposals for advocacy as a whole. However, it can see some benefits and synergies from having a national consumer advisory function for regulated industries in place in the new consumer protection regime, with legal powers for information gathering. The OFT agrees with the design principles BIS outlines.
- 10.5 A straightforward coordination function to look across the sectoral areas and undertake a horizon scanning role would be helpful and ensure consistency, as would the ability to bring pressure to bear on regulators and government to take action in certain areas on behalf of consumers.
- 10.6 **The OFT supports the principles behind the Regulated Industries Unit as proposed by BIS – joining up common themes across sectors, looking forward for future issues and holding regulators and government accountable. The OFT does not have a view on the specific organisational structure or home but would agree that it should minimise duplication and there should be a strong economic analytical function.**

Redress

- 10.7 The OFT has a keen interest in consumers' ability to obtain redress and considers this is an important tool in raising and maintaining consumer confidence in markets. The OFT actively supports and encourages self-regulatory mechanisms for the resolution of individual consumer complaints via CCAS, and via its approval and monitoring responsibilities for statutory estate agents redress schemes under the Consumers, Estate Agents and Redress Act 2007. In order to better understand the current consumer redress system the OFT has completed a mapping exercise of existing ADR provision within the UK and highlighted gaps in provision against Consumer Direct's most frequently complained-about sectors.⁶⁷

⁶⁷ *Mapping UK consumer redress: A summary guide to dispute resolution systems* OFT 1267
www.offt.gov.uk/OFTwork/policy/mapping-uk-consumer-redress/

- 10.8 Although at present the OFT does not provide redress directly to consumers, through preparation for the BIS Civil Sanctions Pilot it perceived considerable consumer protection benefits relating to restorative justice and the opportunities such powers would provide for redress provision. While there do not appear to be any immediate opportunities to apply these powers, the OFT remains interested in considering alternative solutions for applying restorative justice given the potential for improving consumer outcomes.
- 10.9 The OFT has also been keen to widen the debate in the UK on redress for consumers under CPRs. The OFT hosted and organised a joint workshop in October 2010 with the Law Commission and Local Better Regulation Office to discuss the practical implications of such measures with TSS representatives from around the UK. It has also responded to the Law Commission and Scottish Law Commissions' recent consultation on private redress for misleading and aggressive practices under the CPRs using findings from the workshop and its enforcement experience to provide relevant examples to support the view that private redress should be available for all breaches of the CPRs.
- 10.10 The OFT strongly supports the view that representative actions would be beneficial to groups of consumers who have been unable for whatever reason to resolve their disputes through direct settlement with a trader or by voluntary ADR. It would be of particular value where individual losses may be low and therefore unlikely to be suitable for individual actions, but across a sector or group represent a high level of detriment to consumers.
- 10.11 The European Commission (DGs Sanco, Justice and Competition) recently published a joint consultation on the common principles which should be applicable to collective redress mechanisms across the piece. The OFT was uniquely placed in the UK in its ability to formulate its response to the consultation based on an informed consideration of both consumer and competition elements.
- 10.12 The OFT notes that the consultation paper addresses the issue of consumer redress primarily under the advocacy proposals in Chapter 4 in

relation to proposed statutory redress schemes in the water and transport sectors. In the OFT's view, the provision of wider consumer redress outside of statutory schemes should feature strongly in the consultation, because:

- effective redress mechanisms encourage the resolution of consumer problems and incentivise businesses to provide satisfactory goods and services
- widespread use of effective redress mechanisms is likely to lead to less need for enforcement interventions, with consequent budgetary savings.

10.13 Current and forthcoming developments at EU and UK level for the provision of consumer redress following breaches of consumer law would suggest this is an area which needs more consideration in the proposed structure. For example, for enforcer-led provision of redress/restorative justice there would clearly be a role for both the CMA and TSS to ensure that cases across the spectrum of size provided equal access to redress by this mechanism. The JEB's involvement in prioritisation of cases for the provision of redress would also be crucial in this respect.

