

# **Draft statutory instruments: exemptions, post-contract information and licensing**

Office of Fair Trading response to Department of  
Trade and Industry consultation document

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OFT878

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# 1 EXECUTIVE SUMMARY

- 1.1 The Office of Fair Trading (OFT) welcomes the opportunity to comment on the draft statutory instruments (SIs) enclosed with the Department of Trade and Industry (DTI) consultation document.
- 1.2 In general, we welcome the DTI proposals and have only minor comments of detail on the drafts. A number of these were raised previously, in the context of discussions in the Technical Stakeholder Group. Other points are new or arise from the subsequent redrafting of the SIs. We would be happy to elaborate on any of the points raised in this response, and look forward to working closely with the DTI in the development of final legislation.
- 1.3 We do however have a number of points of substance on the draft SIs, reflecting wider policy concerns. We outline some of these below.
- 1.4 We agree in principle with the proposed exemption for high net worth individuals, but suggest that the thresholds should be set at a high level and should be subject to regular review, to ensure that the exemption applies only to genuinely wealthy individuals who are well placed to protect their own interests. The figure for net assets should be limited to assets owned personally by the individual. We would also question whether employers should be permitted to make statements of high net worth, unless accompanied by a current P60 certificate.
- 1.5 We agree that the proposals on post-contract information should provide sufficient transparency to the consumer, consistent with the need to avoid information overload. In particular, they should provide adequate details regarding the consumer's rights and obligations under the contract and the cost and other implications of different courses of action that may be available to the consumer.
- 1.6 In relation to periodic statements for fixed-sum credit, we suggest that the statement should indicate how and when interest is calculated and applied under the agreement. Where the loan would not be repaid by the due date on the basis of current repayments, the statement should spell

out the implications of this and what the consumer might do to remedy the situation.

- 1.7 We also suggest changes to the proposed wording in relation to termination or early settlement of the agreement, and the inclusion of the total amount payable. The consumer should also be reminded of the right to request additional statements at any time under section 77 of the Act, and the procedures for doing so.
- 1.8 Where agreements are covered by an aggregated payment, there should be adequate transparency regarding the position under each agreement. In particular, in cases involving payment protection or other insurance, the consumer needs to be aware of the implications if he wishes to terminate the agreement or settle early. There should also be a reminder where appropriate of the right under section 81 of the Act regarding the appropriation of payments.
- 1.9 In relation to statements for credit cards and other running-account credit, we endorse recommendations made previously by the Treasury Select Committee concerning the use of illustrative scenarios. We suggest that the proposed minimum payment warning should indicate the time (in years) and the cost (in £s) to repay the current balance if only minimum repayments are made. We believe that this is much more likely to have the desired impact, in terms of responsible borrowing, than a generic warning of the kind proposed.
- 1.10 We agree that there should be a prominent statement regarding the allocation of repayments under the agreement. Where payments are allocated otherwise than to the highest interest element first, we suggest that there should be a specific warning to that effect, which should be positioned prominently on the first page of the statement.
- 1.11 In relation to arrears notices, we suggest that if additional sums may become payable as a result of the arrears, the notice should indicate the reason for this and the amount or likely amount (if ascertainable). In the case of hire-purchase and conditional sale agreements, it should include a reminder of the right to terminate together with an indication of the

amount payable. We also suggest changes in respect of the proposed reference to time orders.

- 1.12 In relation to notices of default sums, we agree that there should be no minimum threshold for the sending of such notices – the consumer should be aware no matter how small the amount may be.
- 1.13 In relation to default notices, we suggest that in the case of hire-purchase and conditional sale agreements the notice should indicate the amount that would be payable if the consumer terminates the agreement and hands back the goods. It should also make clear that this applies only to the principal credit and does not cover any linked transaction such as payment protection insurance. We have also suggested other changes to the current regulations, in order to update them and bring them into line with proposed SIs.
- 1.14 Finally, in relation to the form of the various notices and statements, we suggest that notices of default sums and notices of post-judgment interest should be required to be given in paper form (as with arrears notices and default notices) so that they are likely to be seen by the consumer and to have a sufficient impact. We also suggest that where the wording of particular statements is prescribed by regulation, this should be tested on a representative sample of consumers to ensure that it is sufficiently clear and comprehensible.
- 1.15 In this consultation response, references to 'debtors' should be taken to include hirers where appropriate, and similarly references to 'creditors' should be taken to include owners.

## 2 EXEMPTION FOR HIGH NET WORTH INDIVIDUALS

### **Q1 – Are you content with our proposal to link the thresholds of what constitutes high net worth to the Financial Services and Markets Act 2000 (Financial Promotions) Order 2005?**

- 2.1 We agree that the exemption should apply only to genuinely wealthy individuals who have the resources to obtain independent legal and financial advice and are well placed to protect their own interests. For this reason we suggest that the thresholds should be set at a high level and should be subject to regular review.
- 2.2 The FSMA thresholds have been unchanged since 2001. We suggest that higher thresholds would be appropriate in the Consumer Credit Act (CCA) context, to take account of inflation since 2001 and to future proof, given that the provisions will not come into force until 2008. We are concerned that the FSMA thresholds might be capable (at least in the medium term) of excluding individuals who are not genuinely wealthy.
- 2.3 We suggest initial figures of £125,000 for net income and £300,000 for net assets, reviewable every three years.
- 2.4 We agree that the exemption should not apply on the basis of 'paper wealth'. We suggest therefore that the figure for net assets should be limited to assets owned personally by the applicant, and should exclude the value of any interest (whether legal or beneficial) in assets held jointly. The exclusion in article 5(2)(b) should not be limited to the individual's main residence or loans secured on that property.
- 2.5 In any event, determining the value of an individual's beneficial interest in jointly held assets (for example a holiday home) may be a difficult exercise, and is best avoided.
- 2.6 We suggest that the order should specify how assets are to be valued for the purposes of the exemption. The word 'asset' has been attributed both a broad and restricted meaning for the purposes of different statutes, and may be ambiguous.

