

Statement of consumer protection enforcement principles

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1 INTRODUCTION

- 1.1 The Consumer Protection from Unfair Trading Regulations (CPRs)¹ and the Consumer Credit Act 2006² have made significant changes to the body of UK consumer protection law. Together with the Unfair Terms in Consumer Contracts Regulations 1999 and the Enterprise Act 2002, they mark a fundamental move away from prescriptive regulation towards a principles-based consumer protection regime which encourages targeted, risk-based enforcement geared to the efficient operation of the market. At the same time, they also increase the range of enforcement tools available to enforcers, strengthening investigative powers and enabling the Office of Fair Trading (OFT) to take criminal proceedings and to seek financial penalties, alongside existing civil enforcement and compliance tools.
- 1.2 At the same time, other new legislation has taken forward the Government's better regulation agenda and in particular the recommendations of the Arculus,³ Hampton⁴ and Macrory⁵ reports. Part 2 of the Legislative and Regulatory Reform Act 2006⁶ requires regulators to have regard to principles of good regulation. Such activities should be carried out in a way that is transparent, accountable, proportionate, consistent, and targeted only at cases where action is needed. Enforcers also have a duty under the Legislative and Regulatory Reform Act to comply with the Regulators' Compliance Code, a statutory code of practice which came into force on 6 April 2008 and is aimed at embedding the Hampton and Macrory principles in regulatory practice.⁷ Part 4 of the Regulatory Enforcement and Sanctions Act 2008 requires

¹ www.offt.gov.uk/advice_and_resources/small_businesses/competing/protection

² www.offt.gov.uk/advice_and_resources/resource_base/legal/cca/CCA2006/

³ 'Regulation – less is more' March 2005 - www.berr.gov.uk/files/file22967.pdf

⁴ Reducing Administrative Burdens: Effective Inspection and Enforcement, March 2005 - www.berr.gov.uk/files/file22988.pdf

⁵ Regulatory Justice: Making Sanctions Effective, November 2006
www.berr.gov.uk/files/file44593.pdf

⁶ www.opsi.gov.uk/ACTS/acts2006/ukpga_20060051_en_1

⁷ www.berr.gov.uk/files/file45019.pdf

authorities to which it applies to review the performance of their regulatory functions and remove any unnecessary burdens that they may be imposing.⁸

- 1.3 In the light of these changes, and as a means of better articulating our established commitment to good regulatory practice,⁹ OFT reviewed its consumer protection enforcement methods and published an overall statement of enforcement principles in November 2007. We have now revised and expanded that statement.
- 1.4 This statement does not replace existing guidance concentrating on compliance issues relating to specific areas of enforcement – it is designed to complement it, drawing together the new legislative and policy requirements stemming from the better regulation agenda referred to above and summarising the key common elements in a coherent form. It should also be read alongside the OFT's prioritisation principles,¹⁰ which apply to the whole range of our activities.

⁸ Part 4 of the Act provides a mechanism for this duty to be imposed 'by exception', but the OFT and certain economic regulators have agreed to be subject to it without use of that mechanism and are named in the Act for that purpose.

⁹ The OFT remains committed to the non-statutory Enforcement Concordat launched by the Cabinet Office in 1998, in relation to which we first developed a set of enforcement principles in March 2003. The Concordat continues to exist alongside the Regulators Compliance Code – see www.berr.gov.uk/whatwedo/bre/inspection-enforcement/implementing-principles/regulatory-compliance-code/enforcement/page46822.html

¹⁰ www.offt.gov.uk/advice_and_resources/publications/corporate/general/oft953

2 STATEMENT OF CONSUMER PROTECTION ENFORCEMENT PRINCIPLES

2.1 The OFT is the UK's national competition and consumer authority, established in its current form – an independent non-ministerial government department headed by a Board and funded by the Treasury – under the Enterprise Act 2002. Our mission is to make markets work well for consumers.¹¹ With that aim we exercise a range of statutory functions including:

- enforcement of competition and consumer law
- researching and publishing market studies
- making market investigation references to the Competition Commission
- advising government
- encouraging industry codes and self-regulation
- promoting business and consumer education
- supporting the provision of advice to individual consumers via Consumer Direct.¹²

2.2 Though the OFT is not primarily a regulator, certain of our functions are regulatory in character, and as such are subject to the statutory better regulation provisions referred to in the introduction.¹³ These functions are in the areas of consumer enforcement, consumer credit licensing and

¹¹ The OFT has the function of promoting good practice in the carrying out of activities which may affect the economic interests of consumers in the United Kingdom, S8(1) EA2002.

