

# **Compliance partnerships**

**An OFT consultation on developing the use of  
'established means'**

**December 2008**

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## Scope of this consultation

<b>Topic of this consultation</b>	This is a public consultation on a draft set of principles that the OFT proposes to apply when working with its partners to maximise compliance with the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and Business Protection from Misleading Marketing Regulations 2008 (BPRs) (the Regulations).
<b>Scope of this consultation</b>	<p>This consultation will propose how best to reflect the intention and purpose of the Regulations to maximise compliance.</p> <p>This consultation does not focus on procedural matters, such as the development of case handling protocols and memoranda of understanding.</p>
<b>Geographical scope</b>	The Regulations apply to the whole of the UK.
<b>Impact assessment</b>	An impact assessment has not been conducted in support of this consultation. To ensure effective use of our resources, the OFT only undertakes impact assessments where we have reason to suppose proposals could impose measurable additional regulatory burdens. We do not consider this to be the case in this instance.

## Basic information

<b>To</b>	Anyone with an interest in the OFT's approach to enforcement of consumer protection legislation. This may include large and small businesses, trade associations, professional bodies, regulators, enforcers and consumer groups.
<b>Duration</b>	The consultation period began on 11 December 2008 and views are required by 5 March 2009.

<b>Enquiries</b>	<p>By telephone: Pauline Goodship on 0207 211 8335</p> <p>By email to: establishedmeans@oft.gsi.gov.uk</p> <p>By fax to: 020 7211 8757</p> <p>By post to: Established means Project, Room 3C/26, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX</p>
<b>How to respond</b>	<p>We would welcome your comments on the draft set of principles contained within this consultation (at Chapter 3) and the specific questions listed at Annexe B. Please respond to as many questions as you are able and provide any suggested changes or comments on the draft set of principles in writing (by email, or alternatively by letter or fax, as indicated above).</p> <p>When responding to this consultation please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.</p> <p>We are publishing this consultation on the OFT website and sending it to a range of stakeholders to invite comments.</p>
<b>Additional ways to become involved</b>	<p>This document forms part of a wider consultation process that includes conversations with existing and potential providers of 'established means'. We also plan to hold a stakeholder event in early 2009 which will include a discussion of this consultation.</p>
<b>After the consultation</b>	<p>We will collate responses to the consultation and publish a formal summary of these on our website, along with a final version of the principles adopted, by spring 2009.</p>
<b>Compliance with the Code of Practice on Consultation</b>	<p>This consultation complies with BRE's Code of Practice on Consultation. A list of the key criteria can be found at Annexe D, along with a link to the full document.</p>

## Background

<b>Getting to this stage</b>	The Regulations implement the Unfair Commercial Practices Directive in the UK and came into force on 26 May 2008. The OFT (and every authority with the duty of enforcing the Regulations) in determining how to comply with its duty of enforcement is required to have regard to the desirability of encouraging the control of unfair commercial practices by such 'established means' as it considers appropriate. In its Annual Plan 2008-09 the OFT committed to consult on the subject.
<b>Previous engagement</b>	We have had preliminary discussions about our proposed approach with a selection of stakeholders.

## **Feedback about this consultation**

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

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

## **Data use statement for responses**

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

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

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

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# 1 INTRODUCTION

- 1.1 This is a public consultation on a draft OFT policy statement. The OFT's Annual Plan for 2008-09 includes a commitment to consult on 'how to maximise the use of 'established means' under both the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and Business Protection from Misleading Marketing Regulations 2008 (BPRs) (referred to collectively as 'the Regulations'), in order to improve compliance more generally with these Regulations and to publish principles as appropriate'.
- 1.2 This policy statement sets out the principles that the OFT will apply in working with its partners to enforce these regulations. This consultation is part of a project the OFT is undertaking in order to:
- determine our future policy with regard to 'established means'
  - maximise the effectiveness of the Regulations and secure compliance by utilising the mechanisms/systems of appropriate bodies, and
  - ensure we apply the policy in a transparent way.
- 1.3 There is no definition of 'established means' in the Regulations. We interpret it as referring to those systems and mechanisms outside the OFT which have the effect of encouraging the control of unfair commercial practices under the Regulations. In other words, providers of 'established means' offer alternative channels for enabling or encouraging compliance with the Regulations, in addition to the OFT. We will also refer in this consultation to individual providers of 'established means' as our 'compliance partners'.
- 1.4 This consultation aims to inform our policy consideration, providing for proper OFT reflection of the views of interested parties and to ensure transparency and understanding of the proposed policy. This document forms part of a wider consultation process that includes conversations with existing and potential 'established means' which we expect to culminate in a stakeholder event early in 2009. The policy forms part of

our commitment to working in partnership with others to increase the impact of our consumer enforcement and protection.

- 1.5 This consultation proposes an OFT policy on using 'established means', which we describe as compliance partnerships, that will apply only in respect of our duties under these Regulations. In practice, this proposal formalises the existence of current beneficial arrangements and allows for the possibility of expansion to new partners.
- 1.6 The OFT targets its enforcement activity towards cases of high detriment, in line with its prioritisation principles.<sup>1</sup> The OFT will continue to intervene in those cases where it is appropriate for us to do so, but using appropriate 'established means' as a first port of call for resolving compliance issues will expand the reach of the Regulations and in so doing bring benefits to consumers, business and enforcers alike.
- 1.7 It is worth stating explicitly that, in the interests of flexibility and in seeking to avoid erecting unnecessary barriers, the OFT does not intend to set up a system whereby bodies who consider themselves to be 'established means' may seek some form of accreditation. Rather, the draft principles will underpin the policy and process for utilising 'established means'. What is important about providers of 'established means' is not their status but rather how well placed they are to bring about compliance. In Chapters 4 and 5 we discuss how this can be extended beyond the traditional means of securing compliance.
- 1.8 In line with current legislative thinking, we are proposing a principles-based approach to the use of 'established means'. This provides flexibility and will allow us to take account of future changes that influence the regulatory framework, for example, the role of local

