

Consumer law review: call for evidence

OFT response

July 2008

OFT1015

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CONTENTS

<i>Chapter</i>	<i>Page</i>
1 Executive summary	4
2 OFT response	8
Annexe – Central Register of Convictions	19

1 EXECUTIVE SUMMARY

- 1.1 The OFT has a leading role in the UK in helping consumers to understand their rights and protecting their interests, while ensuring that business practices are fair and competitive.
- 1.2 The OFT works in partnership to deliver high-impact outcomes and support national economic progress. Empowered and well informed consumers act as a positive stimulus to competition between businesses. The law provides us with a framework for consumer protection and if those laws are the right ones then the key issues are:
- whether business knows what is expected of it and how it behaves in the market
 - whether consumers understand their rights and what to do when things go wrong, and
 - what enforcers do to address any problems in the market.
- 1.3 The OFT believes that making markets work well is the best protection for consumers and businesses. Where OFT intervention is necessary, it is designed to support the development of competitive, efficient, innovative markets where standards of consumer care are high, consumers are informed and confident about making choices and where businesses are not disproportionately burdened by government regulations but are stimulated to offer benefits to consumers beyond the protection afforded by law.

The case for consumer law reform

- 1.4 The OFT strongly supports the principle of seeking to ensure the UK has a coherent legislative regime. We value clarity in legislation most highly. However, we do not think it would be a good use of resources to rewrite the whole body of consumer legislation and case law for the ordinary reader. **But we do think it is a practicable and worthwhile goal to ensure that consumer law is capable of being clearly and concisely explained to consumers and businesses through advice, publicity and written guidance so that they understand their rights and obligations.** This would provide for greater transparency and certainty in support of the high level aims set out above.

- 1.5 For the most part the OFT's existing consumer tools work well. And we have recently been given new ones. The new Consumer Protection from Unfair Trading Regulations (CPRs) are a recent example of EU principles-based legislation. **The new legislation must be given the chance to bed in after careful preparation and publicity.**
- 1.6 Because consumer legislation is largely driven at European level and the UK has only recently completed implementation of new legislation, further wholesale legislative change at this time is unlikely to be cost effective or practicable. But we believe there is some scope for simplification and harmonisation of issues within the acquis, including cancellation rights. Some of the differences between cooling off periods in different directives (such as Distance Selling and Doorstep Selling Directives) appear arbitrary and may prove to be confusing for consumers. **Cooling off periods should be harmonised to one period long enough to ensure consumers' rights are not restricted in any area.**
- 1.7 The UK is required to implement the new Consumer Credit Directive by June 2010, and as this is maximum harmonisation it will limit the scope for Member States to adopt different rules in the covered areas. Alongside transposition of the Directive, **we recommend that BERR undertake a review, to assess whether there may be scope to simplify aspects of the Consumer Credit Act and regulations (to the extent permissible under the Directive), in order to enhance transparency and consumer protection. Any such review should be informed by consumer research to establish the effectiveness of the current provisions.**

Options for legislative reform

- 1.8 The Review points out the piecemeal and confusing legislation surrounding the sale of goods/services legislation. **We think the Sale of Goods law would benefit from consolidation** given its status as one of the main keystones of consumer protection so intrinsic to everyday transactions. However, this would still need to be aligned with proposals from the European Commission (expected Autumn 2008) to make changes to the consumer acquis. **The point when any new Directive needs to be implemented would be the opportunity to consider consolidation of the UK framework.**

Working in partnership

- 1.9 We see our role with Trading Standards Services (TSS) in terms of providing **strategic leadership and support**. Examples include:
- Our role with the Regional Intelligence Network (RIN) and developing the annual National Threat Assessment
 - Our current work on developing reliable methodologies to assess the economic impact of the fair trading work of TSS and carrying out the first national assessment of that impact, and
 - Our role in leading efforts to tackle scams.
- 1.10 To enhance the effectiveness of cross boundary working, **the OFT advocates that central and local government should now enter into a meaningful dialogue with a view to ensuring sustainable funding solutions are established, at least for the existing coordination and intelligence regional functions. These are essential components of any collaborative working between TSS.** If this is not achieved, there is a risk that these networks will diminish in effectiveness or even disappear altogether. We think there should be greater convergence between regional initiatives, such as illegal money lending, scambusters and regional intelligence, to ensure that these essential services complement each other, rather than compete for profile and funding.

