

A Code of Practice for regulators – a consultation paper

Response of the Office of Fair Trading

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1 INTRODUCTION

- 1.1 OFT welcomes the draft Code of Practice. Its goal, to maximise regulatory outcomes while minimising burdens, in particular on businesses, fits well with OFT's mission and goal: to make markets work well for consumers, and to ensure that businesses comply with consumer and competition laws but are not disproportionately burdened by Government regulations.
- 1.2 Encouraging economic progress is integral to our role. By striving to make markets work well, we deliver significant benefits to consumers, businesses and the economy.
- 1.3 Although OFT is not for the most part a regulator (our direct regulatory powers primarily relate to consumer credit licensing), we take a risk-based approach to intervention in markets, using robust enforcement where necessary and for deterrence purposes, but also looking to work closely with business and consumers to raise compliance and awareness levels.

2 CONSULTATION QUESTIONS ON THE LISTING ORDER FOR THE COMPLIANCE CODE

- 2.1 Question 1. Is there anything that should be added to or removed from the draft Compliance Code?

There are some matters in the Enforcement Concordat that you have excluded from the Code which we believe could usefully be included. We would particularly mention the requirement to use plain language in regulatory communications. There is a strong need for as much consistency as possible between Code and Concordat (see comment below on relationship of Code and Concordat). Coverage of these matters so far as appropriate would reduce the potential for apparent inconsistency.

- 2.2 Question 2. Is the Code clearly written and easy to understand? If not, please indicate where it might be made clearer.

- 2.3 The Code is clearly written – all the more reason why it should not drop the Concordat's reference to the need for plain language in regulatory communication.

- 2.4 Question 3. Our intention is that regulators use risk assessment to prioritise their work more systematically. Do you think the Code will achieve that?

- 2.5 The Code seems well calculated to encourage the use of risk assessment, which the OFT supports. Indeed, given the exclusive emphasis on risk in section 4, it might perhaps be good to clarify that there is no intention to stop regulators from devoting resources to activities which are more positively directed than averting the risk of harm. An instance would be educating consumers to make better choices between products or services none of which is actively harmful. This would be clearly within the statutory functions of the OFT and indeed would be regarded as a worthwhile objective given our overall strategy. Of course this form of consumer education could be said to be 'covered' by the Code section on supporting economic progress.

However to ensure that a seamless message is conveyed, in which targeted economic enhancement measures and risk-based enforcement are clearly presented as two sides of the same coin, it may be desirable to introduce some clarificatory wording in section 4.

- 2.6 Question 4. The Code seeks to strike the right balance between regulators achieving their regulatory outcomes and eliminating unnecessary burdens on regulated entities. We would welcome your views on whether the Code strikes this balance.
- 2.7 In general, the Code seems to us to strike a fair balance between allowing the achievement of OFT's regulatory objectives and eliminating unnecessary burdens. We cannot speak for the other regulators. Some specific points at which the Code could cause difficulties are identified in detailed comments
- 2.8 Question 5. Our intention is to ensure that regulators place emphasis on providing information, advice and guidance to help encourage compliance, within relevant constraints, such as resources. We would welcome your views on whether the section on advice is likely to achieve this objective.
- 2.9 We think there is a scope for concern on one point in relation to the giving of advice 'within relevant constraints such as resources' – see detailed comments below.
- 2.10 Question 6. Our intention is to ensure that regulators base their data requests on risk assessment and share data to reduce burdens on regulated entities, within relevant constraints, such as resources and legal requirements. We would welcome your views on whether the sections on risk assessment and data requirements can achieve this policy intention.
- 2.11 We think there is a need for clarification of the distinction between routine data requests and information requested for the purpose of enforcement action. See detailed comments on drafting below. We think that section 7 should apply to data of the former kind, not the latter, or

at any rate not without appropriate qualification recognising the special factors which apply to collection and sharing of data of the latter type.

- 2.12 Question 7. We would welcome your views on the proposal to exempt local authorities from sections 9.2 and 9.3 regarding measurement of performance standards on the grounds that they meet the requirements under the existing reporting framework for local authorities.
- 2.13 We support the exemption of local authorities from paras 9.2 and 9.3
- 2.14 Question 8. Are there any other comments you would like the Government to consider in relation to the draft Code?
- 2.15 The OFT has one general comment on the relationship of the Code to the Enforcement Concordat, and a number of detailed comments on the drafting of the Code.

