

Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation

**A consultation response by the
Office of Fair Trading**

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1 EXECUTIVE SUMMARY

Introduction

- 1.1** The Office of Fair Trading (OFT) welcomes the adoption of the EU Unfair Commercial Practices Directive (UCPD) and the opportunity to play a major role in implementing it in the UK. The OFT believes that the UCPD can provide a more effective consumer protection regime which reduces consumer detriment¹, encourages high standards of business behaviour while reducing burdens on fair dealing businesses.
- 1.2** As principles based legislation, the UCPD provides speed and flexibility to tackle new unfair practices that cause consumers economic harm and so eliminates the need for reactive/catch up legislation to deal with each problem only after it occurs. Principles based legislation also better tackles the problem of legislative loopholes.
- 1.3** The UCPD fits with our market based approach to achieve compliance wherever possible. We produce guidance to business on compliance and our approach to enforcement, and this would continue with the UCPD. Voluntary codes of practice promoting fair dealing can address particular problems causing consumer detriment in market sectors. The UCPD recognises this and the OFT, which already runs a codes approval scheme, supports proposals to give codes a role in controlling unfair practices.
- 1.4** Where enforcement action under UCPD implementing legislation is required, that action should be proportionate, timely and effective. To ensure that this can be the case, the UCPD's principal enforcers, the OFT and the Trading Standards Service (TSS)², require a full range of

¹ The OFT concurs with the DTI on the scope for reduction in consumer detriment as indicated on page 26 of the Partial Regulatory Impact Assessment.

² We include The Department of Enterprise, Trade and Investment in Northern Ireland as part of the UK Trading Standards Service.

investigative powers and an appropriate range of sanctions. The UCPD applies to a spectrum of unfair practices—from internet scams to high pressure doorstep selling—and cuts across all sectors. The effects of traders breaching the UCPD will also be diverse. A range of investigative tools will enable enforcers to investigate different cases more appropriately and efficiently and result in better quality enforcement decisions. A full range of civil and criminal sanctions will also better promote successful compliance.

Interpretation

- 1.5** The OFT agrees with the Government's analysis of the definitions and scope of the UCPD. We also agree that adopting text from the UCPD, amplified by guidance is the best approach to take to implement the Articles defining the scope of the UCPD, the definitions of the terms in the UCPD, the Annex of Banned Practices, and the tests for unfair practices.
- 1.6** Elaborating the definitions and tests on the face of the implementing legislation would be inconsistent with this principle based law and reduce its value, in addition to risking non compliance with maximum harmonisation requirements. With clear, up to date and widely promulgated guidance, enforcers, the judiciary, business and consumer representatives will be well equipped to determine whether or not a practice is unfair.
- 1.7** Given our experience in providing consumer protection guidance and our relationship with the wider enforcement community, the OFT in partnership with the DTI and the TSS is best placed to produce UCPD guidance. In drafting guidance we would of course ensure that the process is transparent and takes full account of stakeholders' views. The UCPD guidance project will be part of a broad strategy to raise business awareness of the UCPD, to promote consistent enforcement amongst co-regulators and to promote the better regulation principle of providing authoritative and accessible advice.

Enforcement

Enforcement by public authorities

- 1.8** The OFT's views on the best enforcement regime for the UCPD build on the proposals announced in the Chancellor's Pre-Budget Report. The Report announced that the OFT will play a new role in UK consumer protection in close partnership with the TSS, to facilitate better working together, effective co-ordination and consistency of enforcement. To achieve this consistency, it is important that the OFT and the TSS share the same enforcement powers. The OFT is committed to working with the TSS so that we use civil and criminal powers in a proportionate way to secure compliance in the interests of consumers.
- 1.9** In our view, the Enterprise Act 2002 Part 8 injunctive regime should be the main enforcement mechanism for UCPD since we expect it to be the most appropriate response for the majority of UCPD cases. Part 8 requires consultation with business before enforcement orders are sought (except in rare cases where immediate action is needed). Where consultation fails and Orders are secured, they deter future misconduct. A breach of an Order can lead to a custodial sentence as a result of contempt proceedings. To ensure consistency in the use of Part 8 generally and in relation to UCPD action, the OFT will continue to work in partnership with the TSS by providing support when necessary and promoting best practice.
- 1.10** Part 8 acts as a deterrent solely to future, repeat breaches. This is in contrast to our competition work where, under the Competition Act 1998, we have powers to impose administrative fines against the original breach. This has proved an effective means of encouraging compliance. Arguably, therefore, a gap in the effective enforcement of consumer protection under civil law will remain from the continuing absence of a first breach penalty deterrent. The appropriate range of penalties for the enforcement of consumer protection law is an issue that we are currently assessing in light of the review of penalties being conducted by the Better Regulation Executive—'Regulatory Justice:

Sanctioning in a post-Hampton World.' In the absence of effective sanctions at civil level, more specific regulation of individual sectors may be demanded by consumers. We welcome the review, which includes an evaluation of administrative penalties for breaches of consumer protection law.

- 1.11** We also recognise that there are practices which by their nature call for criminal enforcement. For example, unfair practices which involve fraudulent activity, aggressive or threatening behaviour or danger to the physical safety of consumers, should be capable of being tackled using criminal powers. To deter traders from deliberately engaging in the most extreme practices and to prevent further harm to consumers, a range of criminal sanctions, including imprisonment, should be available for the courts to apply.
- 1.12** Effective and proportionate enforcement of the UCPD will depend on enforcers having a suitable range of investigative powers. For example, the power to make a covert test purchase can help determine if formal enforcement action is necessary. In order to stop a mass telemarketing scam, breaching several of the UCPD Annex of Banned Practices, the power to intercept communication would provide the evidence needed to pursue an enforcement case.
- 1.13** We recommend there be no reduction of investigative powers available to the TSS under existing legislation and that these are also given to the OFT. Different and unequal powers of investigation between enforcers will undermine efficient enforcement. Decisions as to whether the OFT or the TSS takes a UCPD case forward should be made on the basis of who is better placed to act and not be determined by the investigative powers available to the enforcer.
- 1.14** Providing the primary enforcers with the same toolkit of options in terms of penalties and powers of investigation will also meet the UCPD's requirement for Member States to ensure that an adequate and effective means exists to combat unfair practices and that penalties are effective, proportionate and dissuasive. The issue of the correct obligations on

enforcers to administer the law to achieve this continuing, effective regime is less straightforward. The OFT believes that any duty on us to enforce the new law, or to consider all consumer complaints made under it, would be counter-productive and work against our attempts to enforce proportionately and on the basis of risk to consumers. However, we do not directly enforce all current law covered by the UCPD and so acknowledge that there may be cases for retention of a duty to enforce under legislation for which we are not the primary enforcer. Others are better placed to identify whether and where any such cases exist.

The role of self regulation

- 1.15** The OFT advocates the use of market based solutions wherever practicable and therefore strongly recommends that codes play a part in controlling unfair practices. A consumer protection framework based on general principles can only benefit from closer involvement of representative trade bodies since they are well placed to identify and discourage unfair practices. The OFT would support all trade associations with guidance in respect of the UCPD.
- 1.16** The OFT supports the proposal that code owners may face civil enforcement action if their codes recommend conduct which breaches the UCPD. This proposal supports efficient enforcement as it provides the OFT with the potential means to address a sector-wide unfair practice through consultation with relevant code owners, rather than by separate actions against the individual traders involved.
- 1.17** The OFT also welcomes the proposal that the Advertising Standards Authority continue its role in relation to misleading advertising.

