

# **Fraud review**

# **final report**

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

**November 2006**

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# 1 EXECUTIVE SUMMARY

- 1.1 The Fraud Review is a timely and welcome development which aims to reduce the harmful effects of fraud on the UK economy and society by means of a coordinated strategic approach. We support this initiative and are grateful for the opportunity to provide input on the recommendations contained in the final report.
- 1.2 We welcome the development of a strategic approach to tackling fraud and proposals to ensure anti-fraud measures are targeted, proportionate and taken by the most appropriate body. A coordinated approach including a National Fraud Strategic Authority (NFSA) and a National Fraud Reporting Centre (NFRC) are essential to bring this about. OFT wishes to play a full part as a member of the NFSA and by contributing data to the NFRC. We believe it is important however that the NFSA recognises the autonomy of stakeholder organisations to set their own strategy and allocate resources according to priorities. The NFSA's functions should therefore not extend to directing stakeholder organisations to take action in particular cases.
- 1.3 Consumer targeted fraud can have a massive impact on both individuals and the economy. As well as reducing consumer confidence in markets, fraud can have a far greater emotional impact by destroying victims' trust in their own judgement as well as increasing levels of anxiety due to loss of financial security and savings. Victims can also be reluctant to report instances of fraud over fears of criticism from family members meaning an under reporting of the problems caused by fraud.
- 1.4 The Fraud Bill,<sup>1</sup> currently before Parliament, will for the first time define the term 'fraud' in English law. This definition will ensure that 'high volume low value' consumer based scams, such as misleading mass mailings and deceptive telemarketing practices, are properly defined as

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<sup>1</sup> [www.publications.parliament.uk/pa/ld200506/ldbills/007/2006007.pdf](http://www.publications.parliament.uk/pa/ld200506/ldbills/007/2006007.pdf)

fraud underlining the serious nature of these consumer targeted activities.

- 1.5 Mass marketed scams are one of the OFT's five priority areas for 2006-07 with a focus on coordination, enforcement action and consumer education. Increasingly consumer fraud is being operated on a large scale by criminals who can see the potential for large profits with very little prospect of enforcement action. High volume low value fraud is often not considered sufficiently serious to be dealt with by criminal enforcement agencies. We welcome the development of a national measurement to ensure that fraud reporting is consistent and comprehensive. We are happy to share our research which attempts to measure the impact of scams on UK consumers.
- 1.6 We play a coordinating role in bringing together a range of organisations which tackle fraud through the Scams Enforcement Group (SEG). Local authority Trading Standards Services (TSS) play a key role in the SEG and address a wide range of consumer fraud in the UK. As well as tackling fraudulent business practices, and where necessary taking criminal enforcement actions, TSS have been able to provide advice to businesses, such as mail box providers and money transfer agents, in their geographical area who may be unwittingly facilitating fraud against UK consumers. In addition we have worked closely with both domestic and overseas counterparts in the development of partnerships to facilitate the sharing of information and best practice relating to consumer fraud. Our own experience therefore shows the benefit of a joined up approach and we welcome the development of a national fraud strategy, together with the proposal to coordinate day to day operational work through the Multi Agency Coordination Group (MACG).
- 1.7 The NFRC will provide real benefits if it collects data from a range of public and private organisations to create a comprehensive database of information about fraud in the UK. For the first time one body will be able to see the bigger picture and will facilitate targeting of resources towards the most harmful activities. The benefits will be greatly reduced however if the NFRC is not given a wide ranging role covering all types

of fraud. There are a number of existing databases which collect fraud data in respect of certain aspects of the economy. These will in themselves be valuable sources of information for the NFRC, but none of them individually meets the aims that the NFRC aspires to and could not therefore be an adequate substitute. The NFRC should be a genuine one stop shop for fraud reporting to ensure victims are not required to notify more than one organisation of their problem. Many may not bother to report smaller frauds if they do not identify the correct organisation at the outset.

- 1.8 We believe that criminal sanctions are appropriate for the worst breaches of competition and consumer protection law. Rogue traders purposefully deceiving consumers to sell goods and services on false pretences or engaging in aggressive tactics to force purchase or payment, or cartels engaged in serious fraud should be subject to criminal penalties. Both the punishment and the possibility of compensation orders that criminal sanctions can provide, represent a powerful deterrent to those traders intent on causing significant consumer detriment.
- 1.9 However, OFT also believes in the use of a wide range of tools to solve problems in markets. This can range from the development of consumer focussed educational messages, to appropriate risk based, targeted and proportionate enforcement action in line with the principles set out in the Enforcement Concordat.<sup>2</sup> In order to take the most appropriate actions to meet a wide range of trader and market behaviour, including consumer targeted fraud, we believe all enforcement agencies should have appropriate investigation tools such as those contained under s21, 28 and 29 of the Regulation of Investigatory Powers Act 2000.<sup>3</sup>
- 1.10 We are also broadly supportive of the recommendations in the report for penalising fraud and of the aims behind them. The proposals are

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<sup>2</sup> [www.cabinetoffice.gov.uk/REGULATION/documents/pst/pdf/concord.pdf](http://www.cabinetoffice.gov.uk/REGULATION/documents/pst/pdf/concord.pdf)

<sup>3</sup> [www.opsi.gov.uk/acts/acts2000/ukpga\\_20000023\\_en.pdf](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000023_en.pdf)

particularly relevant to our scams work. We nevertheless think it important to consider their application in the context of the particular type of conduct concerned. In the field of cartel enforcement we consider that criminal sanctions should be maintained for individuals but that this will not be appropriate in all cases and would expect criminal proceedings to be accompanied or closely followed by administrative proceedings against the businesses concerned. In many cases criminal sanctions would not be appropriate at all. Also, where action against individuals is required, we recognise that the use of lesser sanctions, such as director disqualification may be appropriate. The criminal and director disqualification provisions for cartel cases are still relatively new and untested. It thus remains to be seen how things will develop in the light of future experience. For the time being, however, we see considerable merit in retaining the existing administrative procedures for taking action against businesses that engage in cartel activity. In particular, we consider that the victims of a cartel are generally more likely to be able to recover damages by way of follow on action to such administrative proceedings against the businesses concerned than via an award of compensation by a criminal court following the conviction of the individuals behind the cartel.

- 1.11 We also believe that the introduction of plea bargaining for serious and complex criminal fraud prosecutions such as those involving certain criminal cartels will provide benefits such as large financial savings to the public purse. However, given that the use of our criminal investigatory powers is still developing, we envisage that plea-bargaining arrangements for criminal cartel offences will not be available until some time in the future. In relation to our civil enforcement regime, we feel it is more appropriate to talk in terms of 'settlements' between the OFT and undertakings. We would need to consider carefully any negative impact that settlements may have on our leniency programme as well as ensuring the regime continues to provide an effective deterrent against breaches of competition law.

## **2 THE OFT MARKET MISSION**

- 2.1 The Office of Fair Trading (OFT) is the UK's competition and consumer authority. Our mission is to make markets work well for consumers. Our vision is for competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation.
- 2.2 We adopt a market-informed approach, with a focus on outcomes that support productivity, growth and consumer and business welfare. We believe this approach is in the best interests of both businesses and consumers as well as to the benefit of the UK economy.
- 2.3 Our capacity to remedy ill-functioning markets stems from our ability to use the most appropriate mix of consumer and competition instruments and remedies. In order for this approach to work, it is essential that the instruments at our disposal are effective and reflect current concerns in the market. To do this they must be able to adapt to all different types of trader behaviour and the causes of this behaviour as well as to adapt to advancements in technology, product development and sale and marketing practices.

