



**THE UNFAIR COMMERCIAL
PRACTICES (UCP) DIRECTIVE**

Summary of Responses to
the Consultation on
implementing the EU
Directive on Unfair
Commercial Practices and
Amending Existing
Consumer Legislation

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IMPLEMENTING THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE (2005/29/EC) AND AMENDING EXISTING CONSUMER LEGISLATION

RESPONSES TO CONSULTATION PAPER

Introduction

The DTI issued a consultation paper in December 2005 seeking views on implementing the EU Directive on Unfair Commercial Practices and amending existing consumer legislation.

The closing date was 8 March 2006. 69 responses were received in total. These included consumer bodies, businesses and business organisations, trading standards departments, regulators, professional institutions and academics.

A list of respondees is attached at Annex A. Copies of the original responses are available on request. Please contact Peter Deft on 0207 215 0341 or via email at peter.deft@dti.gsi.gov.uk for further information.

The DTI is grateful to respondees for their time and thought. Views expressed are being carefully analysed and will help inform the UK's approach to implementing this Directive. This will be set out in the forthcoming Government Response to the consultation paper, which we expect to publish over the summer.

Executive Summary

The consultation paper sought views in relation to three areas:

- Interpretation
- Enforcement
- Simplification of existing legislation

The main themes emerging from responses were as follows:

Interpretation issues

- Broad agreement with the DTI view on most definitional questions. Some business respondents queried whether the "professional diligence" test also applied to the specific categories of misleading and aggressive practices (Articles 6 to 9), and not merely the general prohibition (Article 5).
- Most stakeholders agreed that definitional issues would require clarification in guidance, though this would need to be simple, straightforward and intelligible. In particular, these stakeholders said

that traders' obligations for dealing with vulnerable consumers would need clarification.

- Business groups expressed a strong preference for the guidance to be produced by the DTI. They said it was vital that business be given the opportunity to be fully involved at an early stage, in order to influence the shape and content of guidance.

Enforcement - civil

- Almost all stakeholders said that the Directive's injunctive regime should rely exclusively on Part 8 of the Enterprise Act. This is because the creation of a dedicated parallel enforcement regime would be confusing and expensive for both enforcers and business. However, a small minority of stakeholders representing intellectual property rights holders favoured a dedicated parallel regime. This should include the power for competitors to take injunctive action to stop the use of copy-cat packaging.
- All stakeholders accepted it will be necessary to amend Part 8 to give the courts the power to require proof of the accuracy of factual claims made in a commercial communication. However, business groups said this should apply only to those parts of the Act which implement the Directive, and not to all the other legislation to which Part 8 applies.
- Trading standards respondents agreed they should be given a duty to enforce the legislation providing there is necessary funding. Business groups said it would be appropriate to introduce a power to enforce rather than a duty. The OFT said a duty on it is likely to prevent it deploying the most proportionate and effective action from a range of options available, including the use of self-regulatory Codes.

Enforcement - criminal

- Business groups opposed the introduction of criminal sanctions in respect of any infringement of the Directive. Enforcement should rely instead on the civil route using injunctive relief, with serious offences left to existing criminal statutes (theft and fraud). If retained at all, the threshold before a criminal offence had been committed should be raised (from strict liability to requiring proof of recklessness or intent). In addition, the ASA and organisations representing the advertising/publishing industry were concerned that criminal sanctions would have adverse implications for advertising self-regulation and co-regulation.
- Enforcers and consumer groups expressed an equally strong preference for a continued role for criminal sanctions. These would be necessary to ensure that existing levels of consumer protection are not reduced. Criminal sanctions are essential because many of the investigative powers used by the trading standards service rely on there

being a criminal offence, and act as a strong deterrent. These respondents argued that criminal sanctions should apply to all the Directive's provisions, ideally with few exceptions.

- Enforcers and consumer groups supported a flexible range of penalties, including the possibility of custodial sentences in the worst cases.
- The OFT said that it was important that the same investigative powers should be made available for both civil and criminal investigations. If these are not provided, enforcers' decisions about how cases should be progressed may, in some instances, be taken on the basis of the powers required to obtain the necessary evidence, rather than choosing the more proportionate and effective route, be that civil or criminal.
- In addition the OFT also said that different and unequal powers of investigation between enforcers would undermine efficient enforcement. This is because decisions as to whether the OFT or the trading standards service takes a case forward should be made on the basis of who is better placed to act and not by the investigative powers available to the enforcer. For this reason OFT should be given the same investigative powers as trading standards services.

Enforcement - private right of action

- Most enforcer and consumer groups expressed a preference for individuals to have a private right of action which should apply to all breaches of the Directive. These respondents agreed that damages will be the appropriate remedy in the vast majority of cases, but some said that there may be cases where damages are insufficient to make good consumer' losses and where other remedies (such as rescission, specific performance and restitution) are the only way to deal with the breach and to provide a fair outcome. Business groups strongly opposed giving individuals a private right of action.

Simplification

- Stakeholder groups expressed varying degrees of support for simplification. Most business groups said that all overlapping legislation should be repealed in so far as it relates to business-to-consumer matters unless there are compelling reasons to the contrary. Consumer groups and the OFT also favoured repealing much existing legislation – including some core consumer legislation such as the Trade Descriptions Act – but only where its repeal would not lessen levels of consumer protection. In particular, this meant retaining criminal sanctions and investigative powers. Conversely, most – though not all – trading standards responses called for the retention of most legislation.

These issues are set out in greater detail in the following section.

Detail

Chapter 1 – Aim & Definitions

Question 1. Do you have any comments on the Government's analysis on the definitions in Article 2?

Question 2. Are there any other issues you would like to see covered in the Guidance accompanying the Directive? The Government would welcome views in particular on: "material distortion"; "professional diligence"; "invitation to purchase"; and "transactional decision".

Respondents broadly supported the Government's analysis of the definitions in Article 2, which they found to be clear and helpful. They also welcomed the Government's intention not to elaborate the definitions and tests in the transposition legislation, as this would be inconsistent with principles-based legislation.

However as most of the definitions would be new to UK law respondents agreed that some further clarification would be necessary in guidance. "Professional diligence" (including the meaning of "material distortion" and "transactional decision") and "invitation to purchase" were particularly identified as definitions requiring further clarification. The interpretation of "invitation to purchase" was seen as being especially important because it triggers the information requirements in Article 7(4).

Overall, business respondents said they favoured guidance that was general and high level, rather than detailed and prescriptive. Flexibility would be lost if the guidance is too specific. It was also especially important that guidance should not seek to re-introduce detail that might be removed by repealing legislation.

Respondents also commented on drafting. The OFT said that it was well placed to produce guidance on the UCPD. This was because of its relationship with co-enforcers of the UCPD and its past experience of producing guidance on consumer protection legislation. On the other hand, business organisations expressed a strong preference for guidance to be produced by the DTI.

Further, business respondents argued that it was vital that business be given the opportunity to be fully involved at an early stage, in order to influence the shape and content of guidance. A business organisation also said that guidance should be supplemented by making easily accessible to business and enforcers all court determinations brought under the UCPD. This would help business and enforcers develop a common understanding of court interpretations of the Directive.

Chapter 2 - Scope, Internal Market Clause

Question 3. Do you have any comments about the Government's analysis of the scope of the Directive?

Most respondents agreed that the scope of the Directive should be interpreted widely. This included, in relation to the definition of a business-to-consumer commercial practice, that it is the trader's actions that are directly connected with the promotion, sale or supply to consumers and not the trader. Nevertheless it was recognised that the remoteness of such acts may in certain cases cause uncertainty about how directly connected it was to a subsequent promotion, sale or supply to consumers. This would need to be clarified through guidance.

In the interests of clarity, the OFT said that the implementing legislation should make express reference to the scope of the Directive, including all exclusions. For example, national rules on intellectual property rights are referred to in Recital 9 as matters outside the scope, even though this is not expressly stated in Article 3.

