

Framing and enforcing criminal sanctions in the Regulations implementing the Unfair Commercial Practices Directive

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

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OFT898

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EXECUTIVE SUMMARY

Introduction

The Office of Fair Trading (OFT) welcomes the Government Response¹ and the decision that the legislation implementing the Unfair Commercial Practices Directive² and the (revised) Misleading and Comparative Advertising Directive (MCAD), will be enforceable by civil and criminal means. We also welcome the proposal for the OFT to be empowered to act against breaches using the criminal enforcement route.

Providing enforcers with a full range of civil and criminal sanctions will help enforcers to achieve compliance by the most appropriate and proportionate means. This will range from the lightest of touches such as informal advice on compliance to timely and effective criminal enforcement action where necessary. For this potential to be realised in practice, all sanctions need to be workable and to be supported by a framework of guidance and safeguards to ensure the optimal compliance or enforcement route is taken.

We agree with the Government's desire to increase the use of civil sanctions and reduce reliance by enforcers on criminal prosecutions where appropriate. It remains our view that the Enterprise Act 2002 Part 8 injunctive regime should be the main enforcement mechanism for the Directive, as the most appropriate response for the majority of unfair commercial practices. However, we recognise that some unfair practices, such as those involving fraudulent activity or aggressive behaviour, will require intervention via criminal enforcement, even for a first offence. Use of this option must be viable but chosen only when clearly appropriate.

¹ Government Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive, DTI, December 2006

² Referred to as 'the Directive'

Controls on criminal prosecutions

Mens rea as a means of reducing prosecutions

The Consultation suggests that a good way of increasing the use of civil sanctions would be to raise the evidential threshold of criminal offences from that of 'strict liability' to requiring proof of '*mens rea*', a guilty mind. We do not believe that this would be an effective or desirable mechanism as it would introduce imbalances which would work against proportionate and appropriate decisions on the best enforcement route. We are also concerned that a move to *mens rea* offences may result in a lessening of consumer protection due to the inability of enforcers to overcome higher evidential thresholds.

The OFT believes that the most desirable route to achieving a greater shift towards civil action is by the effective use of existing safeguards, such as the Regulators' Compliance Code, the Code for Crown Prosecutors and Local Authority enforcement policies. These act as mechanisms to ensure criminal sanctions are not used inappropriately and will be bolstered further by the proposed Macrory framework³ which requires regulators to publish an enforcement policy. We fully support this transparency, and enforcers being held to account against the published policy.

Further, we believe that additional measures to reduce inappropriate prosecutions (such as improving co-ordination and analysis of proposed criminal prosecutions and providing rights of audience in civil courts) could also encourage greater use of civil sanctions and will benefit from further consideration.

Range of enforcement tools

The Hampton Review⁴ found that many regulators have too limited a range of enforcement tools, giving rise to the use of available criminal sanctions, on

³ Regulatory Justice: Making Sanctions Effective, Final Report, November 2006

⁴ Reducing administrative burdens: effective inspection and enforcement, Philip Hampton, March 2005

occasion inappropriately. Macrory confirms this finding and recommends the introduction of a range of new regulatory sanctions and enforcement tools so that prosecutions are reserved for 'serious' offences.

Our engagement with Local Authority Trading Standards Services (TSS) and our own limited experience of criminal cases suggests that *mens rea* offences could be significantly harder to prove than strict liability offences, potentially disproportionately so in the light of the clear detriment caused to consumers. Proving *mens rea* in cases involving corporate entities is widely recognised as a particular area of difficulty.

In these circumstances, the alternative civil route may sometimes be taken as a 'safer' option, even though criminal action may be more appropriate. And for those cases where criminal action is considered to be the only option, even after considering the risks, there is also the possibility of more cases being lost because of a failure to meet the higher evidential threshold.

The use of strict liability

Strict liability offences are included in almost all the consumer protection laws that the Government will repeal on implementation of the Directive. It is a tried and tested method of framing regulatory offences and we believe it to be highly suitable. It is cost effective for enforcers, and businesses are well placed to demonstrate their compliance processes. Due diligence defences, together with the innocent publication defence,⁵ allow fair-dealing businesses to provide evidence that they took appropriate steps to avoid breaching the law and should thus not be convicted.

The OFT does note the Government's concerns about strict liability and accepts that there may be legitimate concerns about the clarity of the Article 5 (general

⁵ Legislation affecting advertising and marketing practices usually contains an 'innocent publication' defence. This enables a publisher to escape liability if he can prove that the offence arose through the publication of an advertisement received from a third party in the ordinary course of business and that he did not know and had no reason to suspect that its publication would constitute an offence.

prohibition) offence. However, we believe these concerns can be overcome by provision of information and advice to business, in conjunction with enforcer's adherence to enforcement policies and other safeguards.

We recommend the introduction of strict liability offences for Articles 5 to 9 and the Annex Practices⁶ as we believe there are valid arguments for the introduction of strict liability across the piece to ensure a consistent and integrated consumer protection regime.

Criminal powers for OFT

The OFT accepts the decision to impose a 'duty to enforce' on the OFT, as qualified by the DTI. The explanation within the Government Response that a duty to enforce does **not** automatically mean that formal enforcement action has to be taken for each and every infringement is very helpful. We look forward to similar clarification in the implementing legislation.

The OFT response⁷ to the DTI consultation Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation outlined our argument for granting the OFT criminal powers to enforce the Regulations implementing the Directive.

We believe the OFT needs to be able to take criminal as well as civil prosecutions for three primary reasons, namely to facilitate:

- consistent enforcement, ensuring enforcement action is taken by the most appropriate body
- actions that are tailored so that they are appropriate and proportionate to the level of detriment created
- access to the same powers of investigation as TSS.

⁶ Excluding Article 6(2) (b) and Annex Practices 11 and 28 which will not be criminal offences.

⁷ Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation, A consultation response by the Office of Fair Trading, March 2006

We welcome the Government's decision to consult further on this issue and the acknowledgement that the OFT's current powers appear anomalous with those of TSS.

1 CONTROL ON CRIMINAL PROSECUTIONS

Question 1 - Do you think these safeguards are sufficient? If not why not?