Civil redress

- 1.18** The OFT is supportive of proposals which extend the ability of consumers to obtain redress. Providing consumers with a right of action under the UCPD will improve their chances of securing compensation when they have suffered a loss as a result of an unfair practice. The

current framework of consumer rights in relation to unfair practices is complex and a more straightforward set of rights based on the UCPD could empower consumers however they seek redress, for example through direct settlement, Alternative Dispute Resolution (ADR) mechanisms, or ultimately the courts. Importantly, in our view, the provision of private rights under the UCPD should be accompanied by the right of interested private organisations to take representative actions on behalf of consumers.

- 1.19** If consumer rights are to be extended, measures are necessary to support the use of these rights. Awareness campaigns for consumers, improved levels of consumer education, training for consumer advisors, and clearly signposted ADR schemes are all required and the OFT would look forward to playing a major role in delivering these supporting measures.

Simplification of existing legislation

- 1.20** The maximum harmonisation nature of the UCPD should enable consumers and business to access all Member State markets with greatly increased confidence.
- 1.21** Implementation allows for the consolidation and rationalisation of existing consumer protection legislation, such as the continuing work being undertaken in line with the review of the Acquis. We urge the Government to seize this opportunity to rationalise domestic consumer protection law to avoid creating unnecessary burdens and uncertainty for business, and to assist enforcers to achieve a consistent approach.
- 1.22** To achieve this it will be necessary for the Government to continue to work closely with the TSS since they are principal enforcers of the Trade Descriptions Act 1968 (TDA) and the Consumer Protection Act 1987 Part III (CPA). There is considerable overlap between the UCPD and this legislation, which currently provides some of the tools most frequently used by the TSS. We have discussed with the TSS whether and to what extent removal of the business to consumer provisions might hamper

effective enforcement by the TSS. We see no inherent reduction of consumer protection in this scenario, but it is imperative that the Government considers the practical effects of rationalising the legislative framework to ensure that there is no unintentional reduction in current levels of consumer protection due to simplification.

2 DETAILED RESPONSE – INTERPRETATION

- 2.1** Implementation of the UCPD and its general duty not to trade unfairly will mark a fundamental shift in UK consumer protection law. A framework law based on general principles fits better than detailed, specific legislation with a comprehensive approach to compliance, where enforcement is considered broadly and encompasses all measures that promote and facilitate adherence to the law and not just formal enforcement actions.
- 2.2** A key element in this compliance focused view of enforcement is the provision of accessible guidance that assists businesses, enforcers and consumer advisors to interpret the law. The value of such guidance cannot be overstated. Stakeholders need appropriate guidance on how to interpret the principle of unfairness when seeking to apply it in practice.
- 2.3** The OFT agrees with the DTI's assessment that the maximum harmonisation requirement gives little scope for providing further clarity on the meaning of the definition Articles of the UCPD in UK implementing legislation. Although the provision of clarity in the transposition law, on terms such as 'professional diligence' and 'invitation to purchase', may be attractive at first sight, the benefits would be illusory as bringing no real benefits. The implementing legislation will, in practice, have to be interpreted by reference to the UCPD itself so attempts at clarification in UK law will potentially hinder correct interpretation. Moreover, variation from the UCPD's text could lead to uncertainty as to whether the Directive's requirements have been transposed as this maximum harmonisation Directive requires³. The OFT believes that implementing legislation which mirrors the content of the

³ Over prescriptive guidance could pose similar risks but illustrative, practical information should not.

UCPD, and is supported by accessible, authoritative guidance, is the right option.

- 2.4** The OFT's relationship with co-enforcers of the UCPD, its past experience of producing guidance on consumer protection legislation, and its close involvement with developments leading to the adoption of the UCPD, make it well placed to produce guidance on the UCPD. The OFT intends to work closely not only with the DTI, but with its primary co-enforcer of the UCPD – the TSS – and will develop guidance in full consultation with all other stakeholders. The OFT will provide stakeholders with full opportunity to make their views known and provide a clear timetable for this work.
- 2.5** The OFT recognises that implementation of the UCPD will result in familiarisation costs for business and enforcers; the OFT will aim to minimise those costs by providing guidance that is of practical benefit and is accessible, illustrating what is likely to fall foul of the new law and the types of issue that businesses will need to address when seeking to comply.
- 2.6** Providing UCPD guidance will be a continuing process. The OFT will consider the need for new or amended guidance as enforcement experience is gained; assess the usefulness of guidance through feedback from enforcement partners and businesses; and update guidance when necessary in order to reflect the needs of stakeholders.
- 2.7** As well as assisting business and enforcers on a practical level, the UCPD guidance will be an important component in the OFT's efforts to raise awareness about the UCPD more generally. The guidance will also be valuable to those providing advice to consumers on their rights. Supported by the UCPD guidance, advisors will be able to alert enforcers to emerging unfair practices which may require regulatory action.
- 2.8** The OFT's responses to this set of questions of the consultation highlight some key areas that we believe will need to be addressed in guidance. The OFT hopes the DTI can share with us the 'interpretation'

responses to this consultation: this would be the first step in developing UCPD guidance designed to meet the needs of all target groups.

Aim & Definitions

Q1. Do you have any comments on the Government's analysis on the definitions in Article 2?

Q2. Are there any other issues you would like to see covered in the Guidance accompanying the Directive? The Government would welcome views in particular on: 'material distortion'; 'professional diligence'; 'invitation to purchase'; and 'transactional decision'.

2.9 It is the OFT's view that all definitions provided for in Article 2 will require clarification and additional explanation in guidance.

2.10 Professional diligence: in assessing this one must determine if the practice meets the standard of an honest market practice and/or the principle of good faith. The OFT has experience applying the concept of good faith under the Unfair Contract Terms Directive. This experience demonstrates that good faith is a concept that sets an objective standard that can involve positive obligations on businesses which may not be evident in existing market practices. Therefore, we agree with the assessment that a trader cannot rely on the fact that an unfair practice is prevalent where it is not consistent with the standard that a trader might reasonably be expected to exercise towards consumers.

2.11 Invitation to purchase: guidance on the scope of invitation to purchase will be required to provide greater certainty, as Article 7 places specific information requirements on communications that are invitations to purchase. The concern stakeholders have expressed about this issue, as referred to in the consultation document, is one the OFT shares. The OFT suggests that this is explored further through stakeholder discussions hosted by the DTI.

- 2.12** Material distortion and transactional decision: the OFT believes that guidance should describe key features of a transactional decision so that any transactional decisions can be easily identified. This will be important with respect to less obvious transactional decisions, such as those that can be made post-contract or those which are negative, i.e. a decision not to act. The OFT agrees with the view that for a practice to materially distort, it must affect a consumer's ability to make a free and informed choice. The practice's impact must be sufficient to cause, or be likely to cause, a consumer to take a transactional decision which he would not otherwise have taken. Guidance will be useful in showing how these terms can apply practically.
- 2.13** The OFT recognises that one of the TSS's main concerns with UCPD implementation is the impact on the TDA. Whether the Government decides to repeal the business-to-consumer (B2C) aspects of the TDA or amend them, some existing case law on false trade descriptions will no longer be useful. The OFT is keen to work on this area of interpretation with the TSS to determine how past experience of enforcing the TDA will be changed by the UCPD.

Scope, Internal Market Clause

Q3. Do you have any comments about the Government's analysis of the scope of the Directive?

- 2.14** The OFT agrees with the analysis of the scope of the UCPD. The OFT suggests that the implementing legislation makes express reference to the scope of the UCPD, including all exclusions. For example, national rules on intellectual property rights are referred to in Recital 9 as matters outside the scope, even though this does not read across to Article 3. The derogation of the UCPD for financial services and immoveable property should also be made explicit: for these sectors, the UCPD provides the minimum standard for B2C commercial practices rather than a standard which cannot be exceeded. These issues can be addressed clearly and effectively in the transposition law.

