

**EXPLANATORY MEMORANDUM TO
THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008**

2008 No. Draft

**THE BUSINESS PROTECTION FROM MISLEADING MARKETING REGULATIONS
2008**

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1. This explanatory memorandum has been prepared by the Department for Business, Enterprise & Regulatory Reform and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) introduce a general prohibition on traders in all sectors engaging in unfair commercial (mainly marketing and selling) practices against consumers. It will put in place a comprehensive framework for dealing with sharp practices and rogue traders who deliberately set out to exploit loopholes in existing legislation.

2.2 The CPRs also repeal a number of laws which cover the same subject matter, including most of the Trade Descriptions Act 1968 (TDA), to create a modern, simplified consumer protection framework.

2.3 The Business Protection from Misleading Marketing Regulations 2008 (BPRs) prohibit misleading business-to-business advertising and set out the conditions under which comparative advertisements (which is any advertisement which identifies a competitor or a competitor's product) are permitted. The BPRs are intended to ensure that there is no reduction in business protections following the repeal of certain legislation such as the TDA which protects businesses as well as consumers.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Unfair Commercial Practices Directive (UCPD) is a maximum harmonisation directive and does not permit Member States to maintain national provisions falling within its scope (unfair commercial practices harming consumers' economic interests) which exceed the provisions of the UCPD (with some exceptions). Accordingly in transposing the UCPD it has been necessary to identify all legislation falling within the scope of the UCPD. The legislation could have been amended so as to make it consistent with UCPD or repealed. The preferred approach following consultation has been to repeal overlapping laws in order that existing laws are replaced with the provisions of the Regulations (see further paragraphs 7.8 to 7.12 below).

3.2 The CPRs repeal much of the Trade Descriptions Act 1968 including the prohibition on false trade descriptions in section 1(1) and the provision on false or misleading statements as to services in section 14. These provisions fall within the scope of the UCPD as they apply in business-to-consumer (B-to-C) cases and could not be maintained consistently with maximum harmonisation. The CPRs offer equivalent protection for consumers in B-to-C cases and the BPRs offer equivalent protection for traders in business-to-business (B-to-B) cases. The provisions in sections 8 and 9 which concern information to be given with goods or in advertisements are also repealed. They could only be used in B-to-C cases consistently with the maximum harmonisation in circumstances where such information would anyway be required under the CPRs. The provisions would be very difficult to use in B-to-B cases without also affecting B-to-C cases in a manner inconsistent with maximum harmonisation.

3.3 The CPRs amend section 12 of the 1968 Act. Section 12 makes it an offence to give a false indication as to Royal approval. This section would cover indications which were commercial practices but could also go beyond commercial practices. In order to maintain compatibility with maximum harmonisation the CPRs amend the section so that where a false indication is a commercial practice no offence is committed unless it is also unfair under the CPRs.

3.4 The CPRs also repeal Part 3 of the Consumer Protection Act 1987 concerning misleading price indications to consumers. This provision falls within the scope of the UCPD and the protections afforded to consumers are provided by the CPRs. As a result of the repeal of Part 3 the Price Indications (Method of Payment) Regulations 1991 (S.I. 1991/199) and the Price Indications (Resale of Tickets) Regulations 1994 (S.I. 1994/3248) which are made under Part 3 cease to have effect. The 1991 Regulations require traders to give consumers certain information where the price indicated does not apply to all methods of payment. The 1994 Regulations require certain information to be given by persons who supply tickets to places of entertainment. The Regulations could not be maintained consistently with maximum harmonisation and the protections they give are broadly replicated by the CPRs. A saving is made for the Price Indications (Bureaux de Change) (No. 2) Regulations 1992 (S.I. 1992/737) which were also made under Part 3. As these regulations concern financial services member States have an option under article 3.9 of the Directive to impose more restrictive provisions,

3.5 The CPRs repeal the Trading Representations (Disabled Persons) Act 1958 which prohibits certain representations when selling goods in the course of business. The Act falls within the scope of the Directive as a restriction on commercial practices to protect the economic interests of consumers. The prohibition could not be maintained consistently with maximum harmonisation.

3.6 The CPRs repeal the saving for orders made under section 22 of the Fair Trading Act 1973 in section 10(2) Enterprise Act 2002. The Orders in question are the Consumer Transactions (Restrictions on Statements) Order 1976 (S.I. 1976/1813) and the Business Advertisements (Disclosure) Order 1977 (S.I. 1977/1918). The 1976 Order restricts the making of statements concerning consumers' rights. The 1977 Order requires persons seeking to sell goods in the course of business to make clear in advertisements that goods are to be sold in the course of business. The protections provided are broadly provided by the CPRs.

3.7 The CPRs repeal the Mock Auctions Act 1961. The Act contains specific prohibitions relating to mock auctions. These cannot be maintained consistently with maximum harmonisation. Although the specific prohibitions are not replicated by the CPRs the overall effect of the Act to prevent consumers being confused at such auctions is provided by the CPRs.

3.8 The CPRs repeal the Fraudulent Mediums Act 1951. The Act makes it an offence for a person to purpose to act as a spiritualistic medium with intent to deceive or uses a fraudulent device. The Act cannot be maintained consistently with maximum harmonisation.

3.9 The CPRs repeal section 29 of the Weights and Measures Act 1985 which contains an offence relating to misrepresentations as to quantity. As far as B-to-C cases is concerned this cannot be maintained consistently with maximum harmonisation. The CPRs provide equivalent protection in relation to B-to-C cases and the BPRs provide equivalent protection in relation to B-to-B cases.

3.10 The CPRs repeal similar provisions in 6 local Acts (County of Cleveland Act 1987, London Local Authorities Act 1996, Kent County Council Act 2001, Medway Council Act 2001, North Yorkshire County Council Act 1991 and Nottingham City Council Act 2003). The provisions require persons holding certain types of occasional sale to display certain information. These information requirements are not compatible with maximum harmonisation and broadly equivalent protection is provided by the CPRs.

3.11 The CPRs repeal section 46 of the Consumer Credit Act 1974 which makes it an offence to give a false or misleading credit or hire advertisement. The offence as far as consumer hire could not be maintained consistently with maximum harmonisation. The Directive (article 3.9) provides member States with the option to impose more restrictive national provisions in relation to financial services which would include consumer credit. However the prohibition in this section in relation to both consumer hire and consumer credit is replicated by the CPRs.

3.12 Amendments are also made to sections 77, 78, 79, 85, 97, 103 and 107 to 110 of the 1974 Act. These sections oblige traders to give debtors or hirers under regulated consumer credit or hire agreements certain information on request. The information requirements amount to commercial practices because they directly relate to the supply of a product. As far as the provisions relating to consumer hire are concerned the existence of these information requirements would breach maximum harmonisation unless they are capable of falling outside the scope of the Directive by virtue of the contract law exclusion in article 3.2. However the existence of criminal sanctions in relation to the breach of these requirements would be incompatible with the contract law exclusion. Accordingly the amendments remove the criminal sanctions relating to these provisions and also for consistency to the equivalent provisions relating to consumer credit.

3.13 The CPRs amend section 40 of the Administration of Justice Act 1970. Section 40 makes it an offence to coerce a person to pay money claimed as a contractual debt by certain means. Some of the activities covered by this section are commercial practices.

Accordingly in order to maintain compatibility with maximum harmonisation this section is amended so it does not apply to anything which is done which is a commercial practice under the CPRs.

3.14 The CPRs revoke the Tourism (Sleeping Accommodation Price Display) Order 1977 (S.I. 1977/1877). The Order requires hotels to display room prices in a certain manner. The Order cannot be maintained consistently with maximum harmonisation. The overall effect of the order is broadly maintained by the CPRs.

3.15 The CPRs also revoke the Price Marking (Food and Drink) Services Order 2003 (S.I. 2003/3183). The Order requires certain information relating to food and drink prices to be displayed at premises offering food and drink in a certain manner. The Order is unlikely to be capable of being maintained consistently with maximum harmonisation. The overall effect of the Order is broadly maintained by the CPRs.

3.16 The CPRs amend the Consumer Credit (Advertising) Regulations 2004 (S.I. 2004/1484). These Regulations impose requirements concerning the form and content of advertisements that relate to the provision of credit and the hiring of goods. The amendments made by the CPRs omit the provisions relating to consumer hire in order to maintain compatibility with maximum harmonisation.

3.17 The revocations and other amendments made to secondary legislation under the CPRs are done under section 2(2) European Communities Act 1972. They could have been done under the powers under which such legislation had originally been made. The amendments and revocations concern both regulations and orders and the use of the same powers under which each instrument was made would be procedurally complex and would mean that amendments and revocations were divided up in a number of instruments. Such a course would have resulted in unnecessary complexity for users of the legislation. Some of the powers under which instruments could have been revoked require consultation. There has been full consultation on the repeals and revocations of overlapping laws by the CPRs (as mentioned in paragraph 7.17).

3.18 Both the CPRs (regulations 21 and 22) and the BPRs (regulations 23 and 24) contain powers of entry and investigation. They are modelled closely on those which exist in section 28 of the Trade Descriptions Act 1968. Section 28(1)(e) provides a power to seize and detain goods or documents but only provides a power concerning the breaking open of containers in order to exercise the power to seize goods. This is anomalous in comparison with other comparable powers such as that in section 162(1)(e) of the Consumer Credit Act 1974 which contains a power concerning the breaking open of containers in order to exercise of the power to seize both goods and documents. Regulation 21(2) CPRs and regulation 23(2) BPRs follow the precedent in the Consumer Credit Act 1974 in this respect.

3.19 The BPRs contain a power in regulation 21 for enforcement authorities to obtain information by notice in writing. Similar powers are contained in the Enterprise Act 2002 (sections 226-7) and the Unfair Terms in Consumer Contracts Regulations 1999 (S.I. 1999/2083)

4. Legislative Background

4.1 The CPRs implement the Unfair Commercial Practices Directive (UCPD, Directive 2005/29/EC).

4.2 The BPRs implement the Misleading and Comparative Advertising Directive (MCAD, Directive 2006 /114/EC). That Directive codified the previous 1984 Directive on the subject with amendments made to it by other Directives (including the UCPD which reduced the scope of the provisions on misleading advertising to business-to-business advertising) The previous 1984 Directive is currently implemented by the Control of Misleading Advertising Regulations 1988 which are to be repealed by the CPRs.

4.3 The DTI submitted explanatory memorandum 10904/03 +ADD 1 on 14 June 2003 on the Commission's proposal for the UCPD. The Commons European Scrutiny Committee considered it politically important and cleared it (Report 13, Item 24683, Session 2003/2004. The Lords Select Committee on the EU cleared it from scrutiny in Sub-Committee G (Progress of Scrutiny, 28 May 2004, Session 2003/2004).

4.4. Transposition notes on the CPRs and BPRs are attached at Annexes A and B, respectively.

5. Territorial Extent and Application

5.1 Both instruments apply to all of the United Kingdom.

5.2 Although the UCPD and MCAD could have been implemented by Northern Ireland, the Northern Ireland Departments concerned have agreed that implementation of the UCPD and MCAD can be carried forward on a UK basis.

6. European Convention on Human Rights

The Parliamentary Under Secretary for Trade and Consumer Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008 are compatible with the Convention rights.

7. Policy background

7.1 The UCPD has two main objectives:

- to strengthen consumer protection by introducing a general prohibition on traders against treating consumers unfairly ; and
- to harmonise unfair trading laws protecting consumers in all EU Member States.

7.2 The Government supports this key Directive, believing it will strengthen our consumer protection regime and achieve its objective of improving cross-border trade. With the DTI's 2003 benchmarking study showing that a "general duty (not) to trade (un)fairly" strengthens consumer protection regimes, transposing the UCPD will mark an important step towards BERR meeting its Public Service Agreement (PSA) target of ensuring that the UK framework for consumer empowerment and support is at the level of the best by 2008.

7.3 Research by the Office of Fair Trading (OFT) (2000¹) estimated that the level of consumer detriment – defined as losses suffered as a result of defective goods, inadequate redress and poor information - is around £8.3 billion a year, excluding the emotional costs and stress which consumers may suffer. The OFT's research also shows that detriment suffered by low-income consumers causes a greater welfare loss than the same monetary loss for an average consumer. Much of the reported problems are covered by existing legislation, but the wide-ranging scope and principles-based approach of the UCPD will in many cases enhance the ability of enforcers to take effective action.

7.4 The UCPD applies across all business sectors (including immovable property) and will set the framework for how businesses must deal with consumers. These rules apply principally to pre-sale marketing, advertising and selling but also apply to certain behaviours post-sale. The latter include failing to comply with a commitment made pre-sale (e.g. to provide after-sale support) or putting onerous or disproportionate non-contractual barriers to consumers wishing to exercise their rights under the contract. The Directive does not apply to the quality of the goods sold or to the standard of service supplied. These will continue to be regulated by existing legislation on the sale and supply of goods and services.

7.5 The UCPD, and the CPRs which implement the Directive, prohibits unfair commercial practices and sets out rules that determine when commercial practices are unfair. These fall into three categories:

- (i) commercial practices which contravene the requirements of professional diligence (honest market practice/ good faith). It is envisaged that this will act as a safety-net to catch practices which do not come under the categories below,
- (ii) commercial practices which are misleading (by action and omission) and aggressive practices.
- (iii) certain specific commercial practises which are always considered to be unfair.

7.6 The first two categories of commercial practice which are caught by the prohibition are principles-based: they apply only if the effect of the trader's practice is likely to alter consumers' decisions in relation to products. The normal benchmark for assessing the likely effect of the practice is the "average consumer. However, the UCPD and CPRs contain two variations of the "average consumer" test. These apply (i) where a practice is directed at a particular group of consumers; or (ii) where a practice is likely to affect only a clearly identifiable group of vulnerable consumers in a way which the trader

¹ "Consumer Detriment", February 2000, OFT 296

could reasonably be expected to foresee. In either case the likely effect of the practice is then assessed from the perspective of the average member of that group. These variations of the “average consumer” test are intended to provide additional protections for vulnerable consumers. By contrast, the third type of commercial practice caught by the prohibition are not principles based, and are always unfair.

Enforcement

7.7 The UCPD requires that there is adequate and effective means to combat unfair commercial practices. This has to include a procedure that allows court action to stop or prevent breaches of its prohibitions. This is achieved by adding the Directive and the CPRs to the Community infringements regime under Part 8 of the Enterprise Act 2002. In addition the Government has decided that a breach of most the prohibitions in the CPRs will be a criminal offence. The CPRs place a duty on the Office of Fair Trading (OFT), local authority Trading Standards Services and the Department of Enterprise, Trade and Investment in Northern Ireland (DETI) to enforce the Regulations.

Simplification

7.8 The Government’s Consumer Strategy², published in June 2005 set out the aim of establishing a legal framework that is flexible, fair and transparent.

7.9 The UCPD’s broad scope means that it overlaps with many existing laws. In addition, because the UCPD is a maximum harmonisation Directive (ie setting out the maximum level of restriction permissible in respect of unfair commercial practices which harm consumers’ economic interests) the UK cannot maintain rules that exceed the level of protection set by the Directive.

