

Evaluation of a sample of Consumer Enforcement Cases

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OFT 1139

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EXECUTIVE SUMMARY

Introduction

- 1.1 The OFT's mission is to make markets work well for consumers. This means acting to remove consumer detriment in the widest sense of outcomes that are less than optimal for consumers. Amongst the methods the OFT uses to achieve this goal is enforcement. Consumer protection law is an important part of the OFT's enforcement activities. In particular, where the OFT believes that consumers and other businesses are suffering harm, the OFT may use a combination of intervention tools to address the causes of the detriment.¹
- 1.2 The principal aims of this study were to review the effectiveness of a sample of six consumer enforcement interventions, to assess and discuss the implications of previous approaches and to consider how to monitor and enhance performance in future interventions. This study is not concerned with whether particular traders committed breaches as a matter of law, or to identify loss or damages that could be claimed by individual consumers in court (see the Note on Legal Issues that follows this executive summary). Rather, it is an economic study that seeks, on the basis of extrapolation from different data sources, to measure intervention outcomes for consumers and markets generally.

Evaluation aims

- 1.3 The six case studies were selected to address the following questions:
- What were the sources and level of consumer detriment associated with particular interventions?

¹ The statement of consumer protection enforcement principles elaborates further on the OFT's approach and prioritisation processes (see www.offt.gov.uk/shared_offt/reports/consumer_protection/oft964.pdf). See also OFT (2008) 'OFT Prioritisation Principles'. OFT 953

- What were the consequences of the OFT's intervention for targeted businesses, for consumers and for the market more generally?
 - What wider impacts might result from the interventions in terms of increasing deterrence amongst non-targeted businesses and consumer confidence?
 - How can the OFT monitor the success of similar interventions in future?
- 1.4 The cases selected for our analysis cover diverse types of consumer detriment with different intervention tools being used across cases. Where the term 'detriment' is used, it refers to detriment defined not in legal terms, but on the basis of the data available and stated assumptions, for the purposes of economic measurement. To clarify that detriment is meant in this sense, the term 'Assumed Consumer Detriment' or ACD is used in what follows.²
- 1.5 The six cases selected involved interventions relating to airline pricing, the trading activities of MB Designs, Book Club Associates advertising, Dabs (an online IT retailer) terms and conditions, Ryanair terms and conditions and clarification of Section 75 of the Consumer Credit Act 1974.

Key findings

- 1.6 All of the cases looked at have delivered positive benefits for consumers. The overall yearly benefit figure of £243 million compares very favourably with estimated costs to OFT of £2.4 million, and includes:
- an estimated saving of £131 million a year delivered by cross-industry action in respect of airline pricing through the inclusion of fixed non-optional costs in advertised prices. The size of the online flight ticket booking market is estimated at £7.4 billion

² See the Note on Legal Issues below for more detail as to what is and is not meant by 'detriment' in this study.

- an estimated saving of £99 million a year delivered by the OFT clarifying the applicability of Section 75 to overseas credit card transactions
- a saving of £10.7 million due to an intervention against the unfavourable trading activities of MB Designs (a double glazing supplier)
- smaller, but still significant savings were made in other markets such as book clubs and electronic goods, as well as an intervention that resulted in Ryanair amending their terms and conditions.

- 1.7 A summary of the quantification of impacts can be found in Table A. Benefits to consumers are delivered in a variety of ways. Whilst a pre-condition for success is that businesses change their prior conduct, for the six cases examined, the greatest benefits are delivered where interventions result in consumers incurring lower costs and making better choices in transactions (accounting for 76 per cent of overall yearly benefits).
- 1.8 The next highest benefit comes from a reduction in deterred complaints (19 per cent of overall yearly benefits). The study of the six interventions highlighted a number of reasons why consumers may be deterred from seeking redress when problematic situations occur. When an intervention succeeds in improving consumer awareness of their rights and confidence in the process of seeking redress, the consumer benefit achieved is significant. However, to fully maximise this benefit requires the targeted company to have in place a satisfactory approach to complaint handling.
- 1.9 The six cases had a smaller impact (less than four per cent of yearly benefits) in terms of deterring similar actions by non-targeted business. Nevertheless the cases highlight OFT interventions can deliver benefits through having a deterrent effect on non-targeted businesses and preventing infringements of a similar nature from occurring. This is particularly likely for precedent setting cases that receive media attention and also cases with high visibility amongst competitors, as was the case

for the two interventions in our sample that had a deterrent effect (MB Designs and Ryanair).

- 1.10 In our sample, interventions targeting unfavourable terms and conditions had relatively less impact than those targeting advertising that was considered to be misleading or Sales of Goods Act (SoGA) cases. This is likely because in the cases in our sample unfavourable terms only manifested themselves when the consumer actually had a specific problem and, the incidence of these specific problems was relatively small, such as lost luggage in the case of Ryanair. Nevertheless, all passengers with luggage incur a risk that if theirs is lost, they may not receive adequate compensation, a factor which affects confidence in the market. There may also be some markets where unfavourable terms have the potential to result in significant detriment should sufficient consumers be expected to experience the relevant problem. On the other hand, misleading advertising and sale of goods of inadequate quality can be expected to affect a large proportion of a seller's customer base.

