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Date	29 September 2010	Email	rebecca.lyon@oft.gsi.gov.uk

Dear Steve,

OFT response to BIS consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-term Holiday Products, Resale and Exchange Contracts

The Office of Fair Trading (OFT) is the UK's competition and consumer authority. Our mission is to make markets work well for consumers. Our goal is for competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation.

We welcome the opportunity to respond to the BIS consultation on the Proposed Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2011. We are supportive of these regulations and agree that a complete replacement of the current regime will make the legal position easier to understand.

OFT research on the impact of mass marketed scams found that bogus holiday club scams cost the UK public an estimated £1.17 billion each year, with a mean loss of £3,030 per victim. On this basis we are pleased that the scope of the regulations is such that products such as these, as well as 'timeshare like' products, such as timeshare in canal boats, are included.

Our response focuses on points of clarity and definition and includes the following key points:



Introduction of criminal offences

We believe that criminal offences should be included as part of a range of tools under these regulations. Having a range of possible responses to unfair business behaviour is essential in order for enforcers to respond proportionately to the detriment caused by such behaviour.

We believe that criminal sanctions are appropriate for the worst breaches of competition and consumer protection law and should be available for use in respect of breaches of all the regulatory proposals that BIS suggest may be subject to such action.

Civil sanctions

We believe that civil sanctions, once tested in the proposed BIS Civil Sanctions Pilot, may prove to be an effective complement to criminal sanctions.

We suggest that it may be appropriate for BIS to consider introducing standard criminal penalties as an interim solution at this stage, with a duty to review after a suitable period to allow for completion of the civil sanctions pilot, and an order-making power to replace and/or supplement these penalties with civil sanctions at that point.

Enforcement

We are concerned that the OFT is not currently listed as an enforcer in the regulations as we would wish to maintain our existing enforcement role under the current regime. We have raised this concern with colleagues at BIS but want to stress the importance of regulation 31 being extended to include the OFT as an enforcer.

If you have any questions in relation to our response, please do not hesitate to get in touch.

Yours faithfully,

Rebecca Lyon

Policy Group

The Proposed 'Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2011'

Consultation Response Form

A copy of the consultation available at: <http://www.bis.gov.uk/consultations>

Responses to the Consultation to be received by Friday 1 October 2010

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Please tick the box from the following list of options that best describes you:

<input type="checkbox"/>	Small to Medium Enterprise
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<input type="checkbox"/>	Big Business
<input type="checkbox"/>	Local Government
<input checked="" type="checkbox"/>	Central Government
<input type="checkbox"/>	Other (e.g. consultant or private individual)

Question 1: Do you agree with our policy decision to repeal the Timeshare Act 1992 as amended and replace it with new implementing regulations in order to simplify the UK legislative regime for traders and consumers? Please explain your reasons.

Comments

Yes, we agree that this makes sense. The current regime is complicated due to amendments made over time and adding additional legislation to the existing legislation would make the fragmented position worse. We consider that a complete replacement will make the legal position easier for traders, enforcers and consumer bodies to understand.

Question 3: Do you have any comments on the application of the Regulations as set out in regulations 5 & 6?

Comments

The application of these regulations is suitable. We support the extension of scope to increase protection for consumers by covering the sale of a range of holiday accommodation contracts.

OFT research on the impact of mass marketed scams¹ found that bogus holiday club scams cost the UK public an estimated £1.17 billion each year, with a mean loss of £3,030 per victim. This illustrates the importance of including such holiday accommodation contracts within the scope of the regulations.

Question 4: Do you agree that all current timeshare models would be caught by the definition included at regulation 7? Please provide examples of timeshare types where you have doubts that they would be covered.

Comments

Yes. We believe that reducing the timeframes from a three year minimum to 'more than one year' and not limiting the definition to fixed properties will effectively ensure that 'timeshare like' products, such as timeshare in canal boats, are covered.

We are supportive of the inclusion of definitions for different contract types (regulations 7-10) and that the regulations consider these together

¹ OFT *Research on impact of mass marketed scams*, December 2006 (OFT883)

as 'regulated contracts'.