Chapter 3 – The General Prohibition

Question 4. Do you have any comments in relation to the tests of professional diligence and to materially distort? Are there any issues you would wish to see clarified in Guidance?

Respondents generally agreed with the DTI's interpretation that the professional diligence test sets standards of behaviour that a reasonable trader is expected to exercise towards consumers. This implies an objective standard rather than a standard which may apply across a particular sector but which may be unacceptably low.

A business organisation said it would be concerned if professional diligence were to be judged according to codes of practice operating in various sectors. This would raise a number of practical issues including coverage offered by any particular code and circumstances where there are competing codes in a sector. However, some other respondents said that they recognised the key role codes of practice could play in helping to demonstrate professional diligence and supported this approach.

Some respondents, including a small business organisation, said "professional diligence" and "material distortion" were difficult to understand and would require clarification, if possible with real life examples or case studies to explain what these mean in practice. However, a number of other, notably business, respondents said professional diligence and material distortion are adequately set out in the Directive and should not be significantly amplified through guidance. It is more appropriate for businesses to have the scope to discuss any differences in interpretation with enforcers where they arise, and that ultimately it will be for the courts to interpret these tests. Guidance could provide general examples of activities taken into account in determining whether or not a firm has acted in accordance with professional diligence and material distortion.

Two business organisations did not agree with the DTI's interpretation that the professional diligence test applies only to the general prohibition. Instead, they argued that the test also applies to the specific categories of misleading and aggressive practices (Articles 6-9), as these are intended as an elaboration (or sub-set) of practices that would be unfair under the general prohibition (Art. 5). Depending on the outcome of this discussion, one of these respondents said it may be necessary to clarify in guidance whether a business that is professionally diligent but has committed an isolated misleading action could be subject to an injunction. In its view, this should not lead to the granting of an injunction.

Question 5. Do you have any comments on the Department's analysis of the relationship between average and vulnerable consumers, and its proposal to express Article 5(3) as an alternative to Article 5(2)(b)? Does this raise issues that could usefully be addressed in Guidance?

Respondents fully supported the Department's view that the vulnerable consumer provision (Article 5(3)) is a variant on the average consumer benchmark and that it is subject to the professional diligence test. A business organisation said this is the most practical and proportionate way forward. It offers protection for vulnerable consumers while ensuring that legitimate business practices are not unduly restricted because they may inadvertently affect the vulnerable.

Most respondents also said traders' obligations for dealing with vulnerable consumers would need clarification through guidance to avoid confusing enforcers and traders. For example, several respondents said there could be issues surrounding the final sentence of Article 5(3) in relation to making exaggerated statements, or statements that are not intended to be taken literally. In addition, further clarification was needed on how the vulnerable consumer test would apply especially in relation to (vulnerable) consumers suffering from poor mental health.

Several respondents said the guidance would also need to clarify when to consider the average member of a particular group rather than the average or vulnerable consumer benchmark. The OFT said this could be achieved through illustrative cases that indicate factors likely to determine which variation of the average consumer test is appropriate.

An enforcement body said the guidance would need to emphasise that there is no need for an actual consumer to have suffered harm – a notional consumer is sufficient.

Question 6. Do you have any comments on the Government's analysis of the implications of applying the average consumer concept in the UK? Are there any issues that you would like to see clarified in Guidance?

Most respondents supported the Government's analysis of the implications of applying the average consumer concept in the UK. In particular respondents welcomed the Government's view that the notional average consumer is

similar to the concept of the reasonable person or ‘the man on the Clapham omnibus’ in English law. Several respondents nevertheless said that it would be useful to clarify this in guidance, with case studies if possible.

The OFT said that it strongly favoured reproducing the definition of the average consumer in Recital 18 in the implementing legislation as this concept is key to interpreting the UCPD.

Question 7. Do you think it would be helpful to clarify that the “average member of a particular group” and the “vulnerable consumer” also apply to Articles 6-9 in the legislation implementing the Directive?

A large majority of respondents agreed this would be helpful. Consumer organisations and enforcers said it was especially important to make this explicit in the implementing regulations because they frequently experience unfair practices captured by Articles 6 to 9 which affect vulnerable consumers.

Two business organisations said they could not support this interpretation unless the DTI agreed that the professional diligence test similarly applies to Articles 6 to 9.

Chapter 4 – Misleading Actions & Omissions

Question 8. Do you have any comments on the Government’s view that the list of elements in Article 6(1) applies both to practices giving false information and practices that deceive or are likely to deceive?

A large majority of respondents supported the Government’s view. Several respondents of all kind said that this should be made clear in guidance, which could also include examples of certain elements listed in Article 6(1).

However, the OFT said that in its view the exhaustive list applies only to practices that deceive or which are likely to deceive. A commercial practice that contains any false information should be capable of being assessed under Article 6(1) and not just those practices which contain information that is false in relation to the list. This interpretation ensures that consumers are provided with the widest protection and is also consistent with the view expressed in a DTI commissioned report¹.

On misleading omissions, a consumer organisation asked whether guidance could explain how the recognition of the limitations of time and space should apply in relation to text messaging. This has become a popular marketing mechanism in recent years, where consumers are targeted with advertising designed to solicit an immediate sale without having all the information necessary to make an informed choice.

¹ *An analysis of the application and scope of the Unfair Commercial Practices Directive*, Twigg Flesner, Parry, Howells & Nordhausen, DTI, 2005

A few respondents said the guidance should clarify the phrase ‘the geographical address and identity of the trader...’ in Article 7(4). This should require traders to provide consumers with the information they need in the event of a dispute, ie both an address for document service and where to physically find the trader and any assets.

Chapter 5 – Aggressive Commercial Practices

Question 9. Do you have any comments on the Government’s analysis relating to aggressive commercial practices? Are there any issues you would like to see clarified in Guidance?

No respondent disagreed with the Government’s analysis, including that the factors in Article 9 are for guidance and do not limit the general definition of an aggressive practice in Article 8. The OFT said that as the prohibition against aggressive practices is new the guidance would need to clarify where legitimate practices end and aggressive practices begin. This would also need to include particular practices associated with pressure-selling. Other respondents similarly agreed on the need for clear guidance, with practical examples.

A business organisation said that guidance should clarify that compliance with reputable codes of practice on debt collection is not an aggressive commercial practice.

Another business organisation said its main concern is the concept of ‘undue influence’. If ‘undue influence’ were interpreted excessively widely, normal commercial practices, especially advertising, used to influence a person to make a purchase could fall foul of the provision. An enforcement organisation similarly agreed that the definition of ‘undue influence’ needed clarification.

Several enforcers asked that guidance clarify that the use of physical force is not a requirement to prove ‘harassment’ or ‘coercion’.

A number of respondents asked for clarification of how these provisions apply to ‘vulnerable consumers’, such as bogus builders verbally intimidating elderly or vulnerable consumers into agreeing to have work done. Such traders’ usual approach is not overtly threatening, but the way in which issues around ‘urgent repairs’ are raised can lead to these consumers agreeing to work when they would not ordinarily have done so.

Chapter 6 – The Annex of Banned Practices

Question 10. Do you have any comments on the Government’s analysis relating to the Annex of banned practices? Are there any issues you would like to see clarified in Guidance?

The large majority of business respondents and enforcers said they did not believe any of the Annex practices required elaboration in guidance. However the OFT and consumer organisations disagreed, saying the scope of some of

the prohibited practices could be clarified, e.g. with examples of the type of activity that may be caught. The OFT said guidance could also clarify what should be treated as a “claim”, as the word “claiming” is used in seven of the banned practices.

The OFT and a small business organisation said that it would be beneficial for business if the guidance could explain which prohibitions are new and which are already unlawful.

Chapter 7 – Civil Law Enforcement

Question 11. What are your views on the Government’s proposal not to make changes to allow court actions to be brought jointly against a group of traders?