7.10 A supplementary objective in transposing the UCPD is to achieve, where possible, some regulatory simplification. Transposition of the Directive has required a thorough review of the UK’s consumer protection regime and has provided an opportunity to assess the scope for simplification and rationalisation of the consumer protection regime.

7.11 The CPRs repeal provisions in a number of overlapping laws, including most of the TDA and Part 3 of the Consumer Protection Act 1987 (misleading price indications).

7.12 Implementation of the UCPD through the CPRs will represent the biggest change to the consumer protection framework for almost 40 years. It will affect all businesses that deal directly with consumers.

Guidance

7.13 Many of the terms and concepts used in the CPRs are novel to domestic law. The OFT are preparing joint OFT/BERR Guidance, in consultation with a small group of core stakeholder, on how the Government believes these terms and concepts should be

² Extending Competitive Markets: Empowered Consumers, Successful Business, DTI 2005

interpreted. The OFT consulted on draft Guidance in May 2007. The final Guidance is expected to be published in late February 2008.

BPRs

7.14 Some of the legislation to be repealed, notably the TDA, protects businesses as well as consumers. TSS have historically enforced false and misleading claims affecting businesses through criminal sanctions and associated investigative powers in the TDA. Without these sanctions and powers TSS ability to enforce business-to-business cases would be removed, thereby exposing businesses to a reduction in protection from other unscrupulous businesses. As business-to-business cases do arise, there was a strong case for the Government to legislate to ensure that there is no reduction in business protection when most of the TDA is repealed, especially as small businesses are often in no better position to protect themselves than consumers.

7.15 The MCAD requires that there are adequate and effective means to combat misleading (business-to-business) advertising and enforce compliance with the provisions on comparative advertising. Comparative advertising is advertising which identifies a competitor or a product of a competitor. In order to be permitted it has to meet all the conditions in regulation 4. These conditions relate mainly to aspects of the fairness of the comparison to a competitor or a competitor's product which is made in the advertisement. If the comparison with a competitor or a competitor's product does not satisfy these conditions the comparative advertising is not permitted even if it does not deceive traders or consumers and alter their economic behaviour.

7.16 The means of enforcement referred to under the MCAD has to include a procedure which allows court action to stop or prevent misleading advertising or impermissible comparative advertising. Regulation 15 allows injunctions to be sought by enforcers to secure compliance with prohibition on misleading advertising in regulation 3(1) or the conditions under which comparative advertising is permitted under regulation 4. In addition the BPRs in regulation 6 provide for an offence for traders to engage in misleading advertising. Regulation 13 places a duty on the OFT, TSS and DETINI to enforce the Regulations.

Consultation

7.17 There were three rounds of written consultation leading up to and during the negotiation of the UCPD. The first was conducted on the basis of the Commission's Green Paper on EU Consumer Protection³, the second in response to the Follow-up Communication, and the third based on the Commission's formal proposal for a Directive on Unfair Commercial Practices. Copies of the two documents and draft Directive were circulated widely amongst stakeholders (businesses and business organisations, consumer organisations and enforcement bodies).

7.18 A further three rounds of written consultation were held on implementation of the UCPD. The first consultation was published in December 2005 and sought views on options for interpretation, enforcement and simplification of existing legislation. The

³ Green Paper on EU Consumer Protection, 2 October 2001 (COM (2001) 531 final

second consultation in December 2006 sought views on how to frame the criminal sanctions in the regulations implementing the UCPD and amended MCAD. The third consultation in May 2007 was on the draft CPRs and BPRs. The responses to these consultations informed the Government's view on how best to implement the UCPD, and formal Government Responses have been published on BERR's webpages.

7.19 Business supports the Government's stated aim to establish a regime that is capable of tackling rogue traders and unfair commercial practices effectively while minimising burdens on legitimate businesses. Business also accept that the purposive approach is the way forward, provided it is underpinned by the adoption of Hampton principles and is accompanied by the removal of existing overlapping legislation.

7.20 Consumer organisations also supported the move towards principles-based legislation which is easy for consumers and enforcers to understand. Both consumer organisations and enforcement bodies supported the inclusion of criminal sanctions in the CPRs which ensure that there is no reduction in existing consumer protection following the repeal of overlapping legislation. Business would have preferred the CPRs to be enforced purely through civil means.

8. Impact

8.1 Impact Assessments on the CPRs and BPRs are attached to this memorandum (Annexes C and D).

9. Contact

Peter Deft at the Department for Business, Enterprise & Regulatory Reform Tel: 020 7215 0341 or e-mail: peter.deft@BERR.gsi.gov.uk can answer any queries regarding the instruments.

Summary: Intervention & Options

Department: Business Enterprise and Regulatory Reform (BERR)	Title: The Consumer Protection from Unfair Trading Regulations 2007 Implementing the Unfair Commercial Practices Directive (UCPD, Directive 2005/29/EC)	
Stage: Final	Version: 1.0	Date: 24/01/08
Related Publications: Consultations on: (i) Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation (Dec 2005); (ii) Framing and enforcing criminal sanctions in the Regulations implementing the Unfair Commercial Practices Directive (Dec 2006); and (iii) the draft Consumer Protection from Unfair Trading Regulations 2007 (May 2007).		

Available to view or download at:

<http://www.berr.gov.uk/consultations/index.html>

Contact for enquiries: Peter Deft

Telephone: 020 7215 0341

What is the problem under consideration? Why is government intervention necessary?

The EU Unfair Commercial Practices Directive (UCPD, Directive 2005/29/EC) was published in the Official Journal on 11 June 2005. Measures to implement the Directive should come into force on 12 December 2007.

The DTI has a Public Service Agreement with HM Treasury to ensure that the UK framework for consumer empowerment and support is at the level of the best by 2008. The Government's Consumer Strategy⁴ (2005), set out the aim of establishing a legal framework that is flexible, fair and transparent. Introducing the general duty not to trade unfairly via implementation of the Directive is a key component of this.

What are the policy objectives and the intended effects?

The Directive aims to eliminate obstacles to the proper functioning of the Single Market for consumers by:

- reducing the barriers to cross-border trade from differences in laws on unfair commercial (mainly marketing and selling) practices. Under UCPD businesses won't have to change their practices in different Member States.
- increasing consumer confidence to shop across frontiers. UCPD gives a high, common level of consumer protection for all transactions, removing uncertainty about the behaviour consumers can expect from traders in other Member States. It will ensure that consumers are not treated unfairly by business, particularly from misleading or aggressive behaviour, or otherwise have their freedom of choice impaired.

⁴ Extending Competitive Markets: Empowered Consumers, Successful Business, DTI 2005

What policy options have been considered? Please justify any preferred option.

The UK is obliged to implement the UCPD as a member of the EU and so there is no option of whether to adopt the policy or not. Maximum harmonization also means that national measures within the scope of the Directive cannot impose more extensive requirements or prohibitions than the level in the Directive. It sets a standard, which has to be applied uniformly across all Member States.

However, there are some implementation options in three distinct areas: Interpretation. Enforcement and Simplification.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Three years from the date the Regulations enter into force (April 2011).

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Gareth Thomas

Date: 3rd March 2008

Summary: Analysis & Evidence

Policy Option: 1

Description: Adopting UCPD

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition)	Yrs	
	£ 12-27 million	1	Familiarisation costs to businesses
	Average Annual Cost (excluding one-off)		New Administrative burdens imposed by UCPD
£ 12-24 million			
Total Cost (7 years) (PV)			£88-179m
<p>Other key non-monetised costs by 'main affected groups'</p> <p>One-off familiarisation costs to enforcers for which BERR is funding There may be some ongoing costs to the courts as well as costs to BERR and OFT for running awareness-raising campaigns and producing guidance.</p>			
BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'.
	One-off	Yrs	
	£ 0.0		Reduction of administrative burdens under existing legislation (£1.46 -1.48 billion) + reduction in consumer detriment (£823 million) + UK retailers supplying EU shoppers (£196).
	Average Annual Benefit (excluding one-off)		
£ 391-395 million			
Total Benefit (7 years) (PV)			£2.470-2.500 billion
<p>Other key non-monetised benefits by 'main affected groups'</p>			

Key Assumptions/Sensitivities/Risks

Move to general principles based legislation and repeal of overlapping prescriptive legislation will enable companies to find cheaper and easier ways of ensuring they do not treat consumers unfairly.

Price Base 2006 Year	Time Period 7 Years	Net Benefit Range (NPV) £2.3-2.4 billion	NET BENEFIT (NPV Best estimate) £ 2.4 billion
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What is the geographic coverage of the policy/option?		UK		
On what date will the policy be implemented?		06/04/2008		
Which organisation(s) will enforce the policy?		OFT, Trading Standards and DETINI		
What is the total annual cost of enforcement for these		£0.0		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		Yes		
What is the value of the proposed offsetting measure per year?		£ N/A		
What is the value of changes in greenhouse gas emissions?		£ N/A		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)

Decrease

Increase of £17.5 million **Decrease of £233.5 million** Net Impact

£ 216 million

Key: Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

Overview

1. Unfair commercial practices harm all in society. Whether through misleading pricing, the selling of clocked second-hand cars, prize scams, or through high-pressure selling techniques. Tackling these deceptive and dishonest practices is key to reducing consumer detriment.
2. The success of the Single Market is already considerable. However, there remains room for improvement. UCPD could play a part in realising further benefits.
3. The Directive aims to eliminate obstacles to the proper functioning of the Single Market for consumers by:
 - reducing the barriers to cross-border trade from differences in laws on unfair commercial (mainly marketing and selling) practices. Under UCPD businesses won't have to change their practices in different Member States.
 - increasing consumer confidence to shop across frontiers. UCPD gives a high, common level of consumer protection for all transactions, removing uncertainty about the behaviour consumers can expect from traders in other Member States. It will ensure that consumers are not treated unfairly by business, particularly from misleading or aggressive behaviour, or otherwise have their freedom of choice impaired.
4. The Directive achieves this by establishing an EU-wide framework of legal principles regulating unfair business-to-consumer commercial practices (Annex 2 provides some examples where the UCPD could help enforcers tackle unfair practices. The Directive aims to deliver a high level of consumer protection and achieve legal certainty whilst remaining as simple and flexible as possible to adapt to market developments.
5. A supplementary objective in transposing the Directive is to achieve, where possible, some regulatory simplification. Transposition of the Directive has required a thorough review of the UK's consumer protection regime and has provided an opportunity to assess the scope for simplification and rationalisation of the UK's consumer protection regime.

Background

6. The DTI has a Public Service Agreement with HM Treasury to ensure that the UK framework for consumer empowerment and support is at the level of the best by 2008. The Government's Consumer Strategy⁵, published in June 2005 set out the aim of establishing a legal framework that is flexible, fair and transparent. Introducing the general duty not to trade unfairly via implementation of the Directive is a key component of this. At the same time, the

⁵ Extending Competitive Markets: Empowered Consumers, Successful Business, DTI 2005

Government will proactively pursue simplification of EU consumer legislation through the review of the EU consumer acquis (8 consumer protection directives)⁶.

7. The Unfair Commercial Practices Directive was published in the Official Journal on 11 June 2005. Measures to implement the Directive should be published by 12 June 2007 and come into force on 12 December 2007.

The Proposals

8. The Directive sets out rules that determine when commercial practices are unfair. These rules fall into three distinct levels:

- there is a general prohibition on unfair business-to-consumer practices which is intended to act as safety-net consumer protection legislation;
- there are provisions on misleading actions and omissions and aggressive commercial practices that are intended to function independently of the general prohibition; and
- there is an Annex of 31 specific practices which are always considered to be unfair and therefore prohibited. These include, for example, prize draw scams which are estimated to cause UK consumers £150 million pounds of detriment a year.

9. The first two types of prohibition are principles-based: they apply only if the effect of the trader's practice is likely to alter consumers' decisions in relation to products. The normal benchmark for assessing the likely effect of a practice is the "average consumer" as determined by ECJ jurisprudence. However, the UCPD contains two variations of the "average consumer" test. These apply (i) where a practice is directed at a particular group of consumers; or (ii) where a practice is likely to affect only a clearly identifiable group of vulnerable consumers in a way which the trader could reasonably be expected to foresee. In either case the likely effect of the practice is then assessed from the perspective of the average member of that group. These variations of the "average consumer" test are intended to provide additional protections for vulnerable consumers to whom the practice is directed or to whom it reaches. By contrast, the Annex practices are not principle-based, and are always unfair.

Scope

10. The Directive applies across all business sectors. It applies to commercial practices directly connected with the promotion, sale or supply of a product to consumers before, during and after a commercial transaction with a consumer. There are approximately 325,000 firms in the retail sector, the great majority of which are small firms

⁶ See <http://www.dti.gov.uk/consumers/policy/eu/review/index.html> for more details.

employing four people or fewer⁷. There are also approximately 153,000 hotel and restaurant enterprises, the majority of which will be affected. Firms in a wide range of other sectors will be affected too, for example the real estate and services sectors.

11. The practical consequences for most law-abiding firms will be very limited. However, the Directive will affect some sectors more than others. In particular, sectors where there is currently a problem with aggressive and high-pressure selling techniques, such as doorstep selling and timeshare.

12. The Directive does not apply to business-to-business commercial practices. As a result, small businesses and sole traders will not benefit from the protections in the Directive.

13. The Department does not anticipate that the Directive will have a disproportionate effect, positive or negative, on any ethnic business or consumer groups.

Rationale for Government Intervention

14. Consumer Protection – Research by the Office of Fair Trading (OFT) (2000⁸) estimated that the level of consumer detriment – defined as losses suffered as a result of defective goods, inadequate redress and poor information – is around £8.3 billion a year⁹, excluding the emotional costs and stress which consumers may suffer. The same research estimated the annual number of complaints consumers have about trading practices are around 85 million, although complaints reported to trading standards are typically around 1 million per year, of which a quarter relate to selling practices. More detail on the OFT complaints data is provided in Annexe 1.

⁷ Source: DTI Stats <http://www.dtistats.net/sme/smestats2005.xls> . Data from the Inter-departmental Business Register gives a figure of 183,000 firms in the retail sector, but unlike the SBS statistics, this excludes a large number of sole traders that will not be registered for VAT.

⁸ “Consumer Detriment”, February 2000, OFT 296.

⁹ The OFT's quantification of consumer detriment at £8.3bn was subject to a margin of error of +/- £2.7bn. In order to be able to detect changes of 5 percent the sample size would need to be increased by a factor of about 50. [OFT296 Para 2.5 -2.6 refers].

15. Barriers to cross border shopping - In the Green Paper on EU Consumer Protection¹⁰, the Commission identified a number of barriers to a genuine Single Market for consumers. These include existing rules becoming outdated quickly, allowing 'rogue traders' to stay one step ahead of the law. Minimum clauses in EU Directives allow national legislation to go higher than the Directives, thereby creating barriers to cross-border trade.

16. Legislation - Maximum harmonisation means that existing UK laws falling within UCPD's scope can't exceed its requirements. This means that overlapping national legislation generally required amendment or repeal.

17. The DTI 2003 comparative study of consumer protection regimes concluded that legislation in the UK was 'piecemeal and inflexible'¹¹. Legislation is currently not responsive to changing market practices. Consumers also find the regulatory framework complicated and perhaps not surprisingly, consumers do not see themselves as well informed about their rights.