- 1.1 The OFT is fully supportive of the desire to increase the use of civil enforcement and reduce the reliance on criminal prosecutions as proposed. The consultation document suggests one way of achieving this is to raise the evidential hurdle from that of strict liability to *mens rea*. In our view, the better way to achieve the same result is to retain a full range of effective enforcement tools, but to control their use by adherence to enforcement policies and other safeguards. We believe this will result in civil enforcement being used more often than criminal enforcement and sanctions.
- 1.2 We agree that the Enterprise Act 2002 Part 8 injunctive regime should be the main enforcement mechanism for the Directive and we expect it to be used to address the majority of unfair commercial practices. This civil route requires enforcers to consult with business before taking steps to seek an Order, unless there are circumstances which necessitate immediate action. The Part 8 route also has the added advantage of allowing enforcers to take unified action on breaches of different legislation. Whether by consultation or obtaining an Order, Part 8 acts as a deterrent to recurrent breaches. Where the problem behaviour recurs, a custodial sentence for contempt of court is one of the ultimate sanctions.
- 1.3 While the Part 8 regime is apposite and generally effective for many breaches, there will still be a number of cases for which the civil route, and notably its inability to allow enforcers to seek imposition of a penalty for a first breach, will not act as a deterrent. These cases require criminal enforcement action and may include, for example, those where consumers are threatened or intimidated or subjected to a particularly manipulative scam, or where traders engage in a series of different unlawful practices.

- 1.4 This is consistent with the analysis of Macrory. In his consultation document⁸ he makes clear that criminal prosecutions should be retained for the most serious offences. Importantly, he identifies that the way to decrease reliance on criminal sanctions is to introduce 'a suite of sanctions to the regulators toolbox', including administrative penalties. We agree that enforcers need to have ready access to the full range of sanctions, all of which must be practicable in their application, in order to be in a position to deploy the most effective one and act proportionately.
- 1.5 Macrory argues for checks and balances. He says enforcement policies need to be in place to support the coherent and transparent use of a wide range of sanctions. His final report⁹ outlines a framework for the operation of the Penalties Principles which enforcers are expected to establish themselves. The Penalties Principles underpin all Macrory recommendations and are supported by characteristics within which the principles must operate to ensure consistent and successful enforcement.
- 1.6 The first of these characteristics is that regulators should publish an enforcement policy. He argues that a published enforcement policy will show that regulators use their powers in a proportionate and risk-based way and that any departure from the enforcement policy will require justification.
- 1.7 In addition to the Macrory requirement to publish an enforcement policy, there are a number of existing or forthcoming measures which work towards ensuring action is consistent amongst enforcers, and that criminal action is only taken when and where it is appropriate. These include:
- Local Authority enforcement policies

⁸ Regulatory Justice: Sanctioning in a post-Hampton World, Consultation Document, May 2006

⁹ Regulatory Justice: Making Sanctions Effective, Final Report, November 2006

- Proposed OFT/TSS enforcement policy
- Co-ordination of civil action
- Local Better Regulation Office's (LBRO) role in addressing a lack of consistency between local authority regulatory services
- Regulators' Compliance Code
- Code for Crown Prosecutors.

In our view these, together with the Macrory Penalties Principles, are all key to ensuring enforcers use their tool kit appropriately, and take criminal intervention only when justifiable. The OFT believes the best way to encourage enforcers to increase the use of civil powers is to retain (and expand) the range of tools available, and determine when they are used by this type of safeguarded.

Local Authority enforcement policies

1.8 As the consultation document identifies, almost all TSS have published enforcement policies, and some also have published prosecution policies.¹⁰ The *R v Adaway*¹¹ case demonstrates that these are not just window dressing; they can be used as a basis for challenge and thus ensure enforcers will be held to account for their actions. The implementation of the Macrory Principles will strengthen their effectiveness.

¹⁰ Information from Local Authorities Coordinating Office on Regulatory Services

¹¹ [2004] EWCA Crim 2831

Proposed OFT/TSS enforcement policy

- 1.9 Section 229 of the Enterprise Act 2002 requires the OFT to publish advice and information to explain how Part 8 works. On implementation of the Directive such advice and information will require updating. Although the requirement relates only to providing information on the civil enforcement (injunctive) routes made available in that legislation, we believe it would be helpful to include material about criminal enforcement and propose to do so if we are given criminal enforcement powers.
- 1.10 Our commitment to consistent enforcement is outlined in the draft OFT Annual Plan for 2007-2008¹² which states 'We will work with co-enforcers and stakeholders to develop a comprehensive policy on the enforcement of consumer law....'.

Co-ordination of civil action

- 1.11 Under Part 8 of the Enterprise Act the OFT has a co-ordination function. This is intended to help avoid disproportionate and multiple actions. There is currently no such co-ordination of criminal cases despite the benefits that should accrue from the OFT having such a role. The concept is not novel. Under section 230 of the Enterprise Act 2002 there is a requirement to notify the OFT ahead of initiating a prosecution under more than 30 pieces of legislation, including the Trade Descriptions Act 1968 and the Consumer Protection Act 1987. Because these obligations were introduced and have operated in a situation where the OFT has had no criminal enforcement powers under most of those pieces of legislation, the OFT has collated these "Notices of Intended Proceedings" and indeed, the outcome of such action, onto a non-public database, but has not previously sought the ability to take other action on notification. We would be happy to explore with the Department of Trade and Industry (DTI), the LBRO and TSS the scope for developing

¹² OFT Annual Plan 2007-08, A Consultation Document, December 2006, Page 24

the existing notification system as means of ensuring that inappropriate criminal actions do not proceed.

Local Better Regulation Office

- 1.12 In addition to the OFT's co-ordination role for civil cases, the LBRO is to be tasked with tackling inconsistencies in enforcement in different local authorities.
- 1.13 LBRO is due to be operating by the end of 2007 and its key role will be to reduce burdens on business without compromising regulatory outcomes. As part of this, the Government will provide LBRO with powers to issue guidance to local authorities and it will place the principle of home and lead authority on a statutory footing for multi-site businesses.

Regulators' Compliance Code

- 1.14 The consultation document refers to the Regulators' Compliance Code. Clearly this too will provide a further safeguard against inappropriate criminal enforcement action. This Code is provided for by the Legislative and Regulatory Reform Act and is due to come into force on 1 April 2008.
- 1.15 Regulators which exercise specified regulatory functions are obliged by section 21 of the Legislative and Regulatory Reform Act to have regard to two overarching principles in the exercise of those functions. These overarching principles are:
- regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent
 - regulatory activities should be targeted only at cases in which action is needed.
- 1.16 Any business or third party that believes a regulator is failing to have regard to the Code will be able to seek redress by means of a complaint procedure provided by the regulator or by making a complaint to the

Local Government Ombudsman or Parliamentary Ombudsman. It may also be possible to apply for a judicial review of the regulator's actions.

- 1.17 We believe the Code will play a significant part in holding regulators accountable, and although at this stage it is unclear which of the OFT's functions will be specified, we are supportive of the principles and introduction of this code.