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<sup>1</sup> [www.offt.gov.uk/shared\\_offt/about\\_offt/oft953.pdf](http://www.offt.gov.uk/shared_offt/about_offt/oft953.pdf)

authority Trading Standards Services (TSS) in the light of Primary Authority partnerships (PAPs).<sup>2</sup>

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<sup>2</sup> From April 2009 the Primary Authority scheme comes into being under the Regulatory Enforcement and Sanctions Act 2008 (RES Act). The scheme will put the long-standing 'Home Authority' voluntary agreements between TSS and businesses which operate across local authority boundaries onto a statutory footing. Under this scheme, a Primary Authority is a local authority registered by the Local Better Regulation Office as having responsibility for a particular business or organisation.

## 2 BACKGROUND

### The legislative framework

- 2.1 The CPRs and BPRs implement the UCPD in the UK and came into force on 26 May 2008. The Regulations extend the scope for enforcers to ask the courts to consider the behaviour of a business and whether or not that behaviour is fair. They mark a move towards a principles-based regime enabling enforcers to tackle unfair commercial practices more effectively.
- 2.2 The legislation increases the range of enforcement tools available to the OFT, expanding the scope to take criminal proceedings alongside existing civil enforcement tools and the provision of advice and guidance.
- 2.3 The OFT (and every authority with the duty of enforcing the Regulations), in determining how to comply with its duty of enforcement, is required to:
- 'have regard to the desirability of encouraging control of unfair commercial practices by such established means as it considers appropriate having regard to all the circumstances of the particular case.' (Reg 19.4 CPRs)
- and
- 'have regard to the desirability of encouraging control of advertising which is misleading under regulation 3 and comparative advertising which is not permitted under regulation 4 by such established means as it considers appropriate having regard to all the circumstances of the particular case.' (Reg 13.4 BPRs)
- 2.4 The OFT understands that the duties in the Regulations are there to encourage the control of unfair commercial practices through the use of alternative sets of arrangements where it is appropriate to do so. The primary concern is to gain compliance. If an alternative process is well

placed to achieve this in place of the OFT, then this expands the reach of compliance processes in the UK.

- 2.5 Historically 'established means' have been understood as bodies with a recognised role in securing compliance under the Control of Misleading Advertisements Regulations 1988 (CMARs).<sup>3</sup> However, the CMARs have now been superseded, and the CPRs have extended the scope for the use of 'established means' in relation to business to consumer transactions. Under CMARs the concept was limited to advertising but under the CPRs it applies to all behaviours covered by the new Regulations – potentially that means anything traders in every market of the economy do before, during and after a consumer transaction.
- 2.6 We think that the requirement in the new Regulations embraces the historic approach and the service provided by bodies such as the Advertising Standards Authority (ASA) and PhonepayPlus, but we do not believe that it is confined to those specific types of arrangements. It is no longer as immediately clear what the 'established means' for dealing with unfair commercial practices are and so the OFT needs to define its policy for recognising such arrangements (for its own administrative purposes, rather than pursuant to any duty or power). We believe the CPRs bring into scope bodies with which we currently have arrangements that may not yet be explicitly recognised as 'established means'. Further, the CPRs may make it appropriate to expand the concept to a wider range of mechanisms and bodies over time as appropriate.
- 2.7 Experience has shown that in addressing problems with advertising, there is no need to distinguish between misleading business to consumer advertising and misleading and illegal comparative business to business advertising. Accordingly, we suggest there is no need for a different set of arrangements for the BPRs.

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<sup>3</sup> The legal concept of first utilising 'established means' in order to help secure compliance with legislation was introduced to the OFT with CMARs. When the OFT gained powers under CMARs in 1988 there were already others addressing complaints about advertising, so it was clear that the term 'established means' referred to the Advertising Standards Authority (ASA).

**Q1 Do you agree there is no requirement for a separate set of principles for the BPRs?**

2.8 Other legislation, including particularly Part 8 of the Enterprise Act 2002 and the BPRs, gives the OFT a statutory coordination role in relation to formal enforcement activity undertaken by certain bodies. Under the coordination provisions in this legislation

- enforcers are named, and
- they have to give us prior notice of any case they wish to bring, and
- (in the case of Part 8 and BPRs) we have power to override enforcement proposals notified to us and to 'reallocate' the cases to different enforcers.

The law has made no such provision in relation to 'established means'. The organisations involved are not named, and no procedure is created for identifying and formally recognising them. They are put under no notification duty, and we are given no powers in relation to what they do and do not do.

### **OFT's consumer protection enforcement policy**

2.9 The OFT's proposed approach on developing the use of 'established means' fits within the context of its wider **consumer protection enforcement principles**.<sup>4</sup> The adoption of a risk-based approach allows the OFT and our partners to apply the principles of proportionality and to make the best use of resources through a mix of incentives, support and enforcement.