Consultation

18. The development of the proposed changes to the current legislation has involved extensive formal and informal consultation with business, enforcement bodies and consumer organisations.

Within Government

19. The Department formally consulted all Government Departments including the devolved administrations on the UCPD. The Department worked particularly closely with HM Treasury, Department for Constitutional Affairs, Office of the Deputy Prime Minister, Department for Transport, Department for Work and Pensions, Financial Services Authority, and the Office of Fair Trading. In addition, the Department circulated a working paper to all Whitehall departments outside of the formal consultation process, outlining the impact of the Directive and seeking views. There have also been discussions with the Commission and other Member States on implementing the Directive.

Public consultation

20. There were three rounds of written consultation leading up to and during the negotiation of the UCPD. The first was conducted on the basis of the Green Paper, the second in response to the Follow-up Communication and based on the Commission's formal proposal for a Directive. Copies of the two documents and the draft Directive were circulated widely amongst stakeholders (business and business organisations, consumer organisations and enforcement bodies).

21. A further three rounds of written consultation were held on implementation of the UCPD. The first consultation was published in December 2005 and sought views on options for interpretation, enforcement, simplification of existing legislation. The second consultation in

¹⁰ Green Paper on EU Consumer Protection, 2 October 2001 (COM(2001)531 final)

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/fair_comm_greenpap_en.pdf

¹¹ Comparative Report on Consumer Policy Regimes, October 2003

<http://www.dti.gov.uk/ccp/topics1/pdf1/benchmain.pdf>

December 2006 sought views on how to frame the criminal offences in the regulations implementing the UCPD. The third consultation in May 2007 was on draft Consumer Protection from Unfair Trading Regulations, which implement the UCPD. The responses to these consultations informed our view on how best to implement the UCPD, and the formal Government Responses to these consultations has been published on BERR's web pages.

22. Presentations to raise awareness of each of the three consultations were held in London, Glasgow and Belfast. In addition, five workshops were held at various times in London Scotland to consider with stakeholders to consider specific policy issues. The discussion of options on civil redress (Option E, paragraphs 105 - 114) is largely informed by one such workshop.

Options

23. The UK is required to implement the UCPD as a member of the EU. Not transposing the Directive would lead to infraction proceedings. This would prove costly to the UK, both financially and in terms of international relations. This option is not considered any further.

24. Maximum harmonization also means that national measures within the scope of the Directive cannot impose more extensive requirements or prohibitions than the level in the Directive. It sets a standard, which has to be applied uniformly across all Member States.

25. However, there are some implementation options in three distinct areas:

- Interpretation: how certain terms used in the Directive could be interpreted and also the extent to which they should be clarified in the legislation or in guidance.
- Enforcement: setting up a new civil law regime, criminal sanctions, self-regulation, self-regulatory codes, and the possibility of providing civil redress.
- Simplification: the value of amending or repealing existing UK legislation that overlaps with the Directive.

Implementation

26. Interpreting and applying the UCPD will not always be straightforward for enforcers, business or consumers. The Directive introduces a principles-based framework that applies to all business sectors. Because of its scope, its provisions have deliberately been designed to be flexible and adaptable, which can be confusing or ambiguous. In addition, the Directive introduces certain concepts and definitions that are new to UK law. All of this highlights the desirability of achieving an appropriate clarification of the Directive's provisions. This needs to be set against the constraint that the Directive sets a standard that has to be implemented and applied uniformly across all Member States.

27. Any combination of options set out in the subsections below is feasible. The Government may choose to provide guidance and/or clarification in the implementing legislation in certain instances and not in others.

28. The options considered below are about:

- (A) Terms in the Directive
- (B) The relationship between the average and vulnerable consumer benchmark
- (C) The application of the average and vulnerable consumer benchmarks to Articles 6-9
- (D) The list of misleading actions, Article 6(1)

(A) Terms in the Directive

A1 – Copying out directly from the Directive without elaboration of ambiguous phrases might leave in place a degree of uncertainty.

29. This uncertainty could also reduce the effectiveness of UCPD by inducing unnecessary caution. Enforcement bodies might be unwilling to take action, even if they believed a practice was unfair, if they considered that there was a reasonable risk that the court might make a different interpretation. Equally, businesses may be put off from innovating in the way that they sell and market their goods and services to consumers if they are unsure how both enforcers and the courts will view their practices. Finally, consumers may not feel empowered if they do not understand the Directive or if they feel that enforcers are constrained by uncertainties over its interpretation.

Option A2 – As A1 but in addition, define terms more clearly in guidance

30. Additional guidance would give greater certainty on how the Government and enforcers think the Directive should be applied. Enforcers would have a clearer idea where to apply themselves and not unnecessarily risk taking cases that would be unsuccessful in the courts. Businesses could develop new approaches to advertising, marketing and selling practices on the understanding that these are unlikely to be unfair to consumers. Consumers would have a clearer understanding of their rights and whether particular practices are unfair.

31. However, there is a risk that additional guidance could have the effect of constraining business behaviour by encouraging compliance with the letter rather than the spirit of guidance. Ensuring that guidance is drafted in a non-prescriptive manner could mitigate this, but it would still only be guidance.

Option A3 – Define terms more clearly in legislation

32. This option might seek to achieve greater clarity than described in option A1. However, the legal risks associated with greater clarification should not be underestimated. The Directive sets a standard that has to be applied uniformly across all Member States. The scope for clarifying ambiguities in the text is therefore constrained because the courts will be required to interpret the Regulations in accordance with the Directive. So any certainty that the implementing regulations

sought to achieve would prove illusory. Further, there is a possibility that such elaboration would lead to differences in applying the Directive compared with other Member States. These differences might lead to infraction proceedings being taken against the UK.

33. There are also downsides associated with introducing a high level of precision to the Directive's definitions and meanings. Such precision could be constraining. Business in particular may find that their freedom to respond to the Directive as they see fit is reduced and this may impose some costs as a result of potentially unnecessary clarifications. Enforcers may feel that too great precision will limit the number of instances where action can be taken against unfair practices. And greater elaboration arguably contradicts the spirit of the Directive, by encouraging compliance with the letter rather than the spirit of the law.

Conclusion

34. Respondents to the 2005 consultation agreed that the best approach would be to copy-out the Directive in most circumstances and limit the amount of elaboration to a minimum. This would minimise the risk of inadvertent gold-plating. In light of the Directive's importance, they also thought that additional guidance would be essential. Guidance should be concise and non-prescriptive, and not seek to establish legal certainty. BERR has therefore primarily opted for Option A2, although it has expanded the definition of a "commercial practice" so that it applies in circumstances where the consumer provides the goods (eg a used car) and the trader (eg a motor dealer) pays the price. This is to ensure that there is no reduction in consumer protection following the repeal of overlapping legislation, such as most of the TDA, which protect consumer sellers (see section on simplification below – paras 115 to 131).

(B) The relationship between the average and vulnerable consumer benchmark

35. In deciding whether a practice is likely to distort the economic behaviour of consumers, the Directive uses the comparator of the "average consumer". The "average consumer" is thus a critical concept in the UCPD.

36. During negotiations, Member States expressed concern that the application of the average consumer benchmark did not of itself provide sufficient protection for vulnerable consumers. For that reason, additional protections were included for certain classes of vulnerable consumer. However, some stakeholders subsequently expressed concern that the addition of these protections could undermine the status of the average consumer as the primary benchmark underpinning the Directive. This matters because adopting the benchmark of the vulnerable consumer would require extensive changes to many traders' business practices, notably by requiring them to provide more information to consumers.

Option B1 – Use copy-out: transpose the Directive as currently drafted

37. Concerns about certainty are particularly great with respect to this provision. Without clarification, some traders might feel that practices which would not be unfair when judged against the average consumer benchmark could nonetheless still fall foul of the

vulnerable consumer benchmark. This may be more likely because it is always reasonably foreseeable that some credulous consumers will be misled, even by honest market practices. This may cause some traders to unnecessarily change their marketing behaviour.

Option B2 – Clarify that the professional diligence test applies to the “vulnerable consumer” benchmark

38. Clarifying that the professional diligence test applies to UCPD Article 5(3) would establish that practices would not be unfair unless they were not professionally diligent. This would render it less likely that traders would misinterpret the Directive and feel obliged to provide more information than was strictly necessary, thereby improving legal certainty. The risk of infraction with this option ought to be relatively low, as it is arguably implicit in the Directive that the professional diligence requirement applies to Article 5(3).

Conclusion

39. Respondents to the 2005 consultation agreed with the Department’s view that the professional diligence test applies to the vulnerable consumer benchmark in Article 5(3). They also thought it important to clarify this in the implementing legislation. BERR has therefore adopted option B2.

(C) The application of the average and vulnerable consumer benchmarks to the specific clauses of misleading and aggressive practices, Articles 6-9

40. UCPD Articles 6-9 set out in greater detail how commercial practices can be unfair by being misleading or aggressive. Much like Article 5, these also make use of the benchmark of the “average consumer” in establishing the likely effect of the practice on the economic behaviour of consumers. However, Articles 6-9 do not explicitly state whether the two variations of the average consumer benchmark (the average member of a particular group of consumers to whom the practice is directed (Article 5.2) and the vulnerable consumer benchmark (Article 5.3)) apply to them. Given that the majority of unfair practices will be dealt with via the specific clauses on misleading and aggressive practices, rather than the general duty, it is important that their operation should be clearly understood.

Option C1 - Use copy-out: transpose the Directive as currently drafted

41. Copying out without further elaboration should not make much difference to the ultimate decision of whether a practice is unfair. However, there is a risk that enforcers and traders would misinterpret the Directive and fail to understand that the vulnerable consumer test also applies to Articles 6-9. This could increase compliance costs for businesses because they would always be required to assess the impact of a practice on the vulnerable against the broader principles of the general prohibition. Similarly, enforcers may incur additional costs trying to understand how to take forward an action for breach of the Directive.

Option C2 – Clarify that the modulations of the “average consumer” and “vulnerable consumer” benchmarks also apply to Article 6-9

42. Enforcers, business and consumers would benefit from the increased legal certainty of being able to assess the impact of a practice on vulnerable consumers against the more specific provisions on misleading and aggressive practices. Furthermore, the risk of infraction proceedings is likely to be low, as this is arguably implicit in the Directive. Adopting C2 is unlikely to decrease the flexibility available to business, enforcers and the courts.

Conclusion

43. In the interest of clarity, BERR has opted for Option C2. This approach was endorsed by the majority of responses to the December 2005 consultation.

(D) The list of misleading actions, Article 6(1)

44. UCPD Article 6 provides that information is capable of being misleading if it is false; or, although factually correct, it is deceptive. For Article 6 to apply, information must be deceptive in relation to one or more of the elements specified in that article, for example in relation to price. Practices that contain information that is deceptive in relation to matters not specified in Article 6 have to be assessed for fairness against the general clause (Article 5).

45. Although the drafting of Article 6(1) is not wholly clear, the Department considers that the list of elements also applies to information that misleads because it is false. This is because the list of elements is intended to reinforce the maximum harmonisation approach of the Directive.

Option D1 – Use copy-out: transpose the Directive as currently drafted

46. If the copy-out approach was adopted, then traders and enforcers could potentially be uncertain about how the Directive worked in this regard. This might lead to inconsistent application of the Directive in particular by enforcers when attempting to take forward cases against rogue traders who might wish to challenge the basis on which the action had been brought. This could lead to delays and an increase in court costs. However, it is unlikely that this would affect whether or not a practice would be unfair because the outcome should be the same irrespective of whether or not the false information is assessed against the specific provisions on misleading actions or the general prohibition.

Option D2 – Clarify that a false statement relates to the elements listed in Article 6(1)

47. The alternative option is to clarify that the list of elements applies to false as well as deceptive information. This would remove the legal uncertainty described above and ensure consistent application. The risk of infraction is likely to be low here.

Conclusion

48. In the interest of clarity, BERR has opted for Option D2.

Enforcement

49. The Directive will need to be effectively enforced if it is to realise the benefits of reducing consumer detriment and providing a level playing field for honest businesses. As the Hampton Review¹² notes, if businesses do not face an effective deterrent it may be rational for them to break the law because the benefits of non-compliance may outweigh the costs of being caught. There are a number of options for enforcing the Directive. Their costs and benefits are considered below.

The options considered below for enforcement are:

- (A) Setting up a civil law regime
- (B) The use of self-regulation options
- (C) Responsibilities of code owners
- (D) Criminal sanctions for breaching the directive
- (E) Providing a route for civil redress

(A) Setting up a civil law regime

50. The Directive sets out a number of requirements and options establishing how the Directive must or can be enforced.

51. UCPD Article 11 sets an overarching requirement to ensure that “adequate and effective means exist to combat unfair commercial practices in the interests of consumers”. These means must include enabling persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices to take legal action or bring such actions before an administrative authority competent to decide on such complaints or initiate legal proceedings. The Directive gives Member States the flexibility to decide which of these facilities should be available.

52. In addition, Article 16(1) adds the UCPD to the Annex of the Injunctions Directive (98/27/EC) in place of the Misleading and Comparative Advertising Directive (MCAD). The Injunctions Directive permits consumer protection bodies (‘qualified entities’) designated by the Member States to apply to the courts or competent administrative authorities for orders to require traders to cease conduct that constitutes a breach of any of the consumer protection directives listed in its Annex and that harm the collective interests of consumers.

53. Part 8 of the Enterprise Act 2002 implements the Injunctions Directive in the UK. This will accordingly require amendment, by adding the UCPD in place of the MCAD.

54. The enforcement regime in Part 8 of the Enterprise Act 2002 broadly satisfies the requirements of Article 11 of the UCPD. This raises the possibility that Article 11 of the UCPD could be implemented via Part 8 of the Enterprise Act, although some changes

¹² “Reducing Administrative Burdens: effective inspection and enforcement,” Philip Hampton, March 2005

would be required to Part 8 to fully comply with Article 11. The main difference between Part 8 and Article 11 is that Part 8 only applies to infringements that harm the “collective interests of consumers” whereas the enforcement regime required by Article 11 makes no reference to the word “collective”. However, as set out in the Government Response to the December 2005 consultation, we believe this does not matter in practice.

Option A1 - Add the Directive to Part 8 EA02 and rely, with some modifications, on this meeting the requirements of Article 11.

55. This option has the advantage of maintaining a single, coherent enforcement regime across the consumer field. Consultation with enforcers suggests that use of enforcement orders under Part 8 of the Enterprise Act is becoming both more common and more effective and does not impose burdens on legitimate businesses that comply with the law. However, there is a risk that the use of the Part 8 civil law enforcement regime may not be seen as fulfilling the UK’s legal obligations transparently and therefore failing to implement the Directive properly. It could also cause confusion over whether injunctions could be sought following one-off breaches of the Directive, as there is some current confusion in this regard with respect to Part 8 orders.

Option A2 - Set up a new injunctive regime meeting the requirements of Article 11, whilst also adding the Directive to Part 8 EA02.