Question 5: Do you agree that, in regulation 7, we do not need to include *the right to participate in arrangements under which a person may use accommodation*? Please provide examples of arrangements for acquiring rights in timeshares where you have doubts that they would be covered unless this wording was added to the definition.

Comments

We agree that 'acquires the right to use' will suffice as a replacement for 'the right to participate in arrangements under which a person may use accommodation'.

Question 6: Do you have any comments on the clarity of the requirements relating to key information and language of the material included at regulation 12?

Comments

Article 4(2) of the Directive requires that key information is provided free of charge. This does not seem to be reflected in the regulations.

Question 7: Do you think that the requirements with regard to use of the standard information forms are clear? (regulation 13). If not, please explain why.

Comments

Yes, these requirements are clear.

Question 9: Do you have any comments on the requirements of the advertising and marketing rules as set out in regulation 14?

Comments

The wording in regulation 14 is narrower than that used in the directive and as such we think it could be broader.

The current wording 'an opportunity to enter' could be problematic as traders could claim that they were advertising something else. We would suggest that replacement wording, such as 'in relation to regulated contracts', would be more suitable – that is 'A trader must not advertise in relation to regulated contracts unless the advertisement...'.²

We have taken a number of cases in this area, where consumers have, for example, been led to attend events on the basis that they would receive a free holiday by attending – in fact the 'free holiday' was subject to admin fees being paid².

Question 11: Do you agree that if we conclude that a criminal offence is proportionate in relation to non-compliance with regulation 14(1) the defence outlined above should be available as a reasonable balance? If not, please explain why.

Comments

Yes, the outlined defence seems appropriate.

Question 12: Do you think that the wording of the requirements in regulation 15 is sufficiently clear? If not, please explain why.

Comments

² See OFT press releases [74/05](#), [213/04](#), [23/04](#), [02/04](#), [121/03](#)

Article 5(1) of the directive requires the contract to be in writing, on paper or another durable medium. While regulation 15 requires the contract to be in writing there is no mention of 'durable medium'. For clarity, we would suggest that the regulations are amended to reflect the wording of the directive.

Question 15: Do you agree with our implementation of the options in relation to Regulation 17? Do you consider the benefit to consumers outweighs the burden on traders? Please provide reasons for your answer.

Comments

Yes. We agree that the contract should always be supplied in English (in addition to any other language in which it is drawn up) where the consumer is resident in the UK or the trader carries out sales activities in the UK.

We believe this would be useful for consumers who may need to seek advice from a UK advisory agency, and should assist in the processes within a UK court should there be a dispute.

Question 18: Do you have any comments on the rights of withdrawal? (regulations 20 and 21)

Comments

We suggest that 'conclusion of the contract' needs to be defined. In our response to the BIS consultation on the proposed Consumer Rights Directive (February 2009) we made the point that "a key aim of the review of the acquis was to achieve consistency in terminology but some key concepts such as 'the conclusion of the contract' are not clearly explained. If left undefined the point at which the contract is concluded will depend on local laws which could lead to differing implementation of the CRD across the community and a new layer of barriers to cross-border trade".

We recognise that the term is not defined in the Timeshare Directive and therefore different member states can adopt different interpretations. However, we still believe that the term should be defined in the UK as we know, from practice, that this phrase can be confusing to both traders and consumers. It is our assumption that the 'conclusion of the contract' is when it becomes binding rather than when it has been fully performed

but this needs to be clarified.

It should also be made clear that all time periods refer to calendar days (rather than business days) as outlined in Article 6(1) of the Directive. At present this is only specified in the withdrawal forms but it should be stated up front in the regulations.

Question 19: Do you have any comments on the provisions for exercising the right of withdrawal? (regulation 20)

Comments

Article 7 of the directive requires the consumer to notify the trader of their decision to withdraw on paper or on another durable medium. The wording of regulation 20 is narrower than this and does not, in our view, adequately reflect the requirements of the directive. The current wording could cause confusion as to what the consumer actually has to do. For example, it is not clear whether an email would be acceptable under this provision.