3 RELATIONSHIP OF THE CODE TO THE ENFORCEMENT CONCORDAT

- 3.1 It is said at paragraph 2.8 that the Code supersedes the 1998 Enforcement Concordat for all the regulatory functions to which it applies.
- 3.2 Greater clarity is needed as to what this statement means. There are important senses in which the Code cannot and does not supersede the Concordat. The Concordat has effect in relation to regulators through each regulator agreeing to abide by it. Agreement to it represents a statement of policy by that regulator. The Code may require changes in regulators' policy statements, but cannot of itself bring about such changes, still less supersede any particular statement of policy by a regulator.
- 3.3 It appears to be recognised that the Concordat will continue to exist alongside the Code. If this is so, the Concordat will continue to bind any regulator that does not choose to withdraw from it. In particular it will, presumably, continue to apply at the level of individual actions in respect of functions to which it applies, while the Code applies to policies. Clarity is needed on whether this is the case. If it is, it will be particularly desirable to ensure consistency between Code and Concordat
- 3.4 The continued existence of the Concordat is appropriate given that it has wider application than the Code, and that there is little if anything in it that is positively inconsistent with the Code. There are minor omissions and differences of emphasis, but these are correctable without abandonment of the Concordat. This could happen through the Concordat being amended. That would have to happen by general agreement, led by Government.
- 3.5 Alternatively, if the Concordat is not amended collectively, given that it has force as an agreement and as such cannot be amended unilaterally (other than by statute), it is suggested that what can and should happen on issue of the Code, is that each regulator should:

- look at all its policy statements, including the Concordat, taken as a whole, for compliance with the Code
- make any adjustments necessary, via changes to statements other than the Concordat, but with an eye to the Concordat, so that any shortcomings in it are corrected, and
- such that all its statements collectively spell out a compliant position.

3.6 For that purpose it would be very helpful to have guidance indicating where the BRE considers that the Concordat is less than perfect as a means of stating compliant enforcement policy.

3.7 However, what would be much better is for the Concordat to be revised to ensure consistency with the Code. The two can then complement each other, with the latter as a statutory core Code, and the former as the self-regulatory ancillary Code which goes wider than the Code proper, and thus achieves broader penetration on the basis of agreement rather than statute.

4 DETAILED COMMENTS ON THE DRAFTING OF THE CODE

Section 5

We would suggest an amendment along the following lines (key words highlighted in bold), to remove any risk that section 5.1 might be used to argue that any particular regulator has a duty to ensure that all legal requirements relating to their regulatory activities are promptly communicated regardless of need or other relevant circumstances. The OFT has enforcement responsibilities formally covering all UK businesses in respect of a very wide range of laws and rules of law, most of which are primarily the responsibility of other bodies.

5.1 - Regulators should ensure that all legal requirements relating to their regulatory activities, as well as changes to those legal requirements, are promptly communicated or otherwise made available to **any** relevant regulated entities **which are likely to be significantly affected by those activities**

- 4.1 What is needed is that government and regulators as a whole should ensure that their information is available to business about every legal requirement that can affect business. But the drafting of the Code should clearly avoid any risk of making each regulator equally and severally responsible for providing information about every legal requirement in relation to which it could potentially take action.

Section 7

- 4.2 This part of the Code should apply just to collection of administrative data and should not extend, or at any rate not in the same way, to requests for information made for the purpose of taking (or deciding whether to take) action before a court or tribunal. The latter kind of data request is subject to its own legal controls. The factors listed in bullet points under 7.1 are not relevant to it. Any request for information for the purposes of enforcement action has to be 'necessary' or at least reasonable, in order to satisfy the court or tribunal, yet is unlikely to be

'legally required' since taking enforcement action (and therefore seeking information in order to do so) is itself normally discretionary.

- 4.3 Our concerns arise particularly in relation to provisions on the sharing of information. This should apply to sharing of non-contentious data (business addresses etc) which is both easier for regulators to do, within the law on data protection and disclosure, and also much more acceptable to the subjects of that information than sharing of information relevant to potential/alleged wrongdoing.
- 4.4 This section should in particular not apply to the collection of information under threat of criminal penalty (i.e. where an offence is committed if false information is given, deliberately or recklessly). The OFT is entitled to require information under threat of such a sanction under the Consumer Credit Act and Estate Agents Act. It should not be arguable that an enforcer entitled to make use of such provisions ought to rely on information given to some other body, which will have been given without the operation of that sanction. Also, and in any case, it is highly likely that in any relevant case there will be data protection and/or information disclosure constraints making it difficult for the other enforcer to pass across information of a sensitive nature.
- 4.5 A final point on this section is applicable to the collection of administrative data rather than enforcement information.
- 4.6 In some cases a regulator is required by statute to collect certain kinds of data in certain circumstances. For instance, the OFT is required to collect information from corporate consumer credit licensees under the Consumer Credit Act about changes of company officers. The drafting of s.7(1) of the Code should recognise that in such cases, the regulator should not be required to go through a cost-benefit assessment before collecting the data. That would be a waste of public money.
- 4.7 Hence we suggest redrafting along the following lines (the key words being emphasised in bold):

7.1 When determining any data they may require **beyond the minimum required to be collected by statute**, regulators must undertake an analysis of the costs and benefits of data requests to regulated entities

Section 8

Section 8(3) fails to recognise that not all regulators have powers that would enable them to 'eliminate any financial gain or benefit from non-compliance'; or to 'restore the harm caused by regulatory non-compliance'. The OFT currently lacks powers of that kind in the area of consumer enforcement, particularly in relation to the majority of its powers (for instance under Part 8 of the Enterprise Act 2002) which enable it only to seek civil injunctions to restrain breaches of law, or to accept undertakings in lieu taking of proceedings.