2.7 We also suggest that the order should make clear that the figures in article 5(1) include sterling equivalents, for example where a person is remunerated in euros. Section 9(2) of the Act is not of assistance as it applies only where credit is provided otherwise than in sterling.

**Q2 – Do you have any comments on the proposed categories of persons who may make a statement of high net worth?**

2.8 We agree that persons able to make statements of high net worth should be suitably qualified, with some objective degree of professional competence being required, and that the person's professional status should be easily verifiable. We agree that this is important in order to minimise the scope for abuse, through exploitation of vulnerable consumers and/or fraudulent applications for credit.

2.9 We would therefore question whether employers should be permitted to make statements of high net worth, even if limited to income. There may be no objective evidence of the person's status or his capacity to act, and as a result there may be scope for an individual to claim falsely that a person is his current employer when that is not the case.

2.10 We suggest that, if it is decided to permit employers to make statements of high net worth, there should be a requirement for a current P60 certificate to accompany the statement. This would provide some objective evidence of status. The certificate should be an original rather than a photocopy.

2.11 Furthermore, the provision should be limited to the applicant's current employer, and to net income earned from that employer during the period in question. An employer should not be able to certify as to income from other employment, or from self-employment or investments, as he is unlikely to be in a position to verify this.

**Q3 – Do you have any comments on the proposed form of a statement of high net worth?**

- 2.12 We suggest that the statement should make clear whether the individual fulfils the conditions by virtue of income or assets or both. This may assist the creditor in satisfying himself that the statement is genuine and so the exemption applies. It may also assist the OFT or other enforcement authority in the event of a complaint or in monitoring compliance with the legislation.
- 2.13 We agree that the statement should indicate the basis on which the person is qualified to make it, by reference to the categories in article 6. We suggest that it should also indicate his relationship to the applicant.

**Q4 – Do you have any comments on the proposed form of a declaration of high net worth?**

- 2.14 We agree that the applicant should be required to sign the declaration, in addition to any signature on the credit agreement of which it forms part. This helps to ensure that he focuses sufficiently on the implications of the declaration and in particular that he will not have the benefit of the protection and remedies that would otherwise be available under the Act. There is a parallel with the requirement in credit agreements where payment protection insurance is financed by credit.
- 2.15 We agree that the declaration should make clear that the agreement will nevertheless be subject to the unfair relationships provisions in section 140A of the Act, since the applicant may otherwise assume that it is exempt from all of the CCA provisions.
- 2.16 We suggest that the declaration should be positioned prior to the main signature box, and in a way that is clearly distinguishable from it so that the consumer does not confuse the two.
- 2.17 We agree that the wording of the declaration should be prescribed, and that it should be set out no less prominently than other information in the agreement and should be readily distinguishable from the background medium. It should also be easily legible.

2.18 We suggest that the declaration should be preceded by reference to the statement of high net worth. For example: 'I have provided a statement of high net worth to [the creditor or owner]'. This reinforces the relationship between the statement and the declaration and hence the basis for the exemption from CCA protections.

### 3 EXEMPTION FOR BUSINESS LENDING

#### **Q5 – Do you have any comments on the proposed form of a declaration of a business purpose?**

- 3.1 We agree that the applicant should be required to sign the declaration, in addition to any signature on the credit agreement, for the reasons indicated at Q4 above. The declaration should be positioned prior to the signature box and should be clearly distinguishable from it.
- 3.2 We also agree that the wording of the declaration should be prescribed, in the interests of clarity and regulatory certainty. This should not be left to the parties to decide.
- 3.3 We agree that the declaration should be no less prominent than other information in the agreement, and should be readily distinguishable from the background medium.
- 3.4 We suggest adding at the end of the declaration: 'as defined in section 189 of the Consumer Credit Act 1974'. This indicates the statutory basis for the declaration, and addresses the fact that 'carrying on a business' is defined in section 189(2) as excluding situations where a person only occasionally enters into relevant transactions.
- 3.5 An example might be where an individual engages in a single buy-to-let transaction. This will be outside the scope of the FSMA regime if the mortgage is second-charge or if the property is not to be occupied at least 40 per cent by the borrower or his immediate family. The borrower may be purchasing the property in a private capacity, or as a one-off, rather than as part of a 'business' activity for the purposes of section 189(2).
- 3.6 We further suggest that the declaration should be expanded, in line with that proposed in relation to high net worth individuals, to set out the consequences if the exemption applies. In particular, that the usual CCA protections and remedies will not apply, with the exception of the unfair relationships provisions.

- 3.7 We suggest wording along the following lines: 'I understand that the agreement will not be regulated under the Consumer Credit Act 1974 and that I will not therefore have the benefit of the protection and remedies that would otherwise be available to me under that Act. I understand that this does not affect my ability to make an application under section 140A of the Act in respect of unfair relationships between debtors or hirers and creditors or owners. I am aware that, if I am in any doubt as to whether the exemption applies, I should seek independent legal or other advice'.
- 3.8 We appreciate that if the agreement is wholly or predominantly for business purposes (and is for more than £25,000) then it will be exempt regardless of whether a declaration is made and in what form. However, the applicant should be aware of the implications if the agreement is exempt and reminded that he may wish to seek legal or other advice.
- 3.9 This may also help to minimise the scope for abuse, given that an individual might be encouraged or inclined to sign a declaration even though the loan is wholly or predominantly for non-business purposes. He might do so, for example, in order to obtain a lower interest rate or a quicker decision on the application. If the creditor does not know or have reasonable cause to suspect that the declaration is false, it will give rise to a statutory presumption by virtue of section 16B(2).
- 3.10 In addition, we suggest that the declaration should include a warning about the consequences of making a false declaration.