The General Prohibition

Q4. Do you have any comments in relation to the tests of professional diligence and to materially distort? Are there any issues you would wish to see clarified in Guidance?

2.15 The OFT agrees with the analysis of the general prohibition in relation to 'professional diligence' and 'to materially distort'. See paragraphs 32 & 34.

Q5. Do you have any comments on the Department's analysis of the relationship between average and vulnerable consumers, and its proposal to express Article 5(3) as an alternative to Article 5(2)(b)? Does this raise issues that could usefully be addressed in Guidance?

2.16 The OFT agrees with the analysis of the relationship between average consumer and vulnerable consumer. The vulnerable consumer modulation allows the average consumer test to be adapted to address unfair practices aimed at all but causing economic detriment disproportionately to vulnerable consumers. Guidance should clarify when it will be appropriate to use the modulation to the average consumer test where a commercial practice is directed at a particular group, and when to use the modulation for vulnerable consumers. This could be achieved through illustrative cases that indicate factors likely to determine which variation of the average consumer is appropriate.

Q6. Do you have any comments on the Government's analysis of the implications of applying the average consumer concept in the UK? Are there any issues that you would like to see clarified in Guidance?

2.17 The OFT strongly recommends that the definition of the average consumer provided by Recital 18 be included in the implementing legislation. This definition of the average consumer, a consumer who is 'reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors,' is the intended definition for the UCPD. As the concept of the average consumer is key

to interpreting the provisions of the UCPD, providing this clarity on the face of the implementing legislation is critical to ensuring the correct interpretation is taken.

Q7. Do you think it would be helpful to clarify that the 'average member of a particular group' and the 'vulnerable consumer' also apply to Articles 6-9 in the legislation implementing the Directive?

2.18 The OFT agrees that it would be helpful to clarify in the implementing legislation that the variations on average consumer are equally applicable to Articles 6-9 of the UCPD.

Misleading Actions & Omissions

Q8. Do you have any comments on the Government's view that the list of elements in Article 6(1) applies both to practices giving false information and practices that deceive or are likely to deceive?

2.19 It is the OFT's view that the exhaustive list of elements in Article 6(1) applies only to practices that deceive or are likely to deceive. Subject to the transactional decision test, a commercial practice that contains any false information should be considered misleading. This principle should not be limited to information that is false in relation to the list of Article 6(1). This interpretation ensures that consumers are provided the widest protection. It is also consistent with the view offered by the authors of the DTI commissioned report on application and scope of the UCPD⁴.

⁴ *An analysis of the application and scope of the Unfair Commercial Practices Directive*, Twigg Flesner, Parry, Howells & Nordhausen, DTI, 2005

Aggressive Commercial Practices

Q9. Do you have any comments on the Government's analysis relating to aggressive commercial practices? Are there any issues you would like to see clarified in Guidance?

2.20 A prohibition against aggressive B2C commercial practices is a new concept, therefore guidance will have to provide illustrations of aggressive practices so it is clear to enforcers and business where legitimate practices end and aggressive practices begin. For example pressure-selling is a long-standing concern of consumer advocates, particularly in relation to its effects on vulnerable consumers. Guidance should address how particular practices associated with pressure-selling relate to the definition of aggressive practices.

The Annex of Banned Practices

Q10. Do you have any comments on the Government's analysis relating to the Annex of banned practices? Are there any issues you would like to see clarified in Guidance?

2.21 The practices identified in the Annex of Banned Practices are fairly clear as stated. However the scope of the practices can be clarified further in guidance. For example, seven of the banned misleading practices involve the act of 'claiming'; guidance could define the scope of what should be treated as a claim.

2.22 Irrespective of which approach is taken with regard to legislation that overlaps with the UCPD (i.e. whether amended or repealed), the OFT believes it will be helpful for guidance to relate the Banned Practices to existing prohibitions.

3 DETAILED RESPONSE – ENFORCEMENT

- 3.1** The OFT acknowledges that only a range of activities can achieve its objective of making markets work well for consumers. Empowered consumers who are able to resolve problems directly with traders, coupled with effective self-regulation, assisted by guidance on the law where needed, all encourage and enable businesses to trade fairly. The OFT welcomes the proposed role for codes of conduct in the control of unfair practices and the proposal to provide consumers with private rights of action supported by meaningful routes to redress, and wishes to produce UCPD guidance.
- 3.2** But underpinning compliance there must be formal enforcement. Where this is necessary, it should be proportionate, swift, effective, and consistent. The OFT strongly recommends that the Government implements the UCPD so as to achieve both rationalised law and a coherent enforcement regime, where enforcers have an appropriate range of tools to facilitate consistent and effective enforcement.
- 3.3** The current framework for enforcing laws that relate to unfair B2C commercial practices is fragmented and not comprehensive. The laws, which have been added to significantly over time, are not easy to navigate. Misleading practices, as defined by the UCPD at Articles 6 & 7 and the Annex of Banned Practices 1 to 26, are currently covered by numerous pieces of legislation. Aggressive practices are not comprehensively addressed in current consumer protection law. Unsurprisingly, the consequent enforcement framework is not consistent. In practice, and notwithstanding a continuing increase in the use of Part 8 of the Enterprise Act 2002 by a number of local enforcers, the TSS routinely uses the criminal powers of the TDA and CPA, which penalises for past offences. The OFT, on the other hand, which is not given these criminal enforcement powers, exercises civil powers – Part 8 or, as needed, the Control of Misleading Advertisements Regulations (CMARs) themselves – which primarily govern future behaviour.

- 3.4** One important practical effect of the difference in powers of enforcers is the related powers of investigation. The civil route provides the OFT and other Part 8 enforcers with limited powers to investigate whether or not a breach has occurred. Conversely, using criminal law gives much wider powers to investigate. Powers critical to proportionate enforcement decisions should not be limited to criminal cases, but should also be available for civil enforcement action.
- 3.5** Implementation of the UCPD provides an opportunity to give, or at least make large strides towards giving, the TSS and the OFT a single, unified regime to combat unfair practices. This would build on the proposals announced in the Chancellor's Pre-Budget Report⁵ which indicated that the OFT will play a new role in UK consumer protection in close partnership with the TSS. A single regime would facilitate better working together, effective co-ordination and consistency of enforcement. To achieve this consistency, it is important that the OFT and the TSS share the same enforcement powers.
- 3.6** In our view, the Enterprise Act 2002 Part 8 injunctive regime will be the primary enforcement mechanism for UCPD, as the most appropriate tool for the majority of unfair practice cases. Part 8 requires consultation with business before enforcement orders are sought (save in rare cases where immediacy is of the essence). Part 8 also allows enforcers to take unified action on breaches of different legislation, stopping the breaches and preventing recurrence. Ultimately the courts can impose custodial sentences for contempt of court where enforcement orders are breached so penalties can be imposed for repeated behaviour.
- 3.7** Breaches of the UCPD will produce a wide range of effects in the market and enforcers must have the full range of options to tackle them. There will of course be certain kinds of breaches where using the civil regime

⁵ Britain meeting the global challenge: Enterprise, fairness & responsibility, HM Treasury, December 2005

alone would be inappropriate. For example, where a breach is a particularly manipulative scam, or when a consumer is threatened or intimidated, then criminal prosecution may well be appropriate. There is insufficient deterrent on those who would deliberately 'rip off' consumers using the current civil law enforcement regime. Moreover, the punitive nature of criminal sanctions when consistently applied to the most unfair practices may benefit markets by deterring dishonest traders from engaging in the practice. The OFT is happy to provide illustrations of such worst case practices.

