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Dear Mr Clayton

OFT response to BIS Discussion Document “Transforming Regulatory Enforcement: Freeing Up Business Growth”

The OFT welcomes the opportunity to respond to this consultation. The OFT is a non-ministerial government department whose mission is to make markets work well for consumers. We support the development of competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered in making choices, business is not disproportionately burdened by government regulations and firms are encouraged to offer benefits to consumers beyond the protection afforded by law. We recognise that not imposing unnecessary burdens is particularly important in a time of economic uncertainty.

The OFT's functions include:

- enforcing consumer law
- enforcing competition law and merger control
- researching and publishing market studies
- making market investigation references to the Competition Commission
- exercising a consumer credit licensing role under the Consumer Credit Act (CCA)
- supervising anti-money laundering compliance by consumer credit and estate agency businesses
- advising Government and carrying out wider advocacy work
- providing information to businesses and promoting consumer education
- supporting the provision of advice to consumers via Consumer Direct, and
- encouraging industry codes and self-regulation.



Most of these functions do not fall within the scope of legislation controlling the exercise of regulatory functions¹. However, clearly a significant number of them, even if they are not strictly regulatory in nature, represent alternatives to regulation. Hence the OFT has a real interest in the subject matter of this discussion document.

Although many of the numbered consultation questions are directed primarily towards businesses, the document contains some important policy issues on which we have comments which we hope will be useful.

Distinctiveness of general consumer fair trading law

The OFT's main regulatory interventions involve enforcement of general fair trading law. We should first make a general point about the nature of these interventions. Our work is strategic, driven by market analysis and evidence - particularly complaint evidence - and targeted on the basis of published prioritisation principles. It is not based on inspections or routine information returns, and as a result it creates no routine burdens on business. This is also broadly true for sectoral and local enforcement of the same laws by other agencies including Trading Standards Services. For these laws the default is therefore already set at an assumption of compliance –the time and effort that businesses invest in achieving compliance is acknowledged in that they are trusted and left to deal with their customers as they think fit except where there is actual evidence of non-compliance. The approach is considerably different from most of the regulatory activity on which the discussion paper concentrates.

General principles (Q1, Q2, Q15)

We agree that frontline delivery of enforcement should be underpinned by principles of accountability, recognising and promoting best practice, and transparency.

We consider that transparency is especially important to good regulation, not least because it is essential to the achievement of accountability in practice. The OFT accordingly places particular emphasis on transparency in its work². For the purposes of consumer enforcement, we publish a Statement of Enforcement Principles on our website.³ This document provides a full explanation of our approach to enforcement. We consider that reviewing and updating – as well as just publishing - enforcement policies is an important element of compliance with the principles of good enforcement.

We agree that engaging businesses with local regulatory delivery is also important to improving regulatory services. To ensure effective outcomes, we think it is also important

¹ In particular, competition functions are excluded, see for instance Legislative and Regulatory Reform (Regulatory Functions) Order 2007 and Regulatory Enforcement and Sanctions Act 2008 s.73(2). See OFT's 2009 Simplification Plan, OFT 1067, particularly Chapter 2 on "The OFT and Regulation". http://www.offt.gov.uk/shared_offt/529862/offt1067.pdf

² See OFT transparency statement <http://www.offt.gov.uk/about-the-offt/accessing-information/transparency/offt-transparency-statement/>

³ Statement of Consumer Protection Enforcement Principles, March 2010, updated from Dec 2008. See <http://www.offt.gov.uk/OFTwork/policy/policy/statement-consumer-enforcement>

to include local stakeholders who represent consumers and the general public, as they too are customers of those services

We also see value in the other principles of better regulation as set out in the Legislative and Regulatory Reform Act and the Regulators' Compliance Code, such as enabling economic progress, risk-based resource allocation and proportionate sanctions for persistent breaches. While it is appropriate to emphasise different principles at different times depending on the problems in particular sectors, it is also important to give a consistent message to businesses, enforcers and other stakeholders regarding the principles of better regulation.

Sector-based reviews (Q9)

The OFT would be keen to provide input to the sector-based reviews of enforcement and the regulatory landscape. We have substantial experience of reviewing and advising on regulation and its impact on the functioning of markets.

Co-regulation (Q18)

We think that there is undoubtedly scope to increase the number of co-regulatory arrangements.

The 'established means' provisions built into the Consumer Protection from Unfair Trading Regulations (CPRs)⁴ are a working mechanism for recognising industry schemes for compliance in the area of fair trading law. Under these arrangements the Advertising Standards Authority and PhonepayPlus have a long-standing record of managing compliance and non-compliance in their sectors with the agreement of the OFT. The OFT publication 'Compliance Partnerships'⁵ sets out our approach to using established means. In addition, we have developed the Consumer Codes Approval Scheme (CCAS) to implement the Enterprise Act provisions for the OFT to promote good business practice⁶. The scheme provides a positive incentive for compliance and a channel through which trade bodies can develop ways of managing business compliance as 'established means'.

The advantage of both the established means mechanism and CCAS is that they operate nationally and across whole sectors, providing consistency between localities, premises and firms.

We agree that it would make sense to extend the Regulators' Compliance Code to require regulators to consider co-regulatory approaches and to work with business to find the most effective way of managing compliance - this would correspond to the statutory obligation to consider established means when enforcing the CPRs.

⁴ Consumer Protection from Unfair Trading Regulations 2008:

19. (4) In determining how to comply with its duty of enforcement every enforcement authority shall have regard to the desirability of encouraging control of unfair commercial practices by such established means as it considers appropriate having regard to all the circumstances of the particular case.

