House of Commons

Trade and Industry Committee

The work of the Office of Fair Trading

Twelfth Report

Report, together with formal minutes, oral and written evidence

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The Trade and Industry Committee

The Trade and Industry Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department of Trade and Industry.

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Committee staff

The current staff of the Committee are Elizabeth Flood (Clerk), David Slater (Second Clerk), Robert Cope (Committee Specialist), Ian Townsend (Inquiry Manager), Anita Fuki (Committee Assistant), Jim Hudson (Senior Office Clerk) and Cassandra Byrne (Secretary).

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Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to written evidence are indicated in the form 'Ev x' which refers to the appropriate page number.

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Report

The Work of the Office of Fair Trading

Introduction

1. We inquired into the work of the Office of Fair Trading (OFT) as part of a programme of short inquiries into the non-departmental public bodies associated with the Department of Business, Enterprise and Regulatory Reform (which recently took on many of the functions of and bodies associated with the former Department of Trade and Industry).

2. We took written evidence from a number of organisations, and oral evidence from two consumer groups, Citizens Advice and the National Consumer Council, as well as the Confederation of British Industry, and the OFT itself.

3. **The evidence covered a very wide range of issues, including regulation of consumer credit, relations between the OFT and local detection and enforcement bodies such as Trading Standards Officers, the new super-complaints procedures, the approach taken by the OFT to conducting market studies, the way in which the OFT was exercising its powers under the Enterprise Act 2002, and co-ordination with other regulators. We were broadly satisfied with the approach of the current management of the OFT, but decided to issue this short report covering some key issues that emerged from the written and oral evidence. The fact that this Report does not mention many of the issues raised in written submissions or with our witnesses is not an indication that we consider those issues unimportant: they are too significant to be dealt with on the basis of a very brief inquiry and Report. Instead, we have chosen to focus on a few areas where swifter conclusions could be drawn.**

The OFT's response to the 2005 NAO report

4. The National Audit Office (NAO) reported on the competition work of the OFT in November 2005.[1] It raised a number of concerns about the OFT and its approach to its work. These focused on three areas:

- making best use of its resources;
- improving the management of investigations;
- improving the measurement of its achievements and the communication of its work.

5. The OFT accepted the NAO's criticisms in full. The organisation has worked hard to respond to them, restructuring internally on a sectoral basis to bring different aspects of its work — consumer and competition — together, reprioritising and moving towards greater efficiency.

6. **We commend the OFT for its response so far to the NAO's criticisms. As witnesses noted, it is too soon to make a balanced assessment of whether these criticisms have been fully addressed, but we are encouraged by the evidence of progress we have seen.**

[1] National Audit Office, *The Office of Fair Trading: Enforcing Competition in Markets*, November 2005

Therefore we also welcome the fact that the NAO will be revisiting the work of the OFT after April 2008.[2]

Salary and other constraints

7. The NAO report said that the OFT "faces an on-going challenge in recruiting and retaining suitably-qualified staff." On the need for the OFT to improve pay and conditions and address staff turnover, we were interested to hear the OFT's Chief Executive raise the issue of constraints deriving from the fact that OFT employees are civil servants.[3] It came to our attention in our inquiry into the communications regulator Ofcom earlier this year that there is a clear disparity between the rewards Ofcom offers to its employees and the rewards that other regulatory bodies are able to offer. That Ofcom is funded by contributions from industry appears to enable it to offer enhanced packages to attract those with sufficient skills and experience. **We share the concerns of OFT management over the lack of flexibility available to it in rewards packages. As the UK's principal competition authority, the OFT needs to employ talented individuals to do its job. We recommend that the Department of Business, Enterprise and Regulatory Reform undertakes a review of the effect that the greater market power of Ofcom in attracting staff could be having on the effectiveness and balance of the overall UK competition regime.**

Merger referral threshold

8. The CBI suggested that too many proposed mergers are referred to the Competition Commission, in part due to the comparatively low level of the threshold above which the OFT is obliged to refer.[4] The OFT is consulting on increasing this *de minimis* threshold from £400,000 annual market turnover to £10 million, with a number of provisos that will enable it to refer mergers below that level in specific circumstances.

9. **While the broad thrust of this new approach appears sensible, we have some concerns that smaller markets or competition in local areas could be neglected under the merger referral proposals. Although there is provision for referrals below the £10 million level in some circumstances, it will be necessary to ensure that this does indeed happen, and we recommend that the OFT continue to keep this matter under review once new guidelines have been adopted.**

10. **Set against the need to maintain the right to make merger referrals where needed, it is important to ensure that the OFT bears in mind the costs to companies of a full referral. Wherever possible the OFT should seek to resolve smaller and less strategically significant merger proposals itself, using, where necessary, its powers to seek undertakings. From the evidence given to us, we are confident that the OFT understands this difficult balancing act, but we believe it is an issue the organisation must keep at the forefront of its thinking.**

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[2] Q137

[3] Qq144-150

[4] Ev 51

Codes of practice

11. The OFT's role in approving voluntary industry codes of practice, and overseeing their operation, is an important one. While the number of approved codes is gradually increasing, Citizens Advice raised concerns that these codes are "quite marginal" or cover "small sections of markets",[5] with the National Consumer Council giving the example of the Debt Managers Standards Association code.[6] Moreover, Citizens Advice thought there was scope for the OFT to be far more active in encouraging such codes of practice. In particular, it considered the withdrawal of the Association of British Travel Agents (ABTA) from the codes scheme a missed opportunity.[7] We sought ABTA's views on this matter, and later raised this issue with the OFT, whose response we have published together with ABTA's evidence.[8]

12. **We see codes of practice as potentially beneficial to the consumer, but are concerned about the apparent lack of incentive for companies to take part. As codes are voluntary while being intended to go beyond legal minima, the successful operation of a code will largely rely on goodwill within an industry, and good working relationships between that industry and the OFT. The case of the ABTA code has denied consumers in the travel market the extra confidence that an approved code could give and is an unfortunate precedent for the Codes of Practice system as a whole, but there appears to be no obvious solution to the difficulties.**

Consumer Direct

13. The OFT's Consumer Direct telephone service provides initial ('first tier') advice and refers consumers to more comprehensive assistance as required. The OFT described its purpose as "to provide a uniform level of consumer advice across Great Britain",[9] but Citizens Advice argued that there was inconsistency in the quality of service between different suppliers in different regions.[10] The OFT denied this.[11] **We believe the delivery mechanism chosen, with eleven different contractors, will take careful management to ensure consistency. We therefore call on the OFT to work with consumer groups to assess whether there are significant inconsistencies of service, and if so, to address them.**

14. The Consumers, Estate Agents and Redress Act, which received Royal Assent earlier this year,[12] allows for the merging of various consumer bodies, including the gas and electricity consumer body, Energywatch, and the postal services consumer body, Postwatch, into a single National Consumer Council.[13] Consumer Direct will become the

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[5] Q19

[6] Q20

[7] Ev 60, paras 5.2 and 5.4–5.5

[8] Ev 38 (ABTA) and Ev 78 (OFT)

[9] Ev 77

[10] Qq 25-26 Also Ev 62, para 7.2–7.4

[11] Qq 207–211

[12] c.17

[13] s.30

public contact point for consumers who would previously have used the Energywatch and Postwatch services. The Act also allows for the consumer organisation for water services to be merged into the new consumer body in due course,[14] which would lead to Consumer Direct also becoming the contact point for water services.

15. **In a previous Report[15] we noted the unwelcome uncertainty caused by the proposals to abolish Postwatch in the middle of a major series of local consultations on the future of the post office network. This uncertainty is unhelpful both for the staff of Postwatch and for the efficacy of the consultation process.**

16. **In the longer term, we share the concerns raised by the OFT and consumer groups regarding the risk that an over-ambitious timetable and potential under-resourcing could lead to a poorer service for customers under the new arrangements. The Government must ensure that the OFT is provided with sufficient resources to enable Consumer Direct to handle the increase in consumer contact (600,000 to 1 million calls, in addition to the 1.7 million existing contacts in 2006-07),[16] and the Government must ensure that a 'second-tier' service comparable with the existing one continues to be available, either through the new National Consumer Council or by enhancing the Consumer Direct service. In either case it is vital that new NCC and Consumer Direct work effectively together; other consumer organisations should not find themselves being called on to take the strain unless this is the stated aim of the Government and proper planning is made for such a change.**

[14] s.31

[15] *Stamp of approval? Restructuring the Post Office Network*, Fourth Report of Session 2006–07, HC 276, para 35

[16] Ev 77

Formal minutes

Thursday 18 October 2007

Members present:

Mr Peter Luff, in the Chair

Mr Roger Berry	Miss Julie Kirkbride
Mr Michael Clapham	Judy Mallaber
Mr Mark Hunter	Mr Anthony Wright

The Committee considered this matter.

Draft Report (The work of the Office of Fair Trading), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 16 read and agreed to.

Resolved, That the Report be the Twelfth Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

[Adjourned till Monday 22 October at 3.15am

Witnesses

List of written evidence

List of unprinted evidence

The following memoranda have been reported to the House, but to save printing costs they have not been printed and copies have been placed in the House of Commons Library, where they may be inspected by Members. Other copies are in the Parliamentary Archives, and are available to the public for inspection. Requests for inspection should be addressed to The Parliamentary Archives, Houses of Parliament, London SW1A 0PW (tel. 020 7219 3074). Opening hours are from 9.30 am to 5.00 pm on Mondays to Fridays.

Training for Professionals

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2006–07

First Report	Local energy—turning consumers into producers	HC 257 (HC 494)
Second Report	Work of the Committee in 2005-06	HC 332
Third Report	Stamp of Approval? Restructuring the Post Office Network	HC 276 (HC 593)
Fourth Report	Success and failure in the UK car manufacturing industry	HC 399
Fifth Report	Better Skills for Manufacturing	HC 493-I
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Eleventh Report	Europe Moves East: The impact of 'new' EU Member States	HC 592

Oral evidence

Taken before the Trade and Industry Committee

on Tuesday 5 June 2007

Members present

Peter Luff, in the Chair

Roger Berry	Mr Lindsay Hoyle
Mr Brian Binley	Mark Hunter
Mr Peter Bone	Judy Mallaber
Mr Michael Clapham	Mr Mike Weir

Witnesses: **Ms Teresa Perchard**, Director of Policy, and **Mr Peter Tutton**, Policy Officer, Citizens Advice, and **Mr Philip Cullum**, Deputy Chief Executive, National Consumer Council, gave evidence.

Q1 Chairman: Welcome to our first evidence session of this Committee's inquiry into the Office of Fair Trading, an organisation I think the Citizens Advice is concerned with, and presumably the National Consumer Council as well. We are very grateful to Mr Cullum for joining us. Perhaps you would introduce yourselves.
Ms Perchard: I am Teresa Perchard. I am Director of Policy at Citizens Advice, which is the national body for Citizens Advice Bureaux in England and Wales.
Mr Tutton: I am Peter Tutton and I am a social policy officer at Citizens Advice.
Mr Cullum: I am Philip Cullum and I am Deputy Chief Executive of the National Consumer Council.

Q2 Chairman: I was fascinated when reading your evidence to this inquiry, for which we are very grateful. I gained the impression that you are not overwhelmed by the present situation of the OFT. They tell us they have a shared aim of benefiting consumers but I do not feel that you feel they are exploiting that objective sufficiently rigorously. Am I right?
Ms Perchard: Yes.

Q3 Chairman: What are the main areas where you do work with the OFT, for the record?
Ms Perchard: There have been some changes in the last few years because the Office of Fair Trading's remit has gradually expanded, although not into dramatically different areas, and they have been given some new potential, particularly through the Enterprise Act and the introduction of the super-complaints provision, and also the formal role to the OFT to approve codes of practice. That has given us more interaction. For Citizens Advice in its national policy work, most of our time in the last few years has been related to the super-complaints we have made. We have made two: one on doorstep selling and one on payment protection insurance. We are also a signatory to the one on home care charges, which is a multi-party complaint. We have a representative on the Consumer Direct board. Regularly, over many years, we have submitted evidence about consumer credit market abuses relating to licensees. We respond to relevant consultations in our field of interest. We have responded to lots of drafts of codes of practice that are in the approval process. We try to get involved with campaigns that the OFT is running, scams and things like that. We have had more involvement with them on European issues when we were running the European Consumer Centre, a cross-border information advice service funded by DTI and the European Commission. We keep in touch with the Consumer Education Alliance, but we also work very strongly with the FSA on financial education, and all bureaux carry OFT information, so it is quite a spread of engagement by Citizens Advice.

Q4 Chairman: Just paint a picture for me. Most of my constituency experience of CAB is normally on benefit issues or asylum issues. How important is the OFT as an interlocutor for you in comparison with the other official bodies to which you relate?
Ms Perchard: We see the OFT as a very important generic market regulator. It has some broad-brush consumer protection responsibilities, which are not restricted to any particular market. It has quite powerful tools to be able to step in, and also new expectations in terms of leading generally trading standards activities at local level. It has competition powers to step in where there is some consumer detriment. Through its role on self-regulation now, it has a real ability to have an influence over self-regulation and standard-setting by different traders. CABx are probably most interested in the OFT's direct role in regulating the consumer credit market. We deal with five and a half million inquiries a year face-to-face in bureaux and 800,000 consumer credit debts. In our evidence, we have listed broadly the areas of inquiry we deal with, including straight questions about financial services issues and goods and services generally. It is an organisation that is there to ensure fair trading and it also has a specific positive licensing duty over a big area like consumer credit. Everything from lending to debt collection is of huge interest to us; we want them to do a good job for the people we advise.

Q5 Chairman: You have talked about the extension of the OFT's powers in your answer already. What do you think have been the most important extensions to its powers? I would like you perhaps to flesh out your answer to my first question. How well do you think the OFT has been doing on using those new powers from your perspective representing consumers?

Ms Perchard: We would say the new power to approve codes of practice and to lead self-regulation in many markets is tremendously important potentially because it is very expensive and very slow to make new legislation. If you can get businesses to do better through persuasion and leadership, you can get there a lot faster and perhaps more effectively over time. Also, they have been given a major role to lead the co-ordination of local trading standards where there has, for a long time, been inconsistency in approaches and low priority given to that area of local authority business. Those two things together have possibly the widest impact, plus the new powers they are getting to regulate in consumer credit, giving them more intermediate sanctions for businesses that fall short of the standards expected.

Q6 Chairman: Perhaps I could ask Mr Cullum to comment on how well the OFT is doing those jobs that Teresa Perchard has just been explaining to us.

Mr Cullum: I think we are more positive than Citizens Advice. I agree with Teresa that in all of the areas that she has identified the OFT's role is incredibly important. May I briefly give some of our interactions because I think it does paint a picture of the sorts of things that OFT has done. Like Teresa, we are involved in Consumer Direct and find it a very useful source of consumer intelligence. I sat on the OFT Payment Systems Task Force, which has led to change in the payments industry, both in terms of practical changes in the clearing system but also in terms of a new governance set-up. The evidence and the assessment is that some of the changes will save consumers the best part of £1 billion over the next 10 years, but it also has a much more consumer-focused governance structure. It is an interesting example of the OFT not using its formal powers but working with industry and others for the consumer good. Like Citizens Advice, we have experience of doing a super-complaint on home credit. We have long threatened one on car servicing, which is an area of massive consumer detriment, estimated to be £4 billion a year in a £6 billion a year market. We have worked with them closely in the moves to set up a code there, which has not been an entirely satisfactory process. We have worked with them on the regulation of quality controls[1] on taxis and minicabs. Our colleagues in Scotland on the Scottish Consumer Council have dealing on Farepak. And we have an interest in consumer education. Looking ahead, I guess the arrival of the Unfair Commercial Practice Directive being implemented and the duty not to trade unfairly will be hugely important. I guess that indicates that both organisations here have lots of "ins" to the OFT and the extent to which the OFT has lots of fingers in lots of pies. We would summarise it to say it has been a rather bureaucratic, slow moving organisation in the past. There is a very good new leadership team that is starting to change things but there is quite a big cultural shift to be undertaken there to remove a bit of a civil service culture still.

Q7 Mr Binley: I want specifically to talk about the audit report of the Office of Fair Trading, which was published in November 2005. The audit report was pretty scathing in certain respects. It set three objectives that needed to be attended to. The first was making better use of resources; the second was improving the management of investigation; and the third, which interests me most, quite frankly, was improving the measurement of its achievement and the communication of its work. My briefing paper tells me that there appears to be widespread belief that the Office of Fair Trading has responded positively to those criticisms. You hint a little that that might be the case and yet your contribution, the evidence you present at paragraph 1.5 suggests that you are not happy with the way it is moving and you are not happy with the methods put into place for improving measurement of its achievements. Can you give me an answer: is my view a correct interpretation of what you are saying and, if it is not, can you tell me where measurement of achievement has been put into place and you are happy with what is being said?

Ms Perchard: The Citizens Advice evidence and the NAO report are looking at two ends of the spectrum of the work of the Office of Fair Trading. So the NAO report is really looking at how the OFT uses its competition powers to get a better deal for consumers. What I drew from the summary of recommendations was really a sense of need for greater transparency to help maintain momentum and improve communications. The NAO was saying the OFT was reactive rather than proactive and it needed to be more proactive and open in order to find out what was going wrong in markets and take action, and also it needs to highlight what the impact of its work could be in terms of competition interventions. Our comments are really focused on and driven by our experience of working with them in areas other than competition interventions: regulation of consumer credit where we find a lack of transparency about investigations; a lack of proactivity about gathering evidence and formulating a forward-looking strategy for addressing problems in that market, in which they have a positive licensing role. It is different from using competition powers. That may suggest a different focus in what we are saying from what other people may be telling you. Even just looking at the OFT's last annual report, yes, they have begun to describe some financial impacts from some of their Competition Act interventions in terms of consumer detriment, money saved in certain areas, like the football strip case intervention where, as a result, prices to consumers went down. That is good and it is a good way of looking at outcomes. But we are still left with a huge amount of evidence we get from

[1] *Footnote by Witness:* This should read "quantity controls".

bureaux dealing with consumer credit problems where we see no real activity on the part of the OFT to address either market-wide issues about unfair treatment of consumers and debt, or specific traders. As for people who said they have seen some greater transparency or more outcomes, I could not comment beyond what is in the OFT annual report. On the competition side, maybe that is how they see it, but the more interventionist side of their work, I cannot recognise that.

Q8 Mr Binley: With respect, they were told to develop a series of performance indicators, which would help demonstrate more clearly the effectiveness of its work across the piece. You have not seen any evidence that those performance indicators have actually had an impact upon the service you receive?

Ms Perchard: No, unless it is being kept a secret. On consumer credit, what you get from us is intense frustration built up over many years. We are really behind the changes to the consumer credit legislation because we have found it so frustrating over many years to see the OFT unable to do anything effectively about traders who really should not be in business. What we would want to see now is a really good forward-looking strategy for regulating the consumer credit market, but what we have sitting on the books are 1997 guidelines on sub-prime lending, not updated after 10 years when there have been huge changes in the credit market. The OFT is running to catch up with the market all the time. It is reactive rather than proactive in a huge market, even more important now than it was in 1997, and it is the regulator of that. That is why our submission is not positive about the work that they do in this area because we do not see them as a forward-looking regulator looking to use all of its powers to address what it says is a market which is a top priority for them. I do not know what their top five ambitions are for regulating the consumer credit market in the next four to five years, how we can help them, what they want to focus on the most. I do not know what their performance indicators are for regulation of the consumer credit market either. Maybe I have not read something they have sent out. If they would like to send it to me, that would be great and I can correct what I am saying.

Q9 Mr Binley: You have talked to them about this, have you, because this report is pretty important to you? You have asked questions and have not got the answers you want.

Ms Perchard: Yes. As I outlined at the beginning, we have quite frequent contact with them on individual issues like super-complaints that we have taken where we have made it very plain that whilst we accept that they have referred payment protection insurance to the Competition Commission, we do not understand why there are not issues for them to look at and to look at using their powers in relation to that, other than referring to the Competition Commission. We have not kept that view a secret. They know and have known for many years that we would like to see them do better on consumer credit regulation.

Mr Cullum: There are two broader issues from this. One is about how they prioritise and how they engage with other organisations. We at the National Consumer Council think that it is improving but it is still very much work in progress and there is still this element of a slightly "processy" bureaucratic feel to engagement with us. I know that both Citizens Advice and the National Consumer Council were sent drafts of the annual strategy in advance but it is not the sparky, creative discussion about where the issues are that need to be nailed down that we perhaps have with other organisations and that we would find useful. There is another thing. What we have found in all regulators is that enforcement is the boring, dull, solid end of the job which people do not really like doing as much as doing a new bit of regulation or looking at a new market. There is this constant frustration from organisations like ours that they are just not nailing things and using the armoury that they already have to try to tackle some of the problems, and this is not OFT specific. Car servicing is the classic example; there have been 11 attempts over the last 30 years to set up some sort of self-regulatory code. It is an area that everybody even in the industry admits is a continuing problem and brings shame and ultimately it damages the reputation of the industry, and yet still there is slow progress; it is limping along and OFT is arguing something but it is probably not being done with the energy that it could be.

Q10 Mr Bone: You talk about them being proactive. Would an example be for instance where a credit card company sends out a big flyer that say, "zero per cent interest for 6 months" and then in very small print it says there is a 3% fee, which obviously makes the whole thing totally different. Is that where they should be more proactive, in your view?

Ms Perchard: We can probably send you supplementary notes giving you some examples of issues we have raised with the OFT over time relating to specific problem traders where, rather than the OFT having a really comprehensive system of evidence gathering so it is spotting what is going on—an open system of reporting is something we have talked about for some time—the onus is very much on us to put together a dossier of cases that could be used in investigation. But, having done that and having provided enough good cases to enable the OFT to take action and working closely with them, the telegraph goes very quiet for a long time. What we would like to see is a much more open system of reporting. There are thousands of advisers working in the CAB service. We have 16,000 people on the front line. They are all coming across consumer credit problems with debt collectors or lenders. They are trying to resolve those problems with individuals, but the evidence should feed into regulation if there are some wider issues about the trade or the market in general. We think it should just be much easier for people to simply report those problems to the OFT. There have been experiments

with this. There was a site called ripoff-tipoff.com which was run during a scams awareness campaign a couple of years ago. That was great because people could just report things and it built up the intelligence picture. It tends to be a rather reactive, cumbersome, slow-moving, evidence-gathering process. If you are going to put a company out of business, you need to get your evidence straight but finding out where you need to go and investigate is something where the OFT really does not seem to have all the intelligence coming in and being used in a dynamic way. We could give you a few examples of cases where we put a lot of effort into getting together a dossier of cases, interviews with clients, and it has just gone into the sand really.

Chairman: We would welcome that.

Q11 Roger Berry: You have referred to the super-complaint mechanism and that at the time it was introduced, it seemed like a really good idea. Has it turned out to be so?

Mr Cullum: I think it has been. The one we submitted was on home credit. We will see, over the next few years, if the changes introduced by the Competition Commission have the effect that they want to have and will save consumers hundreds of millions of pounds. It is a slow process. I think we have all realised that the more we get into it, you have to think long and hard before using it. Quite often you want quick action against something, and it is not the quick solution. More recently, we have been looking at the dispute between BSkyB and Virgin Media, which led to the withdrawal of the Sky basic channels and threatened a super-complaint but are holding off, in part because we are still trying to cajole the companies into doing a deal without having to submit it, partly because it just will not produce the instant or a relatively quick solution that we would like. That is not about the OFT; that is something about the nature of the system. The other issue that we picked up, having done one to the OFT which went to the Competition Commission, one threatened to OFT and one threatened to Ofcom, is that the standard of evidence varies depending on whether it is a generic or sector-specific regulator. With the economy-wide regulators, what you are doing is more identifying an issue and saying, "You know lots about this market but here is a different case or an issue you need to be aware of". With the OFT, sometimes, it is more about saying, "We know something about the home credit market. It is not a market you know about", and so there is an imperative to give more information. One of the battles is quite how much to give. The final issue is what happens when, as so often happens, with the issues that we want to cover, the remedies are both consumer protection remedies and competition policy remedies. I think both organisations feel that there is a bit of a binary approach, which is that the OFT either treat it as a competition issue and send it off to the Competition Commission or they hold it for themselves. Often there needs to be a dual approach. If you look at the OFT website on home credit, it describes what the OFT did and then it just stops. It says, "This is the basis on which we referred this to the Competition Commission". It does not say what was specific to do more on the whole story for consumers, what happened as a result of it, but it is indicative that they (the OFT) dropped their interest in some of the consumer protection side of the issue. Part of that is about the Competition Commission being better about doing both consumer and competition issues that are then inextricably linked to a set of problems. There is something there just about OFT trying to keep both bits going at the same time.

Ms Perchard: I would like to say something about our complaint on doorstep selling because, yes, it does take a long time to get from making a complaint to a conclusion. In terms of the OFT's report, it took two years. We think this a very useful device for consumer groups to make a reasoned case for an issue to be investigated that needs a solution on a number of fronts. The Bill that is currently going through, the Consumers Estate Agents and Redress Bill, does include a change to the legislation relating to cooling off rights when people buy in their own homes. This comes directly from our super-complaint. Probably the recommendations we made were no-brainer really, that you should have the same cooling off rights regardless of whether you invited the salesman into your home or they made a cold call. It is confusing for traders and consumers alike at the moment. We have had a tangible change in legislation, which will benefit millions of people. Just on some home improvements, such as double glazing purchases the market is about 1.5 million purchases a year. If people buying in their own homes have made an appointment with a trader, they do not get a cooling off at present but they will benefit from the change in the law. They did some brilliant research on doorstep selling, some brilliant undercover mystery shopping exercises; they learnt a lot about what went on in the doorstep selling markets but, at the end of the day, they have not followed through with some wider work reflecting the investment in this research, settling on one change in legislation which the DTI is now implementing. Some of the other things we recommended are happening, like regulation of claims handlers for example, but that has perhaps happened for other reasons than the OFT getting involved.

Q12 Roger Berry: From your written submission, you seem less happy with the way they have approached the payment protection insurance issue. I do not know what you think about the home care charges. I would love to hear in brief, if I may, whether you are happy with the way they are dealing with that issue?

Mr Tutton: With payment protection insurance (PPI), on the positive side, the super-complaints procedure allowed us to get the agenda in front of the regulators. We had been talking about PPI for 10 years. It was hard to get this issue in front of the regulators. That was the good side of it. The problem was, as has been described, and this is a very good analysis, that they produced a report which highlighted some of the problems that we identified

and can confirm but, when it came to what we need to do about this, they said, "It is a bit complex, so we are not going to suggest any remedies" and the whole lot was passed to the Competition Commission. The problem we had with this is that with a lot of these issues the Competition Commission made it quite clear that PPI is not just about the products themselves; it has a connection to indebtedness obviously and to the way the consumer credit markets work, and the OFT is the regulator for that. All those issues are swamped by the Competition Commission saying they cannot deal with these issues. We were concerned with what you could call the wider responsible lending issues about the way this market ties in with the way lenders were lending money and how they were concerned about protecting consumers. This is something the OFT should have been concerned with but those issues seem to wash over their heads and they passed all that away. It was an opportunity missed for them to regulate the market and to take some leadership and try to improve matters.

Q13 Roger Berry: That seems entirely unsatisfactory.
Mr Tutton: Yes.

Q14 Roger Berry: What should be done about it?
Mr Tutton: They should have worked harder to think about what they could do as the primary regulatory for consumer credit and the fair trading agency do to make these markets better. We see this approach throughout consumer credit; it tends to be reactive to complaint. It is about: how do we deal with an issue in a reactive role and say that there is a wider problem here and how do we make this market work better? It really is about an attitude. They could have done all sorts of things with PPI. The Payment Systems Taskforce was mentioned. We had firms saying to us, "What do we do to stop this going to the Competition Commission? How do we get our act together?" The OFT could have put some leadership into it, but they did not.

Q15 Mr Clapham: Listening to what Mr Cullum has said and Ms Perchard, Mr Cullum, a little earlier you referred to the fact that the OFT have got their fingers in many pies. Ms Perchard referred to the need to be more proactive. When we look at what has been done, particularly since the NAO report, they do seem to have gone out to emphasise prioritisation and caseload management. From the work that they have done do you see any improvement at all?
Mr Cullum: From our side, we do think it is improving but it is not necessarily quite there yet. One example that we would cite as being a good one, and I know this is a view shared by Citizens Advice,[2] is the work that they are going to be doing on banks. I think that is an example where it would have been easy to say, "We are just going to look at the charges". Given that almost every newspaper or media outlet you care to look for has a standard letter about how to complain to your bank, there is a lot of stuff going on about the charges. The big issue is going to be, as the banks themselves have said: "If we are forced to stop levying all these charges, we will get the money back somewhere else". The fundamental issue is: how does this market operate for consumers; how do people ultimately pay for the services that they are going to get. From our side, what OFT is doing I think is exactly right, which is to say, "Let us get ahead of the game here. Let us look at how the market might develop and try to work out what that means for consumers and in terms of competition".

Q16 Mr Clapham: There is an indication then, Ms Perchard, that they are becoming more proactive, that as they prioritise, we see that prioritisation meeting the reality of the market and their work in the market?
Ms Perchard: The main sector we are interested in is consumer credit—everything from lending to debt recovery and helping people to manage debts as well. That is our biggest area of business interest in terms of what the OFT does. Unless somebody has just failed to get this across to me, and I have looked at their draft plan for this year and at the final plan for this year, I do not know what their top priorities are for that huge market. What are they trying to achieve there? How long is it going to take? For me, that is prioritisation: what is their strategy for the different markets? The conceptual framework of how they will organise this and how they will look to create some multidisciplinary case handling, that is one thing. That is the "how", but the "what" is terribly important. If I was a regulated business in the consumer credit market, I would quite like to know what my regulator was up to and what their strategy was. Down at the FSA, it is all about treating customers fairly, debates about getting rid of rule books, black and white rules or principles, what does fairness mean, who is the fairest of them all. I would struggle with credit to know what the OFT is after in terms of better, fairer treatment of consumers. For me, that is what priority means. I do not get a clear sense of what the priorities are.

Q17 Mr Clapham: Would it be fair to say that your view is that there are challenges out there, some changes have been made by the OFT, but in terms of how we see that protection being provided in the market, you do not see that happening at the present time?
Ms Perchard: No. It applies to bits of it.
Mr Tutton: To give an example of the minutiae of consumer credit, given that there is a number of different areas which we call at high risk of consumer debt, debt collection is a common area of conflict and the OFT has recently done some very good work on that. They have produced some sector-specific guidance two years ago which they have then reviewed, they have consulted on it. It is very good work and it is starting to have an effect on behaviour in the markets. That is an example of something very good. On the other hand, if you look at area like the growth of secured second charge lending and debt

[2] *Footnote by Witness:* "though I know this is not a view shared by Citizens Advice"

consolidation lending, which Teresa alluded to earlier, they have done very little work on that at all. There is a very patchy cover that depends on what they are working and historically what they have worked on and no overall sense of looking at where the detriment lies and how they need to improve matters. It is patchy and hard to see. Why prioritise one and not the other?

Q18 Mr Clapham: My final question is: given that there have been changes put together in the internal structure of the OFT, is there any indication at all in terms of follow-up studies that things are changing for the better? You referred to debt collection. That is an ongoing factor, two years old. We do see changes there but it has been over a longer period. One would expect that if they are focused in the work that they are doing, the timescales would be shorter to bring about the improvements. You are saying that is not yet visible.

Ms Perchard: On consumer credit, it is lack of a coherent big picture that is the problem. There have been some individual tasks over the last six or seven years on credit, in terms of policy and compliance monitoring, where we have been quite pleased with what they have done. On the guidelines on debt management companies, again responding to a complaint from us and the banks, they came in and made a difference and there was a programme of reviewing compliance and continually looking at whether the volume of complaints about debt management companies that charge to manage debts had gone down. We were able to agree, yes, they had, and the guidance was good and we worked closely with them. That is only one small part of the market of which the OFT has an overview. We are looking for a big picture and forward-looking strategy for that market, plus a really long-term commitment to an evidence-reporting system. That means that they do get the evidence that they need to do their job and channel some things to local trading standards for enforcement action but utilise a full range of evidence to inform themselves about what the priorities need to be. I do not get a clear sense of what the top five things are that they really want to make a difference on over the next two years. I just do not.

Mr Cullum: For us, one of the tests is going to be what happens with regard to quantity controls on taxis, which still exist on about 100 towns and cities in England. It is an absolutely outrageous anti-consumer measure. The OFT reported on it in 2004, also saying it was outrageous, to which the Government then put voluntary advice out to local authorities, encouraging them very strongly to review this. Some that did review it, changed it; some reviewed it and kept it the same; and a few decided not even to review it. The OFT is going back to its work this summer and the Government has promised another review next year. The fact that there are still hundreds[3] that are not doing it is a sign partly that somehow they have not managed to persuade the local authorities to do it; Government certainly has not managed to persuade local authorities to do it. The question is: what is the relationship between OFT and the relevant department by saying, "We have a shed load of evidence here that says this is acting against consumer interests and you need to do something about it". How persuasive are they in making that case and getting it on the priority agenda of others?

Q19 Chairman: In a way, that leads on to the question I was going to ask you because the OFT puts a lot of emphasis in their submission to us on what they feel their advocacy role—I think they mean lobbying—is to government. They mean lobbying government. They say that the shape of government regulation can be more significant for the working of some markets than the behaviour of companies and thus have higher impact. They also address some of the questions that you were raising about their apparent lack of interest in detailed intervention, preferring to operate at a higher level and possibly also their preference for developing competitive markets rather than actually intervening in those markets in a micro way. How effective is the OFT in what they call their advocacy role?

Mr Cullum: For me, again I think it is getting better. There is the constant debate about: are they the advocate or are they the umpire? When I sat on the Payment Systems Taskforce, I absolutely saw this because I think at the beginning they saw themselves as the umpire, and then, as things went on and the industry was quite intransigent at the beginning and said, "We are not sure why we are sitting round this table; we do not want to do anything different", OFT realised they needed to be much stronger in starting to push more strongly and to say, "Staying where you are is not an option". There was a gradual realisation of that shift in role. With car servicing, I think part of the issue is that they still see themselves as an umpire, possibly an honest broker, but they are the people who are convening the discussions and they are very gently prodding the industry along. There is a kind of risk aversion in not being too demanding because if OFT are too demanding and say to the industry, "You need to do something" and they do not do it, it makes the OFT look bad. If you are taking an advocacy role, you need to get over that and be clear about what you want to achieve.

Q20 Mr Weir: You say a lot in your evidence about self-regulation. You are quite critical of the OFT and their not being proactive in this area. Can you tell us about how you see the effectiveness of self-regulation and particularly codes of practice within industries?

Ms Perchard: I do think that is an area where advocacy is key to getting businesses to see what it is they can commit to and would like to commit to in order to gain approval and favourability. We have supported the OFT acquiring a new role to approve codes of practice. There are hundreds of them. Do they mean anything? At last, you have a framework for sorting the wheat from the chaff and for consumers to have a clear sign of which code is

[3] *Footnote by Witness:* " . . . there are still about one hundred . . . ".

worth the paper it is written on. Since 2003, we have been involved with consultation on 14 draft codes going through the approval process, some of which have gone in one end and have not come out anywhere near the other. That is including the Finance and Leasing Association code. That covers a huge market. Self-regulation has a role to play because it takes a long time to make new legislation. Legislation sets a floor and through self-regulation, as shown through the Banking Code over many years, you can secure a widespread commitment to improve beyond legislation from service providers in many sectors. You have got to have a credible threat of regulation and good coverage. Probably one of the most disappointing things from the code system has been the fact that ABTA, whose members account for 90% of the package holidays sold in the UK, went into the process and then came out again, admittedly because they could not meet the criteria, but why could not the OFT persuade them to improve so that they could? The membership clearly has no interest in the OFT approval. Some of the approvals given are really quite marginal or small sections of markets. Our own experience of working in the code process is of not a proactive selling job being done on businesses in different sectors, as we have described in our submission. It is an opportunity perhaps not capitalised on as much as possible.

Q21 Mr Weir: Within your evidence you cite the difficulties of the Debt Managers Standards Association. I noted you said there that DEMSA's code of practice has still not being given full approval and one of the six members has now left and they do not seem to have gained any new members. You are talking about codes that cover apparently five members in an industry of which there must be considerably more. I question: what is the use of a code that is restricted to so few members in an industry where there are a lot of complaints because this affects a lot of people who are very poor and get into debt and such like?
Mr Tutton: That is exactly the point. This is an industry where there are firms that are not members or signatories to that code on whom we still get large amount of ongoing evidence of problems. Although that code had some effect on some of the larger firms, it did not deal with the whole of the market; it did not deal with other firms. One could argue that there is some slippage. It is almost as though the OFT have gone half-way in producing guidance that led to the code but there are still problem firms in that market that have not really been fully addressed by it so there is more work to do. The other point this highlights is how the market moves on beyond these things and these codes. One of the reasons why that code has not developed more members is because that market has changed. We have had the recent brouhaha about IVAs where we see the change in the market and movement from a particular product to another one. What is happening now is that a new trade association is going to come along and it is thinking about different sets of standards; it is going to marginalise the earlier one. In a sense, there is always the problem with self-regulation. If it is not linked in to a statutory regulation or if it is not linked in, as Teresa said, to a credible threat that something will happen, it will not keep up the pace with big developments, it will not catch all the members of that market, and ultimately it will not be very effective.

Q22 Mr Weir: You talked about the market developing and that happens in all industries from time to time. Does the OFT have a process for amending the code and updating the code? Does it have any way of imposing the code on new members coming in?
Ms Perchard: The OFT can tell you a bit more about how they do this. They have some good criteria. The criteria they have for deciding which codes get their badge and which do not are good. They have a two-stage process, so if you meet the criteria on paper, you get through to stage one and you will get through to stage two and to full approval if you can then provide evidence that you are complying. That is good. To make firms want to join trade bodies that are on the way to getting approval, they have to feel that they are going to get something out of it as businesses and that consumers will know and look for that brand and trust it. It will give them some market advantage. Consumers need to know that it is something that they can trust and rely on. The criteria are built around that latter point particularly and will provide a lot of comfort for consumers about complaints handing, prepayment protection and those kinds of things. So the policy is great but perhaps the advocacy and the selling have not been strong enough to get enough trade bodies wanting really to get these badges so that they can get more customers. When you have very large trade bodies, really they can take it or leave it; it is not going to make a difference. Self-regulation has provided opportunities for change and improvement over the years, which legislation and intervention has not been able to do. Our experience is that the Office of Fair Trading is rather too hands-off in its role towards codes of practice. It should be going to businesses and persuading them of the benefits of the system. It has spent money on marketing and promotion, but it has to win hearts and minds as well. In our interactions with the OFT over individual codes, it tends to act as a post-box between consumer groups and businesses and we do not see them actually going to firms or trade body bosses and trying to persuade them to change their code to introduce something more promising for consumers. We do that a great deal. We work with all the trade associations and talk to all their members about things that they do.