### 3 MEASURING FRAUD

#### 3.1 The report recommended:

- a measurement unit should be established within the National Fraud Strategic Authority (NFSA) with a capacity to carry out four exercises during its first year
- a programme should be established to measure the national extent of fraud based on robust measurement methodologies.

3.2 The OFT welcomes the recommendations contained in the report surrounding the establishment of a national measurement of fraud based on robust methodologies. Within the UK there is no current overall picture of the harm fraud causes to the economy and society as a whole. This has led to a piecemeal and uncoordinated approach to tackling fraud with different organisations taking widely different approaches to dealing with the problems it causes.

3.3 This uncoordinated approach by organisations has partly been due to the lack of common understanding in the UK as to what constitutes fraud. As such we are supportive of the Fraud Bill, currently before Parliament, which seeks to introduce a clear definition of fraud.

3.4 A new common definition will mean that dishonest and deceptive practices targeted at consumers (scams) will now be classified as fraud, thus hopefully ensuring criminal enforcement agencies will accept reports regarding consumer frauds. Too often in the past consumers, who have been victims of fraudulent behaviour such as misleading prize draw mailings or advance fee telemarketing scams, have been discouraged from reporting these as crimes. The scale of the losses suffered by consumers has consequently been under reported and undervalued. Such low value, high volume fraud causes great damage to the UK economy both in direct financial loss but also in the loss of confidence by consumers in respect of advertising and promotional material used by legitimate businesses. Also in the case of the Internet, which is used increasingly to promote consumer frauds, there is the

knock on effect of slowing the growth of the business to consumer internet trade which thereby reduces the opportunities for new businesses to enter the market.

- 3.5 Responses to these types of fraudulent practice have been piecemeal and dependent on the good work of a small number of police forces. This has led the OFT, as a national body, to take the lead in tackling the wide range of consumer fraud which is targeted at UK consumers. As part of our work in this area we have recently commissioned research to improve the OFT's understanding of the prevalence and impact of consumer based fraud on UK consumers. The research sought to determine consumer experiences of 16 consumer frauds and ascertain how much money, if any, had been lost by consumers to a particular fraud.
- 3.6 Annexe A contains a more detailed analysis of the methodology used in the consumer fraud research.
- 3.7 We will shortly publish in full the findings of the report and would welcome the opportunity to discuss this in more depth with a newly created NFSA. We have also begun work to estimate the consumer detriment caused by illegal anti-competitive practices, including cartels, which may also be of interest to the NFSA.

## 4 NATIONAL FRAUD STRATEGIC AUTHORITY

### 4.1 The report recommendations included:

- a new National Fraud Strategic Authority (NFSA) should be established within central government and accountable to Ministers. The NFSA should, amongst other things:
  - develop an umbrella strategy for tackling fraud in the UK
  - chair a stakeholder committee
  - set agreed priority areas
  - undertake measurement exercises and develop measurement mechanisms within other organisations
  - resolve policy conflicts between actors
  - monitor anti-fraud performance in the UK
  - promote best practice and public awareness of fraud
- a Multi-Agency Co-ordination Group (MACG) should be created as a subordinate group with the responsibility of facilitating operational work on priority areas designated by the NFSA.

4.2 The OFT supports the development of a national strategy as well as the creation of the NFSA to oversee the implementation of the strategy. We believe the possible functions of the NFSA, as listed on page 55 of the Fraud Review, would enable it to take on an important role which is at present not being filled in the UK. We note however the potential for some tension between the scope of the NFSA's authority and the need for other organisations to be able to set their own priorities and apply resources as they see fit. The OFT is a non ministerial body and as such is independent of Government. Responsibility for the strategic direction, priorities, plans and performance lies with the OFT Board. Work on scams is a priority area for the OFT and we see an ongoing role for our work in sharing information, coordinating action, and educating

consumers in the area of consumer fraud. We have performance measures which reflect our commitment to this work. However, our decisions in respect of which enforcement cases to take and the level of resource we are able to allocate will depend on a number of factors relating to our long term strategy and priorities.

- 4.3 Whilst we welcome the creation of the NFSA we do not support arrangements which would cut across existing or future priorities of the OFT. It is unclear at present as to whether the NFSA's role allow it to direct bodies to progress particular cases but we believe a more effective approach would be to encourage cooperation and partnership working to tackle agreed priorities rather than imposing them. We welcome the clarification given at paragraph 3.32 in the report which says that is not proposed that the NFSA will become directly involved in, among other things, either 'the policy development of individual departments or business sectors' or 'the direction of use of resources within individual departments...'
- 4.4 We agree that setting up a sub-group of the NFSA, the MACG, would ensure links between strategy development and operational matters. It will also allow the NFSA to focus on the main challenge of developing strategy. As the report notes the OFT has experience in tackling consumer fraud through a multi agency strategic approach. The work currently being undertaken by the Scams Enforcement Group (SEG) chaired by the OFT, together with our involvement in cross-border international groups such as the Toronto Strategic Partnership, illustrate how different agencies can provide expertise and a range of actions designed to achieve an overall goal such as reducing the impact of fraud on consumers.
- 4.5 The SEG brings together law enforcement agencies including local authority Trading Standards Services (TSS), Serious Organised Crime Agency (SOCA) and various police forces. The group builds on existing enforcement cooperation by exchanging information on new scams and best practice and by coordinating action. The current membership consists of representatives from each TSS region, SOCA, Met Police,

City of London Police, Derbyshire Police, Lincolnshire Police, Gambling Commission, Royal Canadian Mounted Police, Insolvency Service Companies Investigation Branch, Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS), Advertising Standards Authority, and Ofcom.

- 4.6 The Toronto Strategic Partnership is a multi national law enforcement agency response to Mass Marketing Fraud by Canadian Fraudsters. It includes the Toronto Police Service Fraud Squad, Ontario Provincial Police Anti-Rackets, Phonebusters, York Regional Police Service, Royal Canadian Mounted Police-GTA Commercial Crime Section, Ontario Ministry of Consumer and Business Services, Competition Bureau, US Postal Inspection Service, the OFT and the US Federal Trade Commission.
- 4.7 Our work in combating cross border consumer fraud is driven by such international developments as the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders<sup>4</sup> to which the UK is signed up. The Guidelines, which are aimed at national public bodies with enforcement authority for protecting consumers, reflect a commitment by Member countries to increase their effectiveness in combating fraudulent practices. The Guidelines also include a commitment to develop mechanisms for co-operation and information sharing between and among a Member country's consumer protection enforcement agencies and their other law enforcement authorities, for the purpose of combating fraudulent and deceptive commercial practices.
- 4.8 The OFT Annual Plan for 2005-06<sup>5</sup> contained a commitment to tackling mass-marketed scams as a priority area for the OFT until 2008. This included a commitment to taking enforcement action against scams, and

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<sup>4</sup> [www.oecd.org/dataoecd/24/33/2956464.pdf](http://www.oecd.org/dataoecd/24/33/2956464.pdf)

<sup>5</sup> [www.of.gov.uk/NR/rdonlyres/2190ED61-D436-4DA9-B7EE-4CDFAAE30C38/0/Plan05.pdf](http://www.of.gov.uk/NR/rdonlyres/2190ED61-D436-4DA9-B7EE-4CDFAAE30C38/0/Plan05.pdf)

leading other enforcement agencies in this task as well as working with other UK and international stakeholders and Consumer Direct (see paragraph 5.8) so that consumers have the earliest possible warning of new scams. Given our experience of taking enforcement action to tackle consumer based fraud, as well as work on education and alerts to help prevent consumers becoming victims, we would welcome the opportunity to be represented on the NFSA.

