

Business Leadership in Consumer Protection

OFT conference on self regulation and industry-led compliance

18 March 2009

Summary transcript

This summary should be read in conjunction with the conference slides at:

www.oft.gov.uk/shared_of/consultations/slides.pdf

Welcome from the OFT

Philip Collins, Chairman, OFT

Philip Collin's speech can be read in full at:

www.oft.gov.uk/news/speeches/2009/0509

Partnership and business-led solutions in the current climate

Dr Colin Church, Managing Director, Regulatory Innovation, Better Regulation Executive

Scope of talk: BRE's role, the context Better Regulation and why it's relevant to the debates today, questions set out in the OFT discussion paper.

Context.

- A flavour of the political priority that this government attaches to regulatory reform or better regulation (Slide: quote from the Prime Minister, July 2007)

So what does the Better Regulation Executive do?

1. Work with departments and regulators to simplify and modernise the existing stock of regulation.
 - Fit for purpose?
 - Still achieving what it set out to achieve?
 - If not still appropriate - initiate change.
2. Work with departments to improve the design of new regulations.
 - All interactions and interventions - not just traditional State-led regulation
3. Work with regulators on a more risk-based approach to regulation.
4. Promote a dialogue about better regulation.

- Explain what government is trying to achieve.
- Understand the issues from regulated perspective and other stakeholder perspective.

Better Regulation

- You need regulation - even the most efficient markets need some rules in order to function properly.
- But need to be careful not to overburden - it costs money, time and effort which can be spent elsewhere

Principles of good regulation.

- Simple principles but when applied to proposals to regulate - powerful in their approach: Transparency, Accountability, Targeting, Consistency, Proportionality
- And risk-based, fit for purpose, maximum benefit, minimum cost.

A hierarchy of government intervention in the regulatory sphere.

1. Decide if intervention is necessary – based on what you're trying to do.
2. Is there already an existing regime out there? Consider overlaps that you can use
3. If something more needed focus on the market-based approach first. (That's the space in which we find ourselves talking about self-regulation, economic instruments, and the like).
4. If those aren't appropriate then you move on to looking at State/traditional regulation.

Example of where we looked at the availability of existing regimes.

- Helping the Department of Health work with the sector to create a self-regulatory regime for non-surgical cosmetic treatment. (See slide for detail)
- Stakeholders in the sector were concerned about lack of enforcement mechanisms to deal with the issues. However we found existing regulators where there was already a locus. Key was to bring those existing regulators into play.

Partnership in business-led solutions

- The OFT discussion paper. I encourage you to read this. It's an excellent description of the situation – the diagrams give people a conceptual model to work with, it sets out the description of what self-regulation might be, advantages, drawbacks, limitations, and the accompanying economics paper gives you a very good understanding of the background.

There are considerations about whether a self-regulation approach is right or wrong that apply whatever the economic circumstances.

- Decision must be on a case by case basis.
- Have you aligned the incentives between those you're regulating and those for whom the benefit is supposed to accrue? Without alignment it will be very difficult to achieve the outcome for those that are supposed to receive the benefit of the regulation. For example:
 - If the incentives on a consumer services company are to defraud the consumer and there are no consequences then you're going to get a number of businesses that are going to do so.
 - If the incentives relate to reputation built through doing the right thing by the consumer, then that's going to drive their behaviour and you're going to get the consumer benefit.
- You need enough trust by both the public (the people who are getting the benefit) and those that are being regulated (whatever that means in the context of self-regulation) in order for the system to work.
- All these apply in any economic circumstances.
- But the current economic circumstances do have an impact:
 - Trust in the ability of the State to regulate is decreasing, as is trust in the ability of the market to regulate itself – means there needs to be more of a focus on this than say, five years ago.
 - Some of the incentives will be changing so, need to ensure understand the impact of these shifts.

New considerations in the current economic climate

- We're going to enter a period of limited fiscal resources for the government.
 - The administrative effort that government can exert will reduce.
 - Regulators and policy makers are going to have to choose rather more carefully where and how they place those resources.

- A self-regulatory or a market-based approach is sometimes a more resource effective route, and may be more tempting. But sometimes the regulator has to have such a role in a self-regulatory regime that is actually quite resource intensive.
- For the business environment, it's about the changing incentives.
 - Some companies are going to worry more about surviving from one month to another than wider reputation issues, or so on.
 - There is the problem of providers exiting the market, going bankrupt, and therefore consumer choice is narrowing. A change from experience of the last ten years where generally consumer choice has been expanding. This is relevant to the issue of competition.

What the BRE thinks effective self-regulation requires (through observation and experience)

- Clarity over objectives.
 - The level of achievement aimed for - what does 'good' look like?
 - All involved to share the same view.
 - Clear and well communicated standards important.
- Some form of credible sanctioning.
 - If there is no consequence for not doing the right thing then some will be tempted to do the wrong thing.
- The public (or those intended to benefit) need to have awareness of it.
 - If you don't know that the company that has a charter mark, for example, is more trustworthy than this company that doesn't, you're not going to reinforce the benefit of that charter mark by your consumer choices.
- Alignment of incentives (discussed above).
- Support of the industry sector at some level.
- Must not infringe competition.

Final comments

- Self-regulation can be an extremely effective way of achieving good outcomes in the marketplace, and it should always be one of the things that you consider when trying to decide how to achieve a set of outcomes.
- But it needs to be designed carefully.

- Self-regulation's flexibility and responsiveness is a real asset particularly in a very, very rapidly changing world, and I think that makes it even more important that we think about it at the moment than perhaps it might have been in the past.

The economics of self-regulation

Dr Amelia Fletcher, Chief Economist & Senior Director of Mergers, OFT

Speech based on the OFT economics paper – 'The economics of self-regulation in solving consumer quality issues' is available at:

www.offt.gov.uk/shared_offt/economic_research/oft1059.pdf

Aim

- As part of the self-regulation project decided to look at the economics of self-regulation
 - Little academic literature on the subject
 - Decided to go back to first principles
 - Think through for ourselves the economics underlying self-regulation
- A very interesting process. This is a discussion paper and we hope to generate more academic thinking in this area

What do we mean by self-regulation?

- Key question for us was:
 - Why would a business want to do something in consumers' interest and want to do so through working with other businesses, rather than doing so independently?
- To answer this we needed to define what we meant, for the purposes of the economic discussion paper, by self-regulation (a slightly narrower definition from the wider considerations of this conference).
- The definition:
 - An initiative taken by businesses within an industry.
 - With the aim of improving quality (with quality broadly defined to imply some element of quality).
 - And so benefiting consumers.
 - Which is, at least in part, driven by voluntary self-interest (that is, a profit incentive).

- This last part – the voluntary self-interest - is particularly interesting from an economics perspective.
- We therefore don't specifically consider codes brought in by government, but this doesn't mean that there is no external role.
 - Schemes may still benefit from, or need, some sort of external involvement.

The nature of a typical scheme – has two main elements:

1. Member businesses come together to agree a certain level of quality, or to certain standards of selling.
 - For example, through a code of conduct for example.
- Scheme needs to somehow regulate the member businesses to ensure that they honour the agreement on the quality?
 - To be effective there also needs to be some form of enforcement mechanism.
 - Generally through monitoring and sanctions.
- These basic core elements can translate into in a huge variety of solutions – all very different examples but which the follow the broad pattern.

- What is the problem that self-regulation is trying to solve?

Quality is hard to assess

- Information on quality can be costly to get hold of.
- Information can be very complex.
 - Even if a consumer has the information it may be very hard to assess.
- Quality signals may be fuzzy.
 - There may be other information which clouds the quality signal. .
- Sometimes you can only tell the quality after you've purchased and used the goods or service.
 - Called 'experience goods' in the economic literature.
 - For example, only once a decorator has painted a room can you see the quality of the work.
- There are goods/services where you never observe quality (or never observe quality perfectly).
 - In the economic literature - 'credence goods'.

- For example, might be car servicing. If you take a car you think is in good working order to be serviced and are charged £600 for fixes, you never quite know whether you needed to pay the £600 or not.

What happens if consumers can't assess quality?