Methodology

- 1.11 The case studies were developed in parallel and our approach to each case shared a number of common steps, from initially providing an overview of the market and developing an intervention logic model for each case to subsequently assessing the situation post OFT intervention.
- 1.12 A number of different data sources informed our analysis. We undertook primary data collection across cases, including survey research for three cases studies. This was accompanied by in depth interviews with consumers, businesses and other stakeholders. We also utilised aggregated complaints data and existing OFT research to inform our calculations. See the Note on Legal Issues that follows below for an explanation of the difference in our treatment of evidence from that which would be characteristic of a legal, as opposed to an economic analysis.

Lessons learnt

- 1.13 There are two main ways in which results from these case studies may inform future thinking:
- measuring the success of consumer interventions
 - targeting enforcement work.

Measuring the success of consumer interventions

- 1.14 The success of a consumer intervention is primarily measured by the achieved reduction in ACD. A quantification of the initial level of ACD is important when considering interventions. This was not originally available for the cases we looked at in this report. A number of techniques to estimate ACD are available to the OFT.
- 1.15 Information that can be drawn from consumer complaints can have a significant role. The OFT recently carried out a study that comprehensively assesses complaining behaviour of consumers in different markets.³ This analysis can valuably be combined with aggregated complaint information to help inform estimates of consumer benefits arising from OFT action.
- 1.16 The data recorded by Consumer Direct could be utilised further and may benefit from asking complainants a systematic set of questions, such as what the value of the transaction was, what percentage of that transaction was affected by the problem and how much time/money the consumer has spent in seeking redress. We recognise that this suggestion might have cost implications for the Consumer Direct business model, which we have not been in a position to consider.
- 1.17 In markets where the population affected is large, a survey may be a cost-effective and timely method to estimate the incidence of problems

³ OFT, 'Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services', April 2008, OFT992, downloadable at www.offt.gov.uk/shared_offt/reports/consumer_protection/oft992.pdf

in the population. The results of a pre-intervention survey could then be compared with those of a post-intervention survey to help estimate the changes achieved by the intervention.⁴

Targeting and tailoring enforcement work to achieve high impact outcomes

- 1.18 In most of the cases studied here, the OFT intervention required targeted businesses to cease certain practices. A pre-condition for success is thus that businesses change their behaviour and make the changes required by the OFT. Improved business conduct may, however, take many forms and literal changes alone may do little to enhance consumer welfare. Before taking on an intervention, the OFT may want to consider the mechanism through which the intervention is expected to operate. In particular, if post intervention, there is a wide range of actions that businesses can take to undo or undermine the effects of the change imposed by the OFT, then the intervention's success may be a priori compromised.
- 1.19 Even if a good outcome in terms of improved business conduct is expected, an intervention uses up scarce resources and these should be allocated where ultimately benefits to consumers are greatest. As such, impact is one important consideration before taking on these actions.⁵
- 1.20 On the basis of the limited sample of cases we examined, interventions targeting problems that potentially occur more frequently or that potentially affect a very large share of all transactions are likely to have a larger impact on consumers.

⁴ This is clearly a simplification. No assessment would ever be quite as straightforward and a number of controls and supporting analysis would have to be included. Changes in a market may be attributable to many factors and the fact that the OFT made an intervention may be only one of several explanatory factors for observed changes.

⁵ See OFT (2008) 'OFT Prioritisation Principles', OFT 953.

- 1.21 When designing an intervention or considering which markets are most worth tackling, the OFT should put some weight on the potential deterrent effect that an intervention can have.
- 1.22 There are two main ways in which an intervention can deter other similar problems: through adverse reputational effects and through anticipation of [high] financial penalties which remove/reduce the gains from infringements.⁶
- 1.23 Under the powers available to it at the time of these six interventions, the OFT did not have the option of imposing financial penalties on infringing businesses. However, fines, financial civil sanctions and compensation to injured parties may be able to play a significant role in future consumer enforcement, particularly under powers that it is proposed the OFT and a group of local authorities should pilot. This is not to say that such penalties would necessarily have had any role to play in any of the six cases covered by this study. Heavy financial sanctions are likely only ever to be available where there are serious and undoubted breaches of law. But in appropriate cases, the anticipation of high financial costs can be an effective deterrent to potential infringers.

⁶ Criminalisation is a third one, forming part of OFT's enforcement policy where activity borders on being criminal, for instance when dealing with rogue traders such as scammers.