## 5 THE NATIONAL FRAUD REPORTING CENTRE

### 5.1 The recommendations included:

- that a National Fraud Reporting Centre (NFRC) should be established for England and Wales, with capacity to link to domestic and international partners
- the NFRC should have the capacity to accept crime reports from victims according to the Home Office Counting Rules (HOCR) and the National Crime Reporting Statistics (NCRS)
- the NFRC should identify trusted partners in different sectors and establish working relationships with them to identify how information on known fraudsters can be shared efficiently to prevent and detect fraud
- the NFRC should analyse reports to provide strategic, tactical and other assessments to the police and partner organisations. Strategic assessment would pass to the NFSA and inform the United Kingdom Threat Assessment.

5.2 The OFT supports the recommendations regarding the creation of the NFRC. We believe that the central collection of data regarding fraud will assist organisations to quickly identify problems on a national basis and ensure a coordinated approach to tackling fraud. This is a particular problem in the area of mass marketed scams targeted at consumers such as prize draw mailings, where the perpetrators may quickly move on and there is only a limited time frame for alerting consumers to the dangers and/or taking action against the company. Many types of consumer fraud are at present under reported so the NFRC will also be instrumental in identifying what are currently unknown frauds due to the lack of a central reporting point. Our research into the impact of scams on consumers found that few victims bothered to report the problem to the authorities because they did not think it would be of interest. In addition, there are a number of organisations all collecting their own data on fraud and taking victim reports depending on the nature of the crime.

The lack of clarity about who should investigate can be very confusing for a victim and may lead to complaints being missed. In our experience consumers are unlikely to report a problem more than once, so if they do not find the appropriate body the first time then their complaint may never be recorded. Referral of complaints can work but it is variable and this would be best handled from a central point.

- 5.3 Having a central data collection point will also make it easier for the UK to work closer with key international partners by sharing data. Canada and the US use central data collection points such as PhoneBusters and Consumer Sentinel respectively to assist in tackling cross border consumer fraud such as advance fee telemarketing frauds, which also target UK consumers.
- 5.4 As the report identifies it is often confusing for victims to know where they should report instances of fraud to. Also many organisations have been reluctant to accept reports of fraud where it crosses geographical or sectoral boundaries. In order to reduce confusion for victims we see it as vital that the NFRC is established as a one-stop shop for victims to report fraud. A central reporting centre will also ensure all reports are recorded in the same format which will be important when sharing information across enforcement agencies.
- 5.5 There are a number of specialist databases currently in existence which collect data relating to fraudulent activity. There is an opportunity for the NFRC to work closely with the organisations running these databases to maximise the benefits by building on existing systems which work well. However, in our view none of these would be a substitute for the role of the NFRC as outlined in the report. This is a unique opportunity to establish a body which could report on all types of fraudulent activity in the UK. This will be a significant challenge but it is essential it is met if the framework outlined in the review, including the setting up of the NFSA and the development of an overall strategy, is to succeed. The purpose and functions of the NFRC should be wide enough to meet the challenges set out in the report.

- 5.6 A NFRC which acts as a central collection point for data, which is then analysed and used to target appropriate action by relevant agencies, does not, in our view, require changes to the legislation which governs the disclosure of information by the OFT. Information which the OFT receives in connection with the exercise of its functions is 'specified information' under Part 9 of the Enterprise Act 2002 and may not be disclosed unless a gateway exists for such a disclosure. Gateways under Part 9 include disclosure for the performance of statutory functions or for the purposes of criminal proceedings. As such we would face difficulties regarding information we had collected under our statutory functions being passed directly to agencies or private bodies. We believe however that the NFRC would be able to use such information to compile reports which would be helpful to business in taking anti-fraud measures.
- 5.7 The central collection model would also ensure information regarding issues dealt with by local authority Trading Standards Services (TSS) is collected centrally allowing a national picture to be ascertained. Due to the regional nature of the TSS this is not always possible as information is only collected regarding either traders or consumers based within a local authority's jurisdiction. Due to the tight resource restrictions in many local authorities it may not always be possible for them to provide data to a national body in specified formats within given time restrictions.
- 5.8 Consumer Direct is a telephone and online consumer advice service, supported by the Office of Fair Trading. It can provide data to help build a national picture of problems consumers are facing. However, it has not been developed as a reporting line and as such it does not necessarily capture the information needed by enforcement agencies. We would wish to consider carefully whether any data could be obtained from Consumer Direct would be of value to the NFRC.

## 6 FRAUD PREVENTION AND INVESTIGATION

6.1 The report recommended:

- the National Fraud Strategic Authority (NFSA) and the National Fraud Reporting Centre (NFRC) should have a direct role in relation to:
  - devising and implementing public anti fraud campaigns and warnings, drawing on generic and case specific information provided by NFRC
  - liaising with the press for campaigns and case publicity
  - devising and circulating best practice and advice on systemic fraud prevention within industry and government
  - co-ordinating and informing the anti fraud awareness training provided to industry by other regional and sectoral groups.

6.2 The OFT has been a key player in the development of fraud prevention messages with our international stakeholders and as such launched the scams awareness month in 2005 as part of the International Consumer Protection Enforcement Network<sup>6</sup> (ICPEN) fraud awareness month. The OFT has been joined in promoting scams awareness month by local authority Trading Standards Services (TSS) across the country, as well as Consumer Direct, Which?, the Advertising Standards Authority, ICSTIS and other consumer and industry bodies.

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<sup>6</sup> ICPEN is a membership organisation comprising the trade practices enforcement authorities of more than 30 countries across all five continents. ICPEN facilitates multi-lateral cooperation between the relevant authorities on cross-border cases.

6.3 The OFT has also set up the Consumer Education Alliance<sup>7</sup> which oversees and enables the development and delivery of a planned, targeted and high-quality consumer education programme for the UK. It aims to coordinate consumer education activities across England, Wales, Scotland and Northern Ireland by:

- ensuring work is targeted against identified priorities
- enabling members to share and discuss ideas
- acting as a resource for those developing and delivering consumer education initiatives
- acting as a delivery channel for consumer education initiatives
- providing a central voice for consumer education in the UK
- providing a register of consumer education activities across the UK.

6.4 Our work in this area highlights our commitment to developing strong prevention messages with key partners to help promote awareness of consumer based fraud and reduce the opportunities for criminals. As such we would welcome the opportunity to develop key messages with a wide range of domestic stakeholders to promote fraud awareness in the UK.

6.5 Given our already good work with ICPEN we feel there would also be scope for linking domestic messages with global fraud campaigns to tackle cross border fraud issues.

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<sup>7</sup> The Alliance includes organisations from business and professional bodies, consumer and campaigning organisations, trading standards and local authorities, academic institution and educationalists, consumer education practitioners, regulators and other agencies, government and public bodies.