Question 20: Do you have any comments on the consequences of exercising the right of withdrawal? (regulation 22)

Comments

We are supportive of the right of withdrawal taking effect from the day the consumer sends their notice and that the consumer is not liable for any costs or charges.

Question 21: Do you have any comments in relation to automatic cancellation of related credit agreements? (regulation 23)

Comments

Article 11 of the Directive provides that where the consumer exercises the right to withdraw from a regulated contract, any ancillary credit agreement is automatically terminated at no cost to the consumer. This is consistent with Article 15 of the Consumer Credit Directive which provides that where the consumer has exercised a right of withdrawal, based on Community law, concerning a contract for the supply of goods

or services, he shall no longer be bound by a linked credit agreement.

The wording of Article 11 indicates that no interest or other credit charges may be payable by the consumer, however, we question whether regulation 23(2) is sufficient for these purposes. In our view, the regulations should expressly provide for the reimbursement of any money paid by the consumer under the credit agreement. They should also provide for the repayment of any credit advanced to the consumer under the agreement.

There is a model for this at regulation 11 of the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008, as amended. In particular, this provides that where a related credit agreement is cancelled under those regulations –

- (a) the trader must, if he is not the same person as the creditor under that agreement, immediately on receipt of the cancellation notice inform the creditor that the notice has been given;*
- (b) any sum paid by or on behalf of the consumer in relation to the credit agreement must be reimbursed, except for any sum which would have to be paid under sub-paragraph (c);*
- (c) the agreement shall continue in force so far as it relates to repayment of the credit and payment of interest in accordance with regulation 12, but shall otherwise cease to be enforceable; and*
- (d) any security provided under the related credit agreement shall be treated as never having had effect for that purpose and the creditor must immediately return any property lodged with him solely as security for the purposes of the related credit agreement.*

A slightly different model is in section 66A of the Consumer Credit Act 1974, as amended. This provides that where the consumer withdraws from a regulated credit agreement, any ancillary service contract shall be treated as if it had never been entered into. The creditor is required to notify any third party ancillary service provider without delay of the fact that the consumer has withdrawn from the credit agreement. The consumer is required to repay to the creditor any credit provided under the agreement, and must do so without undue delay and no later than the end of the period of 30 days beginning with the day after the day on which the notice of withdrawal was given (and if not paid by the end of that period may be recovered by the creditor as a debt).

We therefore suggest that regulation 23 should make it clear that:

- if credit has been advanced to the consumer, it must be repaid without undue delay and in any case within 30 days
- the credit agreement is treated as if it had never been entered into (and so for example any record placed on a credit reference agency file in relation to the agreement must be removed)
- any ancillary service contract relating to the credit agreement is similarly treated as if it was never entered into
- any sum paid by or on behalf of the consumer must be reimbursed without delay (unless the consumer elects to deduct the sum from any credit repayable under the first bullet)
- notification to any third party creditor must be done immediately on receipt of the cancellation notice.

Question 23: Do you have any comments on the clarity of the requirements and prohibitions on payment set out in regulations 25 and 26?

Comments

The requirements and prohibitions relating to payment seem to be sufficiently clear.

Question 27: In general, do you consider that we need to introduce and maintain criminal offences for breach of the regulatory proposals to tackle problems in this sector? Please provide reasons for your answer

Comments

Yes. We believe that it is vital to maintain (and where necessary, introduce) criminal offences as part of a range of tools. Having a range of possible responses to unfair business behaviour is essential in order for enforcers to respond proportionately to the detriment caused by such behaviour. It is therefore important that there is a range of sanctions available, not just a range of tools, as the deterrent will come from the possible sanction rather than whether criminal offences are available. In the majority of circumstances informal discussions should be sufficient to end problematic practices, but civil and criminal enforcement routes

should be open to enforcers if and when formal action is needed.

