

# **Business leadership in consumer protection**

A discussion document on self regulation and  
industry-led compliance

March 2009

OFT1058

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## Foreword

The Office of Fair Trading (OFT) is initiating a debate on the extent to which self regulation and industry-led compliance with consumer law can assist in making markets work well for consumers. The better regulation agenda has stimulated increasing interest across Government, regulators and business in the use of innovative approaches to achieving compliance, enforcing legislation and solving problems in markets. We want to move the debate on and consider how the tools of self regulation and industry-led compliance can best be used to advance the goal of consumer protection.

The OFT already leads the way with the Consumer Codes Approval Scheme (CCAS) and the relationships being developed with 'established means' to resolve breaches of the Consumer Protection from Unfair Trading Regulations. The latter has been the subject of a recent OFT consultation exercise<sup>1</sup>. In addition we worked with The Travel Association (ABTA) in 2007 on misleading pricing of holidays which resulted in ABTA requiring its members to address the issue or face action under their Code of Conduct.

We believe there are more opportunities to take this type of approach and potentially a wide variety of self regulatory bodies and initiatives within the consumer law sphere with whom we could work. We want to understand more about the factors which determine whether self regulation is successful or not and the principles which underpin the most successful examples.

However, we also recognise that self regulation carries risks. Not all initiatives are successful in delivering better consumer protection and, depending on how they are organised, they can potentially raise competition problems.

Like all government bodies, the OFT has to ensure that its limited resources are used efficiently. With this in mind we need to consider in what circumstances it is appropriate to work with, monitor and support self regulation and industry-led compliance and assess the benefits to be derived.

We want to engage with business, consumer and trade bodies, Local Authority Trading Standards Services, regulators, academics and other government

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<sup>1</sup> Compliance partnerships: An OFT consultation on developing the use of 'established means'. December 2008 - OFT1043con [www.offt.gov.uk/shared\\_offt/consultations/offt1043con.pdf](http://www.offt.gov.uk/shared_offt/consultations/offt1043con.pdf)

departments on all these issues to help us develop our thinking. We are issuing an economics paper to complement this discussion paper and will be hosting a conference in March 2009.

We are initiating this debate in respect of consumer issues – problems that would normally be tackled using powers under consumer legislation - since it is as an alternative to consumer enforcement that self regulation has traditionally had the biggest role to play and where we think there is scope for more to be done. Depending on the conclusions we reach, we may in due course look more widely to see if self regulation has a greater role to play in respect of our other responsibilities. We also recognise that the thinking that emerges from this work may be of interest to other bodies which will find the issues discussed relevant to their own work.

The documents relating to this consultation can be viewed and downloaded from the OFT's website, [www.offt.gov.uk](http://www.offt.gov.uk).

### **Responding to this discussion paper**

We welcome views on any issues raised by this document and in particular responses to the questions posed in Chapter 5. We seek comments from any interested parties and would ask respondents to supply a brief summary of the interests or organisations they represent, where appropriate.

We ask that any comments be submitted in writing **by 30 April 2009** to:

Discussion paper: Business Leadership in Consumer Protection  
Policy Group - 3C16  
Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
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EC4Y 8JX  
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Email: [kate.damania@oft.gsi.gov.uk](mailto:kate.damania@oft.gsi.gov.uk)

There is also an opportunity to attend a conference in Central London on 18 March 2009 to discuss these issues more widely with a range of interested stakeholders. If you would like to attend this conference, please register online at [www.coievents.co.uk/oftconference](http://www.coievents.co.uk/oftconference) or contact Kate Damania on the email address above.

## **Data use statement for responses**

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

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

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

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# 1 INTRODUCTION

## Purpose of this discussion paper

- 1.1 The mission of the OFT is to make markets work well for consumers. We believe that consumer welfare is optimised through vibrant competition in open, well functioning, efficient and productive markets.
- 1.2 The OFT can intervene to protect consumers through enforcement action or alternatively use a range of diagnostic, preventive and advocacy tools<sup>2</sup>. In addressing consumer problems, self regulation and industry-led compliance form an important part of our toolkit and help us to take a balanced and proportionate approach to making markets work well. When appropriate they can give our work greater reach than taking individual cases and produce a more successful outcome for the limited resources we have available.
- 1.3 In current circumstances, questions as to the proper place of regulation in the wider economy are the subject of much debate. We believe this is an opportune time to consider the role of properly structured self regulation and industry-led compliance in our consumer protection work and whether there is potential for it to be used more often as an alternative to action by enforcement authorities. Discussions with stakeholders have indicated there is an appetite for doing more and they would welcome the opportunity to contribute to the debate. The OFT has also initiated a discussion<sup>3</sup> about the way in which it will work with 'established means'<sup>4</sup> under the Consumer Protection from Unfair Trading Regulations 2008.

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<sup>2</sup> OFT Prioritisation Principles – October 2008

[www.offt.gov.uk/advice\\_and\\_resources/publications/corporate/general/oft953](http://www.offt.gov.uk/advice_and_resources/publications/corporate/general/oft953)

<sup>3</sup> Compliance partnerships: An OFT consultation on developing the use of 'established means'. December 2008. OFT1043con [www.offt.gov.uk/shared\\_offt/consultations/oft1043con.pdf](http://www.offt.gov.uk/shared_offt/consultations/oft1043con.pdf)

<sup>4</sup> 'Established means' is a term used in both the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and Business Protection from Misleading Marketing Regulations 2008

- 1.4 In this paper we will consider the breadth and diversity of self regulatory schemes and industry-led consumer law compliance initiatives. We will examine the OFT's current experience of working with such schemes and consider how we might extend the ways in which we work with industry to solve market problems. We want to learn more about the circumstances in which self regulation is most likely to be successful and the factors which underpin it. We think it is crucial that we also understand the economic principles behind self regulation and have therefore produced, in parallel with this discussion paper, a separate economics paper which examines what motivates industries of different types, size and maturity to form self regulation schemes. We encourage you to read that paper<sup>5</sup> in conjunction with this one.
- 1.5 We are aware that there have been a number of recent Government initiatives to influence behaviour in markets by encouraging manufacturers and producers to address issues collectively, in areas such as environmental standards, food safety, and health. Such arrangements<sup>6</sup> are not the subject of this discussion paper, the accompanying economics paper, or the forthcoming conference. The OFT's position is that it does not oppose such arrangements but they must comply with applicable competition law.

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(BPRs) which we interpret as referring to those systems and mechanisms outside the OFT which have the effect of encouraging the control of unfair commercial practices under the Regulations.

<sup>5</sup> The economics of self regulation in solving consumer quality issues – OFT1059  
[www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/economic-research/completed-research](http://www.offt.gov.uk/advice_and_resources/resource_base/economic-research/completed-research)

<sup>6</sup> Competition Law: issues which arise for business when the government or lobby groups seek to encourage businesses to work together to deliver desired policy outcomes.  
[www.berr.gov.uk/files/file45711.pdf](http://www.berr.gov.uk/files/file45711.pdf)

## Intended outcomes

- 1.6 We are holding a conference on 18 March 2009<sup>7</sup> to bring together a range of stakeholders with an interest in self regulation and industry-led compliance in consumer protection.
- 1.7 Having listened to stakeholder views at the conference and to comments received on this paper we will issue a policy statement on the OFT's approach to self regulation and industry-led compliance to provide clarity for business and consumers. This will address:
- the circumstances in which self regulation and industry-led compliance can offer potential solutions to market problems
  - the principles which underpin successful self regulation
  - the circumstances in which the OFT's consumer law compliance work is likely to be assisted by working with existing self regulatory and industry-led compliance initiatives
  - what type of support from the OFT might be appropriate in encouraging self regulatory and industry-led initiatives in achieving and raising standards and helping markets to work well.
- 1.8 We will produce internal guidance for OFT staff to ensure a consistent approach to the way we consider self regulation and industry-led compliance as a possible policy solution to market problems.

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<sup>7</sup> Business Leadership in Consumer Protection - An OFT conference on self regulation and industry-led compliance (Hilton London Tower Bridge, 18 March 2009). Registration at [www.coievents.co.uk/oftconference](http://www.coievents.co.uk/oftconference)

## 2 WHAT IS SELF REGULATION?

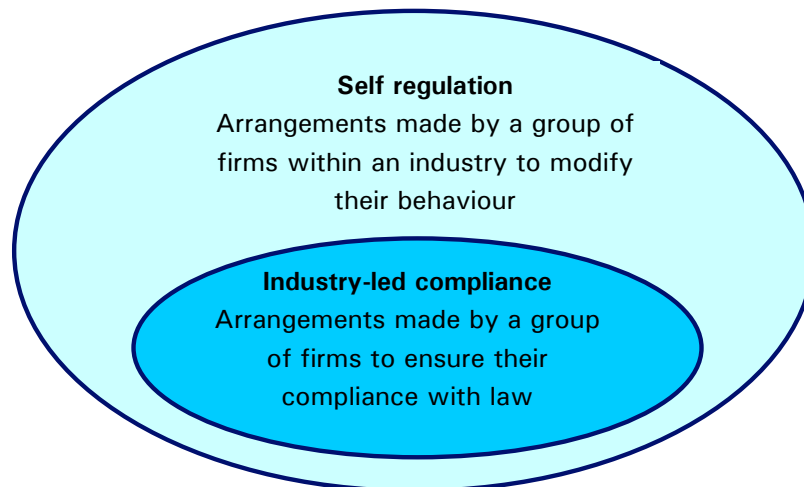
### Terminology

- 2.1 We should make clear our usage of key terms within this paper. When referring to **self regulation**<sup>8</sup> aimed at consumer protection we mean initiatives by groups of businesses<sup>9</sup> within an industry to modify their behaviour in order to improve quality standards, either to achieve compliance with consumer law or to go beyond what the law requires. This is usually achieved through a set of self regulatory rules (such as a code of practice), through voluntary standards, or accreditation.
- 2.2 When referring to **industry-led compliance** we mean initiatives by groups of businesses to ensure their compliance with consumer law and regulations. They can include arrangements such as the provision of guidance material and actions to address particular compliance problems.
- 2.3 As the diagram below illustrates, we see industry-led compliance with consumer law as being one type of self regulation, so for simplicity we use the term self regulation on its own in the rest of this document.

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<sup>8</sup> There is no universally agreed definition of self regulation. Definitions will vary and are often tailored to specific purposes or context. The Better Regulation Task Force described self regulation as rules that are developed and enforced by the people who will have to comply with them, usually in the form of codes of practice but also voluntary accreditation schemes or the adoption of a voluntary standard. Better Regulation Task Force: Imaginative Thinking for Better Regulation (2003)

<sup>9</sup> This paper does not focus on initiatives developed unilaterally by individual firms to improve customer service. These may involve creating rights for consumers which go beyond the statutory minimum.



## A solution to quality problems

2.4 Self regulation may be particularly useful as a tool for solving problems arising from poor quality. The accompanying economics paper<sup>10</sup> defines quality broadly to include not just the features of the physical product or service being immediately provided but also the customer service given, the information provided to the consumer and the after sales care. It therefore covers most problems faced by consumers that come under the OFT's remit. These quality issues are important to consumers when they make decisions about which goods and services to buy and how much to pay for them. Sometimes consumers find it difficult to judge what is being offered by suppliers, particularly when an important aspect of the good or service is not apparent until after the purchase or is never revealed. This includes situations where it is difficult for consumers to be sure that the business will stay in the market long enough to deliver on their promises.