## 4 PERIODIC STATEMENTS FOR FIXED-SUM CREDIT

**Q6 – Do you have any comments on the information we are proposing to include in periodic statements, including comments on any additional information?**

- 4.1 We agree that the statement should include the creditor's name and postal address and a telephone number or numbers. We also agree that it should be permissible to include any other address (such as an e-mail or website address) but suggest that paragraph 2 of part 1 of schedule 1 should make clear that this is optional information. A similar point arises in relation to schedules 3, 4 and 5.
- 4.2 We agree that the statement should indicate the amount of credit provided or to be provided under the agreement. We suggest that it should also indicate the total amount payable.
- 4.3 We agree that the statement should include all applicable interest rates, expressed in each case on a per annum basis. We also agree that it should indicate the period during which each rate applied (if not for the entire period of the statement) and the element of the credit to which it applied (if not the entire amount outstanding).
- 4.4 This does not however appear to be reflected fully in the draft SI. In paragraph 4(3)(a) we suggest that this should read 'applicable during the period to which the statement applies, in each case quoted on a per annum basis'. Sub-paragraph (a)(i) should then apply only if the rate changed during the period or otherwise applied for only part of the period. Sub-paragraph (a)(ii) should apply if different rates applied to different elements of the credit during the period.
- 4.5 We agree that where interest rates were varied during the period, the statement should indicate the date of the variation. This should be added to sub-paragraph (a)(i) above.
- 4.6 We suggest that the SI should make clear that 'on a per annum basis' means an effective rate calculated by similar methods to the APR, with use of compounding where the agreement provides for this. We

appreciate that the wording is used in the Agreements Regulations, but it may be ambiguous and should be clarified.

- 4.7 We agree that where interest is 'pre-computed' the statement should indicate the interest rate(s) quoted in the credit agreement. However, this does not appear to be reflected fully in paragraph 4(3)(b). The question is not whether the rate is applicable on a per annum basis but whether it was applied during the period of the statement.
- 4.8 We agree that the statement should indicate how and when interest charges are calculated and applied under the agreement, as a reminder to the debtor. In our view this should not be limited to agreements with pre-computed charges. We suggest therefore that the final part of paragraph 4(3)(b) should be separated out and should apply in all cases.
- 4.9 We agree that the statement should indicate the date by which all sums outstanding will be repaid. This should be calculated on the basis of the currently agreed rate of repayment and assuming that interest rates do not change, as in part 4 of the schedule. The date may not however correspond to the end date of the agreement. Where this is the case, we suggest that both dates should be specified.
- 4.10 The end date should be calculated on the basis of the duration as stated in the original agreement. Where the agreement was of indefinite duration, it should be based on the stated minimum duration and there should be an explanation of this.
- 4.11 Paragraph 4(4) refers to the remaining term of the agreement, but it may be more useful to the debtor to know the end date and (if different) the date on which repayments are due to end.
- 4.12 We agree that the statement should list all credits or payments made to the account during the period, including the amount and date in each case. In paragraph 4(7) we suggest that this should also indicate the nature of the payment if not a repayment of credit in accordance with the terms of the agreement.

- 4.13 Similarly, the statement should list all debits made to the account during the period, including the amount and date in each case and the nature of the sum in question. In paragraph 4(8) we suggest that this should also indicate the reason why the sum was applied.
- 4.14 We agree that where sums outstanding under the agreement will not be repaid by the end date, based on the original duration of the agreement, there should be a warning notice to that effect. We agree that the wording of this should be prescribed, to ensure that it is clear and comprehensible and has the desired impact, and that it should be more prominent than other wording in the statement.
- 4.15 We agree that the notice in part 4 of schedule 1 should indicate the date by which all sums outstanding under the agreement will be repaid. This should be on the assumption that interest rates remain unchanged (other than as set out in the agreement) and the debtor continues to make repayments at the currently agreed rate. The notice should make clear that this is later than the original end date of the agreement.
- 4.16 We suggest that where the agreed rate of repayment differs from the contractual rate as set out in the credit agreement, the notice should indicate both rates, as a reminder to the debtor.
- 4.17 If the total amount payable (TAP) exceeds that set out in the credit agreement, we suggest that there should be a statement to that effect. (We have proposed that there should be an indication of the TAP in any event, but the debtor should be aware if this has increased as a result of the change in repayments or for other reasons).
- 4.18 We suggest that the notice in part 4 should also indicate the balance outstanding after the original term together with the amount required as a minimum to repay the loan over that term, expressed as a lump sum and as an increased repayment. This may be useful information to the debtor in deciding whether and how to remedy the position.
- 4.19 We agree that the notice should advise the debtor to consider seeking advice from an independent free advice agency. We suggest that the wording of this should be amended to read 'such as a Citizens Advice

Bureau or Consumer Direct'. Other notices should similarly include reference to Consumer Direct, as a source of independent advice on credit and debt matters.