We believe that criminal sanctions are appropriate for the worst breaches of competition and consumer protection law and should be available for use in respect of breaches of all the regulatory proposals that BIS suggest may be subject to such action (regulations 12, 14(1)-(3), 15(8), 16, 17, 18, 23(3), 25(3)-(5), 26(1)-(4)). Criminal sanctions are most likely to be suitable where consumers are harmed or are likely to be harmed by the following behaviours:

- Deliberate and/or reckless illegal behaviour
- Avoidance of compliance (for example, by refusing to enter into dialogue with enforcers, or taking deliberate steps to avoid detection)
- Fraudulent behaviour
- Aggressive behaviour
- Recidivist/persistent illegal behaviour
- Total disregard for the law and/or for consumers

We note that the recent Law Commission consultation 'Criminal Liability in Regulatory Contexts' recommends a general principle that criminal sanctions should be reserved for wrongdoers who have engaged in 'seriously reprehensible conduct'. The Law Commission believe that the Regulatory Enforcement and Sanctions Act 2008 should be sufficient for the majority of offences, given that two step prohibitions can be implemented, that is the first step would be to issue a stop notice or civil penalty, with criminal offences only issued if there was a breach of the first step.

However, we believe it is likely to be more expensive for the taxpayer to follow this proposed civil-criminal route, as the majority of local rogue traders are not effectively constrained by the injunctive regime and enforcers will, therefore, need to go to court twice to deal with the same offence. As a result there is likely to be higher enforcement costs, higher losses and detriment for consumers, and the penalisation of honest businesses by criminals who will undercut them.

Although resources could be shifted into civil enforcement this does not remove the need for criminal prosecution in the very worst cases. We agree with the desire to increase the use of civil sanctions and reduce

reliance by enforcers on criminal prosecutions where appropriate. However, we recognise that some offences will require intervention via criminal enforcement, even for a first offence. Use of this option must be viable but chosen only when clearly appropriate.

Strong arguments have previously been made for criminal sanctions to be a part of the regulatory toolkit by Macrory³ and also by the OFT when implementing the Unfair Commercial Practices Directive 2005. Such arguments should be considered under the proposed regulations as the sort of rogue traders found in this sector share many characteristics with fraudsters and will not take civil penalties seriously. Criminal offences are required to act as a deterrent.

The existence of criminal offences is also often essential to gain third party co-operation in ending unacceptable practices. For instance, a mailing business distributing material promoting illegal practices in the sector may be unwilling to cooperate purely to facilitate civil enforcement, but is more likely to cooperate with enforcers where an offence exists, partly because they may face liability but also because their own policies will prohibit their participation in crime. This is also true of third parties on the internet, such as service providers, who have been more responsive to enforcer requests where offences exist.

Given that criminal offences exist for issues and problems in other sectors and for a wide number of generic practices, as listed in the CPRs, it would be sending the wrong signal to not provide for criminal offences in this sector. In the worst case, this might encourage more criminals to shift to the sector, which is the opposite intention to the legislative changes.

Question 28: Do you consider that any of the specific activities to be regulated under the new regulations might already be covered under existing consumer protection legislation? If so, please provide reasons for your answer and details of the existing consumer protection and where it applies.

Comments

Overall, we consider the correct legislative approach is to provide over-

³ Macrory, R *Regulatory Justice: Making Sanctions Effective*, November 2006

arching general principles (such as those included in the CPRs) and specific method of sale protections (such as those in the Doorstep Selling regulations), while also ensuring that specific sectors (such as, Timeshare and Package Travel) are subject to more detailed rules. Such legislation effectively replaces any relevant more general provisions. This is sometimes known as the principle of 'lex specialis' - that the specific law replaces the general if the two conflict.

As all these pieces of law emanate from European legislation, it seems clear that the legislative intent was for them to complement one another in order to ensure adequate protection for consumers and fair-dealing businesses in this complex and problematic sector. We, therefore, believe the existence of potentially overlapping provisions in pre-existing Community law should not reduce the need for effective sectoral protections as provided for in the draft Timeshare regulations.

Question 29: Do you consider that the introduction of civil sanctions, (such as the ability to seek formal undertakings from business; to apply stop orders backed-up with possible criminal prosecution for non-compliance; and to ensure consumers are compensated by the trader for the effects of non-compliance) rather than criminal offences would provide a proportionate and effective deterrent? (civil sanctions would only become a viable option when and if there is an adequate framework of inspectors with sufficient powers). Please provide reasons for your answer.