2.5 Self regulation can help to remove such problems by offering better quality signals (such as standard setting through codes of practice), by reducing incentives to cheat on quality, or by reducing consumers' need

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<sup>10</sup> 'The economics of self regulation in solving consumer quality issues' March 2009 OFT1059 – [www.of.gov.uk/advice\\_and\\_resources/resource\\_base/economic-research/completed-research](http://www.of.gov.uk/advice_and_resources/resource_base/economic-research/completed-research)

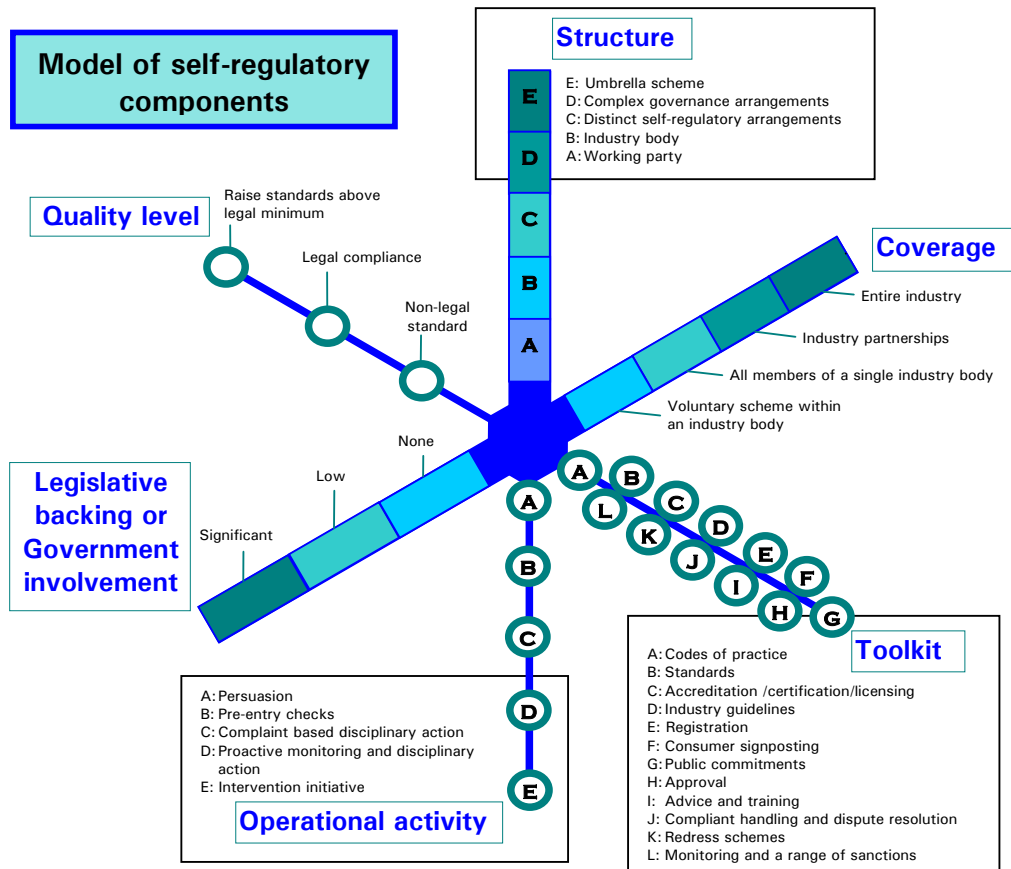
to observe quality by monitoring it for them. It can often perform these roles well because it can go beyond what is legally required, tailor rules and guidance to specific industry problems and create efficiencies through shared costs.

## **The range of self regulation**

- 2.6 There is a wide range of self regulatory arrangements to be found across all sectors of the UK economy. The landscape is extremely diverse, reflecting the way in which solutions have been developed over time in response to emerging issues in particular markets. The motivations for creating self regulatory initiatives are equally varied - some are a direct response to the threat of statutory regulation while others are totally voluntary initiatives from industry to enhance reputation and consumer confidence and thereby increase profits. Common to all such arrangements is that they are, to some degree, developed and administered by the businesses which will be governed by them and are, at least in some part, driven by a voluntary self interest from the businesses.
- 2.7 The diversity of initiatives reflects the variations of quality problems they are trying to address. Different markets require different approaches to address their own unique problems. The array of different types of initiative is a major strength of self regulatory solutions. They are able to utilise specialist knowledge within an industry to create tailor-made solutions.
- 2.8 This diversity means that self regulation cannot easily be categorised. Attempts to do so have tended to place schemes on a single dimension, such as the degree of government involvement – a spectrum which ranges from 'pure' self regulation where the industry acts independently of government and legislation through to 'co-regulation' where there is legislative oversight or backing. We acknowledge those features but have taken a multi-dimensional approach which reflects the many different aspects of what self regulation does, how it is organised, and how it functions. Even when schemes have common features they rarely

display them to the same degree because of the differing nature of markets and the problems they face.

2.9 Our model below serves two functions. First it attempts to capture the main dimensions of variation, and secondly it is a tool that can be used to map the characteristics of each actual scheme. An example of its use to describe an actual scheme is given in Annexe B.

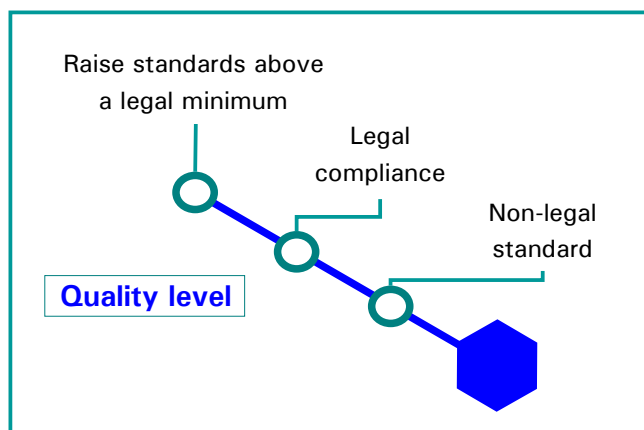


2.10 Each branch on the model represents a different component of a self regulatory scheme or initiative. When considering the **structure** of a scheme, its **coverage**, and whether or not it is underpinned by **legislation** or has some form of **government involvement**, the particular feature relevant to that scheme is represented by a single rectangular block at a single fixed point somewhere along the branch. This is because only one feature can apply to a scheme at any given time. By contrast a scheme

may attempt to achieve more than one **quality level**, include a selection of tools forming its **toolkit**, and undertake a variety of types of **operational activity**. These features are represented by circles on the model and multiple circles may be highlighted to reflect the fact that more than one feature may apply.

- 2.11 One advantage of this model is that it recognises that the components of self regulation schemes are not necessarily correlated. For example, when comparing two self regulatory initiatives, we might see that they both utilise codes of practice and accreditation but share no other characteristics - one involves participation of a small segment of an industry and has significant government backing, while the other covers the entire industry and has no state involvement.

### *Quality level*



- 2.12 Self regulation is used as a way of addressing broad problems associated with quality and although individual initiatives may have different goals, all in some way attempt to regulate behaviour of businesses through rules which set some sort of quality level. Our model identifies three quality levels, but in some cases a single scheme may include a variety of rules which may be at differing quality levels depending on the issues the scheme is trying to address.

### *Non-legal quality standards*

- 2.13 Self regulation can tackle issues of quality that are not defined in law. Particularly as new industries, technologies or trading practices develop a legal vacuum may exist and self regulatory rules can be used to define standards.
- 2.14 Self regulation can also give definition to issues which cause concern for consumers but are not focused on the fairness of transactions. For example, the Advertising Standards Authority (ASA) polices advertising through its advertising codes. The codes supplement the law and fill gaps where the law does not reach - for instance they ensure that advertisements are tasteful, decent and contain measures which display a social responsibility, such as imposing time limits on when advertisements can be aired.

### *Legal compliance*

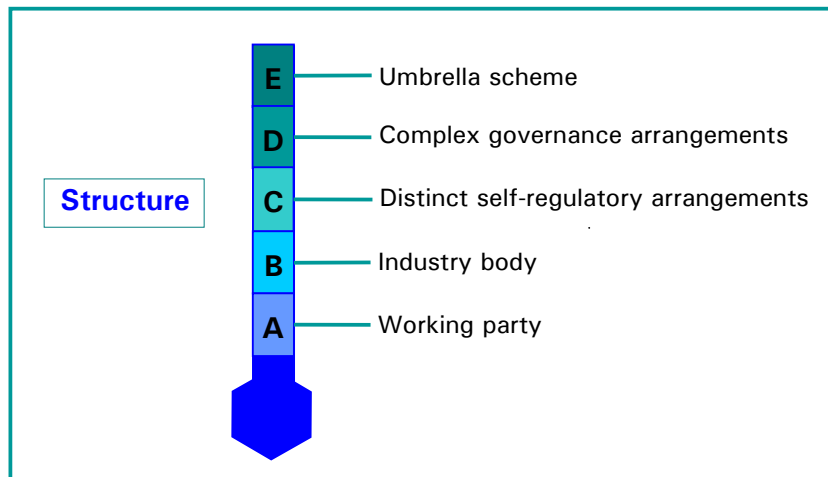
- 2.15 Most initiatives aim to achieve compliance with legal obligations thereby ensuring a minimum quality standard in the market. This may relate to compliance with general consumer protection legislation, such as the Consumer Protection from Unfair Trading Regulations (CPRs).
- 2.16 It can also relate to sector specific legal rules, for example, requirements for only qualified personnel or those deemed to meet fitness criteria being permitted to undertake certain work to safeguard consumer safety or for wider public interest reasons. In legal services, for example, where legislation reserves advocacy and litigation to those who are appropriately qualified, legal professional bodies qualify and register their members, ensuring compliance with the legal requirements.

### *Raise standards*

- 2.17 Initiatives often aim to raise standards above those required by law. Higher quality standards than the legal minimum can improve consumer confidence in a market and provide a reputational advantage to businesses that agree to be bound by a higher quality standard.

2.18 The OFT's CCAS, for instance, is committed to ensuring codes offer higher standards than are required by law. The Direct Selling Association (DSA) code, which is approved under the CCAS, provides customers with a 14 day cooling off period, when only 7 days is required in law. Typically these higher standards are focused on business practices that have been linked with consumer detriment in the particular sector, but in addition the scheme requires legal compliance in all other areas of the customer experience.

### *Structure*



2.19 All forms of self regulation have an organisational structure which determines who in the industry is subject to the rules and how decisions are made. There is wide variation in structure and governance. In some cases existing bodies have chosen to adopt a self regulatory role, while in others new organisations have been built from scratch.

### *Working party*

2.20 A simple form of self regulation is demonstrated when industry working parties, including representatives from single businesses or from industry bodies, meet to explore and identify solutions to problems in a market. For example, the Payments Systems Task Force, chaired by the OFT, was set up as a working party to consider problems with the complex payment systems used in the banking industry affecting both business

and consumers, and culminated in the establishment of the Payments Council.<sup>11</sup>

*Industry body*

- 2.21 Self regulatory activities are often developed within an existing industry body such as a trade association. For example, the British Association of Removers has its own code of practice (approved under the CCAS) which it uses to ensure its members maintain high standards of customer service.

*Distinct self regulatory body*

- 2.22 PhoneyPayPlus (formally ICSTIS) is an example of a body set up specifically for the self regulatory purposes. Its success led to the body gaining official status as an agency of the Office of Communications (Ofcom). PhoneyPayPlus is now responsible for the day to day regulation of premium rate services (those goods and services that are bought by charging the cost to a phone bill or pre-pay phone account) under the direction of Ofcom.

*Complex governance arrangements*

- 2.23 In order to ensure there are the appropriate safeguards to reduce the risk of conflicts of interests adversely impacting on the effectiveness of self regulation, more complex governance arrangements are sometimes adopted which clearly separate the various functions of self regulation. The work of the ASA<sup>12</sup> and the Committee of Advertising Practice (CAP) is an example. The two bodies work together with specific responsibilities for the policing of advertisements, sales promotions and direct marketing in the UK, ensuring greater independence and accountability for the advertising industry.

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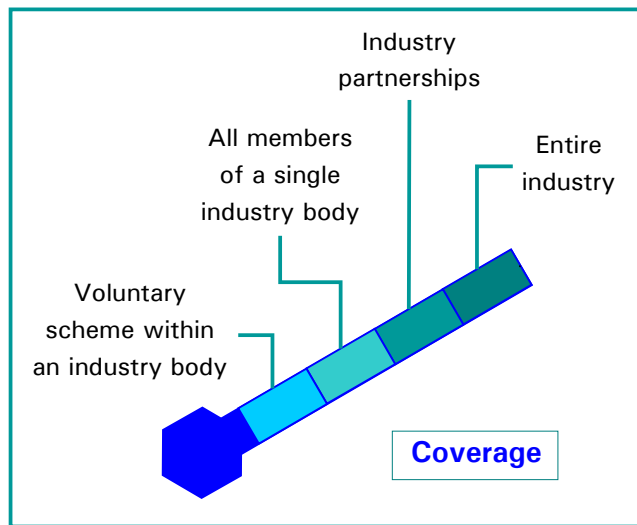
<sup>11</sup> See example box on the Payments Council at paragraph 4.7.