56. A separate injunctive regime would ensure that the Government had transparently met its legal commitments. It would also remove any residual uncertainty that the enforcement regime should be capable of stopping or preventing individual breaches of the Directive. However, establishing another route for enforcement could create confusion between the operation of two similar, but slightly different, civil enforcement mechanisms. Enforcement authorities might incur additional costs as a result of the need to train staff in the operation of two regulatory systems covering the same type of unfair behaviour that causes the same type of detriment.

Conclusion

57. Most respondents to the 2005 consultation agreed with the Department’s view that the differences in terminology between the UCPD and the Injunctions Directive did not matter in practice. They thought the legal risk of infraction was therefore slight. In addition, many argued that establishing a separate, parallel enforcement regime would be unnecessarily complicated and confusing for business and enforcers. BERR agrees that the risk of non-compliance appears slight, and has therefore chosen Option A1.

A(iv)¹³ Giving the OFT and Trading Standards a duty to enforce and/or consider complaints

58. Existing consumer legislation often imposes a duty to enforce on certain bodies. For instance, the Trade Descriptions Act 1968 imposes a statutory duty on every local weights and measures authority to enforce its provisions (s25). Given the central role

¹³ The RIA published with the consultation paper in December 2005 set out a number of sub-options in relation to Option A2. As Option A1 has been adopted, these are not included here. For ease of reference the numberings in this RIA follow those in the previous RIA.

the Directive will play in the UK's consumer protection framework, there is a good case for including a duty to enforce on the OFT, trading standards services in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland. This duty would be contained in the implementing legislation.

59. An alternative approach would be to introduce a duty to consider complaints. Existing Regulations implementing EC directives, and which provide for their own system of injunctive relief¹⁴, contain an obligation on the OFT and, in certain cases, other named enforcers to consider any complaint made to them (unless frivolous or vexatious) about a breach of those Regulations and to give reasons for their decision to either apply or not apply an injunction. No comparable obligation to consider complaints exists on the OFT or other general or designated enforcers under Part 8 of the Enterprise Act 2002. That is because Part 8 is intended as an additional enforcement mechanism to that which exists in the specified legislation to which that Part applies. The Government does not propose to make any changes to Part 8 in this respect.

Option A(iv)1 - Do not impose a duty on OFT and Trading Standards to enforce the UCPD or consider complaints.

60. Not imposing either a duty to enforce or a duty to consider complaints might be viewed as signalling a lack of commitment by the Government to place this key piece of legislation centre-stage in combating unfair practices. There is also a risk that resource-strapped enforcers may choose not to prioritise this core piece of legislation. This option would incur no costs.

Option A(iv)2 – Impose a duty on the OFT and Trading Standards to enforce the UCPD, but not consider complaints.

61. Imposing a duty to enforce would follow precedent in certain consumer law and signal the importance the Government places on this Directive. Although this goes beyond the requirements of the UCPD, not imposing the duty would weaken consumer protection. Its adoption also avoids the risks of the Directive being under-prioritised by enforcers.

62. Not imposing a duty on the OFT and Trading Standards to consider complaints would be a departure from certain precedent and might be perceived as a weakening of Government resolve to have effective enforcement of consumer protection laws. On the other hand, the absence of such a specific duty in Part 8 of the Enterprise Act has not prevented Part 8 from becoming an effective enforcement tool.

Option A(iv)3 - Impose a duty both to enforce the Directive and consider complaints on the OFT and Trading Standards.

63. Imposing a duty on the OFT and Trading Standards to consider complaints under the UCPD could have quite significant resource implications given the very wide scope of the Directive. As with option A(iv)2, this would be going beyond what is required by

¹⁴ Control of Misleading Advertisements Regulations 1988, Unfair Terms in Consumer Contracts Regulations 1999, Consumer Protection (Distance Selling) Regulations 2000 and the Financial Services (Distance Marketing Regulations 2004

the Directive. Some have argued that a dedicated team, comparable to the Unfair Contract Terms Unit, would have to be established at the OFT to consider and deal with such complaints. On the other hand, it could be argued that imposing a duty to consider complaints would signal the Government's determination to set the UCPD centre-stage in combating unfair practices.

Conclusion

64. Most responses to the December 2005 consultation agreed that there should not be a duty to consider complaints. To do so would mean over-stretching enforcers who have scarce resources. Some disagreed, however, as some respondents felt that there are certain areas that are not adequately enforced. The Department does not share these views, and has therefore ruled out Option A(iv)3.

65. Most such consultation responses also agreed that there should be a duty to enforce. However, the OFT did not think that a duty to enforce should apply to itself. It feared that this would hamper its autonomy to choose its enforcement priorities. The Government disagrees and has opted to place a duty on OFT and Trading Standards, ie option A(iv)2.

(B) The use of self-regulation options

66. Article 10 of the UCPD contains a provision giving Member States the option to allow the control of unfair commercial practices through the use of voluntary codes of practice. This is provided statutory enforcement mechanisms also exist.

67. The type of arrangement envisaged in Article 10 is similar to that which currently exists in the UK in relation to misleading advertising in the broadcast and non-broadcast media. Here, the Advertising Standards Authority (ASA) is responsible for ensuring compliance with three Advertising Codes for TV, radio and non-broadcast advertising and sales promotions. Under the Control of Misleading Advertisements Regulations 1988 (CMARs) the OFT is empowered to apply for injunctions to stop the use of misleading and unpermitted comparative advertising in the non-broadcast media. For advertising in the broadcast media, OFCOM is the legal enforcer for CMARs. In exercising their powers these enforcers have regard to encouraging the control of misleading and unpermitted comparative advertisements by means such as the ASA.

68. The Government proposes to encourage the control of unfair commercial practices through self-regulatory codes where these contain effective means to ensure compliance with the code. In particular, it is the Government's intention not to affect the self- and co-regulatory regime that exists in relation to misleading advertising in the non-broadcast and broadcast media, operated by the ASA.

Option B1: Do not use certain codes to control unfair commercial practices.

69. Failure to encourage control by self-regulatory bodies would risk placing much greater burdens on public enforcers. For instance, the ASA deals with thousands of complaints about misleading advertisements each year. In the absence of the ASA, the burden of investigating these complaints would fall entirely on the OFT and other

designated enforcers. This would be likely to lead to a much less effective enforcement regime.

Option B2 - Use certain codes to control unfair commercial practices.

70. This will ensure that other established means of dealing with complaints continue to be supported and play an important role in combating unfair commercial practices for the benefit of consumers generally. It would also ensure that the resource implications of enforcement on the OFT and other enforcers are minimised as a wider range of bodies would be able to secure the cessation of unfair commercial practices, especially misleading advertising. It would also signal the Government's commitment to furthering the use of responsible self-regulation.

Conclusion

71. Business and enforcers thought that some codes should be used to combat unfair commercial practices. Consumer groups were more cautious about the use of codes, arguing that this was the role of statutory enforcers. In line with its commitments to encourage the use of self-regulation, BERR has opted for option B2. At this point in time, appropriate codes are the Codes of Practice enforced by the ASA and PhonePayPlus (formerly ICSTIS).

(C) Responsibilities of code owners

72. UCPD Article 11(1) allows Member States to decide whether enforcement action can be taken against a code owner where the relevant code promotes non-compliance with legal requirements.

C1 - Do nothing.

73. Not allowing action to be taken against code owners where codes promote non-compliance with the UCPD partially reflects the current legal situation that prevents public authorities from taking action against code owners in the majority of instances (one exception is where a code owner deliberately incited their members to commit a criminal offence).

C2 - Make it possible for civil action to be taken against code owners where their codes promote non-compliance with legal requirements.

74. This is justified because the ability to bring a civil action against a code owner where the relevant code promotes non-compliance with legal requirements under the UCPD would be a more proportionate and cost-effective response than bringing actions against individual traders who may inadvertently use unfair commercial practices by following the advice given in a code. Though there is a small risk that this option might deter code owners from operating, this risk is likely to be low. That is because code owners are unlikely to knowingly promote non-compliance with legal requirements and therefore any inadvertent non-compliance would normally be resolved through voluntary agreement with an enforcer. Only in the very unlikely event that agreement could not be reached would formal court action be considered. This reflects the approach taken in

the Unfair Terms in Consumer Contracts Regulations 1999, which provides for action to be taken against any person (including a code owner) recommending use of an unfair term in a standard form contract between a business and a consumer.

C3 - Make it possible for civil action to be taken against all persons, including code owners, who promote non-compliance with legal requirements.

75. This goes further than the Directive requires. This would be a deterrent against any person who might promote the use of an unfair commercial practice. This follows more closely precedent in the Unfair Terms in Consumer Contract Regulations 1999.

Conclusion

76. Some stakeholders, especially enforcement stakeholders, agreed that being able to take action against persons would allow them to tackle potential harm at source. In particular, this would avoid having to take action against traders who were merely following the advice provided by code bodies. Others disagreed, however. They expressed concern that Options C2 and C3 would inhibit the use of self-regulation, notably in relation to pre-clearance advice. BERR disagrees with this view. Sanctions for breach of this option will be civil injunctions only, and not criminal penalties. And Part 8 of the Enterprise Act establishes that, except in serious instances, enforcers are obliged to discuss potential infringements with those responsible before they can seek a court undertaking. This should avoid injunctions for innocent or accidental breaches of the law. Nonetheless, we agree with concerns raised by stakeholders about potential gold-plating in relation to Option C3. For this reason, BERR has opted for Option C2.

(D) Criminal sanctions for breaching the directive

77. The UCPD allows Member States to introduce and/or maintain criminal sanctions for the use of unfair commercial practices. Criminal sanctions currently exist for most areas of consumer law covered by the UCPD, such as the Trade Descriptions Act 1968 (TDA) and Part III of the Consumer Protection Act 1987 (misleading price indications). If criminal offences are to be maintained for breaches of such non-EC derived legislation that fall within the scope of the UCPD and its maximum harmonisation requirements, then this legislation will, at the very least, need to be amended to conform with the Directive's tests and principles. At a minimum this would mean introducing the transactional decision test based on the benchmark of the average consumer before an offence was established.

78. In addition, the UCPD introduces legal provisions that are new to the UK. Notably, these include: the general prohibition; specific rules on misleading omissions and aggressive practices; and many of the prohibitions in the Annex. Alternative options therefore include making breach of some or all of these provisions criminal offences.

79. Various combinations of these options are also possible, depending on the methods chosen for implementing the UCPD into UK law. For example, it would be possible to amend certain key pieces of existing legislation to comply with the requirements of the UCPD; while repealing other legislation. Enforcement options were dependent on the choices made on how to deal with overlapping domestic legislation.

D1 - Repeal all provisions giving rise to criminal sanctions in non-EC derived legislation falling within the scope of the UCPD and its maximum harmonisation requirements, and rely instead solely on the civil enforcement regime underpinning the Directive.

80. Removing criminal sanctions might save money both in terms of court and prison costs. The continuing availability of civil sanctions to enforce the UCPD should still allow the realisation of many of the general benefits described elsewhere. In the period April 2005 to March 2006, there were 389 prosecutions under the Trade Descriptions Act 1968 and 24 prosecutions under Part III of the Consumer Protection Act 1987¹⁵. Of these prosecutions, 19, all under TDA, resulted in custodial sentences (typical length of time might be three months). Each prison place costs approximately £27,850 per year¹⁶, and criminal procedures impose court costs on the public purse and are more expensive than civil routes. Furthermore, having just one sanctions regime for UCPD could make it easier on an ongoing basis to enforce – meaning that savings could be even greater than envisaged here.

81. The lower burden of proof in civil proceedings may mean that enforcement authorities are more likely to have cases that they feel more confident of winning, and hence be prepared to take to court. Hence we might expect an increase in civil court cases. It should be noted, though, that the vast majority of civil disputes where action is begun by trading standards services are resolved by voluntary agreement without ever reaching the courtroom.

82. However, enforcers have voiced concerns that removing criminal sanctions would result in a less effective enforcement regime. This is in part because criminal sanctions are thought to have an important deterrent effect. It is also because civil sanctions are argued to be less effective against those few traders who deliberately flout the law and who do not easily reveal their true identities to enforcement authorities unless threatened with police arrest for a criminal offence. Enforcers argue that removing criminal sanctions might reduce the UCPD's ability to lessen consumer detriment.

83. Finally, there are likely to be one-off costs to enforcers in training and familiarisation with the new regime. By contrast, ongoing costs to enforcers should be the same or lower.

D2 - Amend criminal sanctions in existing non-EC derived legislation to conform with the requirements of the UCPD.

84. Amending criminal sanctions in non-EC derived consumer legislation would still ensure that these would continue to be available to punish traders for the worst practices currently dealt with under, for example, the TDA. The TDA is used for a wide range of offences including misdescription of second-hand cars and home repairs. If the Government decided to repeal such legislation (see para 115 to 131), then it would aim

¹⁵ Source: OFT Annual Report and Resource Accounts 2005-

<http://www.oft.gov.uk/News/Annual+report/resource.htm>

¹⁶ Cost per prison place taken from HM Prisons Service Annual Report 2004-05, this figure is for state-run prisons

<http://www.hmprisonservice.gov.uk/assets/documents/10000DFDappendices1-5.pdf>

to retain these offences and associated defences and investigation powers as best possible in the legislation implementing the UCPD.

85. As with all options, there would be one-off costs to central Government to implement changes and one-off costs in terms of training and education for trading standards departments. These costs are likely to be lower than for options D3, D4 and D5 as this option requires the fewest changes to the enforcement regime.

86. One possible drawback with this option is that it does not introduce criminal sanctions for new provisions of the UCPD such as aggressive practices. This could mean that provisions for aggressive practices are not subject to a strong-enough deterrent for true rogue traders, whereas the harm caused to consumers by such practices can be significant.

D3 - As option D2, but also introduce criminal sanctions in the Regulations implementing the UCPD for engaging in aggressive commercial practices.

87. Whilst civil sanctions work well for most businesses, there are concerns that a different approach is required for those few unscrupulous traders who have little regard for the law. Introducing criminal sanctions to the provisions on aggressive practices would ensure that these traders could be punished for aggressive behaviour and might act as a stronger deterrent. Persistent offenders can cause considerable harm to – often elderly and vulnerable – consumers, so it is important that enforcement activity can address these problems. This view was strongly echoed by enforcers at workshops hosted by the then DTI (see background information in annexes).

88. For a discussion of costs relating to this option, please see D5.

D4 - As option D3, but extending criminal sanctions to include breaches of other new provisions of the UCPD, e.g. the Annex practices which are prohibited under all circumstances; and/or misleading omissions; and/or general prohibition.

89. Extending criminal sanctions also to cover breaches of other new provisions (e.g. the general prohibition; and/or misleading omissions; and/or some or all of the Annex prohibitions) could further strengthen the overall effectiveness of the enforcement regime. For example, many of the practices associated with the mis-selling of holiday clubs described in Annexe 3 would be prohibited under UCPD. As noted for option D3, there are concerns that the civil enforcement route does not adequately punish rogue traders who persistently flout the law. However, this option would involve higher costs than option D3 in terms of additional court time and increased custodial sentences.

90. For a discussion of costs relating to this option, please see D5.

D5 - Make it a criminal offence to breach all provisions of the Regulations implementing the UCPD.