- Firms have an incentive to promise high quality as consumers will pay more for high quality, but then they have an incentive to provide low quality because that's cheaper to provide.
- Where consumers can't see quality the sensible consumer only truly believes low quality promises – and they only pay for low quality.
- A firm keen to offer high quality finds no one believes them.
- Such firms can't sell high quality at the price that reflects quality.
- Therefore the good quality is driven out of the market.

There are two variants of this in the economic literature:

- Moral hazard is where a firm can adjust the quality.
 - Firm promises good quality but actually gives bad quality.
- Adverse selection is where things are of innate quality
 - There is no option of cutting quality so good quality sellers leave the market.
 - Second hand cars are a classic example.

Firms and consumers can both benefit if it's made easier to define quality.

- How can this be done?
 1. Set clear quality standards
 - Can be used to ensure everyone in a market provides at least a certain quality or can be seen not to be making the standard
 2. Enable credible quality signals or promises to be made.
 - Allows firms to provide any level of quality they want but they have to ensure that that the quality they state is true.
- There needs to be some system for detecting whether the quality promises are actually abided by or whether there are quality lies and cheating.
- There needs to be some process for resolving problems when quality promises are broken.

Market-based solutions:

- Reputation

- A firm with a good reputation that charges high prices for high quality, could cut production costs and lower quality but keep the price high and turn a bigger profit. But if the reputation mechanism is working well, customers will complain, tell their friends, may even write about it in the press. The firm's reputation is gone and it can no longer charge high prices.
- A really powerful mechanism where good reputation can be achieved.
- Information and advice
 - For example, use of expert advice from independent advisors or specialist magazines
- Systems that guarantee recompense for unacceptably low quality - redress schemes and warranties
 - Consumers feel confident that if they go into the market they will get what they've been promised or can get compensated.
 - It change the incentives of firms - a firm that knows it will have to compensate consumers for lower than expected quality has a greater incentive to honour the quality promised.

Limitations on market based solutions:

- Reputation can be hard to build
 - Is harder for infrequently purchased products
 - Often requires this 'word of mouth' effect.
 - Small firms can find it harder to develop brands and reputations.
- Solutions such as information, advice, warranties and redress schemes can be costly.
 - Particularly if engaged in on an individual firm basis.
- Free-riding problem, where consumers see the overall quality reputation of a market but they can't see the quality reputation of any individual firm within that market.

Self-regulation as a solution:

- It enables firms to build reputation that they wouldn't be able to do so easily or so cheaply alone.
- It allows cost efficiencies.
- It makes free riding more difficult.

Legal solutions:

- Laws that ban mis-selling.

- Various laws around minimum legal standards

Limitations to legal solutions:

- Limited resources of the authorities for monitoring and enforcing the law.
- Limited potential for redress - it can be expensive to gain redress through the legal framework.
- Consumer law by its nature tends to be generic and not tailored to the specific issues in particular markets
- In some markets it can be in the interest of both business and consumers to go beyond what the legal minima are.

Self-regulation as a solution:

- Enable tailored rules to be set out for a particular market.
- May be able to achieve higher resourcing
 - Leading to better monitoring and sanctions
- Can achieve higher than legal standards
- Alternative redress schemes
- Tailored guidance for consumers

Self-regulation can play a really important role in filling the gap, left by market based and legal solutions to information problems.

A note on competition

- Self-regulation can be good for competition.
- Bringing firms together to solve information problems can allow those firms who would not on their own be able to find solutions to such problems to survive and compete in the market place.
- Self-regulation can enable better competition on the genuine level of quality.
- However, self-regulation also raises some potential competition risks
 - By bringing firms that are in a market together there's a risk that you could facilitate collusion, for example through price fixing.
 - If quality is set too high you could dampen competition and dampen price competition in particular.
 - You could raise barriers to entry if quality is set so high that new entrants can't achieve it.

- Self-regulation could create false confidence in quality which is unjustified - it could essentially send out false quality signals that could mislead consumers and could distort competition.
- Jackie Holland, our Director of Competition Policy, will talk a little more about the competition issues later today.

Finally, we are interested in any comments you may have on the economics of self-regulation. It is a discussion paper and it's put out into the world with that mindset. Thank you very much.

PANEL SESSION ONE:

Business-led consumer protection and partnership working with the OFT

Chaired by Alan Giles, Non-executive Board Member, OFT

The role of a CCAS code sponsor

Michael Hardiman, Chief Executive, The Carpet Foundation

Insight into the practical realities of actually getting OFT approval for a code of practice

Who are the Carpet Foundation?

- Recognised trade association for the UK carpet industry
- Formed in 1999 to promote the generic benefits of carpet to consumers.
- Issues in the market causing problems - cheap imports, competition from laminate flooring.
- Initial solutions:
 - Advertising to consumers.
 - Product accreditation scheme (based on European and British standards).
 - Form a network of high quality independent retailers.

Market/membership

- £2.5 billion market – the market is worth about 1.35 billion at ex factory prices.
- 97 per cent of UK consumers have carpet somewhere in their homes.
- The Carpet Foundation are supported by a range of the UK's top carpet manufacturers with turnover of approximately £400 million.
- Represent a thousand independent retail outlets with a joint turnover of about 250 million. Typically family businesses with a very high reputation for quality.

Ethos

- High quality product and service reflected in our advertising.
- Our message is we want the consumers to buy carpet made by UK based manufacturers, sold by independent retailers and using an OFT code.

How can a trade association convince its retailers that they really are the best?

- Previously - accreditation driven by patronage, businesses paid to belong and light touch monitoring wasn't particularly objective.
- Now - OFT Consumer Codes Approval Scheme which demands high standards for consumers and requires monitoring to prove consumer satisfaction.

OFT Consumer Code Approval Scheme

- For the Carpet Foundation with its thousand retailers - a massive challenge to get all thousand to act in concert.
 - Adopt new disciplines
 - Set new standards for consumers
- But research had shown retailers were producing very high standards of consumer satisfaction so it was worth trying.

Key elements of a consumer code for the retail carpet environment

- Impartial professional advice.
- Written terms of business.
- Provision of written quotations.
- Deposit protection.
- Extended product and installation guarantees.
- Comprehensive after sales service.

More complicated than you might think:

- Getting a thousand independents to act in concert had its challenges, with issues over:
 - Monitoring
 - Communications
 - Enforcement
 - Launch costs
- Getting all sides of industry to agree was quite a slow process.

A two stage process:

- Code gets stage one approval based on the wording of your code.
- You then have to show that it actually works.

- So there was a two stage launch process. We got stage one approval in October 2005 so obviously it went out to the public without the OFT logo on it and full approval was given in March 2007.
- We've actually been running a code of practice now for three and a half years.

So what's been achieved?

- A massive growth in consumer reassurance provided by the code.
 - When we started with our own code, 51 per cent of consumers were reassured by the existence of the code. Now it's 98.5 per cent and that is actual consumers, not potential customers.
 - Quite staggering results.
- Increase in consumer recognition of the Carpet Foundation brand.
 - From 5 per cent brand awareness in the UK to 20-22 per cent recognition, a massive improvement.
 - There is no doubt the link to OFT has had major impact on brand awareness.
- How consumers feel about our OFT code - Most recent research:
 - 86 per cent of consumers believe that OFT accreditation of our code was a good thing.
 - 70 per cent of them were more likely to go out and use retailers that had an OFT approved code sign in their windows.
- Monitor results of how consumers feel about the retailers and the service they provide.
 - We've had some excellent monitoring results (carried out by independents).
 - Our members are 80 per cent plus compliant with all aspects of the code.
 - 98 per cent of consumers felt that the buying experience was really positive.
 - 98.5 per cent of consumers would use that retailer again.
 - Quite staggering results but they actually are pretty well as expected.

So what has the OFT approved code done for the carpet sector?

- It does have quite an impact on self regulation in the carpet sector.