<sup>12</sup> See example box at paragraph 3.10

### *Umbrella scheme*

2.24 Finally, there are a number of 'umbrella' schemes that sit above existing self regulatory arrangements with the aims of encouraging consistency, amplifying the benefits that the individual initiatives offer and achieving economies of scale. They may offer some form of approval mechanism with a badge or logo which allows consumers to make judgements about quality standards. For example, the CCAS was set up by the OFT and gives approval to the consumer codes of practice of self regulatory bodies that meet demanding criteria and provide proof of operational effectiveness. Another government-endorsed example is TrustMark, which approves self regulatory schemes operated by trade associations and independent certification organisations in the home repair, maintenance and improvement sector.

### *Coverage*



2.25 The coverage of self regulatory initiatives can run from voluntary examples which cover only a small number of businesses to schemes that are mandatory throughout an entire sector.

*Voluntary scheme within an industry body*

- 2.26 Some trade associations or other types of industry bodies run or are associated with particular self regulatory initiatives and work to persuade their members to sign up to these initiatives in return for specific and tangible benefits, but do not make participation in the self regulatory element a condition of membership. This can act as a way of encouraging quality improvements without potentially excluding smaller businesses from the 'parent' industry body. It therefore allows individual member firms to retain choice over how they can get their message about quality out to customers. For example, some members of the Fenestration Self-Assessment Scheme (FENSA) which was set up by the Glass and Glazing Federation apply to become registered with TrustMark, though it is not compulsory for all FENSA members to do so.

*All members of a single industry body*

- 2.27 In other instances a trade association will require all of its members to agree to be bound by any self regulatory rules as a condition of membership. This allows a trade association to actively mark its members apart from other businesses which have not adopted the self regulatory rules, particularly where there are significant examples of very low quality in a market. For example, all members of the Debt Managers Standards Association are required to be bound by its code of practice, which has achieved approval under the CCAS.

*Industry partnerships*

- 2.28 Taking this one stage further a number of different industry groups may come together to agree to an overarching form of voluntary self regulation which aims to expand its membership to cover a large segment of the entire market. For example, a car servicing and repair code has been developed by the Sherpa Code Working Group which was established in 2005 at the request of the Retail Motor Strategy Group to develop a sector-specific code. Motor Codes Ltd has since been established to co-ordinate and to operate the process. The Retail Motor Strategy Group is a senior level group of 25 retail motor industry

representatives, facilitated by the Department for Business Enterprise and Regulatory Reform, whose membership includes consumer groups, large independent retailers, vehicle manufacturers, franchised dealer groups and trade associations.

*Entire industry*

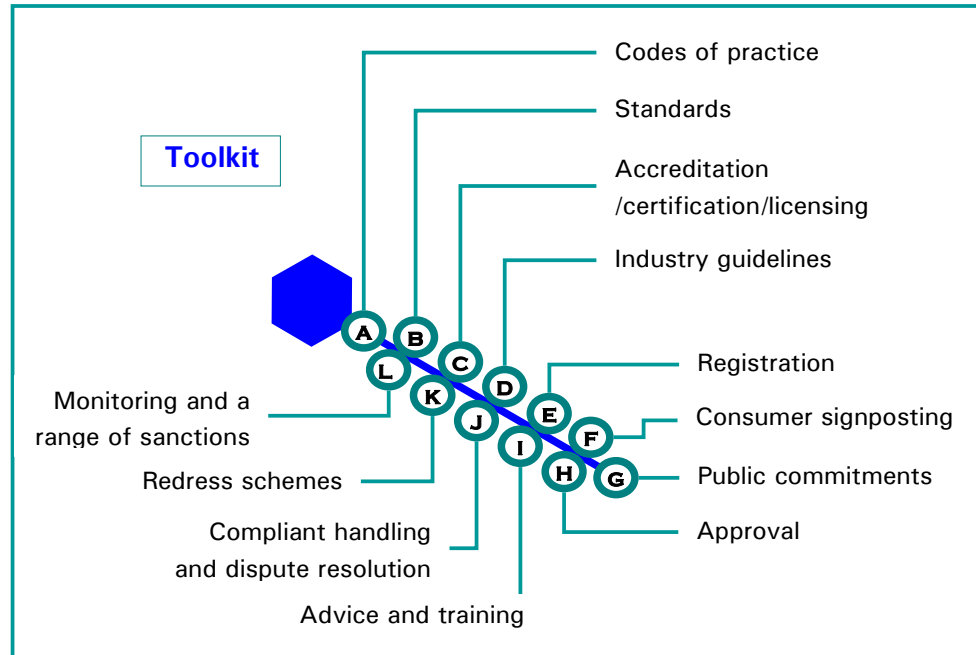
- 2.29 Some self regulatory schemes cover an entire market and this means that membership and compliance become in effect mandatory.
- 2.30 Legislative backing sometimes guarantees that rules can be applied to all traders within a sector. In such circumstances it is increasingly important to consider the potential anti-competitive effects<sup>13</sup>. The arrangements for regulation of professions are to a large extent industry-led as they are conducted by industry bodies (self regulatory) which have significant control over the rules. We include such bodies in our wider definition of self regulation despite the fact that their roles and responsibilities are underpinned by legislation. For example, the Law Society is the professional association of solicitors. Separate bodies within the Law Society deal with regulation of solicitors, for instance the issuing of practicing certificates, and deal with complaints and disciplinary matters. The powers and duties of the Law Society and the independent bodies within it are derived from the Solicitors Act 1974 and the Legal Services Act 2007.
- 2.31 However in some instances entire industry coverage can be achieved through more collaborative arrangements where there is a genuine incentive across the industry to affect change. For example, the ASA aims to stop misleading, harmful or offensive advertising and ensure sales promotions are run fairly. The ASA investigates and adjudicates on UK wide advertisements and does not restrict its consideration to advertisements made by or through membership organisations. However the ASA has no powers to enforce their rulings in law and instead where

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<sup>13</sup> More detail on the risks of self regulation can be found in chapter 4. See Anti-competitive practices 4.25

breaches of ASA rules also fall foul of consumer legislation such breaches can be enforced by the OFT.

### *Toolkit*



2.32 All forms of self regulation use various tools to effect change and there are overlaps with techniques used for statutory regulation. While the tools used vary considerably across the schemes we have observed they can be broadly split into the tools which define a level of quality, tools which make quality more observable and tools designed to resolve problems where rules on quality are not followed – both to identify and modify the behaviour of a business and to resolve a consumer's problem.

#### *Tools which define a level of quality*

- **Codes of practice or codes of conduct:** These outline the expectations which are placed on businesses and can be tailored to meet the needs of a particular industry and tackle common issues which cause problems for customers. Codes are typically linked to membership of a self regulatory body, although the extent to which compliance is made mandatory can vary. Where a code does not

carry with it an expectation of compliance and a mechanism to actively encourage this, it may in effect be closer to best practice guidelines.

- **Standards:** These are technical specifications or other precise criteria designed to be used consistently as a rule. Such standards are often reflected in other tools, such as codes of practice, but can also stand alone.
- **Accreditation, certification or licensing:** A self regulatory scheme may adopt its own form of accreditation, certification or licensing which consider the fitness of a trader to carry out certain work. Such tools rely on assessment to confirm that criteria have been met, ensuring that a minimum standard can be expected within a scheme. Accreditation can be voluntary and used as a way of signalling quality of providers, or compulsory, in which case it is needed for a business to undertake certain functions, so in effect the scheme controls market entry.<sup>14</sup>
- **Industry guidelines:** Guidelines provided by an industry body can address compliance with consumer law, identify unacceptable practices or encourage best practice in the market. These may be in the form of guidance documents. They can support a full code of practice or standards documentation, or may stand independently.

#### *Tools which make quality more observable*

- **Registration:** Registration with a scheme will be based simply on sign up or completion of some sort of accreditation, whether this is the scheme's own accreditation or an external form such as a standard qualification. Through the maintenance of a register, it is possible for schemes to bring together and represent those who have taken the necessary steps and have committed to a given standard. Registration is often used by professional bodies and is needed for

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<sup>14</sup> [www.ofst.gov.uk/advice\\_and\\_resources/publications/guidance/competition-act/ofst408](http://www.ofst.gov.uk/advice_and_resources/publications/guidance/competition-act/ofst408)

individuals to practice. The self regulatory body therefore controls who can practice in the market and such arrangements are inherently vulnerable to competition concerns.

- **Consumer signposting:** This takes the form of logos, membership displays and other 'branding' that give reassurance to consumers of quality, alongside information and marketing arrangements such as on-line search tools or more generic consumer advice to allow consumers to identify appropriate businesses.
- **Public commitments:** To improve transparency and improve consumer awareness of the benefit of buying from firms signed up to a self regulatory scheme, public commitments can be made demonstrating the adherence to certain quality promises. This can be as simple as ensuring a code of practice is publicly available, but can also include specifically designed consumer facing material.
- **Approval:** Types of recognition or approval can be given to self regulatory schemes by government departments or other official bodies which aim to reassure consumers of the validity of self regulatory promises.

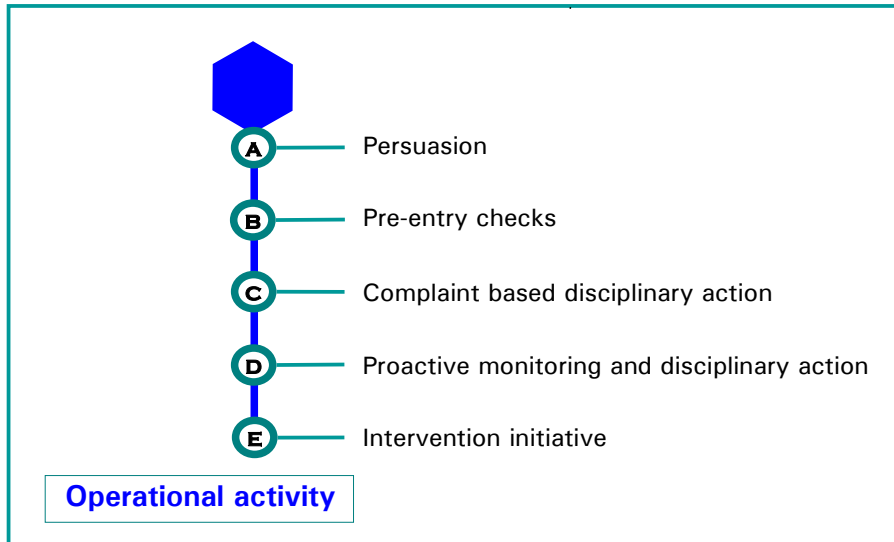
*Tools designed to resolve problems where rules on quality are not followed*

- **Advice and training:** In order to ensure traders stick to the rules of quality, a self regulatory scheme may decide to offer additional support. In addition to generic guidance supporting the scheme, advice or training on adhering to the rules can be given on particular points as compliance issues arise.
- **Complaint handling and dispute resolution:** Self-regulators may deal directly with complaints from consumers as a way of giving both added reassurance and credibility to the scheme. In some instances dispute resolution may be sub-contracted out to a more specialised body.

- **Redress schemes:** These are a means of ensuring that when things do go wrong the injured party can claim redress without needing to apply to the courts. The scope of the schemes can be very wide and need not necessarily cover only breaches of the law but also, for example, customer service commitments given in a code of practice.
- **Monitoring and a range of sanctions:** It is usually important to have some tools to test compliance and to give leverage in encouraging compliance. Monitoring may take the form of proactive testing to see if firms are complying with the rules of a scheme or can be based on collecting and analysing complaints. Sanctions allow self-regulators to ensure that their rules are meaningful. They can range from reprimands and 'naming and shaming' through to fines and on to the ultimate sanction of expulsion from a scheme, and can be chosen to meet the specific circumstances of the particular industry.