91. These sanctions might result in a reduced probability of getting caught as enforcement resources get channelled into the search for evidence in a few cases in order to bring a case before the courts. And the benefits associated with criminal

sanctions need to be kept in perspective. Evidence suggests that, for many purposes, voluntary undertakings backed where appropriate by enforcement orders or undertakings to the court or, in most cases, the enforcer (civil routes) are proving effective for limited resource costs. Nonetheless, with higher penalties for all infringements of the UCPD, this option could provide a strong deterrent effect and a good way to realise the benefit of reduced consumer detriment. Prosecutions are already primarily focussed on problem sectors. In 2004-05, 29% of TDA prosecutions were in relation to transport, of which the vast majority (almost 80%) were in relation to second-hand car sales¹⁷. This indicates that the problem of prosecutions being taken for minor wrongs appears to be small. And one area where additional protections, as represented by Option D5, might prove particularly beneficial is in relation to mock auctions, an area of notorious consumer detriment.

92. There are costs associated with criminal sanctions. We have estimated that there may be 35-50 additional prosecutions per year under this option, of which 5-10 might result in custodial sentences. If 10 people¹⁸ per year were to receive custodial sentences of 3 months each, the additional cost to the National Offender Management Service would be approximately £70,000¹⁹. In addition there would be higher court costs relative to the costs for bringing civil action, and these would fall on the public purse (though court costs can be reclaimed by trading standards services in England & Wales following successful prosecutions). Further, there is a higher burden placed on businesses that are subject to criminal investigation, though the vast majority of these businesses will be acting unlawfully. Finally, we would expect one-off costs to enforcers in adapting to the new regime.

93. It is expected that the majority of infringements of UCPD will fall under the specific categories of misleading or aggressive practices. As a result, the additional costs of imposing criminal sanctions in option D5 (as above) will not be much greater than options D3 and D4.

94. There will also be some one-off costs of implementation, such as in changing legislation and training enforcers, as well as educating the business community.

Conclusion

95. The Government Response to the December 2005 consultation set out its view of the appropriate enforcement regime for fair trading law. This included retaining criminal sanctions for dealing with the most serious and egregious offences. This conclusion is in line with the findings of the Macrory Review of Regulatory Justice, which emphasises the importance of providing enforcers with a wide range of enforcement tools so that enforcers can deal effectively with the entire range of enforcement activities, from assisting compliance to prosecuting truly criminal or rogue operators.²⁰

¹⁷ Source: OFT Annual Report and Resource Accounts 2005

<http://www.of.gov.uk/News/Annual+report/resource.htm>

¹⁸ This is a low estimate. See first paragraph of D1 above.

¹⁹ Again assuming a cost per prison place of £27,850 taken from HM Prisons Service Annual Report

²⁰ *Regulatory Justice: Sanctioning in a post-Hampton World*, Cabinet Office Better Regulation Executive

96. In light of this, and given the Government's intention to repeal key pillars pieces of consumer law, notably including the substantive offences in sections 1 and 14 of the TDA, it has primarily opted for D5. However, as noted in the Government Response to the December 2005 consultation, certain provisions will not be subject to criminal offences where this might appear to undermine self-regulatory mechanisms.

97. Some stakeholders expressed concern that criminal sanctions might undermine the use of self-regulation. This is because traders would be reluctant to adopt codes and the higher commitments they impose if they might be prosecuted for doing so. This is despite the fact that existing self-regulatory regimes exist side by side with criminal offences, such that misleading descriptions made in relation to goods and services are generally already a criminal offence. For instance, the use of false trade descriptions in advertisements is currently a criminal offence.

98. The Government consequently does not agree with these concerns. We do not believe that these proposals substantially alter the current enforcement regime, where the division of responsibilities between enforcers and self-regulatory bodies generally works extremely well. And in certain, serious circumstances, we consider it appropriate for enforcers to be able to prosecute where self-regulatory bodies prove unable to take effective action. Nonetheless, in order to mitigate these concerns we are introducing a provision into the implementing regulations to the effect that an enforcer are to 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. Such a provision is new: it does not currently exist in relation to the criminal enforcement. In addition, breaches of certain Annex practices²¹ and Art. 6(2)(b) (breaches of commitments in codes of conduct) will not be made offences. This should help counter fears that enforcers would prosecute traders who inadvertently breached code commitments.

99. Other stakeholders disagreed with the Government's vision of a fair trading regime that included criminal sanctions. They argued that fair trading offences should best be dealt with by civil means only. If not, then offences should only be committed where intent or recklessness could be proven (*mens rea*), rather than as at present for strict breach of a substantive provision (strict liability).

100. The Government agrees that the primary mechanism for dealing with fair trading enforcement offences should not be criminal prosecutions. Our view is that in a modern fair trading framework the main enforcement mechanism for non-serious breaches ought not to be criminal prosecutions. Alternative tools, including civil sanctions, will normally be more appropriate. Yet there continues to be a need for criminal means and associated investigative powers to tackle true rogue and unfair trading activities. For these reasons, the UCPD will be enforceable both by civil injunctive action and by criminal prosecutions.

101. However, the Department consulted in December 2006 on whether the offences in the Regulations implementing the UCPD and the amended MCAD should include a mental element (*mens rea*), should rely on the current general approach of strict liability

²¹ Annex practice 11 (using editorial content to promote a product without making that clear to consumers); and practice 28 (directly exhorting children to buy advertised products or persuade their parents to do so).

offence/due diligence defences, or should contain a combination of the two. It also consulted on whether OFT should have the power to bring criminal prosecutions.

102. The Government Response to the December 2006 consultation said that in the regulations implementing the UCPD the criminal offence relating to breaches of:

- the general prohibition on unfair commercial practices will require proof of a state of mind (knowledge or recklessness);
- the remaining prohibitions on misleading actions and omissions, aggressive practices and the specific practices in the annex will be offences of strict liability;
- the prohibition on business-to-business indications in the regulations implementing the codified MCAD will also be an offence of strict liability.

103. These offences will be reviewed 3 years after the regulations come into force.

104. The same Government response also confirmed that OFT will have the power to bring criminal prosecutions under the regulations implementing the UCPD and MCAD.

(E) Providing a route for civil redress

105. The UCPD leaves it to Member States to decide whether to provide individuals with a private law right to seek redress for economic loss suffered from an unfair commercial practice.

106. Consideration is limited here to economic loss, rather than other harm such as distress or anxiety.

E1 - do nothing. There are existing routes for consumers to seek redress for economic loss in law. For example, a consumer harmed by a misleading communication could seek redress through an action for breach of contract. However, the UCPD introduces new protections and strengthens existing protections, for example in relation to aggressive practices, so pursuing this option could leave consumers without a route for redress in these areas.

107. Not introducing a right of action for consumers would avoid the risks of consumers pursuing frivolous claims. There is already a considerable body of law protecting consumers in the UK, and much of that provides individuals with the opportunity to obtain civil redress. Given existing rights, some might question the added value of a new right for individuals. In addition, there is arguably a risk that providing a new right of action could make the existing legal framework more difficult to understand.

E2 - provide a cause of action for some breaches of the UCPD, including aggressive and misleading practices. This option could reduce risk of spurious or opportunistic claims by focusing on specific aspects of the Directive.

108. There may be certain areas where providing a new private law right could have greater risks of unintended consequences than others. For instance, some may argue that providing a right of action for breach of the general prohibition could lead to spurious claims. That is because the general prohibition is phrased flexibly, and is

therefore more open to being interpreted in differing ways. Similar concerns may arise in relation to misleading omissions. By contrast, these concerns appear to be less strong in relation to misleading actions, aggressive commercial practices and the 31 practices that are unfair under all circumstances. For this reason, this option represents a lower risk to honest traders than option E3.

109. In addition to consumers benefiting from redress, introducing individual rights to certain areas could strengthen overall enforcement. This is because the threat of having to pay compensation to consumers as well as the increased probability of being caught may act as a stronger deterrent to traders not to act unfairly.

110. Consumers will have to pay court fees to bring an action, whilst businesses defending cases will need to fund that defence. However, costs of defending actions should rarely fall on traders that treat customers fairly as the need for consumers to pay to bring an action makes them likely to pursue only strong cases, thereby minimising the risk of frivolous claims.

E3 - provide a cause of action for all breaches of the UCPD. This would have the advantage of simplicity in providing consumers with rights for any breaches of the Directive.

111. Making the entire Directive actionable arguably has merit in terms of simplicity. This means that when a consumer suffers economic harm, both advisors and consumers would only need to refer to the one piece of legislation, rather than consider whether causes of action existed in many areas of statute or common law. This would in turn make it easier to empower consumers to understand and enforce their rights.

112. However, with this option there is an increased risk of spurious or frivolous claims relative to option E2. As with option E2, the cost of taking the action will fall on the consumer and the trader to defend. Realisation of the benefits will depend on consumers using their rights.

Conclusion

113. Stakeholder responses to the December 2005 consultation were divided on this issue. Business stakeholders argued that a right of action added little value over and above existing causes of action. Consumer and enforcer stakeholders disagreed. They thought that the cause of action would be useful in areas where the Directive covered new ground – notably in relation to misleading omissions and aggressive commercial practices. They also thought that concern over court action would make traders more likely to comply with the law.

114. The Government has consequently decided not to adopt any of these options. Whilst there are potential benefits associated with enhancing existing rights, it shares concerns about potential unintended and adverse consequences and the impact of introducing new rights on existing rights. We are therefore in discussion with the Law Commission to seek their assistance in considering this issue further.

Simplification

115. Existing legislation affected by the Directive's maximum harmonisation requirements has, at the very least, to be amended to conform with UCPD's tests and principles.

116. Such legislation will need to incorporate the "transactional decision" test based on the benchmark of the "average consumer" (or in certain cases the "vulnerable consumer"). Prescriptive information requirements will only be permitted where there is an "invitation to purchase". Any additional information requirements will either need to be repealed or amended. They could be amended so that they only apply in circumstances where failure to disclose the information in question is, in the context of the representation, an omission of material information that the average consumer needs to take an informed decision. However, amendment rather than repeal would result in a complicated offence for no gain.

Wide-ranging simplification

117. The UK could comply with maximum harmonisation by making the minimum changes outlined above. However, the current consumer protection framework is fragmented and lacks coherence²². We have committed ourselves to simplifying consumer legislation where possible, in particular when transposing the UCPD. Such simplification would bring clarity, making it easier for consumers to understand their rights. It would also make it easier for business to understand their obligations. And enforcers would only need to look at one piece of legislation in order to gauge when traders were behaving unfairly.

The impacts on business

118. Although larger businesses welcome the move to fewer and more general laws, the research carried out by Durham Business School found that the majority of smaller business were reluctant to see such changes because:

- they are familiar with the current law and don't want to see new law, even though they estimated that the costs of new law to them would be negligible;
- they prefer prescriptive law which tells them exactly what they need to do, rather than having to interpret what they should do to stay within the law.

Options for simplifying existing legislation

119. Different options may be suitable for different pieces of legislation. We can repeal some pieces of legislation and amend others. We have considered all the pieces of legislation separately in the Government's Response to the December 2005 consultation. Below is a general look at the type of costs and benefits from the options. Here we look at two pieces of legislation in detail (the Trade Descriptions Act 1968 and the Part III of the Consumer Protection Act 1987) for illustrative purposes.

A - Do nothing

²² A Fair Deal for All: Extending Competitive Markets: Empowered Consumers, Successful Business, DTI June 2005, pp. 8-9

120. Failure to make any of the required changes to existing legislation would lead to infraction proceedings against the UK for breaching EC law. Furthermore, it would not tackle the problems of consumer detriment and Single Market barriers outlined earlier in the IA. It was precisely because of this need to improve the functioning of the Single Market that the Directive adopted the maximum harmonisation approach.

121. Doing nothing would mean the benefits described below would not be realised. It would not create new costs.

B - Amend existing legislation to conform with the UCPD.

122. This offers no simplification of the current law and would complicate the law further, which may make it more difficult for users to understand.

123. Amending existing legislation is likely to be the lowest cost option for business and enforcers in the short-run because this option involves the least change.

C - Repeal existing legislation that overlaps with UCPD.

124. The drawback of this option is that rules with which business and traders are familiar will be replaced with untried and untested legislation. This problem is enhanced by the more general principals-based nature of the UCPD, as opposed to the more prescriptive nature of much existing legislation. Together this may result in legal uncertainty for several years until case law is established.

125. Uncertainty can be relieved through guidance. The Office of Fair Trading is drafting guidance in consultation with BERR and a core group of stakeholders. The OFT consulted on draft guidance in May 2007, Final guidance will be published before the Directive comes into force. We will consult on a draft of this guidance in good time before the Consumer Protection from Unfair Trading Regulations come into force.

126. This option will achieve simplification of legislation. It will not reduce consumer protection, as business will need to comply with the UCPD's requirements which provide equivalent or better protections.

127. Benefits will primarily come from not having to check compliance against several pieces of overlapping legislation. This will bring improved business understanding of legislation and enhance consumers' understanding of their rights

128. The Durham Business School study suggests that financial savings for existing businesses from having to consider less legislation are likely to be modest. New businesses looking at the legislation for the first time are more likely to benefit. Also, consumers' should find it easier to understand their rights. It is likely that the benefits of this option will accrue over the longer term.

Business-to-business practices

129. In addition to the options above there is also an issue about parallel regimes. UCPD only covers business-to-consumer legislation. Some of the 29 pieces of potentially affected legislation cover both business-to-consumer and business-to-business practices. For these pieces of legislation we also need to decide what to do with the business-to-business provisions.

130. If they are not altered or repealed (in the same way as the business-to-consumer practices are as in the options above) then additional parallel regimes would be created. In practical terms, this means that traders will need to consider whether their practice is part of a business-to-business transaction or a business-to-consumer transaction to know which law to apply. This could also make enforcement more difficult as unscrupulous traders challenge enforcement action on technicalities about whether their practice is directed at consumers or businesses. These issues are considered in more depth in the section on simplification above (paras 115 to 128).

Decisions on repealing or amending

131. The Government has decided to partially²³ or wholly repeal 22 pieces of legislation and retain the remaining 7. The explanations for these decisions are given in detail in the Government Response to the December 2005 consultation. As an example we have included a detailed look at the TDA and the CPA Part III in text boxes (see background information in annexes).

Assessment of administrative burden reductions

132. See paras 135 to 139 below.

²³ Where the repeal is only partial, this is because the UCP only replaces sections of the legislation and not the whole thing. To avoid losing consumer protections, in these cases the repeal has to be partial.

Costs and Benefits

133. The costs and benefits of adopting the UCPD are summarised in the table below:

Business	
Benefits	Costs
Tackling rogues and reduced consumer detriment	
Better tools for the authorities to tackle rogue traders with will level the playing field for honest business and reduce the amount they currently lose to companies who engage in unfair practices. More confident consumers will benefit business.	No anticipated costs to honest businesses.
Single Market	
Less complex for UK business to trade and market goods and services in other Member States and increased opportunities for trade. Retailers supplying EU shoppers visiting the UK could benefit by an estimated £31 million.	Potential for transition costs – businesses that are less competitive could lose out.
Reduced complexity of legislation	
The straightforward principled approach of UCPD should make it easier for business to interpret their responsibilities toward consumers. Reduces the risk of future legislation in this area. Savings of £230.1 - £234.4 million from reduction of admin burdens.	Businesses will incur one-off familiarisation costs. Will need to review their existing practices against the Directive and amend their practices where necessary. These costs, which are likely to be small, will be incurred on a one off basis. Scale of the costs will depend on the transposition options and on the degree of regulatory simplification, but could amount to £12 - £27 million in one-off costs. May be additional one-off costs where firms need to train staff in the new rules. Greater simplification and a legislative framework based on general principles could mean legal uncertainty for business, thereby increasing short-term costs. There will be a cost of around £12 - £24m from new admin burdens imposed by the UCPD.
Total: £261.1 - £265.4 million	Total ongoing costs: £12-24 million Total one-off costs: £12-27 million

Benefits

- Retailers supplying EU shoppers visiting the UK could benefit by an estimated £31 million.