Code for Crown Prosecutors

- 1.18 The Code for Crown Prosecutors provides further safeguards against inappropriate criminal enforcement action. Enforcers have to be satisfied that there is enough evidence to provide a realistic prospect of conviction and that it is in the public interest to bring the prosecution. If the OFT is provided with powers to take criminal prosecutions for consumer protection issues it will adhere to this Code before and during any criminal enforcement action taken by it.

Additional safeguards

- 1.19 We believe the measures set out above will ensure careful analysis of whether a criminal prosecution is the best way forward in a particular case. However, we believe there are other factors which may have resulted in cases being enforced using criminal sanctions, when other enforcement routes may have been more appropriate. These issues, discussed immediately below, ought to be addressed directly. Creating *mens rea* offences rather than strict liability offences will not address these problems and may reduce consumer protection as regulators may not consider either civil or criminal action to be a viable option because of the difficulties involved.
- 1.20 First, within the UK, there is a greater perceived risk of enforcers being ordered to pay costs for unsuccessful actions in civil cases than in criminal prosecutions. Also, in Scotland the costs of court proceedings are usually met from other budgets, such as that of the Procurator Fiscal. These could both be considered to be influential factors when considering which route to use.

1.21 Second, the OFT has in the past had representations from Trading Standard Officers (TSOs) that providing them with rights of audience in civil courts would improve enforcement options and ease funding difficulties. Without rights of audience in civil courts, TSOs are forced to employ lawyers to represent them in civil actions. In some cases, costs incurred may be disproportionate to the outcome and hence affect the decision to take civil action. We suggest that providing TSOs with a right of audience in civil courts would improve objectivity in choice of enforcement route.

2 ADVANTAGES AND DISADVANTAGES OF *MENS REA*

Question 2 - Do you have any comment on the Government's analysis of the advantages and disadvantages of *mens rea* offences?

2.1 As will be clear, we have serious reservations about the suitability and effectiveness of the proposal to increase the use of civil sanctions by raising the evidential threshold of criminal offences from strict liability to *mens rea*. We believe that a *mens rea* requirement for any of the prohibitions under the Regulations would conflict with the Macrory principles by making many breaches (including some of the most serious) significantly harder, and in some cases impossible to prove, even where pursuit of criminal sanctions is otherwise the most appropriate course.

Reduction in consumer protection

2.2 A key principle for the OFT in the Unfair Commercial Practices implementation project work has been, and remains, that the level of consumer protection currently afforded should not be reduced by the implementing law. Our engagement with TSS and our own, albeit limited, experience of criminal law enforcement suggests that in a number of cases, *mens rea* offences could be significantly harder to prove than strict liability offences. This could potentially be disproportionately so, in the light of the clear detriment that may be caused to consumers by the breaches in question.

2.3 Strict liability offences are included in almost all the consumer protection laws that the Government will repeal on implementation of the Directive¹³ and we thus believe that a move towards *mens rea* will have the unintended effect of reducing the current level of consumer protection.

¹³ As outlined in the Government Response to the Consultation Paper on Implementing the Unfair Commercial Practice Directive, DTI, December 2006

- 2.4 We believe there will be some cases where, after taking into account enforcement policies and other safeguards, enforcers decide criminal action, is the most appropriate route, but the evidence may not be adequate to prove the requisite *mens rea* before the courts. In these circumstances enforcers will have little choice but to take civil action even though it is inappropriate to deal with the practices in question. As highlighted previously it is also conceivable that enforcers might take no action at all (either civil or criminal) and this would result in a lessening of consumer protection. This would create potential distortion which reduces effectiveness.
- 2.5 There will also be cases where enforcers will still wish to instigate a prosecution, in spite of the higher evidential hurdle, for example because of the nature or severity of the offence. In such cases, the chances of a successful prosecution are potentially less and therefore the number of failed prosecutions may increase. We believe this would undermine the whole regime for example, both criminal and civil, resulting in a conflict with Macrory's desire for enforcers to have access to a full range of effective civil and criminal sanctions.

Due diligence defences

- 2.6 The consultation paper states that one advantage of *mens rea* offences is that criminal liability would be restricted to traders who can be shown to have flouted the law with whatever degree of intent was specified. The OFT believes that equally, however, introducing *mens rea* risks those carrying out rogue practices not being stopped effectively and/or brought to account proportionately. We believe that legitimate businesses are better protected by having other safeguards in place as outlined in paragraphs 1.1 to 1.21.

- 2.7 Further, we believe that due diligence defences associated with strict liability offences, together with the innocent publication defence,¹⁴ allow fair-dealing businesses the opportunity to provide evidence that they have taken appropriate steps to avoid breaching the law. This serves to encourage fair-dealing businesses to develop and adhere to their own compliance processes, and thus acts as a mechanism for raising general levels of compliance without recourse to intervention by enforcers.
- 2.8 Strict liability offences with due diligence offences are a tried and tested means of framing regulatory law. One of the reasons for this is cost efficiency. Often, information sought, such as details on internal processes, is known only to the business that is the subject of an investigation. It is more efficient for the person with this information to be required to show it, than for enforcers to seek the information to produce it as evidence. In the absence of strict liability offences enforcers may be required to use resources disproportionately by having to make, potentially multiple, information requests or site visits.
- 2.9 Our views on the benefits of strict liability are at one with those of Macrory, as set down in his consultation document.¹⁵ Macrory acknowledges the heavy reliance on strict liability offences in regulatory criminal law. He is clear that strict liability offences can be justified on the following bases:
- strict liability improves deterrence and this concept would be weakened if the prosecution had to prove the state of mind, in addition to the facts of the case. Macrory identifies that this is

¹⁴ Legislation affecting advertising and marketing practices usually contain an 'innocent publication' defence. This enables a publisher to escape liability if he can prove that the offence arose through the publication of an advertisement received from a third party in the ordinary course of business and that he did not know and had no reason to suspect that its publication would constitute an offence.

¹⁵ Regulatory Justice: Sanctioning in a Post Hampton World, Consultation Document, May 2006, Annexes D & E.

particularly important where the non-compliance involves knowledge that only the regulated body may have. (See paragraph 2.8)

- criminal prosecution should be a last resort, but without the existence of criminal offences which are relatively easy to prove, the regulator's power to advise and warn businesses would be jeopardised
- strict liability offences are an important tool in securing convictions of corporate entities, in addition to individuals. (See paragraph 2.10)
- strict liability for regulatory offences can be justified on the grounds that business operating in regulatory areas can be said to implicitly accept the risk of criminal liability, even where no intention or recklessness is involved. Strict liability encourages companies not just to do what they feel reasonably capable of, but to do what is necessary to comply. (See paragraph 2.7)
- prosecuting bodies have discretion as to whether or not to prosecute and are more likely to prosecute where there is some element of fault. Additionally courts have discretion in imposing sentences and some offences allow for due diligence offences.