ANNEXE(S)

A THE OFT'S INTERNATIONAL ENFORCEMENT, COORDINATION AND LIAISON FUNCTIONS

A.1 The OFT has two main international roles:

- taking enforcement action abroad when necessary, and working with other authorities to deliver a coordinated response to international threats to consumers, directly as an enforcer and through strategic input to improve international consumer enforcement frameworks, and
- acting in a range of ways to ensure the UK's compliance with EU treaty obligations to protect its own and other Member States' consumers.

A.2 **Tackling international threats.** The increasingly international nature of markets and of threats to consumers makes it vital for consumer protection agencies across the world to cooperate and share information. The OFT's contribution to this effort includes:

- action to protect UK consumers through partnership working with non EU counterparts such as the FTC and ACCC
- direct action against overseas rogue firms where possible: the OFT is unique within the EU in our record of taking legal proceedings in other Member States to protect our own consumers⁶⁸
- liaison with other UK and EU agencies on cross-border enforcement issues.

A.3 Effective performance of these nationally important roles is greatly assisted by the OFT's broad experience of UK consumer enforcement, overview of consumer markets, and ability to act a single point of

⁶⁸ The OFT took successful cases against the Duchesne group in Belgium and against Best Sales in the Netherlands www.of.gov.uk/news-and-updates/press/2008/86-08

contact, advice and support for international partners on all relevant issues.

A.4 Box A.1 provides a case study of recent OFT activity in this area.

Box A.1 Case study: Enforcement cooperation with the FTC

In February 2009 the FTC asked the OFT to assist with an investigation into two websites selling discount home electronics equipment to UK consumers. The sites were located in the US, but gave the appearance of being UK based by using '.co.uk' domains. Over 70 consumers complained of issues such as unexpected import fees, invalid warranties and difficulties obtaining refunds.

The OFT assisted the FTC by providing consumer complaints data, assisting the FTC to trace UK witnesses and using formal information gathering powers under section 224 of EA02.

This assistance enabled the FTC to reach a settlement with the trader, prohibiting him from making further misrepresentations. Additionally, the OFT took steps to help UK consumers secure redress after some consumers were unable to raise chargeback requests with their banks. To resolve this the OFT spoke with a number of UK companies who provided commercial services relevant to the payment transactions and also wrote to consumers to inform them of chargeback rights.

A.5 **Strategic input.** The OFT also uses its enforcement experience and markets expertise to contribute fully on behalf of the wider UK consumer enforcement community to international fora on consumer issues, and thus to maintenance and development of the frameworks and mechanisms that allow for international action. This contribution is made both at global and EU level. Specifically it:

- is an active member of the International Consumer Protection Enforcement Network (ICPEN)
- leads the UK enforcers' participation in discussions between EU authorities who enforce the legislation - indeed where appropriate, it

organises such discussions itself (for instance a workshop in Brussels this year on unfair contract terms enforcement)

- contributes to consideration of EU consumer legislation, ensuring that proper account is taken of UK enforcement needs
- develops significant strategic partnerships to benefit UK consumers.⁶⁹

Box A.2 provides an example of recent OFT actions to provide strategic leadership in international enforcement.

A.6 EU compliance. Nearly all new UK consumer law since the 1980s has originated in the EU, and places legal obligations on the UK to ensure effective enforcement. The OFT plays a key part in ensuring UK compliance with these obligations through performing a number of linked roles:

- **National enforcer of consumer directives.** Local and sectoral enforcers in the UK are empowered to enforce EU-derived consumer legislation, but only within their specific remits. UK compliance depends on there being a UK enforcer (currently the OFT) with the ability to consider cases from a national and international perspective, and the resources and expertise to take complex international cases.
- **Competent Authority and Single Liaison Office.** Under the 2004 CPC Regulation the UK is obliged to ensure that its authorities can, and where necessary, do take action in this country to protect consumers in other Member States, and that such cross-border action is facilitated and coordinated. The OFT performs the requisite liaison role at EU level, and acts as national enforcer where required.⁷⁰