3.8 The OFT also believes that administrative penalties can play a role in UCPD enforcement, particularly in those instances which do not merit criminal proceedings but which demonstrate sufficient lack of concern for the law or for consumers' rights to attract a penalty. The Part 8 regime is effective in providing a basis for negotiating undertakings that stop individual problems, and is thus appropriate where the business wishes to respect the law. It is less effective in penalising when undertakings are refused or breached. Except at the contempt stage, there is no penalty, let alone one which can be tailored to the seriousness of the breach and the level of detriment caused. We believe that there should be scope for imposition of an administrative penalty to be used when acting against reckless behaviour and in other appropriate circumstances⁶.

3.9 For the TSS, existing criminal sanctions in relation to the TDA and CPA provide officers access to a range of investigative powers of significant utility in determining whether, and exactly how a breach has occurred. The OFT believes that these powers should be made available for both civil and criminal investigations into potential breaches of the UCPD. If

⁶ The ability to use administrative fines in lieu of court action would enable us to act when, for example, a trader moves on and sets up another business immediately on learning that the OFT is investigating. In such cases, the current enforcement action (i.e. obtaining undertakings or an enforcement order) has insufficient impact, whereas an administrative penalty would provide a genuine deterrent effect.

these are not provided, enforcers' decisions about how the case should be progressed may, in some instances, be taken on the basis of the powers required to obtain the necessary evidence, rather than choosing the more proportionate and effective route, be that civil or criminal. This could mean that practices best dealt with by civil enforcement are enforced via criminal sanctions simply because of the associated investigative powers. This cannot benefit any of those involved.

- 3.10** To illustrate, Part 8's effectiveness is limited by the restricted nature of information gathering powers. Under Sections 224 & 225 Part 8 enforcers can request information from a business suspected of breaching consumer protection law. Using Section 227 an enforcer can apply to a court for an Order if the information is not forthcoming. Although for the OFT, this ability to seek information in writing will be supplemented by an on-site investigation power when the Consumer Protection Co-operation Regulation⁷ is fully implemented, this addition does not adequately remedy the need for improved powers of investigation.
- 3.11** The powers to request information in writing and the power to carry out on site inspections are two extremes on a scale of information gathering powers. Our broader experience suggests that it is better to have a range of possible investigative and enforcement powers in order to ensure that the OFT is able to apply the powers in a risk-based, targeted and proportionate manner.

⁷ Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), October 2004

3.12 The OFT believes that within this range of powers the following, provided appropriate safeguards can be built in, are, ideally, the minimum necessary for primary enforcers of consumer protection law:

- access to communications data⁸
- directed surveillance⁹,
- the power to make test purchases¹⁰.

3.13 The OFT urges the Government to explore further the value of providing a full range of investigative powers to enforcers responsible for enforcing the UCPD. Importantly if the Government decides to consolidate current misleading practices legislation, particularly the TDA and CPA, the powers of investigation provided for in these laws should be replicated in implementing legislation so that enforcers can continue to rely on them to combat unfair practices. Without continued provision of these powers, we believe the level of consumer protection will be unacceptably reduced.

⁸ Access to communications data would allow the OFT to identify the individuals running a particular business and is particularly necessary, for example, in the area of scams, such as advance fee loan fraud. Many of these types of advertisements contain only a telephone number and unless the communications service provider can be asked to identify who is responsible for the number there is no simple way of tracing the perpetrator.

⁹ Surveillance powers are currently used by the OFT when investigating cartels in order to ensure that the correct premises are entered, and officials will not be exposed to danger when entering the premises.

¹⁰ The power allows an authority to make a purchase 'covertly', otherwise these can only be made by revealing its identity. To make covert test purchases may require use of false bank accounts or anonymised Government Procurement Cards that would not reveal the enforcer's identity.

Civil Law Enforcement

Q11. What are your views on the Government's proposal not to make changes to allow court actions to be brought jointly against a group of traders?

- 3.14** The OFT does not believe that UK law requires any amendment to permit actions to be brought against more than one trader. The need to establish the facts of the case and the specific behaviour of each trader by reference to evidence would not be diminished by the introduction of joint actions. Indeed, where a precedent is sought to establish the law, the best route is often to take one 'representative' case and promulgate the outcome widely¹¹.
- 3.15** An exception to this might be the potential for actions against trade associations in lieu of actions against trade association members, but associations should, in our view, only be held liable if there is a clear and explicit connection between membership of the body and the practice in question. On balance, the OFT does not believe that changes to the liability of trade associations should generally be considered in the context of UCPD implementation. However this is an issue that could be explored as part of the forthcoming Better Regulation Executive Penalties Review, which involves discussion with businesses and enforcers.
- 3.16** Where traders have signed up to an Association's Code of Practice and the requirements of the Code have led to a breach of the UCPD, then there is a clear connection. In such circumstances, it should be possible, and indeed desirable, to take action against the Code Owner to ensure that the Code is changed as the most effective way of dealing with the breach.

¹¹ [The Officers Club](#), OFT Press Release, August 2005

Q12. Do you think that the Directive's injunctive regime should rely solely on Part 8 of the Enterprise Act or that an additional injunctive regime should also be established? Can you provide us with reasons explaining your preference? If you favour Option 2, do you have any further thoughts on how this regime should operate?

3.17 The OFT believes that the UCPD's injunctive regime should rely solely on Part 8 of the Enterprise Act.

3.18 The consultation document expresses concerns that the 'collective interests' of consumers test in Part 8 might set a higher threshold for issuing an injunction than the Article 11 tests that rests on the need to protect (all) consumers. The OFT does not believe it does. It considers both Part 8 and Article 11 are concerned with the interests of consumers as a group, to the same extent, notwithstanding the use of 'collective' in the former not the latter. This view is reinforced by Article 16(1) of the UCPD which provides that the UCPD is to be added to the list of directives falling within the Injunctions Directive 98/27, which is of course implemented by Part 8.

3.19 The OFT's experience in the use of Part 8 suggests that the courts are willing to interpret the 'collective interests of consumers' broadly. In *MB Designs*¹² the Judge decided that harm to the collective interests of consumers will normally (although not exclusively) be inferred from a number of individual instances of harm. This means that 'collective interests' involves harm or the risk of harm to the public generally.

3.20 Proportionate and effective enforcement may mean acting on a single breach, for example, a misleading advertisement that is widely published. It may also mean acting on a single complaint if the evidence sufficiently indicates that a business is engaging in behaviour that is purposefully breaching consumer protection law in a way that would

¹² *The Office of Fair Trading v. MB Designs (Scotland) Ltd*, Martin Black, Paul Bett [2005] CSOH 85

harm consumers generally (harming their 'collective interests' in Part 8 terms, but equally harming 'the interest of consumers' in UCPD terms). In the OFT's view, both Part 8 and the UCPD would permit such action. Moreover, the collective interest issue is no bar to informal action to prevent unfair practices.

3.21 The OFT believes that an additional injunctive regime would also undermine the DTI's Consumer Strategy¹³ aim of simplifying the legislative framework for consumer protection and could incur additional training and legal costs for enforcers, as well as businesses.

Q13. Do you have any comments on the proposed approach to designating public enforcers for the Directive?

3.22 If the Government decides that an additional injunctive regime is required for civil enforcement of the UCPD, then the OFT agrees with the proposal to limit enforcement powers to the OFT and the TSS.

Q14. If Option 2 is chosen, do you think the courts should be enabled to require publication of their decisions? What are your views on requiring the publication of a corrective statement by traders? Do you think that any or both options should be chosen?

3.23 If Option 2 is chosen, then the OFT recommends that the courts are provided with the equivalent powers with respect to publishing final decisions and requiring the publication of corrective statements as they have with Part 8.