2.33 As an example to demonstrate how self regulatory schemes use these tools, it is helpful to list those generally deployed by codes covered by the OFT CCAS. The level of quality is defined using codes of practice which set customer service standards, but does not specifically require the use of individual technical standards, accreditation or guidelines. The CCAS makes quality more observable by consumer signposting (via the OFT Approved code logo and its supporting web search facility), by the public commitment of participating businesses to abide by the code, and through OFT's public endorsement (by ultimately approving the code). The CCAS resolves problems if rules are not followed by encouraging the trade body to provide advice and training to its business members, by requiring the code to have in place complaint handling, dispute resolution and redress procedures. It also requires the trade body to employ effective monitoring procedures and to have in place an appropriate range of sanctions. The use of these tools is also depicted on the model of the CCAS self regulatory components shown in Annexe B.

## *Operational activity*



- 2.34 Self regulatory schemes have different ways of achieving their aims. All create rules and some sort of operational activity designed to encourage the modification of behaviour.

### *Persuasion*

- 2.35 Some trade bodies take a light-touch approach, working mainly through persuasion and by selling the benefits of good practice to their members.

### *Pre-entry checks*

- 2.36 Checks may be carried out before a business joins up to ensure they meet minimum standards.

### *Complaint based disciplinary action*

- 2.37 Others may choose to monitor complaints which they will then investigate and which can lead to disciplinary action.

### *Proactive monitoring and disciplinary action*

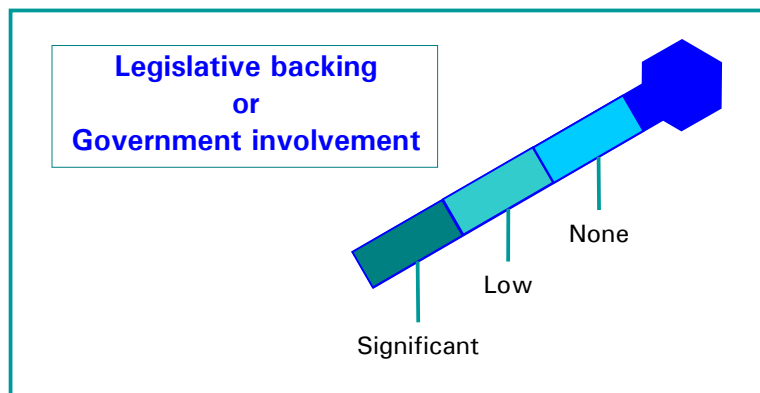
- 2.38 Alternatively, more pro-active action can be taken to check traders are living up to their commitments. This can be through random sampling or

intelligence based investigation and can utilise techniques such as mystery shopping or customer survey analysis. Where problems are found this again can lead to disciplinary action.

#### *Intervention initiative*

- 2.39 Finally, self regulation may involve a more ad-hoc intervention initiative based on a particular issue that erupts in a market, which has the potential to affect change.
- 2.40 Many bodies use a mixture of these techniques. For example, ABTA work primarily through persuasion (encouraging good practice and supporting their members in adherence to their code of practice) and by pre-entry checks which ensure the financial health of members to carry out certain activities. However they also will take enforcement action where there are problematic breaches of their code of practice. In contrast the ASA focuses on complaint based enforcement and this is backed up by persuasion which builds on their enforcement activity and adjudication decisions.

#### *Direct legislative backing or government involvement*



- 2.41 Self regulation commonly occurs because a group of businesses in a particular sector decide there are commercial or reputational benefits in creating a scheme. In many instances there is no legislative backing or government involvement. However in some cases this can add

legitimacy to an initiative or can help increase the benefits to be gained by strengthening the rules.

*None (no direct legislative backing or government involvement)*

- 2.42 There are many examples where self regulation occurs through a desire of businesses to work together without government involvement or the threat of legislation. For example, the Direct Marketing Association's code of practice which sets standards of ethical conduct and best practice and covers all forms of direct marketing. Although the code contains elements that are in line with responsibilities under existing consumer protection legislation, there is no legal requirement for such a code.

*Low (only low levels of direct legislative backing or government involvement)*

- 2.43 There are other schemes that are created with varying levels of involvement or support from government (either central or local) which can range from government simply encouraging development of an initiative through to formal recognition by way of approval or development of working protocols. This reflects a growing appreciation in government in recent years of the benefits of working with industry to tackle policy or enforcement issues. For example, the Vehicle Builders and Repairers Association Ltd code has gained approval under the OFT's CCAS and as such has OFT recognition. The Financial Services Authority also gives a form of recognition through its process of conferring the status of 'confirmed industry guidance' on guidance produced by industry which meets its requirements. As a result the Financial Services Authority agrees not to take action against behaviour that is in line with the confirmed guidance<sup>15</sup>.

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<sup>15</sup> [www.fsa.gov.uk/Pages/Library/Other\\_publications/industry\\_guidance/index.shtml](http://www.fsa.gov.uk/Pages/Library/Other_publications/industry_guidance/index.shtml)

*Significant (significant direct legislative backing or government involvement)*

- 2.44 Sometimes the government may decide that statutory underpinning is required to support a scheme, perhaps where previous self regulation has been shown to have benefits but needs enforcement or disciplinary measures to meet its aims, or where its coverage needs to be widened. In 2008, for example, estate agents were required for the first time to join a consumer redress scheme. Previously a majority of estate agents belonged to a voluntary scheme, but a substantial minority did not. The new law<sup>16</sup> left the redress arrangements in the hands of non-statutory bodies but forced estate agents to join one of them, with the effect that consumers in this sector always have access to an ombudsman. Minimum standards<sup>17</sup> for the ombudsman schemes are set by an OFT approval scheme and to date, two schemes have been approved<sup>18</sup>.
- 2.45 In other circumstances the success of a voluntary self regulatory body makes it a good candidate to take on a broader role and administer statutory regulation. For example, although the bulk of the self regulatory activity of the ASA evolved over time without legislative backing, its success in administering self regulation for printed advertising material led to it being contracted by the broadcast regulator, Ofcom, to write and enforce the codes of practice that govern TV and radio advertising.

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<sup>16</sup> The Consumers, Estate Agents and Redress Act 2007 (CEARA).

<sup>17</sup> Criteria for OFT approval of estate agents redress schemes - [www.offt.gov.uk/shared\\_offt/business\\_leaflets/general/oft919.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/general/oft919.pdf)

<sup>18</sup> Schemes currently approved by the OFT under the CEARA are the Ombudsman for Estate Agents and the Surveyors Ombudsman Service. [www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/EARS/](http://www.offt.gov.uk/advice_and_resources/resource_base/EARS/)

### **3 THE OFT'S EXPERIENCE OF WORKING WITH SELF REGULATION**

- 3.1 The OFT has experience of encouraging, supporting and working with industry bodies through self regulation to achieve compliance with consumer legislation and improve standards in markets. This chapter describes our work on consumer codes of practice, compliance partnerships, local authority schemes, market studies recommendations, and guidance for business.

#### **Consumer codes of practice**

- 3.2 The OFT has been involved in encouraging consumer codes of practice since its conception. The OFT was set up under the Fair Trading Act 1973<sup>19</sup> (now mostly repealed and replaced). Section 124(3) of that Act gave the OFT a specific duty to encourage trade and professional associations to prepare, and disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers. In fact, the OFT actually went significantly beyond that obligation. Formal OFT support was given to 42 codes which we hoped would deliver real benefits to consumers.
- 3.3 However, over time it became increasingly apparent that many of the codes of practice supported by the OFT under the Fair Trading Act were not delivering the benefits envisaged. Consumer awareness was sometimes very low, compliance was patchy, and some code sponsors seemed reluctant to impose meaningful penalties when things went wrong. In many areas complaint levels continued to be high. Traders were also concerned that their adherence to a code was not widely publicised and that costs of adherence put them at a competitive disadvantage. There was no effective means of distinguishing between effective codes and those primarily there for window dressing, nor any

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<sup>19</sup> Most of the OFT's powers under the Fair Trading Act 1973 were replaced with the commencement of the Enterprise Act 2002 on 1 April and 20 June 2003

incentive to take on the ideas of interested parties (such as consumer bodies) in designing and enforcing the codes.

- 3.4 The Government, in its 1999 Consumer White Paper *Modern Markets: Confident Consumers*, proposed a new approach to self regulation to address these issues and to encourage more rigorous and effective consumer codes. From 1 April 2003 the OFT was granted powers under the Enterprise Act 2002 to set up a new process of approving strong consumer codes.
- 3.5 The current CCAS was developed and the first code was approved in 2004. The main aim of the CCAS is to give official approval to voluntary consumer codes of practice which meet core criteria set by the OFT. The code must be administered by a code sponsor which, unlike the previous system of OFT formal support, includes both trade associations and also now other trade bodies too. For example, a consumer code operated by Robert Bosch Ltd in respect of its Bosch Car Service network of independent garages has been approved under the scheme. The CCAS requirement is that the trade body must be capable of influencing and raising standards in its sector and the code itself must tackle consumer issues as appropriate to the sector, provide appropriate consumer redress mechanisms and commit the businesses to offering a higher level of customer service than is required in law. Participation in the scheme involves some time and resources,<sup>20</sup> but the incentive for the businesses involved is the ability to distinguish themselves from other non-participating businesses in their sector. Evaluation of the CCAS to date shows that over half of current members of an OFT approved code believe that the benefits outweigh the costs and only three per cent said the burden was greater than the value added.
- 3.6 Businesses operating under an OFT approved code are licensed to use and display the OFT Approved code logo which provides consumers with a guarantee that the code has been rigorously checked and evaluated to

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<sup>20</sup> Review of the impact on business of the Consumer Codes Approval Scheme – October 2006. [www.offt.gov.uk/advice\\_and\\_resources/publications/reports/consumer-protection/oft870](http://www.offt.gov.uk/advice_and_resources/publications/reports/consumer-protection/oft870)

ensure that it works in practice and delivers on its promises. The ability to distinguish themselves by use of the OFT Approved code logo provides a marketing tool for participating business, helping them to attract and retain customers. While these codes do not directly lead to rogue traders being penalised or removed from the market, they can help to marginalise them by empowering consumers to avoid them.

- 3.7 The CCAS currently has eight approved codes<sup>21</sup> in the following sectors – new car sales, vehicle repairs and servicing, direct selling, estate agency, carpets, domestic removals and debt management. Six more are working towards approval, and a number of others have submitted applications.
- 3.8 Evaluation<sup>22</sup> to date shows that the trade bodies operating codes under the CCAS are positive that their codes deliver the desired effects – both in improving customer service and enhancing conditions for business. Consumers can expect a better approach to customer service and greater satisfaction from businesses that are members of an OFT approved code than from those outside of the Scheme.

#### **The Carpet Foundation**

The Carpet Foundation, one of the trade associations with an OFT Approved code, found that its customer satisfaction monitoring studies showed that, prior to OFT approval 61% of actual buyers were reassured by their consumer code, but this rose to 97.8% after OFT approval.

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<sup>21</sup> A list of current CCAS code sponsors can be seen in Annexe A.

<sup>22</sup> Review of the impact on business of the Consumer Codes Approval Scheme – October 2006.  
[www.offt.gov.uk/shared\\_offt/Approvedcodesofpractice/oft870.pdf](http://www.offt.gov.uk/shared_offt/Approvedcodesofpractice/oft870.pdf)

## **'Established means'/Compliance Partnerships**

3.9 The OFT also has long standing relationships with those industry bodies that have been identified as having a recognised role in helping to enforce legislation. This recognised role has traditionally been known as 'established means', and it was first introduced to the OFT as a legal concept with the Control of Misleading Advertising Regulations 1988 (CMARs). When the OFT gained powers under CMARs in 1988 there were already others addressing complaints about advertising, so in order not to undermine these existing systems, the CMARs permitted the OFT to require a person making a complaint to show that 'established means' had had a reasonable opportunity to deal with it and had not done so, and required the OFT to have regard to 'the desirability of encouraging control, by self regulatory bodies, of advertisements'.<sup>23</sup> In practice this meant that the OFT and the relevant bodies were able to refer complaints between each other according to which was the more appropriate to take action in each case.