Business respondents, consumer organisations and the OFT mainly agreed with the Government’s proposal. Each action needed to be judged separately on the facts of the case. The OFT said that where a precedent is sought to establish the law, the best route is often to take one “representative” case and promulgate the outcome widely, as it had done in the Officers Club case.

However, two trading standards organisations said they would welcome the ability to bring actions jointly against groups of traders. This would be useful where a practice is common across a whole group of traders, because it would avoid the problem of having to 'single out' a trader for enforcement action where all their competitors are acting similarly. However, one of these said concerns had been expressed about the level of evidence required against each individual trader, and whether the entire action would fail if one defendant could demonstrate they were not liable. For this reason it said that a number of individual trading departments and their regional groupings supported the Government proposal.

Question 12. Do you think that the Directive’s injunctive regime should rely solely on Part 8 of the Enterprise Act or that an additional injunctive regime should also be established? Can you provide us with reasons explaining your preference? If you favour Option 2, do you have any further thoughts on how this regime should operate?

The vast majority of respondents said they favoured one injunctive regime. Part 8 of the Enterprise Act 2002 already provides a coherent and well-understood structure for applying for enforcement orders. The creation of a dedicated parallel enforcement regime would be confusing and expensive for enforcers and business, and would not contribute to the broader objective of reducing and simplifying regulatory burdens.

In addition, the OFT said it did not believe the ‘collective interests’ of consumers test in Part 8 set a higher threshold for issuing an injunction than Article 11, which protects (all) consumers. Both Part 8 and Article 11 are concerned with the interests of consumers as a group to the same extent, notwithstanding the use of “collective” in the former not the latter.

The Advertising Standards Authority (ASA) said the current regime employs a safeguard that allows the OFT to ensure that Part 8 enforcers do not by-pass recourse to existing regulatory and self-regulatory mechanisms, such as the ASA, in favour of court action. It was essential to maintain this feature to avoid any significant destabilisation of advertising self-regulation.

A trading standards organisation said that if Option 1 is adopted by the Government it could take the opportunity to update Part 8 in other ways, including the lists of legislation to which it applies. The same trading standards organisation said it would also be useful to include the onus on traders to substantiate any claims made.

Respondents representing the interests of intellectual property rights holders and an organisation representing the interests of trading standards officers said they favoured Option 2. The former respondents said that to limit enforcement action only to those organisations that currently have enforcement powers under Part 8 would mean that some practices that should always be considered unfair, such as misleading packaging, will go unchallenged. Option 2 should therefore include the possibility for competitors to take action to stop copy-cat products. (This comment is elaborated more fully in the following question.)

Question 13. Do you have any comments on the proposed approach to designating public enforcers for the Directive?

Although the majority of respondents favoured Option 1, most of these said that if Option 2 were adopted then its enforcement powers could be limited to the OFT and the trading standards service. However, consumer organisations and a few enforcers disagreed and supported giving enforcement powers to all Part 8 enforcers.

A number of business respondents said they did not believe that non-public Part 8 enforcers should automatically become designated enforcers of the UCPD. Given the wide-ranging nature of the UCPD, the designation of Which? should be considered separately - particularly as it has significant commercial interests. One business organisation said that it understands that all designations under the Enterprise Act were to be reviewed periodically and it believed this is an appropriate moment to undertake such a review.

An organisation representing the interests of brand holders said that there is currently ineffective public enforcement against copycat packaging. Although the trading standards service have the power to act against copycats under the Trade Descriptions Act they rarely did so because their resources tend to be focused on clear-cut cases of intellectual property fraud, such as infringements of registered trade marks by counterfeit products. Competitors should consequently be given the power to take enforcement action against Article 6 and point 13 of Annex I of the Directive. Competitors could also be required to notify the OFT before taking action, but there would be no advantage in allowing the OFT to direct which enforcer may take legal action because of the constraints on the trading standards service and the absence of a self-

regulatory mechanism. Other respondents representing intellectual property rights holders supported giving enforcement powers to competitors for this purpose.

Question 14. If Option 2 is chosen, do you think the courts should be enabled to require publication of their decisions? What are your views on requiring the publication of a corrective statement by traders? Do you think that any or both options should be chosen?

If Option 2 is chosen, consumer organisations, OFT and other enforcers said they strongly supported giving the courts the power to require the publication of their final decisions and corrective statements by traders. This would help ensure consistency by keeping consumers, advisers, traders and enforcers informed about what is considered an unfair practice.

Most business respondents firmly opposed this proposal, given that it is already available under Part 8. They were especially opposed to the publication of corrective statements which would be costly and would not necessarily achieve their aim. The ASA said corrective statements tend to harm overall trust in advertising and could be confusing for consumers. Instead it believed the publication and promotion of ASA and official decisions are able to convey 'corrective' information effectively.

Question 15. If Option 2 is adopted, what are your views on giving the OFT a specific power to publish information relating to voluntary undertakings and court proceedings?

All respondents were strongly in favour of publishing information on the results of enforcement action to inform stakeholders about developments in the law. Two business organisations said that this should include applications for Court Orders which failed, as this can also constitute useful advice for businesses. A consumer organisation said that it would also be helpful if this information were available in one accessible place, although this should not prevent local publicity too.

In addition, the OFT said that if Option 2 is adopted it agrees with the proposal to provide it with a specific power to publish Court Orders and undertakings given to the court or any enforcer. However, one business organisation did not see any particular reason to provide the OFT with a power to do something it can already do. But if the OFT were given the power described it should be required to ensure such information is provided in a neutral manner and not as a naming and shaming exercise. This particularly applies to voluntary undertakings which should not be accepted as interpretations of the law.

Question 16. What are your views on introducing a duty to enforce in the legislation implementing the Directive? Do you agree that this duty should apply to the OFT, trading standards services in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland? And do you agree with the proposal not to introduce a duty to consider complaints?

Consumer organisations said the Government should introduce a duty to enforce, given the key role the Directive will play in the UK's consumer protection framework, and the need to ensure that resources are made available to local authorities. One consumer organisation said this duty should be extended to statutory regulators such as OFGEM and OFCOM as they may be better placed to be aware of unfair practices in their sectors. This should not, however, prevent trading standards services taking action against regulated traders.

Trading standards respondents agreed they should be given a duty to enforce providing there is the necessary funding. This allows more discretion for trading standards authorities to take appropriate action, having consideration to all the relevant circumstances including resources.

The OFT said that Part 8 empowers rather than imposes enforcement duties. A duty on the OFT is likely to prevent it deploying the most proportionate and effective action from the range of options available, including the use of self regulatory Codes of Practice. This did not mean it was necessarily inappropriate to give such a duty to the trading standards service.

Two business organisations said it would be appropriate to introduce a power to enforce rather than a duty to do so. A duty to enforce has often been misinterpreted to mean there should be formal enforcement action for every infringement, and this has resulted in different approaches to enforcement. There should be discretion not to take formal enforcement action in certain cases, particularly where the Enforcement Concordat is followed and a solution is found through discussion.

A large majority of respondents opposed the alternative approach, a duty only to consider complaints. They recognised this could put the limited resources of enforcers under strain. Furthermore, several enforcers said that many unfair practices come to their attention before any complaint is received and therefore the receipt of a complaint cannot be the only trigger for intervention. However, a minority of respondents supported a duty to consider complaints saying that they did not see this necessarily as an alternative to a duty to enforce the legislation. A trading standards organisation said that, although a duty to consider complaints would cost money, it would improve consistency of enforcement. However, this respondent said it did not want a duty to give reasons.

Question 17. Do you have any comments on the proposal to amend Part 8 of the Enterprise Act in relation to substantiation of claims only if Option 1 is adopted?

Respondents agreed that if Option 1 is adopted it will be necessary to amend Part 8 of the Enterprise Act to give the courts the power to require proof of the accuracy of factual claims made in a commercial communication. However, business respondents said this should apply only to those parts of the Act which implement the Directive, and not to all other legislation under Part 8.