Table A: Quantification of impacts

Case	Estimated size of affected market ⁷	Relevant legislation	Estimated OFT costs	Estimated yearly reduction in ACD	← How the reduction in ACD is broken down			
					Consumers have lower costs /make better choices	Improved consumer confidence: Fewer deterred complaints	Deterrent effect on other businesses	Other benefits from better business conduct
Airline pricing	£7.4 billion	CMARs	£310,000	£131 million	100%			
Section 75	£11 billion	Consumer Credit Act	£1 million	£99 million	54%	46%		
MB Designs	£3 million ⁸	Sale of Goods Act Supply of Goods and Services Act UTCCRs	£520,000	£10.7 million			78%	22%
Ryanair	£950 million	UTCCRs	£360,000	£1.4 million		39%	48%	14%
BCA	£100 million	CMARs	£210,000	£876,000	100%			
Dabs	£200 million	UTCCRs Distance Selling Regulations	£13,000	£78,000		46%		54%
Total (£ 000s)			£2.4 million	£243 million	£185,336	£46,110	£9,004	£2,588

⁷ The figures presented for MB Designs, Ryanair, BCA and Dabs are estimates of yearly company turnover as these interventions were focused on the consumers of the individual companies in question. In contrast, the figures for airline pricing and Section 75 cases relate to the wider market reflecting the fact these interventions reach beyond an individual company. See our introduction section for more details on these estimates. Ryanair's latest year annual turnover was £2.5 billion but only a fraction of this will be UK passengers (we have assumed 38 per cent based on the 2008 annual report).

⁸ We estimate the value of the Scottish market for windows and doors at £462 million in 2007 (8.1 per cent of the UK market estimated on the basis that Scotland represents 8.1 per cent of UK GDP). We estimate a less than 1 per cent market share for MB Designs.

NOTE ON LEGAL ISSUES

This study is an independent quantitative assessment by London Economics of the economic effectiveness of six OFT enforcement interventions in markets. Although it has an economic purpose, a number of legal issues may be considered to arise in connection with the study itself and its subject matter.

Authorship

The authors of this report are London Economics (an independent economic consultancy). The work was commissioned by the OFT and this report of its findings is published by the OFT, and given the nature of the subject matter, the OFT is necessarily the source of most of the data on which it is based. However, the views expressed are, on all issues, those of London Economics not the OFT unless otherwise indicated.

The OFT's role as an enforcer includes monitoring compliance with consumer legalisation generally, and particularly with any undertakings given to it. It might well be likely to consider, as evidence, some of the same data that has been used for the purposes of this study. It is therefore important to make clear that such data has been looked at separately from and independently of the OFT's enforcement activity, for different purposes, and using wholly different methodology from that which would have been adopted by an enforcer.

Purpose

The OFT is a statutory body accountable to Parliament and HM Treasury for its use of public money. The OFT has a performance target agreed with HM Treasury of delivering direct financial benefits to consumers of at least five times its cost to the taxpayer. It has the function of informing the public about its work⁹ and is committed to demonstrating a high level of transparency in its work.¹⁰ It is also under a duty to review and report publicly on its exercise of its

⁹ Enterprise Act 2002 s.6

¹⁰ See www.oft.gov.uk/about/transparency

regulatory functions.¹¹ This study by London Economics is published by the OFT with the aim of meeting these duties and commitments.

This study seeks to advance understanding of OFT's use of its consumer enforcement powers. It presents and considers evidence arising from six case-studies relevant to the following issues:

- how far behaviour by businesses was, before the OFT intervened, causing sub-optimal economic outcomes for consumers, and how far it did so afterwards
- to what extent any change in outcomes for consumers can be attributed to OFT's interventions.

As a matter of law, the OFT's use of its consumer enforcement powers can be triggered only by reasonable suspicion that breaches of legal obligation have occurred. The mechanism of enforcement is purely legal. If the matter goes to court, there will be a determination as to whether any infringement has actually occurred, and if it has an order may be made prohibiting its continuance.¹² Note that most of the cases covered by this study were settled out of court, without any finding or admission as to breaches on the part of the businesses involved, so any contentions as to breaches of law that are mentioned in this study remain a matter of OFT's opinion, not settled law.¹³

¹¹ Regulatory Enforcement and Sanctions Act 2008 Part 4

¹² This is a simplified description which does not precisely reflect the nature of all of the OFT's consumer enforcement powers. In certain cases, an order can be sought to restrain anticipated breaches. The OFT also has certain non-injunctive powers, principally licensing functions under the Consumer Credit Act 1974, and the prosecution powers under the Consumer Protection from Unfair Trading Regulations 2008, which were not available at the time the interventions covered by this study were undertaken.

¹³ An interim court order was obtained by the OFT against MB Designs Ltd, but the case was ultimately settled without admission of liability on the part of the company. The case brought by the OFT in relation to s.75 of the Consumer Credit Act was finally determined in the OFT's favour in court, but was a case designed to clarify the law rather than restrain breaches of it.

However, the OFT's use of these legal tools is of necessity highly selective, and as a matter of policy cases are selected with the overall objective of making markets work well for consumers. For this reason, and in order to better meet its HM Treasury commitments, the OFT prioritises its work on the basis of likely measurable impact on consumers. Its aim in carrying out the interventions covered was, therefore, not just, and indeed not primarily, to stop breaches of law from occurring but to achieve improved outcomes for consumers.

Since there was both a legal and an economic dimension to the interventions covered by this study, it is important to clarify that this study is concerned with the economic dimension, and embodies an economic, not a legal analysis. It has three characteristics that an investigation of enforcement effectiveness from a purely legal point of view would not have:

- it looks at whether business behaviour meets the **policy objectives of OFT intervention**, not whether it complies with legal obligations
- it seeks to assess **impact on the welfare of consumers generally**, not outcomes for those consumers (if any) who encountered breaches of law
- it seeks to identify **sub-optimal consumer outcomes in a broad sense** – not only or mainly the kinds of detriment (if any) that would have been significant for legal purposes.