- It standardise selling practices.
- You don't do this overnight - it's been quite an uphill struggle to persuade all thousand to do everything because they're independent businesses and they've got their own minds.
- You have to put the time in, but the results are worth it in the end.
- It does protect consumer interest.
- It influences consumers' behaviour because they feel very much more comfortable about going into a store that's got an OFT approved code.
- It's very good for the industry and we are starting to see evidence that it is pushing up standards elsewhere.
- It's extremely beneficial for the host association.
- I would recommend this approach to other trade associations.
- The investment, which is significant, is worth it.
- The OFT brand does make a very big difference.

But what would we like to see?

- More OFT codes so it becomes part of the High Street culture.
- Deposit protection is a major sticking point so we would like to see is the OFT allow credit card payments for deposit protection because that is a much simpler system than some of the alternatives currently available.
- The accreditation process speeded up (I'm delighted to say that OFT recognises and are doing their best in this direction).
- More promotion of codes by OFT.
- We'd like to see more enforcement where it's appropriate.
 - It's a paradox really, talking about self regulation, but people's interest in self regulation is heavily influenced by cases of enforcement.
 - Dealing with non compliance needs to be a priority for all consumer agencies, not just dependant on OFT priorities.
 - A greater focus to sort out the cowboys.
 - Involve code sponsors in enforcement.
- Accreditation of product standards.
 - If you sell a sub-standard product through an OFT code, it still is a sub-standard product. We believe that there is a case for linking product accreditation systems to the consumer code.

- Although not possible in every case, where it is possible I think it's a benefit for consumers.
- Poor product experience, even though the selling experience might be good, does reflect badly on the codes.

In conclusion:

- OFT approved codes can have a really big impact on the right sector.
- They're very good for consumers and we have lots of evidence to show that consumers respond.
- The results are worth the time and effort in getting OFT approval.
- They have a big impact on regulating retailer behaviour.

But we need:

- More codes
- More enforcement against cowboys
- More of a partnership with co-sponsors.

We'd like to see OFT approved codes become the hallmark of high quality standards of selling in the High Street.

The role of an enforcement partner

Christopher Graham, Director General, Advertising Standards Authority (ASA)

An important part of the effectiveness of advertising regulation in the UK is the partnership between an industry self regulatory structure and statutory authorities like the OFT, like Ofcom, like the Gambling Commission.

The ASA

- I'm not going to do a detailed description of what we do.
- It's very well described in the two background papers you've got - pages 33 and 34 in the discussion paper and page 61 of the economic paper, box 6.3.
- In the early 1960's when the industry self regulatory body was established, it was decided to call it the Advertising Standards Authority – no doubt because that sounds authoritative. We've had to live up to that title ever since and I think we can claim that the system is working pretty well.
- ASA is one part of an arch of self regulation; the other is the Committee of Advertising Practice (CAP), the industry body that sets the rules.

- CAP is the advertisers, the agencies and the media working together, with the ASA there to monitor compliance with the code, to deal with complaints and to secure compliance.

An illustration of the role of an enforcement partner of the OFT.

- We're recognised as the 'established means' for delivering certain consumer protection objectives
 - Particularly under the Consumer Protection Regulations (CPRs) and before that, the Control of Misleading Advertising Regulations (CMARs).
 - Have a similar relationship with Ofcom for TV and radio advertising.
- Increasingly, effective self regulation is being seen by statutory authorities as an alternative to statutory regulation and a way of delivering effective performance across the piece.
- Forming a relationship with an industry, can mean more gets done than if left to statutory authorities alone (due to lack of resources and prioritisation).
- For the ASA, the OFT is (in the context of misleading advertising) the big stick in the cupboard. It's there. It doesn't need to be got out all the time but it's known if push comes to shove and the ASA cannot get compliance with a difficult advertiser, reference to the OFT is there as a sanction. It's a deterrent.

Undoubtedly self regulation has its critics, particularly at the moment given the state of the banking industry and the state of the economy generally.

- Willem Buiter at the London School of Economics said memorably: Unfortunately self regulation stands in relation to regulation, the way self importance stands in relation to importance and self righteousness to righteousness. It just isn't the same thing.

But self-regulation can work...

- Now I don't think we should waste a lot of time trying to come up with neat definitions of self regulation.
- The answer really is just get on with it.
- In doing self regulation effectively, I think you can make the case, not for light touch as opposed to heavy handed, but finger on the pulse regulation, which is what effective self regulatory regimes deliver.

What works about the ASA regime working with the OFT?

- It's not voluntary.
- It's got to be that industry is committed because the industry wants to make standards and quality work.
- It's got to be comprehensive in the sense that it can't just be a coalition of the willing.
- There's got to be critical mass.
 - In the case of advertisers, agencies and media it can involve everybody because bad ads simply won't be posted because the media, the advertisers and the agencies are as signed up to the standards.
 - On the Three Musketeer principle, all for one and one for all, if anyone steps out of line, the media gatekeeper gets them back into line.
- It's vital that the system should be independent.
 - The ASA Council is two thirds independent (the man or woman on the Clapham omnibus - as a jury).
 - It isn't the industry deciding in its own case.
- It's got to be clearly transparent.
 - People have to understand how the decisions are arrived at.
- It's got to be adequately funded.
 - We have funding from a levy on all advertising space, collected by the agencies.
 - The ASA is well funded – employing over 100 people with a budget of nearly £8 million.
 - If everyone pays a little, it raises a lot.
- The system's got to be credible and credibility comes from effectiveness.
 - If you prove that you can get things done, consumers will come to you, advertisers will have confidence in you.
- There's got to be wide public awareness.
 - Over more than 40 years, the ASA brand is pretty well recognised and respected.
- You've got to keep up to date with developments.
- It's very important that the system should be future proofed.
 - This week, the government announced advertising on demand services on TV audio-visual media services should be the responsibility of the ASA.

- Industry is thinking about internet banner advertising, emails, virals and other online issues such as what to do about advertising claims on corporate websites.

Effectiveness

- When Ofcom consulted in 2004 about whether the ASA should take responsibility for advertising standards in TV and radio, there was very strong criticism of the proposal from the then National Consumer Council and other consumer pressure groups, but five years on, there is a much greater consensus.
- The use of effective self regulation by statutory authorities has actually been very successful and that's something that we ought to build on.
- We can show real progress in terms of dealing with individual cases.
- We don't have to prioritise in the same way as the OFT – we can consider more cases.
 - We have to be proportionate in the way that we respond but even just one well judged complaint will be followed up.

Relationship with the OFT

- It's very productive.
- We're very pleased with the partnership.
- The big stick very seldom has to be got out of the cupboard.
- The deterrent is effective.
- But although referral to OFT where needed can get the desired results , it can sometimes take a very long time (reference to Magna Pulse Limited and Magna Jewellery, pages 34 and 35 of the OFT discussion document)
- When we do refer under the Consumer Protection Regulations it's very important that we work closely together.
- The effectiveness of the sanction is maintained if the OFT is seen to be acting.
- Long delays knock credibility in the effectiveness of the regime and the regime depends on belief that the deterrent will be used where appropriate.
- This provides the context for all the other things ASA do.
 - In the last year I can point to just fewer than 2,500 ads that we got changed or withdrawn.

- What I can't count is all the hundreds of thousands of ads that didn't mislead, that didn't offend, that weren't harmful because the industry understands the rules they've signed up to.
- The ASA can do 99.9 per cent of the work and only needs to involve the OFT for those few cases that we can't resolve.

Working with the OFT to gain compliance

Simon Bunce, Head of Legal and Member Services, ABTA

ABTA's code of conduct

- One of the best known consumer codes in the UK. There're a number of reasons for this:
 - It's been around for a long time.
 - People know that it is effectively monitored.
 - Consumers have seen real benefits from it over the years.
 - There are direct financial benefits that consumers can see.
 - It includes one of the most widely used consumer arbitration schemes.
- The code does not work in isolation and it cannot work in isolation.
- The travel industry is ever changing. When our members find themselves at a competitive disadvantage because of their adherence to our code, we can need wider support so the code of conduct can maintain its position and basic principles aren't lost.

Major challenges in recent years - due to the changes in the outbound leisure market – two issues.