¹³ Extending Competitive Markets: Empowered Consumers, Successful Business, DTI consultation response, June 2005

Q15. If Option 2 is adopted, what are your views on giving the OFT a specific power to publish information relating to voluntary undertakings and court proceedings?

3.24 If the option of an additional injunctive regime is chosen, then the OFT agrees with the proposal to provide the OFT with a power to publish Court Orders, and undertakings given to any court or enforcer.

Q16. What are your views on introducing a duty to enforce in the legislation implementing the Directive? Do you agree that this duty should apply to the OFT, trading standards services in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland? And do you agree with the proposal not to introduce a duty to consider complaints?

3.25 Article 11 of the UCPD requires that adequate means (as specified) to combat unfair commercial practices exist, and Article 16 amends the Injunctions Directive – effectively requiring the UK to add the UCPD transposition law to the legislation enforceable under Part 8 of the Enterprise Act 2002. There are no specific obligations on enforcement bodies as to the cases to be taken forward, and Part 8 empowers rather than imposes enforcement duties.

3.26 For the OFT, there are two key drivers across the piece. We wish to see a more effective regime, without the impositions of undue burdens on any player. Secondly, we wish to see no diminution in the level of consumer protection afforded UK consumers.

3.27 Given this, it is imperative that the enforcement regime implemented in the UK for the UCPD encompasses the full spectrum of measures needed to deliver the highest level of compliance without formal intervention. This includes using industry Codes of Practice, ensuring full consultation with all stakeholders, the provision of advice and guidance to businesses and other enforcers by the national enforcement body, and the support of ADR schemes. All are essential, complementary actions to the formal processes of seeking undertakings, making applications to the court for orders, taking account of such outcomes when enforcing licensing regimes etc.

- 3.28** Equally, it is critical that whether compliance is being sought at national or local levels, the considerations and subsequent action must match. The new law must be enforced consistently across the UK, effectively, flexibly and proportionately, whoever leads.
- 3.29** For the OFT, a duty on us to enforce is likely to be too narrow to ensure that we are able to deploy the most proportionate, and the most effective, action to prevent further mischief from the range of options discussed above.
- 3.30** However we are conscious that we do not directly enforce all consumer legislation covered by the scope of the UCPD and that there may be areas of legislation for which we are not the primary enforcer, in which there are arguments for a duty to enforce.
- 3.31** Accordingly, we believe that further discussion is needed on the best formulation of a duty or function with all the bodies concerned to achieve a coherent UK regime.
- 3.32** Finally, we agree that a simple duty to consider complaints is not a viable way forward. Significant breaches, needing swift enforcement measures, can come to our attention before complaints and thus the receipt of a complaint cannot be the only starting gun for intervention. Conversely, complaints sometimes identify an undoubted breach but one where formal enforcement action would be disproportionate to the change in market practice which could be achieved. The duty to consider complaints route does not offer a solution to the issues outlined above.

Q17. Do you have any comments on the proposal to amend Part 8 of the Enterprise Act in relation to substantiation of claims only if Option 1 is adopted?

- 3.33** The OFT agrees that it will be necessary to amend Part 8 to incorporate the requirements and provisions of Article 12 in relation to the substantiation of claims.

Criminal Law Enforcement

Q18. Do you have any comments on the proposal to retain the balance between criminal and civil sanctions in existing legislation?

Q19. Considering Articles 5, 7, 8 & 9 and the Annex provisions in turn, do you think it appropriate that criminal sanctions should be provided for any of the new provisions contained in the Directive? If yes, are they any provisions that you consider particularly important? Can you provide evidence supporting your recommendation?

- 3.34** As stated in the opening comments to this section, to ensure effective and proportionate enforcement of consumer protection law an appropriate mix of penalties, including administrative penalties, will be required. Breaches of the UCPD's specific prohibitions including the Annex of Banned Practices, aggressive and misleading practices will range in effect and that range will include some breaches that warrant criminal prosecution.
- 3.35** The OFT believes that the general duty not to trade unfairly as contained in Article 5 is insufficiently specific to allow it to be subject to criminal sanctions.
- 3.36** The OFT recommends that criminal sanctions are introduced for breaches of Articles 6 and 7. Criminal sanctions already exist for many practices that would be prohibited under the misleading actions provisions of the UCPD by way of the TDA and CPA Part III. Currently there are no such sanctions for misleading omissions and the consultation indicates that the Government is not minded to extend criminal sanctions for breaches of these provisions.
- 3.37** It is the OFT's view that failing to criminalise misleading omissions will produce an inconsistency in enforcement and encourage dishonest traders to take advantage of a disparity in law between misleading actions and misleading omissions.

- 3.38** From our experience of enforcing the CMARs and the Consumer Credit Advertising Regulations 2004, it is necessary to consider both misleading actions and misleading omissions together when assessing the overall impact on consumers of the communication. Significant omissions from a selective portrayal of true facts can potentially cause consumers' judgement to be significantly impaired.
- 3.39** For example, a communication may indicate 'all your money back in five years', but fail to clarify that repayment is contingent on sending in specified documentation, at specified times, containing specified information, attested to in specified forms only. The statement as a whole is misleading because of the omission of any qualifiers on 'money back'. These sorts of claim may arise in scam cases where there is never any intention of making refunds to consumers and traders disappear with their money.
- 3.40** If criminal sanctions are attached to misleading statements but not to misleading omissions, it will create an artificial constraint on enforcers' ability to use the criminal regime, even though criminal prosecution may be the most appropriate route.
- 3.41** The OFT's preference for criminal sanctions for both misleading actions and misleading omissions, is informed by the law enforced by some of our international counterparts. The Australian Trade Practices Act 1974¹⁴ (TPA) is comparable to the UCPD. The civil consumer protection provisions are set out in Part V and are generally mirrored by criminal liability provisions under part VC with the exception of the general prohibition in Section 52. Swiss law also provides similar sanctions with both a civil and criminal route to tackle misleading practices¹⁵.

¹⁴ <http://scaleplus.law.gov.au/html/pasteact/0/115/top.htm>

¹⁵ The State Secretariat for Economic Affairs in Switzerland administers the Federal Act Against Unfair Competition. Article 2 of the Act corresponds with Article 5 of the Directive and is only applied in civil proceedings. Article 3 of the Act covers unfair advertising, sales practices and

- 3.42** The OFT's recommendation to attach criminal sanctions to Articles 6 & 7 has one exception, which relates to Article 6 (2)(b). This prohibits commercial practices that amount to non-compliance with a code of conduct by which the trader has undertaken to be bound. Failure to comply with a code of conduct should not per se be a criminal offence. Codes are not designed to achieve 100% compliance. If Article 6 (2)(b) breaches are made a criminal offence, it will discourage participation in initiatives designed to achieve compliance at no public cost. A business seeking to follow high standards in a Code opens itself up to liabilities which non-member businesses do not face in any event: there are Code mechanisms to correct and resolve problems arising from non-compliance, and to impose penalties as appropriate. What matters is that these mechanisms deal successfully with the majority of breaches.
- 3.43** Of course, where the breach, and thus the practice and its impact, is sufficiently serious, then there will be an alternative route of criminal prosecution, which we would consider and act upon as any other serious unfair practice.
- 3.44** Clearly, making Article 6 (2)(b) breaches a criminal offence would potentially undermine the OFT's Consumer Codes Approval Scheme (CCAS). However, our view is not predicated solely on actual or potential CCAS codes but in relation to all such self-regulatory initiatives. See also our responses to questions 21 and 22.
- 3.45** The OFT also believes that criminal sanctions should be provided for Articles 8 & 9. Where a consumer is forced or pressured into taking a transactional decision, a wider range of sanctions should be available in order to effectively deter such behaviour¹⁶. An example of an aggressive

other unlawful conduct and largely corresponds with Articles 7-9 of the Directive. It is applied in both civil and criminal proceedings.