These characteristics have major implications for the approach to evidence taken in the study and the conclusions that can be drawn from it.

Factors affecting use of evidence

Consumer law may be said to be moving towards a less prescriptive and more principle-based approach, but it cannot prohibit all forms of sub-optimal economic behaviour. Any legal provision has to be narrowly defined to ensure certainty in its application, and is properly concerned not just with economics but also with ethical and social issues. Hence a study that inquired only into behaviour that demonstrably involved breaches of obligation in particular cases, even a large number of cases, would inevitably miss much of the economic impact of OFT's activity. For these reasons, this study is **not based on any investigation of whether breaches of law occurred**.

Similarly, the study is properly concerned to identify the full range of economic outcomes for consumers. It is therefore **not concerned with whether individuals experienced only loss or harm that might have been legally recoverable**. For instance, it considers how far consumers may have suffered annoyance and frustration as a result of business behaviour, and how much of their leisure time was taken. These are not normally matters taken into account by the courts in assessing liability to pay compensation.

Use of complaints and similar data

For all these reasons, the methodology of this study is quite different from that which would have been appropriate in the context of a legal analysis. In common with economic research generally, it is based on extrapolation from sample evidence treated according to stated assumptions.

The raw material of these studies includes complaint, survey and interview data. Had the study aimed to assess OFT effectiveness in tackling breaches of law it would have involved detailed enquiry into individual cases with careful cross-checking of facts alleged in the data. This would have been needed because, as already noted, OFT's interventions did not in general result in court findings - where they did not, the question of whether breaches actually took place is inherently contestable and potentially controversial. Apart from the cost and difficulty of such a detailed enquiry, it would have restricted and distorted the scope of the study. Accordingly, **no investigation has been made of the actual facts related to any individual complaint**.

Instead, the data has been processed on the assumption that the numbers and nature of complaints made by consumers are likely to be broadly consistent with their actual experience of sub-optimal outcomes. That is in line with the focus of the study on outcomes generally, not on breaches of law, and with the fact that consumers are better qualified to describe their experience than to judge whether the law has been broken. Similarly, what consumers say in interviews about their experience is assumed to be not, in general, imaginary or seriously exaggerated. Of course consumers sometimes complain when they have had no real problem, but equally (in fact, far more often) they fail to complain when they have experienced a real problem.

We believe these to be reasonable and indeed uncontroversial assumptions. But they are just assumptions, not findings. **From a legal point of view, the evidence we present does not prove that any individual experienced any harm.**¹⁴

Accordingly, we refer to conclusions regarding consumer detriment as 'assumed consumer detriment' or 'ACD'.

The above are assumptions that underlie the approach taken in this study. The technical detail of its methodology, including statistical and economic assumptions, is explained below. There are of course variations of approach as between the different component case-studies, and the methodology of each is covered in the relevant annex.

Conclusions to be drawn on legal issues

This is an economic study, and no conclusions can be drawn on legal issues arising in connection with the six case studies considered. In particular, it cannot be treated as embodying any finding or view of London Economics or a fortiori of the OFT as to

- whether any person has broken the law or any legal obligation (including the obligation to comply with undertakings given to the OFT)
- whether any consumers have, or could have, a claim for compensation in law against any persons named.

¹⁴ This is not to say that none of the evidence could in any circumstances be relied upon in enforcement proceedings. Reference may be made in such proceedings even to unverified complaints for certain purposes. We express no view on whether any of the evidence we rely on is capable of being so used – that is a matter purely for the OFT or other enforcement agencies.

2 INTRODUCTION

2.1 This report is organised as follows:

- In this chapter we provide a brief overview of the objectives of our evaluation. We then outline the six cases selected, as well as considering the evolving nature of OFT's consumer protection enforcement powers.
- In the following chapters we look at the methodological approach adopted across cases and key findings on effectiveness for the six selected OFT interventions.
- We finally conclude by considering what factors appear most important in determining the relative effectiveness of different interventions. We also make some suggestions for evaluating similar interventions in the future.

Objectives of the study

2.2 The OFT's mission is to make markets work well for consumers. This means acting to remove consumer detriment in the widest sense of outcomes that are less than optimal for consumers. Amongst the methods the OFT uses to achieve this goal is enforcement.¹⁵ Consumer protection law is an important part of the OFT's enforcement activities. In particular, where the OFT believes that consumers and other

¹⁵ The OFT has a range of tools at its disposal to make markets work well for consumers. In many cases, it will be appropriate to use a combination of these tools to address problems. These include preventative tools (such as the Consumer Codes Approval Scheme), diagnostic tools (including research and market studies) as well enforcement tools. For more details on the full range of tools available to the OFT, see www.offt.gov.uk/shared_offt/about_offt/ap09/ap09.pdf20

businesses are suffering harm, the OFT may use a combination of intervention tools to address the causes of the detriment.¹⁶