1. The first issue was the rise in the no frills airlines.
 - New holiday booking patterns and new business models grew up outside of the regulated and protected sectors.
 - Online booking of flights direct with the airline and accommodation direct with the hotel.
 - Done by consumers without going through a travel agent or a tour operator – the basis of ABTA membership.
 - New companies were competing directly with our members without the added cost burdens of code compliance.

- In particular this related to the added cost burdens of protecting the monies paid by consumers.
- After long and hard debate, we changed our requirement for all members to protect all the monies they take from consumers - to allow our members to compete more freely with these new market entrants.
- Most of the monies that you pay to an ABTA member are still protected under a scheme of financial protection, but not all.
- A difficult decision for us to take and that move led us to have to leave the OFT Consumer Codes Approval Scheme.
- But we have maintained a good relationship with OFT.

2. The second issue, was again largely driven by the no frills carriers and a matter of fundamental direct competition.

The way flights are advertised - fully inclusive charges or not?

- Historic conflict between by airlines and holidays are advertised by travel companies.
 - Holidays - given as an all in price.
 - Flights only - exclude taxes and other charges (but customer, no choice but to pay).
- As the no frills carriers started competing directly with our members, it began to cause more problems.
- Hard for ABTA to enforce the inclusive advertising provisions in our code of conduct.
- Competition issues more pronounced because of the way travel services are advertised and marketed.
- Use of booking systems and price comparison sites meant those using fully inclusive pricing looked more expensive so get fewer bookings.
- ABTA placed in a very difficult position - largest members saying that they can see a real significant loss of business through compliance with the code of conduct.
- So we needed help to ensure that if we forced our members to include all the taxes and other charges in the basic advertised prices, their direct competitors, which weren't part of ABTA, would do the same.
- We agreed with the OFT that they would focus their attention on getting airlines to amend their advertising and we would deal with our members.

The process

- Process began in January 2007 and culminated in a fundamental shift in industry practice, which has largely survived.
- In February 2007 we announced to our members a three month period to show fully inclusive prices.
- This was alongside an OFT announcement to airlines based on the same timeframe.
- With 1,600 members required we focused the monitoring in stages.
- Focussed first on tour operators (those with most control over pricing).
- As is the nature with these things of course, some people made it, some people didn't.
- In June 2007, eleven of our members appeared before the Code of Conduct Committee for failing to meet the deadline.
 - Fines of up to £5,000 and reprimands were issued and they were instructed to be fully compliant by the end of July.
 - Largely successful.
- The focus shifted to travel agents - 31st October deadline.
- In December 2007, seven further cases were heard by the Committee with further fines issued.
- By January 2008 ABTA membership compliant so no further action was necessary.
- While we were doing this, the OFT was concentrating on the airlines.

Issues

- As members became compliant they saw an immediate fall-off in bookings, so did not do so quietly.
- Not easy but we were able to hold the line because we were in close contact with the team at the OFT and could tell members with confidence that the airlines were going to be forced to comply
- Once we'd achieved a critical mass, everybody else followed.
- We used the full force of our code processes and penalties against a number of members.
- Concern raised that being subject to our code of conduct was a more onerous obligation than being dealt with by the OFT.

- Non ABTA members did not face any financial penalty as a result of this exercise, unlike ABTA members.
- In response - I believe our members would actually prefer to face internal action by us than a full blown action by the OFT
 - Particularly for the larger companies who need to explain to shareholders.
- The situation needs to be handled carefully.
 - It's not our position to tell our members that they are better off like this - it's for them to decide.
- Result - a fundamental shift in practice and by and large, travel companies and airlines are advertising in a much more transparent way, allowing customers to have a much better idea of what they'll be paying.

Lessons from the exercise/problems in getting to where we are now

- That's not the end of the story - there's still work ongoing but we're in a much better place than we were.
- But this very positive experience of co-operation/shared results is only the latest stage of what has been a very long and pretty unsatisfactory process.
- Historically airlines had got away with advertising exclusive of tax
 - Why?
- In 1997 the government increased passenger duty so differential increased, coupled with a closing of the flight only and holiday markets.
- ABTA complained and the OFT did get the airlines to include taxes.
- But after 2001 September 11th attacks, increased airline insurance and security costs, lead to these increased overheads being shown as separate charges.
 - Practice spread to ABTA's part of the industry as well - tried to crack down, but competition pressures prevented this.
- Series of complaints to the OFT from ABTA / in 2003 the OFT announced a crackdown on the practice / in 2004 Trading Standards – super-complaint to the OFT.
 - But nothing happened!
- In 2005, Ryanair got a decision in the courts that seemed to allow them to exclude such costs as long as they told customers they were doing this.
- The situation was getting worse.
- No indication that OFT were going to act. Why?

- However finally, at the end of 2006 when the UK's largest holiday company complained the OFT agreed to meet with ABTA.
 - Lead to working together to remedy the problem as I outlined earlier.

So can you achieve compliance through working together?

- Yes. And it's been a very encouraging and a very positive experience for our members and for ABTA.
- Why the OFT finally decided to focus on this in 2007 unclear, but I certainly hope that this fresh approach that we've seen from the OFT continues and flourishes.

Tackling Market Problems

Sandra Quinn, Director of Communications, The Payments Council

Payments: What are they? Why do we care about them?

- Really very important - they're things that we do every day without even noticing it.
 - Direct Debits to pay bills, plastic cards to buy goods online, wages paid electronically etc.
- Payments and payment systems matter.

Lead up to the creation of The Payments Council

- The Payments Council was set up March 2007 - as a long term solution to some of the problems identified in this report:

Competition in UK Banking. Otherwise known as the Cruikshank Report

 - Published nine years ago.
 - Don Cruikshank suggested that a regulator be set up.
 - Criticism that innovation took place at the pace of the slowest, so advances not happening in the way that customers demanded.
 - Suggested Government bring forward legislation to establish a Payments System Commission, Paycom, charged with regulation.
 - Interestingly I'm not sure the entire industry had a strong view on this - some were very strongly opposed to regulation but some weren't as opposed because they saw that regulation would give them some benefits and the ability to drive change.
- Cruikshank report followed by range of H M Treasury consultations.

- In May 2003 OFT published the OFT Payment Systems Report in follow up to a market study.
 - This was our first example of working very closely with the OFT.
 - It was quite an interesting way of working.
 - Although we didn't necessarily agree with OFT's conclusions, the working relationship became very strong
- The government's pre-budget report in December 2003 charged the OFT with finding a solution.
- Lead to the OFT Payment Systems Task Force being set up in 2004.

The Payment Systems Task Force

- Brought together a whole range of stakeholders not involved in payments before:
 - Consumer groups (keen to understand more of how payments worked and why they were important).
 - Business groups (wanted to understand benefits for them and why they weren't getting what they thought they needed).

Chaired by OFT.

- Payment Systems Task Force looked at:
 - Access to and governance of the automated payment systems, Bacs.
 - Access to and governance of LINK, the cash machine network.
 - But the two things that it's really notable for are the things that actually matter to us as individual consumers.
1. Identified and agreed that the industry should set up a faster payment service.
 - Generally, transferring payments online took three working days.
 - Going forward in the 21st century, it was agreed, something a lot faster was needed.
 - Interestingly, the Task Force itself did not provide a solution:
 - Industry told to go away and come back in six months with a solution.
 - The industry came up with something better than anticipated.
 - We now have a 24/7 payment system which works every day of the year, all the time.

- A better solution than would have been achieved through the Payment Systems Task Force alone – because industry were given the incentive and encouragement, but left to develop themselves.

2. Develop better transparency around cheque clearing.

- Lack of clarity over cheque clearing - what happens and why.
- Set up measures to standardise cheque clearance and provide clarity.

Next step for the Task Force?

- The industry got together, developed a blueprint for the existence of the Payments Council.
- Talked with the OFT and with the Treasury about what that body (the Payments Council) would look like and how it would work.