- 4.20 We agree that the statement should include a notice reminding the debtor of his right to settle early. We suggest however that the wording of the notice in part 2 of schedule 1 should be aligned more closely with that in the credit agreement, in the interests of consistency and to ensure that it is clear and informative. In particular, the reference to 'an additional sum' may confuse the debtor.
- 4.21 We suggest wording along the following lines: 'You can settle this agreement at any time by giving notice in writing and paying off the amount you owe [less a rebate]. [Illustrative examples of the amounts payable on early settlement were included in your credit agreement]. If you wish to settle early you should contact [the creditor] for a settlement figure'.
- 4.22 We agree that it may be disproportionate to require inclusion of the settlement figure as at the date of the statement, or a re-calculated example, but it would be useful to remind the debtor of the examples included in the credit agreement (if applicable) so that he can have an idea of the likely magnitude of the sum payable if he settles early.
- 4.23 We agree that in the case of hire-purchase and conditional sale agreements, there should be a notice reminding the debtor of his right to terminate under section 99. We suggest however that the wording of the notice in part 3 of schedule 1 should be aligned more closely with that in the credit agreement, and should be expanded slightly to make it more informative to the debtor.
- 4.24 We suggest wording along the following lines: 'You have a right to end this agreement at any time in accordance with section 99 of the Consumer Credit Act 1974. Details were set out in your credit agreement. If you wish to terminate the agreement you should contact [the creditor] [the person you make payments to] for further information including the amount payable (if any) on termination'.

- 4.25 We agree that there should be a notice in all cases regarding dispute resolution and the making of complaints to the Financial Ombudsman Service. We have no comments on the proposed wording.
- 4.26 In addition, we suggest that the statement should include reference to the fact that the debtor can request an additional statement at any time under section 77 of the Act, provided that the request is in writing (and accompanied by a £1 fee) and no similar request was made within the previous month. The debtor should be informed that the format and contents of such additional statement may differ from the periodic statement, where that is the case.

**Q7 – Do you have any comments on our proposals for the way in which we propose to deal with agreements covered by one aggregated payment?**

- 4.27 We agree that it should not be necessary to send separate statements in cases where the debtor has agreed to make a single payment under two or more agreements. We also agree that the creditor should be permitted to show aggregated figures for credits and debits, provided that the statement makes clear that the figures have been aggregated and indicates clearly the agreements to which they relate.
- 4.28 If a payment made by the debtor was insufficient to discharge the total amount due under the agreements, we suggest that the statement should include a reminder of the debtor's right under section 81 of the Act in respect of the appropriation of payments.
- 4.29 In regulation 5(a) and (b) we suggest that 'the creditor' is replaced by 'the statement', to make clear that this must form part of the statement rather than being specified separately.
- 4.30 We note that special provisions are envisaged in the case of agreements to which regulation 2(9) of the Agreements Regulations applies. This provides a limited dispensation from the documentation requirements in relation to agreements covered by regulation 2(8), where the subsidiary agreement involves credit to finance a premium under certain payment protection insurance (PPI) or other insurance.

- 4.31 The consultation document suggests that in such cases the Agreements Regulations allow the agreements to be documented as a single agreement as long as there are separate signatures. This is not strictly true. The dispensation in regulation 2(9) applies only in respect of the heading, signature box and statements of protection and remedies. It does not apply in respect of the financial and related particulars required by schedule 1 to the Regulations. In the OFT's view these are required to be set out separately in each agreement.
- 4.32 We nevertheless agree that additional dispensation should be permitted in the case of periodic statements, in the interests of clarity and to avoid overloading the statement, provided that it is made clear to the debtor that there are separate agreements and that the information in question applies to both agreements where that is the case.
- 4.33 We also agree that this should be permissive rather than mandatory. The creditor should be permitted to send separate statements, or to provide a single statement which shows aggregated credits and debits but otherwise sets out information separately for each agreement.
- 4.34 In regulation 6(2) we suggest that the statement should make clear that the information is the same for both agreements. Otherwise the debtor may assume that it applies only to the principal agreement, and may be unclear whether the rate of interest applicable to the subsidiary agreement or the duration of that agreement is the same.
- 4.35 In regulation 6(3) we agree that this should apply only where the statement is not the first given under section 77A. The initial statement should show the amount of credit (and any opening balance where applicable) separately for the principal agreement and the subsidiary agreement. We suggest however that it should be permissible in such cases also to show an aggregated figure for the two together.
- 4.36 In regulation 6(4) we suggest that this should similarly apply only where the statement is not the first given under section 77A, but that it should be permissible in the initial statement to show the closing balance as an aggregated figure and also separately for each agreement. The debtor

may be confused if opening balances are shown separately on the statement but with a single closing balance.

- 4.37 We suggest that regulation 6(5) should be deleted. It should be made clear that information is the same for both agreements, and that notices apply in relation to both agreements, where that is the case. Otherwise the debtor may assume that they apply only to the principal agreement.
- 4.38 In particular, it is important that the debtor is aware that he can settle the credit agreement relating to the PPI or other insurance, separately from the principal agreement. He should also be aware that if he wishes to settle both agreements he will need to notify the creditor of this and to request separate settlement figures (which may or may not be provided at the same time). He should not assume that by settling the principal credit agreement, the subsidiary agreement will fall automatically. He also needs to know what any settlement figure relates to and what it covers.
- 4.39 Similarly, if he wishes to terminate the principal agreement, in the case of a hire-purchase or conditional sale agreement, he needs to be aware that this will not terminate any linked PPI or other insurance, and that he will need to apply separately to settle any related credit agreement.