¹² The OFT does not have the role of providing advice to the public on consumer problems in general, and is unable directly to take up complaints on behalf of individual consumers. Further information on Consumer Direct can be found at paragraph 2.6

¹³ The OFT's competition and markets functions were outside the remit of the Hampton Review and are excluded from the scope of related legislation in particular the Legislative and Regulatory Reform Act and the Regulatory Enforcement and Sanctions Act.

anti-money laundering supervision.¹⁴ The legislation we enforce in these areas is listed in Annexe A. This statement of principles sets out how, particularly when undertaking enforcement in these areas, we seek to comply with the requirements both of the law and of good practice. It reflects our commitment to supporting economic progress, a goal which is fundamental to all our activities and which we pursue using both competition, consumer and anti-money laundering tools.

Our approach to compliance and enforcement

2.3 Consumers are best served by competitive markets where businesses compete fairly for custom in compliance with the law. We believe that most businesses want to treat their customers fairly and to comply with the consumer protection law that the OFT enforces (see Annexe A). We aim to enable and encourage them to do so, and to take enforcement action only where there is no better route to securing compliance.

2.4 We encourage business compliance by:

- ensuring businesses have clear, targeted and timely information and guidance on legal requirements relating to our functions, and especially on changes to those requirements. Staff across the OFT work closely with businesses and business groups to identify their needs and how best these can be met in terms not only of the content of information provided but, also of presentation and means of dissemination. We pay particular attention to the requirements of smaller businesses
- providing incentives to improved trading practice: we rely, where appropriate, on 'established means'¹⁵ as a way of dealing with

¹⁴ In exercising its regulatory and supervisory role under the Money Laundering Regulations 2007 OFT deals with the same business sectors as in using its consumer powers. However, it uses these powers for different purposes, and is therefore developing a separate but complementary set of principles for this area of its work.

¹⁵ Established means are bodies able to act in place of OFT in encouraging compliance with the consumer protection Regulations. We are currently consulting on ways in which we can extend the reach of established means to aid compliance with the CPRs.

consumer complaints about, for example, misleading advertising¹⁶ and we promote the voluntary adoption of good trading practice through our Consumer Codes Approval Scheme (CCAS).¹⁷

2.5 The law sets minimum standards for behaviour in markets and we have a range of enforcement options to ensure compliance with them. Where appropriate we encourage higher standards when using tools other than enforcement, such as guidance and training, and in particular through our Codes scheme. The CCAS represents a means of giving businesses an incentive to go beyond the basic requirements of the law. It rewards those who adopt best practice, giving them a competitive edge in attracting and retaining customers. However, when providing advice and guidance, we distinguish between what is necessary to meet statutory obligations and what is desirable for the purposes of achieving improvements above the minimum required by law.

2.6 We seek to empower consumers and so reduce the need for enforcement. We do this by running public information campaigns, working with our national and local partners to promote consumer education and consumers' awareness of their rights, and by managing Consumer Direct, a telephone helpline and online service providing clear, practical and impartial advice and information to consumers across Great Britain.¹⁸

Our Approach to Enforcement

2.7 When it is necessary to use enforcement action to achieve compliance, we aim to ensure that such interventions deliver high impact results, for example, by changing market behaviour, clarifying laws or providing the

¹⁶ While OFT has powers under the CPRs to take enforcement action in response to a complaint concerning misleading advertising, in practice we give existing organisations, in this case the Advertising Standards Authority (a self-regulatory body which acts as 'established means' for this purpose) the opportunity to deal with complaints in the first instance.