Q23 Mr Weir: You mentioned that advocacy with the trade bodies. The other side of the coin is that such a code of practice is only effective if the consumer knows of its existence, knows what they can do under it, and knows which organisations are members of it. Does the OFT do any work in advocating it to the consumer directly rather than just to the trade bodies themselves?

Ms Perchard: Yes, and I think in our annual report you will find outlined the advertising that they have done and also more awareness of the code approval brand.

Q24 Mark Hunter: Can I take us on to a different area now? I want to talk about the relationship that Citizens Advice Bureaux have with the Consumer Direct organisation, funded and part of the OFT. Could you tell us a little bit more about your relationship with Consumer Direct, the quality of its work, the division of responsibility, whether or not you think it provides a good service and any concerns that you might have about it?
Ms Perchard: Since Consumer Direct was initially piloted, we have set aside resources within Citizens Advice to act as a liaison between Consumer Direct and CABx, perhaps to reassure bureaux that it would not threaten their funding because it is provided by local trading standards, and also to develop policy, practice and guidance for bureaux on when to refer to Consumer Direct and how to utilise it as part of their demand management strategy. One of our directors is now a member of the board of Consumer Direct, so we have been involved in the advisory process to set it up and now in the oversight of management and governance of it. It seems to be dealing with about one million calls a year or so. Through that process, we get regular statistics, as do other members of the board. The customer satisfaction with it seems to be high from the statistics we get. The question is where it sits in the spectrum of information and advice. It works well for people who can use telephone-based information advice services up to a certain point, but, at the point that they might need what might be called intervention or direct support to enable them to resolve their problems, perhaps help with writing a letter or a bit more detailed analysis and advice, Consumer Direct cannot go that far. In terms of the level of advice it is giving, it is working at below the level a CAB adviser is trained. For us, if somebody has come into a CAB, it would be unusual for us to want to refer them on to Consumer Direct because the level of advice would be lower than we are able to provide, but we would tell people to ring up Consumer Direct and report a problem so that trading standards would be aware of it because it is a good information or intelligence system. It could be frustrating for some consumers who are looking for more and who may have a more complex problem which it is unable to help with. We have highlighted a few examples in our evidence where perhaps the individual consumer's expectation is greater than Consumer Direct's service offering: how it links with trading standards who may provide a more detailed service on some issues, how it links with CABx on ongoing issues.

Q25 Mark Hunter: I will probe this a little further because I am slightly confused. It seemed that on the one hand you are saying that Consumer Direct is a positive development and you are happy for people to ring up and ask for advice and yet, in the evidence you have submitted in the section that deals with Consumer Direct, you have chosen to highlight three examples of individuals' dealings with Consumer Direct, all of which are entirely negative. You further say in your evidence at paragraph 7.3: "Consumer Direct acts as a useful first port of call for information on a range of consumer issues." If the position is more mixed, why are you choosing to emphasise in the report three examples, all of which are negative, and why do you further go on to make the point in paragraph 7.4 that you think the issue is potentially exacerbated by the fact that Consumer Direct is delivered by multiple contractors and consistency of advice is therefore an area of concern? Which is it? Are they doing a useful thing or do the CABx have some very significant areas of concern, which would appear to be down to the multiplicity of contractors being used by the OFT?
Ms Perchard: I do not think what we said in our evidence is inconsistent. There is a general picture that for a large bulk of people who ring up Consumer Direct looking for simple information and a signpost, reassurance on what they think is right and can deal with that over the phone, it works extremely well and is delivering something that we would not set out to compete with and we see that as complementary to our work. For individuals who perhaps have communication difficulties or who are looking for a bit more, who need a bit more to resolve their problem, the hand-off from Consumer Direct to local trading standards or other advice agencies (not just CABx) is an area for development. We are reflecting on it. We have picked up something that we have fed into Consumer Direct, that there are some differences between different providers. It is important, if you have multiple providers providing a single service and there are differences in performance, that that is looked at.

Q26 Mark Hunter: Absolutely and we agree entirely on that point. I am trying to find out how much of a problem the quality and consistency of advice given is affected by the fact that there are multiple contractors working for them. You obviously think it is a significant point because you have put it in your own evidence. Even if you generally think that Consumer Direct is doing a positive job and is a positive force, how much importance do you think this select committee should attach to paragraph 7.4 of your written evidence when you talk about the problems of consistency of advice and multiple contractors? Is it a big problem; is it just a middling problem; or it actually, in the great scheme of things, really quite a small problem altogether?
Ms Perchard: We are not the contract manager; the OFT is. If we are picking it up from people who as a result come to CABx and different CABx are reporting a different experience, then it may be a sign that there is an issue to explore. We think the OFT is aware of it and finds it helpful to have that evidence. Naturally, MPs would be interested in constituents getting consistent service from this national service. I would suggest it might be something you would want to ask as to how consistency is assured and how the hand-off for more complicated cases happens with Consumer Direct. We have just signalled that

there are issues that are for development and further work, as you would expect with any service, including CAB services.

Q27 Mark Hunter: I am happy to leave that point there because it is something I will pursue elsewhere. Finally, may I ask you this? Given some of the caveats about Consumer Direct that we have talked about, do you have concerns about the prospects of broadening the Consumer Direct service, as has been suggested, to cover things like electricity and postal services?
Ms Perchard: The winding up of Energywatch and its merger into the new National Consumer Council obviously does raise some issues around consumer inquiries relating to energy in particular. That is an area of interest. As far as we can tell, there are about 223,000 energy inquiries a year, of which Energywatch says that 131,000, so more than half, were complex, i.e. requiring a bit more intervention, not just information; and then 63,000 complaints which Energywatch was involved in investigating. It is quite a significant increase in Consumer Direct's incoming call load just on the 223,000 inquiries. If 130,000 of the inquiries are more complex, more complex perhaps than Consumer Direct is working at, and if those were directed to CABx, that would be a very substantial increase in the number of utility problems we get.

Q28 Chairman: The answer is: yes, you do have concerns about it?
Ms Perchard: I think there is an open question about what happens to the complex utility inquiries and complaints.

Q29 Judy Mallaber: What more would you like to have seen in the Consumer Redress Bill? Does it meet what you want? Would you like to have seen other things?
Mr Cullum: We are part of the Bill with NCC being merged with Energywatch and Postwatch and we think it is a very good Bill. We think it makes sense to have a better resourced, more powerful consumer advocate and to bring all this together is the right thing to do. It is also the right thing to do to empower Consumer Direct and use it as a portal for complaints so that, as Teresa says, vulnerable consumers can be routed to people who can provide more in-depth support. If you buy the logic, which we absolutely do, of something which is a wide-ranging body with powers able to look at all parts of the economy on the basis of consumer detriment, it is slightly odd to pull in some consumer bodies but not others. It is a slightly strange in-between position. It is a long way better than not doing it but it has left it in a slightly curious position with Consumer Council for Water and possibly in and possibly not and other bodies not mentioned at all. There is a possible lack of clarity there but I think overall it is very much a force for good.

Q30 Judy Mallaber: I am still slightly confused, following on from Mark Hunter's questioning, about this relationship between Consumer Direct and these bodies as the people that give advice and what the actual regulatory and interventionist role of the OFT is. You talk about how they should be doing more on scams; you criticise the OFT on taking enforcement action. I had a big double-glazing company in my constituency a few years ago called Coldseal that ended up clearly being a real scam merchant; they set up one company, closed it down, and set up another. I am still unclear, from what you are saying, how far you are talking about the OFT and these other bodies as dealing with complaints and how far you think they should be intervening or are able and have the powers to intervene in a regulatory sanction in relation to individual companies that are creating problems.
Mr Cullum: I think we are both saying it is a mixed economy. Consumer Direct provides consumer intelligence, which is not the only bit of consumer intelligence but it is a useful bit, about where the problems are in markets and where people are being ripped off. Neither of our organisations is quite clear how that information then drives the OFT's agenda, but it is then pursuing a kind of dual strategy of both protecting individual consumers against individual companies and also saying there are fundamental problems underpinning markets, which need to be sorted out as well.

Q31 Judy Mallaber: How much work does the OFT put into the enforcement regime and investigations of individual companies? Do you think that is something that they should be putting work into, as opposed to markets in the broader sense?
Mr Cullum: I am not sure I can say quite what the balance is, and that is probably more a question for them. All I would say is that it does need to be both, and doing one without the other would be a problem.
Chairman: Thank you very much. There are a number of questions we would like to ask you, but we are up against the time, so there is one more issue we want to explore.

Q32 Mr Hoyle: Obviously, the whole issue of Farepak and the disgraceful way that customers were cheated out of their money, I just wonder what has the OFT done? Obviously, you have got a grant for £1 million to improve consumer awareness. Was that enough money? Is it having an effect? How well-advertised is it and how do people understand?
Ms Perchard: It has only just started.

Q33 Mr Hoyle: Is that too late? My understanding is that people start saving in January for Christmas. So what are you saying? "You have only lost half your money now"?
Ms Perchard: I think the OFT know that, which is why they are looking at building the foundations for a campaign that really starts next year, by piloting some activity in Scotland over this summer. We are having some very constructive discussions with the OFT about how we can work with them to help make this campaign a success. One million pounds is a huge amount of money for a consumer information campaign on saving just for Christmas,

but it does provide a real opportunity to get messages across about money in general—money choices and consumer protection. So we hope we can help to make it a success because people know CAB and we work closely with credit unions (more closely now than in the past) and are trusted in the community, whereas the OFT does not have a community presence. Pamphlet schemes, local savings are very local issues, with different traders. Your butcher, the local shop where you can save up for a school uniform—those are local and I think the OFT would be the first to say they do not have that local presence to get out there and talk to people and talk to people in terms that they can understand and will trust locally. So we hope to get the best value out of it for consumers.

Q34 Mr Hoyle: In Scotland you have done your trial.
Ms Perchard: No, it has not started yet. Nothing has started there yet.

Q35 Mr Hoyle: You are about to trial in Scotland. What about the North East and the North West, other big areas where people have always been associated with clubs, always putting the money in and, unfortunately, it does not matter whether it is the local working men's club and a trip to Blackpool for the week—somebody has run off with the money. The problem is this keeps happening. Do you think they should be outlawed?
Ms Perchard: This is quite difficult. You should probably speak to Ian McCartney about this because—

Q36 Mr Hoyle: That would cost us another day's work!
Ms Perchard: Absolutely! We were saying we thought, really, firms like Farepak—the Farepak product—should be regulated by the FSA. There is more money in there than in many credit unions and they are regulated by the FSA. The issue is about prepayment and would we want all the butchers who let you save for your turkey and pay for your turkey in advance to be regulated by the FSA? I think that might be a bit challenging for the FSA to take on board. The "holding money in trust" model that is being announced very soon as part of the consumer protection arrangements coming in post the Farepak collapse are a help, but I think they are a staging post to a wider look at prepayments. The OFT should be looking at the longer-term policy to protecting people's money; paying in advance for holidays, paying in advance for all sorts of goods and services with lots of different traders. How do we make sure that that is safeguarded if people choose to lay money aside in that way rather than through a bank or a credit union where it will be protected?

Q37 Mr Hoyle: So, really, the scheme this year will not be much but next year we will be motoring?
Ms Perchard: I think you will find the OFT will acknowledge that as well; that, really, it is just starting now. In Scotland they will be working with CABs and others to find out how to do something effective, and then looking to roll it out. So we have offered to help as much as we can to make sure it is an effective campaign.

Q38 Mr Hoyle: So the £1 million will be enough for how many years?
Ms Perchard: I have not seen how the budget is broken down yet. That is a matter for the OFT.
Chairman: We would like to have asked you some more questions but we are over our time now. You have offered us some additional information during the session. We may want to put some questions in writing to get you to flesh out some of the issues overlapping the OFT and FSA, on which I would be interested in your views. Thank you very much indeed and we will be in touch to discuss the further information. We are most grateful to you for your very cogent evidence, thank you.

Tuesday 17 July 2007

Members present

Peter Luff, in the Chair

Mr Brian Binley	Miss Julie Kirkbride
Mr Peter Bone	Anne Moffat
Mr Michael Clapham	Mr Anthony Wright
Mr Lindsay Hoyle	

Witnesses: **Mr Richard Lambert**, Director General, Confederation of British Industry, and **Mr Rufus Ogilvie Smals**, Chairman of the Competition Panel, CBI, and Head of Legal GKN plc, gave evidence.

Q39 Chairman: Gentlemen, first of all can I apologise to you for keeping you waiting but we had some private business to transact which took longer than we hoped. I am sorry about that. Can I welcome you, Director General, to I think your first time giving evidence to this Committee in your current role certainly.
Mr Lambert: Indeed.

Q40 Chairman: You are very welcome. Can I ask you to introduce yourself and your colleague, or your colleague to do it himself?
Mr Lambert: Richard Lambert, Director General of the CBI.
Mr Smals: Rufus Ogilvie Smals, I am Chairman of the Competition Panel of the CBI and Head of the Legal Department at GKN plc.
Chairman: Thank you. There is a certain delightful symmetry about meeting you this morning for the first time because we met your predecessor yesterday afternoon in a lively session. Do you have any plans to become a minister under this Government?

Q41 Mr Hoyle: Think very hard!
Mr Lambert: I was trying to think of a courteous reply but failed. The answer is no, I have no plans under this or any other government.

Q42 Chairman: Lord Jones failed to rule out serving under a future Conservative administration yesterday, "no comment" was his answer. You have given us a much more categorical answer, a much more plain-talking Digby! Just out of interest, what does the CBI make of his appointment? Obviously there were some issues for this Committee about the politics of it, which puzzled some members of the Committee, but in terms of British business has the CBI expressed a view?
Mr Lambert: We have. We have expressed enthusiasm. Obviously we know Digby well and admire him greatly because he was part of our little band for six years or more. He is a person of enormous energy and enthusiasm, he is boundlessly energetic and full of integrity. He spent six years going up and down the land ceaselessly talking to businesses large and small and buzzing around the world talking on their behalf to international governments and customers. I could not think of anybody better suited to do the job and I think the country is lucky to have him doing it.

Q43 Chairman: In canine terms a cross between a Labrador and a Springer Spaniel, is he not?
Mr Lambert: Yes, energetic and brilliant, if that is how that works out.
Chairman: Excellent. Now let us turn more specifically to what you are here to talk about, which is a very important subject for the Committee.

Q44 Mr Hoyle: A Springer Spaniel is usually described as being scatty, so maybe it was appropriate.
Mr Lambert: If it was a trick question I did not spot it.
Chairman: A Cocker Spaniel.

Q45 Mr Hoyle: Extremely well trained but they do go off the rails! Can I move you on to the OFT. The OFT's most recent annual report for 2005-06 states that its mission is "to make markets work for consumers". Should this mission include making markets work for competitive business too?
Mr Lambert: Yes, indeed, and it does include that mission. If I may just make a couple of opening comments.

Q46 Mr Hoyle: Of course.
Mr Lambert: One is that this is a matter of great importance to CBI members and to me. I am not the world's most experienced person in this area so I will deflect, if I may, Chairman, your faster balls to Rufus.

Q47 Mr Hoyle: Mr Smals, I think it is over to you.
Mr Lambert: I will stay with the question. The other thing is that we both feel much more confident talking about competition matters than consumer matters. My opening thoughts would be—

Q48 Chairman: Just to put that in context for you, we have also had the consumer groups in and talked about consumer issues, so we are looking to talk primarily about competition matters. That is the intention of this session. It would be helpful, by the way, if you did not both answer every question.

Mr Lambert: I will start off and we will take it in turns and the really tricky ones I will just move to one side, if I may. Our feeling is that a very important part of the OFT's mission is to make markets work efficiently and well. We also believe that effective competition and the effective management of competition policy is the best way of ensuring consumer protection. We think the two are closely linked together. We strongly support anti-cartel action, including within that measures to encourage whistle blowing against cartels. We think that is a very important part of the OFT's mission which we are enthusiastic supporters of.

Q49 Mr Hoyle: Where do you think cartels exist that need to be investigated?
Mr Lambert: I think that is the OFT's job.

Q50 Mr Hoyle: You do mention cartels so you must have some thoughts or evidence to state it or presumably you would not have stated it.
Mr Lambert: We have seen anti-cartel action over the years in a wide range of business sectors and we have seen them effectively prosecuted. If you compare today's business climate with the business climate 30 years ago you will see that cartels that existed then have been bust apart and that is entirely to the benefit of the UK economy and UK business. If you look back 30 years, or 40 years would be even more appropriate, there were a very large number of cartels running across the business scene, these have been attacked and destroyed and our economy is much the better for it.

Q51 Mr Hoyle: So you think cartels are a thing of the past, they do not exist any more?
Mr Lambert: No, I do not think that, I think they still exist but I would not like to say where or when or how, it is the job of the OFT to identify those and track them down.
Mr Hoyle: So you have got nothing that we can pass on for them then.

Q52 Mr Clapham: What does the CBI consider is the most important change in the powers of the OFT in recent years?
Mr Smals: I think it stems from the changes brought in by the Enterprise Act. The main change there, the one that attracted a very high profile, was the introduction of a criminal penalty for hardcore anti-competitive practices. There are also some other changes brought in by that legislation, including additional penalties such as disqualification of directors and wider scope given to market studies and various changes on the consumer side, which I am less expert on.

Q53 Mr Clapham: So in combination they have added to a much better business climate, should we say, or a better competitive climate for business?
Mr Smals: I think the newer powers in legislation are still working their way through the system and it is too early to say they have actually achieved those results, frankly, we wait to see.

Q54 Mr Clapham: The 2002 Enterprise Act, is that working through well?
Mr Smals: In some areas it certainly is. Generally speaking, with one glitch on the merger system, it took politicians out of merger control, if I dare say that in this building. That has worked very well. We now have a fairly efficient merger review system in this country. The one glitch that has arisen from the wording of the legislation, an unintended consequence, is the threshold at which the OFT needs to refer mergers to the Competition Commission for second stage review is too low and I think it has worked out as being lower than people realised at the time and that does need to be addressed. Too many mergers are being subjected to in-depth review by the Competition Commission.

Q55 Mr Clapham: Has that view been expressed?
Mr Smals: Yes.

Q56 Mr Clapham: What has been the response?
Mr Smals: That view has been expressed. We have had one or two looks at some form of simple change to the legislation but that was ruled out because it was thought to be more complicated than thought at first sight. We are basically waiting until there is an opportunity for the Act to be looked at in more detail and perhaps that change brought in with one or two updating amendments when time allows.

Q57 Mr Clapham: Given the DTI has now changed the way in which it is organised and we have got Business, Enterprise and Regulatory Reform, do you think that is going to be a help in looking at this particular issue?
Mr Lambert: I do not think that will specifically come under the mandate of bringing better regulation into the Department of Business but it is certainly something that we will be talking to the Department of Business about because, as Rufus said, we do not think this was what was intended by the legislation, it has lowered the threshold below what people imagined. We will certainly be bringing that to their attention and hope they will recognise there is an issue there. I think it would be right to say on the Act our members still have anxieties about the criminal prosecution powers of the OFT simply on the grounds that they are uncertain about whether the culture of criminal prosecutions fits well with a body like the OFT. We understand that the initial cases when they come will be taken through the SFO and our inclination is to think that the Serious Fraud Office is the place where criminal prosecutions might better be originated from. There is a question mark in our minds about how that will work in practice.
Chairman: In answer to Mr Clapham's questions you have raised the de minimis level which we wanted to explore with you because it is quite an important part of your written submission to us. I am not sure whether there is any more you can add but Brian Binley was going to ask you some questions on this area.

Q58 Mr Binley: On the de minimis bit I do not think there is, but I am going to raise the consequent cost to business in that respect. It seems to me it is often forgotten that inquiries of this kind cost business not only a great deal of money but a great deal of focus too which detracts from their prime job of actually getting out there and making their business work. How can we improve that situation?
Mr Smals: Is that question raised in the context of mergers?

Q59 Mr Binley: Yes. You might widen it out in general terms about inquiries as well.
Mr Smals: That is quite a wide question.

Q60 Mr Binley: Yes, it is.
Mr Smals: Going back to the Chairman's preliminary comment, there are two aspects to the de minimis situation. There was the one I mentioned just now, which is the threshold for second phase detailed investigation of mergers is too low because of this legislative snag, but a related issue is the de minimis level itself which is a level at which a merger is considered big enough or significant enough to justify it being reviewed at all. The classic example is the snuff industry where I think the turnover is less than a million worldwide and the number of users is about 600. Does it really make sense for a merger in the snuff industry—this is a hypothetical example—to be the subject of the full panoply of the merger control regulations? Obviously the answer to that is no, it does not make any sense whatsoever. There was provision in the Enterprise Act for minor transactions to be kicked out of the system. I do not know if it is the result of our representations or not but certainly the OFT is currently putting out proposals for consultation that the de minimis threshold should be raised significantly and the CBI fully supports that initiative. We are still going through the consultation process and we have not got our answers on that point finalised because we are still consulting with our members, but we will be going back in the relevant period, which I think is in the next month or two, with our views on that. That is that point.

Q61 Mr Binley: Can I ask on that question whether the mood music suggests you are going to get what you want or not?
Mr Smals: I am reasonably encouraged by the OFT proposals, they are not far off what we want. Obviously we will push for a bit more, because he is in the room!

Q62 Chairman: He is taking careful notes!
Mr Smals: Is he? I think it is a pretty good start. As I say, we will have to look at the detail of that and go back to them and we owe them a response.

Q63 Mr Binley: I would like to pursue this slightly further down the line because very often mergers of sizeable operations do not really take into account where most people are employed, which is in the supply chain. I recognise the CBI is UK plc personified but what sort of thinking are you doing with regard to supply chains which very often employ sizeably more people than the actual people involved in mergers?
Mr Smals: In terms of the parties to the merger they obviously have to focus on their own direct business interests.

Q64 Mr Binley: Sure, but you are a trade organisation.
Mr Smals: From the OFT's point of view the process does allow people who are interested or affected by a transaction to make representations. I think everybody gets their day in court, so to speak.

Q65 Mr Binley: So you are happy that the little guy's interests are taken care of too in this respect?
Mr Smals: If they have got a legitimate competition concern then they have the right to be heard and it is then for the OFT to decide whether that balances against—

Q66 Mr Binley: I am not sure I am getting enough back from you to suggest a real concern about supply chains, but never mind.
Mr Lambert: Just to pick up your more general point on cost and time taken. Where I hear more concern from members, in a sense, even than on the merger side is on market studies where, as you know, these do not have to be triggered by competition points, they can be driven by other triggers such as questions about productivity and so on. These can be very expensive, even more so if they are then referred through to the Competition Commission. We have a number of examples where the total costs to the taxpayer and to the businesses involved seem to have been rather large compared with the scale of the industry involved. It is very proper that the OFT is now setting benchmarks for, as it were, the economic returns it expects out of such market studies but we think those aspirations need to be checked carefully and, indeed, in our submission we have suggested that there would be a case for doing a cost benefit analysis to the public good of market studies to make sure they are delivering the benefits they are supposed to.

Q67 Chairman: I find one of the frustrations of this job is that businesses and their representative organisations often say things to me in private that they are not prepared to say in public and the Competition Commission has that problem at present with the supermarket inquiry because the suppliers will not say in public the things that would incriminate them and would mean they lost their contracts in the supermarkets. One of the things that some businessmen have been saying to me in private about the OFT is that on mergers it is too prepared to pass the buck to the Competition Commission and there is a concern that the Competition Commission have a staff there ready and waiting to do the job and the OFT is very busy, so it could actually settle things at its level without

passing it through to the Competition Commission. Is that a concern that you have heard expressed or is it actually a product of the legislative problem you have identified in your evidence?
Mr Lambert: I have not heard that concern expressed. I have heard people say that what they find more than irritating is the lack of certainty about whether a merger is going to be referred or not.

Q68 Chairman: Time.
Mr Lambert: Time and uncertainty, that is a cause of great concern, but I have not heard the easy option thing. Perhaps you have, Rufus?
Mr Smals: It is part of the point I was making earlier that because of this legislative snag, this unintended consequence of the Enterprise Act, some mergers are being referred to the Competition Commission which really the Competition Commission has got better things to do with its time than consider. It is very difficult to get hold of clear statistics about this but one set of figures suggests to me that of mergers notified something like 15% in this country are going on to more detailed review, which is quite a major blow for a transaction because of the cost and delay, whereas the international average is nearer 5%. If that is true that is a significant detriment.

Q69 Chairman: I am tempted to start talking about a case I had in my mind but it would actually breach the confidence which the industry has put in me which gives me a concern about this issue, but never mind. Let me ask about something more generally. I think it would be fair to characterise the National Audit Office report of two years ago now as being critical and the OFT's response as being pretty rapid and pretty thorough. Is that how you see that?
Mr Lambert: It is how we see that. We had dialogue with the OFT after that and with our members and we think that a major programme of culture change is now underway. It is too early to say how it will work out but the early signs seem encouraging.
Mr Smals: I agree. I am not sure that the 2007 Annual Plan for the OFT is actually finalised yet but looking at the drafts we have been consulted about it does show a very encouraging response.

Q70 Chairman: So your members are broadly content.
Mr Smals: Yes.

Q71 Chairman: I have heard some concern expressed that the OFT is now almost suffering from an excess of zeal, it is overreaching itself, it is trying to be too ambitious with what it has got available.
Mr Lambert: One issue that I think the OFT recognises and we recognise is that business does not really take any notice of the OFT or understand these issues until they are in their gun sights. We think it would be a good idea for the OFT to spend more time reaching out and talking generally to business about the issues concerned and, to their credit, they would like to do that and we would like to support them in that effort.

Q72 Chairman: Your submission to us talks a lot about poor communication from the OFT, so it is an issue you have emphasised and you are repeating that concern expressed in your written submission.
Mr Lambert: Yes.

Q73 Chairman: Any sign they are improving at present, they are reaching out more effectively?
Mr Lambert: I have seen Mr Fingleton all over the place actually.

Q74 Chairman: They do not exist behind you, they are not there, they are figments of your imagination.
Mr Lambert: Certainly their intentions are to do that, we can see that.

Q75 Mr Bone: Mr Lambert, Director General of the Confederation of British Industry, you are not really Director General of the Confederation of British Industry, you are the Director General of big business in the country.
Mr Lambert: That is a surprising comment.

Q76 Mr Bone: I just wanted to put that and clear the fact that in about a year's time everything you say here is going to be changed by a different view because you might have been given a different job, so is what we are hearing here going to be consistent from the Confederation?
Mr Lambert: I do not accept a single word you have said so far, but continue.
Mr Bone: That is good.
Chairman: I think he is teasing you most about Digby actually.
Mr Bone: It was a serious point about you representing big business rather than small business.

Q77 Chairman: I think you should address that, Mr Lambert, if you would like to because it is a criticism. Do you think that is fair?
Mr Lambert: I have spent the last year going to meet our members around the country and in our regional offices, in the regions and nations, they are predominantly small business people. Our SME Council is led by a dynamic person and is strong and supportive. We have many thousands of small businesses who are members. I can give examples, but it would be too boring, of cases where it would have been easy to take a particular line, say on pensions, which big business would have been relaxed about but we felt would be damaging the interests of small businesses so we took the line we took.

Q78 Mr Bone: That is encouraging. From the evidence you have submitted I get the impression that the OFT go in rather heavy-handed with investigations and you say they have created, in

effect, a series of regulated markets. If competition is failing, and presumably that is why the OFT has gone in in the first place, are they not doing their job?
Mr Lambert: I think what we meant under the regulated markets heading was particularly under the market studies areas where protracted investigations can lead to a sort of freeze period where in a sense it is anti-competitive because people are frozen in the spotlights and do not respond in the way that they normally would. I was talking to a large clearing bank recently who told me that they had more than 30 inquiries into their behaviour now underway—this was a very respectable company—of which I think ten came from the OFT. These can have detrimental effects on the way businesses can operate.

Q79 Mr Bone: I think people all over the country would say that clearing banks are not exactly the best. You could almost say there is a cartel operating in the banking industry and the OFT should be in there really getting into it.
Mr Lambert: The OFT is actively engaged in looking into the retail banking sector. Sorry.

Q80 Chairman: Peter is hanging on your every word.
Mr Lambert: I thought there was a shout of protest.

Q81 Mr Bone: What I am trying to say is in America competition works but they are very heavy-handed if they do not think competition is working in a particular market.
Mr Lambert: Yes.

Q82 Mr Bone: Are you saying that the OFT is doing too much, that it is going into areas where competition is working?
Mr Lambert: No, I am not saying that. What I am saying is, as indeed it is now making efforts to do in that particular case, it needs to focus its efforts and not go in with a scattergun, it needs to go in with a more focused approach.

Q83 Mr Binley: Can I ask a supplementary there on focusing effort because you do say that the focus needs to be on competition issues having the highest economic value and that concerns me, recognising that you can see we have champions of smaller business in this room, and very firm champions.
Mr Lambert: Yes.

Q84 Mr Binley: Does that approach not raise concerns that competition will be constrained in smaller and apparently less significant markets, recognising of course that 98.6% of all businesses in this country are SMEs, small businesses, and not UK plc?
Mr Lambert: I suppose what we meant by that was that the OFT, as the NAO suggested, should focus its efforts on areas which would have the biggest economic impact. Actually those areas are ones in which small businesses are potential victims. Who are the victims of cartels? It is not necessarily consumers, it is other businesses. The OFT concentrating on big picture challenges is going to be of real benefit to the SME sector who are as likely as any to be victims of anti-competitive behaviour.

Q85 Mr Binley: Forgive me, I have now got mixed views about what you are telling me. I make the point again, that have the highest economic value. They would tend to be the biggest businesses in the biggest market sectors. That is my concern.
Mr Lambert: Their customers would include large numbers of SMEs.

Q86 Mr Binley: Yes, they would, hence my question about the supply chain before.
Mr Smals: You could interpret those words also as having the widest economic impact, and that means affecting the most people.

Q87 Mr Binley: I am not sure that what you are saying here is what you mean now, that is the point I am concerned about. You have made a submission which talks about the highest economic value, I am not sure you have described what you are really talking about as well as you ought to.
Mr Lambert: Forgive us. What we are talking about is the arguments put forward by the NAO in its study of the OFT, which the OFT has subsequently responded to by, as it were, retuning and refocusing its goals.

Q88 Mr Binley: My real concern is that you are pushing for the interests of the smaller businesses that you say you are representing when you vehemently responded to my colleague, not unfairly but vehemently.
Mr Lambert: Very much so.

Q89 Mr Bone: I think you called for a strong focus from the OFT on scams, rogue traders and hard-core cartels. Do you think they have that focus at the moment?
Mr Smals: If I may try and answer, I think they do have that focus. That is how they have recently gone through a reorganisation of the OFT and they have got a new structure which, as I read it, although they must explain it to you, seems to me designed to focus on exactly those issues. I think they are responding to those priorities.

Q90 Mr Bone: How do you think the balance between consumer and competition issues rank in, if you like, the OFT's in-tray?
Mr Smals: That is a question for them, I suppose. It seems to us that the balance is appropriate. I think they are equally important issues, they are two sides of the same coin in some respects. You cannot look at the demand side without looking at the supply side. I am not an economist but that seems to be basic economics. It is not one or the other, you have got to deal with both.

Q91 Mr Bone: Finally, you are really saying that they have moved in the right direction and more or less got it right?
Mr Smals: I think in terms of their vision, their vision and their approach, we do not have a lot of difficulty with that. The issue remains on delivery and there is some way to go, and the OFT will say as well there is some way to go, before they actually deliver the rather fine sounding words that they have got in their Annual Plan.
Chairman: We will return to some of those fine sounding words, if not with you certainly with the Office of Fair Trading itself. Tony Wright.

Q92 Mr Wright: In your written submission you talk a lot about the value for money. Do you think that the OFT is better value for money now than at the time of the National Audit Office's report two years ago?
Mr Lambert: It is too early to say, is it not?
Mr Smals: I think that was only last year. I think it is a bit short term to come to any conclusion.

Q93 Mr Wright: Are they going in the right direction?
Mr Smals: I think that is what I was just saying; I think they are heading in the right direction, I think they have taken those criticisms to heart. There was a change of management and I think the new management was probably thinking along those lines anyway, even before the National Audit Office expressed its views. So I think there is almost a consensus on the way to go forward, but, in fairness, I think it is going to take a bit of time for the OFT to deliver its vision—it cannot happen in one year, it is going to be longer than that.
Mr Lambert: It might not be a bad idea that if in a year or two or three there was another study of whether the cost benefits had indeed been delivered.

Q94 Mr Wright: You go on to say that the value for money could be judged on whether the National Audit Office could "be satisfied that there is a clear cost benefit". Do you see—again, I know this is in the short term—any signs of this kind of approach being adopted by the Office of Fair Trading?
Mr Lambert: I think we do. As Rufus was saying, the agenda which they have set, the way they have reorganised themselves, the culture change which they are driving through is now pointing in that direction. It will be a little time, I think, before we can actually see how it works in practice.
Mr Smals: I think I can supplement the answer in one detail, which is that I think the OFT has publicly said that its aim is to deliver consumer benefit which is five times more valuable than the cost that they represent, and so to that extent they are taking on, as I read it, the cost benefit approach to prioritising their work. But I think the issue that is going to be interesting is how delivery of that promise is actually measured because the value to consumers of OFT intervention is actually quite difficult sometimes to measure.

Q95 Mr Wright: Overall you would sum it up by saying that they are going in the right direction and let us measure it in a couple of years' time to see the outcomes?
Mr Smals: As we said in our submission—jumping ahead a bit—the idea that we had there was that this cost benefit issue is likely to be quite a difficult one to measure and that is where we thought it might be useful to have some sort of independent assessment from a body such as the National Audit Office.
Mr Lambert: Particularly on the question of market studies.

Q96 Chairman: You say it is too early to tell, but it is some time on from the NAO report and we have seen quite a lot of evidence of the style of the Office of Fair Trading now. Do you have a view about the total level of resource the organisation needs? Do you feel that it is adequately resourced, inadequately resourced, over resourced?
Mr Lambert: I do not think I can respond to that.
Mr Smals: I do not think that we have a huge amount of visibility of the finances of the OFT but we have an idea of their total budget and we have an idea about the numbers. We only know the position historically, it is a question of I think they are up for a new round of approval for the next three years—and I do not know what the Treasury has done to them in the next round.

Q97 Chairman: When I read your evidence to us—possibly inaccurately, and tell me—is that you are quite happy that they should not have too much money because it means that they have to choose their work quite carefully. You talk about that in view of the OFT's admitted resource constraints there must be clear evidence a market study is needed and will represent value for money. That is not just an interesting market to study, for example.
Mr Smals: In fairness, we were not just thinking about the OFT's resources we were also thinking about the cost to business of these investigations, which are huge.

Q98 Chairman: But a limit on the OFT's resources therefore is quite helpful to your members.
Mr Lambert: I think that is right and there have been cases where we have felt that studies have been nice to know—for example the study on Internet shopping—but has not actually made an enormous difference to the way the world works. I think there have been other cases where we have worried, for example an investigation into the Northern Ireland banking market. We reckon that that cost about £20 million and the total market, we reckon, is worth £170 million and we wonder whether that was money well spent—£20 million by companies as well as by the taxpayer.

Q99 Chairman: When was that study?
Mr Lambert: Last year.

Q100 Chairman: Mr Fingleton has a particular interest in Northern Ireland, I suppose! Although not £20 million worth of personal interest!
Mr Lambert: I think we do feel that value for money is important and the culture change that has been undertaken needs to deliver value for money.

Q101 Chairman: Let us move on. I am trying to find where in your evidence—I cannot find it now—you are talking about prevention rather than cure.
Mr Lambert: Education.

Q102 Chairman: Which obviously is tremendously important, and the OFT in its glorious language says it undertakes " . . . powerful awareness and education programmes and coordinates an alliance of consumer education departments. Our aim is to increase a consumer and business knowledge." It also says, "Business representatives and industry organisations can and do play an important role." I entirely agree with you, *caveat emptor*. I am not aware as a consumer of the OFT's work—perhaps they have not targeted me, I am not a businessman, I would not see that work. But do you feel that getting this prevention rather than cure balance right should be making more and better use of organisations like yours?
Mr Smals: I think there is always more to be done, frankly, and I think it is a question of balance. Maybe in recent years there is a feeling amongst our members that maybe there has been too much emphasis on the OFT's enforcement role and their apparent desire to create deterrents, but we think that having a workable system of competition law in this country is more likely to be achieved and it is just as important to concentrate on education and raising awareness, and I think that sometimes that is not given sufficient priority. We as an organisation at the CBI have organised various things in tandem with the OFT but I think there is always more to be done. What we would just say, to summarise our concerns on this, is that 99.5% of businesses just want to comply with the law; they do not want trouble, they are not trying to do anything clever, they have lots of other problems, they just want to comply with the law and they need some assistance in doing that. There is always going to be a 0.5% rogue element but most people just want to know what the law is and they want an easy explanation and they want an easy route to how to comply without undue trouble and inconvenience, and that is the overwhelming desire of the business communities.

Q103 Mr Bone: I think that is absolutely true and I can remember when I was in the travel industry with the package directive from Brussels; there was nobody who could tell us what it actually meant. That was the frustrating thing. We would get one thing from ABTA, we would get another thing from the Government and anything that could be done to improve that would be great. If you are a small company, to be honest, you are not involved in the debate over the issue; you want to know what the law is and how do you comply with it.
Mr Smals: You need a little card about *that* big with the key points on it.

Q104 Mr Bone: That certainly was not happening when I was in the industry. Is that improving or is there still a lot more to be done?
Mr Smals: I think there is a lot more to be done. This is not a criticism, but I think that the OFT have been focusing on their reorganisation, they have been focusing on deterrents and enforcement and I am not sure that education has been given the same level of resource and commitment.