Section 9

- 4.8 There is significant potential in the wording of paragraphs 9.2 and 9.3 to impose an unwarranted burden on the OFT. The OFT agrees targets with the Treasury for its regulatory performance as regards the country and the economy as a whole. Except in the credit and estate agency areas, the OFT's regulatory relationship is with all businesses in the UK, and is a strategic one – it does not involve repeated interventions affecting any individual businesses in a regular way. (In fact, this is also true of our relationship with estate agency businesses – as more generally, the only area in which the OFT is truly a regulator is in its operation of the consumer credit licensing system).
- 4.9 We therefore consider it is inappropriate for the Code to be worded in a way that may imply that we need to develop separate and additional performance targets to those agreed with the Treasury.
- 4.10 Our preference would be for an exemption from paragraphs 9.2 and 9.3 corresponding to that proposed for local authorities. Please note that it is not suggested that the OFT should be exempt from the effect of

paragraph 9 as a whole, and is entirely supportive of the principle that regulators should be accountable.

- 4.11 Alternatively, we would strongly urge an amendment along the lines of, or designed to produce the same effect as, the following (key words in bold):

9.2 Regulators should identify and explain the principal risks against which they are acting. They should, in consultation with regulated entities and other interested parties, set and publish clear standards and targets for the regulator's service and performance in relation to any regulated entities, or groups of regulated entities **with which they have regular dealings as regulators.**

- 4.12 In any event, we would recommend revisiting the third bullet point under 9.2 which refers to 'perceptions of regulated entities'. While it is obviously entirely appropriate for regulators to collect and assess, and take proper account of, such perceptions in setting performance standards, the Code should not be phrased so that regulated entities could expect that their perceptions will directly determine the standards that drive what the regulator does. The regulators have statutory duties to enforce legislation and are answerable for their use of public money in so doing, whereas regulated entities naturally want as much resource as possible devoted to meeting their concerns rather than carrying out statutory purposes - the Code must not feed unrealistic expectations on that score.

5 CONSULTATION QUESTIONS ON THE LISTING ORDER FOR THE COMPLIANCE CODE

- 5.1 Question 1. We would welcome your comments on the coverage of the Compliance Code, i.e. the regulatory functions that it applies to. Are there regulators or regulatory functions carried out by any regulator that should be included in or excluded from the scope of the Code? (Please see paragraph 39 of the Consultation Document for background explanation).
- 5.2 We are content for the Code to apply to the enforcement functions of the OFT other than its competition functions. We are concerned, however, at the proposed wording in the Listing Order which does not achieve the intended effect. The draft Order proposes the following -
- ...functions to be subject to the code... All regulatory functions of the OFT, except those relating to the Competition Act 1998 and to the competition functions under the Enterprise Act 2002 (Parts 3, 4, 6 and 7).
- 5.3 Our concern is that the OFT derives certain of its competition functions from other statutory sources – for example the Financial Services and Markets Act 2000, the Fair Trading Act 1973, EU Regulation 1/2003 the 'Modernisation Regulation' and importantly Part 1 of the Enterprise Act 2001. A number of functions also arise under statutory instruments made under the primary legislation. We would seek amendment to the proposed wording so as to ensure that none of the OFT's competition functions are inadvertently left outside the exclusion. Perhaps it would be best to specify the competition functions of the OFT generally and then, if it is felt desirable, to refer to the Competition Act 1998 and the Enterprise Act 2002 as particular examples. This approach would have the additional advantage of avoiding the need for amendment to the Listing Order in the event of additional functions being conferred on the OFT by future legislation.

6 CONSULTATION QUESTIONS ON THE APPLICATION OF THE FIVE PRINCIPLES

- 6.1 Question 1. Do you agree that the five Principles should apply to the same regulators as the Compliance Code? Please support your answer with reasons.
- 6.2 We accept that the 5 Principles should apply to the OFT in exercise of its consumer functions.
- 6.3 Question 2. Do you think the five Principles should apply at the general and individual levels or at the general level only?
- 6.4 We are not aware of a reason, at any rate in relation to the OFT, for the Principles applying at only the general level.
- 6.5 Question 3. If you think the Principles should apply at the general level only, should this be in respect of all or some of the regulators listed; if to some, please tell us which and why.
- 6.6 Not applicable
- 6.7 Question 4. If any regulator seeks an exemption from the duty to have regard to the section 21 duty in respect of any individual level function, we would welcome evidence that supports the case for making that exemption (please see paragraphs 40 to 45 of the Consultation Document).
- 6.8 Not applicable