¹⁷ www.oft.gov.uk/oft_at_work/consumer_initiatives/codes/publications/#named3

¹⁸ Consumer Direct can be contacted by telephone on 08454 04 05 06 and on-line at www.consumerdirect.gov.uk/

necessary level of deterrence to those who would deliberately flout their legal obligations. We take a risk-based approach, prioritising our actions to ensure resources are used to maximum effect and to avoid burdening business with the costs of unnecessary interventions. Our aim is to be as robust as necessary to gain compliance while allowing maximum freedom for effective competition within the law.

2.8 Enforcement is used to protect consumers, and particularly vulnerable consumers, from rogue traders, unfair practices and other instances where businesses disregard their legal obligations. We do not hesitate to act where it is clearly appropriate to do so. We expect to prosecute where offences have occurred and there is serious consumer harm or where other factors such as fraud or other dishonesty warrant the use of criminal process. We seek to ensure that our choice of enforcement sanctions is consistent with the principles set out in the Macrory report, namely to:

- aim to change the behaviour of the business and others in the sector
- aim (where our powers allow this) to eliminate any financial gain or benefit from non-compliance
- be responsive and consider what is appropriate for the particular breach and particular offender which may, or may not, include punishment and a criminal conviction.

2.9 We are committed to the principles of good enforcement, as set out in the Legislative and Regulatory Reform Act and elsewhere. We aim to act in such a way that business, consumers, fellow regulators and all other stakeholders are:

- satisfied that decisions on enforcement interventions will be **proportionate** and **consistent**
- able to understand how we **target** our resource for the greatest impact
- **clear** on the factors taken into account when deciding the appropriate enforcement intervention and

- able to hold us to **account** for our interpretation of the law and decisions we take on enforcement action.

Proportionate

- 2.10 We decide our enforcement approach to any particular case in light of all the facts before us, our current overall priorities¹⁹ and the appropriate legal considerations such as whether we have a duty or power to act.²⁰
- 2.11 The OFT generally prioritises its work according to published prioritisation principles.²¹ Where appropriate the OFT may also take account of other relevant factors. All relevant principles will be balanced in the round.
- 2.12 We fully recognise the need to ensure that our interventions are proportionate. In considering the proportionality of our interventions we take into account issues such as:
- the direct effect of enforcement on consumer welfare in the market or sector where the intervention takes place. We may prioritise work because the direct effects would specifically benefit disadvantaged consumers
 - the indirect effects of our action, particularly on the working of relevant markets, including deterrence; for example where the practice is new and likely to be repeated or copied, the deterrent effect of enforcement action is likely to be higher
 - the likelihood of a successful outcome and the risks of not taking action bearing in mind the seriousness of any breach of the law and any impact on the effectiveness of the consumer protection regime

¹⁹ OFT Annual Plan 08-09 – www.offt.gov.uk/shared_offt/about_offt/ap09/ap09.pdf

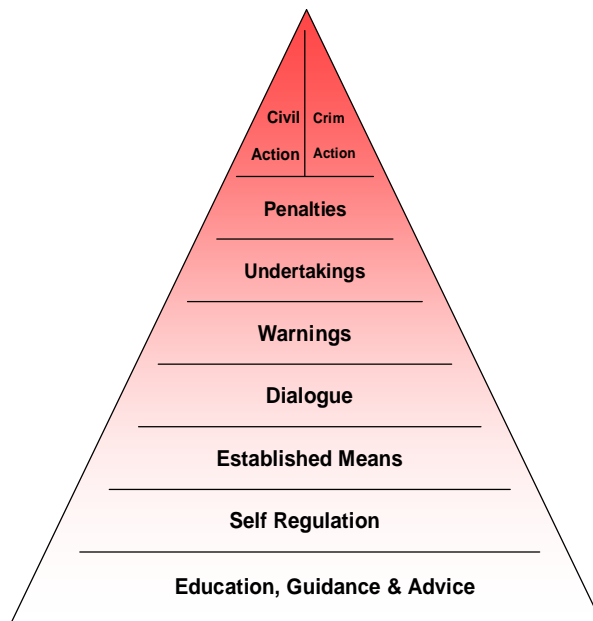
²⁰ Even when we have a duty to enforce, this does not automatically mean that formal (civil or criminal) enforcement action will be taken in respect of each and every infringement. Instead, we interpret the duty as obliging us to take steps to promote compliance by the most appropriate means, in line with enforcement priorities and consistent with available resources.