## 5 INFORMATION IN STATEMENTS FOR RUNNING-ACCOUNT CREDIT

**Q8 – Do you have any comments on the proposed warning in relation to a failure to make a required repayment?**

- 5.1 We agree that where the debtor has failed to make a repayment as required by the credit agreement, there should be a warning notice to that effect, setting out the potential implications. We agree that the wording of this should be prescribed, in the interests of clarity and consumer understanding.
- 5.2 As drafted, paragraph 2 of schedule 2 would be triggered if the debtor has paid less than the minimum repayment during any period to which a previous statement relates. We suggest that it should apply only if a repayment was missed (or was for less than the minimum amount) during the period immediately preceding the statement, as envisaged at page 29 of the consultation document.
- 5.3 In any event, we suggest that the preamble to paragraph 2 should make clear that the requirement also applies where no repayment was made at all, or where it was late.
- 5.4 We suggest that the warning notice should also mention that failure to make a required repayment may lead to additional costs. For example: 'This could lead to additional costs and make it more difficult to obtain credit in future'.
- 5.5 This may also be clearer to the debtor, as not all consumers may readily understand what is meant by a 'credit rating' and how failure to make a minimum repayment could have a 'detrimental effect' on this.
- 5.6 We agree that the warning notice should be more prominent than any other wording in the statement, as envisaged in regulation 25.

**Q9 – Do you have any comments on the proposed warning in relation to the making of minimum repayments?**

- 5.7 We agree that there should be a warning in prescribed terms about the consequences of making only minimum repayments. This may help to promote responsible borrowing, and encourage the debtor to consider carefully how much to repay each month. The debtor needs to be aware that if he operates the account in a particular way this could have serious cost implications.
- 5.8 We suggest however that the wording needs to be strengthened if it is to have the desired impact. In particular, it should indicate the time (in years) and the cost (in £s) to repay the current balance if only minimum repayments are made. This is more likely to attract the debtor's attention, and promote a responsible approach to the operation of the account, than a generic warning of the kind proposed.
- 5.9 We note that the House of Commons Treasury Committee made a similar recommendation in its reports on the transparency of credit card charges. In the Committee's second report<sup>1</sup> it concluded:
- 'Although it is an improvement, the APACS warning on making only minimum repayments does not go far enough. We agree with Barclays that the APACS warning is an arid statement and that the scenario better explains the implications involved. We welcome the lead taken by Barclays, Nationwide, Lloyds TSB and Egg, in introducing clear scenarios showing the cost of repeatedly making the minimum repayment'.
- 5.10 We agree with the Committee that repayment scenarios are useful as a way of illustrating to the consumer the impact of operating a credit card account in different ways. In particular, a scenario based on minimum

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<sup>1</sup> *Credit card charges and marketing: Second report of session 2004-05*, published on 4 February 2005

repayments should be included in the credit agreement and in monthly statements, as part of a 'summary box' approach.

- 5.11 We suggest that the warning notice should be positioned immediately following the indication of the minimum repayment, or elsewhere on the first page of the statement but with a clear cross-reference from the minimum repayment amount. We agree that it should be no less prominent than other wording in the statement, with the exception of the warning notice in paragraph 2 of schedule 2.

**Q10 – Do you think that the allocation of repayments should be displayed more prominently in cases where the balance is not paid off in full, or is our proposal to include it somewhere in the statement sufficient?**

- 5.12 We agree that there should be a statement of the order or proportions in which any amount which is not sufficient to discharge the outstanding debt will be applied or appropriated by the creditor.
- 5.13 It is not sufficient to include the information in the credit agreement and pre-contract information, as the debtor may have forgotten this and is unlikely to refer to the agreement on an ongoing basis. Regular reminders should be provided, as this may affect the debtor's decision on how to operate the account and how much to repay each month.
- 5.14 We agree that the statement should be included in all cases to which paragraph 14A of schedule 1 to the Agreements Regulations applies. It should not be limited to circumstances where payments are allocated to the lowest interest element of the debt first, as envisaged at page 30 of the consultation document.
- 5.15 In addition, we suggest that where payments are allocated otherwise than to the highest interest element first, there should be a specific warning to that effect. This should also warn that this may increase the time taken to repay the debt and the total amount payable.
- 5.16 We suggest that the general statement about the allocation of payments should be accorded sufficient prominence that the debtor is likely to see

it and to appreciate its significance. The additional warning proposed above should be positioned on the first page of the statement and with greater prominence than other wording in the statement (with the exception of the warning notices in schedule 2).

- 5.17 With regard to paragraph 3 of schedule 2 we agree that there should be a requirement to state all applicable interest rates, in each case quoted on a per annum basis. Where applicable, the statement should also indicate the period during which each rate applied (if not for the entire period) and the element of the credit to which it applied.

## **6 NOTICES OF SUMS IN ARREARS FOR FIXED-SUM CREDIT**

**Q11 – Do you have any comments on the proposed information to be included in a notice of sums in arrears for fixed-sum credit agreements, including comments about any additional information?**

- 6.1 We agree that the arrears notice should include a statement that it is being sent because the debtor is behind with payments. We agree that the wording for this does not need to be prescribed.
- 6.2 In regulation 11(2) we agree that it should be permissible to include a statement that the notice is not a demand for immediate payment, provided that it is made clear to the debtor when payment of the sums in question will fall due. If interest or default sums may be added this should be made clear.
- 6.3 We agree that the debtor should be encouraged to contact the creditor to discuss the state of the account. If the debtor is already in contact with the creditor, the wording of the statement should be capable of reflecting this, and we suggest that regulation 11(1)(b) should be amended to put this beyond doubt.
- 6.4 We agree that the notice should include details of each sum which the debtor has failed to pay in full as required by the agreement, and which is still owing, together with the aggregate of such sums. In each case it should indicate the amount and nature of the sum and the date on which it became payable. In the event that part payment has been made, the notice should indicate this together with the amount and date.
- 6.5 In paragraph 5(c) of part 1 of schedule 3 we suggest that this should also indicate the amount of the shortfall.
- 6.6 We agree that the notice should indicate whether additional interest or default sums may become payable. We agree that the wording should be prescribed, in the interests of clarity and consumer understanding.
- 6.7 In some cases additional sums will be payable in any event as a result of the arrears, and the dates and amounts of these should be known or

ascertainable. In other cases sums may become payable only if the debtor does not settle the arrears promptly or otherwise fails to take certain steps in response to the notice. We suggest that the wording of the statements should reflect this distinction.