The Payments Council

- Objectives:
 - Lead the future development of co-operative payment services.
 - Meet the needs of financial providers, users (so businesses and consumers), and the wider UK economy going forward.
 - Ensure that payments are open, accountable and transparent.
 - Ensure that payments work - operational efficiency, integrity and security.
- Body has 28 members.
 - Independent non voting chairman - Brian Pomeroy.
 - Four independent directors.
 - The selection criteria for the chairman and the directors are crucial - people of sufficiently high calibre and appropriate authority to show that we were serious.
 - Eleven industry directors.
 - Other places from banks and building (including the largest five which have an automatic place) and those with have a significant payment volume.
- National Payments Plan launched in May 2008 - Based on a public consultation exercise.
 - It commits the Payments Council to a very ambitious timetable.

- Issues such as the future of cheques, Direct Debits, an education strategy for payments with partners and stakeholders, the development of a mobile payments scheme for account-to-account payments.
- The creation of a National Payments Plan was possible because of the way the Payments Council was set up and the agreement with the OFT - how is implementation going to work going forward?
- User forums have been established including - corporate users, SME users and consumer groups to ensure consultation and transparency.

So where do we go to from here?

- The OFT has been doing a study on the Payments Council and its effectiveness to date.
- Today (18 March) OFT are at the Payments Council Board this morning, talking to them about the outcome of that study. See OFT press release at: www.offt.gov.uk/news/press/2009/34-09
- As the body's only been in existence for two years, it's quite difficult to fully assess yet, but it's looking good and has definitely got a very full agenda.
- The proof and the success of the Payments Council will be in what you see in payments going forward.
- The current economic climate makes it difficult for the industry to commit to spending a lot of money going forward so that will be one of the real challenges for the Payments Council.
- But The Payments Council isn't there just to make the easy decisions - It's there to make the difficult decisions as well.

PANEL SESSION TWO:

A tool for modern markets?

Chaired by Philip Marsden, Non-executive Board Member, OFT

The business perspective

Harold Gay, Trading Law Manager, Alliance Boots and the CBI Consumer Affairs Panel Chairman

Introduction

- The OFT paper seeking to investigate the opportunities provided by self-regulation to consumers, business and regulators is timely.
 - Particularly as it's set against the background of the regulatory reform reviews.
- Welcome the opportunity to discuss and debate these points.
- May help business find solutions that are far more flexible than current regulation.
- Consequent benefit to all of the parties involved:
 - Business will have more solutions to give the consumer clearer routes to solve problems.
 - Enforcers will be freed up, one hopes, to tackle the rogues.
- If compliant businesses can get on with the job, operate in a compliant way and cause the regulators less problems there is hopefully therefore more resource to deal with those at the edges causing real detriment.

Common misconception

- Self-regulation is loved by business and hated by regulators.
- But as with many things, reality is a little different.
- There are issues with self-regulation for business too.
- Although, as a general principle self-regulation has to be a benefit to business.

Self-regulation as part of a modern, sophisticated compliance regime is to be welcomed.

- In many areas it is as effective as statutory regimes in delivering compliance.
- Where self-regulation works well, it is very effective.

- Particularly useful in markets which are growing fast and changing rapidly.
 - Those markets need to respond quickly to the competitive challenge.
 - They need to respond in innovative ways (traditional regulation is not very good at dealing with those rapid market changes).
 - Allows markets to develop without the need for repeated regulatory change.
 - Can provide a consistent level playing field for the marketplace.
- From an industry point of view, self-regulation frequently adds value, provides certainty and quality standards for business, whilst giving consumers a clear route in which to resolve problems.

The downsides of self-regulation

- Sometimes the codes replace statute laws so effectively that they begin to become a burdensome form of regulation rather than a helpful driver for compliance.
 - They seek to interpret their law.
 - They put their own interpretations on business activity.
 - Codes should not seek to fill what is perceived by some as the voids in legislation with rigid rules that remove the flexibility provided by parliament and regulators.
- Where codes are of a type that embrace a whole industry they can have potential competition concerns.
 - They can control too tightly those that seek to be compliant.
 - High costs of entry, through high membership fees or by virtue of the high quality levels/standards they impose. Limit the businesses that can participate.
- Little or no ability to capture and control the people at the edges who don't want to be part of the regime.
 - Run the risk of being a restriction on legitimate business (who bear the cost of such schemes) whilst allowing those who choose not to participate to carry on with none of the constraints of their competition.
- Industry should not be forced into self-regulation - by legislators, well meaning government bodies, or due to a lack of an alternative way of gaining compliance.
 - Has to be done in a way that allows industry to lead.
 - Not through force.

- Self-regulation should not become a tool to simply replace regulation.
 - If the only self-regulatory codes that have any value are those backed by the OFT, which meet the very high quality standards, then we are simply replacing statute law, which undergoes full parliamentary scrutiny with regulator led compliance codes, rather than genuine self-regulatory mechanisms.

Incentives for business

- Some large businesses in competitive markets trade very well on their brand and reputation.
 - A good brand and reputation attracts customers.
 - Those businesses often see no need to participate in compliance codes (backed by the OFT or not) because it is their brand values that customers buy into, and customers trust they will be dealt with fairly.
- However, even big businesses can benefit from self-regulation codes, particularly where they provide simple and easy systems for dealing with problems.
- The key is there must be added a benefits for business.

There is not a one-size fits all approach.

- Arrangements should allow participation in codes to be voluntary.
 - Where codes add value, businesses will sign up.
 - Where they add burden, they will not.
 - This sort of flexibility is what makes codes attractive.
- What industry does not want is statute law being overlaid with a series of compliance codes, which add burden to business.
- Self-regulation needs to be genuinely flexible and not restrict how business operates.
- Codes should endeavour to add something to the regulatory framework.
 - They should provide certainty for compliance but not add a burden – this is a fine line.
- Self-regulation should not be a replacement for proper, effective public enforcement.
 - It is something that needs to be used alongside standard public enforcement.

Sectors

- Most useful in sectors where there is a diverse, small, or disparate market.
- Less application in those sectors where businesses are actively competitive, tightly regulated and perhaps already suffering from too much bureaucratic regulation.

So what does business want from self-regulation?

- An approach that delivers consistent compliance across the market.
- A mechanism for the rogues to be dealt with effectively. (Maybe through the freeing up of enforcement resource which can be used to focus more effectively on the rogue issues).
- A flexible arrangement.
- Match business needs so that it can change quickly as markets and business needs change.
- Add no or minimum burdens, with little or no increase in operating cost.
- Provide simple systems for dealing with consumer problems, but not an extra layer of law.
- Add value to competitive markets by improving the way they work to the benefit of consumers, business and regulators.

So a qualified yes to self-regulation, a definite acceptance of their value, provided they are designed not to add burden but provide opportunity, add value and deliver compliance in a business and consumer friendly way.

The consumer perspective

Steve Brooker, Head of Fair Markets, Consumer Focus

I want to divide my remarks into two this afternoon:

- First - to put today's conference into some context.
- Second - to use a case study the car servicing market, to illustrate some wider points about self-regulation.

Context - the economy

- Challenging times for business.
- Prospects of investing money in self-regulation might not seem an appealing prospect right now.

- But in a recession:
 - Consumers are more conscious of getting value for money.
 - Self-regulation offers an opportunity for businesses to mark themselves out from the pack.
 - Cash strapped consumers will think twice about spending in markets suffering from bad reputations.
 - So credible self-regulation can be a tool for business to bolster consumer confidence/kick start spending.

Context - the regulatory fallout from the banking crisis.

- FSA is not alone in starting to speak a different language about regulation.
- Term 'light touch' out of favour.
- Regulators sending out signals of intent to take a more direct interest in the affairs of the businesses they supervise.
- Seems very much at odds with recent trends to promote self-regulation.
 - Use of self-regulation has declined when seen over a longer historical period.
 - Despite liberalisation of market and deregulation agendas self-regulatory arrangements have gradually been replaced by statutory regulations in most areas of consumer life.
 - Even extended to the professions such as law and medicine, staunch defenders of the right to regulate their own members. (In the legal profession law makers concluded that there was simply a fundamental tension between lawyers both representing and regulating their membership leading to a system of co-regulation).