Securing compliance with the law

Enforcement

- 1.11 When we need to use enforcement to achieve compliance, our objective is to ensure that our interventions will deliver high impact results in terms of consumer benefit, whether that comes via changing market behaviour, clarifying laws or providing the necessary level of deterrence to those who would deliberately flout their legal obligations. We take a risk based approach to these enforcement interventions and within that context will continue to be as robust as necessary.

Self regulation

- 1.12 Self regulation has major potential to provide an effective but lighter touch alternative to statutory regulation, with greater flexibility and speed than Government regulation in addressing specific problems which cause detriment to consumers and tarnish the image of whole sectors of trade.
- 1.13 Differences in focus between schemes make it difficult to imagine them operating under a single brand. For example, the CCAS is a deliberately market focussed tool aimed at raising standards across the board in a given sector. The Local Authority Assured Trader Scheme Network provides a framework of minimum standards for local trader schemes which bring benefits to local communities, rather than trade sectors as a whole (though they may have a local sector focus). They are valuable in terms of raising customer service standards by local businesses, providing a focus for encouraging compliance with legislation. **We think there is room for more than one scheme without confusing consumers.**

Redress

- 1.14 The OFT strongly supports the empowerment of consumers by providing them with access to redress via alternative dispute resolution (ADR) instead of using court procedures which many consumers perceive as formal and expensive, despite wider knowledge of small claims procedures. **We encourage business to provide redress via the self regulation route.**
- 1.15 We contributed to BERR's study on representative actions and restorative justice. **BERR should continue to progress the work on representative actions for consumers** in the UK alongside the EU's work on collective redress as the latter initiative is focussed only on cross border disputes.

Consumer empowerment

- 1.16 **The OFT strongly endorses recommendations which place effective consumer education and the promotion of improved consumer skills at the heart of the agenda to empower consumers.** We aim to help consumers by establishing where a lack of skills and knowledge is leading to detriment, identifying what consumers need, and then establishing how

skills can be developed and knowledge improved to meet the gaps identified.

- 1.17 We continue to work closely with the consumer education alliance to determine how best to implement our communication strategy and maximize its impact.

2 OFT RESPONSE

Introduction

- 2.1 Consistent with its mission of making markets work well for consumers, the OFT has a leading role in helping consumers understand their rights and protecting consumer interests throughout the UK, while ensuring that business practices are fair and competitive.
- 2.2 In addition to this paper, OFT has provided evidence through a series of meetings on the subjects below with BERR officials.

Overview

- 2.3 Working in partnership to deliver high-impact outcomes is at the heart of the OFT's vision and supporting national economic progress is integral to our role. We look at the demand and supply sides of markets together. The competition and consumer regimes are complementary to each other. Empowered and well informed consumers act as a positive stimulus to competition between businesses. The law provides us with a framework for consumer protection and if those laws are the right ones then the issues are:
 - whether business knows what is expected of it and how it behaves in the market
 - whether consumers understand their rights and what to do when things go wrong, and
 - what enforcers do to address any problems in the market.
- 2.4 OFT believes that markets working well are the best protection for consumers and businesses. Where OFT intervention is necessary, it is designed to support the development of competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses are not disproportionately burdened by government regulations and are encouraged to offer benefits to consumers beyond the protection afforded by law.

The OFT's approach is, therefore, two-fold – compliance based alongside empowering consumers through advice and education¹.

2.5 As the BERR paper says, technological advances mean that businesses are able to operate in a number of ways, from the traditional high street model to selling via distance means. This has resulted in an explosion of choice in the ways businesses sell to consumers and the choice open to consumers. The market place now extends far beyond the high street. National boundaries have also become less important and many services are capable of being delivered online in their own right. This creates new challenges for legislators and enforcers.

The case for consumer law reform

2.6 The OFT strongly supports the principle of seeking to ensure the UK has a coherent legislative regime which avoids unnecessarily burdensome regulation and has:

- clear laws whose key elements can be easily communicated to consumers and businesses
- genuine accessible redress systems, and
- proportionate, flexible enforcement enabling swift appropriate action in response to new emerging unfair trading practices.