⁶⁹ www.offt.gov.uk/news-and-updates/press/2011/41-11

⁷⁰ All Member States have a duty to ensure that action is taken to protect consumers elsewhere in the EU by appropriate Competent Authorities. Each country is also required to coordinate

- **Cross-border action.** EU legislation also requires that the consumer protection agencies of other Member States are empowered themselves to act elsewhere in the EU to protect the interests of their own consumers.⁷¹ The OFT has a dual statutory role, in that it takes proceedings as necessary in the courts of other Member States on behalf of UK consumers (as mentioned above), and also assists non-UK authorities taking proceedings in the UK, where they lack full competence to act for technical reasons.⁷²

action under the CPC Regulation via a public authority designated as a Single Liaison Office (SLO). The OFT acts both as the UK's SLO and as its sole fully-empowered Competent Authority. It also chairs the UK's Enforcement Forum, bringing together UK authorities including TSS who have powers to act but only within local or sectoral remits. The OFT is generally able itself to take enforcement action where no such other authority can do so.

⁷¹ The 1998 Injunctions Directive is implemented in the UK through Part 8 of the Enterprise Act 2002.

⁷² Specifically, compel the provision of information by the subjects of enforcement action – s.224(2)(c) of the Enterprise Act.

Box A.2 Case Study: Building a European Internet Enforcement Capability

In December 2010 the OFT secured funding from the European Commission to lead a 13-month project 'Building a European Internet Enforcement Capability' within the CPC Regulation Network. The outcomes of the project are important for UK consumers since they will improve capacity in and collaboration between European enforcers, thereby improving protection for UK consumers in cross border transactions. The OFT leads this initiative which creates a network of e-enforcement officers who work together to share knowledge and expertise through a series of workshops on:

- legal issues, to share experience when applying the law to online economic threats to consumers
- technical issues, to discuss the skills and equipment required for online investigations
- working with industry.

The project group is also developing a knowledge sharing website to share information and intelligence about Internet enforcement with CPC colleagues. By taking the lead role in proposing and delivering this project, the OFT is required to manage all budgetary and administration aspects with the European Commission. Given the success and support for the current project the OFT has made a further bid for a follow up project to commence in 2012.

B SUPER-COMPLAINTS TO THE OFT

Date	Complainant	Issue	Outcome
Oct 2001 *	Consumers' Association	Private dentistry	Market study leading to recommendations to Government and others
Sep 2002 *	Citizens Advice	Doorstep selling	Market Study leading to recommendations to Government and others
Mar 2003 *	Postwatch	Mail consolidation	Referred to Postcomm
Dec 2003	Consumers' Association	Care homes	Market Study leading to recommendations to Government and others
Jun 2004	National Consumer Council	Home credit	Market Investigation Reference to the CC leading to remedies
Nov 2004	Which?	Northern Ireland Banking	Market Investigation Reference to the CC leading to remedies
Sep 2005	Citizens Advice	Payment protection insurance	OFT Market Study resulting in Market Investigation Reference to CC leading to remedies
Apr 2007	Which?	Credit card interest rates	The OFT worked with industry to improve transparency and switching
May 2007	Which?	Scottish legal profession	Recommendations to Government and others
Jul 2009	Campaign for Real Ale	The supply of beer in UK pubs	Clean bill of health. Decision not to make a Reference
Mar 2010	Consumer Focus	Cash ISAs	Voluntary industry undertakings
Mar 2011	Citizens Advice	Sub-prime credit brokerage	Ongoing OFT enforcement action, new OFT guidance and recommendations to Government

Mar 2011	Which?	Card surcharges	Recommendations to Government and potential enforcement action under CPRs
Sept 2011	Consumer Focus	Travel Money	Currently under consideration.

* Complaints pre-dated coming into force of section 11 EA02 but the OFT elected to treat them as Super-complaints and responded within 90 days.