Q105 Chairman: We have a parallel inquiry going into economic regulation in the House of Lords at present, which is very welcome, and this Committee is very much looking forward to seeing what that inquiry concludes. You are seeking a five-year review of overlapping jurisdictions of economic regulators. Could you tell us a bit more about your concerns in this area?
Mr Smals: I have lost track actually of how many regulators have concurrent jurisdiction over competition law, but it is quite a few—11, 12, 15, something like that. It seems to us that whilst there is little recorded activity on the part of these other regulators in terms of exercising their powers under the competition laws that we feel this is an area where expertise is relatively thinly spread and we will be interested to hear what the outcome of that inquiry is, because there is an argument for greater consolidation.

Q106 Chairman: It also makes it quite confusing for ordinary mortals. I sometimes in the broadcasting world get confused whether it is Ofcom or OFT.
Mr Lambert: I mentioned the overlap between the FSA and the OFT.
Chairman: Let us come to that.

Q107 Miss Kirkbride: We want to ask you about that, please carry on. You have some issues with it. How do you see it? Is the joint action plan working or are there still too many inconsistencies?
Mr Lambert: Partly it is to Rufus' point. I think Hampton suggested that there should be consideration of that overlap and whether it could be ironed out and there are some of our members who would support having a single regulator—not all, it is not, as Digby would put it, a "slam-dunk" discussion. As Rufus said business, especially small businesses are trying to comply with regulation and if there are two lots of regulators around it gets confusing and hard work.

Mr Smals: 16.

Q108 Miss Kirkbride: 16?
Mr Smals: It is something of that order.

Q109 Miss Kirkbride: That is overall of everything?
Mr Smals: Yes, everything.

Q110 Miss Kirkbride: So should it be changed or should it stay as it is, or is something coming of the action plan?
Mr Lambert: I do not think we have worked out our position on that, I am sorry to say, but if you would like us to put a note together on that we happily would and buzz it in to you.

Q111 Miss Kirkbride: Thank you very much. What about consumer credit, should that be regulated by the FSA?
Mr Lambert: Gosh!
Mr Smals: It is regulated by both. There is an overlap at the moment and, as I understand it, there is an action committee that has been formed to liaise on these issues and it seems to be working reasonably well, at least those are the reports we get from our members. Apart from that I cannot go much further.

Q112 Miss Kirkbride: Out of interest, given the nation's indebtedness at the moment, do you think that consumer credit is too easily come by in the UK?
Mr Smals: That is beyond my terms of reference, I think.
Mr Lambert: I think if you look at the UK as a whole you will see that there are a measurable number of families whose consumer finances are out of control and I think that is a social problem of some importance; I do not think it is a macroeconomic problem, I do not think the scale is enough to cause overall microeconomic challenges for the UK, but there are a significant number of families who are in real trouble and do not have the financial understanding or capability to deal with their affairs. I think that is an issue.

Q113 Miss Kirkbride: How could that be challenged—through better regulation or is it nothing to do with regulation?
Mr Lambert: I think the starting point actually is financial education and capability. The FSA has now started, perhaps belatedly, a programme of supporting through Citizens Advice and other bodies and through the school system explanations of trying to allow people to understand how their affairs work for them. I think it is very difficult in an open economy like ours to say that there is a section of society that can qualify for bank loans and a section of society that cannot, so the key must be to do with education and explanation.

Q114 Miss Kirkbride: We used to have something, did we not, where you could only borrow so much based on the assets that you had, so it is not about you cannot or you can, it is about what collateral you can put up.
Mr Lambert: Clearly still today there are much more sophisticated ways for lenders deciding how to lend money and they have credit scoring systems which are much, much more sophisticated than they were when I was trying to scrounge money from my bank. So I do not think that is the issue actually. There used to be a cartel, which happily has been broken apart, that would only allow people to borrow money on a house if they had been saving with the cartel for some time. So I think competition has brought enormous benefits, but it also means that there are citizens who do not have that capability in a free market place and have not been given the information and the tools to understand the risks that they are taking?
Chairman: Brian Binley has a supplementary here.

Q115 Mr Binley: I am a little concerned about controlling the access to capital, quite frankly. Having started businesses as a result of releasing equity on my house I am very aware that that is one of the major areas where people do get money to start businesses.
Mr Lambert: I hope I did not imply that I was in favour of it.
Mr Binley: No, you did not, but I just wanted to make the other side of the argument and have it on the record.
Chairman: It is a little wide of the terms of reference of this inquiry.
Mr Binley: It is a little wide but it is important.
Chairman: Mr Binley has made an important point. If Mr Bone is coming in on this he will not be allowed in!

Q116 Mr Bone: Does the Office of Fair Trading have a view on the lending of money? I would like to get the CBI's answer to that. One of the problems when you are starting up a business, as Brian has said, is that you have to use your money on your house to do it.
Mr Lambert: Yes.
Mr Bone: In an area when banks are making billions of pounds really should the family home be allowed as an asset to support—

Q117 Chairman: I think it is a very interesting philosophical question but I am not going to invite you to answer it today. But a very interesting and important point. To change the subject, super complaints, you say in your evidence that there is a risk that super complaint procedures and indeed other actions of the OFT could be subject to populist pressures. Regulators, like politicians and like the law, it has to be done, it has to be seen to be done and sometimes needs to be seen to be doing things that are popular. Do you think that the OFT has responded appropriately, particularly in the super complaints procedure, to public pressure so far?

Mr Smals: That question slightly drives you to a certain answer. They may have responded to popular pressure but our concern is that that is possibly not what they should be doing. We feel that the Enterprise Act powers are intended to preserve and maintain and achieve competitive market places, and we do not want to go back to the old days where there were vague public interest inquiries into this and that.

Q118 Chairman: Not because of the public interest but because it interests the public.
Mr Smals: Exactly, so that seems to become a very wide and unstructured approach to regulatory enforcement, and what these powers should be used for is to deal with competition related issues, and they should be driven by that fundamental legal test.

Q119 Chairman: Is that happening, do you think? What is your sense?
Mr Smals: I think that some of the comments Richard was making earlier on there is some concern that that has not been happening in every case. You mentioned Internet shopping and I am not quite sure what that had to do with competition issues.

Q120 Chairman: I would like to focus on the super complaints issue particularly. Does the CBI have a view there?
Mr Smals: The super complaints that I have heard of seem to have led remorselessly to a market study by the OFT and then on to a market investigation by the Competition Commission, so they do seem to take on a considerable life of their own. Certainly when a market investigation is commenced by the Competition Commission that does have to be based on competition issues, but I think at that earlier stage I am not sure that competition issues are necessarily the only issues that the OFT is actually looking at, and we would like to see that, their powers to conduct market studies being more clearly focused on competition issues.
Mr Lambert: As you would guess, our default position is that competition should be the driver.

Q121 Chairman: I understand that that is what the OFT says its position is as well, to be fair to it, that it seeks that; but there is always the pressure to do the popular thing.
Mr Smals: Yes.

Q122 Chairman: A couple of last questions before I let you go. The Hampton Principles, you refer to them extensively in your submissions for a regulator. Do you feel that the OFT is embracing those principles properly?
Mr Smals: It is one of those areas where we have heard the words but it is a little difficult yet to see the actions. Certainly talking to the OFT it does seem to be an approach of which they are supportive, but I think we need to see that carried out in practice.

Q123 Chairman: Just explain to me a little bit more about your concern you expressed in evidence about the relationship with Trading Standards and additional prosecution powers being sought by the OFT. You say, "We are concerned, for instance, that additional criminal prosecution powers sought by the OFT may change the relationship with the Trading Standards Service who currently exercise those powers, and may additionally may deflect OFT focus to the wider national objective, making the markets work more effectively."
Mr Smals: I think that was on the consumer side, so I am not sure we are in a position to speak about that.

Q124 Chairman: You stand by your written evidence.
Mr Smals: Yes.

Q125 Chairman: One question you can both answer, I am going to make you Chief Executive or Chairman of the OFT for a day and you can change one thing that the organisation does, you can take one strategic decision; what is it going to be?
Mr Smals: I would drop the share of supply test in the merger review process. There are two bases on which the OFT can exercise jurisdiction over mergers: one is turnover and the other is a 25% share of supply test and that is a very unsatisfactory and unclear measure and I think it would simplify things greatly if that test were simply to be dropped.

Q126 Chairman: Superficially that sounds a rather odd thing to do for a competition body. Just explain to me why it is unsatisfactory?
Mr Smals: This is just the threshold at which the OFT can start the clock on a transaction and so right at the beginning of the process they are trying to decide whether they have jurisdiction or not and they have two tests at the moment: one is a straight turnover test, is the transaction big enough to merit our time and effort in looking at it? That is very clear and straightforward and everybody understands how that works. But they have the secondary test which is that if the turnover test is not met, in other words if the turnover of the business acquired is less than £70 million they can still investigate if the merged party will have 25% share of the supply of a particular product in the market, and that is a very, very difficult test to actually understand.

Q127 Chairman: Are we going to the heart of one of the criticisms I have heard, which has not been raised by you today in your evidence, which is that sometimes defining the market is tremendously important?
Mr Smals: Yes.

Q128 Chairman: The whole row about supermarkets comes, in my view, from the failure properly to define the market. It was ludicrous to separate the convenience sector from the

supermarket sector because you can only buy a box of cereal or washing powder once and it is all the same sector, and Tesco ruthlessly exploited the opportunity created by that failure to define markets properly to develop a total monopoly of grocery sales in the UK. Is that the issue you are raising, defining markets?
Mr Smals: It is in part. Defining markets is actually one of the trickiest things in competition enforcement to do and having to try and do that right at the outset before you have even commenced an investigation is ludicrous really and that should be dropped. I think there is power for the Secretary of State in the Enterprise Act to drop that test and I think that power ought to be exercised.

Q129 Chairman: I imagined you would say definition but you are actually arguing for abandonment?
Mr Smals: Yes, just drop that.

Q130 Chairman: Richard, is there a magic wand that you would wave?
Mr Lambert: My Queen for the Day moment would actually subsume Rufus' and say that I want everything that we do to be driven by competitive considerations, one, and to be as predictable as possible because predictability leads to maximum economic benefit. So that would certainly take in predictability at the time of a merger and it would take in the same considerations when doing market studies, that they would be driven by market competition, and we need a world in which companies large and small and consumers know where they stand and are not taken by surprise.

Q131 Chairman: I imagine our next witnesses will tell us that that is their ambition, so let us find out what they say. Is there anything else you would like to say that you have not had a chance to say during your remarks?
Mr Lambert: Thank you very much indeed.
Chairman: We really do appreciate the thoughtful way in which you have responded to our questions and the very helpful and succinct written submissions too. Thank you very much indeed.

Witnesses: **Mr John Fingleton**, Chief Executive and **Mr Colin Brown**, Director, Advisory, Policy and International, Office of Fair Trading, gave evidence.

Q132 Chairman: Gentlemen, welcome to what will be our final evidence session in our inquiry into you, so thank you very much indeed for coming. You heard what our last witnesses said and I am sure you have read what previous witnesses have said as well. As always, can I begin by asking you to introduce yourselves for the record?
Mr Fingleton: Good morning, I am John Fingleton, Chief Executive of the Office of Fair Trading and I am joined by . . .
Mr Brown: I am Colin Brown and I am Policy Director at the Office of Fair Trading.

Q133 Chairman: Can I begin by asking you a question about what you are? I hope this is not a pedantic point, but I have read very carefully your Annual Plan 2007/08—some of the language interested me, tripped me up a bit from time to time—and you say very boldly, right at the top of the document, "We are not a regulator". Then at the back of the document you refer to yourselves as one of a group of regulators and say, "Other regulators will be reviewed thereafter". You have very considerable powers of intervention, surely you are a regulator?
Mr Fingleton: Some of what we do is regulative, particularly on the Consumer Credit Licensing side, but I think the vast majority of what we do is not regulatory. We have an enforcement role, a decision-making role in some instances.

Q134 Chairman: Enforcement is not regulation; that is the distinction you are making?
Mr Fingleton: I would not describe enforcement as regulation, no, and that is the distinction I am making. I think with the benefit of hindsight I would have written that as we are not primarily a regulator, I think it would be fair to say in fact. One of the things I was trying to do there is to kick-start not just a culture change within OFT about how we think of ourselves but also externally about how others think of us because it is important. Our fundamental role is to make markets work well for consumers. We take the view that competition does that most of the time. Sometimes we need to push it to make it work, so cartels for example; and other times we need to pull it back, so for example misleading pricing in airlines where it goes too far, or rogue traders and so on, where people are really trying to be super competitive in a way that harms consumers. Most of the time the difficult choices we face are about not intervening and actually letting the market get on with the process of serving consumers well.

Q135 Chairman: Mr Brown, are you part of the Policy and Strategy Unit of the OFT?
Mr Brown: Yes, I am, that is correct.

Q136 Chairman: I had to laugh at "Policy and strategy will lead our strategy and policy". That is a great phrase!
Mr Brown: It is honest advertising; it does what it says on the tin!

Q137 Chairman: That is certainly a pretty effective description! Let us go back to this National Audit Office report, which is one of the reasons you are here now—we thought two years on it was not too early to look again at what you are doing because it was quite a critical report. The impression we have formed is that our witnesses broadly have

responded quite effectively to that report. In the spirit of the confessional, among friends, privately how far do you think the OFT has succeeded in responding to those criticisms made some two years ago, and what is left to do?

Mr Fingleton: I welcome the fact that people believe we have responded because I think we have put a huge amount into not just taking on board the NAO findings in response to our competition work, but looking at it across our organisation as a whole and asking does this apply to the other areas of our work, and concluding that in fact it did. I should add, for your information, that we are agreeing at the moment an NAO revisit of the OFT starting after April of next year with a report to the PAC, which will be in time for the PAC as it requested, to have hearings in January onwards of 2009, picking up on how we have implemented and how we have carried that work forward, so that the Committee is aware that that would happen. We re-engineered the organisation, we have tried to develop a culture change within the OFT. That re-engineering has made us sector-focused rather than instrument-focused. Historically we had three silos that were close to three different organisations; I think the consumer side of our office might very well find out about a competition decision in the newspapers with everybody else, rather than internally, and vice versa, and I think there were many instances of pieces of work affecting a particular sector that will be done by completely different teams that might have been speaking to each other or might not have been speaking to each other, depending on the vagaries. So a lot of very unsatisfactory things about how we worked as an organisation, but I think we have started to try and look at those. Some of them I think we now do well but there is still a big challenge on the delivery side of achieving what I would describe as excellence in delivery. On our market studies we do give bespoke timetables at the beginning of a market study and we generally speaking have done a number of them in a tight timeframe. I give the example of airports within a ten-month period and supermarkets was about six months, and those were the timetables we agreed in advanced. Banking, we announced in April we would have done that by December. For our competition cases we still intend to do bespoke timetables for individual competition investigations with the parties and that is something we will be bringing forward later this year, and it is quite a complex piece of work, but we are very committed to that. So I think there is a lot done, still a lot more to do and I think the full effects of it we are looking at that NAO examination next year as being the time when we come and show the results of that.

Q138 Chairman: When an organisation is subject to really quite serious criticism about management issues and a reluctance to advocate the benefits of competition policy, is there a risk that you over-react and start to overreach yourselves in an attempt to address those criticisms?

Mr Fingleton: There could be and I think from our point of view that the big risk there is whether we would lose focus on actually doing the day to day work of the organisation while we are doing that change, and I think we have a record over the last six months, for example, of achievements on cartels, market studies, consumer protection work that would suggest that is not the case on average. There are pockets of our work where I think we are disappointed with our own performance, for example on Article 82 enforcement cases and monopoly enforcement cases where we would like to have more cases, and we are working on that. I think in general our response to that has been proportionate. The organisation has a refreshed legal mandate, the competition law is four years and seven years' old respectively, and we are having new consumer law mostly coming into force next April, and I think in response to that and in response to stakeholder feedback that we did not work well with partners, that we were slow and unresponsive and so on, a very bureaucratic organisation, all of that coming together to say that this requires quite a big bang shake-up in the organisation.

Q139 Chairman: There were concerns about staff morale, pay and flexibility and high rates of turnover in the organisation. Do you feel that you have addressed those satisfactorily?

Mr Fingleton: I feel we are addressing them. Our turnover figures have remained constant. There is a big caution in our turnover figures because the detail of who is leaving and who is staying matters much more than the headline figure.

Q140 Chairman: And you need to fresh yourself as well, do you not?

Mr Fingleton: We do. We think that a turnover figure of between ten and 20% is a good thing to have, not just because we refresh ourselves but also it is very important that in the private sector, in the rest of the public sector and in the civil service there are people with competition skills. The guy who led our PPRS market study on pharmaceutical pricing has just got a promotion to the Department of the Environment where he will be pricing climate change, and having somebody who understands competition issues doing that work is a very important skill. So I think that we see that as a benefit but it is important that we at the same time have career openings at a senior level and we have completely restructured the senior team in the organisation and strengthened the senior leadership, and we have brought more business experience on to our board as well reflecting that.

Chairman: He did not join GlaxoSmithKline who were criticised in the report last week—that is something! Lindsay Hoyle.

Q141 Mr Binley: Can I ask a supplementary because I am really concerned about the ethos within government bodies? You are not the only department that has had a pretty awful audit report, quite frankly, and being a businessman who

always looks at his business, has to be keeping it right on the top level as much as possible to compete, I have always been concerned about why you get into such trouble, why you are not doing this in an ongoing way, and I want to know whether you have put that in place this time? We cannot wait for audit reports to be told that the business is rubbish, quite frankly.

Mr Fingleton: I completely disagree with you that the NAO report said that we were rubbish or was an awful report.

Q142 Mr Binley: I did not say that, I said it was not a good report.

Mr Fingleton: I think it was a good report. It recognised that we are best in the world at what we do and it recognised that it was a new regime facing a very high level of intervention at the Appeal Court level; that the OFT had responded well to that. Peer review in 2004 ranked us third internationally; peer review this year still ranked as third but said that we had improved our position *vis-à-vis* the other two countries we were compared against, which was the US and Germany. So we are in the very top league and the report recognised that. The OFT, prior to my arrival there, had grappled with two new pieces of legislation which came three years apart, introduced massive new powers requiring new competences, for example criminal investigation powers, market studies and market investigation studies and it equipped itself to do those to an extremely high standard and there was no questioning in the NAO report of the quality of the work that the OFT had done, or the variety. There was a question mark about the timescales, which was the primary criticism, that we could do this faster and that we could be much more transparent and open in terms of how we put the work forward. I think that those were simply things that the OFT, absent the NAO report, would have got around to doing and the OFT had welcomed and brought in the NAO report. So I do not think that the OFT was negligent beforehand and suddenly woke up, I think it was part of a natural progression of dealing with things.

Q143 Mr Binley: Every business faces new markets, every business faces new challenges and they have to do it day by day, week by week and to say that "we had new challenges" simply is not a good enough answer, quite frankly. What have you put into place to make sure that there is ongoing permanent review of the work you are doing, an assessment of that work?

Mr Fingleton: Agreeing with the National Audit Office to come back and revisit our work next year is a very good example of doing that. Of course we have an audit committee, which is a subcommittee of our board, which looks at risk generally in the organisation. We have strengthened our senior management, as I said, so I think we are doing very many things to do that.

Q144 Chairman: Let us look at the specific. The NAO was critical of staff pay and grade inflexibilities and called for a new system and you have done that.

Mr Fingleton: We operate within the constraints of being a civil service department and I think it is fair to say—and if you ask the Cabinet Office about this—we have put a disproportionate number of original questions to the Cabinet Office in terms of how we are trying to work within that system. You will see that we have strengthened the number of senior posts in the organisation quite substantially and that is very much about trying to recognise the markets in which we compete for people. We lose most of our people to the civil service or Ofcom and the next most to the private sector.

Q145 Chairman: That is an interesting observation because this Committee has expressed concern about high levels of pay within Ofcom, which we have been told is because they need experience in a very highly paid industry. You are losing staff to Ofcom.

Mr Fingleton: We do lose staff to Ofcom but I think we recognise that Ofcom does not operate within the civil service structures, it has more flexibility, but amongst the things that we need to be smarter doing is selling the very fine civil service pension to people who join us, and so on, and we have not been good at marketing.

Q146 Chairman: Although pensions matter—Members of Parliament certainly attach importance to their pensions to make up for the low levels of pay they have—but at the end of the day you need to be able to get the best possible people. If Ofcom has that flexibility should not you have it too?

Mr Fingleton: Ofcom is governed by different funding arrangements; it gets its licensing income from industry and so does the FSA.

Q147 Chairman: If we can think—that horrible phrase—outside the box today, is there a case for changing the base on which—

Mr Fingleton: We have examined that thoroughly and we have discussed it thoroughly with the Treasury and the options that Ofcom has are not open to us legally. If you like, I can come back to you on the details of why that is not the case but we have actually looked at that in some considerable detail as an option at board level and we have concluded that our strategy is to make the flexibility within the civil service system work well for us. We have done a comparator review of other civil service organisations and the flexibilities they use within the system and we have concluded that we do not use all of the flexibilities available, so we are looking at using those, and we are returning to the Cabinet Office asking for more permission to use additional flexibilities going forward. So this is something that is very much changing the reward system in the organisation, which is something on which we are working very hard.

Q148 Chairman: So what is a typical senior manager earning? What is his salary in comparison with someone at Ofcom? Is Ofcom twice that, three times that?
Mr Fingleton: I think Ofcom's upfront salaries look very high because they include the pension money and other benefits on the face of the salary, and if you take that out we are talking about figures that are not as high as the face figures.

Q149 Chairman: You are not on £400,000 a year, for example?
Mr Fingleton: Indeed. If we talk about grade 6, which is the most senior non-civil service level, our grade 6 salaries we advertise up to £60,000 and I think the headline figures that Ofcom might advertise might be up to 90, but when you take the pension and some of the other factors into account that margin is much less, and of course they do not go all the way up. One of the things I have done since I have joined the OFT is to try to make sure when we are bringing people in that we appoint them aggressively on the scale because once people are on the scale the flexibility for moving them up as they go along is very limited, so trying to make sure that when you bring people in—and recently I have brought in people who are on figures of 250 and so on at less than half that, but I want to make sure that we are at least paying them money that will make them feel their value for what they do and recognising that the vast majority of people who work at the OFT do not come and work for us because they want to make a lot of money but because they believe in what we do, and we should not be exploiting that, but at the same time recognising that we need to get the reward system right.

Q150 Chairman: We must not labour the point but it was an issue identified in the NAO report, and you are not concerned that your ability to recruit the best possible people is inhibited by the wage structures within which you operate?
Mr Fingleton: I would love to have more flexibility; it is not going to be possible. I will work with the flexibility we have and it is something that I spend a huge amount of my personal time trying to address, both at recruitment and retention level.
Chairman: Peter Bone.

Q151 Mr Bone: I just wanted to say, Mr Chairman, that I had a member of your staff on a two-day secondment as part of the scheme, and I have to say that he was very inspired by what you are doing and it was nice to see that, and as much as I tried to aggravate him and say that your organisation was useless he was not having any of it. So I was very impressed with that.
Mr Fingleton: Thank you.
Chairman: Easily identifiable, too. Lindsay Hoyle.

Q152 Mr Hoyle: You have been receiving new powers because of changes in legislation. Which of these do you think is the most important?
Mr Fingleton: I think the criminal cartel one is probably the one I would pick out for attention because it was very controversial when it was introduced. It is not unique in Europe but it is unique amongst large Member States in Europe—Ireland and Estonia also have criminal powers. In terms of where we are now we have three publicly known investigations at that level. There is a substantial body of evidence that criminal sanctions for hardcore cartels are the only effective way to address them. There is also a concern that the US has for too long been the world's policeman in this regard and US extraterritoriality is not something in this area which should go on forever. The European Commission cannot within its remit have criminal sanctions, so I think that the way forward is that Member States at European level will have to bring criminal cases and I think this is an example of the UK showing leadership, and I think it is an example of where the OFT has a number of considerable challenges in replicating the US experience, not least because they have instruments like plea bargaining that will not necessarily be available in the UK, although we will obviously contribute to the current review that is going on in that area.

Q153 Mr Hoyle: How well do you think you are using the new powers?
Mr Fingleton: I think we are using them very well. In my previous job as Head of the Irish Competition Authority, which had criminal powers introduced in 1996 and refreshed in 2002, my experience, which mirrors the US experience is that criminal cases take several years to investigate and bring charges, and then several years before those charges actually reach a trial before a jury. In fact I am now watching jury trials in Ireland in respect of investigations that began two and three years before I left, and that is a normal part of the process, and if anything those timescales are likely to be longer with the first cases going through the system, which have to obviously break through new barriers. We are well advanced with three cases already. The powers came in four years ago. Many people have criticised us for not going out and doing criminal investigations immediately but of course we could only investigate behaviour that happened from four years ago, so we had to wait a period of two years or so, and we took that period to do a lot of training in the office and so on to get up to speed. We are very happy with where we are at on that.

Q154 Mr Hoyle: Do you believe that the changes in the OFT's resources match the expansion in its remit and powers?
Mr Fingleton: Yes. I think that the one thing with the benefit of hindsight—and it is always easy to say these things with hindsight—is that the OFT did not invest enough in strengthening its leadership team at the time it got those resources, and I suspect that often can be the case across government, that the strengthening of the leadership does not happen at the same time as the

resources coming in, and we have done that now. Our resources over the next four years will suffer a minus 15% reduction over the CSR period; that is the standard settlement for many departments. But I am very confident that with the delivery approach we have we can actually improve what we do within that tighter budget over that period.

Q155 Chairman: Is that 15% cash or 15% real?
Mr Fingleton: It is 15% cash and you get an add-back for the real, a 2% add back rather than whatever inflation is.

Q156 Mr Hoyle: Quite rightly you mentioned about being a cartel buster and it sounds good and positive. What was the last cartel you busted and where do you think you need to be looking at to bust the next one?
Mr Fingleton: We have a number of cartel cases at the moment in the construction sector that we have amalgamated into one very substantial investigation involving perhaps as many as 50 or 100 parties, and there was a *File on 4* programme last week about construction cartels in the UK which built on earlier construction cartel work we have done. So that is one area. We have two other public investigations that are known outside the construction sector: one is fuel surcharges, transatlantic; and the other is marine hosepipes. Both of those are criminal cases.

Q157 Chairman: The other is?
Mr Fingleton: Marine hose pipes; the Press release on our website late April, early May. Marine hosepipes are pipes that bring oil from tankers that have to sit offshore to sea. International Cartel, the US Department of Justice in both those cases has a similar but separate investigation going on in its jurisdiction. Both those cases, I would prefer not to talk about them because of the criminal elements.

Q158 Chairman: I understand.
Mr Fingleton: They are not in sectors where we would have expected to find cartels necessarily. In fact, historically you tend to find cartels in markets for liquids and homogeneous solids and things like flour and food ingredients like lycine and ingredients that most consumers have never heard of, but because they are homogeneous it tends to be easier to fix prices internationally or nationally. But we found these because of leniency applications and in fact the single most effective instrument we have in the fight against cartels comes from whistleblowers in the industry who come and tell us about a cartel. One of the big challenges for us and for every other cartel enforcement agency is to move from discovering cartels late in their life, when they are beginning to get unstable, and getting in there earlier in their life when they have been formed, and that is a challenge that I do not think any agency has yet done, but I think we are leading the way in thinking about new instruments to do this more.

Q159 Mr Hoyle: Do you think there is a cartel on aviation fuel?
Mr Fingleton: We are investigating a cartel in that market.
Mr Hoyle: Excellent.

Q160 Miss Kirkbride: I am interested in what you have said about the new powers for criminal cartels that you have just mentioned, and you have also mentioned plea-bargaining because of course in the newspapers just recently there has been the case of Lord Black in America. You said that we cannot use the instrument for plea bargaining here, but would you like to see that happen and do you think that you would you be able to police British business better if we did have that available, or the authorities had it available?
Mr Fingleton: I think the way in which plea bargaining works in the United States means that it is the settlement of criminal cases by the agency with the parties going to the court and presenting a settlement, where the parties plead guilty, the agency recommends a sanction and the court approves that. That is something which I know from my Irish experience was an anathema to the criminal justice system in Ireland, for a whole lot of very principled reasons. It is something I know that the FSA is looking at in the context of insider trading and John Tyner referred to recently in his valedictory speech and the FSA has been working on it. It is something I know that the properly constituted authority is looking at it in the context of the UK. Bringing the American version of white-collar crime to bear on the European criminal system is not a trivial matter and I think we recognise that that may take some time to develop and that there are wider considerations regarding the criminal justice system that may be insurmountable constraints in doing that. But we will simply make the argument that it would improve the efficacy of what we do; in other words, we would be able to handle more cases in that regard. But I think at the end of the day we will still get through a number of cases, even without plea-bargaining.

Q161 Miss Kirkbride: But business would be cleaner, for want of a better description, if you did have that?
Mr Fingleton: Yes, I think it is fair to say that the cost of engaging in a cartel is much higher in the United States than it is anywhere else in the world and if you are in the UK or other countries and you are in an international market you probably have to be much more aware of US jurisprudence than any other country's law because of its extraterritorial reach and because of the fact that the system there works very well at putting people behind bars for this type of stealing from consumers.

Q162 Miss Kirkbride: Just on this question a little bit further, a lot is said nowadays about the measures that were brought in after the Enron scandal in America and how that has driven

business to the United Kingdom. Do you think that is true and do you think we could learn something from the way that they tackled the Enron scandal or do you think that it is left best well alone because we are benefiting from the exodus from America on that aspect?

Mr Fingleton: I do not think there is very much similarity between, for example, corporate governance type issues and hardcore cartels. With hardcore cartels people meeting in hotel rooms to fix prices, the lycine cartel, their slogan was, "Our competitor is our friend, the customer is the enemy," and that is what they said at the beginning of the cartel meeting and so on. People who meet in hotel rooms knowingly dishonestly engaging in that type of rip-off behaviour of consumers are not the type of people we would want to encourage to do business in the UK, and I think it needs to be wiped out. I think what is really important—and we will try to do this—is that where UK citizens are involved in this that they stand trial in this country and that will be one of the things we try to make sure that happens effectively going forward in our bilateral relationship with the US.

Chairman: Mick Clapham.

Q163 Mr Clapham: Could I look at the relationship you have with other bodies in actually making the market work for consumers? You were in the previous session and you heard some of the things that were said. How do you feel you manage your relationship with some of the bodies, where you have a formal and less formal relationship?

Mr Fingleton: We sit at the centre of a moderately complex system of relationships. We have concurrent sector regulators that have concurrent competition powers, and there are six of them. I will very happily supply you with a diagram of this if you would like to see it later. We have our relationship with the Competition Commission and the Competition Appeals Tribunal; we have a relationship with Trading Standards Service and we have a relationship with the Financial Service Authority and the Financial Ombudsman Service. Then we have an international relationship with the Commission in Brussels. That is a summary picture of our relationships. In all of those areas the relationship works well. I think the area where it has improved the most in the last year and a half is on the FSA/FOS. We published a further revision of our statement of cooperation on Friday, with the Financial Ombudsman Service and the FSA. The NAO complimented our work with the Financial Service Authority on payment protection insurance. I am very happy to address the banks' concerns about lack of joint regulation, but I think we did say in our submission to the Banking Code Standards Board that if the banks themselves dealt better with their customers' concerns the customers would not be running to us and the FSA and everybody else all the time and the banks would not have us on their backs so much. So there is an issue for the banks to reflect on why we get so many complaints about retail banking. It is all very well for them to say that they would like one joined-up body but if we join up what OFT and FSA does then we would be less joined up with some of the other partners, and I do not think, looking at how this is done in other countries, it is significantly more complex than it was, for example, in Ireland; in fact, I think that we work much better with the Financial Service Authority than my predecessor body in Ireland worked with the Financial Regulator there, and when you look at the European Commission and the way that things are not always joined up in Europe and look at it in other countries, I think the UK actually beats itself up a lot about something that is not quite perfect. It is a bit like Churchill's comment on democracy; it is the worse system in the world except everything else has been tried. I do not think in the UK we should beat ourselves up too much about the system but we should not be complacent about not trying to make it improve further.

Mr Clapham: We have this complex nature of relationships, you feel that they are working well and you did mention that we might be provided with a diagram of the relationship and I think that would be helpful, Chairman.

Chairman: It would be interesting to see that.

Q164 Mr Clapham: If I could turn to sectoral regulators, sectoral regulators general competitive powers have hardly ever been used. Is there an argument to say that they should be taken over by the OFT?

Mr Fingleton: I have given evidence to the House of Lords Committee, to which you referred previously, on this. First of all, we have seen increasing use by the sectoral regulators of the competition powers in recent years. Secondly, in many instances the regulatory powers that they have will be a superior way of dealing with the problem before them than the competition powers that they have. Thirdly, I think Ofcom, if they were here, would make the point that they are prepared to withdraw ex ante regulation in the knowledge that they have the resources to dedicate to ex post enforcement actually in their sector and that ability to commit to ex post enforcement is an important factor going forward. The one issue in the system which I do think we should look at is the question of whether there might arise a case in one of those sectors that, while not important to the regulator in that sector in terms of solving a problem there, might clarify the law across a range of sectors and maybe outside the sectors that the OFT might want to bring, and the concurrency arrangements would permit that type of thing. I think what we have not done in the concurrency working group is actually had a discussion about how would we identify such a case and how would we process it, but we have the ability within the framework to do that, and that is the one issue that would concern me if there were such a case. Nothing that we have seen so far has presented itself but that could arise in the future and I would like to think that the OFT would be in a position to bring such a case if the sector regulator did not want to.

Q165 Mr Clapham: Is there not a chance here or an opportunity, should I say, that is being missed because by not bringing the sectoral regulators into the OFT is there not a duplication of resources?
Mr Fingleton: I think not. I think indeed having come from Ireland where the Competition Authority had to do the enforcement in these sectors there was much less healthy competition than you have in most of these sectors in the UK. Competition in the regulated utilities in the UK is advanced of any other country in Europe and structural change was undertaken earlier and more radically than in it has in most other countries. The European Commission is looking at separation in the energy market that happened here many years ago and UK consumers have benefited. Alistair Buchanan of Ofgem gave evidence of £900 million of benefits to consumers from that decision here as opposed to Germany, before the House of Lords Committee, and very compelling evidence on the benefits here. So I think the concern about the critical mass of competition expertise needed to bring an investigation is a point we are attentive to and I think we work very closely with the regulators on issues like quality assurance and helping them with technical issues on those cases where they are doing the investigations and trying to make sure that the competition toolkit that exists across the sectoral regulators is strong.

Q166 Miss Kirkbride: You have largely answered the questions about the Financial Services Authority and the duplication with the OFT, so we have heard your answer to that. Do you want to answer the criticisms that were made of you in the earlier session when it was remarked upon about the banking in Northern Ireland and the £20 million inquiry for a £130 million sector?
Mr Fingleton: Happily. First of all, this was brought to us as a super complaint and so it was not a piece of work that we initiated, I would say firstly. Secondly, I think that it raised important issues that market structures had been left behind. I would reiterate what I had earlier said, there were clearly issues that had arisen in both the banking work that the Competition Commission had done in the UK and in a similar banking study that the Competition Authority in Ireland had done where the market structure is rather similar. The banks had not gone running to implement those recommendations on any voluntary basis to try and improve things for consumers in Northern Ireland. I think if they had done that they would have found very quickly that the General Consumer Council of Northern Ireland might not have brought the super complaint in the place, and they did so having not got much traction from the banks on that. A final point is that we do have a concern with ensuring that the concerns of the National Consumer Council, Citizens Advice and so on are dealt with, and we think that the super complaint process is a very good mechanism for bringing things to our attention that we might otherwise not see. One final point about super complaints is that only three of the super complaints we have had have actually gone to the Competition Commission as market investigations, and the others have been dealt with in other ways.
Chairman: I wonder whether Mr Bone wants to talk about super complaints now, in the light of the answer that has been given. He was going to ask about super complaints a little later on, but would you like to come in now?

Q167 Mr Bone: Yes, that is helpful. Just give your overall impression, has the super complaints mechanism bedded down, has it worked well? What do you think it has done?
Mr Fingleton: We have had eight super complaints; three have gone to the Competition Commission, and the most recent is payment protection insurance, but Northern Irish Banks and Home Credit went as well. We have been criticised for sending Northern Irish Banks and Home Credit because they were raising, as some people in the competition community saw it, narrow issues, but we thought these were hugely important issues for consumers and particularly in the case of Home Credit for disadvantaged consumers. This is a concern of ours, so we fully stand over sending those and think it is proportionate. Three of the other super complaints resulted in market studies—private dentistry, care homes and doorstep selling. The work on doorstep selling has featured in one of the current Bills before Parliament, the Consumer Estate Agents and Redress Bill, and those recommendations have been taken forward, and the recommendations on care homes and private dentistry have also been taken forward very satisfactorily, so there have been very good outcomes from that. The most one recent one we have reported on is the credit card interest rate calculation, where we have said we are going to work with industry, so we are not doing a market study or market investigation reference there, but working with industry on improving that. We have one which we will report on very shortly on legal services in Scotland, an issue that was already very familiar to us. So I think it works very well. You made a very nice comment, Chairman, about the interest to the public and the public interest, and not everything that the public is interested in is necessarily competition and consumer concern, one has to apply a filter. With the super complaints we actually get a good deal of pre-filtering by reputable bodies who know their consumers and know their concerns and understand our role much better, so in some sense these complaints come to us pre-filtered and they are much more digestible. Colin has been very involved in developing the whole super complaints regime, both before and after he joined the OFT.
Mr Brown: It is a very, very important part of our toolkit, if you like, and we have to recognise that although the OFT is working very, very hard on its own prioritisation and decision-making about what parts of what markets it should be looking at, we have to acknowledge that we work in a pluralist society with pressure groups which have legitimate expertise and that they bring to us problems which

probably would not have come to the surface with our own work or would have taken much longer to do so. So we really welcome the system and we find that our relationship with the super complainant bodies is an extremely good one, and although sometimes they are disappointed with the precise findings, at the end of the day sometimes they are not disappointed. And I think we can say that looking over the whole record there have been some very, very good outcomes.

Q168 Mr Bone: It may be too early to say, but you have upheld or referred on a number of complaints, but are you satisfied that having done that something is actually being done to correct the wrong, and if it is could you give me an example where a complaint has been corrected and somehow the industry has improved its work?
Mr Brown: A very good example is on doorstep selling. Doorstep selling was a super complaint. We carried out a market study and one of the prime recommendations on it was that the cooling off period on home sales should be extended to solicited visits as well as unsolicited visits. The DTI took that recommendation away and eventually decided that it would change the law and the Consumer Bill going through at the moment actually makes that change. So here we have a super complaint that led to a recommendation from the OFT for a change in the law, which will no doubt have a big impact on what happens in the home when vulnerable people are visited by doorstep sellers.

