
OFT position paper: Legislative options for tackling bogus trading

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Introduction

The OFT is due to publish the report of its market study into doorstep selling¹ in April.

In advance of the main report, this paper sets out OFT's position on legislative options for tackling bogus trading since a private member's bill² that would ban cold calling for property repairs is down for debate³ in Parliament on 12 March.

Bogus trading

Bogus trading is where consumers (often the elderly or vulnerable) are cold-called and tricked or pressurised into paying large sums for very shoddy goods or services. There are other examples of bogus trading (eg van sales of fish unfit for consumption) but property maintenance (eg roofing or tarmacking) covers a high proportion of cases and almost all the high value cases.

The consumer detriment in individual cases is clear and it is high – especially as victims are usually vulnerable people and the result is often considerable distress as well as financial loss. (The harm can be further increased by frequent links to distraction burglary, though addressing that is beyond OFT's remit.)

There is no consistent or reliable set of data on bogus trading cases. An estimate of total numbers reported can only be built up from trading standards and police figures that have been collected in certain areas only and on varying definitions, and then grossing up. Our best estimate of the annual number of bogus trading cases reported to UK trading standards departments (TSDs) is 16,000. To this should be added the

¹ The study was launched in November 2002 in response to an informal super-complaint submitted by Citizens Advice (then called NACAB).

² Andrew Robathan MP: Property Repairs (Prohibition of Cold-calling) Bill.

³ Second Reading.

number of bogus trading cases reported to the police and not TSDs, but we do not have a usable estimate. And there is a view among enforcement, advice and consumer bodies that many other cases go unreported. Average values of money paid are well over £2,000 in samples from a number of areas, though we cannot be fully confident the overall average is at that sort of level. Even on the basis of these tentative figures for number and value we have no doubt that this is a serious problem that needs to be tackled.

Both police and TSDs find it hard to take enforcement action in more than a small minority of cases. For the police, many bogus trading offences could be seen as possible deception offences under the Theft Act.⁴ However, the only cases which they can expect to bring to a reasonably straightforward prosecution are those where no work is done by the trader. In other cases, however shoddy the services provided, quite complex evidence is needed to show deception and intention – and often the elderly or vulnerable victims are perceived as unlikely to make good witnesses (and may indeed be unwilling to give evidence). For TSDs, they will often have problems in positively identifying and then tracing bogus traders, they too need detailed witness evidence to enforce consumer protection legislation, and there are questions whether penalties are sufficient deterrent in view of the returns available from bogus trading. There is therefore a considerable enforcement gap.

The best prospects for tackling bogus traders come where there is good cooperation between TSDs and police, a sharing of information and intelligence, and an ability to mount rapid joint operations to catch bogus traders in action. There are good examples of such cooperation, but even here the numbers of convictions are modest. Indeed it is often authorities involved in current best practice who are calling for more powers to tackle bogus traders.

We conclude that, while spread of best practice will help, it will not of itself be sufficient to deal adequately with the bogus trader problem. But we consider that something must be done. **We therefore recommend that Government should pursue legislative options for tackling bogus traders**, as mapped out below.

⁴ Theft Act 1968, section 15 (parallel legislation applies in Northern Ireland, different legislation applies in Scotland).

Legislative options

We have identified four options that could potentially contribute:

- Proposed new fraud offence. This has been recommended by the Law Commission⁵ and would replace the existing Theft Act deception offence under which some bogus trader prosecutions already take place.
- Proposed fraudulent trading offence for individuals. The Law Commission has also recommended that the company law offence of fraudulent trading should be replicated for partnerships and individuals⁶. The existing company law offence has been found useful in dealings with patterns of repeat offending.
- Possible ban on work and/or payment within 7 days following a cold call. There are already provisions in the Doorstep Selling regulations⁷ for a 7-day cooling off period following an unsolicited visit. But this is undermined by the fact that, where the consumer acquires possession of goods under the contract which, before the right of cancellation has been exercised, have been incorporated in any land, the consumer is under a duty to pay for them, and for the provision of any connected service, in accordance with the contract. A ban on work and/or payment within 7 days (with exceptions) is a possible approach to deal with this problem and, if backed by strong enough enforcement powers and sanctions, might also be a way of tackling bogus traders.
- Possible ban on cold calling for property maintenance/repairs (not necessarily along the lines of present private member's bill).

⁵ Law Commission report on Fraud (report 276). (Law Commission recommendations apply to England and Wales. It would be for separate consideration whether parallel reforms were introduced for Northern Ireland. Different arrangements apply in Scotland).