2.10 Enforcement action is used to protect consumers, and particularly vulnerable consumers, from rogue traders, unfair commercial practices and other instances where businesses disregard their legal obligations. Formal enforcement interventions are used in relation to specific

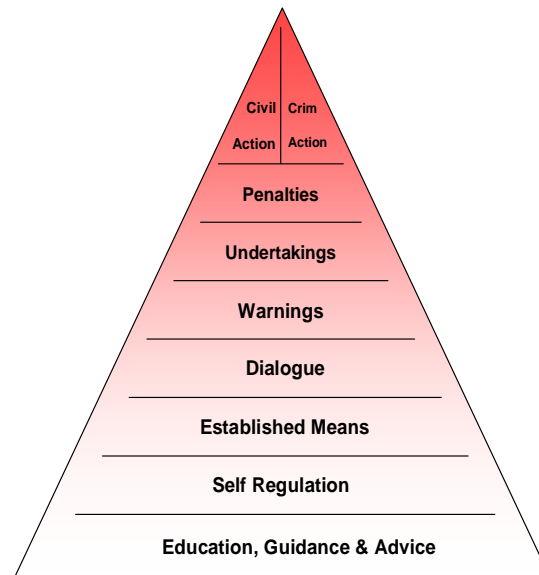
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<sup>4</sup> [www.oft.gov.uk/shared\\_oft/reports/consumer\\_protection/oft964.pdf](http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft964.pdf)

practices outlawed in consumer legislation and require a course of action by reference to that legislation. The OFT will act in more serious cases according to its prioritisation principles.

- 2.11 The Enterprise Act 2002 (EA02) allows for an escalation process which would normally begin with a request to cease the behaviour or practice with the threat of more punitive action underpinning that request. If this does not elicit compliance then enforcement action set out in the legislation may be taken via an Enforcement Order obtained in the courts. This process allows for the giving of signed undertakings by the individuals or businesses in default, in lieu of a court order, with the option of future enforcement in the courts should that fail. It is not essential to go through all stages in all cases, but this is the general approach. In addition, the OFT may take criminal enforcement action under the Regulations where there is or could be serious consumer harm.
- 2.12 Figure one below shows the range of compliance options available to us. It illustrates that many compliance issues can be resolved through education, guidance and advice and that civil and criminal enforcement powers are available if a more targeted approach is appropriate.

**Figure One: The OFT's compliance and enforcement options**



2.13 The OFT targets its enforcement activity in line with its prioritisation principles towards cases of high detriment. Under the prioritisation framework we have first to consider whether the OFT is the most appropriate body to deal with the issue. Implicitly, this requires us to think about what else might be done to address the issue and this includes consideration of what other body might be able to take speedy, effective action to stop the harm to consumers.

2.14 The OFT's Prioritisation Principles require us to ask:

'Is the OFT best placed to act? Alternatives to OFT action could include:

- i. private enforcement
- ii. action by other bodies such as Local Authority Trading Standards Services, other UK regulators or the European Commission, or
- iii. market developments, self regulation or new UK or EU regulatory or legislative developments. '

2.14 So the OFT's procedure includes checking whether there is another entity better placed to take action. In some cases other legislation or agreements may impact on which compliance partner is involved. For example, the Regulatory Enforcement and Sanctions Act 2008 gives businesses a right to request a Primary Authority relationship with a TSS. These are similar to the current home authority relationships. Where the OFT considers that a business is in breach of consumer law, and that action by a TSS is appropriate, Part 2 of the 2008 Act will nonetheless require the TSS to consult any relevant Primary Authority before doing so, unless an exemption applies.<sup>5</sup>

### **Disclosure of information to other enforcers or non public bodies**

2.15 Another factor for us to consider is what information the OFT is permitted to disclose to other bodies. The EA02 places strict controls on the disclosure of information by the OFT. In referring a case to a compliance partner under 'established means' arrangements some disclosure of information would be necessary and such information is likely to include 'specified information' within the meaning of s. 238 EA02. This is information which relates to the affairs of an individual or the business of an undertaking and disclosure can only be made where there is a relevant gateway under Part 9 of the EA02.

2.16 There are legitimate gateways under Part 9 of the EA02 that allow the OFT to share information with public bodies. We have also examined whether it is possible for the OFT to disclose information to non-public

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<sup>5</sup> The exemptions are currently a subject of BERR's 'Consultation on the Primary Authority Scheme'. [www.berr.gov.uk/files/file47801.pdf](http://www.berr.gov.uk/files/file47801.pdf)

bodies. We have concluded that it is possible but that extra care must be taken in doing so: for instance, the OFT may not be able to disclose the same amount of or detailed information about complaints as we would when disclosing to another regulator or public authority which would be bound by similar statutory constraints on disclosure of information.

### **3 DRAFT SET OF PRINCIPLES**

- 3.1 The OFT proposes to use the following principles in identifying appropriate 'established means'.

#### **PRINCIPLE 1**

**In circumstances where the OFT is aware of or suspects non-compliance with the Regulations, it may seek to refer the matter to 'established means' in line with its prioritisation principles.**

#### **PRINCIPLE 2**

**The OFT will seek to refer a matter to the compliance partner best placed to resolve the problem.**

- 3.2 When assessing which partner may be best placed to deal with the issue we will satisfy ourselves that the chosen partner has an effective way of encouraging control of unfair commercial practices. We will therefore not pass on an issue to a body that has shown itself unwilling or incapable of controlling unfair commercial practices. We will have regard to those partners that are relevant to all of the circumstances of the particular case. So what is appropriate in one case may not necessarily be appropriate in another. Factors may include:

- degree of detriment
- geographical location of detriment
- sector in which the detriment is arising
- nature and seriousness of the unfair commercial practice
- complexity of the issue
- history of the trader in dealing with compliance requests, and
- degree of compliance partner's alignment with consumer interests.