Consumer Focus view:

- Welcome evidence of regulators flexing their muscles.
- Consumer Focus report - Rating Regulators
 - www.consumerfocus.org.uk/en/content/cms/Consumer_Focus_Publi/
 - Found - misplaced trust in 'market mechanisms' to change firms' behaviour / a first instinct was to choose self-regulation without considering other, possibly more appropriate, forms of action.
- Our starting point - self-regulation can deliver benefits for consumers (solutions that are faster, more flexible, and cheaper than statutory regulation).

- But we think that self-regulation should only be used in the right circumstances, and the right ingredients must be present.
- The OFT's project in finding the answers to those questions is really valuable.

Case study - the Car Servicing Code

- The sector has experienced historically high levels of consumer complaints.
 - Mystery shopping evidence suggests that just over half of garages, (franchise dealerships and independent garages) were not up to standard.
 - Cost to the economy (Government estimate) of £4 billion per year.
- The National Consumer Council (our predecessor organisation), stepped in following the collapse of the Car Wise self-regulatory scheme.
- We said we would issue a super-complaint unless industry delivered the code with full CCAS status.
- The Society of Motor Manufacturers and Traders stepped forward to lead the development of a cross-industry scheme.
- Under the oversight of a steering group chaired by BERR.
- The code of practice delivered stage one CCAS in August 2007.
- Currently 5,000 members.
- Great news, but it marks one problem - all (bar a few hundred) of those 5,000 members are franchised dealerships.

Five wider points that emerge from this market:

1. Nature of the sector means that statutory regulation is not ideal.
 - Industry - Makeup of industry participants diverse.
 - One size fits all solution unlikely to work.
 - Technology changes fast in the sector (formal regulation likely to be too inflexible to keep pace).
 - A new set of laws would also carry a heavy public enforcement burden (unlikely this could be resourced).
 - Therefore - it does make sense, in a sector like this, to give self-regulation a chance.
2. Self-regulation has failed in the past in this sector.

- Car Wise was one of 11 failed attempts at self-regulation in the previous 30 years.
 - Codes didn't work, because compliance wasn't monitored and the industry bodies didn't expel the worst offenders.
 - Key weakness in self-regulatory schemes - trade associations face conflict between penalising and attracting fee-paying members.
 - Key difference in the OFT's new regime, is that code sponsors must prove compliance before stage two approval and the right to carry the OFT logo.
3. Coverage.
- It's easier to convince industries to participate where there are a small number of big companies with reputations to protect.
 - It's much harder to mobilise industries where there are a large number of small players.
 - Securing the buy in of the independent garages in this sector is a key remaining challenge.
 - Experience also shows it's not always easy for trade associations to bring their members along with them.
4. Leadership.
- Once the sector was convinced to act, things took off impressively.
 - Senior industry commitment can have a galvanising effect in self-regulation, whereas an absence of leadership can lead to paralysis.
5. Role of the state
- Threat of a super complaint/prospect of statutory regulation gave the initial impetus for industry to act.
 - Excessive talk about light touch regulation sends out the wrong signal.
 - Government needs to send out a clear message to business that self-regulation is a privilege, it's not a right.
 - But the state has an important role as enabler.
 - BERR as Chairman of the steering group exerted pressure to corral the various bits of the industry together and to maintain the relations and kept process moving.
 - Government/regulators should be prepared to get involved, rather than to stand aside.

Final comments

- Self-regulation doesn't have the best of track records in consumer markets.
- But when used in the right circumstances, and when the right ingredients are put in place, self-regulation has the potential to benefit consumers (and to do so more quickly, cheaply, flexibly, and at a higher level of standards than might otherwise be possible).
- But self-regulation is one approach among many that can be used to tackle failing markets.
- We need a better understanding of the situations in which self-regulation works and when it doesn't work.
- We need the OFT, and the government more widely, to encourage the right industries to raise their standards through recognised and credible self-regulatory schemes.
- But this must be alongside a willingness to introduce new statutory measures when this is needed to deliver consumer protection.

A regulator's perspective

Kristina Glushkova, Strategy Manager, Ofcom

This is a very timely occasion for us because we recently published our statement on our approach to current self-regulation –

www.ofcom.org.uk/consult/condocs/coregulation/statement/

Today's talk - quick overview of our approach and some examples.

Communications sector

- Very fast and dynamic.
- New products coming to the market every week.
- Constantly new players entering the market (both UK and non-UK based).
- The way consumers use communication services is changing dramatically.

This raises very important questions for Ofcom:

- A relatively young regulator.
- When do we intervene?
- When can we rely on industry self-regulation or co-regulation?

- And in all of these circumstances, how do we make sure that the solutions we do rely on are truly effective in meeting consumer needs?
- All in context of duties that Ofcom has as a regulator - we regulate in the interest of citizens and consumers.

- There are a number of areas where we need to analyse self-regulation and co-regulation.
- We're also asked at times to provide expertise on issues outside our duties.
- We recognise that there isn't one single answer for most kinds of issues or consumer problems.
 - All approaches have their advantages and disadvantages.
 - The best approach depends on the specific circumstances of the case.
- General advantages of self- and co-regulation:
 - Can offer more timely solutions than formal regulation.
 - Can benefit from industry expertise.
 - Can be cheaper to implement, although it is important to make the point this is not always the case.
 - It can reach out to providers that formal regulation may be unable to cover.
- But we also have learned from our experience that self-regulation doesn't always work.
 - Therefore Ofcom intervention necessary.
 - May need very firm intervention to correct a consumer issue or problem.

Recent Ofcom work

- Questions:
 - What is the most appropriate approach in each case?
 - How do we go about gaining a better understanding so that we do not act on first instinct, but we carefully consider what is going to work in each case?
- We looked at best practice in the sector in the UK and abroad, our own experience, and we also carried out an analysis of industry incentives.
- We developed a set of principles that will guide Ofcom in making these decisions.
- We recognised it's important for us to be systematic, transparent and to promote best practice.

- We wanted an approach that is flexible so we do not apply the same approach to each scheme and issue - the issues are different and the circumstances are different.

Our new principles.

There are two elements:

- Assessment steps
- Best practice criteria

Assessment steps

- High-level steps that we will go through when deciding whether self-regulation, co-regulation or formal regulation is the best way to address a problem.
 - The logic is that we will consider if self-regulation could work.
 - If not, then whether a form of co-regulation can be appropriate
 - Where this is not the case, then we'll employ formal regulation.
1. Does the industry has a collective incentive to address an issue?
 - May be commercial interests, reputational interests, threat of statutory regulation etc.
 - The basic question is: does the industry have collective incentives to come together to address the issue?
 - It includes considerations such as:
 - Do costs of regulating outweigh the benefits?
 - What is the distribution of costs and benefits?
 2. Will this solution really meet citizen and consumer interests effectively in the particular case?
 - How does that compare to alternative approaches?
 3. Will businesses actually participate?
 - Will they have incentives to join? How many may not be joining in? What are the implications for how effective the solution is going to be?
 4. What is the likelihood of free riding?
 - Is this a potential problem and can co-regulation do something to address it?

- For example, requiring participation.
5. Can you define clear objectives for a scheme?
- Needs to be targeted.
 - What is the scheme is trying to achieve - needs to be clear to both businesses and consumers.
 - Will depend on complexity of the objective, diversity of interests etc.

Best practice criteria.

- I won't go into detail today.
- Detail can be found in the Ofcom statement (see link above).

Examples from our sector.

1. Mobile content regulation

- The operators had clear interest in coming together, due to significant investments made in this new technology.
- They wanted to make sure that consumers were confident using it.
- They came together, developed a code and then implemented it.
- Ofcom review in 2008 found that it was largely effective - a case of successful self-regulation.

2. Broadband speeds information code

- The issue - the difference between the advertised 'up-to' speeds and the actual speeds that consumers get - often a big discrepancy.
- A recent example of quite a complicated issue and objective.
- There are different ways of measuring speeds, different ways of informing consumers, and different reasons for why the speeds are not as advertised.
- Therefore Ofcom involved at an early stage and lead on developing the code for the ISPs, who then came together and signed up.
- Currently about 50 signatories, covering 95 per cent of consumers.
- Implementation deadline was in December 2008.
- Ofcom currently looking at progress and analysing results.
- An example of industry action with some initial support from Ofcom enabling a much quicker solution for consumers than formal regulation would be able to do.