3.10 The ASA, for example, is recognised as the first port of call (or 'established means') for resolving complaints about advertisements across all media and tackling non-compliance. In non-broadcast media (for example, print, posters, cinema, direct marketing and online, such as banner and pop-ups ads) the ASA regulates advertisements under the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code).

### **The ASA and the CAP Code**

The Committee of Advertising Practice (CAP) was established in the early 1960s and is the self regulatory body that creates, revises and enforces the CAP Code. Its members include organisations that represent the advertising, sales promotion, direct marketing and media businesses. The Code lays down rules for advertisers to follow. The rules state that

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<sup>23</sup> CMARs Regulation 4(3) and (4)

advertising should not mislead or offend and they cover a range of general subjects such as privacy, prices and availability.

The ASA is the independent body responsible for ensuring that advertisers follow the Code. It handles complaint about broadcast and non-broadcast advertisements and carries out research on many subjects related to advertising regulation.

If an advert has been found to be in breach of the Code the ASA will publish the results on its website and ask that the advert be withdrawn or amended. The scheme is able to achieve a good compliance rate through its close links with the media industry - most publishers are signed up to the Code and will not publish advertisements that have been found to breach the Code. The ASA has a range of sanctions that it can apply and a statutory backstop of referral to the OFT in respect of misleading advertising breaches.

The ASA has come to be widely recognised and respected in its sector for the action it takes<sup>24</sup>. This recognition is likely to be due in part to the independence of ASA from the industry. The ASA Council, which determines whether advertisements breach the Code, is made up of at least two thirds of members from outside the industry including consumer experts).

- 3.11 The ASA refers only a handful of cases to the OFT annually for further action, having exhausted its own processes<sup>25</sup>. This allows the OFT to target its enforcement on those cases in which it can particularly add value, for instance by bringing court action to set a precedent. Examples

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<sup>24</sup> This was evidenced by the transfer of regulatory functions to ASA for broadcast advertising in 2004. Broadcast advertising is covered by two codes in relation to television and radio respectively.

<sup>25</sup> Note that there are some cases which the OFT can take which do not fall within the remit of the ASA, for instance relating to misleading pricing, and the OFT cannot deal with certain issues that are covered by the CAP Code, particularly those which involve advertising that is offensive rather than misleading.

of this in action are the cases of Magnopulse Ltd<sup>26</sup> and Magna Jewellery Ltd<sup>27</sup>, both of which related to claims which the OFT considered were misleading regarding the therapeutic effects of magnetic products. These cases involved formidable legal and evidential difficulties, but the OFT was able to tackle both under the CMARs and ultimately obtained formal undertakings in each. Examples of cases referred to the OFT by the ASA and taken to court include DGFT v Tobyward (1989), and DGFT v Planet Telecom (2002).

- 3.12 PhonepayPlus is responsible for regulating premium rate telephony services in the UK. Premium rate services are defined as those which offer some form of content, product or service that is charged to a user's phone bill. PhonepayPlus regulates content, promotion and overall operation of these services as an agency of Ofcom, the communications industry regulator, as designated under s120 (1) of the Communications Act 2003 (the Act). PhonepayPlus operates an industry Code of Practice (the Code) which has been approved by Ofcom under the Act. Therefore, all providers of premium rate services are bound by the provisions of the Code.
- 3.13 The Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which came into force on 26 May 2008 and replace the CMARs, continue to recognise the importance of 'established means' as an effective enforcement mechanism. Under the CPRs, the OFT in determining how to comply with its duty of enforcement, is required to 'have regard to the desirability of encouraging control of unfair commercial practices by such established means as it considers appropriate having regard to all the circumstances of the particular case'.
- 3.14 In December 2008 the OFT issued a consultation document on what should be considered 'established means' for the purposes of the new CPRs. The current practice is that, if we are satisfied that complaints are

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<sup>26</sup> [www.oft.gov.uk/news/press/2007/6-07](http://www.oft.gov.uk/news/press/2007/6-07)

<sup>27</sup> [www.oft.gov.uk/news/press/2006/82-06](http://www.oft.gov.uk/news/press/2006/82-06)

clearly within the scope of an alternative, well-founded and effective system of achieving compliance in the UK (including self regulation), and can be dealt with by it, then the OFT will usually refer such complaints to it. This practice reflects our current working relationship with PhonepayPlus and the ASA. The objective of the 'established means' consultation is to determine how these arrangements can be extended to capture other suitable schemes and bodies, such as the code sponsors operating within the OFT's CCAS, and other self regulatory or industry bodies.

- 3.15 Beyond this, we also recognise that, in certain circumstances, the industry itself can assist the OFT in tackling a compliance issue (rather than complaint handling itself) and that this can be a more effective and quicker alternative to the OFT taking enforcement action itself. For example, following complaints regarding misleading airline ticket pricing in the holiday and travel industry, the OFT worked in partnership with ABTA in a co-ordinated move to solve problems in this market.

#### **ABTA: The Travel Association**

ABTA is the largest trade association in the travel industry with a wide ranging membership including high street travel agents, small specialist independents, large travel companies and tour operators, all of whom operate under the ABTA logo. ABTA aims to maintain high standards of trading practice for the industry at large, its members and the consumers they serve.

ABTA was originally formed in 1950 to give the industry a stronger voice in negotiations with government. ABTA as a trade association continues to represent the industry nationally and internationally but its evolution over time has added other practical benefits to membership through, for example, clarity and standardisation within the supply chain and the protection of moneys between booking agents and holiday providers/operators. Such benefits have allowed ABTA to build up a substantial membership but importantly ABTA also focuses on the reputation of the industry, aiming to ensure a healthy future for its members through enhanced consumer confidence. Its major tool is the

ABTA logo, backed up by the code of conduct which was first introduced in 1960. The ABTA logo enjoys high consumer recognition – a 2008 Ipsos MORI survey found that 74 per cent of the public recognised the ABTA brand.

The ABTA code of conduct is essentially a guide to good practice that also contains relevant requirements under UK and European law. The code lays down practical and general conduct requirements for travel providers right through the travel booking process from advertising and pre-contractual information through to after sales service. For example, rules cover: accurate information provision (including prices), advertising, fair dealing over cancellations or alterations, provision of compensation where appropriate and complying with all statutory requirements. The code aims to provide high standards of customer service and covers issues such as ensuring the travel sold is appropriate to customer requirements, clearly informing customers of booking conditions or other requirements, providing clarity over financial protection and dealing with disputes fairly.

- 3.16 During an OFT investigation it was found that a number of companies were routinely displaying prices on their websites which excluded fixed, non-optional costs such as taxes and fuel supplements. The OFT opinion was that this practice was misleading to consumers, was harmful to businesses that did display full prices and was a breach of consumer legislation relating to misleading advertising and misleading price indications. ABTA's code of conduct required that such non-optional costs be included in advertised prices.
- 3.17 As this was an industry wide problem the OFT and ABTA co-ordinated warnings, to non-ABTA members and ABTA members respectively, to effect change in this industry. Co-ordinating action in this way allowed ABTA to exert more leverage as they could reassure their members that simultaneous OFT action meant that they would not be placed at a competitive disadvantage and the OFT was able to concentrate resources on pursuing the most persistent offenders. Initial warnings to the industry were followed up by the OFT taking action under the Enterprise Act 2002 against 13 airlines and ABTA issuing fines and

reprimands to several of their members. The joint action by the OFT and ABTA has resulted in improved price transparency across the holiday and travel industry<sup>28</sup>.

### **Local authority assured trader schemes**

- 3.18 The Local Authority Assured Trader Scheme Network (LAATSN) was set up in 2006 to assist the development of assured trader schemes that are operated by Local Authority Trading Standards Services. LAATSN aims to bring greater consistency to such schemes through its underpinning framework of minimum standards, and to develop schemes by providing best practice guidance.
- 3.19 LAATSN is supported by the Local Authorities Coordinators of Regulatory Services, the Trading Standards Institute, and the OFT. At the end of 2008 LAATSN comprised 16 member schemes, operated by 37 local authorities.
- 3.20 Although Local Authority assured trader schemes are not technically self regulatory in their format, in that they are not set up and administered by the businesses themselves, they do have similar characteristics and, in effect, operate as a compliance partnership between Local Authority Trading Standards Services and local businesses. By providing a focus for encouraging compliance with legislation and best practice, the schemes raise customer service standards, provide a signpost to reputable businesses and promote consumer confidence. They assist in the process of marginalising rogue traders and open channels of communication between Local Authority Trading Standards Services and local businesses.
- 3.21 The 2006 report 'Implementing Hampton: from enforcement to compliance' stated that positive incentive schemes have been developed by regulators who deal with businesses with a consumer presence, with positive effects to both businesses and consumers. It cited the Buy with

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<sup>28</sup> [www.offt.gov.uk/news/press/2007/118-07](http://www.offt.gov.uk/news/press/2007/118-07)

Confidence scheme as a best practice example of a positive incentive scheme.

#### **Buy with Confidence**

Buy with Confidence (BWC) was established in Hampshire County Council in 1999 and is a generic multi-sector scheme. Following a merger in 2008 between BWC and the Customer First scheme set up by Devon County Council, BWC is now operated by 23 local authorities with a coverage predominantly across the south of England.

The aim of the BWC scheme is to help consumers to avoid rip-offs and cowboys by providing a list of reputable local businesses, in a wide range of different trades. Member companies have been independently checked by staff from the Local Authority Trading Standards Service against the Scheme rules. All members are subjected to stringent checks by Trading Standards staff to ensure their trustworthiness and compliance with the law. Levels of consumer complaints against members are also monitored on a regular basis.

### **Market studies recommendations**

3.22 The OFT's market studies work also often leads to close working relationships with industry in order to correct certain market failures. We use our market studies as a means of identifying and addressing all aspects of market failure from competition issues to consumer detriment and the effect of government regulations. As well as looking at particular economic markets, the studies may also relate to practices across a range of goods or services, for example doorstep selling. The aim of a market study is generally to identify whether there are problems in the market that need to be addressed through the OFT's other functions. There is a range of possible outcomes, including:

- giving the market a clean bill of health
- publishing information to help consumers

- encouraging industry to take voluntary action
- encouraging a consumer code of practice
- making recommendations to the Government or regulators
- investigation or enforcement action against companies or individuals suspected of breaching consumer or competition law
- market Investigation Reference to the Competition Commission.

3.23 These outcomes are listed broadly in the order of the degree of intervention required in the market. The OFT will wish to intervene at the level most appropriate to the nature of the problem and, in a number of the studies undertaken, a solution implemented by the industry has been seen as an effective and proportionate response.

**Examples of existing self regulatory initiatives that have stemmed from or been influenced by OFT market studies**

The Society of Motor Manufacturers and Traders amended its new car warranties consumer code (New Car Warranties - March 2004<sup>29</sup>)

Ombudsman for Estate Agents amended its consumer code (Estate Agents – March 2004<sup>30</sup>)

Debt Managers Standards Association amended its consumer code (Debt Consolidation – March 2004<sup>31</sup>)

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<sup>29</sup> [www.oft.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/new-car-warranties](http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/completed/new-car-warranties)

<sup>30</sup> [www.oft.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/estate-agents](http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/completed/estate-agents)

<sup>31</sup> [www.oft.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/debt-consolidation](http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/completed/debt-consolidation)

The Payments Systems Task Force was established which, in turn, resulted in the Payments Council (Payment Systems – May 2004<sup>32</sup>)

The ASA amended its CAP Code (Ticket Agents – February 2005<sup>33</sup>)

The Direct Selling Association amended its consumer code (Doorstep Selling – December 2005<sup>34</sup>)

Safeway amended its consumer code (Internet Shopping – June 2007<sup>35</sup>).

## Guidance

3.24 There are also other instances where working with self regulatory or trade bodies can assist in securing compliance with legislation. For instance, the development of guidance for business and model terms for tackling unfair terms in consumer contracts helps to educate business as to their obligations under the law. The OFT has published a number of sector specific guidance documents to support compliance with the Unfair Terms in Consumer Contracts Regulations 1999. The regulations apply a test of fairness to standard contract terms and fundamental to this is transparency. Transparency helps consumers to make well-informed and confident decisions when entering into contracts with businesses.