A consumer organisation said the power to require traders to prove their claims is essential to the working of the Directive. This power should not be limited to the courts but should also be given to the OFT, trading standards and the designated enforcers under Part 8.

Chapter 8 – Criminal Law Enforcement

Question 18. Do you have any comments on the proposal to retain the balance between criminal and civil sanctions in existing legislation?

Business respondents said that maintaining the existing balance between civil and criminal sanctions is not a genuine option. The requirement for the Directive to be underpinned by civil sanctions means that injunctive relief will be available for a much wider range of unfair practices than under existing law. This will consequently alter the current balance of sanctions. Furthermore, automatically transferring criminal sanctions in repealed legislation into UCPD would considerably extend the coverage of the criminal regime in that the provisions of the UCPD to which penalties would apply would cover not only the specific offences previously included in the repealed legislation but also many other new potential offences.

Business respondents also said that to impose criminal sanctions would be inappropriate and against the Government's better regulation agenda. The emphasis should be on stopping unfair practices and preventing them being repeated in the future, rather than to punish business for past behaviour. Criminal sanctions do not fit with that approach. Enforcement should therefore be solely through the civil route using injunctive relief.

A business organisation said that the whole question of sanctions, including the balance between civil and criminal sanctions and the need, if any, for administrative penalties, should be considered in the context of the BRE Review of the penalties regime². However, business respondents said that if criminal sanctions are included these should be accompanied by a due diligence defence and the requirement to demonstrate intent or recklessness on the part of the trader (*mens rea*).

The ASA and organisations representing the publishing/advertising industry said proposals for criminal sanctions would have serious adverse implications for advertising self-regulation and co-regulation. Criminal sanctions risk undermining the ASA system, which relies on the backstop of the threat of injunctive relief to ensure that advertisers comply with the CAP/BCAP Codes.

One of the key reasons for the success of the ASA system is that it is founded on the ability of the ASA to gain the trust and co-operation of the advertising sector, including in respect of the provision of evidence. Introducing criminal sanctions in relation to advertising would undermine this confidence, as advertisers could become increasingly anxious about providing the ASA with

² http://www.cabinetoffice.gov.uk/regulation/mergers_and_penalties/penalties_review.asp

substantiation evidence for fear of incurring some future criminal liability. Further, criminal sanctions may cause advertisers to question why they are funding a system that duplicates the criminal law. They might ultimately withdraw their support for the ASA system.

The ASA said that if criminal offences are included then the transposing legislation should require Trading Standards and/or the OFT to have regard to the desirability of matters being resolved by self-regulation before criminal proceedings are undertaken. An advertising organisation said it would also be necessary for the transposing legislation to include due diligence and innocent publication defences.

The OFT, trading standards respondents and consumer organisations all strongly supported retaining a mixture of criminal and civil sanctions. Making undesirable behaviour criminal acts as an important deterrent because it underlines its seriousness to business, whereas it might otherwise be viewed as a regulatory risk. Also, most rogue traders operate using deliberate and oppressive tactics. It was important therefore to have a mix of sanctions for ensuring compliance in the most effective and proportionate manner. The OFT said that if criminal sanctions were not maintained this would lead to an unacceptable loss of consumer protection.

Trading standards respondents said that a further reason why it would be essential to retain criminal offences is because many of their investigative powers rely on there being a criminal offence. Most criminal legislation where trading standards services are designated as the enforcement authority, such as the Trade Descriptions Act, specifically set out their enforcement powers. These include a power obtain warrants where it is necessary to enter premises and seize goods and documents without notice. In addition, further opportunities to gather evidence by legislative provisions such as the Regulation of Investigatory Powers Act 2000 (RIPA) (eg surveillance and access to communications data) is only afforded to local authority enforcers on the basis of the "prevention and detection of crime".

Trading standards services said that local authorities also now have the ability to undertake financial investigations, and confiscate and recover assets under the Proceeds of Crime Act (PoCA). This enables them to take the profit from those criminals that target consumers through mass frauds or doorstep crime or which distort fair competition. This was another important reason to maintain criminal sanctions where appropriate, as asset recovery may only be triggered through criminal convictions.

The OFT said it was important that the same investigative powers should be made available for both civil and criminal investigations. If these are not provided, enforcers' decisions about how cases should be progressed may, in some instances, be taken on the basis of the powers required to obtain the necessary evidence, rather than choosing the more proportionate and effective route, be that civil or criminal. This could mean that practices best dealt with by civil enforcement are enforced via criminal sanctions simply because of the associated investigative powers.

In addition the OFT said that different and unequal powers of investigation between enforcers would undermine efficient enforcement. This is because decisions as to whether the OFT or the trading standards service takes a case should be made on the basis of who is better placed to act and not by the investigative powers available to the enforcer. For this reason OFT should be given the same investigative powers as trading standards services.

Question 19. Considering Articles 5, 7, 8 & 9 in turn, do you think it appropriate that criminal sanctions should be provided for any of the new provisions contained in the Directive? If yes, are they any provisions that you consider particularly important? Can you provide evidence supporting your recommendation?

A number of consumer organisations and trading standards respondents said that criminal sanctions should apply to all the Directive's provisions, given that this will assist the investigation of cases and act as the strongest deterrent. The Government had proposed not to attach criminal sanctions to Articles 5 and 7 (except Article 7(4)) as these might be deemed too imprecise to meet the requirements of certainty inherent in the Human Rights Convention (Article 7). Others accepted that there might be human rights issues relating to criminalising these Articles but that it was worth further investigation before ruling out criminal sanctions altogether.

The OFT said it agreed with the Government's assessment that the general prohibition in Article 5 is insufficiently specific to allow it to be subject to criminal sanctions, but thought that these should be introduced for Articles 6 and 7. Criminal sanctions already exist for many practices that will be prohibited under the misleading actions provisions of the UCPD, by the Trade Descriptions Act and Part III of the Consumer Protection Act. Failure to criminalise misleading omissions will produce an inconsistency in enforcement and encourage dishonest traders to take advantage of a disparity in law between misleading actions and misleading omissions. Several trading standards respondents echoed this view.

The OFT said its recommendation to attach criminal sanctions to Articles 6 & 7 did not apply to Article 6 (2)(b). This prohibits commercial practices that amount to non-compliance with a code of conduct by which the trader has undertaken to be bound under certain circumstances. Failure to comply with a code of conduct should not per se be a criminal offence because codes are not designed to achieve 100% compliance. If breaches of Article 6 (2)(b) were made a criminal offence, it would discourage participation in initiatives designed to achieve compliance at no public cost.

There was strong support from consumer organisations and enforcers for Articles 8 and 9 to be subject to criminal sanctions. Use of harassment, coercion and undue influence are some of the worst examples of trade malpractice and are often employed by rogue traders who prey on the vulnerable, including by doorstep selling. Civil sanctions are not sufficient to deal effectively with such rogues particularly where they disguise their

identities and place of residence. Applying criminal sanctions with the accompanying powers of investigation provides the only way to identify, apprehend and convict such traders.

Consumer organisations and enforcers said that they supported criminalisation of all commercial practices under Annex I. Because these practices are considered to be sufficiently serious to justify deeming them to be unfair under all circumstances then it follows that this list is suitable for criminal sanctions in its entirety. Indeed, one consumer organisation said that if the Government is inclined to take a more ad hoc approach, taking each practice individually in deciding whether to attach criminal penalties to it, it must set out the criteria on which each practice is to be judged. This criteria must make clear the reasons for making a practice a criminal offence but more essentially for not making it a criminal offence.

A majority of business respondents and respondents representing the advertising industry reiterated their strong opposition to introducing criminal sanctions for any provisions of the Directive. The purpose of the Directive is to prevent unfair practices and to protect consumers, not to introduce a punitive regime for business.