- 2.3 The principal aim of this study was to review the effectiveness of a sample of six consumer protection interventions, to assess and discuss the implications of previous approaches and to consider how to monitor and enhance performance in future interventions. This study is not concerned with whether particular traders committed breaches as a matter of law, or to identify loss or damages that could be claimed by individual consumers in court. Rather, it is an economic study that seeks, on the basis of extrapolation from different data sources, to measure intervention outcomes for consumers and the economy generally.
- 2.4 The cases selected for our analysis cover diverse types of consumer detriment with different intervention tools being used across cases. Where the term ‘detriment’ is used, it refers to detriment defined on the basis of stated assumptions coupled with data collected during the course of our research, for the purposes of economic measurement. To clarify that detriment is identified on the basis of assumptions appropriate to economic analysis, not legal analysis and cross-checking of contestable allegations, the term ‘Assumed Consumer Detriment’ or ACD is used at various points below.
- 2.5 A number of broad questions are addressed in each case study, namely:
1. What led the OFT to intervene and what was the initial level of ACD
 2. What were the consequences of the OFT intervention from the perspective of:
 - a. Businesses:

¹⁶ The statement of consumer protection enforcement principles elaborates further on the OFT’s approach and prioritisation processes (see www.offt.gov.uk/shared_offt/reports/consumer_protection/oft964.pdf)

- i. The targeted business
 - ii. Deterrent effect on non-targeted businesses
 - iii. Were there any unintended effects (either positive or negative)?
 - iv. Any burdens imposed by the intervention on other businesses
- b. Consumers:
- i. How have consumers benefited from the involvement of the OFT?
 - ii. What specific benefits can be quantified in monetary terms?
 - iii. Did the OFT's intervention reduce the ACD in each case?
 - iv. Did the actions of the OFT improve consumer awareness, confidence and behaviour?
3. What measures can be used to monitor success in future?
4. What was the impact of any publicity surrounding the intervention in terms of general deterrence and consumer confidence?

Overview of the six interventions

2.6 The six interventions selected for our analysis are summarised below.

Figure 2.1: Six case studies – summary

Case study	OFT contentions	Relevant legislation	Sources of ACD	Intervention tools
Airline pricing	advertised prices and first prices shown on websites do not include all compulsory charges	Control of Misleading Advertising Regulations (CMARs)	<ul style="list-style-type: none"> - Sub-optimal purchases - Time cost - Associated frustration 	Dialogue and settlement
MB Designs Double Glazing	inadequate quality of products and fitting of windows and similar	Sale of goods and services relation UTCCRs	<ul style="list-style-type: none"> - Goods not fit for purpose - Installation of goods not of satisfactory quality - redress lacking 	Court order and undertakings to the Court
BCA book club	advertising did not clearly set out membership obligations	CMARs	<ul style="list-style-type: none"> - Consumers unclear about membership obligations - Costs associated with making complaints returning unwanted books 	Dialogue and accepted undertakings
Dabs e-retailer of computers and accessories	unfavourable terms regarding returns and refunds	UTCCRs Distance Selling regulations	<ul style="list-style-type: none"> - High costs of making returns - Deterred from seeking redress 	Dialogue and accepted undertakings
Ryanair terms and conditions	unfavourable for passengers; not reflecting consumers' full rights under the relevant legislation	Unfair Terms in Consumer Contract Regulations (UTCCRs)	<ul style="list-style-type: none"> - Insufficient compensation (for cancellations, delays, denied boarding, and problems with lost or delayed baggage) - Costs of seeking redress - Deterred from seeking redress 	Dialogue and settlement
Section 75	lack of recognition of right of UK credit card holders to get compensation from the issuer in relation to purchases abroad	Consumer Credit Act	<ul style="list-style-type: none"> - Reduced use of credit cards abroad - Loss of protection for purchases made abroad - Deterred from seeking redress 	OFT launched test case and obtained favourable Court clarification

Airline pricing

- 2.7 The OFT had concerns about the practice by some airlines of quoting various unavoidable costs, such as taxes and surcharges, separately from the base fare on their websites and in advertisements. These costs were added to the price at a late stage in the booking process and, as a result, the actual price paid by consumers could be significantly higher than the headline price. The OFT challenged this practice under the Consumer Protection Act and the Control of Misleading Advertisements Regulations.
- 2.8 Thirteen airlines' websites were targeted by the intervention: Aer Lingus, BMI baby, EasyJet, Flybe, Flythomascook, Germanwings, Globespan, Jet2, Monarch, Ryanair, Sky Europe, Thomsonfly and Wizz Air. Beginning in February 2007, the OFT initiated actions which aimed to ensure that all compulsory costs were included in the headline prices of flights displayed on websites and in other media. While the majority of the thirteen airlines were quick to make the changes required, the last company made progress by February 2008.
- 2.9 We identified, for the purposes of this study, three sources of ACD prior to OFT's intervention:
- consumers fail to identify the best value when they purchase flights online
 - consumers spend a longer time searching each site or abandon searches when unavoidable costs are added at the end and
 - consumers suffer associated frustration.
- 2.10 The size of the online flight ticket booking market is estimated at £7.4 billion.

MB Designs

- 2.11 The case against the double glazing company, MB Designs Scotland (Limited) (MB Designs), involved what the OFT contended were breaches of obligations under the Sale of Goods Act 1979; the Supply of Goods

and Services Act 1982 and the Unfair Terms in Consumer Contract Regulation 1999. Such breaches may be enforced under the Enterprise Act 2002 provided that they harm the collective interests of consumers.