134. There are 19.6m visits annually to the UK from EU25 with total spend of £6.5bn. 27% is spent on shopping²⁴. Assume that spending is equal across all visitors. Surveys show that some consumers would feel more confident and as a result spend more in other Member States; 4 per cent of EU15 consumers said that they would spend 'a lot more' in other Member States and 15 per cent said that they would spend 'a little more' in other Member States if they felt equally as confident as they do in their home country. Assume that the 4% who would spend 'a lot more' actually spend an extra 25% and the 15% who would spend 'a little more' actually spend an extra 5%. Total extra spending is $(6.5bn \times 27\%) \times ((4\% \times 25\%) + (15\% \times 5\%)) = £30.71m$ (See annexe 5 for reasons for lack of confidence in cross-border shopping)

- Net savings of £206.6 - £222.7 million from reduction of administrative burdens

135. A Government-wide exercise has been carried out to provide Departments with an indication of the costs each regulatory administrative burden imposes on business. External consultants (PricewaterhouseCoopers, or PwC) have measured the cost associated with complying with administrative tasks contained in all legislation in force before May 2005. The administrative costs associated with the pieces of legislation that will be repealed as a result of the UCPD coming into force are shown in the table below²⁵.

Summary of administrative costs in the PwC study

Legislation	Estimated administrative burden each year (£millions)
Code of Practice for Traders on Price Indications	170.01
Consumer Transactions (Restrictions on Statements) Order 1976	1.55
Price Indications (Method of Payment) Regulations 1991	11.04
Price Marking (Food and Drink Services) Order 2003	28.89
Trade Descriptions Act 1968	17.93
Consumer Credit (Advertisements) Regulations 2004	1.08
Control of Misleading Advertisements Regulations 1988	78.97
Total	309.4

136. The version of this RIA published in December 2006 estimated that the repeal of provisions in these pieces of legislation would save £28.6-£45.6. When the cost of new burdens from UCPD (£12-£24m, updated from December 2006, see page 24 of RIA published in May 2007 or Annexe 6 to this IA) is taken into account, this gave a range of savings in the order of £5-34m per annum. This conservative estimate of the administrative burdens savings associated with implementation of the UCPD was based on the belief that although these provisions will no longer be obligations on business, in the short term at least, business was likely to continue carrying out the repealed measures to ensure they comply with the law.

²⁴ National Statistics (www.statistics.gov.uk) Travel Trends: a report on the 1998 International Passenger Survey

²⁵ For more information on the study, please see <http://www.dti.gov.uk/files/file35841.pdf>

137. However, as detailed work on the implementation of the Directive has progressed over the last year, it has become clear that its terms will allow traders far greater flexibility not to act unfairly without following the detailed information obligations in the provisions to be repealed. This in turn, leads to substantially greater reductions in the administrative burdens that these provisions place on business.

138. In particular, the current statutory Code of Practice for Traders on Price Indications will be repealed and replaced by purely voluntary guidance on best practice on how not to give a misleading price indication; and the specific information requirements in Control of Misleading Advertising Regulations 1988 in relation to comparative advertisements which refer to special offers will be repealed altogether.

139. As a result of these major simplification initiatives, we now expect implementation of the UCPD to produce administrative burdens savings from £230.1 - £234.4m per year. When the cost of new burdens from UCPD is taken into account this gives net savings in the order of £206.8 - £222.7 m.

140. In order to get a better understanding of the true impact of the UCPD on business we will conduct a review in 2011, when the legislation has been in place for 3 years and the practices are likely to have changed. This will give more accurate indications of the savings than the estimates above. See Annex 6 for more detailed information on the new administrative burdens imposed by UCPD.

Costs

- Businesses will incur one-off familiarisation costs, which could amount to £12 - £27 million.

141. This is based on 770,000 enterprises (an estimate based on the number of retail, hotel and restaurant, automotive, and personal services enterprises²⁶), of which about 99% are small businesses (the majority of which employ less than 5 people), assuming between one and two hours of a manager's time is spent on this function. The 2006 Annual Survey of Hours and Earnings suggests that the average hourly pay for a retail and wholesale manager is £11.43. Adding one-third non-wage labour costs, we multiply this by the number of enterprises to get £11.7m, if the time taken were 2 hours, the figure would be £23.4m. A small proportion of these enterprises (approx 1%) employ more than 50 people. These enterprises are likely to take more time and employ legal advisors or use in-house legal teams for this purpose, hence the range for familiarisation costs is broadened to £12-£27m.

- There will be a cost of around £12 - £24m from new admin burdens imposed by the UCPD.

142. See discussion above and Annexe 6.

²⁶ Source: DTI Stats <http://www.dtistats.net/sme/smestats2005.xls> . It is not possible to precisely estimate the number of businesses affected, therefore this analysis has focused on sectors which are most likely to contain businesses engaging in business-to-consumer transactions (from SIC codes 50, 52, 55, 71.1, 71.4 and 93).

Consumers	
Benefits	Costs
Reduced consumer detriment	
If the UCPD led to 5% fall in consumer detriment caused by selling practices this could equate to a £100 million reduction each year. Reduced aggressive and high-pressure selling practices will reduce the estimated £30m lost to bogus traders each year by UK consumers. Should tackle other significant problems e.g. with scams (see Annex 4 for some of the most harmful scams currently in circulation), holiday clubs.	There are no anticipated costs to consumers.
Single Market	
Consumers should have greater confidence to shop cross border. This will give them access to a greater range and choice of products and services across the EU. It should also force business both in the UK and in the rest of the EU to improve quality, to innovate and to keep prices low.	There are no anticipated costs to consumers.
Reduced complexity of legislation	
The simple principled approach of UCPD should make it easier for consumers to understand when they have been subject to unfair practices and therefore increase their confidence and empowerment.	There are no anticipated costs to consumers.
Total: £130million	

Benefits

- If the UCPD led to 5% fall in consumer detriment caused by selling practices this could equate to a £100 million reduction each year

143. The extent of UK consumer detriment was outlined in the rationale section above (see para 14). It showed that the total detriment caused by consumer problems could be considerably in excess of £8.3bn per year²⁷. Information from the OFT shows that around a quarter (26 per cent) of all the complaints that they record relate to selling practices²⁸, including those which will be covered by UCPD. Volume of complaints does not necessarily equate to value, but making that simplifying assumption would lead us to conclude that these selling practices cause consumer detriment of over £2

²⁷ "Consumer Detriment", February 2000, OFT 296.

²⁸ OFT annual report 2003, Annexe E <http://www.of.gov.uk/NR/rdonlyres/64911092-2EA6-4A4E-B5D4-5BC8FCB2ED4B/0/annexeee.pdf>

billion²⁹. If the improved protection that UCPD provides were to reduce these problems by as little as 5 per cent, this could result in a £100 million per year reduction in consumer detriment. While this figure is necessarily speculative, it does illustrate the important fact that even a small improvement in consumer protection arising from the UCPD will result in very significant benefits for consumers. The precise reduction in consumer detriment will depend on the effectiveness of enforcement and consumer awareness.

- Reduced aggressive and high-pressure selling practices will reduce the estimated £30m lost to bogus traders each year by UK consumers.

144. There are an estimated 15,000 cases of bogus trading with an associated consumer detriment of around £30 million³⁰.

Public sector bodies	
Benefits	Costs
There are no anticipated economic benefits to public sector bodies, but they will profit from an enhanced ability to tackle cases already falling under their responsibility.	Extending consumer protection to include new areas such as aggressive selling will result in one-off familiarisation costs to enforcers, but do not believe this should inevitably lead to additional enforcement costs. There may be some ongoing costs to the courts, as well as costs for running awareness-raising campaigns and producing guidance.

£ million	Annual Benefits	Annual Costs	One-off costs
Business	261.1-265.4	12-24	12-27
Consumers	130		
Totals	391.1-395.4	12-24	12-27
Overall annual net benefit:			

Race Equality/Disability Equality/Gender Equality

145. After initial screening as to the potential impact of these Regulations on race, disability and gender equality it has been decided that there will not be a major impact upon minority groups in terms of numbers affected or the seriousness of the likely impact, or both.

²⁹ 26% x £8.3 billion = £2.2 bn

³⁰ NACAB Evidence Report “Door to Door: CAB clients’ experience of doorstep selling”, September 2002

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

Annexes

Competition Assessment

A competition filter test has been conducted. Overall, the UCPD should have a positive effect on competition. It should empower consumers, level the playing field for honest business by weeding out rogue traders and sharpen competitive pressure in many sectors through its positive effect on the European Single Market.

The Directive will apply to all firms that sell or supply products (goods and services and immovable property) directly to consumers across the whole range of markets. The effects of the Directive may not be felt equally **across** all markets, as different markets have different levels of consumer detriment and different patterns of business behaviour, but it should have a similar impact on traders **within** any given market. In this respect, it will not distort competition in any given market either by disproportionately assisting or disproportionately disadvantaging any firm relative to any other. The exception to this is those traders who break the law in respect of consumer protection rules or who otherwise treat consumers unfairly. The effect of the UCPD will be to make their unfair practices unattractive and uncompetitive. It should make consumers better protected and more confident.

As noted previously, some sectors such as those involved in doorstep sales or holiday clubs may face higher costs as a result of the UCPD as it will tackle rogue practices particularly prevalent in those sectors. But all firms within these sectors will be affected proportionately.

Firms that operate in tradable sectors of the economy are likely to experience increased competition from elsewhere in the EU and will be better able to apply pressure in EU markets themselves. The heightening of competitive pressure within the EU is unlikely to distort competition within markets although there may initially be regional differences.

Across the board, new traders will not face a greater burden than existing traders, and are more likely to find entry barriers (in particular customer inertia) lowered. Regulatory simplification from UCPD could reduce the initial burden which new business face in familiarisation with consumer protection legislation.

The proposals will not restrict the ability of traders to choose the price, quality, range or location of their products.

The small firms' impact test

We sought volunteers from a database of small businesses to conduct a small firms impact assessment. We held telephone conferences with two small businesses and had a further meeting with small business representatives. We asked for impressions of the overall impact of the Directive and for specific issues raised by the implementation options.

As small businesses have fewer resources than large businesses, changes to legislation absorb a disproportionately greater amount of available time and resource. In addition, larger businesses often employ people specifically to monitor and deal with legislative changes.

The consensus view was that the Directive should not impact on those companies operating fairly. Consultees emphasised the importance of guidance that is clear, brief and includes a version targeted especially at small businesses. They also indicated a preference for enforcement options that secured the greatest reduction in activity by rogue traders.

Consultees expressed less interest in existing legislation and interpreting terms and definitions. This was because small businesses tend to focus on guidance and not on the underpinning legislation. However, consultees noted that simplification might be beneficial for new small businesses if this resulted in less guidance material.

The Department also received useful feedback on methods for disseminating information and guidance to small businesses.

Background Information

Criminal Sanctions and Aggressive commercial practices – feedback from an enforcers' workshop

Doorstep selling, aggressive practices: workshop participants looked at a case where a trader had used aggressive selling techniques, normally taking the form of staying in consumers' homes, to persuade them to take out contracts to buy beds. In all cases notices of cancellation rights were given and no other offence was committed. Participants felt that the new provisions of UCPD were potentially powerful new protections for consumers. However, there were some concerns about the practicalities of proving that an offence had been committed. Participants argued that it would not be possible to ascertain the identity of rogue, often itinerant, traders commonly involved with this sort of practice unless they were able to threaten them with arrest for a criminal offence. For such traders. it was felt that criminal sanctions were

How to deal with overlapping legislation

Trade Descriptions Act 1968

The Trade Descriptions Act 1968 (TDA) protects businesses and consumers by ensuring that they have the correct information when considering buying a good or service. It contains two main offences (1) applying a false trade description to goods or supplying goods with a false trade description and (2) knowingly or recklessly making a false statement about services, accommodation or facilities.

In addition the Business Protection from Misleading Marketing Regulations (BPRs) (which will replace the Control of Misleading Advertising Regulations 1988 (CMARs), implementing EU Directive on Misleading and Comparative Advertisements, MCAD prohibits misleading business to business trade descriptions and provides the business protections from the TDA.

In all the options below the UCPD will also govern unfair practices towards consumers under the Consumer Protection from Unfair Trading Regulations (CPRs) which implement the UCPD, and which will provide the consumer protections from the TDA.

Option 1. Amend the business-to-consumer aspects of the TDA. This would require adding a transactional decision test to the TDA when a false trade description or statement is directed at consumers. This would not need to be introduced for false descriptions aimed at businesses. Doing so would create

different regimes under the TDA for false descriptions towards consumers and businesses. The TDA would also exist alongside the CPRs and BPRs.

Option 2. Amend the relevant provisions of the TDA. This would require a transactional decision test to cover all the TDA. The CPRs and BPRs would also apply.

Option 3. Repeal the business to consumer aspects of the TDA. In this case, false descriptions and statements directed at consumers would be assessed against the CPRs. However, this would include provisions equivalent to the TDA's criminal sanctions, powers and defences into the UCPD if its effect is to be fully reproduced for business-to-consumer practices. Business-to-business practices would continue to be assessed against the TDA and BPRs.

Option 4. Repeal the relevant provisions of the TDA. The CPRs would be relied on to provide the TDA's protections for consumers and BPRs for businesses. As before, the TDA may only be completely replicated if the corresponding criminal offences, powers and defences were imported into the CPRs (and also BPRs in this case). As the UCPD covers only business-to-consumer practices there may be some resentment from legitimate businesses that would see these changes as unnecessary.

	Business to consumer law	Business to Business law	Number of different sets of rules
Option 1 Amend B2C TDA	Amended TDA & CPRs	TDA BPRs	4 (3 new)
Option 2 Amend relevant provisions of TDA	Amended TDA & CPRs	Amended TDA BPRs	3 (3 new)
Option 3 Repeal B2C TDA	CPRs	TDA BPRs	3 (2 new)
Option 4 Repeal relevant provisions of TDA	CPRs	BPRs	2 (2 new)

Conclusion: Option 4 (repealing all of the TDA) provides the simplest system.

Part III of the Consumer Protection Act 1987

Part III of the Consumer Protection Act 1987 ("the CPA") makes it an offence for a trader to give consumers a misleading price indication about goods, services, accommodation or facilities. It applies however a price is given – whether in a TV or press advertisement, on a website, in a catalogue or leaflet, on notices, price tickets or shelf-edge marking in stores, or if given orally, for example on the telephone. This piece of legislation is quite flexible and is backed up by a code of practice.