¹⁶ The Partial RIA provides examples of such practices at page 56

practice where criminal sanctions would be proportionate would be threatening frail consumers in order to secure a sale.

- 3.46** Additionally, we believe the Annex of Banned Practices should be criminalised. The practices are sufficiently specific that a trader should not need to be told not to engage in the practice by an injunction – rather, strict sanctions should be available in order to act as a serious deterrent. The Commission's belief that these practices are sufficiently serious enough to justify deeming them to be unfair in all circumstances lends weight to according them a high level of deterrence.

Q20. If criminal sanctions are introduced for some of the Directive's provisions, do you have any comments on the Government's proposals to model powers and defences on the Trade Descriptions Act 1968? And do you have any comments on the proposal to provide flexibility in the range of penalties, including possible custodial sentences?

- 3.47** For the OFT's views on powers, see paragraphs 3.1 – 3.13.

- 3.48** If the Government introduces criminal sanctions for breaches of the UCPD, defences to the offences could be modelled on those applicable to TDA offences (provided, of course, there is also a civil regime for UCPD enforcement that does not allow such defences). This would be beneficial especially if the B2C aspects of the TDA are repealed as it would provide continuity in respect of defences to the TSS and business. The OFT recommends that consideration is given to how current defences are used in practice and takes this opportunity to address any practical problems experienced to date. Secondly, consideration will have to be given to the interface between the UCPD concept of professional diligence and the defence of due diligence in a criminal context.

- 3.49** The OFT agrees that a range of penalties should be available so that courts can impose sanctions that are proportionate to the seriousness of the infringement.

The Role of Self-Regulation

Q21. Do you have any comments on the proposal to allow certain codes a role in enforcing breaches of the Directive? Are there any particular codes that you think should be used for controlling unfair commercial practices?

Q22. Do you agree with the proposal that enforcers should be able to take civil action against any person, including code owners, who recommends breaches of the Directive?

3.50 The OFT advocates effective self-regulation: voluntary codes of conduct are effective mechanisms for promoting compliance. Self-regulation can act as an impetus for best-practice, encouraging traders to raise standards of behaviour above the legal minimum requirement.

3.51 The OFT strongly supports the proposal to give codes and their owners a role in applying the UCPD. The existing case handling principles agreed between the OFT and the Advertising Standards Authority (ASA) are an example of how the OFT and self-regulatory bodies can work effectively together. Unless there are circumstances to indicate that the OFT needs to act immediately using Part 8 powers – such as repeated breaches or a major and misleading advertising campaign, the OFT believes that in virtually all cases involving written misleading advertising, consumer interests are best served by initial action by the ASA under its self-regulatory regime.

3.52 We also support the proposal for the OFT, in consultation with the TSS and other enforcers, to consider on a case by case basis which other codes can play a role in delivering compliance with the UCPD.

3.53 The Government proposes to allow civil action to be taken against Code Owners who recommend breaches of the UCPD. The OFT welcomes this proposal. It is the OFT's view that formal enforcement action against Code Owners would be exceptional. The OFT's role in relation to Code Owners aims to be one that is supportive, providing advice in relation to the interface between codes and consumer protection law. Therefore we

anticipate that any code recommendation that could potentially lead to a breach of the UCPD will be flagged and addressed through consultation.

- 3.54** Having access to a formal enforcement mechanism will be a powerful tool for use against Code Owners who recommend breaches of the UCPD and remain unwilling to engage with the OFT. It will allow enforcers to tackle mischief that may be sector wide without taking action against a large number of individual traders or selecting one business as the test case when that business is not the source of the practice in question. This is both a good use of resources and fairer for the parties involved.

Civil Redress

Q23. Given existing protections, do you think that individuals should have a right of action in order to seek redress for breaches of the Directive? Can you provide examples of the benefits and drawbacks associated with this approach?

- 3.55** The OFT supports the proposal to provide individual consumers with a right of action in respect to breaches of the UCPD. We agree with the assessment of the current set of rights available to consumers in respect of unfair practices: access to rights is complex and information about how to exercise them is not comprehensive. Provision of consumer rights in relation to all UCPD prohibitions will give consumers a clearer and more complete set of rights. Equipped with these rights, consumers will be more empowered when seeking compensation for loss suffered as a result of unfair practices.
- 3.56** The OFT believes that an improved suite of consumer rights should be accompanied by improved means to access the different methods of achieving redress. The OFT believes that formal action is a matter of last resort. It is a process that can be resource intensive and costly, and one that many consumer feel to be inaccessible or too daunting.

- 3.57** A direct settlement between consumers and business should be the preferred route to reaching resolution on disputes. The key to ensuring the success of direct settlement is the provision of support, through guidance and training to front line consumer advisors in addition to raising awareness generally with consumers. Where direct settlement fails to achieve a solution, the OFT wishes to see a range of easily accessible, high quality independent dispute resolution mechanisms.
- 3.58** Where many consumers are affected by a problem in one or more markets, the OFT also believes that the introduction of representative actions for consumers will provide an additional, valuable tool to support the overarching objectives outlined above. Additionally, and in the same vein, the OFT supports proposals to make it easier for consumers' money to be returned to them if a trader has been found by a court to have acted unlawfully¹⁷.

Q24. If a right of action is provided for, should it apply to all of the Directive or only to specified parts of it? If the latter, which parts in particular and why?

- 3.59** Private rights of action should apply to all breaches of the UCPD. This ensures that a comprehensive set of consumer rights exist in relation to the UCPD and does not produce an incentive for dishonest traders to breach some Articles of the UCPD more than others. It is the OFT's view that the principle-based nature of Article 5 should not be a bar to consumers bringing actions for breaches of the general duty.

Q25. If an individual right of action is provided, is a breach of statutory duty an appropriate form?

- 3.60** The OFT believes that a breach of the statutory duty would be the appropriate form to frame a private right of action in the UCPD implementing legislation because it is recognised that unless statute

¹⁷ See the OFT's response to *Extending Competitive Markets: Empowered Consumers, Successful Business*, October 2004

expressly provides for a breach to be actionable as breach of statutory duty, the courts are not willing to infer such a duty. Breach of statutory duty would also mean consumers do not have to prove negligence before a claim can be made.

Q26. Would damages be an adequate remedy if an individual right of action were provided for, or might additional remedies be needed? Why?

3.61 As breaches of the UCPD rest on consumers' economic interests being harmed, in most case, damages will be the appropriate remedy. However as the OFT has stated previously, breaches of the UCPD will produce varied effects. The courts' discretion in determining the most appropriate remedy should not, therefore, be restricted.

4 DETAILED RESPONSE – SIMPLIFICATION

Amending Existing Legislation

Q27. Do you think the Government should adopt a single uniform approach to dealing with existing legislation, and if yes, what should it be and why?