- 3.3 While this allows flexibility it also means that it may not be possible to say that such a body will always be tasked with dealing with a particular unfair commercial practice or that a particular approach will always be used. To meet the circumstances of a particular case the OFT may choose to approach a different body or use a different set of arrangements from those used on a previous occasion.

### **PRINCIPLE 3**

**In certain circumstances there may be multiple mechanisms for addressing non-compliance.**

- 3.4 Regulation 19(4) of the CPRs is also flexible enough to allow us to conclude that there is more than one partner for dealing with an issue. For example, bearing in mind the OFT's coordination role under the Enterprise Act 2002, if we were to become aware of an issue relating to the misleading advertising of gas services, both Ofgem and ASA would have a potential interest. It could also be the case that where there are multiple issues the OFT might consider it appropriate for different partners to tackle the different issues or to take parallel actions to secure compliance. In making this assessment we will have regard to any protocols that are in place between the OFT and its partners and the principle of who is best placed to act.

### **PRINCIPLE 4**

**Compliance partners that may be considered to be effective means of addressing non-compliance are likely to be able to demonstrate a combination of the following factors (see chapter 5 for more detail):**

- 3.5 Bodies, or sets of arrangements, would normally be able to demonstrate the following qualities:
- adequate resources to address instances of non-compliance within its community
  - it is law abiding in its own operation

- it is recognised by its community, and
- it is properly incentivised to act.

3.6 They would normally be able to demonstrate a combination of the following mechanisms:

- systems to set requirements
- systems to enforce those requirements
- an appropriate degree of independence in governance
- an appropriate degree of objectivity in governance
- public accountability
- systems for providing information/communication within markets
- a public facing element that may incorporate a complaint handling facility, and
- regard for principles of better regulation and the Human Rights Act with regard to the rights of consumers and traders/businesses.

## **PRINCIPLE 5**

### **The OFT continues to be under a duty to enforce legislation**

3.7 The OFT wishes to foster trust with its compliance partners. However, we will only consider referrals to compliance partners that appear to us to meet to a sufficient degree the qualities described in chapter 4. The OFT will monitor the role of compliance partners. If a body fails to address speedily and successfully an unfair commercial practice in a market, the OFT may take action itself to prevent continued harm to consumers. The OFT will always retain its discretion to intervene in any case and whether to refer or not to refer to a compliance partner.

- Q2** Is the draft set of principles sufficiently clear?
- Q3** Do the principles summarise all relevant legal provisions clearly and accurately?
- Q4** Are there any substantive aspects of the draft set of principles with which you disagree?
- Q5** Does the draft set of principles have any significant omissions?
- Q6** Does the draft set of principles make clear the factors we will consider in deciding whether to refer cases to other bodies to deal with breaches under the Regulations?
- Q7** Do you have any other suggestions for improvement to the draft set of principles?

## 4 RATIONALE FOR DRAFT PRINCIPLES

- 4.1 As we have stated previously the OFT targets its enforcement activity in line with its prioritisation principles towards cases of high detriment. The OFT will continue to intervene in those cases where it is appropriate for it to do so, and that policy will be unaffected by this proposal.
- 4.2 We aim to formalise the concept of 'established means' as a first port of call for resolving compliance issues and extend its reach to those compliance partners who have not previously considered themselves as falling within this definition.
- 4.3 The new Regulations allow an interpretation of 'established means' that is broader than under previous legislation, enabling the OFT to identify and recognise further arrangements that can act as an appropriate first port of call in achieving compliance with the Regulations. An example would be where a reputable body has the means and process in place to achieve compliance through advising the subject of the complaint of its obligations to end the unfair commercial practice.
- 4.4 Using this approach would allow a body which previously may not have considered itself to be an active player in the compliance landscape to take action to remove the unfair commercial practice in a market and to improve compliance with the Regulations.
- 4.5 We think this inclusive and flexible approach will have the benefit of gaining speedy, improved levels of compliance and can be achieved in a way which will not require the same formal enforcement action by statutory enforcers to reduce overall detriment levels. Our recent engagement with stakeholders shows a strong demand for a closer working relationship with the OFT and this policy will allow these links to develop.
- 4.6 This approach is also in line with the principles of Better Regulation,<sup>6</sup> as the use of 'established means' should mean a reduction in direct

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<sup>6</sup> [www.berr.gov.uk/whatwedo/bre/about/page44014.html](http://www.berr.gov.uk/whatwedo/bre/about/page44014.html)

regulatory burdens on businesses which may have to deal less often with the full machinery of the statutory enforcement regime.

- 4.7 Our approach to 'established means' is limited to considering how to maximise compliance with the CPRs and BPRs and thus will not affect our enforcement policy under other legislation we enforce, such as our licensing functions under the Consumer Credit Act 2006, Estate Agents Act 1979 and Money Laundering Regulations 2007.
- 4.8 This approach and the policy that will underpin it does not limit the OFT's ability or discretion to intervene in any case to take enforcement action or any other action it deems appropriate having regard to any arrangements with designated enforcers.<sup>7</sup>
- 4.9 What is important about using 'established means' is not the organisation's status but rather how well placed it is to bring about compliance with the Regulations.

### **Current compliance partnerships**

- 4.10 Currently, if we are satisfied that complaints and cases are clearly within the scope of an alternative, well-founded and effective system of achieving compliance in the UK (including self regulation), and can be dealt with by that identified compliance partner, the OFT will usually refer such complaints and cases to it. There is already a network of such compliance partnerships in a number of markets or industries. The use of compliance partnerships would not normally be considered if the matter calls for immediate OFT action according to our prioritisation procedure. We believe that the proposed policy is merely formalising current practice and procedure.
- 4.11 The OFT recognises the potential, through transparency of procedure and understanding of aims, to extend these compliance partnerships into

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<sup>7</sup> Those bodies empowered to take enforcement action in the courts by the legislation with whom OFT has coordination arrangements to maximise the impact of legislation but negate duplication.

new, wider areas. The Homebuilding market study<sup>8</sup> demonstrates that an industry can provide its own solutions to problems; it has agreed to form a body to deliver a code of conduct and redress scheme for consumers and aims to have it fully operational by March 2010.