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<sup>32</sup> [www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/payment-systems](http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/completed/payment-systems)

<sup>33</sup> [www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/ticket-agents](http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/completed/ticket-agents)

<sup>34</sup> [www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/doorstep-selling](http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/completed/doorstep-selling)

<sup>35</sup> [www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/internet](http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/completed/internet)

### **Guidance on unfair terms in home improvement contracts<sup>36</sup>**

In 2005 the OFT published guidance for the home improvement sector to explain why it considered some standard terms used in consumer contracts for home improvements to be potentially unfair. Annexe E of the guidance summarises the OFT's liaison with trade associations and major firms and shows how significant improvement can be made to standard contract terms. Trade associations often offer model terms, for use by their members. Through the OFT's work with the Glass and Glazing Federation, for example, a number of potentially unfair clauses were amended.

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<sup>36</sup> [www.oft.gov.uk/shared\\_of/business\\_leaflets/unfair\\_contract\\_terms/oft737.pdf](http://www.oft.gov.uk/shared_of/business_leaflets/unfair_contract_terms/oft737.pdf)

## 4 THE BENEFITS AND RISKS OF SELF REGULATION

### The benefits

- 4.1 Self regulation relies on legitimate self interest on the part of business, which usually reflects a profit incentive. From the perspective of the OFT, with our mission to make markets work well for consumers, it is most likely to be effective when the interests of business are aligned with the public interest, in other words, where there are mutual benefits to be had from the self regulatory activity. It has the potential to provide an effective, alternative to statutory regulation or formal enforcement interventions providing it is well designed and implemented in a way that avoids risks, such as the risk of infringing competition rules. It can speedily address specific problems which cause detriment to consumers and damage the reputation of a market as a whole. By involving industry participants in tackling sector specific problems, it builds upon industry expertise and legitimate self-interest in addressing malpractice or poor standards.
- 4.2 This can be advantageous to business, consumers and the OFT. Business benefits from having greater involvement in how solutions are designed and helping to ensure they are cost-efficient, thereby leading to better buy-in and higher compliance levels. Consumers benefit because self regulation can deliver high quality customer service standards and redress, as well as providing a means of identifying good businesses. From the OFT's perspective, working successfully with self regulation can be a quicker, cheaper and more flexible approach which allows the OFT to target its own enforcement action where the need is greatest and to focus its resources on rogue traders, leaving self regulatory initiatives to 'police' their members. Some of these key benefits are explained in further detail below.

### **Helps business to build a good reputation**

- 4.3 Consumers sometimes find it hard to know in advance the quality of a particular purchase and therefore businesses can find credible quality promises hard to make. If a business has a good reputation, consumers

feel more confident about purchasing from it, even in circumstances where they cannot easily see the quality of a product or be sure of the service being offered. However, it can sometimes be hard for businesses to build a good reputation. This is particularly true for smaller firms which will find advertising and branding proportionally more costly. It can also be hard for firms to build reputation as some firms, rather than building their own reputation try to take advantage of the better reputation of their competitors (so called free-riding) which over time can reduce the reputation of the fair trading firms.

- 4.4 Self regulation can help to solve these problems. By agreeing quality standards or rules, participating businesses can distinguish themselves from other businesses not operating to the same standards and can reduce the risk that others will free ride on the efforts of higher quality providers.<sup>37</sup> They can also share the costs of advertising and branding through self regulation schemes leading to enhanced consumer awareness.
- 4.5 Self regulation also aims to change consumer behaviour by encouraging consumers to seek out reputable businesses that publicly agree to abide by the rules of the regime. It therefore increases trust and consumer confidence and encourages spending in the market thereby leading to increased trade.

**The ASA concern for reputation<sup>38</sup>**

Reputation is particularly important in the advertising industry. If reputation is damaged and consumers do not trust advertising claims this is harmful to the whole industry. The only point in commissioning advertising is to encourage additional custom and if the public fail to trust

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<sup>37</sup> Schedule 1 of the CPRs prohibits 'claiming to be a signatory to a code of conduct when the trader is not'.

<sup>38</sup> Does self regulation live up to the claim? Article by Christopher Graham of the ASA in the Consumer Policy Review, Jan/Feb 2008, Volume 18, Number 1.

advertises and do not make purchasing decisions in response to the adverts then it becomes an impractical way of increasing revenue. It is therefore in the advertising industry's own interest to ensure that irresponsible advertisers are stopped from making false claims or causing offense to the buying public. Publishers also care about the adverts that their publications carry, as the impact of false or distasteful adverts can rub off on the reputation of their own newspapers and magazines.

Through the ASA the advertising, publishing and media industries are able to take control themselves and act to halt or minimise such damaging promotions and ensure that advertisements are 'legal, decent, honest and truthful' and accountable to a single set of fairness rules across the industry. The ASA is able to act more quickly and more cost effectively than would be the case with a statutory regime and achieves good compliance results where it rules that an advert should be withdrawn. Through the ASA, the industry is able to safeguard the freedom to control the rules and adapt to changes in public expectations. Where adjudication finds an advert is in breach of its code, 'Ad Alerts' are a quick and easy way of drawing the media's attention to a problem advertiser. Ad Alerts are circulated to CAP members and to individuals responsible for accepting items for publication and all bodies signed up to the code have agreed to withdraw any problem advertisements. The impact of an upheld ASA adjudication can be serious in terms of damage both to a brand's reputation and to the reputation of the ad agency responsible for the brand.

### **The industry takes control**

- 4.6 Avoiding the threat of statutory regulation or enforcement action can often be a strong incentive for self regulation, which allows industry to retain more control over the rules and structures put in place. Many of the self regulatory schemes with which the OFT has worked originally came into being as a result of a perceived or real threat prompted by public concern over problems in the market. In our experience such bodies, where they seriously address the actual problems in the market, can successfully align their objectives with the public interest.

### **Car Servicing and Repair Code**

The Society of Motor Manufacturers and Traders Ltd (with the support of the Retail Motor Strategy Group) made an application under the CCAS in January 2006 for its Car Repair and Servicing Industry Code in response to a threat from the then National Consumer Council (now Consumer Focus) that it would make a super-complaint to the OFT and press for statutory regulation unless the industry got its 'house in order'.

Motor Codes Ltd has since been established to co-ordinate and operate the process. The code of practice aims to tackle concerns of poor garage repairs and car servicing by committing subscribers to honest and fair services, open and transparent pricing, completion of work as agreed, invoices that match quoted prices, competent and conscientious staff and a straightforward and swift complaints procedure.

The Code was launched in August 2008 and has completed Stage One of the OFT's CCAS process.<sup>39</sup> It currently has about 5,000 garages participating.

### **Provides speed and flexibility**

- 4.7 Self regulation is more flexible than legislation. It can be adapted more easily and speedily than statutory rules to address changing circumstances. This is important in dynamic markets where technical innovations are evolving rapidly, and where consumer expectations may change. In such markets, the people best placed to specify constructively the parameters of effective regulation and to have the technical expertise to monitor it are likely to be the industry members themselves.

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<sup>39</sup> OFT press release [www.offt.gov.uk/news/press/2008/101-08](http://www.offt.gov.uk/news/press/2008/101-08)

### **The Payments Council**

The 2000 Cruickshank report on competition in the UK banking industry<sup>40</sup> found a lack of competition and innovation in payments systems<sup>41</sup> in the UK. It was originally envisaged that a legislative solution be introduced but a time delay in doing this meant that other potential solutions needed to be considered. At the request of the Treasury, the OFT set up and chaired the Payments Systems Task Force which brought together the banking industry, payments industry, retail, consumer and business representatives to ensure that any decisions reached benefited all sectors of the UK economy.

The Task Force was able to use its expertise to introduce significant changes to the cheques clearing cycle, reach agreements on 'fate'<sup>42</sup> and the introduction of faster electronic payments, all of which put the United Kingdom in a world-leading position. These changes were agreed and introduced ahead of agreed timescales, although full implementation of the faster payments service has not yet taken place.

A further success was the establishment of a new strategic governance body, The Payments Council, which was established in March 2007 as an independent self regulatory body funded by its members. The Payments Council's core objectives are to have a strategic vision and lead on future development, to ensure systems are open, accountable and transparent and to ensure continued efficiency, effectiveness and integrity of payments services.

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<sup>40</sup> [www.hm-treasury.gov.uk/fin\\_bank\\_reviewfinal.htm](http://www.hm-treasury.gov.uk/fin_bank_reviewfinal.htm)

<sup>41</sup> Payment systems covering for example cheque clearing, cheque guarantee cards, cash machines, BACS and CHAPS.

<sup>42</sup> 'Fate' agreement – providing that consumers were not a knowing party to fraud, money paid to them by cheque cannot be taken out of their account as a result of the cheque being dishonoured more than six days after the cheque is deposited by them.

## Utilising industry knowledge

- 4.8 Self regulation has an advantage over statutory regulation in having much better access to specialist knowledge about a sector. Where industry takes the lead in rule setting, there is also a sense of ownership which cannot be achieved through legislation imposed by government. With a greater understanding of the motivation of businesses in the market, rules can be written and presented in a way that encourages compliance.
- 4.9 The OFT's CCAS has, as a mandatory requirement, the need for the self regulatory body to have addressed in its code of practice consumer concerns and undesirable trading practices as appropriate to their sector. A combination of industry knowledge, and input from consumer groups, ensures that all relevant issues are covered and in a manner that is relevant and cost effective for the member businesses.

### **Renewable Energy Association's consumer code**

The Renewable Energy Association (REA) has a consumer code which has completed Stage One of the CCAS. It covers sale, installation and aftercare of micro-renewable and energy efficient generators. This includes products such as solar panelling, micro-wind turbines, ground source heat pumps and wood burners. Such products are quite technical and one area of consumer detriment is the practice of sales representatives making inflated claims about the likely performance of the products. REA Member businesses are therefore required to provide accurate estimates of the predicted performance of the product at the pre-contractual stage, and this information has to be presented in such a way that consumers can understand what benefits or savings they may accrue from the installation, as well as making it easy to compare with other products on the market.

## Raising standards above the law

- 4.10 It is good practice for self regulatory rules to cover areas where businesses are under existing legal duties in such a way as to ensure

that member businesses are clear about their full obligations. To this end, self regulation can help businesses to comply with the law and can monitor to this effect. It also gives business an opportunity to distinguish themselves further by developing best practice solutions, or offering customers services that go beyond the law.

- 4.11 The OFT's CCAS, in particular, requires those trade bodies participating to develop codes that offer consumer benefits beyond the protection afforded by law. A code should not necessarily be limited to ensuring adherence with the law but can influence and raise standards within its sector by leading the way in terms of offering consumers high quality customer service. We believe that such an approach incentivises member businesses to strive for excellence which, in itself, can act as a catalyst for non-participating businesses to improve their game.

#### **The Direct Selling Association (DSA)**

The DSA's consumer code was approved under the CCAS in 2005. It sets standards for businesses and their direct sellers that engage in direct selling. A direct sale is one that is carried out primarily as the result of face to face contact with a customer away from business premises and usually in the home. The main consumer benefits of the code include a consumer guide to shopping at home, trained direct sellers committed to act with integrity and not use misleading, deceptive or unfair practices, a free independent arbitration scheme, on-going monitoring of customer satisfaction and, importantly, a 14 day cooling-off period during which a consumer can cancel the contract whereas, by law, consumers are only entitled to cancel orders within seven days.

#### **Consumer redress**

- 4.12 Self regulation can provide efficient ways of dealing with consumer complaints and, in particular, help avoid costly litigation. Setting out simplified rules and the provision of specialist business support can rectify market problems where business practices are breaching existing consumer protection legislation. Even well-intentioned businesses get things wrong on occasions and a self regulatory scheme that involves a

consumer friendly redress mechanism allows for consumer disputes to be solved without the need for court action.

- 4.13 The core criteria for the CCAS require all codes to have in place speedy, responsive, accessible and user friendly procedures for dealing with complaints and low cost independent redress if a complaint is not dealt with satisfactorily.