Comments

We believe that civil sanctions, once tested in the proposed BIS Civil Sanctions Pilot, may prove to be an effective complement to criminal sanctions. We do not, however, currently support the introduction of civil sanctions as an alternative to criminal sanctions. As discussed in our response to Q27, we believe that criminal sanctions should be available to deal with the worst offenders.

As regards the ability to seek formal undertakings or injunctive relief by way of an enforcement order, enforcers could use Part 8 of the Enterprise Act 2002. However, there is no scope for seeking compensation on behalf of consumers within the Enterprise Act.

The Civil Sanctions Pilot, however, includes a number of options and we believe that the proposed enforcement undertakings route is likely to be most effective if it is introduced alongside other civil sanctions, such as

the wide package of measures included in the proposed discretionary requirements. Discretionary requirements include the power to order restitution to consumers, which we believe will act as a deterrent to businesses considering whether or not to break the law. Without this, enforcers will have no ability to order restitution, only to request it, which may not have the desired effect.

Following the recent Law Commission consultation 'Criminal Liability in Regulatory Contexts' we recognise the likely move away from routine use of criminal procedures in the regulatory sector. We suggest that it may be appropriate for BIS to consider introducing standard criminal penalties as an interim solution at this stage, with a duty to review after a suitable period to allow for completion of the civil sanctions pilot, and an order-making power to replace and/or supplement these penalties with civil sanctions at that point.

Question 30: Do you agree that culpability as set out in Regulations 28 and 29 are appropriate given the nature of the regulated contracts and the sales practices associated with them? Please explain your reasons.

Comments

Yes, we agree that the culpability set out in regulation 28 and 29 is appropriate and we welcome the attempts to make this issue clearer than it is in the current statutory regime.

Question 31: Do you agree that the availability of the defence set out in regulation 30 is appropriate to the offences included in the Regulations (and to any offences that may subsequently be included in the Regulations)? If not please explain why.

Comments

Yes, we agree that the availability of the defence set out in regulation 30 is appropriate to the offences included in the regulations.

Question 32: Do you consider the powers included at regulation 32 are appropriate and proportionate in relation to the enforcement of any subsequent criminal offences which might apply in these Regulations?

Comments

Yes, we consider the powers to be appropriate and proportionate.

Question 33: Do you consider the provision of the offence at Regulation 33 is reasonable? If not, please provide reasons.

Comments

Yes, this provision seems reasonable.

Question 34: For enforcers: What would be the impact on you of the proposed Regulations if applicable criminal offences were identified or introduced at the points where they are discussed above? Where possible, please provide supporting evidence including:

- estimates of any additional costs and benefits associated with familiarisation with the proposed Regulations;
- any increase/decrease in workload resulting from the increased scope of the proposed Regulations, for example ease of prosecution or other enforcement activity under the new regime as compared to possible activity under other statutes;
- benefits from replacing the old complicated Act and Regulations with a single set of regulations;
- and, any increase/decrease in the overall annual cost of enforcement (taking into account the level of enforcement in the UK).

Comments

We do not believe that the introduction of criminal offences would be a burden to our enforcement work. We already have some experience of using criminal sanctions and believe that any additional powers coming from these regulations would add strength to our existing toolkit, including powers under the Enterprise Act 2002 and the CPRs. We prioritise enforcement cases according to consumer detriment and so

would take cases under these regulations when they meet our prioritisation criteria.

There would, of course, be some costs involved in familiarising ourselves with the regulations but we believe the benefits of having an appropriate toolkit would far outweigh these costs.

Question 35: Are the provisions in Regulation 34, relating to civil proceedings clear? If not, please provide reasons.

Comments

It is not clear from regulation 34 that consumers have the right to take private civil action for breach of the regulations. Given that regulation 34 is aimed at consumers, we think that the scope of the regulation needs to be made clearer so that consumers will understand its application.