2.7 We see very limited practical scope for making wholesale legislative changes at this time. This is partly because consumer legislation is largely driven at European level and partly because the UK has only recently completed implementation of new consumer protection legislation such that further change in that area at this time is likely to be neither cost effective nor practicable.

2.8 Most new laws and regulations for consumer protection are initiated in Brussels (CPRs, UTCCRs, Consumer Credit Directive). The OFT generally favours the introduction of a maximum harmonisation approach to EC consumer protection law where this is feasible and provided that this will

¹ OFT is not able to intervene on behalf of individual consumers' problems to put things right and get them redress. Consumer Direct refers and signposts cases to second tier support partners best placed to do this (for example, Local Authority Trading Standards Services, CAB and Ombudsmen).

ensure an effective level of consumer protection in all Member States. We would not support maximum harmonisation where the level of consumer protection required was either too low for a mature market such as the UK consumer credit market or too onerous for developing markets. In such circumstances our view is that consumer protection should be appropriate to the needs of the Member States concerned.

- 2.9 We believe there is scope for simplification and harmonisation of some of the issues within the acquis, including cancellation rights, without a reduction in the protection offered to EU consumers. Some of the differences between cooling off periods in different directives (such as Distance Selling and Doorstep Selling Directives) seem to be arbitrary and as such may prove to be confusing for consumers. **Cooling off periods should be harmonised to one period long enough to ensure consumers' rights are not restricted in any area.**
- 2.10 Some kind of reordering over time under high level principles could help coherence but we value clarity in legislation most highly. We do not think it would be a good use of resources to rewrite the whole body of consumer legislation and case law for the ordinary reader. However, **we do think it is a practicable and worthwhile goal to ensure that consumer law is capable of being clearly and concisely explained to consumers and businesses through advice, publicity and written guidance so that they understand their rights and obligations.** This would provide for greater transparency and certainty in support of the high level aims set out above.
- 2.11 Though there are areas where the clarity of consumer law could be improved, by and large the OFT's own tools work well for us. The new Consumer Protection from Unfair Trading Regulations (CPRs) are a recent example of EU principles based legislation. **The new legislation must be given the chance to bed in after careful preparation and publicity.** We see no scope or desire for change, particularly given the cost of implementation and potential confusion further change would cause. Until initial review and evaluation has taken place (which is unlikely to be meaningful within a two to three year period) this new law, for practical reasons, should not be subject to change, or speculation about change, ahead of that.
- 2.12 In the case of consumer credit, the UK is required to implement the new Consumer Credit Directive by June 2010, and as this is maximum

harmonisation in the areas covered it will significantly limit the scope for Member States to adopt different rules in those areas. In particular, the Directive introduces prescriptive rules on the form and content of pre-contract information, although Member States are permitted to adapt the extent to which, and the manner by which, this is explained to consumers. The Directive also precludes Member States from adopting different rules on the advertising of credit and the form and content of agreements. There is greater scope in relation to post-contract transparency, but here the UK has recently reviewed the legislation, and new requirements come into force in October 2008 – these too should be given time to bed in before they are reviewed.

- 2.13 The Directive does not, however, impact on all aspects of consumer credit regulation, and there will be scope for Member States to introduce national measures in areas outside the co-ordinated field. Alongside transposition of the Directive, **we recommend that BERR undertake a review, to assess whether there may be scope to simplify aspects of the Consumer Credit Act and regulations (to the extent permissible under the Directive), in order to enhance transparency and consumer protection. Any such review should be informed by consumer research to establish the effectiveness of the current provisions.**