3. Mis-selling.

- We published a statement yesterday confirming our intention to introduce formal regulation on mobile mis-selling issues.
- Background:
 - A couple of years ago - huge increase in complaints about mis-selling - slamming, cash back issues, etc.
 - We then worked with the industry to develop a self-regulatory code.
 - We were very clear at the start - if there was no significant improvement quickly that we would step in and consider formal regulation.
 - Although there has been some progress, the overall scale of the mis-selling problem hasn't declined substantially.
 - We consulted in March last year, and we now have confirmed our intention to introduce formal regulation.
- We think one of the main reasons why self-regulation didn't work was due to the structure of incentives and the structure of the market.
- For example, the self-regulatory code only included the five mobile network operators. Other retailers didn't sign up.
- Formal regulation will make sure that all parties will be captured and all the mobile service providers implement the rules in the same way.
- We think formal regulation is the only way to address this issue.

Our principles going forward.

- They're forward-looking.
- We're not going to go back and review all the existing schemes
- We will use them as a high level guide and we will continue engaging with stakeholders, case by case.

A self regulatory body's perspective

Peter Robbins, Chief Executive, Internet Watch Foundation

Background to how Internet Watch Foundation came into existence.

- Formed in 1996 due to concern from the Government, law enforcement agencies about the distribution of indecent images of children across the Internet.
 - Particularly those apparently hosted by UK Internet service providers.

- They were looking for a solution.
- Wanted to avoid seizing the servers and prosecuting the internet service providers who may have been inadvertently hosting indecent images of children.
- The industry agreed to:
 - Set up a national hotline (the basis of IWF) for the public
 - Provide a notice and takedown service to the service providers.

IWF

- Seen as both a self- and co-regulatory body.
 - We deal with the criminal law, but our members go further than just dealing with aspects of taking down criminally obscene adult content and indecent images of children by agreeing to block access to indecent images of children hosted outside the UK and not carrying newsgroups that regularly contain indecent images of children.
- We're also a registered charity.
 - Provide a public service consistent with Charity Commission rules.
- Organisation runs on a £1 million budget.
- We have some legal status - confirmed through a Memorandum of Understanding linked to S46 Sex Offences Act of 2003.
- We also provide a list of websites to service providers so they can block access to those websites around the globe that distribute indecent images of children.
 - Service providers do this on a voluntary basis.

Role of IWF

- Remit covers three areas of criminality:
 - Indecent images of children.
 - Criminally obscene and extreme pornographic adult type content.
 - Incitement to racial hatred
- Provide a notice and takedown service to UK service providers who may be hosting such content.
- Success of the model – illegal (indecent images of children) hosted in the UK has gone from 18 per cent in 1996-97 to less than 1 per cent now.
- However this is a global problem.

Structure and governance

- Staff of 15.
- CEO
- Director of Policy and Performance.
- Director of Technology responsible for the hotline.
- Director of Communications responsible for dealing with the massive media interest in our model.
- IWF has a board of 10 trustees and directors.
 - Independent Chair and six independents.
- The Funding Council.
 - Represented by 90 different companies.
 - Funding Council is consulted on issues, such as funding and policy development and as issues develop or new ones emerge.
 - Part funded by the European Commission.
- Periodically we are independently inspected by representatives from law enforcement, academia and security professionals.
 - Make sure that the systems, practices and processes adopted are consistent with best practice.
 - IWF are also under scrutiny from the media. (Criticisms over claims of censorship).

Work in partnership

- We work with all the police forces in the UK.
- We work with Government, for example, the Department for Children Schools and Families, the Department for Culture Media and Sport, BERR and the Home Office.
- Challenge of dealing with conflicting ideas over our objectives.
- We're one of 33 hotlines around the world, so we work in partnership with other countries and other hotlines doing similar work.
- And of course industry.

Challenges

1. Updating the code of practice.
 - Code is owned by the industry and it can take time to get agreement.

- Negotiations currently in train particularly in relation to sanctions applicable for lack of compliance with the code.
2. Government set a 100 per cent target for all residential broadband households to be covered by ISP's using IWF block list.
 - It is estimated that 700,000 households or 5 per cent of those who receive residential broadband services are supplied by companies that do not take our URL block list.
 - 5 per cent are mostly small companies - niche service providers.
 - But as we have good take up from all the large ISPs, the Government have set a target for 100 per cent compliance.
 - Currently working with the Government on moving towards this full coverage.
 3. Ensuring the system works.
 - Those that take the list also enter into a verification and validation programme to prove that the list that they take is deployed and that it works.
 - If they don't prove that it works, then they may be subject to remedial action or sanctions.
 - Sanctions are currently being negotiated but may include removal from access to the list and this would have an impact of their reputation
 4. International interest.
 - High level of interest from international governments.
 - The way in which we've managed to succeed in eradicating quite a lot of this content from the Internet in the UK through self-regulation is of massive international interest.
 - In terms of the UK approach it seems there aren't many other countries who fully appreciate how we achieve so much through self-regulation rather than statutory regulation.

An international perspective

Mary Engle, Acting Deputy Director, Bureau of Consumer Protection, US Federal Trade Commission

Mary Engle's speech (pdf 62 kb) can be read at:

www.ofc.gov.uk/shared_ofc/consultations/speech.pdf

Afternoon session – Looking forward

Competition law considerations

Jackie Holland, Director of Competition Policy, OFT

A brief introduction to the competition law considerations to bear in mind when designing or running a self-regulation scheme.

- Focus on the rules that are most likely to apply to self-regulation schemes.
- Relevant to the way you set up schemes and run them in practice.
- Competition law prohibition of anti-competitive agreements.
- Important point - competition law generally allows beneficial agreements to take place.
- There is flexibility in the system
- The rules can catch a wide variety of agreements, but there are exemption criteria allowing agreements with benefits flowing from them to proceed.

The rules are contained in the Chapter I Prohibition of the Competition Act 1998 and Article 81 of the EC Treaty.

- The wording is very similar - UK law is based on the EC law.
- The provisions apply to agreements between undertakings.
- Wide definition of agreement:
 - It does not need to be a written agreement.
 - May be oral or a so-called gentleman's agreement.
 - It does not need to be a legally binding agreement.
- The law also catches decisions made by associations of undertakings.

- The definition also catches concerted practices where companies are moving together in the same direction in the market without there being an actual agreement between them.

In looking at the prohibition, two criteria that are important:

1. The agreement must be capable of affecting trade.
 - In the EC rules - trade between member states.
 - In the UK rules - trade within the United Kingdom.
2. The agreement must have, as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent.
 - De minimis provisions mean that agreements of minor importance are not caught by the prohibition.
 - Potentially a very wide prohibition, but it is possible for agreements to benefit from an exemption from the prohibition.

Four exemption criteria must all be met in order for agreements to benefit from exemption:

1. The agreement contributes to improving production or distribution or promotes technical or economic progress.
 - For example, economic efficiencies arising from the agreement.
2. Consumer benefits,
 - The benefits flowing from the agreements, or at least a fair share of the benefits, are passed on to consumers.
3. Indispensability.
 - The agreement must not include restrictions other than ones that are indispensable to the attainment of the benefits.
 - It must only include restrictions that are necessary to obtain the benefits.
4. No foreclosure effects arising from the agreement.
 - It must not be the case that the agreement will result in the elimination of competition in the market.

How this might apply to a self-regulation scheme:

- Self-regulatory bodies are not immune from the competition rules.
- The definition of agreement is wide enough to encompass the actual constitution or rules of the self-regulatory scheme.

- It would also cover recommendations made to members, resolutions or decisions.
- Decisions do not have to be legally binding or in writing to be caught.
- There could also be competition law risks arising from agreements or concerted action directly between members
 - For example, members of a self-regulatory body making an agreement, without any involvement from the self-regulation body itself.