- 6.6 We believe that the changes to the regulatory landscape in light of the Macrory Report<sup>8</sup> will provide significant benefits which will increase the scope of regulators, such as the OFT, to tackle consumer fraud. The Macrory Report contained recommendations regarding the flexible and proportionate use of a broad range of sanctioning options. We believe that a toolkit which will enable flexibility, efficiency, and responsive enforcement in line with the recommendations contained in the Hampton report<sup>9</sup> will achieve outcomes which result in better compliance for business and better outcomes for society as a whole, and which have deterrent effects for the future.
- 6.7 We therefore strongly endorse the proposal that a wide range of tools should be available to regulators who adhere to the Hampton principles of risk-based enforcement; and who address breaches with sanctions proportionate to their harm and future risk; starting from statutory notices to deal with minor infringements and working up through administrative penalties and enforceable undertakings to the maintenance of strong criminal penalties to be able to deal with gross negligence, intentional recklessness and offences with serious consequences or harm. In relation to our specific remit, we are largely satisfied that the powers and sanctions available to us under competition law are commensurate with that approach. We have a broad range of tools available under the Competition Act 1998 and the Enterprise Act 2002 (EA02) which we employ as part of our risk-based approach to competition enforcement, and there are only minor questions which remain to be debated, such as should there be an absolute limit of 10 per cent of annual turnover for our fining regime and should the OFT be able to impose civil penalties for non-compliance with statutory information requests. It is therefore in relation to consumer law and its

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<sup>8</sup> Regulatory Justice: Sanctioning in a post – Hampton World  
[www.cabinetoffice.gov.uk/regulation/documents/pdf/macrory060524.pdf](http://www.cabinetoffice.gov.uk/regulation/documents/pdf/macrory060524.pdf)

<sup>9</sup> Reducing administrative burdens: effective inspection and enforcement  
[www.hm-treasury.gov.uk/media/A63/EF/bud05hamptonv1.pdf](http://www.hm-treasury.gov.uk/media/A63/EF/bud05hamptonv1.pdf)

enforcement that we believe most change is needed, and we are currently working with government departments, stakeholders and the European Commission to help to shape the future consumer legislative framework in the UK.

- 6.8 Much of consumer fraud is operated on a large scale by organised crime gangs who can see large profits with the potential of very little effective and proportionate enforcement action as criminal enforcement bodies have historically opted against taking a lead on consumer based fraud. However, given the OFT's lack of criminal powers when enforcing consumer based legislation we have found it difficult to pursue and ultimately bring to justice fraudsters who target criminal activities towards consumers.
- 6.9 Under Part 8 of the EA02 the OFT can seek injunctions against traders who breach certain listed consumer protection legislation where that breach harms the collective interest of consumers. Whilst Part 8 is an effective and efficient way of dealing directly with individual breaches of consumer law it contains little ex-ante deterrent aspects and is not, of itself, effective at dealing with true 'rogue' traders, con-artists or 'scammers'. Breach of court orders granted under Part 8 of the EA02 and related legislation is contempt of court, and as such potentially subject to certain criminal penalties though not fully criminal in the sense of giving rise to a criminal record.
- 6.10 We need to ensure we are effective in stopping persistent or flagrant offenders in the consumer field and as such believe that criminal sanctions are appropriate for the worst breaches of competition and consumer protection law. Rogue traders purposefully deceiving consumers to sell goods and services on false pretences or engaging in aggressive tactics to force purchase or payment, or cartels engaged in serious fraud should be subject to criminal penalties. Both the punishment and the possibility of compensation orders that criminal sanctions can provide, represent a powerful deterrent to those traders intent on causing significant consumer detriment.

- 6.11 A key objective of enforcement is to change the incentive structure that traders face. This can be achieved by calculating the financial penalty in such a way that traders cannot expect to profit from their behaviour. They would lose through sanctions, and any action for compensation by affected customers, whatever gains they might initially acquire from breaking the law. We would therefore like to see the availability of civil financial penalties as part of the consumer protection regime. The Part 8 regime is effective in providing a basis for negotiating undertakings that stop individual problems, and it has the ultimate sanction of contempt of court potentially resulting in imprisonment if a court order is breached. However, it is less effective where undertakings are refused or breached, and thus in dealing with traders who do not respect the law. Except at the contempt stage, it does not offer a swift penalty that can be tailored to the seriousness of the breach and the extent of gain achieved by it. It also provides no scope for orders providing redress for victims or facilitating their pursuit of redress.
- 6.12 We believe that all deliberate 'rogue' behaviour, or consistent negligence should be able to be punished, rather than just halted, in order to have a deterrent effect, and that penalties should be proportionate to the breach. For example, the ability to use administrative fines prior to court action would enable us to deal with occasions when prior, to us taking court action, rogue traders have moved on and set up another business so the enforcement action (for example, obtaining undertakings or an enforcement order) has no real effect and perhaps fines at an earlier stage would have more of a deterrent effect.
- 6.13 To facilitate the use of criminal sanctions and ensure enforcement action is targeted, proportionate and risk based we feel it is appropriate for all enforcement agencies to be provided with powers under sections 21, 28 and 29 of the Regulation of Investigatory Powers Act 2000 (RIPA).
- 6.14 The power under s21 of RIPA requires communication service providers to disclose the identities and addresses of those who are responsible for

a telephone number, PO Box or website.<sup>10</sup> Without this information, enforcers' investigations can be compromised as they may not be in a position to identify those running the business or the premises from which they operate. This can be particularly damaging as rogue traders can avoid detection by hiding behind a telephone number, PO Box address or increasingly a website without fear of an on-site inspection.

- 6.15 The ability to covertly make recordings under s28 of RIPA is necessary because requesting the information in writing is unlikely to produce the necessary evidence. For example, if enforcers could record telephone calls it would allow them to transcribe fraudulent or misleading sales scripts to check the claims made by telesales staff with regards to a particular product, such as a credit loan or a particular service on offer. It would also allow, for example, enforcers to act as consumers and attend sales presentations at which misleading claims are reportedly being made.
- 6.16 We also feel it is appropriate to have the power to use covert surveillance, which would involve using Covert Human Intelligence Sources (CHIS) as provided under s29 RIPA. Without this, enforcers are unable to engage, for example, in conversations with the trader without revealing their role. This might be necessary in telephone conversations or in the planning of an on-site inspection where it is important to identify a particular person. Without powers to use CHIS, neither will it be possible to attend a fraudulent sales presentation as a consumer and record the representations that are made by staff.
- 6.17 Added to this would be the power to covertly make test purchases so, for example, goods can be ordered from a website without revealing the enforcer is the purchaser.

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<sup>10</sup> Defined as 'communications data' under RIPA 2000 and does **not** include the content of communications.

- 6.18 Wherever possible we seek to resolve issues through the least intrusive route whether that be issuing guidance to business, consumer education or the use of undertakings from traders. However, in extreme circumstances it is not always possible to rely on the cooperation of the trader especially those which purposefully seek to breach legislation. In cases such as these we feel it is essential to have the most effective tools available, as detailed above, to tackle problems and help restore consumer confidence in both markets and the fair dealing businesses which operate within them.
- 6.19 The cases below (based on recent, real cases) are examples of the types of fraudulent trader behaviour faced by consumers. We believe that with the appropriate investigation methods, such as those detailed above, the OFT would have been better placed to achieve outcomes which have produced greater benefits to consumers and the UK economy as a whole.

### **Pyramid selling recruitment network**

- 6.20 When investigating a pyramid selling scheme consisting of a changing network of individuals with no fixed UK trading address, the OFT faced difficulties in identifying the responsible individuals and taking appropriate action. In the absence of RIPA authorisation to use CHIS we were unable to attend the recruitment presentations to observe the operation. This led to difficulties in obtaining adequate evidence to support appropriate enforcement action which would have stopped the detriment from continuing.

### **Prize draws with premium rate lines**

- 6.21 Consumers were deceived by widely circulated deceptive prize draws and premium rate phone line scams claiming they had won a significant prize, and were encouraged to claim their prizes via an expensive premium rate phone line. In reality most consumers had actually 'won' a very low-value giveaway item. However, without access to

communications data, the OFT was unable to discover the identity of the perpetrators of this fraud.

## **Mock auctions**

6.22 Traders using deliberate and systematic use of mock auctions on a national scale to avoid detection meant this was a case best suited to an OFT investigation. It was necessary to attend presentations in order to gather appropriate evidence but this was not possible without CHIS authorisation due to the need to establish or maintain a personal relationship with presenters/salesmen.