Options for legislative reform

- 2.14 To ensure the effectiveness of a modern consumer protection framework based on general principles, clear guidance is essential:
- to ensure clarity and certainty for businesses, for example, on what traders should or should not be doing
 - for consumers, so that they know what to do if their rights are infringed, and
 - enforcement bodies need to outline how they will use the powers available to them.
- 2.15 The Review points out the piecemeal and confusing legislation surrounding the sale of goods/services legislation. Calls to Consumer Direct (the OFT's national consumer advice service) average approximately 125,000 calls per month, equating to 1.5 million contacts per year. Of these, roughly 80 per cent are cases where advice is provided to people encountering a

specific problem with goods and/or services they have purchased. This demonstrates a high level of public confusion and need for information and advice as to the best way for an aggrieved consumer to proceed. **We think the Sale of Goods law would benefit from consolidation** given its status as one of the main keystones of consumer protection so intrinsic to everyday transactions. However, this would still need to be aligned with proposals from the European Commission (expected Autumn 2008) to make changes to the consumer acquis. **The point when any new Directive needs to be implemented would be the opportunity to consider consolidation of the UK framework.**

2.16 If the Law Review were able to achieve one change in consolidating and clarifying basic everyday shopping rights for all consumers and businesses backed by effective publicity it would be a significant achievement and would be likely to deliver considerable savings and benefits to the economy.

Working in partnership

2.17 We view our relationship with Local Authority Trading Standards Services (TSS) in the context of effective delivery of the objectives of competition and consumer policy. With the advent of the Local Better Regulation Office, our focus is now on improving how we and TSS work together where our remits overlap, for example fair trading.

2.18 The reforms introduced by the Consumer Credit Act 2006 mean TSS will play a major role in gathering the evidence and information needed to make the required competence assessments. Formal arrangements have now been concluded to facilitate this process and build upon our partnership approach to regulating credit markets.

2.19 We see our role with TSS in terms of providing **strategic leadership and support**. We are also a key ally for TSS in central government. We provide strategic leadership in the development and application of consumer policy at a national level. Other examples of strategic leadership include:

- our role with the Regional Intelligence Network (RIN) and developing the annual National Threat Assessment²

² See Annexe for further details.

- our current work on developing reliable methodologies to assess the economic impact of the fair trading work of TSS and carrying out the first national assessment of that impact, and
- our role in leading efforts to tackle scams.

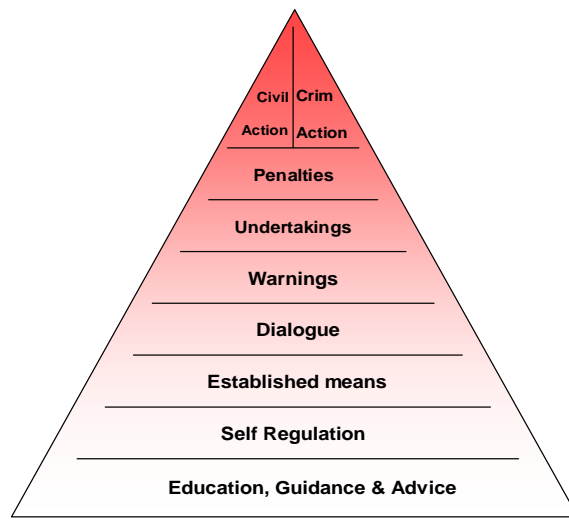
2.20 We also provide strategically important support for TSS, involving case support and advice, and training, most recently in the use of the CPRs and the provision of guidance.

2.21 To enhance the effectiveness of cross boundary working, **the OFT advocates that central and local government should enter into a meaningful dialogue as a matter of urgency, with a view to ensuring sustainable funding solutions are put in place at least for the existing coordination and intelligence regional functions, as we see these as essential components of any collaborative working between TSS.** If this is not achieved, there is a risk that these networks will diminish in effectiveness or even disappear altogether, which would seriously undermine the effectiveness of any future regional or cross boundary working. We also think that there should be greater convergence between regional initiatives, such as illegal money lending, scambusters and regional intelligence, to ensure that these essential services complement each other, rather than compete for profile and funding. Whatever level of resource is made available for regional working, it is clear that it needs to be long term and sustainable in order to enable more strategic planning of regional working and of the RIN, and to encourage their scope and activity to be extended.

2.22 OFT is not the appropriate body to provide funding nor is it financially able to do so.

Securing compliance with the law

2.23 The diagram below shows the range of compliance and enforcement options available to us. The base represents our default starting point, and thus the options it covers are those most extensively used.