Question 20. If criminal sanctions are introduced for some of the Directive's provisions, do you have any comments on the Government's proposals to model powers and defences on the Trade Descriptions Act 1968? And do you have any comments on the proposal to provide flexibility in the range of penalties, including possible custodial sentences?

Consumer organisations said that powers of inspection and the ability to require the production of information will be essential for the enforcement community to be able to tackle unfair commercial practices. However, they also appreciated it is appropriate to provide for due diligence defences which mitigate the apparent severity of strict liability offences.

Business respondents also said that if criminal sanctions were to be introduced it would be essential that due diligence and innocent publication defences are provided where appropriate.

Trading standards services agreed these powers and defences should be modelled on those contained in the Trade Descriptions Act 1968. This has stood the test of time and has been a model for later legislation. There may, however, be some value in updating some provisions to reflect the use of computer generated documents, etc. Some concern was expressed that these powers could only be used in relation to criminal offences and that greater investigative powers were needed to support civil enforcement action. One respondent suggested the Consumer Credit Act as an alternative model. This is because its enforcement provisions apply to breaches and not offences, thereby giving powers in civil law matters as well as criminal offences.

Trading standards respondents said it would be crucial for local authority officers to retain their existing rights of audience in criminal cases in

magistrates' courts. However, as the UCPD must be underpinned by civil sanctions it is important these rights are extended to include rights of audience in the civil courts up to at least the interim order stage. This would speed up cases, reduce costs (including to the defendant if costs are awarded against him) and bring expertise to the court.

Consumer organisations and trading standards respondents supported a flexible range of penalties including the possibility of custodial sentences in the worst cases. Such flexibility would enable the courts to impose sanctions that are appropriate to the seriousness of the infringement.

Chapter 9 – The Role of Self-Regulation

Question 21. Do you have any comments on the proposal to allow certain codes a role in enforcing breaches of the Directive? Are there any particular codes that you think should be used for controlling unfair commercial practices?

The OFT strongly supported this proposal and referred to the existing case handling principles agreed between the OFT and the ASA as a good example of how it and self-regulatory bodies can work effectively together.

The OFT said it also supported the proposal for the OFT, in consultation with the trading standards services and other enforcers, to consider on a case by case basis which other codes can play a role in delivering compliance with the UCPD.

Almost all business respondents said they welcomed the Government's intention to reinforce the self-regulatory system operated by the ASA. The ASA itself said it is keen to continue to be viewed as the 'established means' for removing unfair or misleading advertising and welcomed the Government's intention to maintain the ASA's role in broadcast and non-broadcast media, although some disagreed.

Business respondents also welcomed recognition of the Banking Code and the development of self-regulatory systems when supported by those who are regulated. One business organisation said that codes do not always operate across an entire business sector and are therefore statements of good practice for those companies which sign up to them. Another business organisation said that while a code could be used to deliver compliance with the requirements of the UCPD in respect of those who voluntarily signed up to it, that is not the same as enforcement. A code cannot and should not be used to impose procedures or standards on those who have not signed up. In particular, such codes should not become the standard for establishing professional diligence, the whole point being that codes are intended to establish a higher standard than legal requirements.

Consumer organisations were more cautious about encouraging the control of unfair commercial practices through self-regulatory codes. They recognised that the ASA and Banking Code regime do have a part to play here, but said

many code providers have insufficient means to monitor compliance with their codes and action is rarely taken against non-compliant members. It is important the OFT consults widely when considering which codes may be used to help control unfair commercial practices. One consumer organisation said it was important that this consultation includes consumer organisations as well as enforcers. Another opposed the provision of a discretion of the courts and administrative authorities to reject a complaint because it had not first been referred to the code owner.

Trading standards organisations said that they broadly supported the use of codes where statutory enforcement mechanisms also exist. However, it was essential to maintain the status quo. A trading standards organisation said that where a code such as the ASA code is backed by criminal legislation, such as the Trade Descriptions Act, together with a civil injunctive regime such as the Control of Misleading Advertisements Regulations 1988, the existing regime must be retained: to remove criminal sanctions would otherwise badly weaken consumer protection.

Question 22. Do you agree with the proposal that enforcers should be able to take civil action against any person, including code owners, who recommends breaches of the Directive?

The OFT said it welcomed this proposal. This will allow enforcers to tackle mischief that may be sector wide without taking action against a large number of individual traders or selecting one business as the test case when that business is not the source of the practice in question. This is both a good use of resources and fairer for the parties involved. Consumer organisations, trading standards and some business respondents, including a small business organisation, also supported this proposal.

However, most business respondents disagreed. They thought it highly unlikely that a code owner would recommend an infringement of the Directive, and feared this could have a negative effect on code owners' current willingness to provide advice on compliance with their codes. A few were particularly concerned about the proposal to enable action to be taken against any person who recommends breaches of the Directive. However one business said it could provide useful powers against those offering models or business practices for scams, rather than only those who may use these models and practices to perpetrate scams.

Chapter 10 – Civil Redress

Question 23. Given existing protections, do you think that individuals should have a right of action in order to seek redress for breaches of the Directive? Can you provide examples of the benefits and drawbacks associated with this approach?

The OFT, consumer organisations, the trading standards service and academic respondents strongly supported giving individual consumers a right of action. This would give consumers a clearer and more complete set of

rights. In turn this will lead to a greater understanding of consumer rights and empowerment, and may also encourage traders to resolve problems. A consumer organisation said failure to take this opportunity would allow unfair commercial practices to be profitable, up to the point that enforcement action succeeds.

Several consumer organisations also said the proposal to limit claims to where there is a loss, and the requirement that the claimant must prove their loss, will prevent actions that are spurious and opportunistic. The fact that consumers may already have rights in contract law in some cases is not problematic – multiple rights already exist in many areas without causing problems.

Academic respondents said that existing causes of action are inadequate, especially in relation to misleading omissions and aggressive practices falling short of the common law doctrines of duress/undue influence.

Conversely, business respondents strongly opposed the introduction of a new right. It was difficult to identify breaches of the Directive which would cause a consumer loss which were not already subject to a cause of action under existing law. A more appropriate alternative would be for additional rights to be considered as part of a more general review of civil redress.

Business respondents also expressed concern that such a move carries the obvious risk of increasing the number of claims made by consumers, including vexatious cases. This would increase the number of cases going through the courts and add regulatory burdens on business. It would also risk encouraging a "compensation culture" at a time when the Government wished to discourage the emergence of such a culture.

Question 24. If a right of action is provided for, should it apply to all of the Directive or only to specified parts of it? If the latter, which parts in particular and why?

The OFT, consumer organisations, trading standards service and academic respondents said that a private right of action should apply to all breaches of the UCPD. The OFT said that this would ensure that a comprehensive set of consumer rights exist in relation to the UCPD and does not produce an incentive for dishonest traders to breach some Articles of the UCPD more than others. A consumer organisation said that the benefits of promoting consumer rights may be diminished or lost if a more complex ad hoc approach is adopted. Another consumer organisation said that if there is no right of redress for Article 5 then consumers will not benefit from the future proof element of the Directive.

Business respondents continued to strongly oppose the granting of an individual right of redress under the Directive.

Question 25. If an individual right of action is provided, is a breach of statutory duty an appropriate form?

The OFT, consumer organisations, trading standards service and academic respondents agreed that a breach of statutory duty would be the appropriate form. The OFT said that breach of a statutory duty would also mean that consumers do not have to prove negligence before a claim can be made. A consumer organisation said it would be concerned if additional provision were made specifying defences that might be available to traders. This is because they might be used as a bargaining chip in discussions with enforcers about their agreement to undertakings, eg where trade-offs are agreed between the undertaking and access to a defence against consumer. Such activities would inhibit access to consumer redress even where a practice was deemed unfair.