- 4.1** The OFT agrees with the Government's objective to simplify the UK consumer protection framework by repealing legislation that overlaps with the UCPD wherever it is appropriate or sensible to do so. Duplication overburdens business by complicating compliance efforts and increases the risk of inconsistent enforcement, with enforcers using different law to tackle the same issues. A consolidated legislative framework for unfair commercial practices will facilitate consistent, transparent and proportionate enforcement action.
- 4.2** As stated in our response to the consultation's enforcement questions, the goal of a rational legislative framework for unfair practices must be achieved without jeopardising the level of consumer protection. For this to occur, where legislation offers the same substantial protection as the UCPD, the Government should have particular regard to any evidence demonstrating a potential adverse impact on consumers were that legislation to be repealed.
- 4.3** Successful implementation of the UCPD will depend on such legitimate concerns being addressed. This may require further consultation with stakeholders to ensure that proposals will achieve the required practical effect and the OFT stands ready to participate in this further analysis work.
- 4.4** The consultation and the Partial Regulatory Impact Assessment acknowledge that a number of the current laws relate to both B2C and business-to-business (B2B) practices. Repeal or amendment to legislation may result in disparity between the two regimes and loss of protection to small businesses. The Government will determine its approach to these issues based on responses received to this consultation. Given our

remit, the primary concern for the OFT is the effect that existing B2B law may have on consumer protection. Any evidence which shows that repeal of B2B law will also impact negatively on consumers will need close and careful scrutiny.

- 4.5** It is perhaps worth pointing out here, for completeness, that the UCPD sits alongside the rest of the laws that comprise the Consumer Protection Acquis currently under review by the European Commission¹⁸. This will include any measures brought into place in order to increase the level of protection as permitted under the Directives. The Unfair Contract Terms Directive (UCTD) and the UK implementing law – the Unfair Terms in Consumer Contracts Regulations (UTCCRs) – is of particular note. The UCPD is without prejudice to contract law. Thus OFT sees the UCPD and the UCTD as addressing different issues – albeit that unfair practices often incur a breach of both – and is content that the UTCCRs will remain in being as now alongside the new law. Our analysis and responses take account of the scope of the UCPD and its future position alongside other consumer protection law.

The OFT and the Affected Legislation

- 4.6** The OFT's response on legislation that falls within the scope of the UCPD is limited to the legislation that is important to its responsibilities and objectives. Legislation such as the county specific Acts and the Food Safety Act 1990, Section 14 are not within the OFT's enforcement remit. The OFT's relationship with other pieces of legislation is varied.
- 4.7** The OFT is responsible for administering the Consumer Credit Act 1974 (CCA) and also has direct experience enforcing the Act and its accompanying regulations, directly or through Part 8. Under Section 4, the OFT is required to provide information and advice to the public about

¹⁸ The review is of eight Directives and excludes the UCPD

the CCA and to this end has issued guidance on the application of consumer credit law.

- 4.8** There are 17¹⁹ other pieces of legislation that OFT can enforce via Part 8. To date, it has not been necessary for the OFT to take action against breaches of some of these laws as direct enforcement of these laws is mainly undertaken by the TSS.
- 4.9** The B2C provisions of the TDA and the CPA Part III are the key pieces of legislation that overlap with the provisions of the UCPD. Together with the CMARs, the TDA and CPA are the principal pieces of legislation currently used to tackle misleading practices as defined by the UCPD. How the Government deals with the TDA and CPA will determine UCPD's place within the consumer protection landscape. Critically for the OFT, it will affect how the TSS and the OFT work together in relation to UCPD enforcement and compliance efforts.

¹⁹ Accommodation Agencies Act 1953, Administration of Justice Act 1970 section 40, The Business Advertisements (Disclosure) Order 1977, Charities Act 1992 sections 60, 61 and 63, Consumer Credit Act 1974, Consumer Protection Act 1987 part III, Consumer Transactions (Restrictions on Statements) Order 1976 Prices Act 1974 section 4, Timeshare Act 1992, Trade Descriptions Act 1968 Weights and Measures Act 1985 sections 21, 22, 23, 25, 28, 29, 30, 31, 32, 50(5) and (6), and orders under Consumer Protection Act 1987 Part III - Consumer Protection (Code of Practice for Traders on Price Indications) Approval Order 2005, Price Indications (Method of Payment) Regulations 1991, Price Indications (Resale of Tickets) Regulations 1994, Prices Act 1974 section 4 - Price Marking (Food and Drinks Services) Order 2004, Timeshare Act 1992 - Timeshare (Cancellation Information) Order 2003, Trade Descriptions Act 1968- Trade Descriptions (Sealskin Goods)(Information) Order 1980.

Indicative List of Affected Legislation

Q33. Do you think the relevant provisions of the Consumer Credit Act 1974 should be amended or repealed; and why?

Q34. Do you think the relevant provisions of the Consumer Credit (Advertisements) Regulations 2004 should be repealed or amended; and why?

- 4.10** The CCA establishes a consumer credit licensing regime that requires traders engaging in consumer hire, consumer credit and other ancillary credit activities to be licensed before engaging in such business. The CCA also regulates the validity, formation and effect of credit and hire agreements. As indicated in the consultation document, in the opinion of the OFT both these functions of the CCA are beyond the scope of the UCPD, in that they fall within the authorisation regimes and contract law exemptions.
- 4.11** The maximum harmonisation requirement makes the UCPD the standard for all B2C practices; however the UCPD permits national laws regulating business to consumer commercial practices in relation to financial services to exceed the standard. The scope of financial services does not include hire, so hire provisions in the CCA that do not fall within the authorisation regime and contract law exemptions must be brought into line with the UCPD standard.
- 4.12** These provisions include parts of the Consumer Credit Advertising Regulations 2004 (the Regulations) that relate to hire advertisements and the associated advertising offences in Section 46 and Section 167 of the CCA; Section 50 and Section 154 that create offences related to the marketing of hire services; and Section 79 and Section 103 that create offences for failure to provide a hirer with information in a prescribed form and within a specified time.

The Regulations and CCA advertising offences

- 4.13** The Regulations treat the advertising of hire and credit services similarly, though different detailed rules apply to each. The Regulations set rules on the content of advertisements and the placement and prominence of information. If certain pieces of information, 'triggers', are displayed then other information must be included in the advertisement. Some types of information require a degree of prominence and must be placed in proximity to other information. All credit and hire advertisements must be in plain and intelligible language, be easily legible and specify the name of the advertiser.²⁰
- 4.14** It is the OFT's view that for hire provisions to remain in the Regulations and be UCPD compliant, reference to the form in which information in hire advertisements is displayed must be repealed as they exceed Article 7(2). This would mean removing the hire reference from Regulation 3(c), and Regulation 4(2).
- 4.15** In terms of information required in a hire advertisement, the information requirements specified in Regulation 4(1) can be retained. It is the OFT's view that where existing triggers feature in an advertisement it is highly likely to amount to an invitation to purchase. The additional information required to be displayed as a result of the trigger fits within the information required by Article 7(4). Regulation 7(1) requires that a hire advertisement must state if security is required and specify the nature of that security. The OFT considers that this requirement also fits within Article 7(4) as the nature of the security would be a main characteristic of a hire product requiring security.
- 4.16** Section 167(2) makes it a criminal offence to contravene the Regulations. In the OFT's view where Art 7(4) applies to deem information 'material', failure to provide it will in all cases be 'likely thereby to cause the average consumer to take a transactional decision

20 Consumer Credit (Advertisements) Regulations 2004, SI 2004/1484, Regulation 3.

that he would not have taken otherwise,' and would constitute a breach of Article 7. The logical consequence of this view of Article 7(4) is that section 167(2) is UCPD compliant as it stands. Section 46 makes it a criminal offence to publish a false or misleading advertisement. It is the OFT's view that this offence is framed in such a way that is UCPD compliant: it is already aligned with Article 7(1).

4.17 Thus the OFT is confident that hire specific information requirements can be retained in the Regulations. Should they be so retained? The OFT view is that they should, and certainly while the Advertising Regulations, as they relate to credit, remain in place. Consumer credit has long been acknowledged to be complex and an area where there is asymmetry of power between consumers and suppliers. Hire, including hire purchase (HP), conditional-sale, credit-hire and consumer credit are part of a continuum, so closely associated that they have been subject to comparable regulation. This should remain the case.