⁶ Law Commission report on Effective Prosecution of Multiple Offending (report 277). Fraudulent trading offence at section 458, Companies Act 1985. (Law Commission recommendations apply to England and Wales. It would be for separate consideration whether parallel reforms were introduced for Northern Ireland. Different arrangements apply in Scotland).

⁷ Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, as amended by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) (Amendment) Regulations 1988 and the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) (Amendment) Regulations 1998.

Proposed new fraud offence

We understand that the Home Office is considering the Law Commission's report on fraud with a view to a possible Fraud Bill when Parliamentary time allows. The Law Commission's draft bill contains provisions on 'Fraud by false representation' and 'Fraud by wrongfully failing to disclose information', each of which might be used to tackle bogus traders. The proposed new offence has features that may be of assistance in prosecuting bogus traders (and other consumer scams), eg removal of the need to adduce evidence that the deception operated on the mind of the victim. It would no longer be necessary to prove that the trader's dishonest and false representation was the effective cause of loss. **We therefore support legislation on the proposed new fraud offence as a useful addition to consumer protection.**

Proposed fraudulent trading offence for individuals

The Law Commission recommended that the Companies Act fraudulent trading offence be replicated for individuals. The existing company law offence has been used for consumer protection but more for areas such as creditor and shareholder protection. It may well be that such an offence applying to individuals, with its ability to deal with patterns of offending, could be useful in tackling bogus trading. But potentially it has greater benefit across a wider range of consumer protection. **We therefore support legislation on the proposed new fraudulent trading offence as a useful addition to consumer protection.** Consultation is needed, eg on enforcement arrangements which are likely to be different from the company law offence. **We recommend that consultation and legislation should be taken forward, possibly as part of the proposed Fraud Bill.**

Possible ban on work and/or payment within seven days following a cold call

It will not be straightforward to frame changes to the Doorstep Selling regulations to address the existing undermining of the seven-day cooling off period, described above. A ban on work and/or payment within seven days following a cold call would, for example, need exceptions for urgent work. This would in any event need to be the subject of a DTI consultation. It will be more difficult to take changes further, eg with stronger enforcement measures and sanctions, and thus make it effective against bogus traders. But a feature of bogus trading is the extraction of immediate payment and it is worth exploring in depth whether a seven-day ban on work/payment could be an effective means of tackling it. **We recommend that DTI should consult on a possible ban (and potential exceptions) on work and/or payment within seven days as a means of dealing with the present undermining of cooling off periods, and that this consultation should explore whether it could also be made an effective means of dealing with bogus traders.**

Possible ban on cold calling for property maintenance/repairs

There can be no guarantee that any of the three measures above can be framed in ways that would make it (or a combination) go far enough in tackling the problem of bogus trading. This raises the question of a possible ban on cold calling for property maintenance/repairs.

A cold calling ban would have clear advantages for enforcement (eg in not requiring complex evidence of intent). But we recognise the difficulties and issues associated with legislating for a ban, including:

- justifying a criminal offence that would catch activity that was not harmful along with the harmful
- how to avoid harm to legitimate business or potentially creating barriers to entry
- considering whether there was sufficient justification for making the offence arrestable, or for including prison among the available penalties: but if not, whether the ban would provide the improvement looked for in enforcement and deterrence
- how cold calling should be defined, and what would constitute prior arrangement
- what the scope of property maintenance/repair should be
- whether a ban might, at some point in the future, be in conflict with whatever emerges from negotiations on an Unfair Commercial Practices Directive.

Some (though not all) of these difficulties might be addressed by alternatives that could be considered in a consultation exercise (eg coverage, exemptions etc)

It is at present unclear whether the balance of advantages and disadvantages argues for a ban on cold calling for property maintenance/repairs. However, **we recommend that DTI should consult on the option of such a ban and on specific issues and alternatives involved.**

Recommendations

That Government should pursue legislative options for tackling bogus traders. In particular:

- that it should proceed with legislation on the proposed new fraud offence as a useful addition to consumer protection
- that it should proceed with consultation and legislation on a fraudulent trading offence for individuals, as another useful addition to consumer protection, possibly as part of the proposed Fraud Bill
- that DTI should consult on a possible ban (and potential exceptions) on work and/or payment within seven days as a means of dealing with the present undermining of cooling off periods, and that this consultation should explore whether it could also be made an effective means of dealing with bogus traders
- that DTI should consult on the option of a ban on cold calling for property maintenance/repairs and on specific issues and alternatives involved in such a possible ban.