- 6.8 In paragraph 6(a) we suggest that this should indicate the nature of the additional sums in question, and the reason why they will or may become payable. If an amount is known or ascertainable it should be stated. It should not be necessary for the debtor to contact the creditor for this information, although we agree that he should be encouraged to do so in any event, for further details.
- 6.9 We agree that the debtor should be informed that further notices will be sent at intervals of not more than six months if he continues to be behind with payments. We agree that the wording of this should be prescribed, although the formulation proposed could be simplified.
- 6.10 We suggest that in the case of hire-purchase or conditional sale agreements, the notice should include a reminder of the debtor's right to terminate under section 99 together with an indication of the amount payable (if any) as at the date of the notice.
- 6.11 This may be an appropriate option for the debtor in dealing with the arrears. We suggest that the amount should be included so that the debtor is aware of how much it would be likely to cost if he exercises the right to terminate. We do not consider that this would be unduly onerous in the case of arrears notices, or that it would be disproportionate as might be the case for periodic statements.
- 6.12 In paragraph 1 of part 3 of schedule 3 we appreciate that the word 'include' reflects the statutory language of section 86B, but we suggest that 'accompanied by' would be more appropriate as the information sheet will be a separate document. We are otherwise content with the proposed reference to OFT information sheets.

- 6.13 In paragraph 2 we agree that reference should be made to the possibility of a time order application. The House of Lords judgment in the First National Bank case<sup>2</sup> emphasised the importance of time orders as a procedural safeguard for the consumer but that problems had arisen in practice because borrowers did not know of the effect of sections 129 and 136 as 'neither the procedure for giving notice of default to the borrower nor the prescribed county court forms draw attention to them'.
- 6.14 Given that debtors will have a right to apply for a time order following receipt of an arrears notice, subject to the procedure laid down in section 129A, we agree that the notice should include a reminder to that effect. We agree that the wording of this should be prescribed.
- 6.15 We agree that the notice should refer in this context to the OFT information sheet, but it is highly unlikely that the latter will include details of the procedures involved. It may merely mention the possibility of a time order and (if applicable) refer to other information elsewhere. In particular, it will not set out the steps that the debtor must go through, by virtue of section 129A, before being able to make an application.
- 6.16 We suggest therefore that the notice should include reference to those procedures, in a suitably abbreviated form, or to information held elsewhere which sets out the steps involved. This might be in the form, for example, of a DTI leaflet or one issued by the Court Services.
- 6.17 In any event, we suggest that the wording of the notice should be simplified. In particular, in the first sentence it should be sufficient to say: 'If you are having difficulty in making payments under this agreement you may be able to apply to the court for a time order'. It should not be necessary to set out the different types of court in the different jurisdictions, and this merely adds to the length of the notice which may confuse consumers or deter them from reading it.

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<sup>2</sup> Director General of Fair Trading v First National Bank plc [2002] 1 A.C. 481 at 496

6.18 As above, we suggest that the final sentence should set out the procedures involved, in summary form, or should refer the debtor to information held elsewhere. The latter would be preferable, to avoid over-loading the notice.

## **7 NOTICES OF SUMS IN ARREARS FOR RUNNING-ACCOUNT CREDIT**

**Q12 – Do you have any comments on the proposed information to be included in a notice of sums in arrears for running-account credit agreements, including comments about any additional information?**

- 7.1 We agree that similar requirements should apply in the case of arrears notices for running-account credit agreements.
- 7.2 A number of the comments made above apply also in respect of running-account credit. In addition, we are unclear why the notices at paragraph 7 of part 2 of schedule 3 refer to 'default sums and interest' whereas those at paragraph 6 of part 1 refer to 'additional sums'.

## 8 NOTICES OF DEFAULT SUMS

### **Q13 – Do you have any comments on our proposed way forward for the requirement to provide notices of default sums?**

- 8.1 We agree that there should be no minimum threshold for the sending of default sum notices. The debtor should be aware of the existence of such sums no matter how small they may be.
- 8.2 We agree that it would be difficult to identify an appropriate threshold that would ensure the requisite degree of transparency in all market sectors and all circumstances. It is advisable therefore to err on the side of caution by requiring default sum notices to be sent in all cases, at least initially until the operation of section 86E can be reviewed. We agree that, if it were decided to apply a threshold, this should take account of sums imposed previously, but that this may prove unduly complicated in practice.
- 8.3 Page 38 of the consultation document states that 'the OFT have suggested that £12 is a fair level for a default sum'. This is not in fact correct. Our statement of April 2006<sup>3</sup> indicated that OFT intervention is more likely where a credit card default charge exceeds £12 since this is likely to exceed a reasonable pre-estimate of the lender's recoverable administrative costs arising out of default unless there are exceptional factors. The £12 figure is therefore a threshold for OFT investigation which reflects our enforcement priorities – a court would not consider that a default fee is fair merely because it is below this threshold.