2.10 We consider that it is efficient and effective to give traders an opportunity to deploy a due diligence defence if prosecuted. The OFT believes that this is a suitable method of constructing regulatory offences, fair to both enforcer and those liable to prosecution, as well as effective in protecting consumers. We see no compelling evidence to support a move away from the traditionally accepted and proven system of strict liability with defences.

Corporate entities

2.11 A particularly problematic feature of regulatory offences that incorporate a *mens rea* element is the difficulty of taking successful prosecutions against corporate entities (especially where they are large and/or complex in structure) because of the evidential difficulties of attributing *mens rea* to individual 'controlling minds' within the corporate structure.

We believe that this well-recognised area of difficulty is likely to hinder, and in many cases to prevent, the successful prosecution of a wide range of offences under the Regulations if they fall within prohibitions which incorporate a *mens rea* requirement. This seems particularly anomalous in the case of Regulations which are intended to impact exclusively on commercial practices, a significant proportion of which are thus likely to be carried on by corporate entities. Where rogue traders operate 'sharp' practices, deliberately exploiting the boundaries of law, the inclusion of a *mens rea* requirement may potentially provide an incentive for traders to take steps to adopt incorporated form, and to isolate controlling minds from operational processes, as a means of insulating themselves from responsibility.

- 2.12 We would expect to be able to bring a prosecution against a company officer/controller where such a person has consented to, or connived in, an offence committed by a company of which he is a company officer/controller, or where the offence has been committed because of his neglect. Equally if an offence is committed by a partnership with the consent or connivance of a partner or because of his neglect, we would want to be able to bring a prosecution against that partner.
- 2.13 In his consultation document¹⁶ Macrory makes particular reference to the suitability of strict liability offences for securing convictions against corporate entities. He is clear that suggesting changes in fundamental legal principles concerning corporate liability is beyond the remit of his Review, but acknowledges that any substantial move away from strict liability offences towards those requiring some element of *mens rea* is likely to require a reappraisal of current principles of securing convictions of both companies and individuals.

¹⁶Regulatory Justice: Sanctioning in a Post Hampton World, Consultation Document, May 2006 , Annex D, Paragraph D.6

Itinerant rogue traders

2.14 We agree with the assessment of difficulties in proving *mens rea* when dealing with itinerant rogue traders. Evidence that enforcers have secured undertakings or ultimately an Order via Part 8 of the Enterprise Act 2002 may well be one way of proving that a trader knew what was expected of him and therefore what constituted an offence. Any further breach could then be used as a means of proving *mens rea* on the part of the trader. But as cited in the consultation document enforcers frequently encounter difficulties in obtaining undertakings or securing an Order against such traders due to the inability to locate and identify them. Having to do so for the purpose of taking civil action, before being in a position to then take criminal action, would increase these difficulties significantly.

Improving sentencing outcomes

- 2.15 We agree with the general assessment that strict liability offences usually attract a lower level of penalties than those where *mens rea* has been proven and Macrory's consultation document cites evidence that strict liability offences can undermine the seriousness with which the offence is regarded by the courts.
- 2.16 We are of the view that *mens rea* should not be introduced solely to encourage courts to impose heftier sentences. We believe that any view that the courts may have about strict liability offences being less serious or, somehow, not truly criminal is an issue that should be more properly addressed through sentencing policy, rather than indirectly by creating *mens rea* offences.

Minimising uncertainty associated with new offences

2.17 The OFT is clear that business needs to be aware of all consequences they face for breaches of legislation and this will of course be equally important for the Regulations implementing the Directive. Together with the DTI, the OFT is jointly drafting illustrative Guidance and this will provide some indication of how we expect the legislation to be applied.

This, the OFT considers, is a more appropriate way of limiting any uncertainty otherwise associated with new offences. In addition, over time there will be guidance available from reported cases. The OFT would argue that it is inappropriate to create a legislative framework which assumes that any initial uncertainty will remain for all time.

Increased enforcement costs

- 2.18 In paragraph 2.8 above we have made reference to *mens rea* offences resulting in what we believe to be inefficient use of enforcers resources.
- 2.19 The OFT believes that producing sufficient evidence to adequately demonstrate a guilty mind over and above the other elements of the offence will require greater resources and hence incur greater costs than proving strict liability offences. The information about what systems a trader has in place to avoid committing a breach of the Directive is wholly within the knowledge of the trader. It is more cost effective to impose the requirement to demonstrate those systems on the trader rather than to require enforcers to use information-gathering powers to ascertain a state of mind. There is also a danger of 'spin off' litigation being required in individual cases to 'enforce the enforcer's' information-gathering powers and enable a prosecution to be launched.
- 2.20 The Regulatory Impact Assessment accompanying the consultation document identifies the clear benefits for enforcers of strict liability offences. Retaining the 'status quo' of strict liability offences would have the least change in costs for enforcers and may potentially result in a reduction of costs.

Summary

- 2.21 **We have outlined above our arguments in favour of strict liability across the piece.** Should the Government, following consultation, choose to include any *mens rea* requirements, notwithstanding our recommendation that Articles 5 to 9 and Annex Practice offences should be based on strict liability, then we would suggest that this should be reviewed after the introduction of the full Macrory 'toolkit'.

3 CRIMINAL SANCTIONS IN THE UNFAIR COMMERCIAL PRACTICES REGULATIONS

3.1 We have discussed in the preceding paragraphs the detailed reasons for our preference of a consistent strict liability approach to be applied across the implementing Regulations, such that each of the criminal offences arising out of the Directive's prohibitions¹⁷ should be framed as strict liability offences with a due diligence defence. Our comments below, in relation to each of the Articles under discussion, should be read in conjunction with, and in light of, that detailed analysis.

Article 5

3.2 The Government argues that the Article 5 offence should include a *mens rea* requirement because of its 'novel', and broad 'principles-based', nature. Whilst we accept that the novelty and breadth of Article 5 may give rise to some legitimate concerns about certainty, we consider that these can be adequately met by alternative means were a strict liability offence to be adopted in respect of Article 5.