²¹ www.offt.gov.uk/advice_and_resources/publications/corporate/general/offt953

- the available options, from advice on compliance, established means, warning letters, undertakings, interim measures, injunctive action or enforcement orders through to criminal prosecution
- the extent of any administrative burdens likely to be imposed by these various interventions, particularly taking account of the size of the business or businesses involved
- the type of action to which the particular business will best respond
- intelligence, including knowledge of the business's intent and past behaviour
- whether the resource requirements of the action are proportionate to achieving the desired results.

2.13 Where we, or our co-enforcers acting on our behalf, carry out routine visits to trading premises, feedback is given as appropriate to encourage and reinforce good practice. We also share information about good practice with our partners.

2.14 The diagram below illustrates the range of options available to us. We will normally seek to use less burdensome options in the first instance (see below on transparency) unless factors indicate that formal enforcement action is the appropriate first step: such action may include a criminal investigation and prosecution.



Consistent and targeted

2.15 Where powers are shared between separate authorities, we work on the principle that action should always be taken by the most appropriate body, following necessary consultation and taking account of both statutory and non-statutory mechanisms.

- We have a central coordination role under Part 8 of the Enterprise Act 2002 and the Consumer Protection and Cooperation Regulation

(EC) No 2006/2004.²² We also have Memoranda of Understanding with partners, particularly the Financial Services Authority and the Financial Ombudsman Service in our common areas of interest ²³

- Using these means, we seek actively to promote consistency in enforcement between ourselves and other enforcement bodies, and liaise with them to this end. It is our intention to avoid a situation whereby businesses receive multiple approaches on similar or linked issues, or approaches reflecting different interpretations of the law, so they can deal effectively with a single body and expect a consistent approach.

2.16 In carrying out our functions, we act fairly and apply our procedures to achieve consistent outcomes in the market. This does not mean that we **always** take the same steps to enforce the law in the same way on apparently comparable cases or use the same legislative option – we aim to tailor the action to the individual circumstances. We administer 'fitness' regimes in consumer credit and estate agency, for example, which offer specific and tailored remedies for use within, but not outside, those sectors.²⁴ But across all our consumer enforcement activities, we assess each case on its own merits, taking account of risk and of the need for proportionality, deterrence and achieving high levels of compliance.

2.17 We are committed to working in partnership on the basis of the best available intelligence. We target our work at the most serious and prevalent market problems and instances of rogue trading using data from Consumer Direct and other sources.

²² Of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

²³ www.offt.gov.uk/oft_at_work/partnership_working/financial_services/

²⁴ www.offt.gov.uk/advice_and_resources/resource_base/credit-licence/
www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/oft969.pdf
www.offt.gov.uk/advice_and_resources/resource_base/legal/cca/CCA2006/requirements
www.offt.gov.uk/advice_and_resources/resource_base/legal/estate-agents-act/

- 2.18 To meet the challenge of the new system of coordination of local authority enforcement being established under the Regulatory Enforcement and Sanctions Act, we will enter into and abide by a memorandum of understanding with the Local Better Regulation Office (LBRO) with a view to ensuring consistency of interpretation between TSS who propose to enforce under Part 8 against those businesses who have established a Primary Authority relationship with another TSS.²⁵
- 2.19 The OFT has a programme of estimation and evaluation of the impact of its work which seeks to ensure its actions are cost-effective, well targeted and any burdens imposed on legitimate businesses are proportionate to benefits obtained for consumers. The OFT considers the impact of its work in various ways, including, for example, analysis of complaints, soliciting views of trade bodies and businesses effected and independently commissioned research.