The Code of Practice for Traders on Price Indications Approval Order 2005 is intended to guide traders in avoiding giving misleading price indications and to promote best practice. Not complying with the Code is not a criminal offence. However, it has evidential effect in court to establish whether a person has committed an offence under Part III of the CPA.

Option 1. Amend Part III of the CPA (keep the code). This would require adding a transactional decision test to the CPA and amending certain definitions to bring them into line with the UCPD (the Code may also need amending). Part III would then co-exist alongside the UCPD and provide similar protections. The Code would continue to have evidential effect in any prosecutions brought for contraventions of Part III of CPA.

Option 2. Repeal Part III of the CPA (remove the Code). This approach has the advantage of reducing the number of laws that traders have to comply with. This approach would mean that that the Code would also have to be repealed because it would lose its statutory basis. Options then would be:

Option 2a. Not produce separate guidance on price indications. Rely instead on the guidance accompanying the regulations implementing UCPD. This might provide high-level guidance only.

Option 2b. Produce separate guidance on price indications. The detailed guidance contained in the Code could be reproduced as examples of best practice on how to avoid giving a misleading price indication. Unlike the Code this guidance would be purely voluntary and would not have evidential effect in court. The courts may nevertheless still wish to take it into account in deciding whether a trader has committed a misleading action

	Part III of CPA	Status of Code
Option 1	Amended so overlaps with UCPD	Would still have evidential effect
Option 2a	Repealed – UCPD only	Use high-level UCPD guidance only
Option 2b	Repealed – UCPD only	Reproduce code as guidance only

Conclusion: Option 2b results in the simplest legislative situation and retains specific guidance, which consultees said they wished to see. This was the option preferred by stakeholders and is the one adopted by BERR.

Annexe 1 – Breakdown of OFT complaints data³¹

Table 1. Top ten complaints by sector – all complaints

Home maintenance, repairs and improvements	83,069
Second-hand motor vehicles	63,608
Other personal goods and services	49,142
Radio, TV and audiovisual equipment etc.	35,496
Large white goods and major fixed appliances	34,950
Other professional services	33,847
Upholstered furniture	33,519
Food and drink	29,722
Personal computers and related hardware	29,339
Clothing and clothing fabrics	28,498

Source: OFT annual report 2003

Table 2. Top ten complaints by sector – selling techniques

Other professional services	22,934
Other personal goods and services	20,195
Betting, competitions and prize draws	18,341
Second-hand motor vehicles	13,695
Home maintenance, repairs and improvements	12,524
Food and drink	11,337
Clothing and clothing fabrics	7,831
Holidays	6,707
Mobile phones and services	6,595
Radio, TV and audiovisual equipment etc.	4,768

Source: OFT annual report 2003

³¹ Consumer complaints relating to inadequate goods and services are available from a number of different sources. Figures presented here are compiled by the local authority trading standards service, local authority environmental health departments and some advice agencies. These organisations voluntarily submit quarterly returns to the OFT systematically classified by the specific goods and services and the trading practices that gave rise to the complaint. Most, but not all, local authorities provide returns and the number of returns varies slightly from year to year. The figures reflect only those complaints brought to the attention of trading standards, environmental health departments and advice agencies which are reported to the OFT. They exclude complaints made to regulatory bodies (eg OFCOM, OFWAT, OFGAS), government departments (other than the Northern Ireland Department of Economic Development Trading Standards Branch), representative bodies (eg National Consumer Council), and trade associations.

Most occasions when consumers are dissatisfied go unreported, while not all complaints raised with local authorities are justified. The figures cannot therefore be interpreted as a record of the overall level of consumer dissatisfaction.

<http://www.of.gov.uk/NR/ronlyres/64911092-2EA6-4A4E-B5D4-5BC8FCB2ED4B/0/annexeee.pdf> We use 2003 figures as more recent statistics for 2004 have been affected by the introduction of Consumer Direct.

Table 3. Ten sectors with highest proportion of complaints related to selling techniques

	% of complaints in that sector relating to selling techniques
Betting, competitions and prize draws	83%
Other professional services	68%
Time sharing	66%
Home working schemes	63%
Other financial services	62%
Estate agency, house purchase, surveying, etc.	56%
Ancillary credit business	50%
Books, newspapers and magazines	49%
Mortgages and other secured credit	48%
Life insurance	47%

Source: OFT annual report 2003

Annexe 2 - Perceived Gains: Case Based Analysis by OFT

The following examples have been provided by the Office of Fair Trading (OFT) to illustrate its views of areas where the UCPD could help enforcers tackle unfair practices.

Estate agents and Ring Fencing

Under the Estate Agents Act, the OFT has had some problems tackling “ring fencing”, a practice where the agent colludes with the purchaser contrary to the interests of the vendor.

Ring fencing is a bribe and constitutes a breach of the agent’s fiduciary duty. However, such a breach of duty is not a ‘trigger event’ under the Act. Similarly, although the agent provides a service to the purchaser that was not disclosed to the vendor, the information an agent must disclose about services does not cover this situation.

Although the above conduct would not appear to constitute a breach of the Estate Agents Act, it would appear to constitute a breach of the UCPD. The conduct of the agent was ‘contrary to the requirements of professional diligence’ and it materially impacted on the economic behaviour of his client. There is also a case for applying Article 7 relating to misleading omissions to this behaviour.

Vulnerable consumers, Health Claims and Sweepstakes

The OFT has seen a number of cases relating to the marketing of ‘miracle’ health products (such as magnetic devices, an eye bath that cures depression etc). These products are frequently marketed in the same way as, or in conjunction with, prize draws. The companies concerned compile mailing lists with purchase details of the consumer respondents. This information often includes age, amount spent on types of products, likelihood of responding to sweepstakes, date of last purchase. These lists are rented out to other traders for mail shots. The more savvy companies mail to a broad cross section of the community in full knowledge that certain vulnerable groups will respond. In one case the trader included terms and conditions in light grey size 6 font on the inside of the envelope.

It appears that these traders are specifically aiming to exploit the vulnerability of their respondents. Judged against an ‘average consumer’ such a practice might not be said to be misleading whereas the vulnerable consumer test in UCPD contains a clear legislative message that such practices designed to exploit vulnerabilities are illegal.

Pressure Sales

One of the most significant gains in the UCPD is likely to be the ability to tackle practices involving the use of pressure sales that the current array of consumer protection legislation does not deal with adequately. Pressure sales are used in a number of sectors, most notably doorstep selling and presentation marketing (investments, property sales, holiday clubs and timeshare).

In one case of doorstep selling investigated by the OFT, sales reps often verbally coerced and unduly influenced elderly consumers into buying their products, possibly causing them to take a transactional decision that they would not have taken otherwise.

The timing of visits was often late in the day, sometimes for as long as 6 or 7 hours.

Reps would use all kinds of devices to levy undue influence or coercion - often focussing on a consumer's lack of independence and external help.

The company involved were often seen to be trying to prevent consumers from exercising their legitimate rights to cancel the contract. They were reported as often bullying consumers who phoned up to cancel by offering further discounts or even suggesting that the consumer's relatives, in encouraging cancellation, cared more for their inheritance than the consumer's health. In one case the sales rep said that the consumer's cancellation letter that had been sent by registered post had to have been 'in the manager's hands' for it to be effective.

Annexe 3 – Timeshare and Holiday Clubs and UCPD

The Organisation for Timeshare in Europe estimates that approximately 8-10 per cent of sales are lost to rogue operators in Spain out of total revenue of €431million per annum.

While the Timeshare Directive has tackled some of the misbehaviour in this sector, problems still remain, with rogue traders exploiting loopholes and definitional weaknesses in the law. For example, unscrupulous traders have only to modify the product slightly to be outside the legislation. Timeshares lasting 36 months or more are caught by the legislation but 35 month contracts are not. Similarly, a timeshare in a building is caught whilst timeshares in a boat are not. Consumers purchasing 35 month timeshares or boat timeshares have no cooling off rights or rights to mandatory information³².

In some cases products such as Holiday Clubs attempt to circumvent the consumer protection legislation. They do not offer the consumer any certainty of being able to use specific accommodation, only access to an unidentified (and possibly non-existent) pool of accommodation that may or may not be available. Lump sum initial payment and periodic payments are demanded and the product is still sold as a means of accessing cheap holidays. However, the lump sums have been found by the OFT to be between £3,000 and £12,000³³.

OFT have provided two examples of where UCPD could be useful in dealing with some of the issues faced in timeshare (this would also apply to similar situations in other sectors).

EXAMPLE 1: SCAM HOLIDAYS – “DEPOSIT TAKERS”

Agents of a provider of holiday club membership cold called consumers telling them they had won a holiday to be collected at a presentation to discuss the benefits of membership of the holiday club.

Consumers attended the presentation at a local hotel and were subject to what complainants felt to be a pressurised sales presentation to induce them to sign up. The company provided a website through which they claimed members could obtain high quality, low cost holidays around the world. Subsequent use of the site by many consumers indicated that these claims were misleading in respect of the cost, quality and availability of holidays available using their website.

Provisions in the UCPD in relation to bait advertising has relevance to this type of conduct as these marketers are inviting consumers to purchase products (holiday

³² Paradise Lost by Citizen's Advice <http://www.citizensadvice.org.uk/paradiselost.pdf>

³³ Reported in Paradise Lost by Citizen's Advice

club membership) with a reasonable knowledge that they would not be able to deliver. This is even clearer in the case of 'deposit takers' who sell a service on the basis that when the consumer finds out that it is not what is promised they will cancel the contract but will not be able to reclaim their deposit.

Example 2: Posing as a private seller

This provision in the UCPD will tackle the problem of trader's seeking to avoid consumer protection law by posing as private sellers. There are particular problems with this in regard to internet auctions and timeshare.

The OFT has seen a number of cases of timeshare developers seeking to avoid the Timeshare Directive by claiming that they are 'reselling' property or acting as a sales agent for a private vendor, and using third party trustees to receive deposits during cooling off periods.

This conduct raises two UCPD issues. When the developer is actually acting merely as an agent in law (which does not trigger the Timeshare Directive) then failure to reveal this might be a misleading omission under the UCPD. Where the developer is claiming to consumers that they are acting as agents for a private vendor and actually not acting in this capacity (ie where they are selling reclaimed stock) the behaviour is addressed with the annex provision against posing as a private seller, Annex I para 20(a).

Annexe 4 - Scams and the UCPD

Scams are an unfair deception of a consumer causing him/her financial detriment. They come in numerous guises and are not necessarily unlawful. The most prevalent and profitable are those misleading and/or fraudulent marketing practices perpetrated on a mass scale by mail, phone, e-mail or text message, which undermine confidence in legitimate direct marketing. Below is a list collated by the OFT of some of the most common and costly current scams.

The OFT estimated that total consumer harm caused by the ten most prevalent scams was around £1 billion³⁴. This figure was calculated by extrapolating known losses to the number of known scam operations and collating estimates from other government and law enforcement agencies in the UK and overseas.

In some cases, the UCPD will provide protection to consumers where there is very little protection at the moment. In other cases, the UCPD will tighten up existing legislation and open up new enforcement possibilities to the authorities.

Telephone Lottery Scams

The victim is told that before they can claim the prize, they must send money to pay for taxes and processing fees. These scams include the 'Canadian Lottery Scam' and the 'El Gordo Spanish Lottery Scam'. The OFT estimates that telephone lottery scams could be worth up to £150m a year³⁵.

Email Lottery Scams

Lottery scam emails are increasing at an alarming rate. The OFT estimates that the average loss to this scam is between £2,000 and £10,000.

Prize draws, Sweepstakes and foreign lottery mailings

Many typical scams take the form of prize draws, lotteries or false promises of 'government payouts' designed to trick the unwary. These are estimated to cost consumers £320 million per annum. The UCPD may not help with dealing with scams from outside the EC.

Premium rate telephone number scams

PhonePayPlus (formerly ICSTIS) received over eighty thousand complaints last year from consumers about unexpected charges for premium-rate numbers on their phone bills. These scams often work by persuading the unwary to telephone a premium rate

³⁴ OFT estimate, cited in the Guardian February 1 2005

<http://money.guardian.co.uk/scamsandfraud/story/0,13802,1403183,00.html>

³⁵ OFT 2003 Annual Report

number by informing the consumer they are a winner of a desirable prize such as a holiday, a car or luxury consumer good. They then have to listen to a long recorded message in order to claim their prize. In most cases most consumers receive a cheap 'give away' item or a holiday with strings attached.

The OFT estimates that this type of scam is worth £80m per year through extrapolating known consumer losses to the number of known similar promotions.

PhonePayPlus report a similar type of scam using premium rate fax numbers³⁶.

Investment Related Scams

A call may 'come out of the blue' from somebody with an invitation to invest in shares, fine wine, gemstones or other soon-to-be rare commodity. These investments often carry very high risk and may be worth a lot less than is paid.

The OFT estimates that overall, this scam could be costing UK consumers £490m, including investment in art and wine³⁷.

Pyramid Schemes

Pyramid schemes promise a financial return based on the number of people that a participant is able to recruit to enter the scheme. No new money is created in pyramid schemes. Investors who get in early take their profits from investors who join later. At some point, no new investors can be found and as a result the last investors, who are at the bottom of the pyramid, lose their money. Pyramid schemes are doomed to failure because all they do is circulate money between participants. This means that for every £1 someone makes, somebody else loses £1. The OFT recently estimated that pyramid schemes cost UK consumers about £420m per year.³⁸

Matrix Schemes

Websites offering the latest expensive hi-tech gadgets as a 'free gift' in return for buying a low-value product are the subject of an OFT warning to consumers. The 'matrix' schemes, which are being promoted by a growing number of websites, promise people the chance of getting a valuable 'free gift' by spending a relatively small amount on a low-value product. Consumers who buy the product become members of a waiting list to receive their chosen 'free gift'. The matrix works by sending the person at the top of the list their 'free gift' only after a prescribed number of new recruits has signed up.