4.12 Compliance partners may be found in, but are not necessarily confined to, the following areas:

- statutory enforcers
- industry funded self-regulatory and co-regulatory bodies, or
- code scheme operators (OFT approved and non-OFT approved), trade and business associations.

4.13 These bodies maintain expertise through regular contact with their sector, or regular contact with the businesses operating in their locality. Regular contact is likely to lead to high levels of compliance due to industry awareness of their requirements and powers.

4.14 We also work in partnership with authorities and organisations in other European Member States through the Consumer Protection Cooperation Regulation arrangements and more widely with consumer protection organisations throughout the world. Broadening our use and understanding of 'established means' complements our overall policy of working in partnership with others to enhance regulatory compliance.

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<sup>8</sup> See 'Homebuilding in the UK – A market study' – September 2008 OFT1020  
[www.oft.gov.uk/shared\\_oft/reports/comp\\_policy/oft1020.pdf](http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft1020.pdf)

### **Working with the Association of British Travel Agents (ABTA)**

The OFT was aware that holiday and travel suppliers were routinely excluding fixed, non-optional costs (such as taxes and fuel supplements) from advertised prices. We were concerned that this was misleading for consumers and harmful to businesses that displayed fully inclusive prices. As a result, the OFT issued a warning to the holiday and travel industry to ensure it was not misleading consumers about prices. Following the warning the OFT also engaged with 13 airlines, based in the UK or elsewhere in the European Union, to ensure they changed the way prices were displayed on their websites.

In a co-ordinated move, ABTA agreed with the OFT that it would take action to ensure its members complied with the ABTA Code of Conduct, which requires them to include fixed, non-optional costs in advertised prices. Many ABTA members made changes to their websites in order to comply with the Code and ABTA handed fines and reprimands to the few members that failed to comply. The OFT worked closely with ABTA on this matter and strongly welcomed and supported ABTA's actions. The action taken by both the OFT and ABTA has resulted in improved price transparency across the holiday and travel industry.

4.15 We set out below in more detail the roles of our various compliance partners.

### **Statutory enforcers**

4.16 TSS and the Department of Enterprise, Trade and Investment in Northern Ireland (DETNI) are co-enforcers of the Regulations and are our main enforcement partners. They share powers with the OFT to take criminal prosecutions or take civil action in the courts for the purpose of achieving compliance.

4.17 The OFT and the Local Authorities Coordinators of Regulatory Services (LACORS) have agreed a protocol<sup>9</sup> that sets out the procedure for TSS and DETNI to refer cases to the OFT for possible enforcement action

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<sup>9</sup> The agreed protocol will be published on LACORS' website.  
[www.lacors.gov.uk/lacors/home.aspx](http://www.lacors.gov.uk/lacors/home.aspx)

against breaches of non-credit related consumer protection legislation. The protocol is based on the principles of the National Intelligence Model<sup>10</sup> (NIM), which is being used to develop intelligence-led approaches in both TSS and OFT. The OFT will mainly deal with those cases and issues causing significant consumer detriment that are best tackled at a UK or international level, working in partnership with TSS.

## **Designated enforcers under Part 8 of the Enterprise Act 2002**

- 4.18 The Financial Services Authority (FSA), the Office of Gas and Electricity Markets (Ofgem), Ofgem Scotland, the Northern Ireland Authority for Utility Regulation (formerly NIAER)/OFREG), the Office of Communications (Ofcom), the Water Services Regulation Authority (Ofwat), the Office of Rail Regulation (ORR) and the Civil Aviation Authority (CAA) all have a role as compliance partners by virtue of their designated status and enforcement powers under Part 8 of the EA02.
- 4.19 Since March 2006, the FSA and the OFT have collaborated more on matters of joint regulatory interest. Work is set out in a joint Action Plan.<sup>11</sup> As a Part 8 enforcer the FSA has injunctive powers under the CPRs but it is most likely to continue to use its existing powers under the Financial Services and Markets Act 2000 (FSMA) when taking action against firms it regulates. The FSA expects consumers to continue to seek redress by taking cases to the Financial Ombudsman Service, if the dispute cannot be resolved with the firm in the first instance.
- 4.20 The FSA has also entered into a concordat<sup>12</sup> with the OFT for the CPRs, similar to that used for the Unfair Terms in Consumer Contracts Regulations 1999, to ensure clarity and avoidance of duplication when enforcing these Regulations. It provides a clear division of responsibilities

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<sup>10</sup> The National Intelligence Model (NIM) is an intelligence led business model, utilised by Police Forces in the UK to gather and manage information in order to make the most effective decisions.

<sup>11</sup> [www.ofc.gov.uk/shared\\_ofc/about\\_ofc/ofc838.pdf](http://www.ofc.gov.uk/shared_ofc/about_ofc/ofc838.pdf)

<sup>12</sup> [www.ofc.gov.uk/shared\\_ofc/consumer\\_leaflets/general/CPROFTFSAconcordat.pdf](http://www.ofc.gov.uk/shared_ofc/consumer_leaflets/general/CPROFTFSAconcordat.pdf)

so firms understand the respective powers available to the FSA and the OFT.