Q169 Mr Bone: So that is where it has gone through to a legal resolution, but also on the credit card interest rate, you are hoping to get a change by the industry, and that is negotiating.
Mr Fingleton: Yes, and also Northern Irish Banking, we welcome their recommendations. In fact the National Consumer Council in a submission to us on our banking study has recommended that all of the work that the Competition Commission has done in Northern Ireland should now be applied by us to the rest of the banking market in the UK, suggesting that there are wider benefits for the UK than just the narrow cost benefit analysis of Northern Irish Banking on its own, and with Home Credit the Commission put a lot of effort into thinking about that complex market where many people wanted to apply interest rate caps or price controls in that market and in fact they thought about how do we try to improve, I suppose what you would call the quality of the conversation that people selling have with the purchaser of Home Credit. There is still a bit problem in that market, but I think banning or price regulating the market was not going to be the right answer, and I think the CC has come up with reasonably clever remedies in what is a very, very difficult market.

Q170 Chairman: Just before I bring in Tony Wright there is one question that arises out of your annual plan. On the whole I found it a very helpful document, occasionally drifting into sub-optimal management-speak, but on the whole a very good document. There is one point for this Committee that interested me, where you say: "We will look more closely with the Cabinet Office and the Better Regulation Executive in order to ensure that the negative effects on market arising from government policies are minimised." Of course, the better regulation work now comes to the newly named DBERR, or whatever we call it and therefore is this Committee to worry about. What kind of processes are we talking about there?
Mr Fingleton: Two examples of market studies we have done that are highly relevant are our work on public subsidies and our work on commercial use of public information published last November. Public subsidies were about how government spending in particular markets may distort competition—again about competitive neutrality; and our commercial use of public information was also about competitive neutrality. We identified a number of public sector information holders who do not make that information available to private sector competitors. All those pieces of work were welcomed by the CBI and by government, and trying to make sure that there is a level playing field between publicly owned or publicly favoured companies and private sector companies is a key part not just of effective service or consumers but also driving productivity within those publicly owned or publicly favoured companies.

Q171 Chairman: Does that mean that you will quite often cast an eye over proposals for regulation and legislation as well?
Mr Fingleton: We do. We have an advocacy unit that interacts with government on large numbers of proposals each year. Government departments are obliged to do a regulatory impact assessment which looks at the competition issues, so they do the first take. We get involved where it gets particularly complex.

Q172 Chairman: Not routinely but where it is necessary?
Mr Fingleton: Yes, so we have got involved this year on buses, on some issues in health care. We also of course make recommendations to government on removing entry restrictions in markets, so that is an example of better regulation. So there is a whole host of our work trying to address public restrictions on competition in parallel with private restrictions on competition.

Q173 Chairman: There are three Bills which the Department is bringing forward, which is an unusually large number for this Department in a new parliamentary session, we know from the announcement. One is regulatory enforcement and sanctions; would you be involved in the consultation process in that particular Bill?
Mr Fingleton: Yes, and we also made submissions to the McCrory Review on that as well, so we have been very involved in all those processes.

Chairman: Splendid. Tony Wright.

Q174 Mr Wright: On competition-specific issues, the National Audit Office Report 2005. Could you explain the change in prioritisation and resourcing that have taken place in the OFT's competition work since that report?
Mr Fingleton: Last October we published new prioritisation criteria and, put simply, they go through a series of questions—is there a problem; are we best placed to act; what would be the direct impact; what would be the wider, indirect impact of that work? We are currently at the final stages of revising that and publishing for consultation, which will most likely be in September now, OFT prioritisation, so prioritising across all our work, consumer and competition work and market studies, again looking at how we anticipate the impact of that going forward. I think that reflects a different approach than simply responding to complainants as they came in, and I think recognising that sometimes complaints who might be trying to hobble their rivals, once we started an investigation ended up, in the way in which appeals went, having far too much control over our process, and we found ourselves in the position that it was becoming extremely expensive to end investigations. When I arrived at the OFT about 30% of the entire enforcement budget was spent trying to close cases that we did not want to take forward, where we were being constantly appealed by parties who did not want to close those cases but where we did not think there was a particularly strong, if any, competition effect in the market. That was because on a number of instances almost all the cases of the OFT—and this is just an example I think of learning under a new Act—the OFT raced in to do lots of cases under the Competition Act, very effectively, but then it realised that in fact the Competition Appeals Tribunal had upheld all but one of its infringement decisions, but where it lost all its decisions was on its non-infringement decisions where it said, "Actually we do not think there is a problem," and the court said, "You have to go much further before you can say that and do a lot more work." Of course, if we go a long way in doing all of the investigation to say that there is not a problem there are many fewer cases in which we can do that where there is a problem. On the merger side and on the competition casework side that happened. The only instance where it happened on the market studies was the Federation of Small Shops, the Association of Convenience Stores' appeal of our initial decision not to refer supermarkets to the Competition Commission, and we then revisited that. So the Competition Appeals Tribunal never opined on that but it made very clear what its view might be. So that has been perhaps the most important change, for us to try and make sure that we own the pruning shears rather than the complainants.

Q175 Mr Wright: So is it down more to efficiency savings rather than looking at it logically because if you are going to prioritise on the basis of efficiency is not the danger that the less high profile cases will fall below the radar and you would miss out on them. Has there been a case for that?
Mr Fingleton: No, we are very careful to think about the wider impact, so for example one of the cases, we have published a statement of objections two months ago on Cardiff Bus, and some people criticised us because Cardiff Bus is a small local market, but we actually think it is important to look at predatory pricing cases in small local markets as well as in big markets, like construction across the country. If you look at our construction cartel cases you will find many of them are in quite small niche markets, so what we are trying to do is to make sure that we have a balanced portfolio—some very big things, like airports, which affect everybody, and supermarkets and so on, but actually that we are not ignoring many of the issues that affect much smaller markets. That is a fine balance and of course some people might say that we should err more on one side or the other side. I think what we will try to do, is when we published our prioritisation criteria one of the reasons—we took it to our board last week or two weeks ago and the board said it would be very nice to give some examples for people when you do this consultation so that they can relate to them, and so we are now drawing up some examples so that we can now make that more understandable to people and people can get a sense of what it looks like as an overall picture. We hope to find the right balance but we look forward to hearing other people's views on what exactly that balance should be.

Q176 Chairman: I just get a bit nervous about this word "high-impact". It is this question I was asking you about overreaching yourselves in response to criticism. Is there a danger that you go for the sensational, either in the small market or the big market *pour encourage les autres* and really seek headlines rather than effectiveness? Surely it is your first and key objective, high-impact outcomes? It just makes me nervous.
Mr Fingleton: We have moved in our agreement with the Treasury on our funding for 2008/07 to thinking about how we measure the real effects of what we do on actually consumers' experience in markets, what we call focusing on outcomes, rather than we have done this number of competition cases, this number of consumer cases and so on, because we can do lots of outputs but if people are not experiencing a real change on the ground that does not mean anything. When we talk about impact that is what we mean.

Q177 Chairman: Impact in the real economic world and not in headlines in the *Daily Mail* or *Daily Express*?
Mr Fingleton: So will landing charges at UK airports be cheaper in ten years from now? Will payment protection insurance offer a better deal for

consumers? Will banks be more competitive? I think there are a number of very fine examples where we have done that, but that is what we mean by it. In terms of doing that we need to change the behaviour of the three main actors: the consumers, business, how they behave, and government, how it behaves. So it is really important that we get our message out there, and we do need to avoid being sensational and we need to be very proportionate about what we say—it is not fair to single out just one business. At the same time we need to think that in some cases it is right to single out one business and use it as an example to others because, going back to a point that the CBI raised in its evidence, business education is all very well—we do a lot of business education—but businesses are not really interested in listening to that message unless we can point to some examples where it really makes a difference for them. So having cases that we can use as examples is an important part of the business education programme, and there is a balance to be struck there, and I think that effective competition authorities—and we could be much better at this—are ones that are able to get their message out simply and clearly in a non-sensational way but in a way that makes people think, "That is what the OFT does and that is why it is important," and I think we have some way to go in getting that message out, which will be one of my top priorities in my period at the OFT.

Q178 Chairman: There are very few occasions where an issue really touches consumers, their wallets and is really important. Football shirts, you have not mentioned them yet and I would have thought you might have done by now! An hour in and you have not mentioned football shirts!

Mr Fingleton: We have many other examples to mention. I am disappointed that APACS are delaying the introduction of instantaneous bank clearing because that was something we negotiated and put in place, and there are many other fine examples of this that make a real difference for consumers on the ground, and football kit is one of them, but I think all too often we bring out that fine example and there are many other ones.

Chairman: We will move on from football shirts. I will pass the ball to Brian Binley.

Q179 Mr Binley: I was pleased to hear your comment that it was important to concentrate on smaller markets—you said that a couple of minutes ago, and that is very welcome. However, recent consultation on changes to the *de minimis* exception to merger reference to the Competition Commission will see the annual market value threshold rise 25-fold from £400,000 to £10 million, as you well know. I am concerned, why was it so bad in the first place, why was the amount so small, or have you gone over the top and gone too big? Is the balance right? Can you explain the analysis behind this enormous leap?

Mr Fingleton: The number goes back to the Enterprise Act[1] and a statement in the House referred to a number of that order of magnitude. We have decided to reinterpret that number, and that is what we are consulting on, in the context of the relative cost and benefits of a Competition Commission investigation. A Competition Commission investigation at an average cost we expect may be of about £500,000 for the taxpayer. A market of £10 million, if there is a price increase, say, of 5% to consumers, will suggest spending £500,000 to deliver a £500,000 benefit to consumers in a market like this, is the sort of risk calculation we have proposed in that. However, it is a very subtle change. Under our new proposal, we would still have a duty to refer above £10 million, but below £10 million it is a discretion not to refer, and what we have said is that we will still refer mergers below £10 million where either it is a merger to monopoly, so if it was a snuff market, as was referred to earlier, of less than £1 million but was going to be a monopoly we would still say a monopoly and stuff is not right for a snuff user if that is what we found and referred, because then if it is going to be a price raising merger and the merger falls through and it is going to be a monopoly, that is the right answer to give for consumers because consumers should not have to face a monopoly in very small markets. Secondly, if there is a history of cartel behaviour and the industry is becoming a type of oligopoly. So we have said in our consultation that what we aspiring to do is not to result in any reduction in consumer protection. The problem we face is that there are too many cases at the margin going to the Competition Commission and it focuses on this word "duty"—Freshfields, having given their submission to the House of Lords Regulators Committee, have said that that word should be reconsidered as a discretion, and it is of course a high standard. The courts in IBA and other cases have interpreted the threshold for reference even lower than the OFT did. Whether it is too low is a matter for debate. Over the last three years we have done many more undertakings in lieu of reference at phase one, so we have closed deals at phase one. And recently Flybe BA Connect and last year Boots Unichem. We have two appeals before the Competition Appeal Tribunal at the moment on exactly such cases so every time we do something like this there is usually an appeal case testing what we are doing in our interpretation of the law. So everything we do is very highly scrutinised and tested and in fact these cases can go to the Court of Appeal.

Q180 Chairman: This Competition Appeals Tribunal point, it is an interesting one, and not many other witnesses have made this to us and you

[1] *Footnote by Witness:* The original £400,000 number goes back to the Enterprise Act and the threshold for small markets was then interpreted as the taxpayer cost of one Competition Commission inquiry. Having looked at materials like statements in the House, we have decided to reinterpret that number, and that is what we are consulting on, in the context of the relative cost and benefits of a Competition Commission investigation.

raised it just then. Is that tribunal interpreting its remit too broadly? Is it acting as a deterrent, or is it inhibiting your flexibility? Do people have concerns about your relationship with the tribunal?
Mr Fingleton: I think the tribunal started off looking in a very thorough way at the OFT's decision-making and bringing principles that applied in Luxembourg to the European Commission at a time when there was a huge amount of scrutiny of the Commission by the Court of First Instance, and bringing some of that thinking. In France, for example, and in continental Europe, agencies cannot close files, or if they close files are reviewable on closing those files. In the US, for example, if the Department of Justice decides not to investigate something it faces almost no scrutiny. What we saw here was basically a much more continental European type system. OFT has adjusted to this and we have done it in two ways. One is that we have appealed the decisions we thought went too far to the Court of Appeal and in general I a happy to say that the Court of Appeal has moved things back a bit—not back as much as we wanted, but further back then where the CAT had it. So we have worked the appeal system to get what we think is closer to the right result, and we think there are still some issues, that we would like to find the right case to take on to the Court of Appeal if it comes up. Secondly, we have decided, as I said earlier, to make sure that we do not go too far down the road before we know we want to go all the way, so that we do not get into this bind.

Q181 Mr Binley: You mentioned the Cardiff situation and my concern is that the threshold means that you cannot get down to local monopoly that really impacts upon consumers. Are you concerned?
Mr Fingleton: No, it simply means that we have a discretion rather than a duty to refer those markets and there have been cases where we have felt obliged to refer markets, where we have felt that the problem was not likely to result in harm, but where the burden we faced in the test was one we could not meet.

Q182 Mr Binley: So you are absolutely sure that that threshold will not hinder you in that respect?
Mr Fingleton: Yes.

Q183 Mr Binley: My final point on this matter is that consumers really are looked after because I am concerned about that side of your business and I want to be absolutely sure in those terms that that will be the case, even though you have had this massive 25-fold increase.
Mr Fingleton: Looking after consumers—
Chairman: In terms of competition.

Q184 Mr Binley: That is right.
Mr Fingleton: --- is absolutely at the heart of what we do, we could not be clearer about that. In many instances our work touches on them directly. The work we are doing across a number of issues across banking, across pharmaceutical distribution, across house building and many other areas—scams—touches directly on the concerns of consumers. Our work on the credit area I know does not do everything that Citizens Advice want but I think it is a big programme of work on credit. We do not think that the old Consumer Credit Act was very good, we have said that for a long time, and our primary focus now is on making the new legislation work well going forward.
Mr Brown: There is one other point I would make about that. You know that the Office has been restructured and one of the most fundamental changes in that restructure is a bringing together of the previous consumer side, competition side, bringing them together. They exist elsewhere in two separate traditions in other countries, but bringing them together in the UK in one organisation has meant that those on the consumer side understand the competitive issues much better, but also those who are working on the mergers and competition side also understand consumer detriment much better as well. So that gives you some comfort as well and it does mean that we are actively thinking in those terms.

Q185 Mr Binley: You also mentioned that you do a lot of work with business education and that involves a lot of communications. We have had a number of submissions to this inquiry which suggested some unhappiness with the quality of Office of Fair Trading's communications with them. Have you picked up on this concern and, if you have, what are you doing about it?
Mr Fingleton: We are aware of the concern. We produced much material for business and we are very transparent. I think we recognise that very often, although we produce reasoned decisions in cases and the Competition Bar and so on digest that, we need to do much more in terms of making the information we produce digestible, and that is part of our work. We work very closely with individual business associations, so for example the Unfair Commercial Practices Directive comes into force next April and it is going to radically change the legal landscape of business. We worked very closely with the British Retail Consortium and others prior to publishing our draft guidance in May on how we proposed to implement that alongside the then DTI's draft implementing regulation here. SMEs primarily are the ones we need to worry about with some new change in law like that with lots of new legal terms to be defined, and I think business is very happy how we have worked on that. On the Consumer Credit Act, another new piece of legislation coming in next year, we have worked very closely with the Financing and Leasing Association and other businesses affected on the guidance there. So I think there is very much a different approach to working with business on that. We have strengthened business input at our board level so a number of our new board members are former Chief Executives in different businesses. I think the overall ethos of the Office is to understand our

stakeholders much better and to pay much more attention to what is generally called stakeholder relationship and stakeholder management and learning from them what their concerns are and also helping to communicate with them what we are doing and what we are about.

Q186 Mr Binley: Can I raise a particular issue that Citizens Advice Bureau made about the Debt Managers Standards Association, because they are arguing that they have been on to you for years about this matter. You are communicating with the four members of the Debt Managers Standards Association when there are many other companies out there that you are not getting through to. Is that a weakness in terms of your communication?
Mr Brown: I think I need to explain some of the background to that. The Debt Managers, DEMSA, are an applicant to the Consumer Codes Approval Scheme—that is our relationship with them. They have made an application and we are considering their code. They have been under consideration for some time now and we are amassing the evidence that they are providing to us to show whether or not their members comply with their own code. That is our relationship there. That does not mean that we do not have a relationship with other trade associations and other businesses in debt and in the credit sector. It is just that DEMSA are very visible because they are an applicant to this scheme.

Q187 Chairman: I do not want to get too involved in individual issues, we are trying to look at your work overall. Brian has made an important point. What I would like to do is to bring in Anne Moffat, who is going to ask you about self-regulatory codes in general.
Mr Fingleton: Just on that issue could I make the point that we have investigated 250 businesses in the debt management, debt collection area in the last three and a half years. We have warned about 120 of them and we have removed licences from 11 of them. We acted earlier this year on independent voluntary arrangements on the misleading advertising of that, and so we have done quite a lot of work in this area, and there are restrictions on what we can say while we are doing work to Citizens Advice or anybody else under the disclosure requirements of the Enterprise Act.

Q188 Anne Moffat: Just on Codes of Practice, do you think that they are worth the paper they are written on, and do you think as an organisation that if an industry is not cutting it whether you should be proactive in terms of going in there and sorting them out, and do you think that there might be a need for more teeth than that, and that is statutory regulation as opposed to self-regulation?
Mr Fingleton: The code system is about trying to raise a standard above the minimum statutory standard, so it complements our trying to get people up to the statutory standard, and taking some people beyond that statutory standard, in particular markets where there are concerns. I think it is a very good system; it does not exist in most other countries. It takes time to get these arrangements in place and working with the industries concerned. It is a good example of us working closely with trade associations. I think generally it works very well, and I do not think it is yet timely to look at putting in a change in the statutory basis for it. Colin has been very involved in developing it.
Mr Brown: Just to repeat the point that it is about building standards higher than the legal standard, not putting something in place that enforces the legal standard. So this is in some ways putting the "shelf" back into self-regulation. You asked whether or not they are worth the paper they are written on. A long time ago the OFT authorised and signed off codes without actually checking them—it was a long time ago and at the time we called a halt to that there were 49 that had the Director General's signature on the front page—and we pulled out from all of those. So earlier, in about 2001, we had a position where we approved no codes at all and started off again. We have set up a set of very clear and quite tough authorisation criteria which they have to meet in order to be approved by the OFT. Trade bodies tell us that they are very tough and so far there are some six codes of practice that have met our standards, and carry an OFT approved logo. There are a number of others we are working with and six are half way there and about another 25 of 30 are working with us towards that. And we can tell you that those really are worth the paper they are written on because they have to send us monitoring data, they all have to have all ombudsmen or arbitration schemes, they have to provide evidence to show not only that the code is good and meets our standards but that their members are compliant with the code, using surveys, mystery shopping, surprise visits and so on.

Q189 Chairman: One organisation that withdrew from your scheme were ABTA and the reasons they have given in evidence were pretty compelling—it was about delay, changes in policy that they were not informed about and failure of communication. I do not want to get too much detail on an individual case but on the paper it is written on it looks quite impressive. What lessons do you learn from experience?
Mr Brown: I think the record shows that the reason ABTA chose to withdraw from the scheme was that ABTA changed their code and reduced the level of protection for prepayments by consumers and they therefore no longer met the requirements of the scheme.

Q190 Chairman: They say that it was delays in deciding whether after changes to their code regarding deposit and payment protection their code remained approved; it was your delay, they say, and they say you changed your stance on protection without telling them.
Mr Brown: They withdrew actually before they changed their code.

Chairman: So there is disagreement on the facts? Peter Bone wants to come in.

Q191 Mr Bone: I was a member of ABTA but I am not any more. I have to say that ABTA probably has the highest achieving rating of any public protection scheme in the whole of the UK and the fact that they were dissatisfied with the Office of Fair Trading is a heavy criticism of yourself.
Mr Brown: I have to repeat that we approved the code; we were all very satisfied with the situation. We invested a large amount, and so did ABTA, in a publicity campaign advertising the fact that we had approved the code. Very soon after that approval ABTA made quite severe changes to its financial protection scheme, which they knew would not comply with the original criteria on which we had approved them. They then came to us, we had some discussions over some months and then they voluntarily withdrew from the scheme because of those changes. Those are the facts.

Q192 Mr Bone: We have had a lot of people saying how good an organisation you are and that is fine, but I just think that the people who run the best protection scheme for consumers in the country are now saying—
Mr Fingleton: But it is not the best protection scheme.

Q193 Anne Moffat: Exactly; who says that?
Mr Fingleton: Because the best protection scheme is the one that meets the code and it does not meet the code. This is not a criticism of ABTA. If they meet 90% of the code that means that they go well above the statutory standards and therefore their reputation with their customers is well deserved, but we set the gold standard for this and we set that consistently, and it would not be fair to the other businesses who meet it to say that ABTA does not meet it, but they are very good on 90%.
Chairman: We were very concerned in this whole inquiry that we did not get into specifics because they are very interesting and it is easy to get sidetracked, but I think this is quite an important one because I share Mr Bone's perception that of all the codes of conduct out there, the one that I as a consumer most trust is ABTA's—it is a perception thing, it may be ill-founded. We will send you the note that ABTA sent us about their experiences and you comment on that and take it forward.

Q194 Mr Bone: Is the Office of Fair Trading the umpire in disputes or is it the advocate for consumers? Which role do you perform?
Mr Fingleton: We are absolutely very clear; we are not the advocates on behalf of consumers. The advocates on behalf of consumers are numerous but they principally include *Which?*, the National Consumer Council, Citizens Advice and so on, so there are many advocates out there for consumers, and arguably the Internet has improved immeasurably the ability of those organisations to effectively advocate on behalf of consumers. In terms of umpire, I would not describe our role either as an umpire. The primary umpire role rests with the courts, the Ombudsman and financial ombudsmen. We do have a role in bringing issues before the courts and in helping Trading Standards bring the right issues before the courts at a local level, but the way the system is designed it is up to the courts—and this goes back to your point about a regulator—the OFT can take a view on legality or not but really it must be for the courts to interpret the law in this area and that is what the statute requires. So I do not think we would describe ourselves quite correctly as an umpire but obviously there are many situations in which we look at a market and we think that consumers are getting a raw deal here—and in some cases it is really easy, rogue traders like Jimmy Slater, who we put behind bars for six months last week, or on the cartel side it is just a no-brainer about the consumer harm. But in many of the cases, if you take airline pricing where we have been very aggressive about advertising the full price of airline tickets, if you get into areas where there is a very clear cut baseline and then above that some consumers might be harmed, some of them might benefit and so on and you get into a finer balance. But where we see clear harm to the consumer we will bring these issues before the courts, also if we think it affects a lot of consumers and if it affects consumers in areas where there is wider application. So this issue about misleading advertising by airlines has a much wider application because if airlines are able to drop everything from fuel surcharges to everything else off the price of the ticket we will soon be having shops offer to sell you a t-shirt but actually the material is extra, but you only find out once you get to the till. So that type of misleading advertising would seriously undermine consumer confidence in markets and so we will tackle it very seriously.

Q195 Mr Bone: So you are not a proactive advocate for the consumer because that is somebody like *Which?* and you are not the umpire because clearly that is for the Competition Commission, but you are somewhere in the middle?
Mr Fingleton: Yes, and we clearly do look after the consumers' interest, which is the focus of all of our work.

Q196 Mr Bone: It is right to say that you are not proactive in that because it is more that people bring things to you?
Mr Fingleton: We can be proactive. The airports example is a great example, which nobody brought to us but we looked at the market and we thought that this is a market worthy of looking at.

Q197 Mr Bone: But that was because it was a competition and you were proactive because you saw there was a competition issue and it just happened to be a bonus that it was proactive for the consumer.
Mr Fingleton: The competition issue is why it does not work well for consumers.

Q198 Chairman: Can I put this to you? Your mission as I understand it now, and as you interpret it, and I actually agree with this, is that the best protection for the consumer is effective competitive markets and therefore your emphasis is on competition, but sometimes there are consumer groups out there that want to see you intervening more directly in those markets and doing things to regulate change and that leads to some tension sometimes between you and the consumer bodies because you say, "No, we are competition first or foremost and that delivers the benefits you really want," and they say, "No, there is a wrong here—right it." Is that a tension?

Mr Fingleton: I think it can be and I think very often what most concerns consumers may look to them like a competition problem but not be a competition problem. Competition agencies usually get lots of complaints about interest rates, for example, when the Bank of England's interest rates rise, but they get very few complaints when the Bank of England's interest rates fall. That is usually when the margin is more likely to be widening. Similarly with international oil prices, we get lots of complaints when petrol prices go up because OPEC has increased the price of oil. When OPEC's price falls and the pass through is not 100% nobody notices, but we do, so very often the consumer concerned can be inversely correlated with actual harmed competition and we need to be very vigilant of that. But in other cases, like bank charges, the consumer concerned is very high correlated with the problem, so we do need to apply a lens or filter to what we hear and actually say, "Is there really a competition problem or is this being driven by something outside the market that is separate from this?" But it does create tensions. The other thing is that I think there are some people who would like us to intervene in every instance and I think that building consumer confidence in markets is partly about really going after the rogue traders very aggressively, but at the same time allowing other issues to sort themselves out in the market place so that the market develops its own responses to this rather than necessarily jumping in and trying to regulate here and regulate there, and I think that is consistent with a better regulation agenda generally. It is a bit like Icarus, we are going to be criticised for intervening too much by business or intervening too little by consumers and we tend to hear both of those criticisms, and what I look for when I go to talk to people is actually that they come in equal measure and I feel that in specific instances we are getting that balance right.

Q199 Chairman: Let us look at a specific one—and I am going to bring in Mr Wright after this on the obviously example to cite, consumer credit, and the Citizens Advice told us of their "intense frustration built up over many years". Do you have a strategy for the consumer credit market regulation?

Mr Fingleton: We share their frustration. We have for a long time believed that the existing legislation was not fit for purpose; we argued to the government that it should be changed and we worked with government on the new Consumer Credit Act. We have put our focus most recently into preparing for the new Credit Act rather than trying to make the existing poor piece of legislation work well. We are very enthusiastic about the increased flexibility that is going to give and we share many of the concerns of Citizens Advice, but they would like us to do things that we do not think would be the most effective use of our resources in the face of that new legislation, and trying to get that new legislation started well and get industry compliant with it and bring in its best features quickly is going to be our top priority.

Q200 Chairman: I am now going to ask you a question that I do not understand, but it is one that is rather important to ask. Sub-prime lending growth I do know about but are there any plans to update the 1997 non-status lending guidelines, whatever they are!

Mr Brown: We have a programme of reviewing all of our guidance and guidelines on the credit side. We have been focusing over the last year in preparing the guidance for the introduction of the new Consumer Credit Act because that is fundamental and changes an awful lot and, as John said, gives us a much bigger toolkit for dealing with consumer credit problems. Now that that is almost out of the way we are going to look at updating and improving the other stable of guidance we have.

Q201 Chairman: I presume this whole area we are talking about here, consumer credit, the issue about where it is regulated, FSA, OFT, for you is not a problem, from what you said earlier?

Mr Fingleton: There was a famous footnote in the Hampton Report on consumer credit licensing that recommended that consumer credit licensing should move from the OFT to the FSA and that issue was looked at by government. It was decided not to implement it, as it was only a question of the government looking at it, and instead the OFT and the FSA agreed with government that we would produce a joint statement—this is the one we put out our third iteration of on Friday—on how we would work together to ensure that that delivered the correct outcome, and contrary to what was stated earlier we do not both regulate that market, it is only the OFT that regulates it.

Q202 Mr Binley: I am interested in sub-prime mortgages particularly. It seems to me that fair trading and regulation means that you keep an eye on market places and the sub-prime mortgage market is becoming a great concern. Could you explain a little of your role in that respect because it impacts upon your work with the Treasury in those terms, and that interests me.

Mr Fingleton: We are concerned, we are working on it and Colin will talk about some of the detail of that. Also just looking at the way in which the market has developed in the United States there is a wider role for not just us but the Bank of England, the FSA and the Treasury to look at

overall indebtedness issues that are systemic. That is not our role and I think the mortgage sector would be most unhappy if we decided to put our oar in as yet another organisation looking at that, but obviously we will try to make sure that whatever limited role we might have in that area is consistent.

Mr Brown: Could I just say that because of the new-ish role of the FSA in regulating mortgage lending, that is another reason why we have not rushed to look at the sub-prime mortgage sector, because of their interest there.

Q203 Mr Wright: One of the high profiles last year was the Farepak saving scheme which obviously drew an awful lot of publicity for obvious reasons. The government then charged yourselves with delivering a £1 million Christmas savings scheme awareness programme and in a Press statement just in June you announced that it was going to be launched and piloted in Scotland at the end of July with a UK rollout later this year. Could you tell us where we are with this one and do you not think it is a little bit too late and is after the horse has bolted?

Mr Fingleton: There has been a good deal written and said about this that is not based on fact. The first fact I would like to get clear is that we got authorisation for this money in June of this year, so many statements were made about us taking on this work but as Accounting Officer I cannot go spending money until I have authorisation, so point one, that is when we got authorisation and even before that we had done a good deal of preparatory work. Secondly, what we have been asked to do is to do a long-term consumer education campaign, targeted on changing behaviour, working on the ground with the groups and with the individuals who are most affected in this market. We have not been asked to do a high profile, high visible advertising campaign on national television—we would buy, I think, for this amount of money 11 minutes of national advertising. That would be a highly visible short-run thing but it would have no lasting effect. One of the things we have done in the consumer education alliance is pioneered best practice in evaluating consumer education programmes. So we have to, as an organisation, make sure that any consumer programme we do meets our highest standards for evaluation afterwards. So what we are doing is putting in place a sustained programme that would have an effect over time, which means that it is not going to have its primary effect just for this Christmas but actually over a longer period of time. There is not a quick fix for this Christmas and it is my job to be honest about what we can do. And there are not easy answers in this market, and that can be a tough message to deliver because the regulation of prepayment markets is one of the things we have said before to the then DTI is that we did not think that regulation of the market was necessarily going to address all of the problems because it might just drive the market completely under.

Q204 Mr Wright: So you do not necessarily agree that savings clubs would be better regulated, for instance through the FSA?

Mr Fingleton: We said we did not think that that would work because the extra cost it would impose on the industry either would be passed on to these consumers, who I think are the consumers who can least afford the extra cost, or might even make this market less sustainable.

Q205 Mr Wright: I mentioned earlier that it was going to be piloted in Scotland in the first instance. What was the decision for it to be based in Scotland first? Why could you not do it across the whole of the UK?

Mr Fingleton: There was a higher incidence, relatively speaking, in terms of the population as a whole in Scotland and that is why we decided to pilot it there. As it happens, Colin is the director who looks after that piece of work.

Mr Brown: I have nothing to add to that. That is the reason we started in Scotland. It is not where the bulk of the target group are but it is disproportionately where the target group are and we will be rolling it out also with some attention to where the customers who went with Farepak are predominantly located. We thought that Scotland was a good idea and we have made contact with some 40 partner organisations up there already and we are starting working in the community with a leaflet and with videos and so on to get the message across.

Q206 Mr Wright: And is £1m at the very low end of the scale which you would have expected for a campaign such as this?

Mr Brown: £1 million is £1 million and that is what we have been given for it and we think we can deliver a substantial outcome from that £1 million. It is going to be a good campaign and it will move things forward.

Q207 Chairman: There is just one area of substance I want to explore with you before we let you go but we can think it fairly brief. It is Consumer Direct, which we have not talked about so far. The first question is, are you satisfied that the service is sufficiently consistent? We have heard that multiplicity of providers leads to inconsistency in service delivery; do you share those concerns?

Mr Fingleton: No. The satisfaction figures we get are very good, satisfaction has risen from 78% to 86% in the period between March 2006 and April 2007—that was the first year of OFT running the service. There is concern about staff turnover; staff turnover varies from 1% in some locations to 21%—21% is in London and that is where we have the most difficulty in retaining staff and that obviously creates an inconsistency. But overall we think that the work we are doing in evaluating it does not resonate.

Q208 Chairman: How many suppliers do you have providing the service?

Mr Fingleton: Eleven.

Q209 Chairman: And you are really satisfied that there is consistency across those 11 suppliers? Because people can be satisfied but getting a different service.
Mr Fingleton: Clearly we work to identify particular issues that arise and to remedy them and there will be issues around that, but overall the quality that the Consumer Direct delivers is superb.
Mr Brown: The procedures we have in place to ensure consistency—there are about 320 advisers and most of them are full-time advisers who have six weeks' training and pass two exams in order to do this.

Q210 Chairman: These are exams you set?
Mr Brown: Yes. We have a special performance and monitoring team that goes around and listen into calls; we have Trading Standards officers coming in and listening to calls. All operations of this kind have to work very hard to get consistency.

Q211 Chairman: I know from ringing the Child Support Agency and it depends on the quality of whoever is on the phone whether you get a good service or not and that is an integrated organisation.
Mr Brown: We are never satisfied with the level of consistency but I think we have good measures in place and it is a good service.
Mr Binley: Can I ask on this issue whether Consumer Direct works on the basis of progressive talk guide planning and so forth, or do you rely on training the people and they simply give their own message?
Chairman: How much do they follow a computer screen?

Q212 Mr Binley: That is exactly what I am asking?
Mr Fingleton: They are not following a computer screen; it is very much bespoke for the individual consumer who calls in, understanding the legal framework. They obviously have resources on which to draw. One of the standard things, for example, is that we email people letters—we have a number of template letters that will help consumers deal with issues, so a lot of the issues are pretty routine. Where issues are non-routine we can get back to the consumer with other support and refer them to secondary agencies.

Q213 Mr Binley: Let me pick up on this because you said you gave six weeks' training and yet we are talking about a very involved area indeed, particularly if they are acting of their own volition, and I am not sure that that balance is a good enough balance; are you?
Mr Fingleton: I think in terms of the benefit it delivers to consumer, for the cost we deliver, it is the right balance. Consumer Direct is a first tier consumer advice service—it is not a second tier service—and so we do deal with the vast majority of calls ourselves, but we pass a large number of them to Trading Standards and to other organisations that look after more detailed complaints.

Q214 Mr Binley: But not in real time? You do not switch it straight through?
Mr Fingleton: Not straight through, but we pass it on.

Q215 Chairman: I think you were about to say Energy Watch then.
Mr Fingleton: That is coming up.

Q216 Chairman: I know it is coming up, that is exactly what I was going to ask you because the work is going to get . . . Sorry, Mr Brown, there is something you are desperate to say.
Mr Brown: We do not just take the figures and look at the numbers that come in. All of the senior staff of the OFT have been to these call centres and sat in with the advisers to listen to the advice they give and if there was a real problem we might not spot the problem but all of the advisers we have sat and listened to have been giving good advice.
Mr Binley: I started a company in 1989 so it is a particular area of interest to me and if you have any stuff you can send me I would be very grateful.

Q217 Chairman: There is quite a lot in the public domain of course about this but the issue that really concerns me is the expansion of its role; it is going to haul electricity in and the postal sector quite soon, and this Committee is concerned at the timing of the postal of course as well because that could impact on the closure programme. Will these people be able to cope with the extra work, and budget cuts too coming?
Mr Fingleton: We share some of those concerns. We believe that bringing these calls into Consumer Direct is the right answer; it is giving consumers a one-stop shop where they can go with their calls, so we are absolutely committed to that. Our concerns are to ensure that there continues to be the resource there for second tier advice—the area of electricity where people are going to get cut off, it is not going to be the job of Consumer Direct to intervene with the electricity company, but rather now with what is Energy Watch.

Q218 Chairman: How will second tier advice be provided to energy customers?
Mr Fingleton: In the case, for example, that a customer might be cut off for not paying a bill by an energy company Energy Watch will intervene individually on their behalf with the company. That is what I would call second tier advice, as direct intervention on behalf of that customer.

Q219 Chairman: How will that work in future?
Mr Fingleton: This is the question that there should be a concern about, to ensure that the new NCC consumer voice agency, which will take on that part of Energy Watch's work, will work so that they can

intervene in that way, because we want to make sure that there is a robust second tier advice there to support consumers.

Q220 Mr Binley: It can only work if you are able to put a time bar on them taking further action until they have had time to give advice and hopefully resolve the situation.
Mr Fingleton: We already do that with Trading Standards on many other issues, and in some cases with Citizens Advice we pass issues to them. So there is a process there for that. We have seen some inkling of this at the Trading Standards, that some local authorities have thought fit to close their Trading Standards department because of Consumer Direct and we have taken exception to that and said, no, second tier advice is needed. We have 97% Trading Standards signed up to second tier advice for Consumer Direct, so that is a good rate; so it is a very limited product. So there is one issue about second tier advice, I think. The second issue obviously of concern to us is to make sure that we have the funding to deal with this. I do not have any doubt that we can, given the lead time to bring it in and the correct resources, deliver the service in at the same cost per call that we currently do our service and possibly less, but I do want to make sure that we get the results to do that.
Mr Binley: Can I suggest, Chairman, that this is going to be a bigger issue and grow and get bigger and you are going to have more responsibilities, and I wonder if we ought to sideline this.

Q221 Chairman: It has been debated extensively in the House, of course, through the passage of the current Bill. I must say that what you have said about the electricity sector does make me nervous and I am worried over timing of the postal service issue as well here.
Mr Fingleton: We have already raised with Ministers our concern that the timing was more aggressive than we thought appropriate, so I think on some of those issues the concerns that you have are ones that we also share.

Q222 Chairman: We will look at the progress of the Bill and consider what more we can do.
Mr Fingleton: I do not want you to take in any sense any lack of enthusiasm by ourselves.

Q223 Chairman: It is soundly based and I find consumer representation very confusing as a reasonably informed consumer, so I do not have a problem with that in principle. Timing and resource also matters here. You are using that intelligence as well to inform your broader work, are you not, so that is one of the other advantages.
Mr Fingleton: Yes.