3.3 There are a number of reasons why strict liability may be more appropriate for Article 5 and these can be summarised as:

- enforcers needing a full range of viable sanctions the use of which can be limited by other safeguards
- providing guidance to assist in transparency
- more appropriate evidential thresholds and hence greater likelihood of securing convictions
- genuinely 'future – proofing' the Directive

¹⁷ That is, excluding Article 6(2)(b) and Annex Practices 11 and 28 which will not be criminal offences.

- Article 5's relationship with Articles 6 to 9 and the Annex Practices.

Retaining a full range of sanctions, but limiting their use by safeguards

- 3.4 Our detailed comments in relation to controls on criminal prosecution and advantages and disadvantages of *mens rea* outline our view that the range of tools available to enforcers should not be limited by making any part of the implementing legislation 'unworkable'.
- 3.5 As Macrory¹⁸ points out: "...without the existence of criminal offences which are reasonably easy to prove, the regulators' power to advise and warn regulated businesses would be seriously jeopardised. Routine enforcement is conducted against a backdrop of the criminal law and the implicit threat of its invocation. The fewer the uncertainties which attach to the law, therefore, the stronger the agency's bargaining power."
- 3.6 Although a *mens rea* requirement for Article 5 may be seen as a way of ensuring that inappropriate prosecutions are not taken, it is equally true that the flexibility of the Directive's principles-based nature will only be secured, and enhanced, if enforcers can choose freely between the most appropriate civil or criminal enforcement routes.

Providing guidance to assist in transparency

- 3.7 We accept that there may be concerns, particularly at the outset, about the lack of certainty of Article 5 and know that the importance of providing advice to, and consulting with, business cannot be overemphasised, since the very nature of a principles-based regime will preclude complete certainty.

¹⁸ Regulatory Justice: Sanctioning in a post-Hampton World, Consultation Document, Annex D, Paragraph D.5

- 3.8 We believe that providing advice, including the OFT/DTI drafted illustrative Guidance, will promote compliance and play an essential part in addressing concerns about transparency.

More achievable evidential thresholds and hence greater likelihood of securing convictions

- 3.9 We are concerned that introducing a *mens rea* requirement for Article 5 prosecutions, with the increased evidential burden that this entails, is likely to result in significant difficulty in (and in some cases even the impossibility of) securing successful convictions. We anticipate that this is particularly likely to be the case in the well-recognised area of difficulty surrounding corporate entities (See paragraph 2.11) and our engagement with TSS indicates they share our concerns in this regard.

Future proofing the Directive

- 3.10 Article 5 is the primary 'safety net' provision that will ensure 'future-proofing' of the Directive. We think lessening the deterrent effect of criminal sanctions by introducing *mens rea* runs a risk of rendering this element of the Directive unworkable, or significantly impairing the genuineness of its availability. This would undermine the effectiveness of the 'principle-based' concept and could potentially leave consumers more vulnerable to emerging scams and unfair practices designed to take advantage of the evidential difficulties associated with *mens rea*.

Article 5's relationship with Articles 6 to 9 and the Annex Practices

- 3.11 We believe that the structure of the Directive, given that Article 5 is intended to underpin the whole of the Directive, may make cases difficult to bring if different prohibitions were to attract different evidential requirements. We think there are clear advantages in all prohibitions having equal evidential requirements. If all offences were strict liability, then enforcers would know what levels of evidence were required at the outset of an investigation (that is the precise nature of the breaches could be determined and thus, the appropriate offence

under which to prosecute). Introducing different evidential thresholds may increase the risk of enforcers ' defaulting ' to those offences that are easier to prove, as is suggested to be the case in relation to section 1 (strict liability) as opposed to section 14 of the Trade Descriptions Act 1968, which includes a mental element.

Other considerations

- 3.12 In order for a practice to be prohibited under Article 5, it must be 'contrary to the requirements of professional diligence',¹⁹ as well as causing (or being likely to cause) material distortion of the economic behaviour of consumers. Since Article 5 would already require an enforcer to demonstrate that a trader has failed to meet an objective standard which he ought to reasonably meet there is an opportunity for a trader who has acted reasonably to avoid a successful prosecution. This provides a reasonable trader with sufficient protections against unjustified prosecutions/convictions.
- 3.13 It is also worth echoing, here, a further point made by Macrory²⁰: "...in practice, any perceived injustices from strict criminal liability is tempered by the fact that 'fault creeps back in during the various stages of the enforcement process'. Prosecuting bodies have discretion whether or not to prosecute in a particular case, and are more likely to prosecute where in their view there is some element of fault. Courts have discretion in the sentence they impose, and lack of intention or recklessness can be presented by the offender in mitigation".

¹⁹ Article 2(h) 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'

²⁰ Regulatory Justice: Sanctioning in a post-Hampton World, Consultation Document, Annex D, Paragraph D.8

3.14 In summary, whilst we acknowledge that there are arguments for the adoption of a *mens rea* requirement for Article 5 we believe that the concerns raised by these can be addressed by other means. Our view is that there are also strong arguments against such a requirement and accordingly recommend that the offence should be framed as one based on strict liability.

Article 6²¹

3.15 The OFT agrees with the Government's recommendation that Article 6 offences should be framed as strict liability offences. As is recognised in the Government's consultation document, Article 6 is fundamental in ensuring that the core consumer protections in existing law, including section 1 and section 14 of the Trade Descriptions Act 1968 and Part III of the Consumer Protection Act 1987, are available under the Directive. Much of this existing protection has been by way of strict liability offences, and the introduction of a *mens rea* requirement would, therefore, be likely to result in a decrease in the current level of consumer protection.

3.16 Enforcers will place a heavy reliance on Article 6 as the single most important means of tackling a wide range of sharp and dishonest trading practices, including those which cause the most serious consumer detriment.

3.17 The availability of civil enforcement routes cannot be regarded as compensation for any reduction in the availability of criminal enforcement sanctions in cases where the seriousness of the offence warrants such sanctions, or where only criminal action is likely to be effective in bringing about a cessation. We believe that the adoption of a *mens rea* requirement for Article 6 would result in a reduction in the availability of criminal enforcement sanctions by making it significantly more difficult to prosecute true rogue behaviour.

²¹ Excluding Article 6(2) (b) which will not be a criminal offence.

- 3.18 We also have concerns about the greater difficulties in prosecuting corporate entities that would result from the introduction of a *mens rea* requirement. It could also encourage rogue traders to increase their use of incorporated entities as trading vehicles as a means of decreasing the likelihood of successful prosecution.
- 3.19 In light of all of the factors referred to above, we consider that it would potentially be damaging to consumer protection were a *mens rea* requirement to be introduced for Article 6 offences.