Question 36: Do you agree with the amendments relating to enforcement and saving of the implementing Regulations? If not, please explain.

Comments

Yes, we agree that the implementing regulations should be covered by the Enterprise Act 2002 and the existing statutory regime should be saved so that action can be taken for offences committed up to the date that the new law comes into force.

Question 37: Do you have any suggestions as to how the draft Regulations might be improved so that they are least burdensome to business while still including provisions which implement all of the requirements in Directive 2008/122/EC (Annex C)? If so please, provide details

Comments

It would seem appropriate for all definitions to be included at the outset. This would make it simpler to navigate as readers can currently switch between three regulations before finding a definition. Where possible the definitions should also be consistent with those used elsewhere.

Question 38: Do you have any further comments on the draft Regulations?

Comments

We have a couple of further comments on the regulations:

- The OFT is not currently listed as an enforcer in the regulations. This is of great concern to us as we are an existing enforcer under the current regime, as well as holding an enforcement role under the CPRs and being involved in the civil sanctions pilot, both of which have links to the draft regulations. We have raised this concern with colleagues at BIS but want to stress the importance of regulation 31 being extended to include the OFT as an enforcer.
- The OFT is committed to working with BIS on improving standards in the industry by working with code owners in this field. We want to continue to engage with BIS and the industry on compliance and how best to deliver what Article 14 requires.

Question 39: If you are an enforcement agency or an organisation that compiles statistics relating to UK consumer complaints, please provide any quantifiable evidence that shows the current number of UK consumer complaints and the associated losses/detriment with regard to the purchase of:

- (a) Timeshare sales
- (b) Long term holiday products
- (c) Resale
- (d) Timeshare exchange

Comments

The following statistics, taken from the Consumer Direct database for the calendar year 2009, relate to consumer complaints/enquiries for Great Britain. Please note that complaints to Consumer Direct are unverified and all enquiries are classified alongside complaints. We do not have data on the associated losses/detriment or any statistics relating to timeshare exchange.

- Timeshare sales: 1222 complaints
- Timeshare resale: 1706 complaints
- Holiday Clubs: 1665 complaints

Although the complaints relate to a variety of different issues, verbal misrepresentation accounted for the highest number of complaints in each category. Other issues receiving a large number of complaints across all categories were substandard services, unfair business practice and customer service.

Question 40: If you are an enforcement agency or an organisation that compiles statistics relating to UK consumer complaints, please provide your view of the likely reduction in the number of UK consumer complaints and the associated losses/detriment likely to result from businesses' compliance with our proposals with regard to:

- (a) Timeshare sales
- (b) Long term holiday products
- (c) Resale
- (d) Timeshare exchange

Comments

Consumer complaints in this area have been a longstanding issue for the OFT, particularly given developments in the industry. As the new regulations go beyond existing legislation and cover holiday clubs, timeshare resale and exchange as well as traditional timeshare products, we would expect the number of complaints to decrease, provided there is adequate business compliance.

Question 47: Do you think that the proposed Regulations are likely to limit or increase the ability of traders to compete? If so, please explain your reasons and where possible, provide supporting evidence

Comments

It is possible that the regulations could have a positive effect on competition. We believe that markets work well when there are efficient interactions on both the demand (consumer) side and the supply (firm) side. On the demand side, confident consumers activate competition by making well-informed and well-reasoned decisions which reward those firms who best satisfy their needs. On the supply side, vigorous competition provides firms with incentives to deliver what consumers want as efficiently and innovatively as possible. When both sides function well, a virtuous circle is created between consumers and competition. However, when either side fails the virtuous circle breaks down.

In order for the demand side to work well consumers need to be able to access, assess and act on relevant information:

- access information about the various offers available in the market
- assess these offers in a well-reasoned way, and
- act on this information and analysis by purchasing the good or service that offers the best value to the customer.

These regulations are aimed at improving consumers' ability to access and assess crucial information. If they improve the working of the consumer side, this should force firms to react and improve the competition side. If consumers are unable to assess and act on the information, the positive impact on competition will not be delivered.