#### **The Ombudsman for Estate Agents Company Ltd's (OEA) complaints procedure**

The OEA operates a consumer code approved under the CCAS. Under the code, a consumer would complain in the first instance to the OEA member who must have effective procedures for handling complaints and respond within a reasonable time frame (acknowledgement within 3 working days and formal written outcome of investigation of matter within 21 days).<sup>43</sup>

If the member's own complaint handling procedure is exhausted without success then consumers may refer their complaint to the Ombudsman for consideration under the OEA scheme. The Ombudsman will attempt conciliation in the first instance before deciding to open up a full investigation. The Ombudsman will rule upon an unresolved dispute between a member agent and complainant. His decisions are binding on the agent but not the consumer, who retains the right to pursue the matter in the courts. The procedure is free to the complainant.

#### **Better regulation for regulators**

- 4.14 Regulatory activity has to comply with the principles of better regulation set out in statute – transparency, accountability, proportionality, consistency and targeting – and with the Regulators' Compliance

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<sup>43</sup> The OEA complaints procedure is not the only redress scheme operating in the estate agents sector. As mentioned in paragraph 2.44 there are also statutory redress schemes under the Consumers, Estate Agents and Redress Act 2007.

Code.<sup>44</sup> The OFT's consumer enforcement policy and priorities are set out in our Statement of Consumer Protection Enforcement Principles,<sup>45</sup> and reflect these requirements. Their aim is to achieve smarter, risk-based enforcement geared to the efficient operation of the market, to the benefit of consumers and customer-oriented businesses. The OFT uses its range of enforcement tools flexibly and proportionately, taking matters to Court only where necessary, in the most serious cases, and wherever possible encouraging compliance by warning, advice and education, and by promoting self regulation. As an enforcer of consumer law, self regulation offers opportunities for finding solutions to issues in markets without needing to bring enforcement cases.

## **Risks of self regulation**

- 4.15 Not all self regulation is successful. Some initiatives deliver insufficient penetration of their sector or fail to secure appropriate standards, and there will always be a need for regulation and enforcement action in certain instances. Moreover, even when self regulation succeeds in its main consumer protection objectives it can run the risk of causing other problems in the market.

### **Partial coverage**

- 4.16 One of the most obvious potential drawbacks is that self regulation does not usually cover all firms within a sector. The voluntary nature of most self regulation means that there is normally no compulsion to join and the problem businesses in a sector are unlikely to join the scheme<sup>46</sup>. Self

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<sup>44</sup> Legislative and Regulatory Reform Act, Part 2.

<sup>45</sup> [www.of.gov.uk/advice\\_and\\_resources/publications/reports/consumer-protection/oft964](http://www.of.gov.uk/advice_and_resources/publications/reports/consumer-protection/oft964)

<sup>46</sup> It is also true that many fair businesses decide not to join a scheme simply because they feel they can provide credible quality promises to their customers through other means.

regulatory schemes therefore have no direct influence<sup>47</sup> on the behaviour of the worst firms, which are outside their remit.

- 4.17 Some consumers will consider the benefits of trading with firms which promise to follow self regulatory rules, or will use other methods to ensure they deal with companies they can trust. However, there will always be others who fail to appreciate the implications of trading with those not subject to such rules and they may suffer detriment if they deal with rogues within the market. This can be compounded by consumer confusion over which businesses are within a scheme.

### **Rules are ineffective**

- 4.18 Another risk with self regulation is that schemes can fail to protect consumers in the way they claim to do and may offer a false signal of quality. This can vary from schemes that have few meaningless rules to those whose rules are so vague or simplistic that there is no real commitment to improve quality or behaviour. Such schemes may use badging or logos to try and give the impression they offer consumers a guarantee of quality when it simply has no value. This can result in consumers being misled into making inappropriate purchasing decisions.<sup>48</sup>
- 4.19 This may be particularly problematic where consumers have poor information with which to judge the quality of what they are being offered, or have been supplied – for instance where certain important aspects of a purchase are hidden from view (for instance, the consumer may never know whether parts allegedly replaced in a car service were

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<sup>47</sup> Although there is no direct influence a self-regulatory initiative undertaken by fair traders in a market can have an indirect influence on problematic traders over time by increasing consumers' perceptions of quality and forcing more disreputable competitors to raise their game, to retain a market share, or withdraw from the market.

<sup>48</sup> The CPRs specifically deal with misleading practices. For example, schedule practice 10 prohibits the presentation of rights given to consumers in law as a distinctive feature of the trader's offer.

actually changed, and so whether the charge for those parts is justified) or where problems may take a long time to unravel (for example in the case of insurance policies, where they may come to light only at the point when a claim is made). Furthermore, false quality signals from self regulatory schemes can be more convincing than the misleading claims of individual businesses so detriment to consumers could be exacerbated.

### **Ineffective monitoring and limited sanctions**

- 4.20 Schemes that have developed a useful set of rules can also be unsuccessful if these are not supported by mechanisms to check that the rules are being followed and to rectify the problem, or to discipline members, where rules are broken.
- 4.21 Monitoring compliance can be expensive and it can be tempting for schemes to cut corners. However there is little incentive for businesses to follow the rules if there is no effort made to ensure promises are being honoured.
- 4.22 The decision on what is an appropriate sanction for non-compliance can be difficult for those operating self regulatory schemes. It is necessary to balance the need for sanctions with the need to attract and retain members who pay for the running of the scheme. It can sometimes be difficult for schemes to impose effective sanctions. If a self regulatory scheme imposes too harsh a sanction, for example a large fine, it may be more attractive for the business to exit the scheme rather than pay such a fine. Similarly, although expulsion from a scheme is effective in protecting quality within the scheme, it is likely that the offending business will continue the behaviour for which it was expelled outside of the self regulatory body's influence.
- 4.23 Ineffective monitoring and a failure to impose sanctions where rules are broken can lead to a general lack of public confidence in a scheme's ability to provide consumer protection.

4.24 This is a challenge the OFT has faced itself through its CCAS. The challenge is to encourage voluntary participation of codes that bring real benefits to consumers. This inherent tension explains why the rate of approvals has so far been slow. However, the robust and stringent nature of the codes approved and the monitoring requirements are seen as a selling point by many of the codes sponsors<sup>49</sup> and we believe that it is important not to dilute code standards simply to make it easier for applicants to gain approval as this would reduce the value of the CCAS to participating business as well as consumers.

### **Anti-competitive practices**

4.25 Another key concern with self regulation is the possibility of anti-competitive practices such as price fixing or raising significant barriers to entry. Just as it can be in the collective interest of businesses to solve quality problems, so can it be in the interest of businesses to collude to restrict competition, and cooperation may spill over into areas which raise competition law concerns under the Competition Act 1998 and/or Article 81 EC.<sup>50</sup>

4.26 The process of self regulation can open the door for businesses to restrict competition, either intentionally (explicit collusion) or unintentionally (tacit collusion). In reaching and enforcing agreements on

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<sup>49</sup> [www.berr.gov.uk/files/file45359.pdf](http://www.berr.gov.uk/files/file45359.pdf) - pages 18 - 19.

<sup>50</sup> It is outside the scope of this paper to provide a full assessment of all relevant aspects of the competition law. We do not attempt to explain the law here; nor do we represent the OFT's view of what is permissible under UK and EU law. The OFT provides more guidance in this area on its website. In particular, see [www.offt.gov.uk/advice\\_and\\_resources/publications/guidance/competition-act/oft408](http://www.offt.gov.uk/advice_and_resources/publications/guidance/competition-act/oft408). This document explains how the OFT will apply Article 81 and the Chapter I prohibition when assessing the activities of trade associations, professions and self-regulating bodies. It should be read in conjunction with the competition law guideline 'Agreements and concerted practices' (OFT401).

quality, opportunity is provided for businesses, for example to share information on demand costs and production processes; to monitor each other's behaviour on an on-going basis; or to co-ordinate output decisions, and this could result in a restriction, distortion or prevention of competition. In addition, quality requirements or standards could themselves dampen competition. For instance, this could occur if self regulation results in requirements that benefit some businesses at the expense of others, if quality standards are set too high, if businesses gravitate towards one quality level, or if restrictions are placed on conduct.

- 4.27 Since the very nature of self regulation means that it is likely to involve cooperation between competitors, it will be important that the parties assess, if necessary by taking independent legal advice, whether self regulation is likely to result in a restriction, distortion or prevention of competition within the meaning of the Competition Act 1998 and/or Article 81 EC and, if so, whether the exemption criteria set out in the Competition Act and/or Article 81(3) EC are met.

### **Self regulation as a solution**

- 4.28 What is clear is that there are no neat solutions and no 'black and white' answers as to when self regulation is the right response. The level of risk will vary in different situations and therefore we believe a flexible approach should be adopted. What is vital is that the self regulation is transparent and accountable in order to provide confidence and trust in its effectiveness. Although most self regulation does not have full sector coverage, an effective scheme that actively promotes itself to consumers can distinguish reputable traders from others in the marketplace, allowing consumers to make informed choices about the business they want to purchase from.

## 5 WORKING MORE CLOSELY WITH SELF REGULATION

### The case for doing more

- 5.1 The evidence suggests that self regulation in the area of consumer protection can, under certain conditions, add real value to the functioning of efficient markets. Self regulatory schemes can help to ensure businesses meet their legal obligations but also have the potential to raise standards in areas where it is difficult or undesirable to legislate, such as customer service and quality issues. Consumer law cannot realistically address every aspect of the relationship between a business and a consumer, nor should it attempt to. Even where there is legislation in place which offers a possible enforcement approach, that may not always be the most effective or proportionate solution.
- 5.2 Where consumer law aims to protect consumers as a whole (for example, 'the collective interests' of consumers under the Enterprise Act) the potential volume of breaches across primary and secondary legislation gives enforcers a dilemma because it places unrealistic demands on resources. An industry led approach can produce more flexible results and, where it also includes a redress mechanism, direct benefits for consumers.
- 5.3 The OFT's experience shows that while some businesses respond best to a self regulatory regime such as the CCAS with a clear framework and fixed criteria, this is not the only approach which can be successful. CCAS provides clear benefits for consumers and will continue to grow. However, there will always be markets in which businesses do not organise themselves in a way which fits within the structure of the CCAS. Although the OFT will continue to evaluate the effectiveness of the CCAS periodically, and may amend the criteria where evidence shows this would benefit the operation of the scheme, it will not dilute the strength of the CCAS overall in order to accommodate initiatives which cannot work within its structure. This means that some self regulatory initiatives, while valuable, will inevitably never fit within the CCAS.

- 5.4 Our discussions with stakeholders have revealed an appetite for the OFT to encourage more work in the area of self regulation and recognition that legislation or enforcement action cannot address all problems in markets. Stakeholders expressed a desire for clarity as to the circumstances when self regulation might offer a solution and to understand more about those instances when it is less likely to work. We found in our discussions with stakeholders that there was a perception that CCAS is the only way in which the OFT engages with self regulatory initiatives. While examples given in this paper tell a different story, these views support an examination of the case for greater OFT involvement in business-led solutions to address consumer problems in markets.
- 5.5 For business there are incentives to distinguish themselves from others in the market and to be able to signal to consumers that they provide high quality service standards and redress, and that they comply with the law. For regulators and enforcers there are opportunities to engage with business to find solutions which, with industry buy-in, have the potential to achieve high compliance levels and a wider reach than more traditional enforcement approaches.
- 5.6 As we have shown with our work with ABTA on misleading airline pricing in the travel industry, the self regulatory approach can provide a more flexible alternative. ABTA's work in policing its own members was effective and ensured an undesirable industry practice was remedied quickly. Although underpinned by the threat of enforcement action for breaches of the law it was a novel approach to dealing with the issue.
- 5.7 In working with ABTA we have seen the valuable role trade associations can play in raising compliance levels. We believe there is likely to be untapped potential for other associations to help resolve issues which affect consumers and the functioning of markets. We are interested in exploring what types of issue can be addressed in a similar way outside of an association or similar body achieving formal OFT approval through CCAS. There are many organisations already in existence which are likely to be suitable to take a greater role in achieving compliance without the need for resource to be spent in building them from scratch.

Although not currently CCAS-approved, ABTA clearly demonstrated its ability to bring members into line through disciplinary procedures and we would like to find other cases where an equally firm approach by an industry body could bring a quick and effective resolution to problems. In such instances there would not be formal approval of the organisation by the OFT but we would want to publicise how the industry had put its own house in order to the benefit of consumers. There are therefore reputational benefits for business from being part of such action.