The key competition law risk areas for self-regulation:

1. Structure and design of the self-regulation scheme in the first place. The structure and design of the scheme could, for example:
 - Raise barriers to entry in the market, restricting competition.
 - Disadvantage certain market players or limit innovation and choice.
 - Distort competition through the quality levels being set too high.
2. Ongoing risks of collusion and exchange of confidential information
 - The self-regulation scheme, by its nature, may involve an increase in the number of contacts made between competitors and so facilitate such collusion/exchange of information.

Ways you can mitigate these risks.

- You need to think carefully about the structure and design of the self-regulation scheme itself in order to minimise competition law risks.
 - Clear aim and scope of the scheme.
 - Do not let the scope of the scheme go further than reasonably necessary in order to achieve your objectives.
 - Consider having a voluntary scheme rather than imposing mandatory membership to reduce the potential distortive effect on competition.
 - Put in place measures to prevent the exchange of confidential information between members.
 - Minimise the risks of discussions straying into areas which might facilitate collusion - have a strict agenda for meetings
- Consider whether any particular proposed action may restrict competition and, if so, whether the exemption criteria may be met. It might be helpful to think of three categories of proposed actions.

- First category - action you are taking that does not prevent, restrict or distort competition at all (there may be many areas of your work that fall into that category).
- Second category, where there is a risk that what you are doing could distort competition or restrict competition, consider whether there are any benefits flowing from the action which could mean that the exemption criteria will be met.
- Third category, where there is a significant risk that what you are doing will prevent, restrict or distort competition, but there are no corresponding benefits flowing from it and so the exemption criteria will not be met - you may need to rethink your proposal or decide not to engage in the conduct at all.

In conclusion:

- Competition law is a flexible tool.
- Beneficial agreements and beneficial action that you are taking in the context of a self-regulation scheme are generally not prohibited by competition law.
- However, it is very important to bear in mind competition law issues since they might affect how you want to structure or design the scheme in the first place, and also how you operate it, once it is up and running, in order to minimise your risks of breaching competition law.

Looking forward

Colin Brown, Director of Consumer Policy

Diversity of self-regulation

- Today, we've looked at self-regulation from top and from bottom.
- In addition to economics of self-regulation work in OFT, we've been running a project looking at how it works in practice:
- We've looked at the different manifestations, and the policy paper attempts to capture that diversity.
- There have been previous expeditions to map this landscape, notably by Richard Thomas, the outgoing Information Commissioner, back in 1999 for the National Consumer Council – a very good piece of work.

- However, previous work tended to place self-regulation on a single spectrum, for example, from statutory across to increasing elements of voluntary content.
- Our view is that things are much more diverse than that - you can't capture it in one single spectrum.

The model of self-regulatory components

- Our model is part of our contribution to the debate.
- It looks complicated. I hope to convince you that it makes things simpler.
- It's a descriptive model - a tool for classifying individual self-regulatory schemes.
 - It isn't a map of the whole self-regulatory landscape.
 - It isn't a model in the sense of something to aim for - it's not normative.
 - It doesn't in itself explain what works and what doesn't work.
- What it does do is offer a language to discuss those things.
- It's a compass for our exploration.

Detail of the model

See page 14 of 'Business leadership in consumer protection – A discussion document on self regulation and industry-led compliance'

www.ofc.gov.uk/shared_ofc/reports/consumer-policy/ofc1058.pdf

- We suggest that there are six key dimensions of self-regulation.
- Each self-regulatory body can be placed somewhere on each of these dimensions, so you can see its footprint.

1. Quality level

- Our notion of quality isn't just the product or the service itself but in fact everything around it, like customer service, customer care, after sales care, fair treatment of consumers, and so on.
- 'Raise standards above the legal minimum'
- 'Legal compliance'
- 'Non-legal standard' - where the standard is unrelated to the legal framework
- There are three distinct offerings to the consumers - and to the government - on this axis.

- The two at each end ('above a legal minimum' and the 'non-legal standard') are the main arenas where the economic rationale for self regulation operates - where businesses get together to signpost something that they're offering extra, where they club together to achieve a brand.
2. Structure.
 - The different types of organisation or group.
 3. Coverage.
 - Who is in reach of the scheme. For example:
 - The Glass and Glazing Federation run something called FENSA, the Fenestration Self Assessment Scheme. Not all their members in the Federation are part of that scheme - 'a voluntary scheme within an industry body'
 - The motor codes scheme that Steve Brooker talked about this morning - 'All members of a single body'
 - Professional bodies like the Law Society - 'Entire industry'.
 4. Toolkit.
 - The things that a scheme may use to deliver the standards and to change behaviour.
 - We've tried to be comprehensive about it - we may have missed some things so please get back to us, when you've read the paper, if you think we have.
 5. Operational activity - closely connected to the toolkit.
 - This is a list of the things that self-regulatory initiatives actually do to ensure the options used in the toolkit are effective - from 'persuasion', 'pre-entry checks' right up to 'intervention initiatives' at the far end.
 6. Legislative backing or government involvement.
 - This is really just a three-level categorisation of whether the government is involved in the scheme.
 - 'Significant' - for example anything with statutory underpinning - the legal approval process for Estate Agents Redress Schemes, or professional bodies

- 'Low' – for example the OFT's Consumer Code Approval Scheme. We don't run the schemes we just approve them according to the criteria.

Mapping a scheme

- See Annex B in the discussion paper.
- We've looked at how CCAS itself would look in this multidimensional model.
- This is the footprint of CCAS.
- Other schemes would look completely different – the markers would be in different places, so if you took TrustMark, or the ASA or the Bosch Car Service Code you'd get a different footprint.

We are interested in your comments.

- Have we missed any limbs? Should there be seven, eight, nine, ten of them?
- Have we missed off any items on the limbs?
- How could it be more helpful?
- My own feeling is maybe we need to reflect governance and independent participation, and maybe the kind of market that it's operating in.
- There are other things that we could put on there - it's not meant to be set in stone.
- It's meant to help us all understand what goes on, and to talk about it.

Compliance partnerships.

- Our general description of self-regulation, as Philip said this morning:
 - 'Arrangements made by a group of firms within an industry to modify their behaviour'.
- But within that whole arena of self-regulation there's a sub-group we call industry-led compliance
 - 'Arrangements made by a group of firms to ensure compliance with the law'
 - In the model, this corresponds to the middle dot on that 'quality level' arm.
- Christopher Graham spoke this morning about the ASA - that's precisely the kind of arrangement we're talking about:
 - technically what's referred to in the legislation as 'established means'.
- We tend to refer to these as compliance partnerships.

- They are the first port of call for legal compliance, with a government agency acting as backstop, like the OFT.
- It's a requirement on us in the consumer protection regulations to take full account of the existence of these and to encourage them.
- We think there is scope for more activity here.
- We issued a consultation paper before Christmas and responses to that consultation paper are due in now.
 - We've had quite a lot of responses
 - I'm happy to say that most of the responses, if not all, have been positive
 - They agree that there is a lot more to be done in this area and that we can look to achieving compliance with the consumer protection regulations by looking at compliance partnerships.

Our general appetite for moving forward on self-regulation:

- The big questions are can we do more and should we?
- We think the answers are yes and yes.
- We accept that there are risks as well as benefits in self-regulation (as in our discussion paper).
- We touch on what works and what doesn't - but only briefly. We don't think there are any obvious answers to that question. But it is worth discussing it.
- I think success factors for self-regulation are incredibly complicated.
- Those of us who work in self-regulation develop a feel for schemes – when something will work/when it won't. The difficulty is getting all that down in a codified form, in a way which is robust and evidence-based. There's a lot of work to be done.
- Personally, I think that some of the factors that lead to success can be divided up between:
 - Factors that lead to successful establishment of a scheme
 - Factors that lead to sustainability of a scheme.
 - These may be very different.

We also need to consider:

- What is the role of government?
- How has the economic situation changed things?
 - We should beware tabloid answers such as 'it's all a failure of self-regulation' and 'it's all a failure of trusting in the market'.

Closing Comments

Ali Nikpay, Senior Director of Policy, OFT

Ali Nikpay's speech can be read at:

www.offt.gov.uk/shared_offt/consultations/comments.pdf