### **Q14 – Do you have any comments on the proposed period for the giving of notices of default sums?**

- 8.4 We agree that a notice should be given within 35 calendar days after a default sum becomes payable. This ensures that the debtor is notified

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<sup>3</sup> *Calculating fair default charges in credit card contracts: A statement of the OFT's position* (OFT 842)

without undue delay, while at the same time enabling the creditor to incorporate the notice as part of the next monthly statement in the case of running-account credit agreements.

**Q15 – Do you have any comments on the proposed information to be included in a notice of default sums, including comments about any additional information?**

- 8.5 We agree that the notice should state that it relates to default sums and is given under section 86E of the Act. This ensures that the debtor is aware of the statutory basis for the provision and the reason therefore why the notice is being sent.
- 8.6 We agree that it should include details of all default sums incurred during the relevant period, in each case indicating the nature and amount of the sum and the date on which it became payable.
- 8.7 In paragraph 5 of part 1 of schedule 4 we suggest that this should also indicate the reason why the default sum was charged. Paragraph 6 appears to be redundant given paragraph 5.
- 8.8 In part 2 of schedule 4 we suggest that it should also specify the date by which payment must be received by the creditor if interest is not to be charged. The debtor should be reminded that least x working days should be allowed if payment is sent by post.
- 8.9 We agree that where interest may be applied, there should be a clear statement to that effect, in prescribed terms. This should also indicate the applicable interest rate, expressed on a per annum basis.

## 9 INFORMATION IN S.87 DEFAULT NOTICES

**Q16 – Do you have any comments on the proposed requirement for the inclusion in s.87 default notices of information about the right to end HP and conditional sale agreements?**

- 9.1 We agree that in the case of hire-purchase and conditional sale agreements, there should be a statement reminding the debtor of the right to terminate the agreement under section 99.
- 9.2 We agree that this should describe the nature of the right and how it operates rather than merely referring to the statutory statement in the credit agreement. The debtor may not have retained a copy of the agreement or may not have it readily to hand.
- 9.3 We suggest however that the requirement should apply only in the case of a hire-purchase or conditional sale agreement under which the debtor still has a right to terminate pursuant to section 99. The word 'may' (together with note 1) can then be omitted.
- 9.4 In the first paragraph of the statement we suggest that the creditor should be permitted to substitute 'your lender' (or the relevant name) if in fact he is the person entitled or authorised to receive payments under the agreement.
- 9.5 We agree that the statement should emphasise that the right may be lost if the debtor does not serve notice of termination by the specified date. We suggest however that the second paragraph should make clear that the notice must reach the creditor by this date, and that at least x working days should be allowed if the notice is sent by post. The debtor must therefore act well before the date shown.
- 9.6 In note 5 we suggest that Consumer Direct should be added to the list of consumer advice bodies.

**Q17 – Do you consider that a generic description of liabilities for the debtor under s.100(1) would be more appropriate than a specific figure of the amount the debtor would have to pay as at the date of the notice, or vice versa, and why?**

- 9.7 We consider that it is more useful to the debtor if the notice specifies the amount that would be payable following termination as at the date of the notice. This should be stated as a cash figure.
- 9.8 In our view this should be easy enough for the creditor to generate for the purpose of the default notice. The debtor can then consider whether to exercise the right to terminate (as one of the options available for dealing with the default) in the knowledge of what this is likely to involve in terms of cost and procedure. Given the limited time for response to the notice, and the potential implications if the debtor fails to respond in time, we consider this to be important information.
- 9.9 We note however that, even if the debtor does not exercise his right to terminate under section 99, and the creditor terminates as a consequence of the debtor's repudiatory breach, it is arguable that section 100 indirectly places a cap on the damages recoverable from the debtor. That is certainly the OFT's view.
- 9.10 We suggest that the statement should make clear that the amount in question applies only to the principal credit and does not cover any linked transaction (such as payment protection insurance) or ancillary charges not falling within the total charge for credit.

**Q18 – Do you have any comments on the proposed requirement for the inclusion in s.87 default notices of information about interest payable after a judgment?**

- 9.11 We agree that there should be a statement regarding interest payable after judgment, in cases where the agreement makes provision for this. It is important to alert the debtor at an early stage to the possibility of additional costs if he is taken to court and a judgment is made against him, since this may be a factor in his decision on how to deal with the default. He needs to be fully aware of the potential implications.

9.12 We suggest that the statement should make clear that interest may be charged after a judgment only if a valid notice has first been served on the debtor in accordance with section 130A.

**Q19 – Do you have any comments on the proposed requirement for inclusion in s.87 default notices of a reference to the OFT information sheet on default?**

9.13 We agree that there should be a prescribed statement (as with arrears notices) alerting the debtor to the fact that the notice should be accompanied by an OFT information sheet and the consequences if this is not included. We note that the vires exist for this by virtue of section 88(4) as amended by section 14(2) of the 2006 Act.

9.14 In the proposed statement at regulation 18(3) we suggest that 'include' should be replaced by 'be accompanied by' as the information sheet will be a separate document.

**Q20 – Do you consider that any other information not already proposed should be included in s.87 default notices?**

9.15 We have suggested that the provisions of SI 1983/1561 should be reviewed more generally, in line with the proposals on arrears notices, and to update them.

9.16 In particular, in paragraph 4 of schedule 1 to SI 1983/1561 the reference to 'seven days' should be amended to '14 days' in line with the change to section 88 as introduced by the 2006 Act.