## **Wider considerations**

- 5.8 Not all self regulation is successful and there will always be a need for regulation and enforcement action in certain instances. The challenge is to identify where self regulation is most likely to succeed and deliver the desired outcomes.
- 5.9 We have shown that government or regulator involvement can be necessary to facilitate the development of initiatives or to assist in their operation. Judging how much resource to invest in developing initiatives with industry can be difficult and the benefits need to be assessed carefully. Where government or regulators find themselves taking too prominent a role it can be argued that the issue, or the market, was not really suitable for self regulation and a more orthodox legislative and enforcement approach was really needed. There is a fine line to be drawn because another consequence of too much government intervention could mean that businesses lose the element of control and the initiative is no longer self regulation.
- 5.10 In addition the current economic climate may create scepticism about the role that self regulation can play where the main goal for many businesses is to survive. Our initial thoughts are that consumers, at a time when they are being especially careful about how they spend their money, will value high customer service, compliance with the law, and access to redress mechanisms. Innovative use of tools will therefore have a part to play alongside more traditional enforcement action to ensure consumer confidence in markets. However, we welcome views

on how the current economic climate impacts on the role of self regulation as a solution to consumer protection issues in markets.

5.11 Self regulatory solutions may not be appropriate to all types of market and all types of problem. We would welcome the views of others on in what situations self regulation can offer the greatest benefits.

5.12 Our economic analysis<sup>51</sup> considered where it may be appropriate to encourage self regulatory activity given that enforcement action is resource constrained and can only do so much. It was concluded that regulators would be most likely to encourage industry to move towards self regulation in the one or more of the following circumstances:

- where quality is never revealed - this tallies with our experience with the CCAS where many of the codes we have approved relate to sectors where it is hard for consumers to judge exactly what they are getting, for example codes within the car industry
- where there is a relatively large proportion of small suppliers - our direct experience of working with self regulation seems to indicate both large and small businesses can be attracted to self regulation for its reputational benefits, but working with self regulatory schemes that involve relatively small suppliers can increase the overall impact on a market
- where consumer detriment would be high if the market is left unchecked – since the establishment of the CCAS there have been a number of instances where other government bodies and consumer groups have called for industries to apply for CCAS approval as a way of addressing issues of consumer detriment
- when there are checks and balances in place to mitigate against risks – our progress developing the CCAS (in contrast to the earlier OFT

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<sup>51</sup> The economics of self regulation in solving consumer quality issues – OFT1059  
[www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/economic-research/completed-research](http://www.offt.gov.uk/advice_and_resources/resource_base/economic-research/completed-research)

involvement with self regulation described in chapter two) very much depends on robust criteria that ensures the self regulatory promises are met.

- 5.13 With the variety of self regulatory mechanisms in existence it is also a considerable challenge to establish core principles for what works well and in what circumstances. We want to try and identify those principles and understand what types of problem they are best suited to deal with. We also want to encourage others who have an interest in dealing with consumer protection issues to think about where self regulation might have a role to play in solving market problems.
- 5.14 A key benefit for government and regulators is the potential resource saving which successful self regulation can bring because it should reduce the need for direct intervention through enforcement cases. However, our experience is that self regulatory schemes can need a helping hand, at least at the start, and an important incentive for industry is to be able to show it has the support of the relevant government department or regulator. Such involvement can in itself be resource intensive and, for the OFT, it is important to be able to show that resource saved on enforcement is not simply transferred to working on the alternative self regulatory solution. We therefore want to learn more about what industry needs by way of assistance and support.
- 5.15 We would like respondents to consider the following questions:
- i. What types of market problem are most likely to be suitable for an industry-led solution?
  - ii. In which market conditions is self regulation more likely to be an effective solution than legislation and enforcement?
  - iii. What type of support from the OFT would be appropriate to encourage more self regulatory solutions to market problems?
  - iv. How will the current economic climate impact on the role of self regulation as a solution to market problems?

- v. What does effective self regulation require?

## Conclusion

- 5.16 We believe there may be a good case for considering a greater use of self regulation to solve consumer protection issues in markets. The OFT's experience suggests that, where consumer problems within a market have been identified, industry often welcomes the opportunity to put its own house in order and, where possible, to avoid the need for new statutory regulation and/or resource intensive enforcement action which is often costly for both business and regulators. A lighter touch is consistent with the Government's better regulation agenda.
- 5.17 We also know from the examples cited in this paper that a flexible approach is required and, from the OFT perspective, we need to think beyond just the application of our CCAS scheme. Our work in dealing with 'established means' under the CPRs also illustrates that the OFT's work is already moving in this direction. We would like to hear how others with an interest in consumer protection work feel about the type of approach we have been starting to take.
- 5.18 It seems clear there can be significant benefits from using self regulation but we are very aware that not all self regulation works equally well and that there is more to be learnt about what underpins successful self regulatory initiatives. We want to hear the views and experiences of stakeholders and other interested parties on what works best and why. We also want to hear opinions on what impact, if any, the current economic climate is going to have on self regulatory approaches.
- 5.19 We are following up this discussion paper and our economics paper with a conference on 18 March. We will use information gathered from responses to our papers and at the event to help us formulate a policy statement on how the OFT will work with self regulation to deal with consumer protection issues. We will also decide whether there is merit in looking closely at the potential for expanding this approach to other areas of our work.

## **A CONSUMER CODES APPROVAL SCHEME (CCAS)**

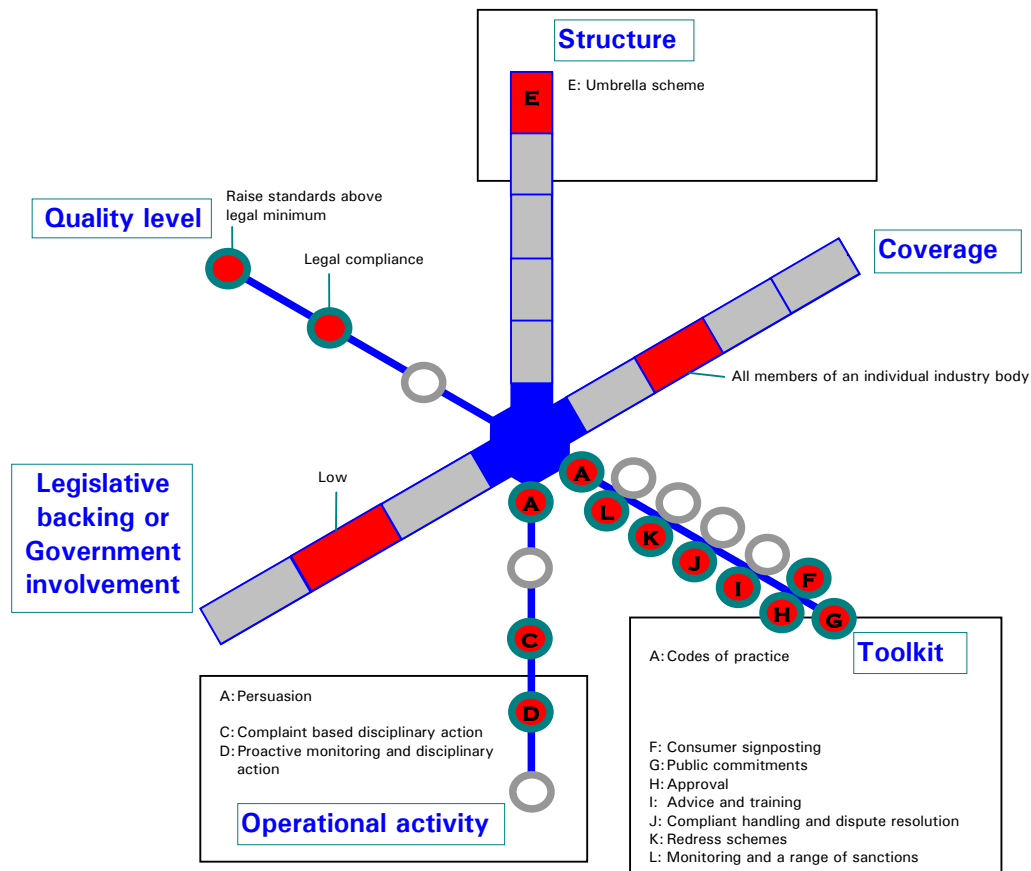
### **A.1 Consumer codes approved under the CCAS**

<u>Sector</u>	<u>Code Sponsor</u>
New car warranties	Society of Motor Manufacturers and Traders
Vehicle body repairs	Vehicle Builders and Repairers Association
Direct selling	Direct Selling Association
Estate agency	Ombudsman for Estate Agents Co Ltd
Carpets	Carpet Foundation
Car service/repair	Robert Bosch Ltd
Domestic removal	British Association of Removers
Debt management	Debt Managers Standards Association Ltd

### **A.2 Consumer codes working towards approval (Stage one completers)**

<u>Sector</u>	<u>Code Sponsor</u>
Vehicle repairs	MVRA Ltd
Internet retailing	SafeBuy
Mobility/assistive aids	British Healthcare Trades Association
Micro-renewable energy products	Renewable Energy Association
Willwriting	Institute of Professional Willwriters
Car service/repair	Motor Codes Ltd

## B THE CCAS MODEL OF SELF REGULATORY COMPONENTS IN ACTION



- B.1 The diagram above shows the model adapted to depict the features of a generic CCAS code of practice.
- B.2 On the 'quality level' branch, both the legal compliance and the raise standards circles are highlighted to demonstrate that the CCAS criteria require that the codes must ensure legal compliance with relevant legislation and have content which sets higher standards than required in law.
- B.3 The 'structure' branch shows that this is an umbrella scheme, in that the CCAS does not have its own code of practice, but has criteria against

which it assesses the codes developed by trade bodies which it refers to as code sponsors.

- B.4 All of a trade body is highlighted on the 'coverage' branch. In some instances more than one trade association or other industry body may indeed come together to develop a code but, whatever arrangements are made, the CCAS requires the responsibility for operating the code to be taken on by a single code sponsor for the purposes of running a CCAS scheme. It is worth noting that the innermost box of voluntary scheme within an industry body is not highlighted, as it is a requirement of the CCAS that sign up to the code be mandatory for all members.
- B.5 On the 'toolkit' branch, the tool the CCAS uses to define quality is the code of practice which is developed by the code sponsor and must meet the core criteria set by the OFT. Although schemes may also use standards, accreditation/certification/licensing and industry guidelines as well as their code, these are not required for the CCAS approval so they are not highlighted on the model. To ensure quality is observable, the CCAS uses the OFT Approved code logo for consumer signposting, it demands public commitments in the form of transparent sign-up to the regime and of course it involves approval of the code by the OFT. Lastly, this branch also shows that the CCAS requires appropriate tools to be in place, to resolve problems should they occur, adequate support for members through advice and training, complaint handling and dispute resolution procedures and a redress scheme, as well as ensuring the code sponsor carries out monitoring and has developed an appropriate range of sanctions.
- B.6 On the 'operational activity' branch three boxes are highlighted – persuasion, complaint based disciplinary action and proactive monitoring and disciplinary action, reflecting the requirement that code sponsors take non-compliance seriously.
- B.7 Lastly, the CCAS is categorised as low on the scale of 'legislative backing or government involvement' recognising the fact that although the CCAS is an OFT scheme the actual self regulatory activity is taking place within industry and is overseen by the code sponsor. The OFT

approves the codes and provides some support but the codes remain fully owned by industry and do not have legislative backing.

## **C GLOSSARY OF ACRONYMS**

ABTA	ABTA – The Travel Association
ASA	Advertising Standards Authority
BPRs	Business Protection from Misleading Marketing Regulations 2008
BWC	Buy with Confidence assured trader scheme
CAP	Committee of Advertising Practice
CCAS	Consumer Codes Approval Scheme
CMARs	Control of Misleading Advertisements Regulations 1988
CPRs	Consumer Protection from Unfair Trading Regulations 2008
DGFT	Director General of Fair Trading
DSA	Direct Selling Association
LAATSN	Local Authority Assured Trader Scheme Network
OEA	The Ombudsman for Estate Agents Company Ltd
Ofcom	The Office of Communications
OFT	Office of Fair Trading
REA	Renewable Energy Association