## 7 PENALISING FRAUD

7.1 The report identified the need for a system or systems that meet the various requirements for effective sanctions, and identified some of the problems associated with the need for parallel proceedings and the so-called 'justice gap' for fraud victims. The report considered two options in this area:

- extending the range of non custodial sentences available to the Crown Court following conviction for a fraud offence by adding:
  - power to wind up companies and dissolve partnerships used in fraud
  - power to award compensation to all victims of a fraud offence
  - power to appoint a Receiver to recover property and distribute compensation awards
  - power to disqualify, prohibit or restrict an offender engaging in particular professional, or commercial activities
  - power to make orders dealing with consequential insolvency.
- establishing a Financial Court jurisdiction in the High Court to link the Crown Court with a division of the High Court, such that any matter civil or criminal arising out of an offence involving fraud should be dealt with and co-ordinated within the Financial Court jurisdiction and, unless the interests of justice require otherwise, heard by the same judge
- in addition, greater use could be made of the administrative and civil court options available to Regulators, as an alternative to criminal proceedings for appropriate fraud offences.

7.2 We are supportive of the above recommendations and the aims behind them. They are consistent with the proposals in the Macrory Report to

give regulators a toolkit which allows for the flexible and proportionate use of a broad range of sanctioning options. It follows that the courts should have a similar degree of flexibility and scope to ensure that sanctions are applied quickly and effectively. Our experience of consumer fraud shows that a multi-faceted approach may be necessary to deal with the activities of the business, the individuals behind it, and also to ensure consumers obtain redress. For scams cases it would be extremely effective if a Financial Court, in addition to the conviction for a fraud offence, was able to freeze assets, wind up a company, disqualify directors, and award compensation to victims. The arguments we set out at 6.6 – 6.22 are equally relevant here.

- 7.3 It will nevertheless be important to consider the application of the recommendations in the context of the particular type of conduct concerned. We believe that in the fight against cartels there are strong reasons for having a mixture of sanctions aimed not only at undertakings (businesses) but also at individuals. It is generally recognised that cartels cause very substantial economic harm to the detriment of consumers and the economy more generally. We estimate the financial detriment caused by cartel activity by considering the total value of the relevant market and assuming that a cartel will have led to prices being 10 per cent higher than they would otherwise have been. The principal beneficiaries of cartel behaviour are undertakings and it is appropriate that there should be mechanisms for sanctioning them through the imposition of financial penalties. The OFT is also generally supportive of the case for increased private enforcement, whether by way of follow on claims or actions brought independently of public enforcement.
- 7.4 At the same time we see the need for sanctions against individuals who are involved in cartel behaviour. We consider that the use of criminal sanctions against individuals with the imposition of non-transferable custodial sentences is an important additional tool for deterring cartel activity. It also carries a clear signal that cartels are a form of fraud and morally unacceptable. We feel there is considerable merit in maintaining the scope for prosecuting individuals for the cartel offence under the Enterprise Act 2002 (EA02), whilst retaining a separate administrative

regime for taking action against undertakings under Article 81, EC Treaty (Article 81) and the Competition Act 1998 (CA98).

- 7.5 The OFT already has a number of interlinking functions and powers, both civil and criminal, in the field of cartel enforcement. It may be instructive to set these out in order to fully explain how they might work in the context of these particular recommendations.
- 7.6 To date the principal tool used by the OFT for investigation and enforcement action against cartels has been the CA98. The provisions of the CA98 are modelled on the competition rules of the EC Treaty and are expressed to apply to undertakings (businesses). In the case of any cartel which affects trade between EU Member States the OFT also has the power, and indeed is required, to apply Article 81 whenever it takes action against the undertakings concerned.<sup>11</sup>
- 7.7 The OFT's proceedings under Article 81 and/ or the CA98 are essentially administrative, resulting in an infringement decision by the OFT which may include the imposition of financial penalties of up to 10 per cent of an undertaking's worldwide turnover and/or the issue of directions requiring the parties to bring the infringement to an end. Decisions by the OFT may be appealed to the Competition Appeal Tribunal (CAT), a specialist tribunal, which may also hear certain claims for damages in respect of breaches of Article 81 and/or the CA98. Appeals to the CAT against OFT infringement decisions are on the merits. There is also a right of further appeal to the Court of Appeal (Court of Session in Scotland) which is limited to points of law or the level of fine.
- 7.8 Where the OFT or the European Commission has made an infringement decision under the CA98 and/or Article 81, victims of the infringement

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<sup>11</sup> The OFT's jurisdiction to apply Article 81 and the CA98 in respect of such cartels exists only so long as the European Commission does not initiate proceedings. This does not affect the OFT's ability to take action under the EA02 or the Company Directors Disqualification Act 1986 against the individuals concerned, however.

may bring a 'follow on' claim for damages before the CAT once any appeal from the OFT's decision has been finally determined or the time for such an appeal has expired. In such circumstances damages claims may also be brought before the CAT by specified bodies on behalf of named consumers.<sup>12</sup> Individual claimants may also start follow on proceedings before the High Court or a county court (Court of Session or sheriff court in Scotland).

- 7.9 In the case of follow on proceedings, whether before the CAT or otherwise, the court hearing the case is bound by the decision of the European Commission or the OFT (or of the CAT on appeal) that Article 81 and/or the CA98 has or have been infringed. The claimant will still need to prove that it has suffered loss but may be assisted by section 58 of the CA98 which provides that, unless the court directs otherwise, relevant findings of fact by the OFT are binding on the parties.<sup>13</sup>
- 7.10 In addition to administrative proceedings against the undertakings concerned under Article 81 and/or the CA98, individuals who dishonestly make or implement a cartel agreement may be prosecuted for the cartel offence under the EA02.<sup>14</sup> Investigations under the EA02 are carried out by the OFT which may also bring prosecutions in England and Wales and Northern Ireland. Prosecutions in England and Wales and Northern Ireland may also be brought by the Serious Fraud Office

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<sup>12</sup> Which? is currently the only such specified body.

<sup>13</sup> Where there has been no infringement decision by the OFT or the European Commission, the victims of a cartel may still bring a claim for civil damages before the High Court or county court (Court of Session or sheriff court in Scotland). The onus that this places on the claimant to obtain sufficient evidence to prove the infringement makes this more difficult, however.

<sup>14</sup> An individual will be guilty of an offence under section 188, EA02 if he dishonestly agrees with one or more persons to make or implement, or to cause to be made or implemented, arrangements between at least two undertakings which would fix prices, limit or prevent supply, limit or prevent production, divide markets or customers or rig bids.

(SFO).<sup>15</sup> In Scotland prosecutions are brought by the Lord Advocate. The maximum sentence for the cartel offence on indictment is five years' imprisonment and/ or an unlimited fine. On summary conviction the maximum sentence is six months and/or a fine.

- 7.11 In addition to criminal sanctions under the EA02, or as an alternative, directors of companies which breach competition law may be the subject of a Competition Disqualification Order (CDO) under the Company Directors Disqualification Act 1986 (CDDA). A CDO may be granted on an application by the OFT to the High Court (Court of Session in Scotland). A CDO must be granted if the court is satisfied that an undertaking which is a company of which that person is a director commits a breach of competition law and that the person's conduct as a director makes him or her unfit to be concerned in the management of a company. The maximum period of disqualification under a CDO is 15 years. Breach of a CDO is a criminal offence.
- 7.12 As an alternative to applying for a CDO the OFT may accept a Competition Disqualification Undertaking (CDU). Breach of a CDU has the same consequences as the breach of a CDO.
- 7.13 The OFT's jurisdiction to apply for a CDO or accept a CDU under the CDDA is separate from that of a criminal court to make a disqualification order against an individual who has been convicted of an indictable offence in connection with the management of a company. Consistent with the recommendations of the report, the OFT takes the view that where a company director has been convicted of the cartel offence under the EA02 and the offence has been committed in connection with the management of a company, the court by or before which he or she was convicted is the most appropriate forum for considering a disqualification order.