2.12 The OFT had the following main concerns:

- Goods supplied by MB Designs appeared to be, in cases brought to the OFT's attention, of an unsatisfactory quality not fit for purpose and/or did not correspond to the descriptions provided by MB Designs to the consumer.
- In cases drawn to the OFT's attention, MB Designs appeared to have carried out installation work without exercising the level of skill and care that could be expected of a reasonably competent installer of products supplied.
- MB Designs appeared to be relying on a contract term which was potentially unfair in that it allowed them to exclude liability for all statements which did not appear in the written contract made with consumers, and thus put the firm in a position to refuse to be bound by oral statements and promises made to consumers by its representatives.

2.13 Furthermore, from evidence before the OFT, it did not appear that consumers' complaints were being resolved satisfactorily by the company.

2.14 Negotiations between the OFT and MB Designs did not produce a resolution but the OFT obtained an interim enforcement order in June 2005 against MB Designs and its Directors. This order was the first of its kind in Scotland granted under the Enterprise Act 2002. In broad terms, it stated that MB Designs and its Directors should stop certain specified infringements of law that were held to be harmful to the collective interests of consumers, namely:

- using or relying on terms disclaiming responsibility for commitments not included in the written contract

- supplying products that were of unsatisfactory quality or unfit for purpose or which failed to correspond to their descriptions
- failing to exercise the skill and care to be expected of a reasonably competent installer of windows, doors and conservatories.

2.15 The case was settled with MB Designs and its Directors giving a formal undertaking to the Court of Session. The settlement made the main points of the interim enforcement order permanent.

2.16 The estimated turnover of MB Designs at the time of the intervention was £3 million per annum.¹⁷

Book Club Associates

2.17 Book Club Associates (BCA) is one of the few remaining book clubs in the UK that adheres to the traditional book club model. Typically this model attracts members with a heavily discounted introductory offer in return for a requirement to purchase a minimum number of books over a certain period of time and to buy monthly recommended books (the 'Editor's Choice'), unless specifically rejected each time.

2.18 The OFT considered that a number of the claims made in BCA's advertising were misleading under the Control of Misleading Advertising Regulations. Whilst BCA did not accept that their advertisements were misleading (and this was not determined as a matter of law in the courts) they gave undertakings to the OFT in July 2007 to provide clearer information in adverts about the obligations of consumers when joining BCA's book clubs.

2.19 We identified, for the purposes of this study, the following main sources of ACD prior to the OFT's intervention:

- consumers being unclear about the terms of their contract with BCA

¹⁷ We estimate the value of the Scottish market for windows and doors at £462 million in 2007 (8.1 per cent of the UK market estimated on the basis that Scotland represents 8.1 per cent of UK GDP). We estimate a less than 1 per cent market share for MB Designs.

- consumers paying for unwanted goods
- consumers spending time and money making complaints and seeking redress.

2.20 It is estimated that BCA clubs have more than one million members and an annual turnover in the order of £100 million.

Dabs

2.21 Dabs.com (Dabs) is an online IT retailer. The company has positioned itself as a low priced online retailer with a large product offering competing on price and product range with the high street retailers.

2.22 The OFT identified terms and conditions in Dabs' consumer contract that raised concerns under the Unfair Terms in Consumer Contracts Regulations and the Distance Selling Regulations. Following discussions with the OFT, Dabs agreed to delete or revise certain terms.

2.23 We identified, for the purposes of this study, the following sources of ACD prior to the OFT's intervention:

- some consumers were deterred from making a complaint and pursuing redress from the retailer
- of those who had sought redress from the retailer, some would find the process to be unduly costly and/or the outcome to be inadequate.

2.24 We estimate the yearly turnover of Dabs at £200 million.

Ryanair terms and conditions

2.25 The OFT had three main concerns in relation to Ryanair's contract terms:

2.26 The first issue concerned passengers' rights when flights are cancelled or delayed, or if they are denied boarding to a flight. The OFT considered

that Ryanair's terms did not reflect consumers' full rights under EU Regulation 261/2004.¹⁸

- 2.27 The second concerned Ryanair's liability for baggage claims. Ryanair's terms and conditions put conditions on how travellers should claim for compensation. The OFT considered that Ryanair's conditions on its limit of liability relieved the airline of liability to a greater extent than permitted by the Montreal Convention.¹⁹
- 2.28 Thirdly, Ryanair's terms excluded liability for damage or delay to non-standard baggage items. These items were carried on a 'limited release basis', which meant they were carried at the passenger's own risk.
- 2.29 After entering into dialogue with the OFT in 2004 regarding these three terms, Ryanair amended all three terms by the end of October 2006. As a result the exclusions of liability and baggage claim requirements were removed, and consumers' rights under the EU Regulation were amended.
- 2.30 We identified, for the purposes of this study, the following sources of ACD prior to OFT's intervention:
- consumers received inadequate compensation (for cancellations, delays, denied boarding, and problems with lost or delayed baggage)
 - consumers faced excessive costs when seeking redress (time spent, repeated contact required, restrictive procedures)
 - consumers were deterred from complaining and seeking redress.
- 2.31 The UK turnover of Ryanair is estimated at £950 million per annum.