An academic respondent said that if non-material damage (eg disappointment, frustration) was to be unavailable then this would need to be explicitly excluded in the implementing legislation.

Question 26. Would damages be an adequate remedy if an individual right of action were provided for, or might additional remedies be needed? Why?

The OFT, consumer organisations, trading standards service and academic respondents said that damages (aimed at putting the consumer back in the position he would have been in if the unfair commercial practice had not occurred) will be the appropriate remedy in the vast majority of cases. However several such respondents said that there may be cases where damages are insufficient to make good consumers' losses. Other remedies (such as rescission, specific performance and restitution) may then be the only way to deal with the breach and provide a fair outcome. For this reason the courts' discretion in determining the most appropriate remedy should not be restricted. However an academic respondent said that it was probably not desirable to extend the right of rescission to all of the UCPD because this might render quite a large number of contracts suspect in their validity.

A trading standards organisation said that if the civil injunctive regime relies on Part 8 of the Enterprise Act, this regime could be amended to enable damages to be granted where action is successful under the Act. This would enable actual victims to be recompensed and not just the perpetrator admonished. It would also help prevent unnecessary duplication of cases, as it would allow civil redress to be appended to an Enforcement Order in a similar way to compensation orders for criminal cases.

Business organisations said that the difficulty with providing a right of individual redress in respect of breaches of the UCPD is that they do not readily lend themselves to redress by way of damages. In order to make an award of damages, a court must endeavour to compensate the consumer for the loss which resulted from the unfair practice in question. However, in many cases it would be impossible for a consumer's loss to be evaluated in monetary terms, unless the intention is that damages should be punitive. Such a step would mark a significant change in UK law which business would strongly oppose.

Chapter 11 – Amending Existing Legislation

Question 27. Do you think the Government should adopt a single uniform approach to dealing with existing legislation, and if yes, what should it be and why?

A large majority of business respondents said that all overlapping legislation should be repealed in so far as it relates to business-to-consumer matters unless there are compelling reasons to the contrary. Keeping overlapping legislation would risk double jeopardy for businesses which could be open both to challenge under the general provisions of the Directive or the specific legislation. The creation of parallel regimes for business-to-consumer and business-to-business transactions should not present a problem. The business-to-business provisions of the Trade Descriptions Act 1968 and the Weights and Measures Act 1985 should therefore be retained for the present.

A business organisation also said that the implementing legislation should include provisions which attributes a priority to the new legislation where certain activities may be caught by both the UCPD and existing legislation. An example of similar provisions could be found in the new Gambling Act.

The OFT, academic respondents and most consumer organisations said they supported the Government's objective to simplify the UK consumer protection framework, provided this does not lead to any reduction in existing consumer protection. Consumer organisations said that the latter would only be achievable if the new law contained criminal and civil sanctions for a breach. Some concern was expressed about repealing some key statutes and the removal of detailed information requirements.

Almost all trading standards respondents said that a single uniform approach would be inappropriate, and could reduce the level of consumer protection. While some simplification would be beneficial to business the Government should consider each piece of legislation on its own merits. Small businesses also suffer greatly from fraudsters and it would therefore be necessary to preserve the protection for business-to-business transactions. It might be better to keep some of the core principal statutes, while repealing some periphery orders and regulations.

Chapter 12 – Indicative List of Affected Legislation

Question 28. Do you think this section of the Accommodation Agencies Act should be repealed or left unamended; and why?

A large majority of respondents (13 out of 17 who specifically responded to this question) said that they believed that section 1(1) of the Accommodation Agencies Act benefited from the exclusion for immovable property and should be left unamended. It is by no means clear that the Directive would outlaw the kind of practices that these provisions prohibit. They prevent prospective tenants being charged if they do not take up a tenancy. Their repeal would allow letting agents to charge people for lists of, or to register for,

accommodation, which is likely to use up money needed to take up the tenancy, ie deposits and rent in advance. Section 1(1) therefore serves a useful purpose in deterring the exploitation of vulnerable and low-income people desperately seeking somewhere to live. In addition, it is particularly important that criminal sanction remains.

The CBI and a minority of respondents representing the trading standards community in Scotland said that these provisions should be repealed.

Question 29. Do you think this section of the Administration of Justice Act should be partially or wholly repealed, amended or left unaffected; and why?

A large majority of respondents who expressed a preference (9 out of 13) said section 40 of the Administration of Justice Act 1970 should be left unamended. The Institute of Credit Management said that this provision sets out criminal offences covering not only harassment, but also various forms of deception which dishonest people might use in an attempt to extort debt repayments. These are considered by the OFT when considering fitness to hold a consumer credit licence. The Protection from Harassment Act 1997 covers the broader range of types of harassment, but not the other offences listed in section 40.

Four respondents, including the CBI and the Federation of Small Businesses, said section 40 should be repealed on the basis that consumers could rely on Article 8 of the UCPD. Businesses would rely on the Protection from Harassment Act. A Scottish Trading Standards Department noted there is no equivalent to section 40 in Scottish law.

Question 30. Do you think the Business Advertisements Order should be repealed or left unamended; and why?

A large majority of respondents (12 out of 19) said the Business Advertisements Order 1977 should be repealed. Trading standards respondents said that it would be important nevertheless to retain criminal sanctions, as such a deliberate act is fraudulent and an injunctive remedy alone is insufficient. Although not necessarily disagreeing with repeal, a few respondents said that Annex point 22 offers less protection to consumers than the 1977 Order. This is because the Order requires that it is clear that goods are being sold in the course of a business, whereas Annex point 22 prohibits traders falsely representing themselves as consumers.

A minority of respondents were in favour of leaving the 1977 Order unamended as it was consistent with Annex point 22.

Question 31. Do you think these sections of the Charities Act 1992 should be repealed, amended or left unamended; and why?

Very few replies (6) were received to this question, and expressed mixed views. The CBI said that sections 60(3), (4) (5) and 61 of the Charities Act 1992 should be repealed because a failure to include the information in the

prescribed form is a strict liability offence and therefore punishes innocent mistakes. Two trading standards respondents said these provisions should be amended to comply with the requirements of the UCPD. Two respondents, including the Federation of Small Business, said these provisions should be left unamended because they are outside the scope of the Directive. The Federation of Small Businesses said that repeal or amendment could give rise to legal uncertainty. Citizens Advice did not express a preference except to say the Charities Act appears to work.

Question 32. Do you think Regulation 7 of the Charitable Institutions (Fund-Raising) Regulations 1994 should be partially or wholly repealed or left unamended; and why?

Again very few replies (4) were received to this question. The CBI said that the Charitable Institutions (Fund-Raising) Regulations 1994 should be repealed for the same reasons as given per their reply to question 31. A trading standards respondent said that the Regulations should be amended. Two respondents, including the Federation of Small Business, said these provisions should be left unamended because they are outside the scope of the Directive.

Question 33. Do you think the relevant provisions of the Consumer Credit Act 1974 should be amended or repealed; and why?

The OFT said that the scope of the financial services exemption from maximum harmonisation does not include hire, so hire provisions in the Consumer Credit Act 1974 that do not fall within either the authorisation or contract law exemptions must be brought into line with the UCPD standard. Within this constraint, a clear majority of respondents who expressed a preference favoured considering the feasibility of amending the hire provisions rather than repealing them and relying instead on Articles 6 and 7 of the UCPD. A few respondents favoured no change, as additional amendments would only complicate further a highly complex legislative area.

LACORS said that the main problem with hire has always been with business lease agreements (eg normal hires of office equipment, such as photocopiers, telephone equipment, plus sometimes vehicles). It was therefore necessary to retain the business-to-business protections.

The CBI said that simplification should be carried out in such a way that it does not create inconsistencies with other areas of consumer legislation.

Question 34. Do you think the relevant provisions of the Consumer Credit (Advertisements) Regulations 2004 should be repealed or amended; and why?