Enforcement

- 2.24 When we need to use enforcement to achieve compliance, our objective is to ensure that our interventions will deliver high impact results in terms of consumer benefit, whether that comes via changing market behaviour, clarifying laws or providing the necessary level of deterrence to those who would deliberately flout their legal obligations. We take a risk based approach to these enforcement interventions and within that context will continue to be as robust as necessary.
- 2.25 Our risk based approach to credit licensing means that different categories of credit business are placed in different risk bands. Those businesses with a history of trading fairly and which represent a low risk to consumer well-being will be subjected to the minimum of regulatory burden. However, those businesses which may be new to credit markets – particularly those seeking to engage in high risk credit activity such as debt collecting – will be subjected to a much higher level of scrutiny as to their fitness to hold a licence.

2.26 The adoption of a risk-based approach allows OFT and our partners to apply proportionality and to make the best use of resources through:

- a mix of incentives (for example minimal inspections where there is a history of compliance)
- support (for example provision of advice through interaction and guidance), and
- enforcement (the application of sanctions or remedies in cases where there is significant detriment to consumers).

2.27 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 expect to take criminal enforcement action where there is or could be serious consumer harm. We aim to be transparent about how we enforce by issuing guidance and policies which enable businesses to understand the requirements upon them and comply.

Self regulation

2.28 Self regulation has major potential to provide an effective but lighter touch alternative to statutory regulation with greater flexibility and speed than Government regulation in addressing specific problems which cause detriment to consumers and tarnish the image of whole sectors of trade. By involving industry participants in tackling sector specific problems, it builds upon industry expertise and legitimate self-interest in addressing malpractice or poor standards in the relevant market place. Because it is voluntary, and take-up has to be achieved by persuasion, it does not represent a quick fix. But over time it can lead to increased standards of customer care across industry sectors as these voluntary standards are increasingly adopted and exceeded in order to attract and retain customers. Codes of practice do not directly lead to rogue traders being penalised or removed from the market, but can help to marginalize them by empowering consumers to avoid them.

2.29 The OFT's Consumer Codes Approval Scheme (CCAS) has approved codes of practice in important sectors of consumer spend - vehicle bodywork repairs, new car sales, direct selling, estate agency, carpets, vehicles repairs and servicing and removers. 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. Our consumer research found that nearly three-quarters of those consumers interviewed thought that an OFT approved code would give them confidence when buying goods or services.

2.30 We consider that differences in focus between schemes make it difficult to imagine them operating under a single brand. For example, the CCAS is a deliberately market focussed tool aimed at raising standards across the board within a sector that a code operates. The Local Authority Assured Trader Scheme Network (LAATSN) provides a framework of minimum standards for local trader schemes. Local trader schemes bring benefits to local communities, rather than trade sectors as a whole (though they may have a local sector focus). They are valuable in terms of raising customer service standards by local businesses, providing a focus for encouraging compliance with legislation.

2.31 We think there is room for more than one scheme without confusing consumers.

Redress

2.32 The OFT strongly supports the empowerment of consumers by providing them with access to redress via alternative dispute resolution (ADR) as it provides a viable alternative to using court procedures which many consumers would still regard as formal and possibly expensive, despite wider knowledge of small claims procedures. We encourage business to provide redress via the self regulation route through both the CCAS and LAATSN.

2.33 The OFT strongly supports the view that actions on behalf of a representative group of individuals will have the greatest effect on achieving both redress for the biggest number of affected consumers and the best deterrent effect on companies. Representative actions would be beneficial to groups of consumers who have been unable to settle their disputes through direct settlement or third party resolution although we do not agree that these mechanisms must be exhausted before consumers are allowed to participate. There may be instances where a suitable ADR

mechanism is not available, or the relevant parties are unwilling to engage in an ADR process.

- 2.34 We contributed to BERR's current study on representative actions and restorative justice. **BERR should continue to progress the work on representative actions for consumers** in the UK alongside the EU's work on collective redress as the latter initiative is focussed only on cross border disputes.³
- 2.35 One of the priorities within BERR's consumer strategy of 2005 was to act to facilitate the return of funds to UK consumers who are victims of overseas scams where successful enforcement action has been taken by overseas authorities. We considered how such a refund mechanism could work in practice and have provided BERR with our findings.