Q224 Chairman: It does not explain your preliminary investigation unit.
Mr Fingleton: Notwithstanding the two million calls to Consumer Direct, we get some 90,000 other inquiries a year—I cannot remember the exact number, a large number of inquiries come in. We previously had three organisations and we had three separate entry points, so what we have done, we have a single inquiries line for people who are coming to OFT and they are primarily coming about competition and other matters, that they do not think of Consumer Direct. So we are trying to make sure that Consumer Direct is the single point of contact for consumers and we have redesigned our website this year with a consumer facing website for Consumer Direct alongside the OFT website. So we are trying to channel the right consumer calls, but we will still have calls coming in for our preliminary investigation centre, and we are trying to make sure that we streamline the intelligence of that and bring it together with what come in for Consumer Direct and so it all combines into a single whole.

Q225 Chairman: I just want to ask two last short questions. The first is going back in a sense to where we began with the competition and merger market. Very often a company will want to do something and you have to investigate it because it has an impact on the market and you catch up all kinds of other companies in the process, companies that are part of the market and then incur large amounts of express and distractions of management time advising on issues that do not directly impact on them, but there will be a consequence on the market in which they operate. That is a source of considerable concern that I have encountered. It does mean that you have to be very, very competent, does it not, about launching inquiries, referring something to the Competition Commission because you must not impose burdens on people who are not part of the problem.
Mr Fingleton: I will address that in the context of market studies and market investigation references. In the context of mergers could I just say, on the basis of my experience that sometimes competitors in markets that are not merging have entry plans that will mean that if we knew about them we would be much more likely to approve the merger. They are never going to come forward and tell us about those, but it is really important for the interests of consumers that they do not hold back that information in order to knobble the merger that is going ahead. So sometimes it is entirely proportionate we should have access to that information and the CC should have access. On the market investigation references, having listened to the CBI evidence earlier, I would just say that three references have been made in the last year to the Competition Commission in relation to airports—an enormous market and enormous ramifications. PPI, huge issues; and supermarkets. None of those, I think, we could possibly question the proportionality standard for referring them. The exercise of this power is the most discretion that the OFT has; it is the only issue that the board of the OFT has not delegated, so it is a board level decision, the board discusses in detail the market investigation reference decision, so we take it very seriously. We do take account of the wider impact. We think not just of the direct costs of the CC

investigation to the parties but we also concern ourselves, and we get submissions on, the wider investment costs and the parties will say to us, as BAA did, "This is going to stymie investment in the market for two years." And we have to think about those costs. But some of those arguments are made all the time and we have to say that there is actually a right time to look at this market. So there have been very few market investigation references—in fact some people criticise us for there being too few—but we are aware of the wider cost. And in the cases where they have been imposed—and many people in the supermarket sector would say that they have had burdens imposed on them as a result of this investigation of supermarkets. At the end of the day we took that decision based on the evidence we had before us, but we are also looking at an appeal to the Competition Appeals Tribunal, which had made very clear what its view might be on the issue, and it is a primary thing. On airports and on PPI I think many of the other businesses that are brought into that, like the airlines, have a lot to gain from improved competition in the market in the context of payment protection insurance, I think the 20% pay out rate on that market is a very bad deal for consumers and the business have a lot to answer for. So we try to get that right and we are very aware of the consumer.

Q226 Chairman: If your predecessor had got the definition of markets right on supermarkets the first time round there might not have been a need for a second reference.
Mr Fingleton: I heard you say that earlier. I was not at the OFT at the time, but let me just defend that decision in the sense that there is a legal issue we have to defend before the Competition Appeals Tribunal on measuring market definition and it is measured by actual consumer behaviour. We go out and we measure through consumer survey and consumer reactions to price changes how consumers react to price differentials and other factors between small shops and larger shops, and we base it on that evidence. Unfortunately it is that evidence that points to distinct markets because consumer behaviour does appear to support that, and we cannot suddenly take a view that actually market consideration suggest differently. But happily the Competition Commission has before it at the moment not just the supermarkets issue but also the Slough question, which we have sent to them, which is a very small local issue, which will enable them to revisit that question, and this is a question at which we will look with interest at what the CC has to say about this question of market definition because it is possible that it will wade its way and give us greater guidance on what we should be looking for.

Q227 Chairman: I am not convinced. You can still only buy a packet of dishwashing powder from one shop and use it once, and Tesco Express has certainly filled the niche, closing many of the small stores around me, where I live. One last question: if you came back before us in four or five years' time what would you think might be different about the OFT?
Mr Fingleton: Delivery. I would like us to be faster at what we do and doing more of it, number one. Number two, I would like to be able to say that business, consumers, government have a very clear idea of what OFT does and what it stands for, and that is about us getting a digestible clear message over about what we do. That we have implemented the new consumer legislation in a way that meets the objectives of that, that business are compliant and consumers know what it is. Finally, that our partnership working with other bodies is even smoother than it is now and better understood.

Q228 Chairman: Thank you, I am very grateful. It is worth putting on the record that we are not yet committed to producing a report as a result of all of this. We will reflect on what we have heard and see whether we need to produce a report or not, so I will be in discussion with you about that. But if the outside world is listening they may like to know that we will keep that option open. I suspect we will but we are not committed to it at present, but I think we probably will. We are very grateful, you have given very clear evidence. We have not talked about the pharmaceutical industry at all, which is only peripheral—
Mr Fingleton: Or banking.
Chairman: Or banking. But we were very concerned that this inquiry should not focus on the individuals but on the processes and the policies underlying your undertakings. Thank you very much indeed and this evidence session is concluded.

Written evidence

Memorandum submitted by ABTA

REPORT FOR THE TRADE AND INDUSTRY COMMITTEE ON ABTA'S EXPERIENCE OF THE OFT CONSUMER CODES APPROVAL SCHEME

Overview

ABTA operates a very effective Code of Conduct that applies to all its Members. ABTA participated in the OFT Consumer Codes Approval Scheme and achieved full approval. ABTA withdrew from the Scheme after a year in order to make changes to its Code of Conduct which may have conflicted with the criteria of the Scheme.

ABTA's involvement with the CCAS

1. ABTA was founded in 1950 and currently has 1,600 members with 6,300 outlets. Members include travel agents, tour operators and support services right across the spectrum from small family-owned businesses to the largest tour operators.

2. ABTA is the main travel trade association in the UK and its members provide 90% of the overseas package holidays in the UK as well as selling millions of independent travel arrangements.

3. ABTA has, since the early 1970s, been at the forefront of industry self-regulation by way of a consumer Code of Conduct and the provision of financial protection to consumers. As such, ABTA was keen to work with the OFT on its Consumer Codes Approval Scheme (CCAS) and was involved in the development of the scheme from the outset.

4. This involvement began in 2001 and ABTA obtained full OFT approval under the CCAS on 28 September 2005.

ABTA's Review of its Scheme of Financial Protection

5. In parallel to working with the OFT on the CCAS, ABTA was carrying out a separate review of the protection of consumers' deposits and prepayments. Significant changes to the market within which ABTA and its Members were operating meant that ABTA's financial protection rules needed updating to allow Members more flexibility to compete. The market changes also lead to reviews of financial protection in the travel sector by the Transport Select Committee, Department for Transport and the Department for Trade and Industry.

6. ABTA met with OFT on 6 January 2006 to outline certain proposals for changes to the protection mechanisms operated by ABTA. These proposals would have resulted in changes to the way that consumers received protection and, in some instances eg. some cases of fraud by the trader, the withdrawal of protection.

7. ABTA was told by the OFT at that meeting that the OFT considered that, notwithstanding the precise wording of the CCAS Core Criteria which relates to the protection of deposits and prepayments (3J. The code shall address protection of deposit or prepayments *as appropriate to the sector* (my italics)), the OFT considered that the CCAS required protection of *all* monies taken by members of the Scheme.

8. ABTA was keen to introduce a new scheme of protection by September 2006, September being a significant date for the financial instruments which underpin the financial protection in the travel sector. In order to do this, changes had to be made to a range of documents, including marketing materials and membership rules and such changes had a lead-in time that meant that ABTA wished to begin this process by May 2006.

9. The OFT was, however, unable to come to a decision by that date as to whether the proposed changes meant that ABTA could remain in the CCAS. The OFT did, however say, on 28 April, that they were considering withdrawing CCAS approval from the ABTA Code of Conduct.

10. On 23 June, some 5 months after ABTA had first notified the OFT of the proposed changes to its Code of Conduct, the OFT commenced its procedures for determining whether CCAS approval should be withdrawn from the ABTA code of conduct.

11. In the meantime, ABTA needed to make some additional changes to its Code of Conduct to effect the changes that were to take effect from September 2006. These changes were not substantive but according to the rules of the CCAS, did require approval by OFT.

12. The OFT, however, did not consider it appropriate to approve or comment on those changes bearing in mind the possibility of withdrawal of approval from the ABTA Code of Conduct.

13. ABTA was therefore faced with a choice of holding back on any changes to its Code of Conduct until the OFT procedures were completed, which on the evidence of past experience was likely to take some time, or withdrawing from the CCAS and pushing ahead with the changes which ABTA believed were necessary in the light of changes in the travel industry.

14. In the end, ABTA decided to pursue changes which it believed were necessary for its own business and the businesses of its members and withdrew from the CCAS on 1 September 2006.

Protection Provided by Other Code Sponsors

15. An OFT Review of the impact on business of the CCAS published in October 2006 concluded that, for some code sponsors, the costs of approval under the CCAS had been minimal. This conclusion lead ABTA to consider whether other code sponsors had found a way of providing the necessary protection of deposits and prepayments that was at a lower cost that the bonding mechanisms which provided the basis of ABTA's scheme.

16. ABTA carried out an informal review of those code sponsors that had obtained approval under CCAS or were on their way to obtaining approval. The aim of this review was to see how such bodies had dealt with the issue of the protection of deposits and pre-payments. ABTA sought this information from the OFT but was informed that they were unable to disclose such information due to the provisions of the Enterprise Act.

17. ABTA sought information about the following issues:

— what mechanisms were used to protect deposits and prepayments;

— how the protection mechanisms were monitored to ensure their existence and effectiveness by the code sponsor and OFT;

— what back-up protection was provided where the primary protection mechanisms were non-existent or insufficient; and

— what provision existed for protection in cases of monies being taken from consumers fraudulently by the trader.

18. The results of our review show a wide variation in the ways that code sponsors approached the issue of financial protection.

— the mechanisms for providing protection varied from code sponsors having no formal arrangements in place, other than a requirement to refund deposits and pre-payments where goods were not provided or to hold such monies in a separate account, neither of which is of any value in the case of financial failure, through to insurance backed bonds;

— monitoring of any protection scheme by the code sponsor was not carried out by all code sponsors and did not appear to be carried out at all by OFT;

— the issue of back-up funds to provide cover if the protection scheme did not offer full protection was unclear but there did not appear to be any formal arrangements in place for most code sponsors;

— little, if any, thought appeared to have been given to the protection of monies taken fraudulently by traders; and

— one code sponsor told us that such information was commercially confidential.

Consultation on Core Criteria

19. In November 2005, the OFT launched a consultation into the CCAS Core Criteria including criterion 3J relating to the protection of deposits and prepayments.

20. The result of this consultation was that, in November 2006, Criterion 3J was amended, or rather the implementation of Criterion 3J was amended, so that the OFT no longer considered that the CCAS required protection of *all* monies taken by members of the Scheme. It is now envisaged that there will be sectors where such protection is not required for approval under CCAS. In effect, the OFT has adopted a risk-based approach to financial protection (ie one that does leave a risk that protection may not be in place when needed) in place of a requirement for complete financial protection

21. This significant shift in policy does not appear to have been accompanied by any publicity that would alert consumers, trading standards officers or other trade bodies, that Approval under the CCAS no longer equates to protection of all monies taken under the Scheme.

Conclusions

22. ABTA was very supportive of the CCAS from its inception. ABTA continues to operate and enforce its Code of Conduct which is a core feature of ABTA membership and maintains a very high level of consumer recognition and trust. ABTA works closely with the OFT on matters relating to the trading practices of its Members and travel companies generally.

23. The OFT has recognised the very real concerns about the onerous nature of the criterion 3J as expressed by industry groups during the consultation on the core criteria. The OFT has therefore significantly changed the requirements under the CCAS in respect of the protection of deposits and prepayments. These concerns mirror the pressures that lead to ABTA changing the way that it dealt with financial protection.

24. ABTA has serious concerns about the OFT's understanding of how consumers' deposits and prepayments are protected; about the apparent inconsistencies in how this is addressed by code sponsors under the CCAS; and about the OFT's apparent lack of investigation into this during the approval process. At no time during ABTA's involvement with the CCAS was any significant assessment carried out by the OFT of the protection of deposits or prepayments by ABTA or its Members.

25. ABTA believes that, having regard to the changes to the criterion 3J and to the way that other code sponsors approach compliance with that criterion, ABTA should have been able to reach agreement with the OFT and stayed within the CCAS. The reason that ABTA felt compelled to withdraw from the CCAS was that it could not see any conclusion being reached within an acceptable time scale.

26. Before ABTA would consider engaging again with the CCAS we would need to see that the OFT had a thorough understanding of the issues surrounding the protection of consumers monies and adopted a consistent approach to this. We would also need to see the OFT working to timescales which more adequately meet the requirements of business.

28 June 2007

Memorandum submitted by the Alliance Against IP Theft

INTRODUCTION

The Alliance Against Intellectual Property Theft ("the Alliance") is pleased to submit written evidence to the Trade and Industry Select Committee as part of its inquiry into the work of the OFT. Our comments relate mainly to how the OFT prioritises its activities and its relationship with Trading Standards Services, businesses and consumers.

SUMMARY

The OFT has recently assumed responsibility for championing the work of Local Authority Trading Standards Services. Alliance members see firsthand the important work undertaken by trading standards in protecting businesses and consumers from the sale of fake products. It is important that this new responsibility is taken into account when the OFT prioritises its activities, with adequate resources provided.

The production, distribution and sale of fakes harm consumers, local businesses and the UK economy. The OFT must take the opportunity to engage with industry in order to protect consumers and businesses from the harm and damage caused by intellectual property theft.

OFT AND TRADING STANDARDS SERVICES: THE IMPORTANCE OF THIS NEW RESPONSIBILITY

Trading Standards Services are the front line in intellectual property rights enforcement. It is their responsibility, along with the police, to protect and enforce against IP crime, performing an important public function in ensuring trade is fair and lawful. They protect consumers from shoddy, substandard and potentially dangerous products, and combat local criminality, while protecting rights owners and shops and traders who are operating legally, selling legitimate products. They also now have powers to ensure companies are not abusing intellectual property rights by, for example, committing copyright offences by installing or reproducing copyright protected material with the proper licenses whilst clearly knowing about it.

The Alliance strongly believes it is very important that IP crime is a priority for trading standards, a view supported by the conclusions of the recent Rogers Review into priorities for local authority enforcement agencies. Rights owners do all they can to protect their rights, but they do not have the necessary enforcement powers; they cannot enter premises, or inspect and seize evidence of crime or documents relating to infringing activity.

The trading standards service (TSS) falls within the remit of the Department for Communities and Local Government, but a number of TSS functions emanate from the DTI, and they are ultimately answerable to local authorities actually employ the TS officers and determine their work priorities and available resources. So the service needs a clear, identifiable champion to promote the vital work they undertake. With the OFT nominated as such a champion, it is vital that this is not in name only but that TS is supported by a clear strategy and activity designed to promote and prioritise its work.

The OFT and IP Crime

The Government's acceptance and adoption of all the recommendations of the recent Gowers Review clearly demonstrates the priority and importance it places on protecting intellectual property—for consumers, retailers, industry and the UK economy. Particularly demonstrative of this was the swiftness with which IP crime received a specific mention in the updated National Community Safety Plan. This was in recognition of the harm caused by IP crime, the impact it has on local communities and businesses, the associated criminality which goes alongside it and the detriment felt by consumers. This has subsequently been endorsed, as already mentioned, by the Rogers Review, which included 'intellectual property crime and counterfeiting' within fair trading, identified as one of the five key enforcement priorities for local authorities.

The Alliance believes there needs to be greater reference to and acknowledgement of IP crime within the OFT's remit and activity. For example, its Annual Plan states that the OFT seeks to "protect the reputation of legitimate business and the UK market as a whole by dealing with scams, rogue traders, cartels and other negative influences on consumer confidence across all markets". Given the level of harm caused to consumers, industry and the economy by IP crime, this statement would be greatly strengthened simply by the addition of counterfeiters and pirates to this list.

Consumer Champion

Consumers are at risk from fake goods, both physically through the sale of dangerous products and financially by paying for shoddy, substandard items, with no retailer's exchange policy or manufacturer's guarantee. The fakers invest very little in their products and, through clever marketing and pricing, make a huge profit. There are no research and development costs, no compliance with quality and safety standards, no advertising or retail costs, and of course, no taxes are paid. Consumers are also being ripped off by being misled into buying goods they believe to be genuine. Recent research commissioned by the Alliance showed that nearly a third of people have or might have unknowingly bought a fake item of clothing or footwear. The OFT has a clear responsibility here to protect these consumers.

Local communities also find themselves affected as this level of criminality is often linked to other forms of anti-social behaviour. The sale of fake goods in towns up and down the UK is a very visible reminder of the organised criminal activity that exists in local communities. By allowing it to go unchecked, a dangerous message is sent, not only to the criminals involved, but also to the public and particularly children—a message that counterfeiting and piracy are acceptable and that IP theft is a 'victimless' crime. On the contrary, it allows criminals to exert control over local markets, puts consumers in harm's way, damages the UK economy and deprives entrepreneurs of a return on their investment and reward for risk taking.

Internet-facilitated IP Crime

Internet-facilitated IP crime is rapidly on the increase. Content owners are finding their intellectual property is being distributed illegal digitally, while rights owners of all physical products are seeing a proliferation of fake goods sold via websites and Internet auction sites. There is a real opportunity for the OFT, via its market study on Internet Shopping, to provide a comprehensive analysis of the scale of the problem and make recommendations on how it can be stemmed. To illustrate the scale of the problem:

- one designer wear/accessory brand detected nearly 21,000 counterfeits for sale on eBay alone in 2006;
- one brand of footwear estimates that 74% of its products listed for sale on Internet auction sites are fake; and
- an automotive brand estimates that 90% of its products listed for sale on Internet auction sites are fake—an obvious danger to consumers

In addition, in 2006:

- The BPI took action to remove 350,000 individual online auctions which were selling counterfeit, pirated or infringing product;
- The Federation Against Copyright Theft (FACT) took action to remove 20,000 online auction listings which involved the sale of over 300,000 products; and
- Microsoft removed over 30,000 auction listings.

There are also consumer issues for the OFT to address in relation to digital piracy and the increasing proliferation of illegal peer-2-peer filesharing software. Such software is particularly dangerous; while allowing music, film and other content files to be distributed illegally, it opens up entire shared drives—often on family computers—allowing access to a vast array of private information. Investigations conducted by the BPI into offences of making music files available illegally also unearthed family photographs, purchase receipts, bank details etc. The Alliance believes there is a clear role here for the OFT to investigate and recommend action.

The OFT and Misleading Advertising

The OFT and trading standards are the Government's preferred means of enforcing the legislation which provides recourse for companies that are victims of misleading packaging (the Control of Misleading Advertising Regulations and soon the Unfair Commercial Practices Directive). However, this is proving ineffective for the reasons outlined in the submission to this Inquiry from Alliance members, the British Brands Group (BBG).

Misleading packaging adopts distinctive features of familiar branded goods in order to mislead the consumer. It can persuade some shoppers to buy goods they did not intend to buy, while misleading many more into believing the products have similar qualities and heritage to the brand being mimicked. Consumers are prevented from making informed choices, while enormous damage is caused to the brand owners and the years of investment, innovation and reputation-building they have undertaken. Costs of the original rise, competition with other products in the category become distorted and innovation inhibited.

The OFT and trading standards are already overstretched, a situation only likely to increase as more responsibilities fall under their remits. The Alliance supports the BBG in its call for companies to have the right, with measures in place to safeguard against vexatious cases, to take private action to protect consumers and their businesses. The Alliance urges the Select Committee to consider this when discussing how the OFT can best use its resources and meet its responsibilities.

About the Alliance

Established in 1998, the Alliance Against Intellectual Property (IP) Theft is a UK-based coalition of 17 trade associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. With a combined turnover of over £250 billion, our members include representatives of the film/TV and video, music, games and business software industries, branded manufactured goods, publishers, retailers and designers.

The Alliance is concerned with ensuring intellectual property rights are valued in the UK and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected. Our members work closely with trading standards and local police forces to reduce the harm caused by intellectual property crime in local communities and ensure legitimate businesses and traders are able to operate fairly.

We also work closely with the Department of Trade and Industry and the UK IP Office to raise awareness of the harm caused by IP theft. We are active supporters of, and participants in, the IP Crime Group, which facilitates cross-departmental dialogue and joint working amongst the relevant enforcement bodies and organisations.

Alliance Members

Anti-Counterfeiting Group;

British Brands Group;

British Music Rights;

British Phonographic Industry;

British Video Association;

Business Software Alliance;

Cinema Exhibitors Association

Copyright Licensing Agency

Entertainment and Leisure Software Publishers Association;

Entertainment Retailers Association;

Federation Against Copyright Theft;

Federation Against Software Theft;

Film Distributors Association;

Institute of Trade Mark Attorneys;

Publishers Licensing Society;

British Jewellery, Giftware and Finishing Federation; and

Video Standards Council.

April 2007

Memorandum submitted by the Association of Newspaper and Magazine Wholesalers

1. Introduction

1.1 Following the announcement of a short inquiry into *The Work of the OFT* on 21 March, the Association of Newspaper and Magazine Wholesalers (ANMW) welcomes the opportunity to make some brief comments on our considerable experience of working with the OFT over recent years.

1.2 By way of overall background, the ANMW was founded over 100 years ago in 1904 and now represents over 99% of all newspaper and magazine wholesalers in the UK. The Association exists to represent the interests of its members on non-competitive industry issues to government, the regulatory authorities or any other external parties who have influence in our industry.

1.3 This short paper is predominantly informed by the ANMW's experience of working with the OFT since the announcement in January 2002 that it would review the undertakings given by newspaper wholesalers, stemming from the 1993 review by the then Monopolies and Mergers Commission of the Supply of Newspaper in England and Wales.

1.4 Given the general nature of the Committee's inquiry, we will not go into the detail of how this initial review has expanded into the current status quo of three parallel reviews by the OFT (and DTI) of:

- The Newspaper Code of Conduct (under the Fair Trading Act 1973);
- A Draft OFT Opinion into the likely compatibility of the current system for the supply of newspapers and magazines in the UK with relevant competition law (under the Competition Act 1998); and
- A request to the OFT by the National Federation of Retail Newsagents (NFRN) to consider whether to refer the market for the supply of newspapers and magazines in the UK to the Competition Commission for a market investigation (under Section 131 of the Enterprise Act 2002).

1.5 Suffice it to say that the style and duration of the reviews since 2002 have created many years of cost and uncertainty for an industry committed to supporting a distribution system that currently guarantees universal access to newspapers and magazines across all parts of the UK 364 days a year. There are some signs that the OFT nouveau regime under John Fingleton *may* be addressing many of the issues noted in the paper. However, the jury sadly remains very much out until the three parallel reviews report later this year.

2. Specific Observations

2.1 The following are the key observations that the ANMW would make in terms of the OFT's operating style and substantive approach, based on our experience of recent years:

(a) *Theory vs the Real World*

2.2 Our main comment on the OFT's approach is that over the past five years of reviews, the OFT has demonstrated a repeated tendency to approach industry-critical issues from the perspective of econometric theory, rather than practical business reality. To take just one stark example of this, the "factual vs counter-factual model" used by the OFT in past draft Opinions sadly bore little resemblance to the on-the-ground realities of the current newspaper and magazine distribution system.

2.3 Equally, the "decision-trees" suggested as part of last year's Draft Opinion would be entirely unworkable from a business and commercial perspective—underlining the frequent disconnect between the OFT's often purist and theoretical approach, and actual business realities.

2.4 Most importantly, until relatively recently, the OFT appeared adamant to analyse the system of newspaper and magazine distribution agreements in isolation from the Code that underpins them, with this failure to analyse this highly effective distribution system *as a complete system* having potentially serious implications for their final recommendations. The possible ramification of this disconnect are not only potentially worrying for those whose businesses the OFT's ruling effects, but also for the very consumer interests that a competition watchdog should be aiming to protect.

2.5 We are hopeful that this mis-match between theory and reality may have moderated over recent months. For example, a sizeable OFT delegation recently spent around eight hours as part of a detailed overnight visit to a newspaper and magazine distribution depot, suggesting a keenness to ensure that their reviews were properly informed by on-the-ground reality.

2.6 However, this issue has generated very considerable concern within our industry and we are hopeful that it will not rear its head when the OFT makes its recommendations to Ministers on the Code review, or when it publishes its Final Opinion and ruling on a potential market referral.

(b) *Rejection of Real World Evidence*

2.7 Directly linked to the OFT's often theoretical approach has been a worrying tendency in the past for OFT case teams to ignore considerable bodies of industry and independent evidence in reaching their conclusions. Allied to this has been considerable resistance on the part of the OFT to conduct independent analysis of what information they did take into account from consultees, compounding concerns that eventual findings and recommendations to Ministers would not reflect on-the-ground realities.

2.8 This has included repeated dismissals of independent academic evidence that proposed changes to the distribution system could see the closure of up to 10,000 independent newsagents, decimate the universal access to newspapers and magazines currently enjoyed by every part of the UK and deal a damaging blow to the UK's diverse, pluralist free press.

2.9 The fact that such real-world evidence has been dismissed on the basis that it did not accord with the OFT's theoretical econometric models has been a source of considerable concern and is an issue that we are again hopeful will not manifest itself in decisions and recommendations later this year.

(c) *Frequent Personnel Changes*

2.10 An additional issue of concern to our industry and others in the newspaper and magazine supply chain has been the frequent team changes have taken place the OFT, at almost all levels of seniority. The issues being examined by the OFT are highly complex. Their final decisions and recommendations will have very real implications for the 10,500 wholesaler employees operating from 140 locations in the UK, as well as for those working in to 54,000 retail outlets—not to mention those working for the newspaper and magazine publishers and, ultimately, consumers.

2.11 It has therefore been a further cause of grave concern that no sooner had the OFT case teams mastered the complex issues involved, than personnel changes required new team members to master what is without doubt a highly challenging brief. The potential implications of this do not need to be spelled out, though we have noted below one of the possible ramifications of this tendency for churn among key personnel.

(d) *Changing Positions and Timescales—Added Uncertainty*

2.12 One possible manifestation of this pattern of staff turnover has been the appearance of periodic changes in the OFT's position on crucial issues and regular alterations to timescales, compounding a sense of industry uncertainty. The most stark example of this has been the marked u-turn performed by the OFT between its Draft Opinion on Newspaper and Magazine Distribution Agreements in May 2006 and its earlier Draft Opinion of February 2005.

2.13 In May 2006, the OFT issued a Draft Opinion suggesting that "*current arrangements for distributing both newspapers and magazines that award local monopolies may harm consumers and be difficult to justify in terms of competition law".* This was in direct contradiction of the OFT's provisional conclusions only 15 months earlier that "*the current distribution agreements for newspapers are likely to be compatible with the Competition Act".*

2.14 This decision to add more than a year to an already protracted process was, in itself, a prime example of a repeated tendency to make major changes to the timescales involved, with all the added cost and uncertainty this involves.

2.15 Recent developments that have seen the very real potential of a market referral materialise, after so many years of detailed discussion and interaction, are simply the latest in a series of changes that have only served to add further delay, cost and uncertainty to all parts of the newspaper and magazine supply chain. Again, the added time, cost and uncertainty involved are worthy of particular note.

2.16 Many in our industry are hopeful that the OFT's recent (apparent) focus on real-world evidence might culminate in a set of decisions and recommendations that reflect on-the-ground realities and put real consumer interest (rather than economic theory) first. However, past experience suggests that this is far from guaranteed.

2.16 In summary, while there may have been some changes in the OFT's style and substantive approach over recent months, the experience of recent years mean that the ANMW and its members can only be partially optimistic that the days of purist econometric theory and staff churn are behind us.

2.17 We hope that we have struck a balance that the Committee will find useful in utilising our experience of working with the OFT on issues specific to our industry to exemplify a number of potentially more general observations on the OFT. The ANMW would be happy to provide any further information that the Committee might find helpful.

19 April 2007

Memorandum submitted by BT

Introduction

1. BT welcomes the opportunity to provide input to the Committee's inquiry on the work of the Office of Fair Trading, in reply to the Press Notice published on 20 March 2007 on the Trade and Industry Committee's website. BT operates in the telecommunications sector where Ofcom has concurrent Competition Act powers with the OFT. However BT deals frequently with the OFT for example when mergers are notified or when public consultations are issued which would lead to an improvement of the UK competition regime.

2. The OFT is highly regarded among competition authorities in the EU and in the world (as shown eg by the good rating allocated to the OFT by the Global Competition Review).[1] The comments below are intended to identify a number of areas where, in BT's view, certain changes would benefit the implementation by the OFT of its remit.

The Remit of the OFT

3. OFT has a broad remit and diverse set of tools available to implement its tasks. The recent restructuring, whereby consumer and competition law are administered by a single body, is a welcome step which allows the OFT to use the most appropriate measures to address consumer harm.

4. However, a number of comments in this respect deserve consideration, and in particular:

- The OFT has announced its intention of carrying out market studies to gather knowledge of various sector. The existing legal framework does not offer any clear legal basis and criteria for the OFT to carry out market studies. Market studies are time consuming for parties under investigation and the OFT. Defining a set of criteria on the basis of which market studies would be carried out would assist in targeting valuable public and private resources.
- In relation to mergers, the use of the share of supply test as a threshold for merger notification creates significant uncertainty and encourages parties to make 'fail-safe' notifications even for low value acquisitions that raise no material competition issues. A test based only on turnover thresholds as adopted in many jurisdictions and at EC level would provide more certainty.
- The same comment applies in relation to the test of "material influence". Further guidance on how the OFT applies this test in practice to assess its jurisdiction and the need for parties to notify their operations would be useful. Such guidance could be provided in the OFT's revised mergers procedural guidance.
- Over the past years, there have been a lot of uncertainties around the application of the statutory reference test. For this reasons any steps the OFT could take to clarify its practical application of the reference test (over and above existing guidelines) would be welcomed. This would help to foster a climate in which legitimate M&A activity is not unnecessarily discouraged.

How the OFT Prioritises its Activities

5. BT welcomes the OFT's October 2006 competition prioritisation framework explaining its thinking about setting its priorities.[2] BT believes that the targets and objectives described in the framework are clear and legitimate and an improvement on the previous annual plans.

6. In its Annual Plan Consultation Document 2007–08, the OFT acknowledges working to identify, analyse and prioritise the areas where there is a need for action.

7. However it is not clear whether the prioritisation criteria are applied in every case (eg the OFT acknowledges that the market study on internet shopping has not been led by any specific customers or internet traders' complaints).

8. In addition, different priorities could arise in the course of the year and those would still require proper allocation of resources.

OFT's Performance and Accountability

9. BT recognises the OFT's efforts to address the NAO 2005 criticisms and implement its recommendations,[3] in particular, through initiating a wide internal reorganisation (See OFT Annual Report 2005–06 published in February 2007, and Annual Plan Consultation Document 2006–07).

10. Moreover, BT welcomes the OFT's announcement that the performance review of its competition law enforcement approach is primarily driven by its focus on the best interests of UK consumers.

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[1] Global Competition Law Volume 9, Issue 7.

[2] http://www.oft.gov.uk/shared—oft/press—release—attachments/compcriteria.pdf

[3] http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/841/841.pdf

OFT's Relationship with Other Bodies Involved in Consumer Protection and Regulation of Competition such as Sectoral Regulators

11. BT recognises the difficulties in ensuring consistency in the enforcement actions by sectoral regulators applying competition law on the one hand and by the OFT on the other hand.

12. In BT's view, it is important that, in exercising concurrent powers under the Competition Act 1998, all regulators should have a unified approach to procedural and substantive issues. Divergences would be inconsistent with the unified approach taken by the Competition Appeal Tribunal.

13. BT has become aware of a number of specific issues, for instance, in relation to the rights of complainants, where the practice of the authorities has diverged. For example one sectoral regulator allows access to "key documents" in a Competition Act investigation, whereas the OFT's guidelines state that normally the complainant will have no access to documents. Inconsistencies such as this lead to unnecessary confusion, with different procedures depending whether an investigation is initiated by the OFT or by a sectoral regulator.

14. Moreover, overlapping guidelines make it more difficult for companies and their advisers to come to grips with them, than if there were a single set of guidelines, eg on enforcement.

15. We believe that the OFT should have a more developed and formal process for ensuring consistency between its policies and guidelines and those of the sectoral regulators. It is not clear that the current arrangements lead to sufficient consistency. In particular, the Concurrency Working Party (CWP) provides working arrangements for case allocation, sharing of information and co-ordination between the regulators. In practice, however, the CWP lacks transparency and we lack visibility of how it exercises its co-ordination role.

20 April 2007

Memorandum submitted by Brick Development Association

Wienberger/Baggeridge Merger Inquiry

Thank you for your letter of 27 March concerning the Wienerberger/Baggeridge merger inquiry.

I estimate that the inquiry has caused me five days work. One day connected with the OFT, three with the Competition Commission and one answering Member's enquiries related to the inquiry.

I have no previous experience of a merger inquiry by my observation on the Wienerberger/Baggeridge case is that it has taken such a time that there have been significant changes to both companies. Arguably this calls into question the original terms of the merger and must be unsatisfactory for both parties.

I think the Competition Commission has been very thorough and I was impressed by their comprehension of the industry, however, I do not think that the extra detail was necessary for the resolution of the inquiry. I believe it should have been possible to make a decision after the work conducted by the OFT.

29 March 2007

Memorandum submitted by the British Bankers' Association

1. The BBA is the leading UK banking and financial service trade association and acts on behalf of its members on domestic and international issues. Our 219 members are from 60 different countries and collectively provide the full range of banking and financial services. They operate some 130 million personal accounts, contribute £35 billion to the economy, and together make up the world's largest international banking centre.

Introduction

2. The OFT has two sets of powers. Broadly, these are: (I) consumer protection related and (II) competition related. The principal interaction between the OFT and the BBA members is on consumer credit related matters, where they provide *circa* 70% of consumer credit regulated agreements in the UK. The Consumer Credit Act 2006 and the recent fact finding study into Bank Account Fees have given members a clear insight into the modus operandi of the OFT and our comments are drawn largely from these experiences.

3. Whilst we are appreciative of the way in which the OFT is now looking at the market from an issues perspective, we remain significantly concerned that an industry such as banking finds itself subject to dual and competing regulation in some areas from the OFT and from the Financial Services Authority and, coupled with the Ombudsman's powers, this "triple regulatory environment" lacks sufficient coordination.

4. We accept the OFT's remit to investigate and address market structures. However the way that this takes place it can cause market disruption, consumer concern and have commercial impacts—we note that this is different to similar investigations by other authorities such as the FSA. We therefore believe the OFT must find ways in which its investigations and announcements are met with calm understanding in future.

5. Whilst understanding that there are firm aspects of the OFT remit, such as competition issues which restrict the consultation with market users and other stakeholders, in areas such as consumer protection this is not the case. We therefore remain concerned at the nature and type of consultation undertaken by the OFT and believe that its stature would be enhanced if it adopts more open consultative processes in the future.

6. Although, the OFT has started to give indications as to the areas of work which it proposes to undertake in the year ahead, this is a practice which needs considerable further developments. If the OFT were to discuss such programmes and significantly in advance and with due attention paid to possible consequences, then this could be a further useful method of engaging with stakeholders.

The Remit of the OFT

7. The OFT draws its mandate in law from the Enterprise Act 2002, which defines its governance. This mandate under the Enterprise Act is supplemented for credit matters by the Consumer Credit Act 1974 as amended by the Consumer Credit Act 2006. We consider it hugely significant that these Acts restrict the mandate of the OFT to one of an enforcer, whereas, by contrast, the Financial Services and Markets Act 2000 provides the Financial Services Authority with four key regulatory objectives: (I) market confidence, (II) public awareness, (III) the protection of consumers and (IV) the reduction of financial crime, as well as a number of requirements that the FSA must have regard to when discharging its general functions. This mandate ensures that the FSA considers regulatory matters in their context.

8. In addition, the FSA supervises firms subject to the FSMA 2000 whereas the OFT is simply a licensing authority with regard to firms subject to its Consumer Credit Act jurisdiction and, consequently, has much less contact with firms it licences.

How the OFT Prioritises its Activities

9. Under the Enterprise Act, there is a statutory requirement for the OFT to consult on and then produce an annual plan. In previous years, this has highlighted areas of review; for example the annual plan for the financial year to 2007 highlighted the work that the OFT intended to take under its existing priority areas of consumer credit, health care, construction and building, mass marketed scams and interaction between government and markets. This is helpful to the industry as it gives an opportunity for forward planning and potential for broad debate ahead of any more formal activity. However, notwithstanding the recent introduction of periodic "Stakeholder Group" meetings—this opportunity has yet to be fully recognised.

10. There is a more general issue about inadequate OFT consultation. For example, the OFT published its guidance on the 2004 Consumer Credit regulations a number of months after the regulations came into force. As there are a number of ambiguities in the regulations themselves, the stance taken by the OFT alienated a number of lenders who—after taking considered external legal advice—had taken a differing view ahead of the OFT guidance and organised their business model accordingly. These differences remain unresolved as the OFT does not have rule making powers, exacerbating the problem through the passage of time/volume of business written.

11. Example of poor planning is the OFT's PROMOD consumer credit licensing system which has been beset by delays to the extent that it will now not be ready to risk-weight the new licence categories created under the Consumer Credit Act 2006. Any risk assessment will be further complicated by the longstanding convention that applicants for consumer credit licences should apply for all categories of licence. Thus any distinction of licensable activities would seem difficult to achieve through a review of licence based information.

12. Acknowledging that it can be difficult to predict forthcoming events, it is also surprising that the OFT did not mention the need to undertake extensive research into bank account fees (six month fact-finding study) in the annual plan for the financial year commencing 1 April 2006, when it published assertions that there was a read-across from its work into credit card charges on 5 April 2006.