³⁶ <http://www.readersdigest.co.uk/magazine/fax4.htm>

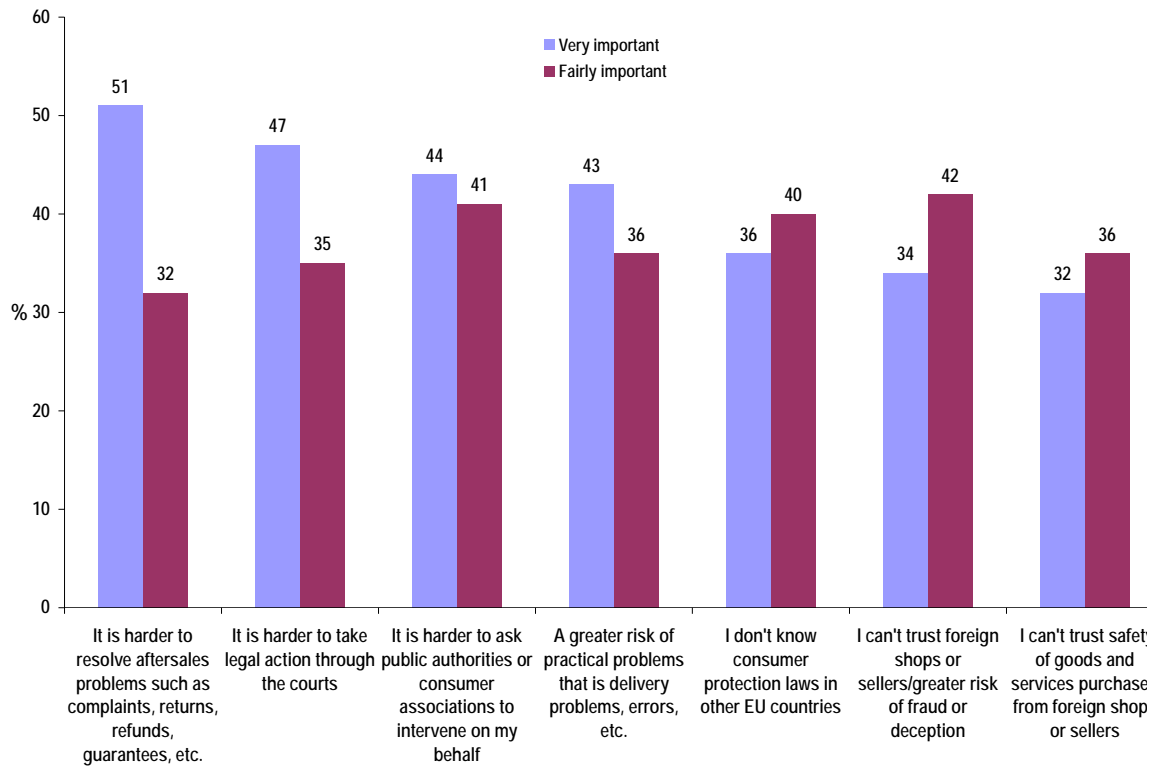
³⁷ From the 2006 OFT Annual report.

³⁸ OFT Research on Impact of Mass Marketed Scams, December 2006

http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft883.pdf

Annexe 5 – The UCPD and the Single Market

Chart 1. Reasons given for lack of confidence in cross-border shopping



Source: Eurobarometer 57.2 / Flash Eurobarometer 128 'Public Opinion In Europe: Views On Business-To-Consumer Cross-border Trade'

Annexe 6 – Administrative Burden Implications of UCPD

Administrative burden implications of UCPD

UCPD offers an opportunity to simplify consumer legislation. There will be some reductions of the administrative burden imposed on businesses from existing legislation that is affected. The section on simplification examines this in more detail (see para 115 to 131).

As well as removing existing information obligations as discussed in paragraph 116, UCPD may impose new ones on business. Article 7 of UCPD (misleading omissions) sets out information obligations that businesses must comply with. Some of these information obligations will replicate existing business practices and are not additional costs for business.

The new information requirements imposed by the UCPD vary according to whether or not a commercial practice is an invitation to purchase. Both situations are considered below.

Commercial practices where there is no invitation to purchase

The Directive provides, in Article 7.1, that traders must not omit material information which in the context, the average consumer needs to make an informed transactional decision. Consequently, , whenever a trader performs any commercial practice he has to consider whether there is any information which he has omitted from that commercial practice which is in the context material.

It is not possible to sensibly estimate the cost to business of supplying additional information of this sort. In order to quantify this obligation every action or inaction which can be defined as a commercial practice must be examined. The context of the commercial practice must be assessed as well as the materiality of the information to the average consumer. The medium used to make the commercial action must be known. Finally, we would have to look at any other means by which the omitted information may be brought to the attention of the consumer. Given the scope of these factors we believe it is highly unrealistic that this cost can be estimated. As the majority of businesses already deal fairly with their customers, we expect few businesses are not complying with this. Therefore any additional costs here are likely to be very small.

Commercial practices where there is an invitation to purchase

Article 7(4) lists certain information that is always regarded as material when an invitation to purchase is made, unless that information is apparent from the context. The Directive defines an invitation to purchase as a commercial communication that indicates the characteristics of a product and the price and thereby enables the consumers to make a purchase.

This concept is ambiguous and open to different interpretations. It could apply to any commercial communication that indicates the product and price. However, the UK's view is that such a commercial communication does not constitute an invitation to purchase unless it also allows the consumer to make a purchase. Whether a commercial communication is an invitation to purchase will depend on the context and the nature of the product.

The information that is material under article 7(4) of UCPD is summarised below:

- the main characteristics of the product, to an extent appropriate to the medium and the product;
- the geographical address and the identity of the trader
- the price inclusive of taxes along with any after sales additional costs (if appropriate);
- the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
- for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

The cost to business of each of the above information obligations has been estimated separately. The cost estimates are of the time spent by employees to insert the above information into invitations to purchase. **These are very approximate estimates based on the standard cost model, due to the nature of the information and the practices being quantified.**

1. The main characteristics of the product.

UCPD limits this obligation by taking into consideration the medium used and the product. Therefore for the majority of businesses that sell relatively simple products, the information currently provided by traders will probably suffice. Businesses who sell complex products may need to describe more characteristics in any activity that represents an invitation to purchase. We need to calculate how many businesses sell complex products and need to change their information practices

A conservative assumption is that 10 per cent of all non-food retailers will face additional costs due to describing the main characteristics of a product in more depth³⁹. We assume that 20 per cent of firms who sell automobiles or related parts, hotels and restaurants and personal service enterprises⁴⁰ will incur additional costs due to this information obligation. We estimate that just over 93,000⁴¹ businesses will face additional costs and that this will cost business in the region of £1.4-£2.8 million each year⁴².

2. The geographical address and trading name.

If the firm is acting on behalf of another agent they must reveal the identity of that trader. This information obligation has some overlaps with the Business Names Act 1985, which applies to companies, as well as individuals and partnerships trading under a name which is not their corporate name. Potential areas of overlap include disclosing your company name on business letters and displaying this name in premises. There may be additional costs to business as under UCPD, in every invitation to purchase for traders who operate under a name other than their own businesses they must reveal their corporate name⁴³. We assume that for all businesses that trade from a physical premises it will be apparent from the context for consumers who the trader is as there is likely to be a shop sign indicating the traders name outside the premises.

The Companies Act 1985 requires every company to have its name mentioned legibly in all its business letters and 'in all its notices and official publications'. The latter requirements may capture some invitations to purchase. Finally, for businesses that sell over the internet, the e-Commerce Directive 2000/31/EC (implemented in the UK by the Electronic Commerce (EC Directive) Regulations 2002) and the Distance Selling Directive 97/7/EC (implemented in the UK by the Consumer Protection

³⁹ Food products are assumed to be simple products and it is likely that the main characteristics of the product will be apparent from the context.

⁴⁰ It is not possible to precisely estimate all the firms that will be affected therefore this analysis has focused on businesses that are most likely to engage in business to consumer transactions (SIC codes 50,52, 55, 71.1, 71.4 and 93).

⁴¹ Using 2005 DTI Statistics <http://www.dtistats.net/sme/smestats2005.xls> there are around 325,000 retail firms (we assume that half of these firms sell predominately non-food products as ONS retail sales data reveals that half of retail sales are from non-food). The SME statistics indicate that there are around 47,000 enterprises that sell automobiles (this figure only includes businesses with employees). Around 3,000 enterprises rent automobiles or personal and household goods (this figure only includes businesses with employees). There are around 183,000 personal service enterprises and 152,000 hotels and restaurants. Having obtained an estimate of 93,250 = $(325,000 * 0.5 * 0.1) + 0.2 * (47,000 + 3,000 + 183,000 + 152,000)$, we round the number of estimated firms likely to face additional costs to 93,000.

⁴² We assume that it will cost businesses the equivalent of 1-2 hours of a manager's time per annum to ensure that this information obligation is satisfied. The range of hours reflects that larger businesses will have a greater number of invitations to purchase per annum compared to smaller sized businesses. According to the Annual survey of hours and earnings a retail and wholesale managers wage costs £11.43 per hour. Adding on 33% of non-wage costs and multiplying by 93,000 firms we obtain a cost estimate of roughly £1.4-£2.8m per annum.

⁴³ The Business Names Act stipulates, amongst other things, that businesses must reveal their corporate name and there will only be an overlap with the UCPD requirement if a business letter is used as an invitation to purchase.

(Distance Selling) Regulations 2000, “the Distance Selling Regulations”) provides some existing overlap with this information obligation.

We therefore assume that only a small fraction of businesses potentially affected by UCPD will incur additional admin costs. We estimate that the cost to business from this information obligation will be approximately £0.06-£0.12 million each year⁴⁴.

3. Traders must state prices inclusive of taxes, if the price of a product cannot be easily calculated in advance traders must indicate the method of pricing. Where appropriate traders must inform consumers of any additional charges (for example postal or delivery charges).

We believe that only a small proportion of businesses will be additionally affected by this information obligation as it largely overlaps with the Price Marking Order and Price Marking (Food and Drinks Services) Order 2003.

4. Traders must provide information about the payment, delivery, performance and complaint handling procedure if they depart from the requirements of professional diligence.

Where traders follow market norms, they are not required to provide any additional information. Also, the Distance Selling Regulations overlap with this requirement so most traders will already provide this information to consumers. Current practice is that this type of information may be given to consumers after they purchase a product. UCPD may require that this information be given to consumers earlier.

5. Inform consumers about right of withdrawal, or cancellation of such a right, where these exist.

Rights of withdrawal and cancellation rights are limited to very specific types of sales. Where they exist, the relevant legislation normally already requires that consumers should be informed of them. Examples are the Distance Selling Regulations and the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987.

⁴⁴ In the business sectors affected section of the RIA it was estimated that around 770,000 enterprises would be affected by UCPD. We have assumed that 1% of these enterprises will incur additional costs and that this cost will be equivalent to ½ - 1 hour of a managers time per annum (the range reflects that larger businesses will spend more time compared to smaller businesses as they will have a greater number of invitations to purchase). Multiplying 7,700 firms by £15.20 (the equivalent of 1 hours of a retail and wholesale managers hourly wage plus non-wage labour costs) gives £0.06-£0.12million a year.

We expect that the combined cost to business of these three information obligations (3-5 above) will be minimal given the overlap with existing legislation and that businesses in many cases already provide this type of information to consumers. Our conservative assumption for illustrative purposes is that a potential 7,700 enterprises⁴⁵ will incur significant admin costs estimated to cost business around £ 0.06-£0.12million each year⁴⁶.

⁴⁵ We have assumed that 1% of the potential firms affected by UCPD will incur additional admin costs.

⁴⁶ We estimate that the cost to business will be equivalent to ½-1 hour of a manager's time per firm per annum (this range reflects that larger businesses will have a greater number of invitations to purchase compared to smaller sized businesses). Multiplying 7,700 firms by a retail and wholesale managers wage (plus non-wage labour costs) gives £ 0.06-0.12million a year.

TRANSPOSITION NOTE

Consumer Protection from Unfair Trading Regulations

These Regulations implement Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices ('the Directive') (OJ No L149, 11.5.2005, p220).

These Regulations do more than is necessary to implement the Directive in the following areas:

- The type of commercial practice to which the Directive applies is extended in the Regulations to practices by traders connected with the sale or supply of a product by consumers to traders. For example a practice by a trader connected with the sale a good by a consumer to the trader. This is to ensure that there is no reduction in consumer protection following the repeal of overlapping legislation including most of the Trade Descriptions Act 1968.

Article	Objective	Implementation	Responsibility
Article 5.1	Unfair commercial practices to be prohibited.	regulation 3(1) (prohibition of unfair commercial practices).	Secretary of State
Article 5.2 to 5.5	Set out the conditions for a commercial practice to be unfair.	regulation 2(3) to (5) (effect of commercial practice on average consumer and vulnerable consumer), regulation 3(2) to (4) (circumstances when a commercial practice is unfair).	Secretary of State
Article 6	Sets out when a commercial practice is a misleading action.	regulation 5.	Secretary of State
Article 7	Sets out when a commercial practice is a misleading omission.	regulation 6.	Secretary of State
Article 8	Sets out when a commercial practice is aggressive.	regulation 7(1) (aggressive practices) and 7((3) (definition of coercion and undue influence).	Secretary of State
Article 9	Sets out a non-exhaustive list of factors to be taken into account in determining whether a commercial practice uses harassment, coercion or undue influence.	regulation 7(2) (determining whether harassment, coercion or undue influence is used).	Secretary of State
Article 10	Clarifies that the Directive does not prevent Member States encouraging the control of unfair commercial practices through codes of conduct.	regulation 19(4) provides that 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.	Secretary of State
Article 11.1, paragraph 1	Requires Member States to ensure that adequate and effective means exist to combat unfair commercial practice in order to enforce the Directive.	regulations 19 to 25 impose a duty on enforcement authorities in the UK to enforce the Regulations and powers in relation to civil and criminal enforcement.	
Article 11.1, paragraph 2	Requires Member States to give persons or organisations regarded under national law as	regulation 26 adds the Directive to the Community infringements regime under	Secretary of State

	having a legitimate interest in combating unfair commercial practices to take legal action described in article 11.2 against such unfair commercial practices.	Part 8 of the Enterprise Act 2002 and paragraph 100 of Schedule 2 which amends the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003 (S.I. 20031374) so as to specify the Regulations for the purpose of Part 8 of the 2002 Act.	
Article 12	Requirement for courts in civil proceedings referred to in article 11.1 to have power to require traders to furnish evidence of the accuracy of factual claims in commercial practices etc.	regulation 27 (evidence as to factual claims).	Secretary of State
Article 14	Amends the Misleading and Comparative Advertising Directive (MCAD, Directive 84/450/EEC).	MCAD has been repealed by Directive 2006/114/EC on misleading and comparative advertising which codifies the Directive 84/450/EC as amended. See accompanying Transposition Notes for Directive 2006/114/EC.	
Article 15	Amends Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 2002/65/EC concerning the distance marketing of consumer financial services.	Paragraphs 96 and 100 of Schedule 2 amend the Consumer Protection (Distance Selling) Regulations 2000 (S.I. 2000/2334) and the Financial Services (Distance Marketing) Regulation 2004 (S.I. 2004/2095).	Secretary of State
Article 16	Adds the UCPD to the list of Directives to be enforced under the Injunctions Directive (98/27/EC) (in place of the Misleading and Comparative Advertising Directive (84/450/EEC) and adds the UCPD to the list of Directives which benefit from Regulation (EC) No 2006/2004 (the Regulation on consumer protection cooperation).	regulation 26 (application of Part 8 Enterprise Act 2002) and paragraph 100 of Schedule 2 which amends the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003 (S.I. 2003/1374) so as to specify the Regulations for the purpose of Part 8 of the 2002 Act.	Secretary of State
Annex 1	Lists 31 specific practices which are prohibited under all circumstances.	Schedule 1 (commercial practices which are in all circumstances considered unfair).	Secretary of State

The Regulations also implement article 6.2, first indent of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (OJ No. L171, 7.7.1999, p.12). They do what is necessary to implement article 6.2

Article	Objective	Implementation	Responsibility
Article 6.2, first indent	Requirement for guarantees from seller to the consumer to	Paragraph 97 of Schedule 2 amends the Sale and Supply of	Secretary of State

	provide certain information.	Goods to Consumers Regulations 2002 (S.I. 2002/3045).	
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