Articles 7(1) and 7(2)

- 3.20 The OFT disagrees with the assertion that misleading omissions are a novel concept in UK law. The Trade Descriptions Act 1968, and also the Control of Misleading Advertisements Regulations, each contain prohibitions that cover both misleading statements and omissions. This legislation currently addresses the majority of relevant omissions that will fall within Article 7 of the Directive and we consider, therefore, that strict liability offences would be appropriate. Insofar as there is novelty in relation to Article 7, this results primarily from the separation of misleading statements and omissions. The UK law does not generally distinguish between misleading statements made by act or by omission.
- 3.21 We do acknowledge that some 'pure omissions' may be covered by Article 7 of the Directive, but not by existing UK legislation. However, to the extent that this is new, we think that all our other arguments to the effect that *mens rea* is not the right tool for dealing with novelty apply.
- 3.22 We are concerned that the separation of misleading actions and omissions in the Directive could, in practice, prove to be highly problematic if these Articles are dealt with inconsistently by introducing a strict liability offence for misleading actions and a *mens rea* offence in the case of omissions. The OFT's concern is that such a difference in treatment would suggest they are always distinct and mutually exclusive practices, when this is not the case, and result in a reduction in

consumer protection in relation to omissions. This can be illustrated in three ways.

- 3.23 First, our enforcement experience (particularly in relation to the Control of Misleading Advertising Regulations, but also in other areas) indicates that many unfair practices, including (but by no means limited to) the majority of scams, are likely to consist of a mixture of misleading actions and misleading omissions.
- 3.24 In such cases, it is necessary to consider all of these misleading acts and omissions together for the purpose of ascertaining their effect on consumers. It is likely to prove impossible, in many cases, to separate the misleading acts and omissions and their effects. An inconsistent treatment of these Articles could require such separation, making the prosecution of such cases problematic and reducing the protection given to consumers.
- 3.25 Second, a further problem arises out of the fact that it may often be difficult (both for enforcers and for the courts) to distinguish between misleading actions, half-truths (that is, partial omissions), Article 7(2) omissions and 'pure omissions' and so to characterise any single practice as one or another.
- 3.26 In some cases the distinction may be clear, but in many it will not. And, in any event, the OFT considers that how a misleading practice is characterised should not have any material effect on its prosecution. In principle, acts and omissions are two sides of the same coin. In practice, their impact on consumers is the same – they mislead.
- 3.27 We argue that, in their drafting, Articles 6 and Article 7(2) specifically acknowledge this overlap between actions and omissions. Article 6, for example, covers practices which deceive even if the information in them is factually correct (including, for example, those practices where factually correct statements are rendered deceptive by the omission of other information). Article 7(2), meanwhile, deals with misleading omissions but covers situations where the information in question is, in

fact, hidden rather than omitted (in other words, is included, but not clearly).

- 3.28 However, an inconsistent treatment of Articles 6²² and 7 would have a material impact on their prosecution. There may be real difficulties in determining the applicable offence in many situations, and thus with determining the applicable evidential requirement for establishing that offence. And, where practices are identified as omissions, the offence will be materially more difficult to prove, offering consumers less protection in respect of omissions (notwithstanding what the OFT would say is the artificiality, in principle and practice, of treating them differently from misleading actions).
- 3.29 By contrast, if Articles 6 and 7 are treated consistently, by framing all offences as strict liability, as we recommend, then the difficulty of characterising offences one way or another has no material impact on their prosecution (or the consumer protection they offer).
- 3.30 Third, the inconsistent treatment of these two provisions proposed by the Government could also provide a perverse incentive for traders to omit information in the hope of a diminished likelihood of successful prosecution, rather than risk more certain prosecution for providing potentially inaccurate information. This would be an unhelpful outcome for consumers.

Article 7(4)

- 3.31 The OFT does not agree with the implication in the Government's consultation document that Article 7(4) should be interpreted as a stand-alone prohibition, and we take the view that it should not be treated as such by framing it as a separate offence. Article 7(4) provides clarification of information that is always required (because it is viewed as 'material' for the purposes of Articles 7(1) and 7(2)) in certain

²² Excluding Article 6(2) (b) which will not be a criminal offence.

situations - where there are invitations to purchase - the omission of which will breach Article 7(1) and/or Article 7(2).

- 3.32 If Article 7(4) is framed in the implementing regulations as a separate offence, we would argue that it ought to be considered alongside the other prohibitions in Article 7, and should thus be a strict liability offence in line with our recommendations for Articles 7(1) and 7(2).

Article 8

- 3.33 The OFT agrees with the Government's recommendation that aggressive practices should be dealt with as strict liability offences, given their serious nature and the significant detriment to consumers (both pecuniary and non-pecuniary) which they incur.

Offences in Annex I²³

- 3.34 We consider that the Annex Practices were designed to prohibit the worst and most damaging, unfair practices and we agree with the Government's recommendation that they should be framed as strict liability offences.

Question 3. Do you agree with the proposal to add a *mens rea* requirement to the provisions creating offences for breaches of Articles 5 and 7(1) and (2)?

- 3.35 For the reasons given above, the OFT does not agree with the proposal to add a *mens rea* requirement to the Article 5 provision, or to the Article 7(1) and (2) provisions. Rather we would recommend that the offences created by these provisions should be strict liability offences.

²³ Excluding Annex Practices 11 and 28 which will not be criminal offences.

Question 4. Do you agree that offences for breaches of most of the prohibitions contained in UCPD Articles 6 and 8, and in UCPD Annex I should not require proof of any particular state of mind of the trader?

3.36 For all the reasons given above (and at paragraphs 2.1 – 2.21) , we agree with the Government proposal that Article 6, Article 8 and the Annex Practice offences should be strict liability offences.

Question 5. Do you consider that the new offence for breaching the information obligations in Article 7(4) should be one of strict liability or should it require proof of a state of mind of the trader on the same basis as the proposal for article 7(1) and 7(2)?

3.37 As discussed above, we do not agree with the implication in the Government's consultation document that Article 7(4) should be interpreted as a stand-alone offence. We consider that it merely provides clarification of information that will always be required in certain situations, the omission of which will breach Article 7(1) and/or Article 7(2) (which we recommend should be a strict liability offence).

3.38 If Article 7(4) is framed in the implementing regulations as a separate offence, we would argue that it ought to be considered alongside the other prohibitions in Article 7, and should thus be a strict liability offence in line with our recommendations for Articles 7(1) and 7(2).

Question 6. Do you consider that a new offence in relation to the publication of misleading advertisements in provisions implementing the MCAD should be one of strict liability or should it require proof of a state of mind of the trader?