About half the respondents who expressed a preference favoured amending the hire provisions of the Consumer Credit (Advertisements) Regulations 2004. The remainder were divided between repeal and the (non-option) of no change. Among those who favoured repeal were the Federation of Small Businesses and a number of trading standards respondents, including the Trading Standards Institute. One trading standards respondent said that repeal

would enable enforcers to concentrate on combating consumer detriment rather than technical compliance with hire advertisements. Another such respondent said that since 1980, when hire advertisements were first regulated, there have been few, if any, problems with hire advertising in general.

Question 35. Do you think Part III of the Consumer Protection Act 1987 should be amended or repealed; and why?

A large majority of respondents (17 out of 23) said that Part III of the Consumer Protection Act 1987 could be repealed provided criminal sanctions are transferred to the Directive. A trading standards respondent said that it would be confusing for enforcers, consumers and businesses to have two separate pieces of legislation which not merely overlap but have virtually identical aims. A consumer organisation said that the Directive takes a broader approach to the definition of misleading price indications than Part III, which sets out a limited list of factors which may be taken into account in determining whether a price indication is misleading.

Question 36. Do you think the Consumer Protection (Code of Practice for Traders on Price Indications) Approval Order 2005 should be repealed or reproduced; and why?

Almost all respondents (22 out of 24) said that the Code of Practice on Price Indications provides useful guidance for businesses (particularly small business) and should be reproduced as part of the UCPD guidance, incorporating any amendments necessary to ensure compliance with the Directive. The BRC said that it would not suffer if it were retained as guidance - indeed this might serve to emphasise rather better that it provides only one way of meeting the legal requirement.

One trading standards respondent did however express concern that the new Code of Practice is not effective in the area of sales promotions and misleading discount pricing in some retail sectors.

Question 37. Do you think the relevant provisions of the Consumer Transactions (Restrictions on Statements) Order 1976 should be repealed, amended or left unamended; and why?

A majority of respondents (14 out of 20) said that the relevant provisions of the Consumer Transactions (Restrictions on Statements) Order 1976 should be repealed. Again trading standards said that this was subject to criminal powers being introduced into the equivalent provisions of the UCPD. Most other respondents favoured doing nothing as the Order covers matters which may be prohibited under Annex point 10.

Question 38. Do you think that section 14 of the Food Safety Act 1990 should be repealed, amended or left unamended; and why?

Almost all respondents (16 out of 18), including food safety/environmental health enforcers, said that section 14 of the Food Safety Act should be left unamended. This is because it is primarily concerned with quality and safety standards rather than unfair commercial practices, and therefore falls outside the scope of the UCPD. The Food Standards Agency also said that the unfairness test applied by the Directive is effectively already included in section 14, through the phrase “to the prejudice of the consumer”.

The CBI said that section 14 should be repealed, but noted that it did receive differing views from members on the best way to deal with this section.

Question 39a. Do you think the Fraudulent Mediums Act 1951 should be repealed, amended or left unamended; and why?

Only four respondents replied to this question. Two (including the Trading Standards Institute) said that the Fraudulent Mediums Act 1951 should be repealed. One (a trading standards department) said that it should be left unamended on the basis that the Act relates to avoiding mental distress and anguish. Citizens Advice did not express a preference but said that the general effect of this legislation, to purport to be a medium or clairvoyant, would seem to be caught by Article 6(1)(f), using the misleading element as to “qualification or status”.

Question 39b. Do you think section 13 of the Kent County Council Act 2001 should be repealed, amended or left unamended; and why?

Very few respondents replied to this question, expressing mixed views. The CBI said that section 13 of the Kent County Council Act should be repealed. Two respondents, including the Trading Standards Institute, said this Act provides a valuable mechanism to effectively police occasional sales but that section 13 should be amended. Three respondents, including the Federation of Small Businesses and LACORS, said that this section should be left unamended. However, amongst those respondents who favoured retaining this section (either amended or unamended) there was some acceptance that it could be repealed if misleading omissions were made a criminal offence.

Question 40. Do you think section 13 of the Medway Council Act 2001 should be repealed, amended or left unamended; and why?

The replies to this question were broadly the same as to Question 39b.

Question 41. Do you think the Mock Auctions Act 1961 should be repealed or left unaffected; and why?

Almost all respondents (13 out of 15) said that the Mock Auctions Act 1961 should be repealed. Several respondents cited this as a good example of overly prescriptive law making of the past. The Act is extremely narrow in scope so that rogue businesses learned quickly to avoid its provisions without hampering the general unfairness of such sales. Trading standards respondents said that it is important that criminal sanctions are retained

because offences have helped to stop mock auctions from taking place, as venues can cancel contracts if the activities that would take place there are illegal. Also, officers need to retain powers to check telephone subscriber details, accommodation addresses, carry out direct surveillance and use covert human intelligence sources under RIPA

Question 42. Do you think the relevant sections of the North Yorkshire County Council Act 1991 should be repealed, amended or left unamended; and why?

The replies to this question were broadly the same as to Question 39b.

Question 43a. Do you think that section 12 of the Nottingham City Council Act 2003 should be repealed, amended or left unamended; and why?

The replies to this question were broadly the same as to Question 39b. However a respondent appeared to misunderstand the proposal was to repeal the whole Act (which includes provisions requiring dealers in second hand goods to be licensed and which are designed to combat the easy disposal of stolen property) rather than merely section 12. The latter requires persons holding, promoting or conducting certain types of occasional sales to display certain information about themselves at the location of the sale.

Question 43b. Do you think the Price Indications (Method of Payment) Regulations 1991 should be repealed or amended; and why?

A small majority of respondents (11 out of 19), including LACORS and the Trading Standards Institute, said that the Price Indications (Method of Payment) Regulations 1991 should be repealed. However, the OFT and LACORS said that businesses needed clarity and the matters covered by these Regulations which are compatible with the Directive could be contained in guidance. Those respondents who favoured amendment were, with one exception, individual trading standards departments and/or their regional groupings. They argued that the Regulations contain important specific information for consumers not replicated by the Directive.

Question 44. Do you think the Price Indications (Resale of Tickets) Regulations 1994 should be repealed or amended; and why?

A very small majority of respondents (9 trading standards bodies out of total of 17 respondents) said that the Price Indications (Resale of Tickets) Regulations 1994 should be amended where possible. However, those in favour of repeal included not only business organisations and a consumer organisation, but also London Trading Standards Association in whose area most problems covered by these Regulations are likely to arise. Several respondents in favour of repeal said that the matters covered by these Regulations which are compatible with the Directive could be contained in guidance.

Question 45. Do you think the Price Marking (Food and Drinks Services) Order 2003 should be revoked or left unaffected; and why?

A majority of respondents (12 out of 17), including the Federation of Small Businesses, said that the Price Marking (Food and Drinks Services) Order 2003 should either be left unamended for as long as the transitional exception applies or be amended to comply with the requirements of the Directive. Most such respondents favoured the former option. This is because the Order provides not only what, but crucially where, food and drink prices must be displayed.

Those in favour of repeal included the CBI and British Hospitality Association. The latter said that it favoured this option because any hospitality operator will want guests or potential guests to know what is on the menu. They would be unlikely to use repeal as an excuse not to display any menu items or prices, especially as Article 7 may treat such non-display as an omission of material information. The Trading Standards Institute said that this Order could be repealed provided that in guidance it was made clear that a reasonable indication of prices would be expected to avoid action for a misleading omission. The requirement for restaurant prices to be shown before a consumer enters premises is a provision that also exists in other European countries and should be retained.

Question 46. How do you think the relevant parts of the Timeshare Act 1992 should be amended; and why?

Question 47. Do you think the affected parts of the Timeshare (Cancellation Information) Order 2003 should be repealed or amended; and why?

Given the notoriety of this sector almost all respondents said the Government should do no more than is absolutely necessary in amending the Timeshare Act 1992 and the Timeshare (Cancellation Information) Order 2003. Only a very small minority of respondents, including the CBI, favoured repeal and relying instead on Articles 6 and 7.