The OFT's Performance and Accountability

13. We welcome Parliamentary scrutiny of the OFT as the industry's opportunity to challenge much of the OFT's activities is through judicial review, which is expensive, high profile and difficult to predict and consequently not undertaken lightly. The alternative is often to challenge the OFT on points of legal interpretation through the courts, but this is time consuming and arguably, as in the ongoing challenge on Section 75 of the Consumer Credit Act 1974 where the Act itself was re-opened in the midst of the debate and could have been used as a vehicle for change, could have been dealt with in a more constructive way.

1. *The OFT's relationship with other bodies*

14. Regulatory coordination between the Financial Services Authority, the Office of Fair Trading and the Financial Ombudsman Service in situations when each has an interest in a particular issue relevant to all three bodies is an issue of significant concern to our members. We would be very keen for the inquiry to focus on this issue and below we have highlighted our proposals for enhancing regulatory cooperation in this area.

15. In very general terms, FSA's regulatory remit is to regulate the vast majority of financial services firms both with regard to their financial soundness (prudential issues) and the way in which they conduct their business with their customers (conduct of business issues). As a result it has a close supervisory relationship with firms, particularly larger firms likely to have a significant impact on their regulatory objectives such as banks and insurance companies.

16. OFT's role, in this context, is, essentially, two fold—as a licensing authority with regard to consumer credit licences for a wide range of institutions (not just financial services institutions) and as a competition authority. In both roles their remit extends well beyond financial services institutions but is focused on much narrower issues than the FSA's regulatory responsibility (i.e. consumer credit license issues and competition issues).

17. FOS, strictly speaking, is not a regulator. Its role is to consider individual complaints from certain retail customers of firms and to resolve them in a fair manner. Only individuals whose complaints fall within the thresholds of the FOS scheme are eligible to make such complaints. On occasions, however, FOS receives a large number of similar complaints from retail customers and in such circumstances these complaints can have implications for firms of a general nature. A procedure for dealing with such "wider issue" complaints has been put in place designed to ensure dialogue between FOS, the FSA and the parts of the industry affected. Where these complaints relate to issues which FSA and OFT also have responsibility for the issue of coordination becomes relevant.

18. None of the statutes or statutory instruments governing FSA, OFT and FOS give a clear legal framework for the detail of how the three entities should interact if a particular issue arises which has relevance to all three of them. There are, however, a range of legal provisions which are relevant. These include a number of provisions of the Financial Services and Markets Act 2000 and the legislation which gives jurisdiction to the OFT.

19. The more detailed arrangements are, however, set out elsewhere. In the case of the relationship between FSA and the FOS this takes the form of a Memorandum of Understanding ("MOU") between the FSA and the FOS dated 11 July 2002. In the case of the relationship between FSA and the OFT a joint Action Plan ("Action Plan") was published in April 2006 setting out their objectives of working together in a better coordinated way. This document also has some material relating to the FOS.

20. As a result, the principal difficulty is that the current absence of an overarching structure means that co-ordination between, for example, the FSA and the Ombudsman is vested more in the individuals than it is in any other proper framework. The second issue around a better co-ordinating framework is that the impact of an OFT announcement addressing a change in market practices going forward can trigger a retrospective application of those new proposals to the previous position. This is a difficult matter to address from a commercial perspective and is also, ironically given the OFT's competition role, overall anti-competitive for the UK industry. It also impedes good open discussions with the OFT. It is clearly difficult to address an OFT inquiry for the future without having ones views coloured by the historic position.

21. Closer working between the Financial Services Authority and the OFT would also create a single organisation responsible for financial education whereas presently the OFT considers credit through Consumer Direct and a suite of brochures, with the FSA considering financial capability more generically (including credit and debt) through its financial capability programme.

22. Broadly speaking members are looking for:

- clarity about when joint working between all three entities is required—a trigger mechanism;
- a clear lead regulator when there is a combination of complaints to OFT, complaints to FOS, and related FSA issues;
- a common communication approach so that all three entities send common, rather than conflicting, messages about their approach to issues;
- a co-ordinated approach to investigation—so that banks are not subject to multiple overlapping investigations and data requests; and
- a mechanism whereby it is possible to conduct negotiations with the regulators which can lead to a conclusive agreement on the relevant issue which will not leave the banks open to later action by one or more of the three entities.

23. One way forward would be to adopt an approach similar to that adopted by HM Treasury, the Bank of England and the FSA at the advent of the creation of the FSA. They have a tripartite MOU and regular meetings to consider issues of common interest and so that they can co-ordinate their actions.

24. It is also important to recognise the fact that there can be wider economic implications to decisions of the three entities, which can have a broader impact on the UK economy and the financial services sector. To this end, consideration would also be given to involving entities such as HM Treasury and/or the Bank of England which could input their views—not in relation to any operational matters—but in relation to the wider economic implications.

25. The review of regulators by Phillip Hampton[4] suggested that consideration was given to the transfer of responsibilities for consumer credit to the Financial Services Authority which our members supported at the time. Again, this was not pursued to its fullest extent instead a number of initiatives for closer working were introduced during 2006, under the joint Action Plan, previously referred. We strongly recommend that this decision is given further consideration as it seems incongruous that all financial services are regulated by the Financial Services Authority, with the exception of consumer credit.

26. The OFT needs to find a much better way of engaging with the industry for the purposes of obtaining information, undertaking a discussion about various issues, undertaking a market study than currently is the case. At the moment, any sort of announcement of an involvement by the OFT in an industry results in assumptions that there is not only a problem but an expensive problem as well. This makes the OFT an organisation to avoid, rather than with which to engage. It inhibits significantly the ability for sensible discussion and investigation of market issues, and there is a resultant consequence on share price, on the operation of the company and on its customers; it is both unfavourable and unwarranted.

27. Whilst understanding that it is difficult for it to be open and consultative in respect of its competition-related responsibilities, on the consumer protection side it should adopt the practices of the best in this area (the FSA) thus enabling the true engagement of the industry which does not happen at the moment and which can only be to the customer benefit.

28. A good example where the OFT can act discreetly to deal effectively with customer facing issues would be the OFT's concerns around the advertising of balance transfer fees in credit card promotions. The BBA was able to effect a change with its members to the satisfaction of the OFT outside the glare of media publicity. At a local level, our members also report good working relations with Trading Standards officers/departments to resolve issues and concerns before they are escalated to the level where OFT intervention is necessary.

29. We are clear that some of these issues are unintended consequences and therefore we would seek some early changes in the operation of the OFT such that there is a more open relationship with the industry, a better co-ordination with the other relevant regulators, an ability to frame an enquiry both without adverse initial consequences and with true regard to the retrospective impact as well as the future.

April 2007

Memorandum submitted by the British Brands Group

1. We are responding to your request for evidence for the Trade and Industry Select Committee's inquiry into the work of the Office of Fair Trading (OFT).

2. Members of the British Brands Group comprise brand manufacturers operating in the UK, ranging in size and supplying a variety of branded goods including food, drink, household, toiletry, pharmaceutical, DIY, clothing and sports goods. Most of them distribute their products through grocery retailers, including supermarkets and convenience stores, and for many this is their main route to the consumer.

3. We would like to make two points to the Committee:

(i) the OFT—operating under existing resources—has been ineffective at properly investigating and then acting upon potential breaches of the Supermarket Code of Practice, a remedy arising from an adverse finding by the Competition Commission; and

(ii) the Unfair Commercial Practices (UCP) Directive, which is about to be transposed into UK law, is important consumer protection legislation that includes in its original form the new right for competitors to take private action through the courts in the event of breaches of its terms. In the course of our regular discussions with the Department of Trade and Industry we have learnt that the Government intends to omit this right from the secondary legislation that it intends to table early next month.

4. It is the Government's view that the OFT and Trading Standards provide the best means of enforcing this legislation. Given that both organisations are already overstretched, increasing both organisations' responsibilities with no appropriate increase in resource would lead to potentially negative consequences for consumers and markets and would mean that provisions will not be effectively enforced as the Directive requires. We suggest that companies' right to pursue those who breach the UCP Directive through the courts should be retained in relation to the specific issue of misleading ("copycat") packaging. Such packaging falls outside self-regulatory codes and existing legislation (including IP rights) are ineffective at addressing it, making this Directive particularly important in the UK.

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[4] Reducing administrative burdens: effective inspection and enforcement, Phillip Hampton (March 2005).

5. In general, we believe the OFT to be "fit for purpose", we support their remit and believe that the effective fulfilment of its main tasks are crucial to the running of a vibrant and innovative economy. We also understand that the scale of these tasks requires that the OFT prioritise the cases it deals with to make the most effective use of its resources.

6. However, we believe that the paucity of that resource, a failure of prioritisation and a lack of investigatory vigour have constrained the OFT in the pursuance of its existing remit. Our experience has been that the grocery retail sector—and particularly, though not exclusively, manufacturers and other suppliers to the major grocery retailers—has been neglected by the OFT.

7. Supermarket Code of Practice

The Supermarket Code of Practice provides specific illustrations of where the OFT has not been fully effective. We refer in particular to:

(i) the OFT's difficulty in monitoring proactively the Supermarkets Code of Practice (SCOP), investigating actively when alerted to potential breaches and ensuring compliance;

(ii) the OFT's inability to express effectively concerns—where they may have existed—over a specific practice to the retailer involved; and

(iii) the shortage of practical feedback from the OFT to manufacturers and other suppliers and their trade associations on raising concerns in the first place and then addressing concerns raised about potential breaches of the SCOP, including reviewing the case in question and helping to prevent any future potential incidents.

8. If retailers continue to be allowed to exercise anti-competitive commercial practices that have been identified by the Competition Commission and subjected to an adverse finding, then manufacturers and other suppliers will suffer. In the short term this may lead to higher prices for smaller retailers. In the longer term a diminution of consumer choice and innovative products is likely.

9. Unfair Commercial Practices Directive

Our members are particularly concerned that the Government intends to hand prime responsibility for enforcement of the UCP Directive to the OFT and Trading Standards. We are convinced that the OFT, operating within its existing resource constraints, would not be able to enforce effectively the Directive's provisions relating to the specific issue of misleading packaging and that this would perpetuate a regulatory gap in the UK to the detriment of consumers and brand-owners. This view is reinforced by the OFT's current reluctance to combat such deceptive marketing under its existing powers under the Control of Misleading Advertisements Regulations (CMARs).

10. We therefore make the following two suggestions:

— The OFT be given the powers and, importantly, resources so that it may implement effectively the provisions of the UCP Directive as required by European law;

— Companies be given the right to take enforcement action through the courts against practices that breach of the UCP Directive's provisions against misleading packaging—thus reducing the burden on Government.

11. It is likely that the simple fact of increased resources, combined where appropriate with private action, would represent a significant deterrent to those who might otherwise be tempted to consider unfair commercial practices. This approach seems to be endorsed by the OFT when its Chairman, Philip Collins, stated on launching a consultation on private actions in competition law: "A more effective private actions system would promote a greater culture of compliance with competition law and ensure that public enforcement and private actions work together to the best effect for business and consumers." He may have been talking about competition law but we believe the principle holds true in safeguarding consumers too.

12. We appreciate the concerns that have been expressed to us by Ministers and officials from the Department of Trade and Industry about pursuing this course. These include the difficulty in limiting such a right to misleading packaging. However there is a particular gap here in both existing UK law and the self-regulatory regime and, whilst it may well be difficult to limit such a right, it would not be impossible. We have made specific proposals as to how this might be achieved and would be happy to discuss this with the Committee.

13. A second concern is that companies might be tempted to bring vexatious actions, to further their own commercial interests rather than the interests of consumers. A simple way of mitigating this risk would be to require companies to refer the matter first to the OFT before proceeding. A further measure would be to instruct the courts to establish at the outset of any case the impact on consumers. Should the Court consider a particular case to be vexatious, it could dismiss the case and require the company bringing the action to pay the defendant's legal costs while imposing a penalty for wasting the Court's time. We have made these suggestions to officials.

14. Conclusion

Consumer welfare must rightly lie at the heart of the Government's competition policy and we all have a keen interest in markets working well for consumers. The OFT has a central role to play in delivering such an environment but our concern is that it is insufficiently equipped to be wholly effective and, where it is less effective, other mechanisms are not in place to fill the gap.

15. We welcome the Committee's inquiry into the work of the OFT. We ask that it considers the points we have made here in relation to the OFT's role in (1) ensuring that remedies recommended by the Competition Commission to address adverse findings are effective and (2) ensuring that the OFT is resourced to enforce the UCP Directive effectively and, where this it not practical, to recommend that other measures be put in place.

16. If you wish to explore any points that we have raised in greater detail, we would be delighted to help further. Similarly, if you wish copies of any past submissions we have made on the two issues we have raised, either to the OFT, DTI or the Competition Commission, please let us know.

20 April 2007

Memorandum submitted by the CBI

We appreciate the opportunity to respond to the Committee's inquiry and are pleased to offer the comments below:

The Remit of the OFT

While accepting that a key focus of the OFT will be on the consumer this needs to be balanced by taking into account the impact on business. Also we believe markets should not be looked at solely through the prism of the consumer, the end-user. There can be distortions of the competitive process higher up the supply chain. Business-to-business markets and public-sector markets also need to be kept in focus.

The OFT is the UK's primary competition enforcement agency and we would like to see a greater emphasis on the benefits of competition enforcement generally. Establishing strong competition in the UK economy has been a key policy objective, which we support. It encourages open dynamic markets and through them, innovation and value for consumers.

We very much welcome the fact that the first main task as described by the OFT in the Press Notice of the Inquiry relates to the encouragement of businesses to comply with competition and consumer law. This is in line with Hampton principles and we hope that this will mark a shift to positive promotion of compliance and away from what historically seems to have been a greater emphasis on wielding the enforcement stick.

How the OFT Prioritises its Activities

It is right that the priorities for its activities should be set by the OFT's board. With the new focus on delivering high impact outcomes our expectation is that this will mean the OFT concentrating its resources on competition issues having the highest economic value. Some of the recent OFT actions appear to reflect this new approach and are responsive to the points made by the Public Accounts Committee.

We would also anticipate a strong focus on scams and rogue traders, particularly those which are likely to have a national or international impact. This would be in line with the Hampton risk- based approach to enforcement, targeting those areas of greatest consumer detriment. We regard it as important that the OFT is seen as having an overarching role, focusing on industry wide problems.

We believe it is right for the OFT to focus on hard-core cartels as these are extremely damaging to the whole supply chain and have a direct adverse effect on business as well as consumers.

We agree with the OFT's approach that preventing consumer harm is preferable to enforcement action after the event. The emphasis on consumer education and raising awareness among businesses is positive and helpful.

We are pleased that the OFT is making use of its powers to examine government restrictions which distort markets and harm competition. It is important too to review other government actions which distort the competitive process. The OFT's report on the impact of government subsidies broke new ground and was most welcome.

On setting the OFT's priorities for market inquiries, we consider the essential test is whether they are a sensible use of the public purse and provide value for money. Put another way, could the NAO be satisfied that there is a clear cost benefit?

Responding to an OFT market inquiry and a subsequent CC market investigation is extremely costly for the companies concerned. This is in terms of external advisor costs, and a great deal more in terms of the huge diversion of management and employee resources.

The OFT's inquiries therefore should not be undertaken lightly. The over-riding principle is that they should have a firm legal basis in competition law and be used to solve competition issues.

We do see a substantial risk that they will be initiated more in response to populist pressures and historic concepts of the public interest. The opportunities for making super-complaints and the OFT's setting of targets reinforces this risk.

If the focus of an investigation is on barriers to entry then the outcome should create more competition. However the risk is that the long-term effect of a number of inquiries and investigations can be to create a series of regulated markets in the economy. OFT market inquiries, followed by CC market investigations, can last for years during which the normal process of competition is inhibited. Some of the outcomes too have been the imposition of price caps and other controls, which remain in place for long periods of time, and effectively produce a regulated market.

We suggest that the criteria for when the OFT may make a reference set out in the OFT guidance could be revised to include a new value for money requirement. In essence, the economic value of the market concerned and the financial measure of the potential prevention, restriction or distortion of competition should justify the overall costs of a CC investigation. Similar principles to those in Regulatory Impact Assessments should be applied.

In terms of market studies there is an equal need to ensure that they are value for money and priorities are set accordingly. Particularly in view of the OFT's admitted resource constraints there must be clear evidence that a market study is needed and will represent value for money and not just that it is an interesting market to study.

The OFT's Performance and Accountability

The current operation of the UK merger regime in our view results in too many mergers being referred to the CC, causing substantial additional cost and delay to business. This is principally due to a systemic problem in the reference test set out in the Enterprise Act, as interpreted by the Court of Appeal. The problem is well recognised and needs legislation to fix it.

In the meantime, the OFT is striving to adapt to the revised interpretation of the reference test and is perceived to be taking quite a cautious and restrictive view. We believe also that it could decide not to investigate mergers in small markets, which pose insignificant problems of competition. The OFT has recognised the scope for doing this and is expected to issue a consultation paper shortly.

The OFT has a stated it will act in a manner which is proportionate to the matter in hand and will have regard to the Hampton principles. We believe that it would be helpful to have a more specific commitment to embedding the Hampton principles into the OFT enforcement approach, making it clear that it will observe fully the provisions of the new Compliance Code and abide by the Hampton principles themselves as set out in legislation. Leading by example in this way would, we believe, do much to encourage trading standards departments and others to adopt the Hampton culture in practice as well as in principle.

On the consumer side we believe that the OFT should make full and effective use of existing powers rather than seeking to add to them through any new legislative measures. It already has very considerable powers under the Enterprise Act to seek civil injunctions to bring an end to unlawful practices, with the back up of contempt proceedings if they are breached.

We have suggested to the OFT that it should do more to improve communications during its investigations and discussions with companies. We have proposed it consider developing a Code of Practice to set out how interviews would be conducted and how companies would be kept informed of the planned timetable of the investigation.

Transparency of process and timetable for the conduct of those discussions are important components in building trust and a culture of quality within the OFT. This would help to ensure that, where appropriate, businesses are willing to provide information on a voluntary basis.

We understand that there has to be confidentiality around the OFT's investigations but at the same time publicly owned companies have to respond to questions from the investment community and should not be left in a state of limbo for months, and sometimes years. The moves apparently taken by the OFT to clear its backlog of cases are welcome steps in the right direction.

The OFT's criteria for selecting cases for investigation are unclear. Further refinement is desirable to ensure action is targeted at those cases having the highest economic value and enable the most effective use of limited resources.

On the exercise of the OFT's new powers of criminal prosecution, we have been doubtful about how workable they would be in practice because of the complexity of the offences and the general difficulty of establishing individual responsibility within a corporation.

These new powers have been added to the OFT's existing powers to bring civil cases and impose potentially huge fines for infringing competition law. For the rights of defence, as well as effective enforcement, there needs to be a clear separation of powers between criminal and civil. The OFT's experience is based on bringing civil cases and its capability for criminal prosecution is not yet demonstrated.

The concern of business is that enforcement should be predictable, fair and proportionate. Companies should not be subject to a long drawn-out process, with threats of imprisonment for individuals, in cases which are not substantiated and should not have been brought.

A leniency programme has been proven to be a very effective tool in exposing and breaking up cartels. However it needs to be designed to provide an adequate incentive and security for an applicant because of the follow-on risks. An applicant making a disclosure to the OFT in return for its leniency needs to be sure this is not going to lead to civil litigation, as well as the risk of US class actions and possible extradition for a criminal trial in the US.

The OFT is reportedly exercising its leniency programme in investigating cartels in the construction industry and we suggest its efficiency be validated in a few months' time.

In relation to market studies carried out by the OFT, we believe that there is greater scope for the OFT acting in a more open and inclusive fashion by keeping market participants informed of progress and preliminary findings.

Another important principle is that market studies must be effectively managed to minimise the burden on respondents. The CBI has welcomed the CC's and OFT's recent efforts to review best practice and identify lessons learned. These include the need for a clearly focused scope of effort at the outset and avoiding "scope creep". Experience has shown that logistics, time-scale and project management need to be established and the questionnaires carefully worked out.

The OFT's Relationships with the Other Bodies Involved in Consumer Protection and Regulation of Competition

As far as the partnership between the trading standards service (TSS) and the OFT is concerned, the way in which this develops will be particularly important in the context of the application and enforcement of the Unfair Commercial Practices Directive. We are concerned for instance that additional criminal prosecution powers sought by the OFT may change the relationship with the TSS who currently exercise those powers, and may additionally deflect OFT focus from the wider national objective of making markets work more effectively.

The relationship between the OFT and the proposed LBRO will need clarity to ensure that the role of the OFT as national champion of trading standards and the central co-ordinating function to promote consistency in local authority enforcement on the part of the LBRO are well defined and delineated.

It is clearly important for the OFT to work closely with the sectoral regulators, the SFO and others. As there is limited availability of skilled resources it is essential to allocate these resources in such a way as to achieve maximum effectiveness. This allocation of resources needs to be underpinned by a clear division of responsibilities communicated to business to avoid confusion and overlap.

We consider that the present allocation of responsibilities and resources across the OFT and the sectoral regulators is sub-optimal. The record shows that the sectoral regulators have hardly ever used their general competition powers and in our view it would make sense for these to be concentrated in the OFT.

There is a particular issue regarding financial services where there is overlap and a potential for inconsistencies as a result of different approaches from two regulators, the OFT and the Financial Services Authority. Consistent, appropriate and proportionate enforcement is difficult to achieve unless there is a single regulator responsible.

The House of Lords Select Committee on Regulators is looking at this issue and we await the outcome with interest.

Similarly, the preparation and prosecution of complex criminal cases is a task requiring specialised skills. We understand that the SFO has concurrent jurisdiction with the OFT on the prosecution of hard-core cartels which is covered by a Memorandum of Understanding.

We believe there is much to be said for such prosecutions to be handled exclusively by the SFO. This would leave the OFT to exercise its powers of civil prosecution in which it has experience. Five years after the passing of the Enterprise Act we propose that this question of overlapping jurisdictions be looked at again.

20 April 2007

Memorandum submitted by Citizens Advice

EXECUTIVE SUMMARY

- Citizens Advice Bureaux (CABx) help people resolve a significant number of consumer problems relating to markets which are overseen by the Office of Fair Trading (OFT). In 2005–06 CABx in England and Wales dealt with 5.2 million enquiries. This includes providing face to face advice on over 838,000 consumer credit debt problems, 101,000 financial services and products problems, 157,000 consumer goods and services problems, 57,000 utilities problems, and 25,000 travel, transport and holiday problems. In addition our public information website www.adviceguide.co.uk received over 6.2 million visits in 2006–07.
- Through our advice work we come across evidence that consumers are being treated unfairly by traders, including those specifically authorised by the OFT under the consumer credit licensing system. CAB clients are often people who live on low incomes or state benefits, and a minority are homeowners in contrast to the population at large. We therefore have a significant interest in the OFT acting to remedy consumer detriment which may cause our clients direct financial hardship, especially in the areas where they have a direct locus as a regulator such as consumer credit.
- Citizens Advice has engaged with the OFT on numerous policy and investigation initiatives over many years. We welcome close co-operation and consultation and wish to see our evidence used by the OFT to achieve its purpose. Overall Citizens Advice wishes to see increased activity of the OFT in a wider range of areas than they have to date. Currently, the OFT's working practices are slow and the style and manner of working too remote, meaning that opportunities are missed and concrete outcomes are rare. Examples of these issues include:
  - the absence of a clear comprehensive regulatory strategy for consumer credit, or any high profile, accessible or robust systems for gathering evidence and monitoring compliance;
  - the considerable time taken for the OFT to investigate and come to conclusions on significant issues such as the credit card interchange fee, default charges and the matters identified in super-complaints. Its latest annual report documents a number of Competition Act investigations concerning fast moving markets which have taken anything up to three years, and in one case five years;
  - the absence of action by the OFT on fair trading and consumer credit practice issues in super-complaints and market investigations relating to payment protection insurance;
  - the modest impact of self-regulation and codes of practice.
- The OFT has expanded its remit as a consequence of the Enterprise Act (giving it a leading role in relation to self-regulation and consumer education). It has also been given delivery responsibility for Consumer Direct. The new Consumer Credit Act should inject a new energy to its work as a regulator of this significant market. There is considerable scope for the OFT to take an increasingly dynamic and effective role in protecting consumers, tackling bad practice and promoting better practice. The OFT is not yet performing to its full potential for the consumers who turn to us for advice.

1. INTRODUCTION

1.1 Citizens Advice is the national body for Citizens Advice Bureaux (CABx) in England, Wales and Northern Ireland. The CAB service is the largest independent network of free advice centres in Europe, with 462 main bureaux in England, Wales and Northern Ireland. Bureaux provide advice from over 3,200 outlets, including courts, prisons, GP surgeries, hospitals, probation services and prisons. All CABx are registered charities.

1.2 The CAB service has twin aims: to ensure that individuals do not suffer through a lack of information about their rights; and equally to exercise a responsible influence on the development of policies and practices, both at a local and national level.

1.3 In 2005–06, CABx in England and Wales dealt with 5.2 million enquiries. The breakdown of issues relevant to the work of the OFT is as follows:

Problem type	*Number of enquiries handled by CABx during 2005–06*
Consumer credit debt (including bank overdrafts, credit and store card debts, unsecured loan debts, catalogue debts, arrears on hire purchase agreements)	838,000
Financial services and products (including credit, mortgages, banking, insurance, debt management services and financial advisers)	101,000
Consumer goods and services (including new and second-hand vehicles, furniture, electrical appliances)	157,000
Utilities (including communications, water and energy)	57,000
Travel, transport and holidays (including package holidays and timeshares)	25,000
Total	1,178,000

1.4 The Office of Fair Trading (OFT) is a very important agency, with an important mission to make markets work well for consumers. Successive reports from the OFT over the years have highlighted the scale of consumer detriment in different markets, and also the disproportionate impact for consumers on low incomes. Consumers, businesses and the economy at large have much to gain from an effective OFT.

1.5 Citizens Advice understands the complex and wide ranging brief the OFT has. We support the need for the OFT to use all of the tools at its disposal to achieve this mission—including providing consumer information and education, seeking to educate firms and supporting self-regulation as well as enforcing the law. All three areas of activity are important—and the strategy for any market, or sub-sector of a market, may involve deploying a mixture of education and enforcement. Overall, the work of the OFT, including its choices of markets to act on to improve their operation, and decisions on the best methods of intervention, needs to be founded on evidence, it also must accept the responsibility to use all the tools at its disposal to the maximum and in the most timely way and effective and energetic external engagement with consumers and businesses. We think the OFT still faces considerable challenges in terms of its:

— evidence base, particularly for ongoing monitoring of markets where they have a direct regulatory remit or the clear lead to enforce law (consumer credit particularly);

— judgement and approach to taking up issues, deciding priorities for intervention or decisions not to intervene; and

— leadership and engagement—particularly towards self regulatory bodies.

1.6 Citizens Advice undertakes significant public policy work on consumer issues including consumer credit and debt and goods and services. We have contributed throughout the DTI policy process to reform the Consumer Credit Act, as has the OFT. We also engage with the OFT on a number of policy and service delivery areas. This memorandum comments on our experience of working with the OFT in some key areas, as follows:

— consumer credit licensing;

— super-complaints;

— bank charges;

— codes of practice;

— scams; and

— Consumer Direct.

2. Consumer Credit Licensing

2.1 The consumer credit licensing system administered by the OFT should protect consumers against abusive practices by lenders, brokers, debt collectors, credit repair companies and debt management companies. Individuals and organisations must have a consumer credit licence order to lend money, collect debt or provide debt advice and management. Section 25 of the Consumer Credit Act 1974 states that applicants for consumer credit licences must be fit to hold a licence and the OFT can refuse a new licence or revoke an existing licence, if there are any doubts about the licence-holder's fitness.

2.2 From the debt advice work CABx undertake, we are aware of a large volume of cases where the practices and policies of some consumer credit licence-holders have caused considerable consumer detriment. These practices are not confined to small companies but are widespread throughout the credit industry. These are only two examples of the many shocking cases we have received on this subject since the beginning of this year. Both of these cases, and many others we come across, call into question the fitness of the licence holder in our view:

> A CAB in Surrey reported that a married woman with mental health problems owed more than £35,000. She had got into difficulties when she had to give up work due to her health problems. Five of the debts were to a high street bank. The client and her husband were co-operative throughout, arranging payments to their priority creditor, their landlord, responding to calls and letters from non-priority creditors, such as the bank, negotiating extended overdraft and reduced payments on loans and credit cards. But none of these actions could resolve the basic problem of unaffordability, and arrangements fell apart when reduced payment plans were withdrawn but there was no change in their circumstances. The CAB has since been negotiating on their behalf for token payments and interest to be frozen until the client was able to work again and repay her debts. The bank rarely responded, bypassed the CAB, and instead pressed the client and her husband by phone and letter for payments they could not afford, promised but failed to freeze interest, failed to pass on details when passing (some) accounts to collection. Two complaints have made no significant difference. The client's recovery has been put back by the extra stress. After nine months of this with no end in sight, the clients were borrowing money to apply for bankruptcy to relieve themselves of the extreme pressure the bank was putting them under.
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> A CAB in South East Wales reported that a woman with health problems got into difficulties when she was made redundant from one of her part-time jobs. The client owed money to a high street bank, had tried to resolve matters with no success, and subsequently sought help from the CAB. The bank passed the debt to an external debt collection agency to collect. The client told the CAB that she had received repeated calls from them over a two week period. In one day she received as many as seven telephone calls from them, the first at 8 am and the last at 9.30 pm. On each occasion the client informed the collection company that she was receiving assistance from the CAB, explained her circumstances and offered payment of £1 per month which was all she could afford to pay. The client told the bureau that the debt collectors she spoke to were aggressive and rude and were actually shouting at her at one point. The client also received a letter stating that doorstep collectors would be calling at her home. By this time the CAB had sent letters to both the bank and the debt collectors, outlining the client's personal and financial circumstances. The client told the CAB that the volume of calls and collection tactics employed by the debt collection company left her feeling stressed, fearful and unable to sleep.

2.3 In its guidance for consumer credit licence holders the OFT states that:

> *"Protecting the interests of consumers is our top priority. Ensuring the fitness of applicants and licence holders is of vital importance to the OFT's statutory licensing role."*[5]

2.4 We agree with this high level vision for the exercise of its consumer credit licensing functions—protecting consumers should be the top priority. The guidance goes on to indicate issues taken into account when assessing fitness of business to acquire and retain a licence, including the following factors:

- *"Any evidence of discrimination on grounds of sex, colour, race or ethnic or national origin.*
- *Any consumer complaints about the business.*
- *Evidence of business practices that damage—or could damage—the interests of consumers.*
- *Information from other regulators, professional bodies, trade bodies, consumer organisations or other traders.*
- *Failure to comply with general or sector specific guidance on fitness to hold a consumer credit licence."*[6]

2.5 The Guidance also says:

> *"There is no need for the OFT to demonstrate that individual consumers have been harmed when taking these key issues into account. Showing that there is a real risk to consumers is enough."*[7]

2.6 Later in the guidance the OFT illustrates behaviour towards consumers that might call into question a trader's continued right to have a licence.

- *"Applying unreasonable pressure on consumers to sign an agreement when you are dealing with them face to face. An example would be a salesman or broker visiting consumers at their home and staying long into the evening to coerce them into signing a credit agreement.*
- *Not giving consumers enough time to read and consider the terms of a contract, or—where appropriate—not telling them where to obtain independent advice.*

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[5] Consumer credit licences: guidance for holders and applicants, OFT, 2003, p 3.
[6] *Ibid.*
[7] *Ibid.*

— *Misrepresenting or concealing the terms of the contract.*

— *Making false representations to persuade them to agree more quickly—for example, by saying that the price will rise if they do not sign straightaway.*

— *Failure to deal with complaints fairly and promptly or not giving proper redress."*[8]

2.7 The published guidance for consumer credit licence holders therefore gives a strong indication that consumer protection is a top priority and that evidence from complaints or third parties is used to monitor compliance with the OFT's expectations. A number of practices are highlighted which CABx come across very frequently in their work with consumers. In addition to advising individual consumers we are extremely keen that their experiences and evidence is used to deliver a wider remedy, of benefit to other consumers who have not sought advice.

2.8 Citizens Advice has worked hard over the last seven years to try to establish an effective working relationship with the OFT consumer credit licensing enforcement team to enable us to raise issues of licence-holders' abusive practices from CAB evidence and urge them to take action. This has involved OFT staff visiting our offices to read our evidence collection, regular meetings to discuss new issues, contacting CABx to see if their clients would be willing to complain to the OFT and OFT staff visiting CAB advisers and their clients to take witness statements about the behaviour of individual licence-holders. The OFT have also produced guidance for CAB advisers on making an effective complaint to assist with a compliance investigation. There have also been specific initiatives, for example the production of guidance on debt management in response to a complaint from Citizens Advice and an evaluation of the debt collection guidance which included a simple method of registering evidence for use in investigations.

2.9 Although close working is welcome, Citizens Advice has been concerned for a long time that the consumer credit licensing system has not worked sufficiently well to protect consumers from abuse from some financial service providers. We believe there is a substantial financial and personal cost borne by the consumer as a result of an inadequate approach to regulation in this area:

— Firstly, people in debt may feel so worn down and stressed by the collection practices of creditors and collection agencies that they do not wish to make a complaint in case it leads to further harassment and therefore further stress. Another barrier to complaining has been that the OFT does not provide a redress scheme, although from April 2007 it is now possible to make complaints to the Financial Ombudsman Service about consumer credit cases.

— Secondly, it is not being made sufficiently clear to firms or the public what the standards expected of licence holders actually are in terms of their conduct of business and fair treatment of consumers. This has been ameliorated somewhat by the introduction of general and sector-specific guidelines for licence-holders, particularly those on debt collection and debt management services. The former has proved particularly useful for CAB debt advisers to spot unfair debt collection practice and successfully challenge it. However even with clear policy on guidelines it is not clear what is needed to enable the regulator to actually take action against alleged breaches of the guidance. Evidence of extreme abuse of consumers has been provided to the OFT but bad practice still goes unchallenged. The lack of transparency about judgements not to act on evidence means that the OFT's decisions on whether or not to act in response to evidence of consumer detriment in this market are internalised and not subject to external challenge or scrutiny. The lack of an effective and open continuous system for gathering evidence does not help the OFT to build up the evidence base to act.

— Thirdly, policy ossifies if it is not kept up to date. The guidance needs to be regularly reviewed if it is to remain effective, particularly in fast moving markets. Although the OFT have carried out recent compliance reviews of the debt management and debt collection guidance, the non-status lending guidance which was published in 1997, has not been reviewed or revised, despite several pledges to do so by the OFT.

— Fourthly, in general the OFT consumer credit licensing functions seem out of touch with what is actually happening in the market and the experience of consumers. The OFT may respond to external entreaties from consumer groups to take up issues from time to time, but the general approach is very reactive, and the 'system' for drawing intelligence and issues to their attention is opaque and low profile. Consumers and consumer groups who provide evidence for use in investigations, which may be highly personal information affecting individuals, are not kept regularly informed about whether the OFT is taking the issue up or how and when. By contrast the FSA has created a high profile system for reporting of inappropriate financial promotions.

— Fifthly, the OFT's current sole sanction of revoking a licence does not seem to have proved an appropriate tool for addressing consumer detriment, especially affecting the most vulnerable customers who may constitute a minority of all customer accounts. Consequently, there are insufficient incentives for firms to focus on compliance in a consistent and pro-active way. The new powers given to the OFT in the Consumer Credit Act 2006 (the power to obtain undertakings and to issue civil penalties for breach of these) will help, as long as the OFT has the will and energy to

[8] Consumer credit licenses: guidance for holders and applicants, OFT 2003, p 4.

take cases against large national or multi-national companies. We would like to see the OFT make an early and high profile start on shaping its policy and practice towards the implementation of the reforms in order to emphasise how the reforms will make a difference.

— Finally, the confidentiality requirements of the Consumer Credit Act 1974 discourage advice agencies' attempts to work with the OFT to tackle abuses. CABx find it frustrating to get little or no feedback from the OFT about the progress and outcome of their clients' complaints, particularly when they may have spent considerable time encouraging clients to make a complaint providing evidence for investigation, when they may fear reprisals from the firm with whom they continue to have a relationship as a creditor or debt collector.

2.10 We are pleased that the OFT recognises some of these issues, including in their report on evaluating compliance with their guidelines on debt collection:

> *"The OFT will work with stakeholders to establish a more pro-active debt collection compliance monitoring regime based on the following key elements:*
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> — *working in partnership with stakeholders to improve the quality of complaint evidence we receive: we need robust complaint evidence in order to take licensing enforcement action; we have disseminated guidance for consumer advice organisations on the type of evidence we need in order to take action against a non- compliant licensee, as well as how and to whom they should complain to about alleged breaches of the guidance;*
>
> — *explore the scope for improvement in the ways complaint information is recorded in order to capture more quality data: the aim will be to work with consumer advice organisations and the TSS to achieve more consistency of approach in complaint data recording;*
>
> — *work closely with the TSS and consumer advice organisations to share complaint or trend data on a regular basis so that we can target our resource."*[9]

2.11 Citizens Advice would like to see the above conclusions and actions apply to the whole approach of the OFT to consumer credit monitoring and enforcement, and for this to be accompanied by a more accessible and high profile reporting system—which encourages consumers to report problems directly, and a more transparent and timely system of investigation and action taking.

3. Super-complaints

3.1 The Enterprise Act 2002 gave the OFT powers to respond to super-complaints about problems in a market. Citizens Advice was amongst the first consumer organisations to be designated a super-complainant in 2003. We have since used this mechanism twice—on the issue of doorstep selling in 2002[10] which is likely to result in a statutory change in 2008, and on payment protection insurance (PPI) in 2005[11] which has now been referred to the Competition Commission.

3.2 Super-complaints are a valuable opportunity to ensure that problem markets are tackled. The initial response is required in 90 days, but changes in policy and legislation resulting from the super-complaint can take years. We recognise that super-complaints are a trigger for instigating change which could take several years to come to fruition.

3.3 However, whilst a super-complaint is being investigated, the detriment for consumers continues. This makes it imperative for the OFT to not only take a timely approach to investigations, but also to progress a range of remedies and improvement strategies even where the ultimate solution may be a change in legislation. We were disappointed, for example, that the extensive and high quality investigation of door step selling problems which the OFT undertook in response to our super-complaint in 2002 has not been maximised by OFT. Whilst a change in the law is included in the Consumers, Estate Agents and Redress Bill, other recommendations we made have not been picked up by the OFT, for example regarding the need for a doorstep preference service along the lines of the existing Mailing Preference Service. We are not clear why their final report does not address these issues.