Transparency in our consumer enforcement work

- 2.20 We are committed to the principle of transparency in our consumer regulatory work not least because it is essential to proportionate enforcement. We start from the position of wanting to give a business an opportunity to put matters right. There will be circumstances where this is not appropriate, but we do not escalate our enforcement decisions unless dialogue is failing or is clearly inappropriate – for example, where it would prejudice the investigation. When we take enforcement action we tell businesses the reasons why. Our practice in normal circumstances is to state clearly:
- the business activity or practice causing concern
 - the law(s) being or likely to be breached
 - an invitation to open dialogue

²⁵ Parts 1 and 2 of the Regulatory Enforcement and Sanctions Act puts the LBRO on a statutory footing and creates a system of Primary Authorities, designed to ensure consistency in local enforcement. A local authority wishing to take enforcement action against a business that has established a Primary Authority relationship with another local authority will be required in most cases to consult the relevant Primary Authority before so doing.

- an explanation of the next steps including timescales and the possible consequences of failure to respond
- the risks OFT has identified which we believe make enforcement necessary
- at the appropriate time information on any right to appeal following the outcome any enforcement action.

2.21 In general, we aim to be as transparent as we can about our enforcement activities to aid consumer and business understanding of how we ensure markets work well. We seek to provide full, clear and timely information and guidance on legal requirements - see above under the heading 'our approach to compliance and enforcement'. In addition, we:

- deal with enquiries about our enforcement activities in line with the requirements of the Freedom of Information Act 2000, while also having regard to legal protections enjoyed by information subjects
- aim proactively to put into the public domain information which it is in the public interest to disclose, in particular via an approved Information Scheme under the Freedom of Information Act, and the on-line Consumer Credit Licensing and the Estate Agents Registers²⁶
- where possible and appropriate, share or exchange information with other regulators (as far as permitted by legal disclosure restrictions), so as to reduce the burden on business of regulatory interventions.

2.22 In making disclosures to the public we take into account the need to comply with any statutory constraints on the disclosure of information that protect businesses and individuals under Part 9 of the Enterprise Act and under the Data Protection Act 1998, and we have full regard to the importance of the duty of confidentiality.

²⁶ www2.crw.gov.uk/pr/Default.aspx

- 2.23 Where possible and appropriate, we publicise all outcomes of court proceedings, undertakings, interim measures and orders, taking due account of the need to:
- deter others from engaging in similar kinds of conduct
 - warn consumers about practices that are detrimental to their interests
 - increase consumers' awareness of their rights
 - facilitate complaints about further breaches, and educate other businesses in the market
- (www.offt.gov.uk/advice_and_resources/small_businesses/)
- 2.24 Our policy is not to accept undertakings in lieu of enforcement action on the basis that they are to be kept confidential. We depart from this rule only in exceptional circumstances, where special public interest factors apply, and normally only on a temporary basis, where there is (for instance) a need to avoid prejudice to an ongoing investigation. We reserve the right to publish the undertakings even where no infringement is admitted. However, we aim so far as is practicable to outline the circumstances in which the undertakings were given so as to avoid giving a misleading impression on that or any other issue.
- 2.25 We recognise the importance of being transparent with those that we deal with, and increasing the public transparency of our work is a key theme in our 2008-09 Annual Plan.