3.39 As is explained in the Government's consultation document, the prohibition on misleading advertising contained in the amended MCAD will effectively, for business-to-business practices, provide an equivalent to Article 6 of the Directive. It will also provide some protection for businesses against misleading omissions so far as they are included

within the MCAD definition of misleading advertising. As such, it will also provide a partial equivalent, for business-to-business practices, to elements of Article 7 of the Directive.

- 3.40 The consultation document notes that it would seem consistent (with Article 6 of the Directive) for the prohibition in the amended MCAD to be framed as a strict liability offence. We agree that there should be consistency between the amended MCAD and Article 6 of the Directive in order to avoid discrepancies in how practices that potentially affect businesses as well as consumers are brought before the courts. The Government suggests that there might be an argument that offences in a business-to-business context should incorporate a *mens rea* requirement on grounds that businesses can generally be expected to take greater precautions and make more enquiries than consumers in order to protect themselves against the consequences of misleading advertising. However, we would suggest that small businesses (and particularly sole traders without the administrative resources to make exhaustive enquiries) may be equally as vulnerable to misleading advertising as individual consumers and, as such, we believe that they should be afforded the same protections as individual consumers.
- 3.41 We also take the further view that, if any criminal offences relating to Article 6 of the Directive and the MCAD are strict liability offences, that is another reason for the same also to apply to the criminalisation of Article 7 of the Directive. That is, if the latter is treated differently, then, to the extent the MCAD offence would cover misleading omissions as well as actions, such offences would be easier to prosecute in business to business situations than in business to consumer ones. Businesses would, in effect, derive more protection from the criminal law than consumers, which the OFT submits would be inappropriate.

4 TYPES OF *MENS REA*

Question 7 - Do you agree that the *mens rea* offences for breaches of the UCPD should be 'knowledge or recklessness'?

- 4.1 As outlined throughout our response the OFT favours the introduction of strict liability offences for Articles 5 to 9 and the Annex Practices of the Directive.
- 4.2 In paragraph 2.21 we suggested that if *mens rea* requirements are introduced, then this should be reviewed after the introduction of the Macrory 'toolkit'.
- 4.3 We have considered the four types of *mens rea* requirements detailed in the consultation document and agree that *if mens rea* is introduced, then knowledge or recklessness are the most appropriate levels of proving *mens rea*. Section 14 of the Trade Descriptions Act 1968 is a *mens rea* offence requiring proof of knowledge or recklessness and we believe it would be sensible to replicate this in any *mens rea* requirements in the Regulations.
- 4.4 Given our arguments against the principle of *mens rea*, we think the requirement to prove 'intent' would present enforcers with even greater evidential hurdles and potentially result in a lowering of consumer protection.
- 4.5 We can see no real advantage in having a 'negligence' *mens rea* requirement as we think in practice, 'negligent' traders are more likely to be dealt with via the civil route.

5 THE OFFICE OF FAIR TRADING'S (OFT) POWER TO BRING CRIMINAL PROSECUTIONS

Question 8 Do you agree that the OFT should have the power to bring criminal prosecutions for breaches of the UCPD and the MCAD?

- 5.1 We welcome the Government's decision to consult further on the issue of providing the OFT with the power to bring criminal prosecutions, and the acknowledgement that the OFT's current powers appear anomalous with those of TSS.
- 5.2 Furthermore, we accept the decision announced in the Government response,²⁴ of the intention for the OFT, together with TSS and The Department of Enterprise, Trade and Investment in Northern Ireland to be imposed with a duty to enforce the Directive and MCAD.

Duty to enforce

- 5.3 In our previous response²⁵ to the DTI consultation 'Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation' we conveyed our concerns about the OFT being imposed with a duty to enforce the new Unfair Commercial Practices legislation. This was based primarily on concerns that a rigid duty could fetter our ability to enforce proportionately and deploy a risk-based approach.
- 5.4 The Government Response clarifies the meaning of imposing a duty to enforce as 'This does not automatically mean that formal (civil or criminal) enforcement action will be taken in respect of each and every

²⁴ Government Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive, DTI, December 2006

²⁵ Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation, A consultation response by the Office of Fair Trading, March 2006

infringement. Instead, the duty will oblige enforcers to take steps to promote compliance by the most appropriate means, in line with their enforcement priorities and consistent with available resources. The Government has consequently decided not to include the alternative of a duty to consider complaints, as this could prove overly onerous on enforcement authorities'.

- 5.5 This explanation is very helpful and the OFT is reassured that such a duty will not require us to take formal enforcement action for each and every infringement. We are no longer concerned that the imposition of a duty to enforce will work against our attempts to take the right action in the right circumstances, whether this is by seeking compliance by more informal routes or, ultimately taking a criminal case. A similar clarification on a 'duty to enforce' would also be helpful in the Regulations implementing the Directive.

Criminal sanctions for the OFT

- 5.6 The OFT Response to the DTI consultation 'Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation' outlined our argument for granting the OFT criminal powers to enforce the Unfair Commercial Practices Regulations. Chapter 6 of the current consultation document consequently sets out the reasons for the OFT being granted powers to bring criminal prosecutions.
- 5.7 We have also responded to the Government's Fraud Review, and in our Response²⁶ we reinforced our view that criminal sanctions are appropriate for the worst breaches of consumer protection law. Much of consumer fraud is operated on a large scale by organised criminal 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.

²⁶ Fraud review final report, A consultation response by the Office of Fair Trading, November 2006

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.

- 5.8 We see no value in repeating detailed arguments made in both of these Responses and the current consultation document, so simply highlight the main benefits we see in providing the OFT with the power to take criminal prosecutions.