3.4 The Citizens Advice super-complaint on PPI was made in September 2005. The OFT responded in December 2005 with a proposal for a market study. This process was concluded in February 2007 when the OFT announced, after consultation, that it was refering the issue to the Competition Commission (CC) for further investigation. The CC have now embarked on a further prolonged investigation, which is expected to last for two years, with no guarantee of action when it is completed. In the meantime CABx continue to see cases of PPI mis-selling.

3.5 It is disappointing that despite drawing up a good summary of the problems of the PPI market, the OFT did not consider that there was any evidence that it could or should act on from the perspective of its role on fair trading or regulator of the consumer credit market. In particular we highlighted the link between consumer credit lending and insurance sales, particularly for lump sum policies where the consumer is advanced a sum as part of the loan to fund the associated policy. In many cases the overall level of borrowing

[9] *Debt collection guidance compliance review*, OFT, 2006, p 8.
[10] *Door to Door—CAB evidence on doorstep selling*, Citizens Advice 2002.
[11] *Protection Racket—CAB evidence on the cost and effectiveness of payment protection insurance,* Citizens Advice, 2005.

taken on by some consumers calls into question whether the lender has acted responsibly and taken into account the affordability of the overall amount lent by the consumer. Insurance commission bias may be distorting lender's representatives' ability to act as a responsible provider of consumer credit. We think this raises immediate issues for the OFT to address in terms of conduct of consumer credit licence holders, and need not require the intervention of the Competition Commission .

3.6 In our super-complaint on PPI we also made a number of recommendations for the approach of relevant self regulatory codes of practice which the OFT has an interest in, such as the Finance and Leasing Association lending code.

3.7 The OFT's report on the market study and its conclusions were not accompanied by any recommendations or actions other than a decision to refer the market to the Competition Commission (CC). To an extent the opportunity has been lost as the CC will look only at issues of competition and not consumer protection. We are disappointed the OFT has not seen that there are actions for them to take in this market or explained why they are unable to act on the evidence submitted and which they have found themselves.

4. Bank Charges

4.1 Charges levied by banks for items such as failed direct debits, standing orders, unauthorised overdrafts and bounced cheques can cause considerable hardship for CAB clients.

4.2 The level of charges imposed for items such as unpaid direct debits is particularly problematic for people on low incomes. Information provided by the British Bankers' Association reveals that 13 of the 17 banks which offer Basic Bank Accounts charge £30 or more for unpaid direct debits, with some charging as much as £39.[12] Comparing the levels of charges for failed direct debits with rates of benefits gives an insight into how such charges can often lead to greater debt problems:

- The personal allowance for income support for an individual who is 25 or over is £59.15 per week.
- Incapacity benefit for an adult dependent at the long-term rate is £48.65 per week.
- Child benefit for an only or eldest child is £18.10 per week.

4.3 A person on income support would therefore be left with less than half their weekly benefit entitlement to live on if their bank charged £30 for a failed direct debit. CAB evidence shows that bank charges can end up pushing vulnerable customers into a spiral of debt, or even deeper into debt, as the following cases demonstrate:

> A Hertfordshire CAB saw an 82 year old man who was living on a low income and was being charged large bank fees. The client paid for most of his bills by standing order and direct debit. In July 2006 his account became overdrawn for a short time and he was charged £110 (£20 for being overdrawn and £90 for three direct debits not being paid whilst his account was overdrawn). These charges had a cumulative effect as in subsequent months his account went further into overdraft and he was charged £275 in August, £140 in September, £320 in October and £250 in November. Since the client was on a low income the bank charges were affecting his ability to pay his essential bills.
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> A Leicestershire CAB reported that their client had been subjected to hefty fees for unpaid direct debits. Their client, a 67 year old woman who lives alone and who has an income of £114 per week, was generally careful with her money but had incurred several bank charges for unpaid direct debits. Sometimes the bank had taken the whole of her pension to pay the charges, leaving the client with nothing to live on. The bank refused to waive the charges so the client cancelled all her direct debits and instead paid all her bills weekly via payment cards.

4.4 Citizens Advice was therefore pleased that when the OFT announced their findings on default credit card charges they stated that "the broad principles in relation to default charges are likely to be relevant to other standard agreements with consumers such as those for bank current accounts."[13]

4.5 While we have welcomed the OFT's subsequent announcement that it is to conduct an in-depth study of retail bank pricing, we are disappointed that this could mean there will be a significant delay in dealing with the level of default charges imposed on bank accounts. We are genuinely puzzled as to why the OFT have not been able to confidently apply the same principles they set out for credit card default charges to default charges connected to bank accounts, particularly as they made it clear in April 2006 that the banks should address the fairness of these charges within a reasonable timescale.[14] As a consequence many consumers have sought refunds on unfair amounts of bank charges, including taking action through the courts, and there is a growing practice of goodwill settlement.

[12] http://www.moneymadeclear.fsa.gov.uk/pdfs/bank—accounts.pdf

[13] Following success on credit card default charges—OFT turns attention to bank current accounts, OFT press release, 7 September 2006.

[14] Current credit card default charges unfair—OFT sets threshold for intervention, OFT Press Release 68/06, 5 April 2006.

4.6 In our opinion the OFT has confused wider issues about retail bank pricing and threats to 'free' banking with a decision on whether default charges on current accounts are fair. The fairness of bank charges can be judged in isolation, and the OFT's unnecessary delay in coming to a clear view on this has perhaps condemned many people on low income to receiving additional and inflated bank charges. Moreover, the vacuum created by the OFT's unwillingness to take a swift and robust stance on bank account default charges has encouraged the emergence of numerous 'ambulance chasing' companies which charge customers as much as 40% of any fees successfully reclaimed from banks.[15]

5. Codes of Practice

5.1 The leading role the OFT has been given in relation to self regulation including the ability of the OFT to approve business-to-consumer codes of practice could potentially benefit many millions of consumers. Citizens Advice would like to see the OFT make the maximum impact from its new role here.

5.2 However the OFT's performance in providing energetic leadership and engagement towards the self regulatory codes is modest. Over the four year period since the OFT gained its powers in relation to codes of practice just five codes have been fully approved and twenty-one are still being developed.

5.3 Citizens Advice contributes to this process by giving the OFT information on the problems in the relevant market at the stage that the OFT has been approached by the business sector concerned seeking approval.

5.4 The process includes a quarterly meeting with consumer bodies and correspondence is circulated. However we consider that the OFT is really missing an opportunity to take a more dynamic role to drive up standards in the self regulatory arena. Although there has been some general expenditure on promotion and advertising generally the OFT is reacting to applications and is not seen by us as actively encouraging applications from market sectors where there are problems which self regulation could address, neither are the OFT displacing much space in terms of public policy on self-regulation—the codes approval operation seems to be very much a paper exercise. Although the OFT seek our evidence on problems with the market in question and our views on changes we feel are necessary to the code, the OFT are not visibly utilising this input to engage with the code owner's to secure improvements. The OFT approach seems to be to act as a post-box between consumer groups and code owners rather than seeming to form and communicate clear views on what it wishes to see in codes to address detriment in markets. The approach contrasts poorly with the independent reviewer system which now applies to the Banking Code and which is run by the British Bankers Association, where all requests and inputs are considered openly as the reviewer makes their recommendations.

5.5 The process of handling code approvals is frustrating and time consuming for us, and for other consumer groups. Businesses do not appear to feel that OFT approval is essential to ensure consumer confidence. This is demonstrated by the small numbers of trade bodies who seek approval for their codes and that, for example, the Association of British Travel Agents decided to withdraw from the approval process rather than meet OFT standards. We have suggested several years ago transformations to the process, including a much more transparent process of engagement and decision making by OFT.

5.6 To illustrate the processes involved, the OFT asked Citizens Advice to comment on the Debt Managers Standards Association (DEMSA)'s code of practice which covers standards of advice and services provided by fee charging debt management companies in October 2003. This is an area where such a code would be of particular value to clients as bureaux receive a large amount of evidence that bureaux receive on this issue:

> A CAB in South-West Wales reported that a married couple in receipt of working and child tax credit, came to bureau for assistance in dealing with Council Tax arrears being recovered by bailiffs. They also had a small amount of rent arrears and arrears on a water bill. The wife's credit debts were being dealt with by a debt management company, who had set up a special bank account for the clients to have all their income paid in. The clients were stressed at having to deal with the bailiffs whilst not being able to access information as to how much money she had in the debt management company bank account to find out how much she could afford to pay off the council tax, water and rent debts. The debt management company was not only making charges of £39 per month for making payments to the creditors, but also charged £25 for setting up the bank account and regular monthly management fees of £12.50 per month. One of the creditors had not accepted the offer by the debt management company and was continuing to add interest and default charges.
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> A CAB in Yorkshire reported that a couple with £19,000 debt sought CAB advice about bankruptcy. The clients' essential expenditure exceeded their income by £48 per month. The clients told the CAB that they got into debt about two years ago when the wife stopped working due to ill health. At the time, she went to a debt management company with debts of approximately £15,500.

[15] Ambulance-chasing' touts join penalty fee bandwagon, *The Guardian*, 7 April 2007.

> Although the debt management company were paid a monthly management fee and the clients made all the payments due, the debts had increased. The clients felt they could no longer continue with the anxiety and stress that the debt is causing and can see no other way out but to go bankrupt.
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> A CAB in Surrey reported that their clients had agreed with a debt management company that they would negotiate with their creditors and arrange debt repayments. They paid the debt management over £500 per month for two months, including a £38 monthly management fee. The clients received a statement from the debt management company dated 22 September 2006 saying creditors had been paid but in fact the creditors had not been paid. The CAB wrote to the debt management company on 1 December 2006 to cancel the agreement and get the clients' money back, but received no response. The debt management company's phone was now not being answered.

5.7 In our initial submission to the OFT on DEMSA's code, we made a number of suggestions for improvement, as it seemed to us to be offering standards of service which were poorer than those outlined in the OFT's own Debt Management Guidance. However, OFT did not take these suggestions up with DEMSA and told us to take these up directly with DEMSA. Eventually they brokered a meeting between ourselves and DEMSA in late 2004, at which DEMSA agreed to take up some of our proposals to improve their code. However we remain concerned that nearly two and a half years later, DEMSA's code has still not been given full approval; one of their six members has now left and they do not seem to have not gained any new members. Many fee charging debt management companies remain outside the additional protection provided by the DEMSA code.

5.8 In addition, the OFT might have noticed that Farepak left membership of the Direct Selling Association in 2004, prior to this code obtaining approval from the OFT. Evidence of firms leaving self regulatory codes should raise questions in the mind of OFT as to why this might be. In the case of Farepak the OFT's core code criteria requirement for consumers' deposits to be protected meant this company, who had no such protection, could not continue membership of a code the OFT were approving. As the purpose of Christmas savings schemes is to collect money from consumers throughout the year, the failure to protect those monies illustrates a clear risk of consumer detriment.

6. Scams

6.1 Citizens Advice Bureaux regularly advise people who have been contacted by rogue traders or who have fallen victims of consumer scams. Each year scams account for over 3,500 of our enquiries on goods and services and close to 1,000 of our enquiries on financial products and services. In many cases these cases prove time-consuming and unsuccessful, in terms of recovering the often substantial funds lost by the client.

> A Hampshire CAB reported that in November 2005 a retired man sought advice because he had been to the bank trying to pay a company in Spain who said they needed a payment before they could send him his lottery winnings. The client had never purchased a ticket, but did not think he was being deceived. He came to the CAB because he wanted to verify what the bank had said. The CAB confirmed that the bank were correct after contacting Trading Standards and Consumer Direct. The client returned to the bureau six months later and said that he wanted to pay the company to release his winnings because he thought that he *had* at some point purchased a ticket, though he did not have it. The bank had told him they suspected this was a further scam. The CAB again called Consumer Direct and they said they also thought this was a scam and gave the bureau the number of the Spanish Embassy who subsequently confirmed that this was a scam. The client was advised to destroy the paperwork as the details they asked him to send back to them were extensive and required his personal bank details. The CAB was concerned that if the bank had not warned him and referred him to the bureau, the client could have given found himself in a position where he could have lost a lot of money.
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> A CAB in West London reported that a woman rang them about a letter she had received from an international debt collection company based in the Czech Republic for a debt of £182 to an electronics company. The client did not know the company or how the debt had arisen. The client had tried to contact them by phone and was kept on hold for a long time. She believed it was a premium rate call. She also contacted them by post (recorded delivery) and the letter was returned. The client was worried about the threatened legal action and that she might not be the only one affected.

6.2 It is important to prevent consumer scams from taking place and to respond quickly when they come to light. The OFT has an important role in tackling scams, both in terms of informing the public and taking effective enforcement action against the perpetrators. The OFT is very active in consumer information about new scams, but has been less energetic in taking enforcement action. In order for this to be effective the OFT need to work closely with the police and other enforcement agencies, both in the UK and abroad. They also need to keep one step ahead of the scamsters, as the nature of scams change constantly. Adequate resources are essential for the OFT, Trading Standards and indeed the police to enforce consumer rights. A better enforcement toolbox could result from the Hampton and Macrory reviews, the new EU wide

Consumer Protection Co-operation Regulations and the Unfair Commercial Practices Directive, where the OFT could play a central role in enforcing consumer rights, resources permitting. Success in this endeavour would require significant effort, not least in engaging the public.

6.3 In the past Citizens Advice has worked closely with the OFT to ensure that CAB evidence is used to help tackle scams. Citizens Advice considers that this communication is vital and is disappointed that the level of engagement has decreased in recent years. For example, Citizens Advice used to attend regular meetings on scams at the OFT, but these meetings have stopped since July 2005 and CAB evidence is not now used on a regular basis.

7. Consumer Direct

7.1 Consumer Direct is the government-funded telephone and online service which is designed to deal with consumer enquiries and simple complaints. It is funded by the Office of Fair Trading and delivered in partnership with Local Authority Trading Standards Services. It deals with each caller's problems or questions individually, but can only provide information and advice—it cannot intervene directly in consumer matters, such as taking action against a trader.

7.2 CABx and Consumer Direct therefore have overlapping but complementary roles in helping consumers resolve problems they may experience. However, many bureaux report a number of difficulties and frustrations in the dealings they and their clients have with Consumer Direct:

> A Northumberland CAB reported a case in which their elderly female client had experienced problems with some repairs she had done to her Double Glazing. The client found herself at an impasse since the trader who installed the double glazing could not be located, but as he had not wound-up his business or formally ceased trading the warranty company refused to intervene. The client contacted Consumer Direct and explained the problem, but they said they could not give out information about companies, and failed to refer her to the local trading standards. Consumer Direct kept insisting that she contact her warranty company—she kept telling them she had done so and they had told her to contact trading standards for more information. The client was forced to make her own enquiries locally with the Council and discovered that the company was no longer registered as trading. The client called Consumer Direct to inform them of this and they told her she must not call them again, they had already told her twice what she should do and would not assist her further.
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> A Merseyside CAB reported that their client wanted to find out some information about a company offering to chase up an inheritance on her behalf. The client wished to know if the company was legitimate and she was also querying part of the contract that the company had provided. The client phoned Consumer Direct but was told that they could not provide any information about the company due to the Data Protection Act. The client asked about trading standards but was not given any information about them. The client subsequently took it upon herself to phone trading standards and was given all the information required as well as advice about the contract.
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> A Cheshire CAB helped a blind client who had a number of problems with a conservatory that she had had built, which have been confirmed by an insurance assessor. The client wished to know who she could contact about the possibility of gaining redress from the company that built the conservatory. Since the client has problems making telephone calls due to her blindness the CAB adviser called Consumer Direct and asked them to ring the client direct to discuss. Consumer Direct said they could not ring the client; she would have to ring them, even though they were informed that the client was blind and had difficulties making phone calls.

7.3 Consumer Direct acts as a useful first port of call for information on a range of consumer issues. However, it is important that Consumer Direct advisers receive sufficient training so that they are able to offer appropriate information and advice, and resolve consumer enquiries in a professional manner which supplements the work of CABx and other advice agencies. At present the level of advice provided by Consumer Direct seems to be below the standard of general advice provided by CABx and local CABx. It is therefore difficult for advisers to be certain whether referring clients to Consumer Direct would be helpful.

7.4 This issue is potentially exacerbated by the fact that Consumer Direct is delivered by multiple contractors. Consistency of advice is therefore an area of concern, as well as the additional costs to the OFT of managing all the contracts.

7.5 The level of training and expertise at Consumer Direct will be of even greater importance in the near future when changes to the consumer representation regime put forward in the Consumers, Estate Agents and Redress Bill come into force. These changes mean that sectoral consumer organisations such as energywatch and Postwatch will be subsumed into a new National Consumer Council, with Consumer Direct acting as a single point of contact for consumers on an even wider range of issues than is the case currently.

7.6 The impact of this Bill on the workload of Consumer Direct could be large. Citizens Advice considers that the OFT should be looking at the consumers' pathway from end-to-end, to plug gaps, avoid duplication and maximise efficiency of all operations in delivering this service. The consumer advice sector, including Citizens Advice, will need to work together with the OFT in order to achieve this.

April 2007

Supplementary memorandum submitted by Citizens Advice

Introduction

As part of the Trade and Industry Select Committee's inquiry into the work of the Office of Fair Trading, Citizens Advice gave oral evidence to the Committee on 5 June 2007. During this evidence session it was agreed that supplementary information would be submitted outlining areas where Citizens Advice have provided evidence to the OFT about unfair trading practices in the consumer credit market but considers that insufficient action has been taken.

This supplementary note will outline our experience of working with the OFT in the following areas:

— Debt Management;

— Consumer Credit; and

— Debt Collection.

These areas reflect the range of our experience of working with the OFT, both positive and less positive.

Debt Management

In spring 2001 Citizens Advice and other organisations complained to the OFT about the poor service provided by many debt management companies. The OFT issued guidance on debt management in December 2001. To the best of our knowledge these guidelines set out the OFT's views on the standards that any firm offering debt management services should meet to have and continue to hold a consumer credit license.

A trade association, the Debt Managers Standards Association (DEMSA), also set up a code of conduct for its members. This was a positive step and the CAB service saw a drop in the number of complaints from bureaux about debt management companies. However DEMSA now has four members (initially there were six members) and those debt management companies that are not members operate without the constraints of its code of conduct.

The following are some examples of cases which we have recently come across which met neither OFT or DEMSA standards:

> A CAB in South-East Wales saw a single mother of two who had approached a debt management company in 2006 to handle her debt problems. She was charged an initial fee of over £1,500, a monthly administration charge of £39 and a £34 monthly insurance charge. No payments were made to her creditors for six months. During this period the clients debts actually doubled due to interest and because she was paying more to the debt management company than to her creditors.
>
> A CAB in South London saw a 58 year old client with multiple non-priority debts in excess of £60,000. He recently signed up to a debt management plan with a debt management company for which he was being charged up front fees of £4,399. The client came to bureau for advice as he could not afford to pay these fees. The bureau advised the client to cancel the post-dated cheque he had sent for the first fee instalment and to cancel the agreement with the debt management company. The bureau provided him with information on two free debt management providers and advised to contact them to set up a free plan.

Citizens Advice meets with the OFT approximately every six to eight weeks to set out trends in our evidence. During these meetings we have regularly raised cases relating to specific debt management companies, which are not members of DEMSA, and have been disappointed by the lack of action to deal with problems raised. Bureaux continue to see cases where these firms are causing consumer detriment, and breaching the standards set out in the OFT debt management guidance.

More fundamentally the OFT has failed to ensure its policies keep pace with market developments and has been slow to respond to these developments. For example, the OFT failed to react rapidly enough to the growth in debt management companies offering Individual Voluntary Arrangements (IVAs), which in many cases took certain activities of these companies out of the OFTs purview. The OFT eventually attached a clarification note on IVAs to their guidance in January 2007. The OFT did issue a strong warning to IVA providers over misleading advertisements. This resulted in the Advertising Standards Agency taking action against two of these adverts in April. This is the sort of assertive action that we would like to see the OFT take more often.

Citizens Advice of course recognises that the OFTs work is limited by the legislative framework under which it operates but we contend that a more positive and proactive approach could have been taken. With the impending implementation of the Consumer Credit Act 2006 we expect that the OFT will take a more strategic approach and will make effective use of the new powers that the Act provides.

Consumer Credit

The market in non-status lending has expanded over recent years. Citizens Advice considers that the OFT have not reacted to developments in this market in an effective or timely manner, despite regular discussions on the issue with Citizens Advice. The OFT have not addressed non-status lending since they revised their guidance in 1997.

Citizens Advice has similar concerns about secured lending. The bad practice of specific secured lenders has been raised by Citizens Advice in its regular liaison meetings with the OFT since 2003, yet no action has been taken to our knowledge. The following case is one recent example of the problems that bureaux see on a regular basis:

> A CAB in Staffordshire saw a man who had a mortgage and eight secured loan advances from the same lender adding up to £210,000. The secured loans were used for home improvements and also for debt consolidation following a business failure some years earlier. The house was valued at about the same amount but the combined repayments of £1,900 per month exceeded his take home wage of £1,600 per month. Even with his wife's incapacity benefit, disability living allowance and the child benefit their outgoings exceeded their income by £90 per week. He had been covering this by using credit cards and other unsecured debts as well. He said he wanted to apply for bankruptcy.

There is an expectation among lenders, and the CAB service, of a step-change in the regulation of consumer credit with the implementation of the Consumer Credit Act 2006 in April 2008. Citizens Advice considers that the OFT should make the most of this expectation by publishing strong guidance as early as possible. Draft guidance for licensees and applicants on fitness and requirements was issued in June this year.

However, the draft guidance issued for consultation in June 2007 is little more than an explanation of the legislation. We were, however, pleased to see that the OFT are planning to consult shortly on guidance for license holders on responsible lending.

The Consumer Credit Act 2006 has provided a significant opportunity for the OFT to consider how it commits its resources, how its processes can be improved and how it can develop a more strategic approach to this sector. If the OFT continues to rely on evidence from a small number of complaints then it will remain a reactive, rather than proactive regulator. Citizens Advice would like to see the OFT following in the footsteps of the FSA by using tactics such as mystery shopping to expose problems in the market. It remains a concern that there is no compliance strategy beyond investigating complaints. The onus is entirely on individuals and consumer groups with limited resources to gather enough evidence to convince the OFT to take action. As it is not clear how much evidence is "enough" this is a constant uphill struggle for consumers and their representatives. Instead the OFT should be taking steps to satisfy itself that license holders are compliant.

Citizens Advice would like to see major changes in the OFT's working practices and the development of a new strategic vision for regulation in this market to utilise fully the opportunities provided by the new legislation to get a better deal for consumers of consumer credit.

Debt Collection

Though debt collection problems persist, the OFTs performance in this area has been a comparative success story and exemplifies the approach which we would like to see across the OFT's work.

The strength of their performance in this area is due to the quality of the guidance that it produced. The guidance on debt collection is focused on problems in the market and relates directly to the sort of problems that bureaux encounter on a regular basis. CAB advisers have therefore been able to use the guidance as a practical tool to tackle bad practice on the part of debt collectors by referring the offending parties directly to the OFT. This has directly influenced the behaviour of the debt collection firms.

The OFT has also kept the guidance under review and is moving towards developing a strategy to tackle the broader problems in the market. As stated above, Citizens Advice would like to see this work incorporating a more proactive compliance strategy. Though market outcomes have not materialised yet, Citizens Advice is optimistic that the industry is moving in the right direction. We have been further encouraged by the behaviour of trade bodies such as the Credit Services Association which has been keen to receive information on our cases and trends.

July 2007

Memorandum submitted by the Finance and Leasing Association

1. The Finance and Leasing Association (FLA) welcomes the opportunity to submit evidence on the work of the OFT to the House of Commons Trade and Industry Committee. We have extensive dealings with OFT.

2. FLA is the main representative organisation for the asset finance, consumer credit and motor finance sectors in the UK. Our members (banks, subsidiaries of banks and building societies, the finance arms of leading retailers and manufacturing companies, and a range of independent firms) are currently regulated to various degrees by the Office of Fair Trading ("OFT"), the Financial Services Authority ("FSA") or both. Providers of consumer credit, including motor finance, are regulated by the OFT and also by FSA if they sell insurance products, as most do. OFT regulation affects asset finance businesses (hire purchase and leasing businesses) only if they engage in agreements regulated under the Consumer Credit Act (CCA), which many of them do. Many of them also provide general insurance, and are therefore regulated by FSA. Firms of both types are prudentially supervised by FSA if they are part of banking groups. Holders of consumer credit licenses are to be regulated for money laundering by the OFT, previously unregulated firms or firms holding banking authorisation by FSA.

Summary

3. The credit and asset finance industries face a balancing act in their relations with OFT. On the one hand we do not believe the present position of separate regulation of consumer lending from other retail financial services makes any sense other than for administrative convenience. So we want this to remain a live issue. At the same time we recognise that we are where we are, and want to work co-operatively and constructively with the OFT and with FSA.

4. We agree with the OFT that healthy competition in informed markets is the best way to protect consumers. We believe the present management is rightly focusing on markets and on strengthening its ability to remove distortions. We note that this is increasingly the OFT's emphasis rather than the enforcement of rules or regulation.

5. We would like to see more joined up thinking and approaches by the OFT in partnership with the FSA. We prefer action to words and commitments. A lack of consistency and joined-up thinking shown by recent initiatives on codes of practice and industry guidance and in regulatory interventions in the Payment Protection Insurance ("PPI") market highlight weaknesses in the current regulatory regime.

6. The cost of regulation is high and needs to be minimised wherever possible. The recent Davidson Review helpfully showed the FSA where it has "gold-plated" and where it can start cutting back these regulatory burdens in a more principles-based world eg by cutting back on the Insurance Mediation Directive (IMD) etc. A similar approach, wherever possible, should also be taken by the OFT as they restructure the way they work.

7. We believe OFT has made notable efforts to work more closely with our industry. These are reflected by good personal relationships at a working level and a clear "client relationship" policy.

8. Finally, we have a real and genuine concern that the important balance between addressing consumer needs whilst making sure businesses compete legitimately, may be tipping too much towards consumer concerns at the expense of business. Whilst consumer protection is of course vital, especially in respect of the most vulnerable, the OFT must also take into full consideration business issues and concerns. A failure to do so could harm the UK financial services industry and erode competitiveness to the ultimate detriment of both business and consumers. OFT's evolution from a bridge between industry and consumers to consumer champion is not without its downside.

Approach to Regulation—Dual Regulation

9. Our members regret the Government's decision to withdraw, in the small print of the 2006 budget, from its commitment to conduct an open and detailed consultation on the "Hampton Footnote",[16] particularly in light of other strategic initiatives on better and more effective regulation. We believe strongly that lending is a crucial part of the financial services sector and that it should in the longer term be regulated by the single financial services regulator. OFT's Annual Plan, 2007–08, states unequivocally "we are not a regulator; indeed our direct regulating powers are limited—for example to the operation of the consumer credit and merger control regimes which are statutory functions". We explained our detailed concern to HM Treasury at the time of the Hampton Report. This change need not be immediate, or even soon. We are well aware of Sir Callum McCarthy's reservations and have always understood the current very real constraints. We would however like to see a road map with a clear long-term and holistic vision of the future of financial regulation which commands wide political support. We are also vigilant against any reversion to a *de facto* two tier system, abolished in the 1980s, with deposit-takers and other lenders subject to different regimes.

[16] Hampton proposed in a footnote to his report that Government should consider whether consumer credit regulation should be transferred from OFT to the FSA.

10. A major concern is regulation of financial services by two different regulators ("dual regulation"), with very different statutory powers and two very different ways of regulating.

11. There are many areas of dual regulation and areas in which both FSA and OFT currently take an active interest. There are many areas of our members' businesses that are regulated and influenced by both FSA and OFT, although the extent of overlap and its impact depends largely upon members' business models and product range.

12. In addition to regulatory overlap issues, we are concerned that the current landscape leads to or encourages regulatory creep. Members find it more convenient to apply the highest level of regulation to their activities even though some of those activities may not be directly subject to the regulation so applied. So FSA high level principles (treating customers fairly, for example) are applied to FSA regulated general insurance activities and to OFT CCA regulated loan activities.

13. Members also regard the compliance costs as significant, mainly due to the duplication of administrative burdens in many areas. Dual regulation places conflicting or competing demands on members' businesses. Good examples include the approach to first and second charge mortgages; to advertisements and financial promotions; and to brokerage advertisements for secured lending.

14. Different bodies of regulation, with differing degrees of prescription also create problems. For example, in addition to its regulatory functions under the Consumer Credit Act 2006, OFT has powers and duties under the Enterprise Act 2002 and enforces competition laws under both the Chapter I and Chapter II prohibitions and Articles 81 and 82 under European competition laws. Enforcement is therefore focused on both competition and consumer regulation. FSA regulatory functions are more coherently set out in the Financial Services and Markets Act, which contains provisions specifying the objectives and purposes for which FSA must act.

Contrasting Working Methods

15. We also continue to be concerned at the very different way in which the OFT goes about its business compared to the FSA, despite its joint work plan to work with the FSA. A good way to illustrate this is the different approaches taken on the PPI market. The FSA consulted widely with the industry and continues to do so as it goes into its third thematic review. The OFT, on the other hand, has made little effort to fully engage with the industry to try and find satisfactory solutions to regulatory concerns.

16. To illustrate this, we are unaware of any attempts made by the OFT to discuss undertakings with the payment protection insurance supply chain or trade associations prior to referring the industry to the Competition Commission (CC). The very fact that significant improvements to consumer protection have occurred and are continuing to occur as a result of FSA regulatory initiatives indicates to us that there is a willingness by the sector to undertake necessary reforms.

17. Better regulation should mean that regulation and regulators adhere to the Better Regulation Commission's principles for good regulation: proportionality, accountability, consistency, transparency and targeting. The culture should be more market friendly with emphasis on light-touch regulation proportionate to risk.

18. We are also concerned at the continuing lack of joined-up thinking. We highlighted this concern in our response to the FSA s recent discussion paper DP 06/05 looking at FSA "confirmation of industry guidance". This clearly illustrated a very different approach to self regulation and to "policing" and monitoring industry guidance and codes from that taken by the OFT, despite a written commitment to the contrary.

19. Both OFT and FSA appear to have the same objective, the fair treatment of customers, yet have two very different approaches to industry and code guidance. In light of recent commitments made by both organisations we would like to see more collaboration and joined-up thinking extended to this pivotal area of regulatory change longer term. We are committed to trying to make this happen, and recognise that efforts are being made. But it remains our clear view that one body with clear objectives and guidelines in this area is preferable to two bodies "policing" different industry guidance and codes in different ways.

20. We also believe that in our particular case OFT has a potential conflict of interest, as regulator of consumer credit and as generic approver of industry codes of practice.

21. The burden of statutory regulation is high. For example, a recent report from Open Europe puts the cost to the UK of the EU s Financial Services Action Plan (FSAP) at between £14–23.5 billion by 2010.[17] These are all Directive-driven regulatory costs eg the Markets in Financial Instruments Directive (MIFID), the IMD and Direct Marketing Directive (DMD) (there are over 40 of these initiatives in all). We therefore welcome the FSA's lead in doing Regulatory Impact Assessments (RIA's) and Cost Benefit Analysis (CBA's). We would like to see further work done in this area by the OFT, for example when looking at the

[17] *Selling the City short? A Review of the EU's Financial Services Action Plan*: by Open Europe in association with Keith Boyfield Associates, November 2006.

possible effects of its conclusions on the markets it has studied. We have expressed separately to OFT our concerns about their approach to the analysis of empirical evidence on the selling of payment protection insurance. This is however too specialised an issue to be aired fully here.

Dialogue

22. In certain areas the OFT is undoubtedly moving closer to partnership working. For example, we welcome the OFT's continuing consultation and dialogue in relation to its newly acquired powers in supervising some of our members for money laundering. It is essential the OFT maintains this dialogue in order to be able to iron out definitional, scope and supervisory concerns. Again though, we have concerns that a number of different regulators are undertaking the same task for the financial services sector. It would make much more sense for these powers to rest with one regulator. The flaws lie in the underlying regulation.

23. More generally OFT has introduced a "client relations" policy which is bearing fruit. We welcome this, and will work with the grain, and to play our part in groups set up to further "joined-up regulation". We note the OFT has successfully taken on some high quality staff, and appears to have more flexibility in the labour market than in the past. The key lies in developing a confident style which relies less on enforcement of powers and more in diplomacy, persuasion and negotiation.

Resources

24. There appears to be a delay of up to two months at the OFT Consumer Credit Licensing department in issuing new licences or adding new trade names. This is causing some of our members severe problems as it is an offence under section 39 of the CCA 1974 for anyone who needs a consumer credit licence to act without one. Also it is an offence for any trade name used not to appear on the licence. In our view the OFT urgently needs to increase resource in the licensing area. We are also, incidentally, concerned that it should have enough resource to take on its new money laundering regulatory powers.

20 April 2007

Memorandum submitted by Future Media

Impact of the OFT on Future's Business

1. *History*

In addition to the huge shadow cast over the industry for more than three years by the OFT's review of UK distribution, the OFT has also had significant impact on Future's business. Future has had extensive dealings with the OFT in the last two years in relation to two acquisitions and one disposal.

Future/Highbury 1

Future made various applications, had several meetings and discussions with the OFT in relation to the proposed acquisition by Future plc ("Future") of Highbury House Communications plc ("Highbury"). As a result of those meetings and discussions Future believed that it was unlikely that the OFT would refer the proposed acquisition to the Competition Commission.

In April 2005 the OFT announced that it intended to refer the proposed acquisition to the Competition Commission because it believed that the merger may be expected to result in a substantial lessening of competition within the consumer market for computer games magazines and had not focussed on other "markets". As a result of the referral, Future's bid for Highbury lapsed.

This decision was a surprise to all parties and commentators. The fact that they had not come to a conclusion on any other areas other than computer games also left significant confusion in the market for magazines. We understand that the back-drop to our decision was that the OFT had had one of its decisions successfully appealed and another appeal was underway and consequently, rather than looking at the acquisition commercially, it might have been influenced to take the safe option of passing the decision to the Competition Commission.

Future/Highbury 2

As a result of the lapsed bid in Future/Highbury 1, Future entered into an agreement to acquire three subsidiaries and certain titles and other assets from Highbury. Following further detailed submissions and investigations by the OFT, in June 2005 the OFT confirmed that it did not believe that the merger may be expected to result in a substantial lessening of competition within a market or markets in the UK. The acquisition therefore proceeded to completion.

Future/Magicalia

In November 2006, Future Publishing Limited, Future's UK subsidiary, conditionally agreed to sell its Good Woodworking magazine to Magicalia Publishing Limited and sought guidance from the OFT, who confirmed that it would need to investigate the proposed disposal fully.

In March 2007, the OFT confirmed that it did not believe the merger may be expected to result in a substantial lessening of competition within a market or markets in the UK, but it did not accept Future Publishing's evidence that it would close the title if it were not sold to the OFT.

2. *Process*

2.1 The definition of market

Because the definition of mergers which qualify for investigation is a two-pronged test based on either turnover or market share, the definition of what constitutes a market is key. The first prong is a turnover test which would be unlikely to apply the rules to any transaction other than very large acquisitions of many titles. However, in the UK there is also a second limb of a substantial lessening of competition in a "market". The term market is not defined and the OFT have said that they will look at each case on its individual merits. This test does not apply in most of Europe or in the US such that all minor bolt-on's of titles would not be subject to the competition regime. This makes the UK market more regulated and less dynamic than other territories. What the OFT have done in choosing to investigate the Good Woodworking sale to Magicalia is to define market in the narrowest possible sense. This means that for the sale of any title to a publisher who has a similar title, OFT issues will be relevant adding complexity, significant cost and management time and delaying the transaction.

The OFT, in relation to magazines, defined the market as magazines which closely constrain one another both on the demand side and the supply side. On the demand (consumer) side, there is little concrete evidence of consumers switching between magazines in different areas or between media (from magazines to websites, for example) and on the demand side, there is little evidence of actual new entry as a result of the magazine market generally being in decline. As a result, the OFT have assumed (but not definitively said) that the market should be defined narrowly, which we believe produces erroneous and unjust results and makes the UK uncompetitive to other markets, notably us.

2.2 Length of time to consider deals

The OFT has, in our experience, required extremely detailed analysis of the magazine sector and typically requests information going back five years or more. As a result, an unnecessary amount of senior management time is taken up producing the analysis and locating the historic information when, we believe, the OFT should be considering the position in the market as at the date of its analysis.

As a result of the extensive disclosure exercise required by the OFT, the OFT takes a considerable amount of time to produce its decision. Further, the OFT can unilaterally decide to extend the deadline for a decision if, for example, it requests further information.

2.3 Supply side substitutability

When the OFT considers acquisitions, it considers the supply side substitutability—ie the likelihood of existing and/or new publishers launching a magazine in the relevant sector.

In relation to the Future/Highbury 2 deal, Future were confident that some ex-employees of Highbury would set up in competition with Future in the computer games market. The OFT did not accept Future's submission on this point. Those ex-employees did set up in competition with Future in the computer games market and have been providing healthy competition to Future's titles since—indeed including buying the Highbury games titles when Highbury went into receivership. There are a number of other examples which indicate that supply side substitutability is in fact much more prominent than the OFT is willing to accept.

2.4 Market Trends

As we have alluded to above, the magazine market is, on the whole, in decline in the UK. More readers are choosing to source content online and Future is working hard to change its business from one of a print publisher to a print and online publisher.

When the OFT considers the parties share of the market, it fails to take into account this decline. In particular, in relation to the Future/Magicalia deal, Future produced evidence that the woodworking magazine sector had been in decline for a number of years and continued to be so. The OFT did not consider that decline as part of its decision.

2.5 Counterfactual

In relation to the Future/Highbury 1 deal, Future and Highbury both confirmed to the OFT that they believed, if the acquisition did not proceed, Highbury would become insolvent. In both Future's and Highbury's view, such a situation would only serve to reduce consumer choice to a far greater effect than if the acquisition proceeded and Future chose to consolidate the titles it published in a particular sector. As anticipated, following the acquisition being blocked, Highbury went into administrative receivership. Some of its magazines were sold (including 30 to Future) but a number of its magazines were closed.

In relation to the Future/Magicalia deal, Future produced evidence to show that the Board of Future Publishing Limited had resolved to close the title if the deal did not proceed. The OFT did not accept Future's evidence because it said Future had not exhausted all avenues of possibility for sale. In our view, the OFT was saying that they did not believe a publicly quoted company and were straying into questioning the commercial decisions of the Board of Future Publishing Limited.