Accountability

- 2.26 We are accountable to Parliament, the public and stakeholders through:
- reporting to Parliament – via publishing our Annual Plan after consultation as required by statute, and our Annual Report, including statistics and information on our enforcement and non-enforcement outcomes
 - our performance framework agreement with HM Treasury – in particular, we have agreed for 2008-11 to provide evidence of how

the OFT delivers direct financial benefits to consumers of at least five times its cost to the taxpayer over the same period²⁷

- cooperating actively with Parliamentary scrutiny both in Westminster and the devolved administrations, e.g. through investigations by select committees and, where appropriate with any enquiry by the Parliamentary Commissioner for Administration and similarly cooperating with scrutiny by the National Audit Office
- accepting the scrutiny of the Court and relevant tribunals, both under provisions giving rights of appeal against our enforcement actions, and under the administrative law via the mechanism of judicial review as and when invoked
- publishing an annual statement setting out the steps we propose to take to review our regulatory functions, and to remove any unnecessary burdens, and reporting on any steps already taken, in compliance with the Regulatory Enforcement and Sanctions Act (see below)
- commissioning independent research to evaluate the impact of our actions, and publishing the results
- our process of stakeholder engagement, including those organisations representing businesses affected by our regulatory functions
- operating our system for receiving, considering and responding to complaints.

2.27 We are committed to providing a high quality, accessible and responsive service to individuals and businesses. Our policy and practice is to be professional, courteous and helpful in all our contacts and enquiries.²⁸

2.28 Our information charter sets out the standards that members of the public can expect from us when we request or hold personal information

²⁷ www.offt.gov.uk/shared_offt/about_offt/offt999.pdf

²⁸ OFT procedures for dealing with complaints can be found at www.offt.gov.uk/about/governance/complaint

about them; how they can get access to their personal data; and what they can do if they think standards are not being met.²⁹

- 2.29 The OFT supports the Government's simplification programme, aimed at reducing administrative burdens on business in line with the recommendations of the 2005 Arculus report 'Regulation – Less is more'. We published a regulatory simplification plan in April 2008 in which we described the initiatives we were taking and which we planned to carry out over the coming year to ensure we do not impose unnecessary burdens on businesses in our regulatory activities.³⁰ In future we will report annually on what we have done and what more we propose to do by way of reducing burdens on business by way of compliance with Part 4 of the Regulatory Enforcement and Sanctions Act.
- 2.30 We will review these principles and our practices on an annual basis, in line with the principles of better regulation and as new laws are introduced. We do not expect the principles to alter significantly, but will ensure coherence between this statement and our detailed, legislation based guidance on compliance on which we consult publicly.

²⁹ www.of.gov.uk/about/freedom/charter

³⁰ www.of.gov.uk/about/data-protection-act/charter

ANNEXE(S)

A LEGISLATION ENFORCED

Legislation enforced

OFT has a number of enforcement duties and a range of enforcement powers derived from consumer protection legislation, notably:

- The Consumer Credit Act 1974 as amended by The Consumer Credit Act 2006
- The Estate Agents Act 1979 (as amended by The Consumers, Estate Agents and Redress Act 2007)
- The Unfair Terms in Consumer Contracts Regulations 1999;
- The Consumer Protection (Distance Selling) Regulations 2000 as amended by the 2005 Regulations,
- The Consumer Protection from Unfair Trading Regulations 2008
- The Business Protection from Misleading Marketing Regulations 2008
- The Enterprise Act 2002 (part 8)

Part 8 of the Enterprise Act gives OFT the power to enforce a wide range of existing consumer protection legislation, including provisions derived from European Directives and purely domestic legislation - further detail including a full list of community and domestic infringements which can be tackled can be found at on the OFT website on the Enterprise Act part 8 pages.

The OFT also has enforcement duties under the Money Laundering Regulations 2007 (it is the supervisory authority for estate agents and consumer credit financial institutions).

More general information on the individual pieces of legislation can be found on the OFT website at:

www.offt.gov.uk/advice_and_resources/resource_base/legal/

OFT also has a central coordination role under the Consumer Protection and Cooperation Regulation 2006 (CPC) to coordinate initial requests for information and referrals of cases. The CPC creates a network of public consumer protection enforcers (competent authorities) throughout the European Community. Within the European Community unfair practices should be dealt with by enforcers in the jurisdiction where the **trader** responsible for the practice is situated. The CPC allows Member States to share information and to request enforcement action to be taken to stop breaches of the legislation implementing the UCPD (the CPRs in the UK) and other Community consumer protection rules.