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<sup>15</sup> Where serious or complex fraud is suspected, the investigation may also be carried out by the SFO.

7.14 The cartel offence under the EA02 came into force in June 2003, as did the provisions for CDOs and CDUs under the CDDA. Whilst the OFT has started a number of criminal investigations under the EA02, there have as yet been no prosecutions for the cartel offence. Equally, since the OFT's decisions under the CA98 have all related to conduct prior to June 2003 there have as yet been no CDOs or CDUs under the CDDA.

7.15 With regard to the first recommendation – extending the range of non custodial sentences available to the Crown Court – not all of the proposed measures would necessarily be appropriate in the context of cartels. The particular type of conduct concerned, together with the wider social, economic, legal and regulatory context, will need to be taken into account when considering the recommendation's application in practice. Thus:

- The power to wind up companies and dissolve partnerships will not be appropriate so long as criminal proceedings are reserved, as at present under the EA02, for the individuals who organised the cartel rather than for the undertakings they represent. Also, provided they are otherwise lawfully and efficiently managed, putting out of business undertakings that have participated in a cartel and thereby reducing competition may be counterproductive.
- Giving the criminal courts a power to award compensation would generally seem less appropriate in the current legal framework, given that damages are more likely to be recoverable from the undertakings concerned than from individuals and the lower standard of proof in civil proceedings under Article 81 and/or the CA98, combined with the fact that there is no need to prove dishonesty. Rather, we consider that the present arrangements under which follow on damages actions may be brought before the CAT are generally likely to be more effective. There may, of course, be exceptions, for example, where one or more of the undertakings concerned has become insolvent but the proceeds of the cartel are in the hands of the individuals responsible.

- For the same reasons, giving the criminal courts a power to appoint a receiver to recover property and distribute compensation awards would also seem inappropriate in the existing legal framework.<sup>16</sup>
- As set out above, where a company director has been convicted of the cartel offence committed in connection with the management of a company, the court by or before which he or she was convicted already has the power to make a disqualification order against that individual. We consider that any disqualification order should be considered by the court by or before which he or she was convicted. This sanction is only available in the case of company directors, however. There may, therefore, be some merit in exploring other possible prohibitions or restrictions that might be imposed.<sup>17</sup>
- So long as criminal proceedings for the cartel offence are aimed solely at individuals, giving criminal courts the power to make orders dealing with insolvency is also likely to be inappropriate in the context of cartels.

7.16 On the establishment of a Financial Court we can see that there are a number of clear benefits to this proposal, in particular for consumer fraud, but the benefits of such an approach in the current legal framework for cartel enforcement, for example, are likely to be less tangible than in other contexts and may be detrimental. Again, proper account would need to be taken of the particular type of conduct concerned, together with the wider social, economic, legal and regulatory context, when considering its application in practice.

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<sup>16</sup> There may be a case for extending the powers of the CAT in this regard, however, thus enabling it to take enforcement action in respect of any damages it awards.

<sup>17</sup> In terms of avoiding the need for parallel proceedings, where an infringement decision by the OFT has been appealed to the CAT, it may be sensible for any application for a CDO also to be heard by the CAT after the determination of the appeal.

- 7.17 This stems from the fact that criminal proceedings under the EA02 are brought against individuals, whereas any civil claims for damages under Article 81 and/or the CA98 are brought against undertakings. Given that civil claims may be brought by way of follow on action to administrative proceedings by the OFT or the European Commission, which do not require a criminal standard of proof or proof of dishonesty, and that the court hearing the claim will be bound by the OFT's or European Commission's administrative decision as to the existence of an infringement, linking civil claims by the victims of a cartel to criminal proceedings whether against individuals under the EA02 or by criminalising the enforcement of cartels under Article 81 and the CA98 is, in general, likely to make the recovery of damages more difficult for claimants. Equally, if the undertakings concerned had to be joined to criminal proceedings against individuals under the EA02 this would risk complicating and prolonging criminal trials unnecessarily.
- 7.18 While we support the recommendation that regulators make greater use of administrative and civil court options as an alternative to criminal prosecutions we nevertheless consider that criminal proceedings should be maintained to sanction individuals in appropriate cases, including cartels, whilst also recognising that criminal proceedings will not be appropriate in all cases. Indeed, the OFT would generally expect criminal proceedings against individuals for the cartel offence to be accompanied or closely followed by administrative proceedings under Article 81 and/or the CA98 against the undertakings concerned. As discussed above, in many cases a criminal prosecution would not be appropriate at all. Also, where action against individuals is needed, we recognise that a CDO or CDU may be a quicker and more convenient alternative to bringing a prosecution for the cartel offence. Like custodial sentences, disqualification is a severe and non-transferable sanction for directors, involving damage to reputation and effects on career and earning potential. A CDO or CDU also carries a clear message about the unacceptability of cartel behaviour.

## 8 PLEA BARGAINING

8.1 The Fraud Review considers that the introduction of plea-bargaining for fraud offences could improve the effectiveness of fraud trials and could ensure more cost effective justice for victims. It sets out some of the advantages which may be inherent in offering the parties in serious fraud cases the opportunity to consider reaching a court sanctioned agreement at a much earlier stage, namely:

- financial savings to the public purse by early disposal of cases
- easing the strain caused by delay on defendants, victims and witnesses
- giving the investigators and prosecuting authorities more information at an early stage to allow a more focussed and efficient investigation into the role of others involved in the criminality and with whom no such agreement is reached.

8.2 In criminal procedure, 'plea-bargaining' refers to a defendant agreeing to plead guilty to a criminal offence, in return for a reduction of the severity of the charge, the prosecutors' willingness to recommend a particular sentence or some other benefit to the defendant.

8.3 We understand that the initial proposal concerns the availability of plea-bargaining for 'serious and complex fraud cases'. In the event that plea-bargaining is introduced in the UK, we expect that any plea-bargaining in respect of serious and complex fraud charges will be subject to detailed Government guidance. Some but not all cartel activity may fall into the category of serious and complex fraud. The conduct captured by the criminal cartel offence under the Enterprise Act 2002 (EA02) could correctly be described as one obvious example of fraudulent conduct.<sup>18</sup>

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<sup>18</sup> See also chapter 7 on Penalising Fraud, paragraph 7.10 above.

8.4 Plea-bargaining procedures are frequently relied on in US criminal cartel prosecutions.<sup>19</sup> In the UK the OFT's criminal investigatory powers are still relatively new and there is no track record of criminal cartel prosecutions. In principle, we foresee substantial potential benefits in using plea-bargaining procedures in our criminal cartel prosecutions, but would have to be mindful to embed these successfully into our existing system of leniency for undertakings under Article 81, EC Treaty (Article 81) and the Competition Act 1998 (CA98) and no-action letters for individuals under the EA02.<sup>20</sup>

8.5 As concerns the civil side of its competition law enforcement regime, the OFT is currently in the preliminary stages of considering the extent to

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<sup>19</sup> The US system of negotiated plea agreements, along with the Anti-Trust Division's Corporate Leniency policy, continues to play a vital role in cracking cartels and swiftly advancing the Division's investigation and prosecution of cartel members. In the United States, negotiated plea agreements are used to obtain cooperation from the defendant(s) in exchange for a lesser sentence. The vast majority of the Division's major international investigations have involved the cooperation of a corporate leniency applicant and, over the last 20 years, over 90 per cent of the corporate defendants charged with an antitrust offence have entered into plea agreements with the Division where they admitted guilt and cooperated with the Division's criminal investigations' (see Department of Justice, Scott Hammond, 'The US Model of Negotiated Plea Agreements: A Good Deal With Benefits For All', October 2006, for a fuller discussion).