Consumer empowerment

- 2.36 **The OFT strongly endorses recommendations which place effective consumer education and the promotion of improved consumer skills at the heart of the agenda to empower consumers.** We aim to help consumers by establishing where a lack of skills and knowledge is leading to detriment, identifying the skills and knowledge consumers need, and then establishing how skills can be developed and knowledge improved to meet the gaps identified. As mentioned above when discussing legislative reform, our work of educating consumers is made easier if the law is clear.
- 2.37 The definition of what is a vulnerable consumer is in a state of flux – vulnerability is context defined = dependent on whether a consumer understands the nature of the product he/she is purchasing. Time poor consumers are different from consumers who lack the knowledge and the skills to shop with confidence. This, perhaps, points to the Government looking at ways in which key information (about products and terms and conditions) is provided to consumers. Wide definitions of 'vulnerability' are unhelpful and insufficiently discriminating for many purposes. A market based approach looks at how and why consumers are vulnerable in a

³ The OFT's consumer detriment study which showed that an estimated 34 per cent of consumer problems are considered not resolved at all by the consumer. Further work should therefore continue to be undertaken to find out if collective redress could be suitable for particular cases.

particular context. The question is not who are the vulnerable consumers but which consumers are particularly vulnerable in any market situation and why this is the case. Choosing the correct tool from an enforcer's toolkit can then address the deficiencies in the market.

- 2.38 We continue to work closely with the consumer education alliance to determine how best to implement our communication strategy and maximize its impact.

ANNEXE

Central Register of Convictions (CRC)

In order to fully comply with our general public law obligations and specific relevant legislation (such as the Data Protection Act 1998 and Human Rights Act 1998) we must ensure that the processing (including retention and disclosure) of data relates to the carrying out of our functions.

For example, OFT must, under the Data Protection Act, satisfy itself that processing the processing of data that relates to individuals is not only necessary to the performance of our functions, but also proportionate to the purpose for which it is being processed.

Therefore, we only accept notifications that relate to proceedings falling within one of the following categories:

- (a) proceedings under the 33 pieces of legislation which local authority Trading Standards Services (TSS) are required to notify to the OFT under s230 of the Enterprise Act 2002,
- (b) proceedings which are of direct relevance to our consumer credit licensing functions and functions under the Estate Agents Act 1979 (for example where the offence involves fraud or dishonesty), and
- (c) proceedings which are relevant to the OFT's wider functions of promoting good practice in the carrying out of activities which may affect the economic interests of consumers (for example offences relating to product safety or counterfeit goods).

Regional Intelligence and Regional Coordination

Current funding for Regional Coordination is set at £25,000 per region for the nine English regions and Wales and Scotland and current funding for regional Intelligence is set at £55,000 per region for the nine English regions, Wales and Scotland.

OFT and BERR will fund 75 per cent of the Regional Intelligence function in the current year 08-09, with local authorities providing the remainder.

OFT and LBRO will fund all of the Regional Coordination function for the current year.

Going forward, LBRO has currently committed at least £12,500 per region for regional coordination for 2009-10 and BERR will continue to commit some funding to regional intelligence in 2009/10 and 2010/11. OFT funding covers 2008-09 only, and there will be no further funding from the Office available in 2009-10 or 2010-11.

National Intelligence Model

The National Intelligence Model (NIM), originally devised by the National Criminal Intelligence Service, is recognised as a best practice business planning framework for integrating intelligence gathering and deployment within the core business of enforcement agencies. NIM allows the identification of patterns of complaints, consumer detriment and risk and enables a more fundamental approach to business planning in which resources can be tasked efficiently against an accurate understanding of complaints, risk assessment and enforcement.

Through capturing a coherent and robust intelligence picture, effective strategies and tasking and co-ordination for dealing with a particular problem can be developed. Use of the NIM methodology enables the identification of new, current and emerging problems, and gives the capability to provide strategic and tactical direction as to how they can best be tackled.

Papers attached as requested by BERR team:

- confirmation of funding arrangements for Regional Intelligence and Regional Coordination
- information on the NIM and how it underpins the RIN.