¹⁸ This regulation establishes common rules on compensation and assistance to passengers in the event of denied boarding, cancellation and long delay of flights.

¹⁹ The Montreal Convention on the Unification of Certain Rules for International Carriage by Air was signed in 1999 by most European countries, the European Union and the United States of America. It covers, among other legal aspects, the air carrier liability for passenger's injuries and death and for baggage and cargo damages and delay.

Consumer Credit Act 1974 Section 75

- 2.32 Section 75 protects consumers who use a credit card to buy goods or services valued over £100 and up to £30,000. Creditors involved in a debtor-creditor-supplier agreement (credit advanced to buy goods and services from a linked supplier) are jointly and severally²⁰ liable with the supplier in the event of a breach of contract or misrepresentation.²¹ There is no requirement for the consumer to proceed first against the supplier.
- 2.33 The credit card companies however contended that Section 75 was not applicable to overseas transactions. The OFT sought a declaration to clarify the existing law. A series of judgments and appeals over a period of four years culminated with a 2007 final judgement in the House of Lords which found fully in favour of the OFT.
- 2.34 Despite their objections, most of the issuers had already operated a voluntary policy of meeting claims that would be valid under Section 75, although only up to the value of the credit extended²² on the transaction. The judgement therefore appeared to result in little immediate change in the behaviour of the major card issuers.
- 2.35 The main benefits of the intervention arose from clarification of a point of law and as a result consumers being better informed²³ and making

²⁰ Joint and several liability is a form of liability that is used in civil cases where two or more parties are found liable for damages. The winning plaintiff in such a case may collect the entire judgment from any one of the parties, or from any and all of the parties in various amounts until the judgment is paid in full. In other words, if any of the defendants do not have enough money or assets to pay an equal share of the award, the other defendants must make up the difference.

²¹ For example, in relation to a faulty item purchased abroad using a credit card, the liability of the credit card company is similar to the liability of the foreign seller.

²² In other words, an item may have been paid for only in part with a credit card. The credit card company would argue it had liability only up to the level of credit that was extended but the legal position is in fact that the liability is for the entire value and any consequential loss.

²³ According to the results of our consumer survey.

more use of their rights under S75. This occurred in three broad fashions:

- if a problem arose with a purchase, credit card users were able to deal with the credit card company rather than with a distant overseas supplier(s)
- as a result consumers were more likely to use credit cards than another form of payment and
- consumers were more confident about purchasing from abroad at cheaper prices.

2.36 We estimate that the ruling affected overseas transactions totalling about £11 billion per year.

The cases in context: OFT's evolving powers

2.37 Since the six interventions detailed above were undertaken the powers available to the OFT have changed, as has the OFT's approach to consumer protection.²⁴ The interventions featured within this report, therefore, should be viewed in the context of a number of changes in the regulatory landscape and other potential changes on the horizon that will confer stronger powers on the OFT. The impact of changes or proposed changes to the landscape were outside the scope of this study.

2.38 The OFT has a number of enforcement duties and a range of enforcement powers derived from consumer protection legislation.²⁵ In addition, Part 8 of the Enterprise Act 2002 gives the OFT the power to enforce a wide range of existing consumer protection legislation,

²⁴ www.oft.gov.uk/shared_of/reports/consumer_protection/oft964.pdf

²⁵ Notably: The Consumer Credit Act 2006; The Consumers, Estate Agents and Redress Act 2007; The Unfair Terms in Consumer Contracts Regulations 1999; The Consumer Protection (Distance Selling) Regulations 2000 as amended by the 2005 Regulations; The Consumer Protection from Unfair Trading Regulations 2008; and The Business Protection from Misleading Marketing Regulations 2008.

including provisions derived from European Directives and purely domestic legislation.

2.39 The OFT now has wider powers in the area of enforcement of consumer protection legislation. The Consumer Protection from Unfair Trading Regulations (CPRs)²⁶ came into force on 26 May 2008 and implement the Unfair Commercial Practices Directive (UCPD) which is designed to harmonise the legislation across the European Union preventing business practices that are unfair to consumers.

2.40 In addition, in 2008, Part 3 of the Regulatory Enforcement and Sanctions (RES) Act introduced a framework for new powers for regulators, to introduce more choice in how they enforce, ensuring that the action taken is proportionate to the offence and the harm caused to consumers. Under these new powers, a range of new civil sanctions including fixed monetary penalties, restoration orders, stop notices and enforcement undertakings can be set up by departments. The powers would only be available for criminal offences, which could cover certain breaches of the

²⁶ The CPRs consist of:

- A general duty not to trade unfairly by acting contrary to the requirements of professional diligence so as to distort the average consumer's decisions in relation to the product or service. This can be broadly understood as failing to act in accordance with acceptable trading practice a reasonable person would expect.
- Prohibitions of misleading and aggressive practices. Examples include withholding material information from consumers so as to impair their ability to make an informed choice, or coercing a consumer into making a decision.
- 31 specific listed practices that are considered to be unfair in all circumstances and are therefore, banned. Examples include falsely stating that a product will only be available for a very limited time and therefore depriving consumers of sufficient opportunity or time to make an informed choice. Other banned practices include, various prohibitions dealing with abuse of approval schemes, refusing to leave a consumer's home when asked to do so, and operating or promoting a pyramid scheme.