<sup>20</sup> In the case of administrative proceedings against undertakings under Article 81 and/or the CA98 the OFT has adopted a policy of awarding reductions of up to 100 per cent of the penalty that would otherwise have been imposed for cartel participants that come forward, confess and co-operate with the OFT's investigation. In keeping with this policy, the OFT will also in certain circumstances grant individuals immunity from prosecution for the cartel offence by issuing a 'no-action' letter. To be granted a no-action letter, the individual must satisfy certain conditions, such as (i) admit participation in the criminal offence, (ii) provide the OFT with all the information, documents and other evidence available to him/her regarding the cartel; (iii) maintain continuous and complete co-operation throughout the investigation, (iv) not have taken steps to coerce another undertaking to take part in the cartel; and (v) refrain from further participation in the cartel from the time he/she discloses the cartel except as directed by the investigating authority. See also [www.of.gov.uk/NR/rdonlyres/CC73E8F4-2433-48C4-A3BC-5F3255C58AAF/0/oft436.pdf](http://www.of.gov.uk/NR/rdonlyres/CC73E8F4-2433-48C4-A3BC-5F3255C58AAF/0/oft436.pdf).

which settlements between competition agencies and competition law infringers represent an effective means of concluding competition law cases, in circumstances where both the facts and the law of the case are broadly not in dispute.

- 8.6 In this context, the OFT considers that the term 'settlement' would be more appropriate in describing the process of early conclusion of a civil case as opposed to the term 'plea-bargaining' which appears to be used by some competition agencies relating to settlements.
- 8.7 Plea bargaining is a term normally used in relation to the prosecution of criminal offences (as opposed to administrative or civil cases), where the prosecution and the defence reach an arrangement, which is then approved by the court. Unlike prosecutorial competition law enforcement regimes which need to institute court actions in order to impose sanctions (such as the US system), under administrative systems of competition law such as in the UK, (even if they are complemented by criminal offences for some forms of infringement), the competition agency takes its own decisions, which are then subject to appeal, rather than the agency acting as a prosecuting authority. In such systems, no court approval would be required for the settlement of competition law cases. Further, the word 'bargain' suggests a degree of iterative engagement with the infringers about cases, which may give an inappropriate or misleading impression of the process to the undertakings concerned in individual cases and generally.
- 8.8 We feel that a number of advantages could flow from the early resolution of cases by way of settlement:
- potential resource savings (both in terms of reducing the likelihood of appeal and/or the length of administrative procedure) could allow more timely resolution of cases and (potentially) greater scope for more cases being pursued. Together with greater advocacy opportunities, this should increase awareness of competition law and hence compliance and deterrence

- direct/voluntary settlements may enable more direct engagement with the senior management of companies, resulting in a shift away from adversarial to a more constructive dialogue with business
- direct/voluntary settlements could facilitate restitution to victims. We are likely to be well placed during settlement discussions to encourage direct redress, possibly in return for further reductions in penalties. While the scope for restitution may go wider, obtaining redress for victims who are themselves unlikely to initiate private actions may be particularly beneficial.

8.9 Further, we can foresee benefits to the infringing parties themselves, in that settlements enable undertakings to avoid what may otherwise be a lengthy, costly and unnecessary administrative procedure. Offering businesses an early exit route in appropriate cases is also likely to impact positively on share prices and, more generally, on incentives to implement effective competition law compliance programmes. It is also likely to remove uncertainty and to impact positively on business valuations and share prices.

8.10 However, the challenge for us is to successfully embed settlement procedures into our existing competition law enforcement portfolio. In particular, establishing an effective settlement regime requires consideration of the impact settlements would have on our existing leniency programme.

8.11 The OFT's leniency<sup>21</sup> and no-action policies have played a vital part in its fights against cartels. Since its inception in March 2000, we have received in excess of 130 individual leniency applications, with over 30 applications being submitted in the first nine months of 2006 alone.<sup>22</sup> In

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<sup>21</sup> [See](#) footnote 20 above.

<sup>22</sup> These numbers do not refer to the actual number of cases, but to numbers of individual leniency applications for example, more than one leniency application could relate to the same case.

common with most competition authorities nowadays, we consider that our leniency programme is of central importance to the OFT's ability to detect and pursue cartels, with leniency applicants having contributed to the overwhelming majority of the OFT's cartel infringement decisions since the entry into force of the Competition Act 1998 (CA98) in March 2000.

8.12 Under the OFT's leniency programme, undertakings benefit from:

- full immunity from financial penalties where they inform the OFT of the existence of a cartel before an investigation has commenced ('Type A leniency applicants')
- up to 100 per cent immunity from financial penalties where they are the first to come forward after a cartel investigation has commenced ('Type B leniency applicants')
- reductions in financial penalties of up to 50 per cent where they provide evidence of cartel activity to the OFT when they are not the first to come forward ('Type C leniency applicants').

8.13 We would envisage that in order to safeguard the success of any leniency programme, the design of any settlement process will need to ensure that its operation gives rise to a marginal impact only on undertakings' incentives to apply for leniency.

8.14 While much would depend on the typical extent of reductions in financial penalties offered under settlement arrangements, in the UK context at least it would seem that the incentives to apply for leniency on undertakings who would stand to benefit from a reduction in penalty of no more than 50 per cent ('Type C leniency') are more likely to be reduced through the introduction of settlement arrangements than those whose penalty reductions would invariably be much greater (namely 'Type A' or 'Type B' leniency).

8.15 In addition, establishing an effective settlement regime also requires consideration of any impact it could have on maintaining effective

deterrence in our competition law enforcement system. The impact on deterrence could be both positive (inasmuch as more high-profile cases could be pursued, leading to greater advocacy opportunities and increased compliance) and negative (considering lower financial penalties reduce incentives to comply with competition law).

8.16 In order to minimise any negative impact settlements could have both on leniency and on deterrence, we may wish to consider building in safeguards into any future system in the form of:

- unpredictability: settlements ought not to be perceived as a 'per se' right which is available in all cases.
- leniency could be protected by guaranteeing significantly greater reductions in financial penalties to leniency applicants compared to any reductions the companies could obtain by way of settlement.
- making sure that the publicity and advocacy elements are maximised in conjunction with the increased detection of cartels. This could also include addressing individual companies' future behaviour as part of the settlement 'package', by way of, for instance, requesting the introduction of company-wide compliance programmes and/or corporate governance systems and ensuring a review of both internal control programmes and corporate governance structures.

## 9 CONTACT DETAILS

- 9.1 If you have any queries regarding this response, in the first instance, please contact:

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# ANNEXE

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## A OFT COMMISSIONED RESEARCH INTO SCAMS IN UK

### Background and objectives

- A.1 The OFT commissioned Carol Goldstone Associates, together with GfK NOP, to undertake a programme of research to improve the OFT's knowledge of the prevalence and impact of scams on UK consumers. This research will help inform the OFT's future work in this area.
- A.2 The study comprised a four-pronged research approach including an exploratory qualitative phase and then quantification of findings. The four phases were as follows:

### Qualitative

#### Focus group discussions

- A.3 The purpose of this stage of the study was to consult with consumers regarding their awareness and experience of scams. More specifically, it was to understand what they classified to be a scam and what words they would use to describe it. Findings from this survey were used to revise and improve the questions placed on the subsequent omnibus surveys.