Question 48. Do you think the Tourism (Sleeping Accommodation Price Display) Order 1977 should be revoked or amended; and why?

A very small majority comprising exclusively trading standards respondents (9 out of a total of 17 respondents of all kinds) said the Tourism (Sleeping Accommodation Price Display) Order 1977 should be amended where possible. Business organisations, Citizens Advice, an academic respondent and Society of Chief Officers of Trading Standards in Scotland (SCOTSS) said the Order should be repealed. The British Hospitality Association said that the Order had now outlived its usefulness. Very few hotel bookings are made nowadays “off the street” where the transaction could be affected by the display of room prices in the entrance area for which the Order provides.

Question 49. How do you think the Trade Descriptions Act 1968 should be repealed or amended; and why?

A majority of respondents (15 out of 25) said that that the Trade Descriptions Act 1968 is the cornerstone of consumer protection in the UK and should

therefore be amended in relation to either B2C transactions or B2C and B2B transactions. Several respondents also said the Act covers some matters which are outside the scope of the Directive. For example the sale of false proof of age cards to minors on the internet has recently been tackled under the Act. A majority of these respondents favoured amending the Act for both B2C and B2B practices to ensure consistency across the same legislation.

The majority in favour of amendment was weighted by the large number of responses received from individual trading standards departments and/or their regional groupings. However, business organisations representing the interests of intellectual property rights also favoured amendment as opposed to repeal or partial repeal. They were concerned that in repealing the Act the Government would not make the necessary savings for all the legislation (including intellectual property law) that currently relies on the TDA, especially for their enforcement provisions.

Those trading standards respondents who favoured amendment also said that section 14 of the Act should be amended to create a strict liability offence rather than the present one founded upon a reckless or knowing act. This section should also be extended to include misleading statements.

Eight respondents, including Which? and Citizens Advice, said the TDA should be repealed for B2C practices only, or in its entirety. Most of these said this was contingent upon criminal sanctions being introduced into the UCP Regulations. Business organisations said the repeal of the TDA's B2C provisions would ensure businesses have certainty as to the legislation and they are not trying to meet the requirements of two regimes. The CBI said that the TDA should be retained for B2B transactions as it provides a protection that is useful for business, particularly for small traders, who may not be able to negotiate appropriate rights under contract law. A trading standards respondent said that if the B2B provisions are to be repealed then criminal sanctions, etc will need to be introduced into the Control of Misleading Advertisements Regulations 1988. However, it had concerns about the scope of the definition of advertising within those Regulations. For example it was unsure whether it would cover claims on entry forms to car auctions or in respect of documentation accompanying animals submitted to abattoirs (used as an important tool in animal disease control).

An academic respondent said that certain provisions of the TDA, such as the main substantive offences (ss1-6; 14) could be re-enacted in suitable form in the legislation implementing the UCPD; all as strict liability offences. The final respondent did not express a preference for amendment or repeal.

Question 50. Do you think the Trade Descriptions (Sealskin Goods)(Information) Order 1980 should be repealed, amended or left unamended; and why?

A large majority of respondents (11 out of 14) said that the Trade Descriptions (Sealskin Goods) (Information) Order 1980 should be repealed. The CBI said, given the emotive nature of animal welfare in the modern world, it is likely that

making an item with sealskin from baby seals would be regarded by most consumers as information they would like to receive before they make their choice.

Question 51. Do you think the Trading Representations (Disabled Persons) Act 1958 should be repealed, amended or left unamended; and why?

A slim majority of (mainly trading standards) respondents (8 out of 15) said the Trading Representations (Disabled Persons) Act 1958 should be left unamended. There is a strong argument that it falls outside the scope of the Directive on taste and decency grounds. However, LACORS said it believes that investigations are rarely taken under this Act, so some authorities have expressed the view that this legislation may be repealed and reliance placed on the Directive. The Trading Standards Institute, CBI and Citizens Advice also said that this Act should be repealed.

Question 52. Do you think the Trading Schemes Regulations 1997 should be amended (and if so, how) or repealed; and why?

A majority of respondents (10 out of 16) said that the Trading Schemes Regulations 1997 should be amended so as to exclude business-to-consumer transactions from their application.

The Direct Selling Association said that (acting under its duty to implement the Electronic Commerce Directive) the Government should amend the Trading Schemes Regulations to enable contracts to which they apply to be made online. Also, when amending the Regulations, the opportunity should be taken to raise the financial limit in Regulation 10 from £200 to £500.

The Direct Selling Association also said that the Government should transpose Annex point 14 of the Directive in a way which does not involve the use of word "Pyramid".

Question 53. Do you think sections 29 to 31 of the Weights and Measures Act 1985 should be repealed or amended, and if so, how? Why do you hold this view?

Almost all respondents (15 out of 16) said that sections 29 to 31 of the Weights and Measures Act 1985 should be amended rather than repealed. It was essential to retain these provisions to preserve the integrity of the 1985 Act. There would be advantages in the protections applying in an equivalent way for both consumers and business customers. Only the CBI said these sections should be repealed in relation to B2C practices.

LIST OF RESPONDEES

1. Aberdeenshire TSD
2. Advertising Association
3. Advertising Standards Authority (ASA)
4. Alliance Against IP Theft
5. Anti-Counterfeiting Group
6. Approved Coal Merchants Scheme
7. Association for Payment Clearing Systems (APACS)
8. Birmingham TSD
9. Brent Tenants' Rights Group
10. Bristol Design (Tools) Ltd
11. British Association of Removers
12. BritishAmerican Business Inc
13. British Bankers' Association
14. British Brands Group
15. British Hospitality Association
16. British Retail Consortium
17. British Vehicle Rental Leasing Association (BVRLA)
18. Building Societies Association
19. Central England Trading Standards Authorities (CEnTSA) and East Midlands Co-ordinating Body on Trading Standards
20. Chief Environmental Health Officers Group (CEHOG), Northern Ireland
21. Citizens Advice
22. City of Stoke on Trent TSD
23. Clifford Chance
24. Confederation of British Industry
25. Direct Selling Association
26. East of England Trading Standards Association Ltd (EETSA)
27. Energy Retail Association
28. Energywatch
29. Federation of Small Businesses
30. Food Standards Agency
31. Glasgow TSD
32. Glass and Glazing Federation (GGF)
33. Institute of Credit Management
34. Institute of Practitioners in Advertising (IPA)
35. International Trademark Association
36. ISBA
37. Law Society of Scotland
38. Littlewoods Shop Direct Home Shopping Ltd
39. Local Authorities Co-ordination Group on Regulatory Services (LACORS)
40. London Trading Standards Association (LoTSA)
41. Marcus Robinson (individual trading standards officer and academic)
42. Market Research Society
43. National Consumer Council

44. National Consumer Federation
45. Newspaper Society
46. North East Trading Standards Association (NETSA)
47. Office of Communications (OFCOM)
48. Office of Fair Trading (OFT)
49. Periodical Publishers Association
50. Plymouth TSD
51. Professor Hugh Collins
52. Professor Macleod – University of Liverpool
53. Renfrewshire TSD
54. Royal Institute of Chartered Surveyors (RICS)
55. RWE npower
56. Shepherd + Wedderburn
57. Scottish Food Enforcement Liaison Committee
58. Scottish and Southern Energy Group
59. Shelter
60. Society of Chief Officers of Trading Standards in Scotland (SCOTSS)
61. Society of Motor Manufacturers and Traders (SMMT)
62. South West of England Regional Coordination of Trading Standards (SWERCOTS)
63. Sue Malleson (private individual)
64. Timeshare Consumers Association
65. Trading Standards Institute
66. Trading Standards South East (TSSE)
67. Which?
68. Zurich Financial Services
69. Direct Marketing Association

End

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CCP Directorate
June 2006