4.18 HP on car finance, for example, is hire with an option to purchase. Assuming a consumer takes up such an option, the end results of such an agreement and of a standard loan for such purchase are the same: the consumer has repaid interest and capital and has title to the car. Conversely, the rights of a consumer as the agreement continues in being vary significantly between the different credit and credit related products. If comparable provisions for advertising these complex, competing products are not in place, the risks for misunderstanding, and thus of purchase of a less suitable product, will increase. There would be a high risk of regulation causing distortion between competing products in the market. Thus we believe it appropriate to take advantage of Recital 14 of the UCPD and effectively spell out in the Regulations the main characteristics of hire products in an invitation to purchase and simultaneously reduce the likelihood of distortion between credit and hire products arising from very differently formulated advertising requirements.

4.19 The OFT encourages the Government to include this issue in its two year review of the Advertising Regulations due to take place in Autumn 2006. The OFT also strongly recommends that as part of this review the Government considers the interface between the Hire and the Credit Advertising Regulations and the UCPD. The UCPD provisions on misleading practices will act as a 'back-stop' to the Regulations as credit and hire advertisements will be required to comply with the UCPD standard as well as the Regulations. The OFT considers it that as far as possible compliance with the Regulations should ensure compliance with the UCPD.

Other CCA provisions

4.20 Section 50 makes it an offence to send circulars to minors inviting them to obtain goods on hire. It is the OFT's view that this prohibition can fit within UCPD Annex of Banned Practices, 28: including in an advertisement a direct exhortation to children to buy advertised products or to persuade their parents or other adults to buy advertised products for them.

4.21 Section 154 makes it an offence to canvass ancillary services – credit brokerage²¹, debt counselling, and debt adjusting – off trade premises. The prohibition relates to hire as the ancillary services promoted can involve the introduction of hire contracts or advice on hire debts. This prohibition against the marketing of hire debt services off trade premises does not fit any of the practices banned by the Annex of Banned Practices. The options therefore appear to be:

- to amend the offence by introducing the transactional decision test for hire and credit: if the act of canvassing caused a consumer to enter into a transactional decision he would not have done otherwise, then the canvasser commits an offence

²¹ Though s.154 refers to 'credit brokerage' this term is defined in s.145(2)(b) to include the introduction of hire business.

- to amend the offence by introducing the transactional decision test for hire only: if the act of canvassing caused a consumer to enter into a transactional decision relating to hire which he would not have done otherwise, then the canvasser commits an offence,
- to redefine the offence so that it only relates to the canvassing of ancillary credit services proper.

At this time, we express no preference but would wish to participate in further consideration of the best options with other stakeholders.

4.22 There are two other provisions in the CCA relating to hire that may fall within the scope of the UCPD, Section 79 and Section 103. These sections involve owners/business providing information to hirers/consumers. If the provisions fall within the scope of the UCPD, then the requirement for the information to be signed by or on behalf of the owner is likely to exceed the form requirement permitted by Article 7(2).

Q35. Do you think Part III of the Consumer Protection Act 1987 should be amended or repealed; and why?

Q36. Do you think the Consumer Protection (Code of Practice for Traders on Price Indications) Approval Order 2005 should be repealed or reproduced; and why?

Q49. How do you think the Trade Descriptions Act 1968 should be repealed or amended; and why?

4.23 The CPA Part III, its Code, and the B2C provisions of the TDA are the pieces of legislation the TSS currently use routinely²² to address what the UCPD defines as misleading practices. The CPA Part III and Code of Practice for Traders on Price Indications (the 'Code') regulate how prices are indicated to consumers, and the TDA prohibits false trade descriptions. The OFT currently tackles misleading practices through its responsibilities under the CMARs.

4.24 It is the OFT's view that Articles 6 and 7 of the UCPD offer the same substantial level of protection provided by the CPA Part III and B2C provisions of the TDA. Retaining a UCPD compliant version of CPA Part III and TDA would therefore produce duplication in the legislative framework. However, while we have reached this view through careful study and analysis, we recognise the far closer knowledge of the TSS of enforcement under these laws. We would wish our analysis to be tested by the DTI, in consultation with the TSS and the OFT, to ensure that this change would not result in any reduction in the level of consumer protection.

²² From 2004 to June 2005, the Central Register of Convictions, a database administered by the OFT, received 457 notified prosecutions under the TDA by the TSS.

- 4.25** The OFT is confident that the increased flexibility provided by the UCPD will improve enforcers' ability to tackle misleading practices. The OFT's case against the high street menswear retailer, The Officers Club²³, relied on the CMARs to seek an order against its misleading sales promotions. These regulations are less prescriptive than the Code and allowed the OFT to address a practice negatively affecting consumer's economic behaviour not specifically prohibited by the Code.
- 4.26** The UCPD implementing legislation will replace the CMARs, therefore the OFT will rely on this to continue its current enforcement role in relation to misleading practices. It is the OFT's view that the optimal outcome for better regulation and the continuity of consumer protection would be for the UCPD implementing legislation to replace the B2C TDA provisions and CPA Part III. This is contingent on the legislation providing the appropriate range of powers and penalties to support effective and consistent enforcement. And of course, any examples of where removal of current law would reduce the level of consumer protection given by the TSS or other stakeholders must be examined further to ensure this does not occur. Subject to no such examples, our preferred option would give the OFT and the TSS a single piece of legislation to tackle misleading practices and businesses fewer pieces of legislation with which to comply.
- 4.27** As our various references to the views of other in this response illustrate, there are other legitimate concerns in moving to a UCPD based regime. In addition to the need to retain the powers and sanctions available to the TSS under the CPA and TDA, the OFT recognises that enforcement officers will require authoritative guidance, advice and practical support to pursue cases under new legislation. By working in partnership with the TSS, the OFT would look forward to developing

²³ [The Officers Club](#), OFT Press Release, August 2005

strategies to meet these needs. The OFT would also want to explore in consultation with stakeholders how existing TDA and CPA case law and those parts of the Code consistent with the UCPD could feature in UCPD guidance.

4.28 In relation to the B2B provisions of the TDA, the OFT recommends that the provisions that concern the supply of goods where the end user is a consumer are carefully assessed for their practical effect in consumer protection. For example, the case law concerning the chain of supply for second hand cars ensures that 'clocking' at any stage of the chain is prohibited by the TDA. We would not wish the end result of changes to legislation to be that this became unlawful only at the consumer interface.

4.29 Although the OFT believes that our position on the repeal of legislation which duplicates provisions found in the UCPD has been clearly made, we add some additional comments on particular pieces of legislation where we believe these could be helpful:

- The various price marking orders contain a substantial amount of useful information and provisions which are difficult to assess against the UCPD due to the continuing lack of certainty concerning 'invitation to purchase' in Article 7(4) – the OFT believes that those provisions which are useful to consumers and compatible with the UCPD should be contained in guidance. This will require action after more certainty is achieved on the meaning of an invitation to purchase.
- The OFT believes that the provisions of the Timeshare Act raised in the consultation are covered by the exemptions related to contract law or immovable property, and should therefore remain in place.
- On the Accommodation Agencies Act, the OFT agrees that the immovable property derogation covers the activities of accommodation agencies. The OFT recommends that the Government does not change Section 1 of this Act, as we understand that the legislation is used in local authority actions

against dishonest letting agents. This position is informed by the OFT's experience of working with the TSS in handling Estate Agency cases as well as more general enforcement involving letting.

Partial Regulatory Impact Assessment

4.30 We have no separate comment to make on the Partial RIA.