#### In-depth interviews

- A.4 The purpose of the in-depth interviews was to probe issues not covered in any detail in the preceding group discussions. More importantly however, it was to ensure understanding of all the issues impacting on scams so that these could be translated into an appropriate quantitative questionnaire. The idea was to overcome any understanding, relevance, definition or participatory problems. It was also intended that findings

from this phase of the survey be used to feed into press releases as part of the OFT's Scams Awareness Month in February 2006.

## **Quantitative**

### **Omnibus surveys**

- A.5 In light of the uncertainty about incidence levels of scams affecting consumers in the UK, it was felt that it would be beneficial to build up a better understanding of the problem. This involved placing four questions on a series of eight omnibus surveys. The primary aim was to rapidly identify incidence, recency and awareness of scams. More importantly, however, this was to provide a targeted and up to date sample base for the concurrent depth interviews and follow on Computer Aided Telephone Interviews (CATI) survey.

### **CATI**

- A.6 This phase of the survey followed on from the qualitative depths and aimed to quantify and summarise experiences uncovered at this preceding phase, by which stage we would have had an overview of the incidence of scams and the primary issues affecting its targets and victims.

## **Methodology and sample**

### **Qualitative**

#### **Groups**

- A.7 Two group discussions were conducted. Ten members of the public were invited to attend each group. A total turnout of 20 was achieved. This was made up of a mix of males and females, and in line with recruitment criteria, those who had been targeted by a scam. Respondents were recruited randomly, off street. The group discussions

were conducted on 1 December 2005. All were tape recorded and transcribed for further analysis.

## **Depths**

- A.8 Sixteen depth interviews were conducted. These were split to include a range of age breaks, affluence levels and location. Interviews were further split to include a mix of eight respondents who had been victims of a scam, four who knew of a family member, friend or colleague who had been the victim of a scam and four respondents who had been the target of a scam. Sample for these interviews was sourced from the first omnibus which had been conducted mid December 2005. Recruitment was done by phone and appointments were setup and interviews conducted from late December through to mid January 2006. These interviews were all tape recorded and transcribed.

## **Quantitative**

### **Omnis**

- A.9 A total of eight Omnibus surveys were conducted. Omnibus samples are designed to be fully representative of the Great Britain population aged 15 and over. Three omnis were done through GfK NOPs Random Location Survey which approaches 2,000 consumers face to face, and five omnis were done through their Telebus, which approaches 1,000 consumers by telephone. All eight were conducted over a period of two months (December 05 to January 06) and a total of 11,214 consumers were interviewed. Respondents were asked about their (prompted) awareness from a list of 16 scams. They were then asked whether they had ever been the victim of a scam, knew a family member/friend/colleague/other person who had been a victim or whether they had merely been targeted by scams. All those who stated yes (58 per cent) to at least one of these questions were then asked for their permission to be contacted again to talk in more detail about their scams experience. Sixty-two per cent agreed to do so.

## CATI

- A.10 Prior to the start of the research (and before any information was available about incidence levels), it was planned to complete 2,000 CATI, split to include 1000 victims, 500 targets and 500 family, friends and/or colleagues of victims. However, due to the low incidence of Victims (for example, around 10 per cent or less) and the limited sample available for this group, the sample breakdown achieved was slightly less (for example, 1900) and broken down as follows:

<b>Final sample type</b>	<b>Numbers</b>	<b>%</b>
Victim	701	37
Family/Friend/ Colleague	554	29
Target	645	34
Total	1900	100

- A.11 The preceding omnis generated sufficient sample for family and target interviews but not for anticipated victim interviews. Therefore, towards the end of the fieldwork period, and when the omni sample had been exhausted, a batch of 6000 random sample was purchased and added in order to boost the number of completed victim interviews. The questionnaire was slightly revised to accommodate this new sample type and to screen for eligibility. The following numbers originated from the three sample types:

Original sample type	Numbers	%
Telephone omni	933	49
Face to face omni	802	42
Random sample	163	9
Total	1900	100

- A.12 The CATI questionnaire went through an extensive piloting exercise and was revised a number of times before starting the main fieldwork stage. All fieldwork was carried out by GfK NOPs telephone unit in Wimbledon during the months of February to April 2006. The final interview length was kept to an average of 15 minutes.
- A.13 Respondents originating from the omni sample were taken through all the scams they had previously mentioned being aware of (x out of 16) and asked about their experiences of each for example, whether they had personally lost money to this scam, whether they knew a family, friend or colleague who had lost money to this scam or whether they had been targeted by this scam and not lost any money. Order of exposure to the listed scams was randomised. Respondents were then classified according to their answers as either a victim, a family or a target respectively, and then routed through the questionnaire accordingly. If classified as a victim of one or more scams they were only asked about their experiences as a victim, regardless of any mentions of family or target experiences. If classified as family they were only asked about family experiences, and if classified as targets they were only asked about experiences as a target. The same approach was adopted for respondents originating from the random sample, although they were asked an additional upfront question on awareness of the same list of 16 scams before proceeding onto experiences.

## Types of scam

A.14 The OFT research identified 16 scams and looked at their prevalence and impact on UK consumers. The 16 scams identified in the research were:

- Premium Rate Telephone prize scam - notified by post, by telephone or text message that you have won a major prize in a competition but need to ring or text an expensive premium rate telephone number (090...) to claim prize. High call charge and your prize never materialises, or is of low value, or has many strings attached making the prize useless
- Prize Draw/Sweepstake Mailing scam - you receive a mailing or email telling you that you have won a major prize in a competition such as cash, car or a holiday and only need to send an admin or registration fee. Your prize never materialises or is of low value
- Pyramid selling and chain letter scams - promise you large earnings for recruiting new member. You pay to join but the earnings claims are unrealistic, there are no real products or services involved and the scheme eventually collapses as new recruits dry up
- Holiday Club scams - invited to presentation in UK or Spain and pressurised into paying for promised cheap holiday and travel services. Club services are mis-described and promises don't materialise
- Foreign Lottery scam - you receive a mailing, email or call congratulating you on a substantial win in a foreign lottery but before you can claim it you must send money for admin fees and taxes, but the win never materialises
- Work at home and business opportunity scam - told you can earn large amounts from working at home (for example, 'stuffing envelopes',) or investing in a business and asked to pay money up front for more information. The work involved or nature of business

is mis-described and you end up investing your money and time but you earn little or nothing

- Miracle health and slimming cures - promise 'cures' for a variety of ailments or easy weight loss in return for payment. Products don't work
- Loan Scams - advertises offering quick loans even if you have a poor credit history. Told that your loan has been agreed but need to pay fee to cover insurance before released. Loan never materialises
- Internet Dialler scams - a virus secretly re-directs your computer to an expensive premium rate telephone number and you run up an enormous phone bill
- African advance fee frauds/foreign money making scams - contacted by letter, email or fax by a 'top official' and offered share of big money in return for using your bank account to transfer money out of the country. You are then asked to pay money or your bank account is emptied and you never hear anything further
- Become a successful property investor - invited to attend a free presentation and persuaded to hand over money to enrol on course promising to make you a rich and successful property investor. Promises never materialise
- Clairvoyant/psychic mailings - contacted by letter by clairvoyant promising you good luck (for example, winning lottery numbers) or predicting bad omens. Asked to send money for further information or lucky charm
- High risk investment scams - telephone call or mailing giving you the opportunity to invest in items such as shares, fine wines, art or gem stones with promise of very high returns. High risk and investment worth a lot less than you pay

- Become a successful model/ author/ inventor - you are promised that you can become a successful author or model or that your invention will be a huge success in return for paying a fee. The promises never materialise
- Matrix Schemes - website offering top of the range gadgets as free gifts in return for £20 spend on other inexpensive product and joining waiting list. Only those on top of waiting list ever receive free gift
- Other scams - not mentioned above.