9.17 In paragraph 1 of the schedule we suggest that there should be an indication of the date on which the notice is issued. In paragraph 2 a telephone number or numbers should be included.

9.18 In paragraph 6 of the schedule we suggest that the wording should be amended along similar lines to that proposed for arrears notices. We suggest the following: 'If you are having difficulty in making payments under this agreement you can apply to the court for a time order. This is

an order giving you more time to repay what you owe. For further information see the enclosed information sheet'.

- 9.19 If there is a separate leaflet or other document setting out the procedures involved (see Q11 above) we suggest that reference should be made to this rather than to the OFT information sheet.
- 9.20 In paragraph 7 of the schedule we suggest that the list of bodies should be updated, in line with other notices. We suggest the following: 'If you are not sure what to do, you should get help as soon as possible, for example from a solicitor or your nearest Citizens Advice Bureau. You can also get advice and information about managing debt issues from [consumer advice body] on [telephone number]'.
- 9.21 As above, we suggest that Consumer Direct should be specified as a consumer advice body.

## **10 NOTICES IN RELATION TO POST-JUDGMENT INTEREST**

**Q21 – Do you have any comments on the proposed content of the first notice in relation to interest after a judgment?**

- 10.1 We agree that the first required notice should include additional information so that the debtor is aware from the outset of the basis on which interest is being charged and the applicable rate and amount. We agree that the wording of this should be prescribed.
- 10.2 In part 3 of schedule 5 we suggest that reference should be made to the specific clause of the credit agreement which provides for the charging of interest after judgment.

**Q22 – Do you have any comments on the proposed content of second and subsequent notices in relation to interest after a judgment?**

- 10.3 In paragraph 5 of part 1 of schedule 5 we suggest that the rate should be shown on a per annum basis.
- 10.4 In paragraph 8 we suggest that Consumer Direct should be added to the list of consumer advice bodies.

## 11 FORM OF NOTICES AND STATEMENTS

**Q23 – Do you have any comments on our proposals in Chapter 11 on the form of the various post-contract information notices and statements?**

- 11.1 We agree that information should be expressed in plain intelligible language so that it is likely to be understood by consumers.
- 11.2 Where the wording of particular statements is prescribed by regulation, we suggest that the proposed wording should be tested on a sample of consumers, including some of the more vulnerable groups. It is important that the wording is clear and readily comprehensible so that it is likely to be understood and to have the desired impact. Where possible, the statements should be kept short and concise so that consumers are likely to read them.
- 11.3 We assume that the DTI is inviting views specifically from consumer and money advice organisations on the proposed wording.
- 11.4 Where the wording of statements is prescribed, we suggest that it should be made clear that they must be reproduced without any alteration or addition, subject to any relevant note(s). There is a similar requirement at regulation 5 of the Agreements Regulations.
- 11.5 In regulation 21 we agree that arrears notices should be given to the debtor in paper form (as with default notices). As a corollary we would note that the OFT information sheet must also be in paper form.
- 11.6 We suggest that notices of default sums, and notices of intention to recover post-judgment interest, should also be given in paper form, so that they are likely to be read by the consumer and to have a sufficient impact. If notices are sent electronically there is a risk that the consumer may not see them or may fail to appreciate their significance. The consumer may not access e-mails on a frequent basis, or may have technical problems of access, and so may not see the notice in time.

- 11.7 In regulation 22(1) we suggest in addition that the information should not be preceded by any information or wording apart from trade names, logos or reference numbers of the agreement. There is a parallel in regulation 2(4) of the Agreements Regulations.
- 11.8 We agree that it should be permissible to include cross references to explanatory material elsewhere, for example following all of the required information or in the credit agreement or a separate document. We suggest however that this should be made clear in regulation 22(1) since otherwise there may be uncertainty on the point.
- 11.9 We suggest that the information and wording required by SI 1983/1570 to be included in statements for running-account credit should be shown together as a whole and not interspersed, in line with the proposals at regulation 22 in relation to statements for fixed-sum credit.
- 11.10 We agree with the proposed requirements in relation to prominence, subject to the modifications mentioned earlier in this response.
- 11.11 We note that regulation 26 would provide that a clerical error or omission which does not affect the substance of the information or wording would not itself involve a breach of the requirements. However, there may be dispute as to what constitutes a 'clerical' error or omission and whether this affects the 'substance'. We suggest that the terms should be defined so that the exclusion applies only where appropriate and to limit the scope for abuse.
- 11.12 In any event, we suggest that regulation 26 should be qualified by adding a 'due diligence' element along the following lines: 'provided that the creditor or owner can prove that he took all reasonable precautions and exercised all due diligence to avoid making that clerical error or omission'.

**Q24 – Do you think that there are any notices or statements that would benefit from the information appearing in a particular order, or linked to any other specific item of information?**

11.13 We have no specific suggestions in this regard, other than as mentioned previously in this consultation response.

## **12 OFT LICENSING AND OTHER ISSUES**

**Q25 – Do you have any comments on the proposed five year period for the maximum duration of time-limited licences?**

- 12.1 We agree that there should be a maximum five year period for the duration of time-limited licences. We cannot conceive of circumstances in which we might want to issue a time-limited licence for a longer period.

**Q26 – Do you have any comments on the proposed five year period for payment of the periodic licence fee in respect of indefinite licences?**

- 12.2 We agree that the period for payment of periodic fees should be initially five years, subject to possible review in the future.

**Q27 – In addition to any comments you may already have made on questions 1-26, do you have any comments on the draft Statutory Instruments included at Annex A?**

- 12.3 We have no additional comments on the draft SIs.