Consistent enforcement

- 5.9 The thrust of our previous arguments on this issue stem from the Chancellor's Pre-Budget Report 2005 in which he outlined his vision for the OFT to take on a leadership role for TSS to facilitate closer working, effective co-ordination and consistency of enforcement. Since this announcement the OFT and TSS have taken a number of steps to achieve this, including development and delivery of the Programme of Joint Action.²⁷ We believe this will go a long way towards achieving the Chancellor's vision, but the importance of ensuring the OFT and TSS have access to the same set of enforcement tools and powers remains.
- 5.10 As the national enforcement body, the OFT will be best placed to handle national cases. These are the so called 'Level 3' cases envisaged by the National Intelligence Model developed by the Association of Chief Police Officers and now being adopted by TSS. In order to avoid disparities and inconsistencies between these cases and those at local and regional levels, the OFT needs access to the same sanctions and powers as TSS.
- 5.11 Providing the OFT with the ability to take criminal prosecutions will therefore better enable us and TSS to deliver consistent enforcement action. We have clearly stated our desire to make use of civil sanctions wherever possible but know that there will be cases where criminal

²⁷ Office of Fair Trading and Local Authority Trading Standards Services – programme of joint action, June 2006

action is necessary and can be justified. The need for an overarching enforcement policy, covering both civil and criminal action, is obvious and to this end we have made a commitment in our 2007-08 Annual Plan to work towards a comprehensive policy.²⁸

Tailored, proportionate actions

- 5.12 It is disproportionate for traders to face different penalties simply because of the enforcement body which acts against them. Those who infringe consumer protection law at a national level may well face action by the OFT. They are potentially causing higher levels of consumer detriment, by reaching more consumers than local or regional businesses, whose cases are more likely to be acted upon by TSS. Yet the national business here may well face lesser or different sanctions from those trading on a smaller scale. The example in paragraph 6.7 of the current consultation document highlights the somewhat perverse existing situation whereby a trader operating a national scam will, in practice, not attract a criminal penalty unless and until he breaches an Order. Even then whether a penalty is imposed in contempt proceedings is within the court's discretion. Yet a trader harming a relatively small number of consumers and acting in breach of current relevant legislation can be prosecuted and fined.
- 5.13 This anomaly does not fit with the Hampton and Macrory principles of delivering proportionate, risk based action to which we are committed. We strongly believe that providing the OFT with criminal powers will ensure the most appropriate enforcement action is taken by the right enforcer, taking into account all enforcement policies and safeguards, using the civil route as a default position and only pursuing criminal action when it can be justified.

²⁸ OFT Annual Plan 2007-08, A consultation document, December 2006, Page 24

Powers of investigation

5.14 Our consultation response recommended that there be no reduction of investigative powers currently available to TSS under existing legislation when the Directive is implemented, and that these are also given to the OFT. For the same reasons as argued above, we believe unequal powers of investigation will undermine enforcement consistency and efficiency.

5.15 The implementation of the Consumer Protection Co-operation Regulation (CPC)²⁹ and the amendments to Part 8 of the Enterprise Act by the Enterprise Act 2002 (Amendment) Regulations 2006 provide the OFT and other CPC enforcers with on-site inspection powers which enable them, when investigating breaches of the EC consumer protection laws covered by the CPC and enforceable via Part 8 to:

- gain access to premises without a warrant
- require persons to produce goods or documents and give an explanation about them during inspections
- seize goods or documents for certain purposes during inspections with and without a warrant
- to enter and search premises under a warrant.

5.16 Whilst we welcome these powers, the ability to conduct on site inspections and to request information from a business by giving written notice under sections 224 and 225 of the Enterprise Act 2002 are very different methods of gathering information which lie at opposite ends of the spectrum. We believe there is a gap between them which needs to be filled.

²⁹ Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27th October 2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)

5.17 As argued in our last Response, access to the following additional powers would enable the OFT to take more proportionate steps to secure information during an investigation:

- access to communications data
- directed surveillance: and
- the power to make test purchases.

Access to communications data

5.18 This would be particularly helpful in order to track down traders who deliberately adopt evasive tactics so as to avoid compliance with the law and subsequent detection. Communications data is required in order to trace traders who, for example, advertise using only phone numbers or a PO Box, and are then virtually untraceable without access to data from telephone companies or mobile providers, such as the address of the bill holder or payment details of a telephone account. Consumers who respond to such advertisements are unable to contact the trader again, nor obtain any redress. In some cases, the OFT is unable to locate the individuals so as to take action.

Directed Surveillance

5.19 In order to conduct on-site inspections, such as those provided for under the CPC, use of directed surveillance would ensure that:

- the correct building is inspected
- the business(es) sought are on the premises
- any intrusion to obtain the relevant information is kept to a minimum, and any risks to personal safety of the OFT's staff are minimised.

Test Purchasing

- 5.20 In order to fully investigate certain scams, and to test promises made in advertising (such as refund policies) the OFT needs to be able to make test purchases. In some situations this may amount to needing Covert Human Intelligence Source (CHIS) deployment as it may be necessary to develop relationships. Examples of this include attending and potentially participating in a timeshare presentation or purchasing products (which require extended contact and relations with the trader, such as testing a refunds policy), potentially under an assumed identity.

Existing investigation powers

- 5.21 The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 No. 3171 and the Enterprise Act 2002 already permit the OFT to conduct covert surveillance (intrusive and directed) and to authorise the use of CHISs. By virtue of the EA02, the OFT also has the power to carry out property interference under the Police Act 1997. Additionally the OFT is authorised to access communications data for the purposes of preventing and detecting crime in The Regulation of Investigatory Powers (Communications Data) Order 2003.
- 5.22 These powers cover both civil and criminal investigations, but are currently limited to the cartels area of our work.
- 5.23 Additionally, section 164 of the Consumer Credit Act 1974 provides the OFT (and TSS) with the power to make test purchases, procure services and enter into agreements as may appear expedient to us for determining whether the Act is complied with.
- 5.24 The OFT believes it is now clear that these investigative powers are equally necessary to our consumer protection function. Our experience when dealing with cases, our role in addressing mass-marketed scams as well as our role in supporting and co-ordinating TSS, all support the need to extend the current OFT authorisation beyond cartel offences.

- 5.25 Such an extension would add no additional burdens on business generally to those imposed by the Directive. We have no desire, nor the ability, to raise the level of protection in what is, after all, a maximum harmonisation directive. Rather, we simply wish to ensure all enforcers can deliver the specified levels of protection effectively, proportionately and consistently. Indeed the proper use of such powers will reduce burdens on business, by ensuring that, for example, enforcers have adequately prepared for and made certain that an on-site inspection is necessary and operated correctly. In carrying out enforcement functions, we and our colleague enforcers do not wish to choose the civil or criminal route for action on the basis of available investigative powers but on wider considerations of the more appropriate action in the light of all circumstances.
- 5.26 We believe the reality is that some serious breaches of consumer protection law will not be tackled because of the absence of proportionate investigative tools and the traders concerned will avoid enforcement action. Conversely, lack of these powers may oblige enforcers to subject non-compliant businesses who fail to respond to requests for information to on-site inspections, when careful use of other investigatory powers may have removed the need for such action.

Proceeds of Crime Act and compensation orders

- 5.27 The OFT is keen to see that profitability is removed from breaches of consumer protection legislation, so that the incentive to break the law is removed. This could be achieved by extending the ability to use orders in the Proceeds of Crime Act 2002 to the OFT.