## **Industry funded self regulatory and co regulatory bodies**

### **PhonepayPlus**

- 4.21 PhonepayPlus (formerly known as ICSTIS) is responsible for regulating phone-paid services in the UK – those goods and services that are bought by charging the cost to a phone bill or pre-pay phone account. PhonepayPlus regulates content, promotion and overall operation of these services as an agency of Ofcom, the communications industry regulator, as designated under s120 (1) of the Communications Act 2003 (the Act). PhonepayPlus enforces a Code of Practice (the Code) which, as it has been approved by OFCOM under the Act, effectively sets the 'law' by which all providers of such services are bound. Co regulation is therefore encouraged, rather than required by statute, but in the absence of an appropriate form of co regulation Ofcom could choose to enforce its own Code under the Act.
- 4.22 PhonepayPlus' arrangements include complaint handling (a redress scheme and an independent adjudication process) and a wide range of sanctions and penalties for code breaches (including remedying the breach, reprimand, imposing a fine and barring businesses from providing certain services for a set period). PhonepayPlus is ultimately accountable to Ofcom (who approve the PhonepayPlus budget) and its board has a clear majority of members who are independent of the sector it regulates. It produces an Annual Report which includes statistics on the complaints it has handled and the disciplinary action it has taken. Recent decisions are also published on its website.
- 4.23 This set of arrangements mean that PhonepayPlus is well equipped to bring about compliance with the Regulations and in so doing act as 'established means' in the premium rate services sector.

## The Advertising Standards Authority

- 4.24 The ASA is a self-regulatory body widely recognised as the first port of call (or 'established means') for resolving complaints and non-compliance with the Regulations about advertisements across all media. In non-broadcast media (for example print, posters, cinema, direct marketing and online, such as banner and pop-ups ads) the ASA regulates advertisements under the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code).
- 4.25 The ASA's reputation is supported by its independence from industry. The ASA Council, which is made up of at least two thirds of members from outside the industry, takes decisions on whether or not advertisements breach the various Codes. The ASA has a range of sanctions that it can apply and the statutory backstop is referral to the OFT under the Regulations. The ASA publishes performance statistics on a quarterly basis on its website showing the number of complaints received and resolved, and the average time taken to deal with different classes of complaints.
- 4.26 As with PhonepayPlus, these arrangements mean that the ASA is well placed to bring about compliance with the Regulations and in so doing continue to act as the 'established means' for tackling misleading advertising.

## **Working with the ASA**

The use of 'established means' leads to a much greater impact on the enforcement landscape than the OFT could make alone. For example, in 2007, the ASA received 12,083 complaints relating to misleading claims. In contrast, during the financial year 2006-07, the OFT received only 131 complaints relating to misleading advertising.

The ASA refers only a handful of cases to the OFT annually for further action, having exhausted its own processes. This allows the OFT to target its enforcement resources on the most serious cases of non-compliance. Good examples of this in action are the Magnopulse Ltd<sup>13</sup> and Magna Jewellery<sup>14</sup> cases, both of which related to misleading claims regarding the effects of magnetic health products for humans and animals. The OFT tackled both of these cases under the CMARs and obtained formal undertakings in each.

## **Code scheme operators and industry trade associations**

- 4.27 Industry codes of practice can potentially provide an effective, but lighter touch, alternative to statutory regulation. They offer greater flexibility and speed than new legislation in addressing specific problems which cause detriment to consumers and tarnish the image of whole sectors of trade. Involving industry participants in tackling sector-specific malpractice or poor standards builds upon industry expertise and legitimate self-interest and is in line with the aims of Better Regulation.
- 4.28 The OFT's Consumer Codes Approval Scheme (CCAS) encourages self-regulation by giving official approval to voluntary consumer codes of practice which meet core criteria set by the OFT. Codes must be administered by a code sponsor capable of influencing and raising standards in a sector and must tackle consumer issues as appropriate to the sector and provide appropriate consumer redress mechanisms. While the main purpose of the CCAS is to enable consumers to identify those businesses that aspire to higher standards, in practice we have found

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<sup>13</sup> [www.of.gov.uk/news/press/2007/6-07](http://www.of.gov.uk/news/press/2007/6-07)

<sup>14</sup> [www.of.gov.uk/news/press/2006/82-06](http://www.of.gov.uk/news/press/2006/82-06)

that codes of practice also provide an 'established means' of addressing non-compliance in a sector.

## **Summary**

4.29 The OFT is able to consider a range of bodies across a broad spectrum as effective compliance partners, whether they are joint enforcers of the Regulations (TSS), have their basis in co regulation (PhonepayPlus) or self regulation (ASA) or operate on a purely voluntary basis (code scheme operators). The common characteristic these bodies share is their ability to make effective use of their respective tools to address unfair trading practices within their remits.

**Q8 Is our rationale for the draft principles sufficiently clear?**

## **5 CHARACTERISTICS OF COMPLIANCE PARTNERS**

- 5.1 In the previous chapter we explained that 'established means' may be found within different types of bodies and mechanisms and need not be defined by reference to their status. What is more important in identifying them, now and in the future, is their ability to bring about compliance with the Regulations and to generate confidence in their processes and governance. This chapter sets out our thinking on the characteristics that we would expect to see. Note that we do not intend to operate a formal approval or accreditation scheme for compliance partners, and the characteristics should therefore not be seen as a formal checklist of acceptability criteria.
- 5.2 Compliance partners would normally be able to demonstrate the following qualities.

### **Adequate resources**

- 5.3 In order to ensure the compliance partner is able to tackle non-compliance speedily and effectively, it should be adequately funded. Staff resources would need to be proportionate to the nature of the issue in question.