The Regulations are enforceable through the civil and criminal courts.

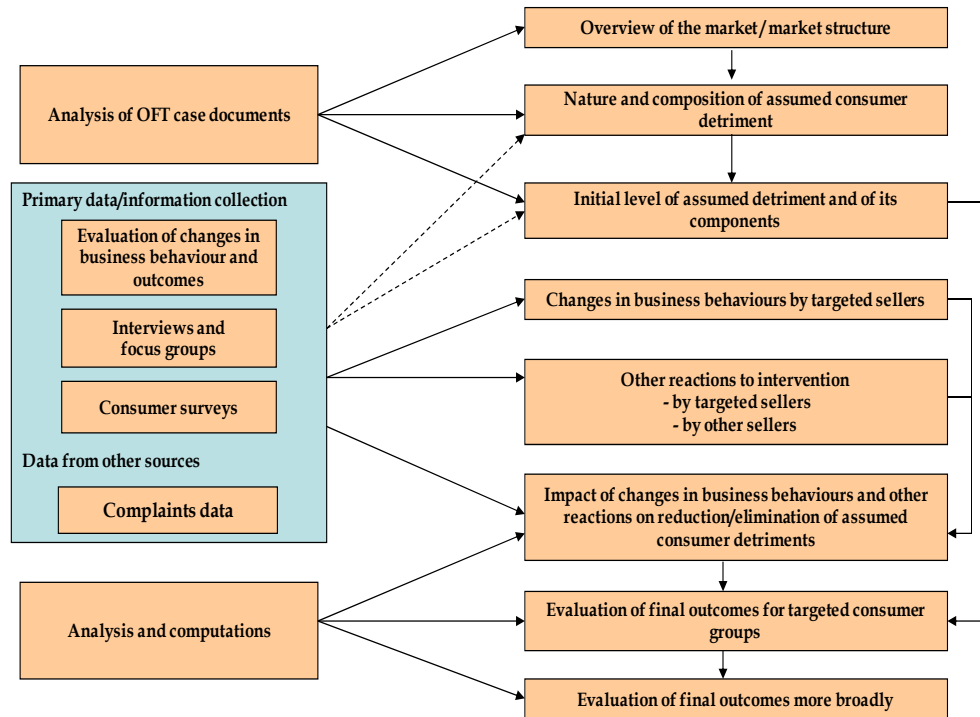
Consumer Credit Act, the Estate Agency Act, the Cartel offence in the Enterprise Act, the Business Protection from Misleading Marketing Regulations, and the CPRs.

- 2.41 In its White Paper – ‘A Better Deal for Consumers Delivering Real Help Now and Change for the Future’ – the Government proposes to launch a series of pilot projects to test the use of new powers to deliver compensation for consumers. Pilots are expected to start in Autumn 2010 and will allow the use of RES Act powers instead of criminal prosecution. These pilots will involve both the OFT and Trading Standards Services.
- 2.42 The discussion that we present in the remainder of this report is mostly based on the analysis of the six interventions, all of which took place before these new powers came into force. It is recognised that the OFT has now considerably more scope to act in similar cases.

3 METHODOLOGY

3.1 The case studies were developed in parallel and our approach to each case shared a number of common steps. A schematic overview of our methodological approach to each case study is illustrated in Figure 3.1.

Figure 3.1: Schematic overview of methodological approach



3.2 The figure above indicates how we approached each of the components of the case studies, with a particular focus on the information sources used.

3.3 We used independent analysis and different data sources in combination with information provided by the OFT in order to gain an understanding of the background to each intervention and of the initial sources of ACD.

3.4 This was followed by an assessment of the immediate economic impacts of the intervention firstly in terms of reactions by targeted businesses

and secondly in terms of the resulting effect on consumers. The sources of information used varied from case to case. In three cases we used consumer surveys that were sub-contracted to a specialist market research company (Ipsos MORI). In five of the cases we used aggregated complaints data, some from Consumer Direct or Trading Standards Offices and some from industry-specific consumer protection organisations. In four of the cases we used in-depth consumer interviews to gain a better understanding, from the consumers' perspective, of the changes that occurred as a consequence of OFT's interventions (working jointly with Ipsos MORI again). In all six cases we interviewed a combination of other industry-specialist representatives and businesses. This is summarised in Figure 3.2 below.

Figure 3.2: Typology of cases: Information sources

Case study	consumer surveys	complaints data	consumer interviews	stakeholder interviews	OFT case officers, case documents
Airline pricing	Yes	Yes, from other sources	No	Yes	Yes
MB Designs	No	Yes, from Trading Standards and Consumer Direct	Yes	Yes	Yes
BCA	No	Yes, from Consumer Direct	Yes	Yes	Yes
Dabs	No	Yes, from Consumer Direct	Yes	Yes	Yes
Ryanair terms and conditions	Yes	Yes, from other sources	Yes	Yes	Yes
Section 75	Yes	No	No	Yes	Yes