⁵ July 2009. See <http://www.oft.gov.uk/about-the-oft/partnership-working/partnership-working-info/compliance>

⁶ Enterprise Act 2002. s8

Professional standards (Q20-22)

We agree that enforcers could usefully work jointly with trade associations, accreditation and professional bodies on common sets of voluntary standards and on providing clear and easily understood guidance and advice, also jointly produced. The OFT has long experience of working with businesses and their representatives to produce guidance, advice and practical compliance tools and we would welcome the opportunity to share it with BRE and other enforcers.

Professional standards in some sectors are important for public reassurance and business confidence. However, we would draw attention to the risk that established businesses can use a standards-setting mechanism as a means to make it more difficult for others to enter the market and compete effectively with them, by setting unnecessary or excessively demanding requirements. Indeed, if the total effect of earned recognition, co-regulation and jointly designed standards were to make the regulatory burden on established businesses systemically lighter for established businesses than for new entrants to the market, then that would stifle innovation and conflict with the overall and fundamental aim of freeing up business resources to support business growth.

Assured guidance (Q23)

We recognise and support what we understand to be the ultimate aims of this proposal: promoting compliance by supporting prevention rather than cure; recognising genuine efforts to keep to the law; avoiding disproportionate actions; providing business with clear practical guidance on the law to give them confidence in their approach to compliance; and tailoring interventions to support future compliance rather than simply seeking to punish. Those aims are incorporated in the OFT's Statement of Enforcement Principles. Moreover, the approach is built into the architecture of the Enterprise Act which sets out a consultative approach to dealing with businesses that have possibly breached the law and a civil enforcement route whose main tools are undertakings and injunctions to comply with the law. This enables criminal enforcement to be reserved (certainly in terms of OFT's practice) for more serious and persistent breaches. Thus the existing framework for fair trading law enforcement is already aligned with the aims described.

Assured guidance, however, may be a difficult concept to apply to the enforcement of general consumer fair trading law. As we understand it, assured guidance would provide businesses with a 'safe harbour' from enforcement action providing they can demonstrate that they have followed the steps outlined in the guidance. This makes clear and compelling sense where regulators have power either to make rules or to interpret them in a authoritative way, for instance by issuing binding guidance. The OFT has no such power, nor do its co-enforcers taking action under the laws referred to above. Such action can be taken only through court or tribunal proceedings⁷, and final decision as to what the law

⁷ In the case of the Consumer Credit Act 1974 and the Estate Agents Act 1979, the OFT has power to take certain decisions of its own motion, but these are subject to involve an automatic right of appeal to an independent tribunal which is not bound by OFT or any guidance it issues.

requires is invariably reserved for the relevant court or tribunal. Therefore enforcers such as the OFT are simply not in a position to offer guidance that can be treated as legally assured.

They can do two things which are helpful to business:

- they can provide advice and explanatory guidance, focusing on what is likely to minimise the risk of an adverse court or tribunal finding - but this can only be at most persuasive in formal proceedings
- they can be transparent about their own enforcement appetite and priorities, indicating the kinds of cases in which they do not expect to intervene. However, legally they cannot bind themselves in the exercise of statutory discretions, and in most cases⁸ legislation has multiple enforcers and no one enforcer can issue guidance that binds any other.

In any case, it should be stressed that there is a tension between the objective of providing assured guidance to traders and the objective of avoiding complex and prescriptive legislation in favour of flexible provision that is capable of being applied to a broad range of situations and particularly to new and emerging practices. Recent fair trading law such as the CPRs and the Unfair Terms in Consumer Contracts Regulations (UTCCRs), and certain earlier legislation such as the licensing provisions of the Consumer Credit Act takes a broad, principles-based approach⁹. It is hard to see how it could (even by a legislative department with the power to make binding rules) be reduced to a simple set of steps which could provide a safe harbour for business without leaving consumers vulnerable to harm, especially harm that emerges from new business models and changes in business practice, including practices specifically designed to circumvent the law. In other words, either its scope would be too narrow to be useful to business or it would risk lowering consumer protection. Furthermore all recent general fair trading legislation originates at EU level, and any attempt to simplify or provide exemptions from it would need to be carefully considered from the point of view of national treaty compliance.

The OFT provides extensive guidance for businesses to help them understand the requirements of the CPRs, UTCCRs and other consumer law including in the credit and estate agency sectors¹⁰. The guidance is of necessity illustrative and explanatory, rather than prescriptive in nature, as the OFT has no power to issue legally binding guidance. For the same reason it does not and cannot prescribe detailed compliance processes.

⁸ All legislation other than the licensing and requirements regime of the CCA and similar 'negative' licensing provisions in the EAA.

⁹ A broad approach to assessing traders' 'fitness' is required by both the credit licensing and estate agency legislation enforced by the OFT.

¹⁰ See, for example, Guidance on the Consumer Protection from Unfair Trading Regulations 2008, OFT 2008 (jointly with BIS) http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf and Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999, OFT September 2008 http://www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/oft311.pdf and http://www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/oft311annexes.pdf

Safe harbours from enforcement of general consumer law created by individual enforcers could also lead to inconsistencies, as practices that would be pursued in one setting would not be in others. This is particularly important while the CPRs are relatively new and few court precedents have been established, making them vulnerable to potentially differing and unhelpful interpretations by different enforcers. The potential for inconsistency would also be compounded, as recognised in the discussion paper, where there are private rights of action.

Our conclusion therefore is that for general consumer law prohibiting unfair trading, the formal use of assured guidance as described in the discussion paper is unlikely to be possible for the OFT itself or for fellow enforcers. It may carry risks of reducing consumer protection and creating inconsistency for business, and would cut across existing legal mechanisms for supporting business compliance.

If you have queries about any of these points we would be happy to discuss them further.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'C. Brown', with a long horizontal flourish extending to the right.

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Goods and Consumer Group