### **Law abiding in its own operation**

- 5.4 In order to ensure the compliance partner is appropriately qualified to ensure compliance within its own particular community, it must be able to demonstrate that its own operations are carried out lawfully.

### **Recognition by its community**

- 5.5 A compliance partner should be able to demonstrate that it is recognised by the relevant community as having expertise or influence within a market in order to bring about change.

## **Properly incentivised to act**

- 5.6 A compliance partner should be able to demonstrate that it acts through a legitimate self-interest, for example, to address a problem that is impacting negatively on the reputation of the community it represents. It should also be able to demonstrate that its interests are aligned with those of consumers.
- 5.7 Again, while this is not a formal checklist, the type of systems that we would normally expect compliance partners to be able to display include:

## **Systems to set requirements**

- 5.8 A clear set of rules that at the very least reinforce legal obligations, for example, but not exclusively, through rules or codes of conduct.

## **Systems to enforce those requirements**

- 5.9 This includes having a range of sanctions available to it for dealing with non-compliance and procedures that are fast and effective, particularly for informal interventions.

## **An appropriate degree of independence in governance**

- 5.10 In order to ensure a sufficient degree of confidence from all parties, the compliance partner should be able to demonstrate an appropriate degree of independence from those it 'regulates'. This will vary by case, but factors to take into account include whether the partner has a designated structure (separate from existing industry bodies), whether the system of funding is consistent with the need for independent decisions and most importantly that, over and above its structure, it can demonstrate independence in practice.

## **Appropriate degree of objectivity in governance**

- 5.11 A compliance partner should be able to demonstrate this quality, thus enabling respect and support for decisions within the community they police. Firms are likely to resist complying with any system that is seen

to favour one group of firms over another and indeed we would not wish to condone any such body, not least for reasons of potential anti-competitive effect. We would vigorously oppose any body attempting to act as 'established means' in such a way that might distort market behaviour.

### **Public accountability**

- 5.12 A compliance partner should be willing to demonstrate its record through prompt, open and transparent reporting on its activities.

### **Systems for providing information/communication within markets**

- 5.13 A compliance partner should have effective systems in place for disseminating advice and guidance relating to compliance issues to those it regulates

### **A public facing element that may incorporate a compliant handling facility**

- 5.14 A compliance partner is likely to provide a route for consumers to communicate with it about the performance of those within its community.

### **Regard for principles of better regulation and the Human Rights Act**

- 5.15 Compliance partners are likely to be able to demonstrate their actions are in line with the requirements of better regulation, in that that they are proportionate, consistent, transparent, targeted and accountable. It will also need to have regard to or respect the HRA rights of both consumers and traders/businesses.

**Q9 Is the explanation of the characteristics we would normally expect compliance partners to display sufficiently clear?**

**Q10 How should the requirement for accountability be demonstrated by potential compliance partners? Should it include the publication of decisions? How or when or with what frequency?**

# ANNEXE(S)

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## A GLOSSARY

A.1 The explanations below explain the OFT's definition of these terms for this purpose. This does not constitute an attempt to provide definitive meanings for these terms.

**Compliance partner:** a body with a set of arrangements that we consider 'established means' for the purposes of the Regulations.

**Co regulation:** a situation where the regulator and industry stakeholders work together with, typically, the regulator setting the framework to work within. It may be left to the industry stakeholders to draft detailed rules within this framework and to take responsibility for implementation and enforcement. Incentives for co-operation are often in the form of strong backstop powers for regulators.<sup>15</sup>

**Established means:** those systems and mechanisms outside the OFT which have the effect of encouraging the control of unfair commercial practices under the Regulations.

**Self regulation:** a process whereby stakeholders (predominantly the industry) collectively take the initiative to set quality standards or modify their behaviour for the benefit of legitimate self-interest and consumers. In some cases the Government (or regulator) also has some formal involvement, but in others it does not.

**The Regulations:** The Consumer Protection from Unfair Trading Regulations (CPRs) and Business Protection from Misleading Marketing Regulations (BPRs).

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<sup>15</sup> The Communications White Paper, *A new Future for Communications*

## **B SUMMARY OF CONSULTATION QUESTIONS**

B.1 We are inviting comments on the draft principles as set out in Chapter 3. The aim of this consultation is to produce principles which are clear, comprehensible and cover all relevant matters. We would therefore like to know if the principles meet this aim and, if not, how you believe we can improve them. This includes identifying omissions and, as the case may be, unnecessary content, as well as suggestions for making the current content as clear, easy to read and accurate as it can be.

B.2 Please answer the following questions:

- Q1 Is there a requirement for a separate set of principles for the BPRs?
- Q2 Is the draft set of principles sufficiently clear?
- Q3 Do the principles summarise all relevant legal provisions clearly and accurately?
- Q4 Are there any substantive aspects of the draft set of principles with which you disagree?
- Q5 Does the draft set of principles have any significant omissions?
- Q6 Does the draft set of principles make clear the factors we will consider in deciding whether to refer cases to other bodies to deal with breaches under the Regulations?
- Q7 Do you have any other suggestions for improvement to the draft set of principles?
- Q8 Is our rationale for the draft principles sufficiently clear?
- Q9 Is the explanation of the characteristics compliance partners are likely to display sufficiently clear?
- Q10 How should the requirement for accountability be demonstrated by potential compliance partners? Should it include the publication of decisions? How or when, or with what frequency?

- Q11 Do you have any views on how the final version of the principles should be disseminated to those who may need to see it?
- Q12 Do you have any general comments at this stage on potential issues relating to procedures, for example how the OFT should monitor the effectiveness of the principles?

## **C LIST OF CONSULTEES**

**The following organisations and individuals have been consulted. We would welcome suggestions of others who may wish to be involved in this consultation process.**

Advertising Association

Advertising Standards Authority

Advice UK

Age Concern England

Assist UK

Association for Payment & Clearing Services

Association of Convenience Stores

Association of British Insurers

Association of British Introduction Agencies

Association of British Travel Agents

Association of District Judges

Association of Home Information Pack Providers

Association of Independent Business

Association of International Property Professionals

Association of Licensed Multiple Retailers

Association of Plumbing and Heating Contractors

Association of Residential Letting Agents

Association of Secondary Ticket Agents

Banking Code Standards Board

Bar Council

Better Regulation Executive

Booksellers Association

Bosch Car Services

British and Irish Ombudsman Association (BIOA)  
British Association of Leisure Parks & Attractions  
British Association of Removers  
British Association of Toy Retailers  
British Audio-Visual Dealers Association  
British Bankers Association  
British Brands Group  
British Chambers of Commerce  
British Cheque Cashers Association  
British Complementary Medicines Association  
British Dental Association  
British Healthcare Trades Association  
British Holiday and Home Parks Association  
British Pest Control Association  
British Retail Consortium  
British Shops and Stores Association  
British Standards Institute  
British Toy & Hobby Association  
British Vehicle Rental and Leasing Association  
Building Societies Association  
Carpet Foundation  
Centre for Policy Studies  
Chartered Institute of Plumbing and Heating Engineers  
Christmas Prepayment Association  
Citizens Advice  
Citizens Advice Scotland  
Civil Aviation Authority

Claims Standards Council  
Committee of Advertising Practice  
Communications Consumer Panel  
Competition Commission  
Confederation for the Registration of Gas Installers  
Confederation of British Industry  
Consumer Council for Northern Ireland  
Consumer Council for Water  
Consumer Credit Association  
Consumer Credit Trade Association  
Consumer Focus  
Consumer Focus Scotland  
Consumer Focus Wales  
Consumers International (London)  
Council for Licensed Conveyancers  
Council of Mortgage Lenders  
Credit Services Association  
Crown Prosecution Service  
Debt Managers Standards Association  
Department for Business, Enterprise and Regulatory Reform  
Department for Enterprise, Trade and Investment Northern Ireland  
Direct Marketing Association  
Direct Marketing Commission  
Direct Selling Association  
Domestic Appliance Service Association  
Electrical Contractors Association  
Energy Retail Association

Federation of Engine Re-Manufacturers  
Federation of Master Builders  
Federation of Small Businesses  
Finance and Leasing Association  
Finance Industry Standards Association  
Financial Ombudsman Service  
Financial Services Authority  
Financial Services Consumer Panel  
Food Standards Agency  
Furniture Ombudsman  
General Dental Council  
General Medical Council  
Glass and Glazing Federation  
Guild of Letting and Management  
Guild of Master Craftsmen  
Guild of Park Home Services  
Health Professions Council  
Hearing Aid Council  
Help the Aged  
Hire Association  
HM Treasury  
Home Builders Federation  
Homes for Scotland  
Housing Ombudsman Service  
Incorporated Society of British Advertisers  
Industry Forum  
Information Commissioner's Office

Institute of Consumer Affairs  
Institute of Directors  
Institute of IT Trainers  
Institute of Professional Willwriters  
Institute of Public Policy research  
Interactive Media in Retail Group  
International Consumer Protection and Enforcement Network  
Internet Watch Foundation  
Introduction Services Federation  
Law Society  
Law Society of Northern Ireland  
Law Society of Scotland  
Legal Services Commission  
Legal Services Ombudsman  
Lift and Escalator Industry Association  
Local Authority Coordinators of Regulatory Services  
Local Better Regulation Office  
Local Government Association  
Mail Order Traders Association  
Master Photographers Association  
Ministry of Justice  
MVRA Ltd  
National Association of Estate Agents  
National Association of Funeral Directors  
National Association of Specialist Computer Retailers  
National Caravan Council  
National Consumer Federation

National Federation of Builders  
National Federation of Glaziers  
National Federation of Roofing Contractors  
National Guild of Removers and Storers  
National House Building Council  
National Insulation Association  
National Landlords Association  
National Pawnbrokers Association  
National Society of Allied & Independent Funeral Directors  
National Tyre Distributors Association  
Newspaper Society  
Northern Ireland Assembly  
Northern Ireland Authority for Utility Regulation  
Ofcom  
Office of Rail Regulation  
Ofgem  
Ofwat  
Ombudsman for Estate Agents Company Ltd  
Organisation for Economic Co-operation and Development  
Passenger Focus  
Personal Computer Association  
PhonepayPlus  
Portman Group  
Postcomm  
Radio, Electrical and Television Retailers' Association  
Renewable Energy Association  
Retail Motor Industry Federation

Ricability  
Royal Institution of Chartered Surveyors  
SafeBuy  
Scottish Government  
Scottish Motor Trade Association  
Scottish Law Commission  
Society of Master Shoe Repairers  
Society of Motor Manufacturers and Traders  
Society of Ticket Agents and Retailers  
Society of Will Writers  
Solicitors Regulation Authority  
The Ombudsman Service Ltd  
Trade Association Forum  
Trading Standards Institute  
Trustmark Ltd  
Vehicle Builders and Repairers Association  
Vehicle Systems Installation Board  
Welsh Assembly Government  
Which?  
Wines & Spirit Trade Association

## D CONSULTATION CRITERIA

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

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