3. *Effect*

The length of time taken to investigate deals is both damaging to the magazines themselves (as staff and senior management's attention is diverted from publishing to dealing with OFT queries) and to the staff. As a result, the quality of the product often suffers.

We believe the Future/Highbury 1 decision has precluded existing magazine publishers from selling assets to one another, choosing instead to close magazines so as to avoid a referral to the OFT, even when those magazines have a good prospect of success with another publisher who is investing in the relevant sector of publication. This, in turn, reduces competition in the marketplace.

In summary, the current process is damaging to the quality of magazines, the magazine publishing business in the UK as a whole and to consumer choice. The OFT is clearly not meeting its stated objectives of promoting consumer choice and of maintaining healthy, competitive markets. In the context of the OFT review of distribution being likely to make it harder for magazines to reach consumers economically, which would naturally lead to consolidation, this seems a double restriction on what has been a dynamic and competitive industry.

4. *How it could work better*

We believe the OFT should concentrate its resources on high value deals and/or deals which affect significant markets, rather than deals which satisfy the qualification for reference test based on the OFT's narrow view of what a market constitutes.

We also believe that the OFT should take a commercial view on transactions rather than looking just at technical issues. As per the PPA magazine industry green paper response the industry is dynamic but under significant pressures and the uncertainty, cost and difficulty of dealing with the OFT should be clarified and eased. When you compare the industry to, for example, Tesco's domination of so many markets and the power it exerts over its suppliers it seems ridiculous that a body which is too busy with its case load should be looking at the disposal of Good Woodworking and, indeed, questioning whether the Board of Future Publishing had committed to closing the magazine when we had provided necessary evidence.

The problem is compounded by the OFT failing to have given a definitive definition of the "market" in relation to consumer magazines and indeed saying each sub-category would be considered. We believe the OFT should be prepared to commit to a definition of market in relation to consumer magazines, to give more certainty. We believe markets could sensibly be defined using the audit bureau of circulation categories (rather than sub-categories) and that such definition would not produce the erroneous results we have seen to date.

We have also discussed with the PPA keeping a database of information commonly requested by the OFT to save resources when an OFT enquiry takes place.

June 2007

Memorandum submitted by The Law Society of Scotland

The Law Society of Scotland is the statutory regulator of solicitors under the Solicitors (Scotland) Act 1980 and, as such, has contact with the Office of Fair Trading over a range of issues.

Accordingly, the Society agrees with the Trade and Industry Committee's decision to embark upon a short enquiry into the work of the Office of Fair Trading with a view to taking written evidence about the OFT.

The Society commends the fact that the OFT opened an office in Scotland on 27 February 2007. This office and the OFT's Scottish Representative should assist the OFT in making informed decisions about markets in Scotland. This is an important development and should ensure that the OFT adopts positions in Scotland which acknowledge the particular markets social and legal systems which exist there.

The Society has the following comments to make on the issues raised in the enquiry announced:

The remit of the OFT

The Society understands the role of the OFT as the UK's consumer and competition authority.

The Society acknowledges that the OFT is of the view that its mission is to make markets work well for consumers.

(i) This goal is pursued by enforcing compliance with competition and consumer law and encouraging businesses to improve their trading practices through self-regulation.

(ii) Acting to stop offenders;

(iii) Studying markets and recommending action where required;

(iv) Providing consumers with the information to make choices and to get the best value from markets; and

(v) The OFT also provides assistance to consumers to resolve problems with suppliers through consumer direct.

The Society is of the view that this remit is by and large met. However, the OFT does not profess to take into account the wider public interest rather than that of consumers. These two systems are distinct and require to be considered separately. The research capability of the OFT for investigating markets is unclear, for example the organisational chart published by the OFT lists various offices including Strategy and Planning, Policy Unit, General Council's Office, the Chief Economists Office under Policy and Strategy, Front-end and Preliminary Investigation, Market Groupings, Mergers and Cartels under Markets and Projects and Case Support and Training, Consumer Direct, OFT Plus and Scam Busters under Consumer Advise and Trading Standards, but there does not appear to be any dedicated research facility within the OFT for the purposes of undertaking research. The Committee may wish to consider it appropriate to inquire into the way the OFT gathers evidence and analyses that evidence in order to determine whether a structure clearly identifying and locating that function may be useful.

The Enforcement and Investigation remit can raise problematic issues and requires to be considered carefully. The Society was the subject of an investigation under section 26 of the Competition Act 1998 during June 2004. The subject matter of this investigation was the professional indemnity insurance policy to which Scottish Solicitors subscribe. The Society perceived the tone of this investigation as somewhat heavy handed. The time limit for compliance was unduly short. The investigation was launched without prior discussion and was sent with blunt warnings of the possibility of Criminal Proceedings. This highlights an issue which can arise when the investigative and enforcement roles are conjoined and about which the Society has concerns. The lack of prior discussion was particularly concerning because at the time the investigation was raised, both the OFT and the Society were co-participants in the Scottish Executive Research Working Group on the Legal Services Markets in Scotland. The investigation placed the OFT and Society participants in a difficult position which could have limited the effectiveness of the Working Group. The investigation caused considerable anxiety and distress which could have been avoided by a more restrained and diplomatic approach. The Society made representations about this issue and a mutually acceptable resolution was achieved.

However this experience highlights the need for the OFT to consider the tone and character of investigations and whether publicity protocols setting out the standards and procedures for investigations would be useful especially in a context where the OFT and the party being investigated have to continue to work together in the public interest.

How the OFT Prioritises its Activities

The process, by which the OFT priorities its activities is to publish an annual plan. The Society was included in the circulation on the Annual Plan last year and generally speaking approved of the Annual Plan.

The OFT held a very useful stakeholder meeting in Edinburgh in February to discuss its priorities. Furthermore, periodic meetings take place with the OFT Representative in Scotland on issues of mutual interest.

The OFT's performance and accountability

The OFT is a non-ministerial government department. The most appropriate way to ensure adequate accountability is to make sure that the relevant departmental minister is knowledgeable about the activities of such a department and is available to answer questions before select committees. Parliamentary accountability, in terms of responding to debates and questions on the activities of the OFT, is one way of ensuring proper performance. Another is to adopt a culture of transparency. The OFT is in a position where sensitive issues are discussed however openness and transparency should characterise its activities.

It should be noted that the OFT has an obligation to submit its Annual Report to the UK Parliament. This obligation should extend to sending the report to the Scottish Parliament, the Scottish Executive and the other devolved institutions in the UK.

The OFT's Relationships with Other Bodies

The Society has very useful relationships with the OFT in the following areas:

(i) Partnership in the Consumer Education Alliance;

(ii) As a group licence holder under the Consumer Credit Act 1974;

(iii) As an interested stakeholder in relation to the legal services market;

(iv) As a periodic consultee in relation to consumer credit issues, consumer law matters and competition law matters and in regard to the OFTs own functionality; and

(v) As a participant in the Scottish Executive Research Working Group on the legal services market in Scotland.

These areas ensure that the public interest is well served by co-operation between the OFT and the Society.

20 April 2007

Memorandum submitted by Ofcom

How Ofcom works with the OFT

The OFT and Ofcom co-operate extensively and have a strong working relationship built on mutual respect and shared goals.

Informally there is discussion and cooperation between individuals of the two organisations on many different levels (e.g. between economists, lawyers, etc), but on a more formal basis, cooperation falls into three broad categories:

1. Concurrency, both for Competition Act and Enterprise Act market investigations.
2. Scams Enforcement Group (SEG).
3. Mergers and acquisitions in communications markets.

1. *Concurrency*

Ofcom works closely with the OFT in enforcing UK and EU competition rules (Chapter I and Chapter II Competition Act 1998 and Articles 81 and 82 EC) in the communications sector.

The Concurrency Working Party (CWP)

Ofcom participates in the CWP which holds bi-monthly meetings and is in regular contact with the OFT in relation to competition investigations in its sector. Ofcom also participates in the Joint Regulators Group.

Ofcom was a signatory to the joint response of the CWP to the DTI's review of concurrency (December 2006). This review proposed further cooperation between the OFT and the regulators including setting up working parties to discuss competition issues, procedure and litigation. Working parties have already been set up for procedure and litigation and Ofcom is an active participant.

Concurrency Arrangements

Three documents deal with the concurrency arrangements between Ofcom and the OFT: the Concurrency Regulations, the Concurrency Guidelines and the Memorandum of Understanding between Ofcom and the OFT of December 2003.

Ofcom and the OFT are obliged to consult each other in areas in which they have concurrent competence (namely investigations in the Communications sector under Chapters 1 and/or II Competition Act and Articles 81 and 82 EC) and agree which of them is to exercise the powers in any given case. If agreement is not reached within a reasonable time, the matter is referred by the OFT to the Secretary of State, who has eight working days in which to decide which organisation is to carry out the investigation.

The OFT and Ofcom consult each other informally, by telephone and email, prior to the use of the formal procedure in the Regulations. To date, Ofcom and the OFT have always reached agreement on who is best placed to act without any need to refer to the Secretary of State.

We expect this arrangement to continue to be a straightforward way of quickly identifying who should do what.

Concurrency Guidelines—who should investigate?

The Concurrency Guidelines state that cases are to be investigated by the authority that is "best placed" to undertake the investigation. The Memorandum of Understanding provides that Ofcom is likely to be best placed to act where:

— there is a desire to ensure consistency of regulation within the ambit of Ofcom's regulatory functions;

— Ofcom may be in a better position to appreciate the relationship between Competition Act cases and the sectoral regulation; and

— the specialist experience and knowledge of the communications sector held by Ofcom staff is required.

The OFT considers that it is likely to be best placed to act if:

— the conduct concerned is potentially criminal;

— there is a covert or hard-core cartel; or

— the case concerned has effects beyond the sectors of Ofcom's expertise.

Power to carry out market investigations

Ofcom also has powers to refer cases to the Competition Commission for a market investigation under Part 4 Enterprise Act in relation to the communications sector. Ofcom used its Enterprise Act powers in relation to the Telecoms Strategic Review to obtain undertakings from BT in lieu of a market investigation reference to the Competition Commission.

Whilst considering making a market reference is not a common event, it remains a very important strategic element in our overall ability to consider competition issues. Having the power to refer markets to the Competition Commission for a detailed market investigation, with the possibility of the Competition Commission imposing behavioural and structural remedies, is an important tool for certain types of competition-related problems relating to features of a market. Again, Ofcom works closely with the OFT to determine concurrency for market investigation references.

2. *Scams Enforcement Group (SEG)*

The Group has been meeting quarterly since September 2005. The Group brings together all the enforcement agencies to develop a coordinated approach to enforcement for tackling scams. The key objectives of the Group are as follows:

— early identification of new scams through sharing information at quarterly meetings;

— practical answers and advice for dealing with scams to pass onto consumers;

— an understanding of each agency's powers, remit, use of legislation, and responsibilities; and

— more legal action to be taken ie prosecutions, but with the intention of all agencies working together to hit the scam with each of our powers.

The SEG has been a valuable forum for the exchange of information on current scams and trends in scams. The focus tends to be on localised issues e.g. bogus Spanish lotteries, MOT fraud and horse betting scams etc but Ofcom has presented to the Group on a number of specific telecoms issues.

The SEG was initially criticised for focusing too much on information-sharing and less on being an "action oriented" and "enforcement focussed" forum. Of late, this has changed, and OFT has moved the focus to being more action-oriented.

As part of the Consumer Protection project, Ofcom held bilateral meetings with the enforcement agencies in order to better understand the approach and priorities to consumer protection/enforcement by other agencies so that we could build this into our protection work. As part of this, Ofcom met OFT twice over the course of the last year.

3. *Mergers*

The OFT is the sole authority with jurisdiction in relation to mergers for the purposes of Part 3 Enterprise Act 2002 (subject to the Secretary of State's power to intervene in public interest cases). In mergers relevant to the communications sector, the OFT will usually ask Ofcom for sector specific advice, and for information (such as market data that Ofcom has as a result of its market reviews, for example) for the purposes of making such an assessment.

Ofcom also makes staff available to brief the OFT team and offer any other assistance. The volume of information can, in some cases, be very considerable and our understanding is that the OFT places considerable value on being able to draw on Ofcom's expertise quickly in this way, given the speed with which it must assess mergers.

Ofcom regularly provides advice in this way to the OFT on mergers in its sector and has a good working relationship with the OFT's mergers team. Ofcom has sector-specific powers in relation to certain acquisitions and mergers on broadcasting issues, in particular the radio ownership rules and the media ownership rules. A recent example is the ongoing analysis of the media ownership rules in the context of the acquisition of shares in ITV by BSkyB. The Secretary of State has also intervened in this case to request Ofcom to report to him on public interest issues and the OFT to report on competition issues.

April 2007

Memorandum submitted by the Office of Fair Trading

OFT's Role, Objectives and Organisational Development

1. The OFT's mission is to make markets work well for consumers and we have a diverse set of tools available to help us achieve this. The bulk of our work consists of analysing and studying markets, enforcing competition and consumer protection law, undertaking advocacy, and working with partners to raise standards and to deliver relevant education programmes to businesses and consumers. We aim not to impose unnecessary burdens or costs on business: such costs could only detract from benefits to consumers and the economy.

2. Competition stimulates businesses to offer the most attractive array of price and quality options possible. Consumers and the economy are best served by vibrant competition in open and well functioning markets, which are in turn driven by empowered and confident consumers. Competition drives productivity, innovation and growth in the economy at large.[18]

3. The Government's vision for the UK competition regime was set out in its White Paper of July 2001 *Productivity and Enterprise: A World Class Competition Regime* (the 2001 White Paper),[19] with a broader consumer perspective in the 1999 White Paper *Modern Markets; Confident Consumers*. The OFT is committed to these aims while being totally independent in all the decisions we take and in advocacy advice we offer to Government. It does not have an overarching statutory remit, rather it has powers and duties under a number of statutes. We operate within a clear understanding of the Government's vision and have adopted the above mission statement and a set of objectives to give coherence and direction to our work.

4. The OFT has developed considerably since those white papers and the legislative reforms that went with them. For the first few years of the new regime the OFT was subject to a target-driven set of service delivery agreements with HMT and was operating on a structure based on legislative tools. This was recognised by the OFT, HMT and the NAO in its 2005 report, as not being an ideal situation and one which was giving incorrect incentives for OFT action. In the 2005 report the NAO recommended that the OFT develop a series of performance indicators which would better demonstrate the effectiveness of its work along with further recommendations which are covered later in this paper.

5. We now have a series of targets and objectives organised within four broad themes: delivering high-impact outcomes, being a centre of excellence and intelligence, working in partnership, and building our internal capability. In the past year we have made radical changes to our internal structure to be better able to meet the challenges we face and ensure that we are more strategic, focused and coherent as an

[18] For recent OFT thinking in the link between competition and productivity see www.oft.gov.uk/shared—oft/economic—research/oft887.pdf

[19] www.archive.official-documents.co.uk/document/cm52/5233/523301.htm

organisation. A key aspect of the new structure is that it puts together project and enforcement work in three sector-focused market groupings covering goods, services, and infrastructure & knowledge economies; supported by dedicated merger, cartel and scambuster teams.

6. Our aim under this new structure is to take a fully market-informed approach to our work: making use of intelligence, evaluation and analysis in order to prioritise our action and resources, and taking a robust risk-based approach to current and future problems. All of this is set out in depth in our Annual Plan 2007–08[20] on which we recently consulted. This consultation on our Annual Plan forms a strategic tier to our engagement with stakeholders, crucial at working level to much that we do. The Annual Plan/ Annual Report process is part of an accountability regime which relies also on Parliamentary scrutiny such as the present inquiry and on judicial oversight mentioned below.

7. For 2007–08, the last year of the CSR 2004, we will be reporting against both the old output-based KPIs and the new outcome-based objectives as agreed with HM Treasury for CSR 2007. We expect that this will mean, as in 2006–07 that we will fail to hit a number of old targets, but in fact provide a better series of outcomes for consumers and the economy.

Powers and Performance in Main areas of Activity

8. *Enforcement of prohibitions on anti-competitive behaviour*. These apply across the economy and are designed to ensure that the process of competition is protected against misuses of market power. The two prohibitions are those of anti-competitive agreements and of abuse of a dominant market position, contained in the Competition Act 1998 (in force since 2000, with additional criminal powers since 2003) and in Articles 81 and 82 of the EC treaty (which OFT has had powers to enforce fully since 2004). The Competition Act also created a specialist independent appeals body (the Competition Appeal Tribunal (CAT)) with a full merits review jurisdiction over OFT decisions on infringement; the CAT's powers have since been further strengthened to allow it to hear appeals on merger and market decisions. This legislation provides strong enforcement powers which had been lacking before, together with a high degree of judicial oversight. The challenge for us now is to make best possible use of these powers.

9. In the first five years since implementation of the Competition Act 1998, the OFT made a number of high profile prohibition decisions (for example, in the markets for toys and games, newspapers, and replica football kit), and imposed fines originally totalling £60 million (consumer benefit set out in paragraph 20). This effective enforcement activity has been built on over the past year in the form of decisive action against unlawful exchange of future fee information by fifty independent schools, and the imposition of multi-million pound fines in the markets for flat roofing, car park resurfacing, window spacer bars and stock check pads.

10. The National Audit Office (NAO) report on the OFT's competition enforcement work (*Enforcing competition in markets*, published in November 2005)[21] has made a valuable contribution to appraising and refocusing our work after several years of experience of the new legislation. The report recognised the OFT's achievements during a period of dramatic change in the legal environment. It also made a number of recommendations on prioritisation and resourcing of OFT's casework; case management in terms of timescales, cost and quality control; and measurement and communication of the OFT's achievements. The OFT accepted all of the NAO's recommendations,[22] and has been working over the past year to implement them, in conjunction with the internal change programme that has taken place over the same period, and directed at the same aim of improving the overall focus and impact of the OFT's work. In October 2006, for example, in line with the NAO's recommendation that the OFT provide more information on how it selects competition cases for investigation, we published refocused criteria explaining how it assesses which cases should be pursued, and whether existing investigations should be continued.[23] The shift towards refocusing of our resources on fewer, high priority competition cases has meant that some 15 investigations have been closed; as noted in paragraph 7 this has also resulted in fewer decisions than originally anticipated. We would have liked to have opened further significant competition enforcement cases last year: we did not for positive reasons (applying NAO recommendations to the whole range of OFT activity as part of the restructuring; fuller consideration of alternative tools, particularly through market studies) but we are looking hard at our planning process in order to achieve more significant new cases.

11. *Merger control*. The OFT investigates completed and anticipated mergers above a certain size to assess their competitive effects. Mergers are referred to the Competition Commission, or the OFT accepts undertakings instead of a reference, where it is believed that they might substantially lessen competition. Since 2003 the OFT has operated under the more competition-focused regime in the Enterprise Act, which

[20] http://www.oft.gov.uk/shared—oft/about—oft/349517/oft881p.pdf

[21] www.nao.org.uk/publications/nao—reports/05-06/0506593.pdf

[22] See OFT evidence before Public Accounts Committee in *Enforcing competition in markets* (42nd Report of 2005–06): www.publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/841/841.pdf

[23] www.oft.gov.uk/shared—oft/press—release—attachments/compcriteria.pdf

took Ministers out of the decision-making process for most mergers. This greatly enhanced the independence of the competition authorities in this area (OFT and the Competition Commission—to whom problematic mergers are referred). And it removed the public interest test from merger cases.[24]

12. The 2005 Global Competition Review Rating Enforcement Survey noted that the OFT was still doing good work in mergers despite the increasing need for in-depth investigations in the first stage. Users praised the decision not to refer the Boots/Alliance Unichem merger as an "exceptional example of a robust stance on a controversial merger" The OFT is currently reviewing and revising its procedural guidance to ensure that best practice continues to be used by the UK's merger regime.

13. *Market investigation references to the Competition Commission*. This is a mechanism (unique to the UK) where markets in which features adversely affect competition (but which cannot be tackled by the prohibitions on anti-competitive agreements) can be investigated and legally enforceable remedies imposed. As with merger control, since 2003 OFT and the CC have been applying a more competition-focused regime, with the former public interest test removed and no role for Ministers in most cases. For market investigations, as for referred mergers, OFT is the initiator with the CC as second-phase reference body: making the system work well requires close co-operation and co-ordination between us.

14. It is early days to say how well the new regime is working. Eight market investigation references have been made (store cards, LPG, home credit, classified directory advertising, NI banking, groceries, PPI, airports): of these, only four have reached the stage of implementation of remedies. Three of these references (home credit, NI banking, PPI) have followed from super-complaints: this is very much in line with Ministers' intentions to empower consumer organisations to bring forward such matters and require OFT to consider what action, if any, it should take.[25] We recognise that there is an onus on OFT (by the references we make) and the CC (by the remedies that come out of them) to demonstrate that the market investigation mechanism (which the UK retained when it caught up with other countries on enforceable prohibitions on business behaviour) is working well and adding value in driving competition in markets.

15. *Enforcement of consumer protection rules*. Consumer protection legislation, like competition law, has been strengthened considerably in recent years, notably since the *Modern Markets; Confident Consumers* white paper. Ensuing changes to the consumer protection landscape include: introduction of controls on distance selling, rationalisation of civil consumer enforcement and strengthening of self-regulation by the Enterprise Act, establishment of Consumer Direct (now part of OFT) providing national consumer advice, and the Unfair Commercial Practices Directive. The OFT enforces some consumer protection rules itself but also has a role to provide strategic leadership for and to champion Local Authority Trading Standards Services (LATSS) to ensure they take a risk-based, proportionate and coordinated approach to their work, including enforcement. Since the Hampton Report[26] much work has been done on getting a proportionate approach to enforcement and one of the real benefits of the OFT/LATSS collaboration is the ability to use intelligence to prioritise the allocation of resources to deal with the worst aspects of consumer detriment. While protecting individual consumers from exploitative practices is important in itself, we believe it also helps strengthen competition in markets: most consumer protection measures will have a competitive effect through increasing consumer information, empowerment and confidence, but individual measures can have more specific effects eg in enabling distance selling channels to compete more strongly with physical retailing. We would like to highlight this interaction and to emphasise the value we believe comes from OFT being both a consumer and competition authority.

16. *Market studies, advocacy, communications*. The OFT has always had the ability to study markets, highlight issues and make recommendations, but those recommendations often had little force. What made it worthwhile for OFT to undertake market studies of the scope and scale it now does was the Government's invitation in the 2001 white paper to competition authorities to advise it on the impact of laws and regulations on competition, and its commitment to respond publicly within 90 days. That provided the assurance that recommendations to Government within a market study report could not simply be ignored. Since then OFT has undertaken some 30 market studies:[27] while there have been other successful outcomes (eg market investigation references to the CC; threat of enforcement action changing behaviour—and recently announced market studies on retail banking and on medicines distribution have aimed at setting possible enforcement action with in a context of better understanding of the market and consideration of alternative options), the majority have resulted in advocacy recommendations to Government. The studies on Public Subsidies and European State Aid Control focused on competition distortion and productivity incentives; the study on Commercial Use of Public information found that more competition in public sector information could benefit the UK economy by around £1billion a year and made recommendations on guidance, regulatory framework and securing compliance; the Pharmaceutical Price Regulation Scheme has been the subject of a major study which recommended reforms aimed both at releasing resources and producing better focused incentives on research and investment. These are examples of where OFT can undertake work that is significant for productivity and economic performance without necessarily going to the CC with a market investigation reference.

[24] Barring exceptional cases where Ministers are involved and take responsibility for considering public interest issues.

[25] For list and details of individual super-complaints: www.oft.gov.uk/advice—and—resources/resource—base/super-complaints/

[26] www.hm-treasury.gov.uk./media/A63/EF/bud05hamptonv1.pdf

[27] For list and details of individual studies: www.oft.gov.uk/advice—and—resources/resource—base/market-studies/

17. The OFT regards this sort of advocacy as very important. We believe that the shape of Government regulation can be more significant for the working of some markets than the behaviour of companies and thus have higher impact. Market studies are not our only means of advocacy. We frequently have direct dialogue with Government departments on the development of new legislation (sometimes as part of our role to advise on competition assessments within the regulatory impact assessment (RIA) process). We also undertake free-standing pieces of work and pursue lines that arise in connection with enforcement or other activity including earlier market studies. Published examples of recent OFT advocacy work are the guide (with the Office of Government Commerce) to public procurers of construction services,[28] a review on schools' uniforms policies,[29] and a recent collaboration with CAA to produce a report for DG Tren on the impact of liberalising airport slot trading.[30]

18. Our advocacy work links across to wider communications. Government will be more inclined to shape regulation to support competition if there is broad public understanding of the value to them of competition in markets. Publicity for OFT successes is important in developing such understanding, as is communication with business. We aim to ensure that effective communications are embedded into all aspects of the OFT's work. In September 2006, a new Business Communications team was established: its aim is to educate and support businesses and to work with them rather than simply telling them about their obligations. It takes forward OFT's drive to promote the benefits of competition to businesses, encouraging compliance and high standards of service to consumers.

Value for Money

19. The OFT's budget for the past year was £55 million (plus £19 million for Consumer Direct). We have achieved efficiency savings of 3% and 5% in the past two years; the saving of £2.5 million last year was a considerable achievement. On funding, we believe strongly that our independence is best preserved through continued funding direct from HM Treasury, rather than through the DTI, as has been mooted in the past.

20. A very conservative analysis of the impact of our competition enforcement work suggested it saved consumers at least £750 million over the years 2000–05 compared to a cost to OFT/CC of £98 million over the same period. The positive impact is likely to be much larger than this, as indicated by preliminary results of our research into the deterrence effect of the UK competition regime. An example of competition case which led to considerable consumer savings was the Replica Football Kit price-fixing case, where our intervention reduced prices significantly and resulted in savings of £15 for an adult shirt.

21. There is evidence of value for money in a number of other areas of our work. The evaluation of the OFT market study into new car warranties showed that the study saved consumers around £150 million, compared to a cost of £300k. An independent evaluation of the OFT training provided to LATSS in the use of the Enterprise Act 2002 found that the training saved local government £5 million per year through increased efficiency even though the total cost of the support is £150k per year. A recent evaluation of the OFT Consumer Code Approval Scheme suggests that the scheme delivers consumer benefits with minimal extra burdens for members.

22. With CSR 2007, we have agreed to deliver measurable benefits to UK consumers of five times our annual budget for all activities excluding Consumer Direct (and 3.5 times budget for Consumer Direct). We are devoting increasing effort to measure the impact of our work through independent evaluations and internal monitoring; evaluation feeds back to better prioritisation and improved outcomes. We have started embedding anticipation of evaluation into our market studies and merger work.

Partnership

23. OFT is at the centre of consumer protection and competition enforcement in the UK but that is a very wide canvas; successful partnerships are crucial to the overall aim of making markets work well for consumers and doing so in ways that are joined up, reduce burdens on business and look for market-driven solutions involving industry where possible. In particular:

- *LATSS*. As noted in para 15, a new relationship and major new championing role for OFT.
- *Consumer organisations*. Shared overall aim of benefiting consumers; key working relationships in areas such as advocacy and super-complaints.
- *Business organisations and self-regulatory bodies*. Shared aim of raising standards, driving out rogue traders and ensuring markets work well, while avoiding unnecesary burdens and costs. Examples are the Consumer Codes Approval Scheme and the Payment Systems Task Force.
- *Competition Commission*. As noted in paras 11 and 13, key complementary roles on mergers and market investigations.

[28] www.oft.gov.uk/shared—oft/reports/comp—policy/oft892.pdf
[29] www.oft.gov.uk/news/press/2006/135-06
[30] www.oft.gov.uk/shared—oft/reports/oft—response—to—consultations/oft832.pdf

— *Sector regulators*. Vital enforcement partnerships, both with those regulators who have concurrent competition powers[31] and those who don't (see below).

— *EU and international*. Partnerships with Commission and member states on enforcement, advocacy relationships, mutual support and learning across international community.

— *Government departments*. Often shared aims in relation to consumers; advocacy as a means for Government to achieve policy aims by best use of markets.

24. Among sector regulators without concurrent competition powers, OFT has greatest dealings with the FSA. That is because, as well as the interaction between OFT's competition powers and FSA's sectoral powers, there is a great deal of interaction on the consumer protection side, arising in part from our joint powers under the Unfair Terms in Consumer Contracts Regulations as well as OFT's role in consumer credit licensing. Both the OFT and FSA are committed to working closely together where our interests overlap, as demonstrated though the OFT/FSA Joint Action Plan published in April and updated in November 2006.[32] Payment protection insurance (PPI) provides a good example of how well the OFT and FSA can work together to tackle key consumer problems. The National Audit Office (NAO) has conducted a review of the FSA, including the way the FSA works with other bodies such as the OFT. The OFT has contributed to this review, which we understand is likely to be published shortly and may provide a useful source of information on co-operation between OFT and FSA.

27 April 2007

Supplementry memorandum submitted by the Office of Fair Trading

CONSUMER DIRECT'S ROLE, OBJECTIVES AND ORGANISATIONAL DEVELOPMENT

1. Consumer Direct (CD) was set up in order to provide better information to consumers and to improve access to consumer advice, a need identified in the 1999 Government White Paper, *Modern Markets: Confident Consumers*. Consumer Direct was set up by the DTI, working closely with Local Authority Trading Standards Services (TSS). The purpose of CD is to provide a uniform level of consumer advice across the whole of Great Britain (Northern Ireland has its own service). OFT took over the management of the service on 1 April 2006. The service is funded by the Treasury and delivered in partnership with TSS.

2. Consumer Direct's objectives are to:

— increase consumers' access to quality-assured advice and information;

— give people the knowledge, tools and confidence to be able to resolve matters themselves;

— improve the quality and coverage of information for Trading Standards and other stakeholders; and

— act as a gateway to other complementary services where further help is required or specialist advice is needed.

3. CD consists of 11 contact centres based in the nine regions of England plus Scotland and Wales, with a central team to co-ordinate the operation based at the OFT offices in central London. There is however seamless delivery to the consumer.

4. Since inheriting the very new service from the DTI a lot of work has been done to consolidate it. This consolidation is taking place at a time of great change when the DTI's proposals for CD to take on Energywatch and Postwatch calls are being implemented. Call volumes are also higher than predicted. The DTI's forecast volume for 2007–08 was 1.8 million calls but that was almost achieved in 2006–07 with 1.7 million calls. Energywatch and Postwatch calls are likely to add between 600,000 and one million extra calls. The OFT is aiming to expand the CD service in a way which enhances consumer protection while providing an efficient and cost-effective service and bearing in mind that calls regarding water services will be absorbed in the near future and the Varney report may well identify other services which could utilise CD.

5. Until 2008 the budget is ring-fenced at £19 million. From 2008–09 budget will be reduced by approximately £1 million at a time when call volumes could have grown to as much as 2.4 million. This presents a challenge to both OFT and its contractors in terms of delivering the service within budget and to specified Key Performance Indicators.

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[31] More information on relationships with concurrent powers regulators, and on international relationships, can be found in an extended version of this evidence submitted to the HoL Committee on Regulators in February: http://www.oft.gov.uk/shared—oft/reports/oft—response—to—consultations/oft907.pdf

[32] These are available at www.oft.gov.uk/shared—oft/about—oft/oft838.pdf and www.oft.gov.uk/shared—oft/about—oft/oft879.pdf

VALUE FOR MONEY

6. In November 2005 the DTI assessed the financial benefits to have a Net Present Value of £124 million to March 2010. Value for money is assured in a number of ways, including:

- enhancing consumer awareness and confidence will improve the GB economy;
- telephone and web-based services are the most accessible and cost-effective channels;
- contact centres at the regional/national level give the best balance between local service and economies of scale;
- output-based payment puts and maintains increased focus on achieving value for money from the operational service;
- easily accessible consumer advice reduces the consumer detriment burden;
- OFT is working to be able to use the data to identify areas of greatest consumer detriment and work with TSS to put resources in place to deal with this at source;
- OFT will utilise the data to prioritise competition and market study work and to identify markets that ought to be targeted for Consumer Codes; and
- see partnership section for other benefits.

PARTNERSHIP

7. CD is an excellent example of successful central/local government partnership working. TSS are key partners in the delivery of the service because they work with the centres to maintain the quality of the advice provided and because CD acts as the first point of call for most departments. CD deals with the basic first-tier complaints for the TSS, which constitute about 80% of calls. This frees up TSS to concentrate on the more complex or criminal 20% of calls. The data collected by CD is also widely used by TSS for enforcement purposes, by the Scam buster teams, by the Regional Intelligence Units and by consumer organisations for trends information. More recently, a pilot is being run to assess the database's usefulness to the police force.

Example

8. CD and OFT staff played a pivotal role in the recent petrol contamination incident. Thousands of people were affected (mainly in the South East) when a batch of contaminated fuel caused their cars to break down. CD centres picked up the seriousness of this very quickly as data built up on the problem. HQ was able to divert excess calls from the South East contact centre to other centres, with uniform lines for advisors to take. OFT and contact centres were able to provide media-trained staff to get advice across to consumers via TV, radio and the press. TSS were kept informed and they took on the role of taking petrol samples for analysis to see what had caused the problem. LACORS and TSI—the LGA coordination body and professional institute respectively- also played a role. Retailers were quick to respond to the problem and offer compensation for affected customers.

23 May 2007

Further supplementary memorandum submitted by the Office of Fair Trading

Thank you for the opportunity for John Fingleton and Colin Brown to present evidence to the Trade and Industry Select Committee on 17 July. I hope you found the session useful.

During the hearing, they promised to provide you with two pieces of supplementary information. Firstly, a written response to the submission received from the Association of British Travel Agents covering why they had withdrawn from the OFT's Consumer Codes Approval Scheme. Secondly, a diagram showing our key enforcement partnerships. I am pleased to enclose both.

We are of course happy to provide any further information the Committee may require.

OFFICE OF FAIR TRADING'S COMMENTS ON THE ASSOCIATION OF BRITISH TRAVEL AGENTS REPORT FOR THE TRADE AND INDUSTRY COMMITTEE ON ITS EXPERIENCE OF THE CONSUMER CODES APPROVAL SCHEME

1. The Consumer Codes Approval Scheme (CCAS) provides a means of approving and promoting consumer codes of practice that meet the OFT's published core criteria and that work well for consumers in practice. It aims to safeguard consumers' interests by helping them identify businesses with higher standards of customer care. By signing up to an OFT Approved code, a trader has agreed to provide the consumer with the benefits that are outlined in the code.

2. ABTA's code of conduct was approved under the scheme on 29 September 2005 and they withdrew from the scheme on 1 September 2006.

COMMENTS

3. ABTA's comments fall into three main categories:

(a) our decision to implement withdrawal of approval procedures, both in light of our subsequent revised approach to financial protection requirements following consultation and in view of the arrangements other code sponsors have in place;

(b) the length of time we took to make a decision to withdraw approval; and

(c) the lack of communication of our revised approach to financial protection requirements.

We deal with each of these issues in turn:

(a) *Our decision to implement withdrawal of approval procedures*

4. Core criterion 3J requires that a code shall address protection of deposits or prepayments as appropriate to the sector. At the time we were considering this issue our policy on this issue was very straightforward—all monies paid over by consumers in the form of a deposit or prepayment were to be protected. ABTA comment that at no time during their involvement with the CCAS was any significant assessment carried out by the OFT of the protection of deposits or prepayments by ABTA or its members. However, ABTA had originally satisfied our requirements by providing us with evidence that it was protecting consumer prepayments and deposits in the event of the financial failure of one of its own members. The CCAS is a self-regulatory scheme and we were satisfied to rely upon the validity of the information provided by ABTA on this issue.

5. We were aware that there were limited circumstances where protection was not provided, for example, where services were provided by airlines or where money was paid for an additional service such as insurance or foreign currency. However, we were content that the arrangements whereby ABTA and its members covered, either through legal requirements or voluntary arrangement, all consumer prepayments and deposits relating to the essential elements of the holiday in the event that one of its own members failed was a reasonable and proportionate manner in which to meet this criterion.

6. Under ABTA's new approach to financial protection consumers are no longer protected in all circumstances when an ABTA member itself fails. We have concluded that as a result of the changes the protection available to ABTA customers is now limited to that which is available to them by law. In our Guidance on the core criteria we state that one of the aims of the CCAS is for consumers to identify businesses that will provide them with protection over and above the law. The particular areas in which we expect codes to provide such benefits may vary depending on the sector in question and the areas in which consumer detriment is most likely to be alleviated by extra protection being given. It is well documented that for the travel sector the protection of prepayments is an area in which increased protection is effective in reducing potential detriment.

7. In November 2005 we issued a consultation on an update of the core criteria, which included a request for views on the value of criterion 3J. This resulted in our retaining this criterion but adopting a more risk-based approach to it. Our new guidance on the core criteria, published in November 2006, includes a non-exhaustive list of the factors to be taken into account when assessing the risk of loss of prepayments/deposits and potential consumer detriment for the transaction or sector. These include factors such as whether or not there is a high risk of loss within the sector identified from consultation with advisory bodies and whether or not there is a history of detriment to consumers within the sector because of loss of deposits/prepayments by traders going out of business or acting fraudulently. Clearly there is a very high degree of risk that consumers will suffer significant loss as a result of business failure in the travel sector unless full protection is made available.

8. ABTA have also carried out their own research into the protection mechanisms provided by other code sponsors working with us under the CCAS. While we are not prescriptive about the methods by which code sponsors meet any of the core criteria, our guidance on meeting core criterion 3J provides examples of acceptable methods by which deposits and prepayments might be protected. ABTA do not provide details of any specific concerns regarding other codes and we are satisfied that all sponsors of approved codes have measures in place that are appropriate to the sectors in which they operate.

(b) *The length of time we took to make a decision to withdraw approval*

9. ABTA informed us in a meeting on 5 January 2006 that they were likely to be making changes to their financial protection arrangements in the near future. They were keen to get soundings from us on the extent of our requirements with regard to financial protection under the scheme. We confirmed that we required all consumer deposits and prepayments taken by ABTA members to be subject to protection.

10. We did not receive detailed information regarding the planned changes to financial protection arrangements until 31 January. This stated that the new arrangements were to be implemented in summer and autumn 2006. We met with ABTA again in early February to discuss the planned changes and expressed

our concern that there appeared to be a significant weakening of protection and that the core criteria may no longer be met. We requested further information about the planned changes which we received on 10 February. Further information was requested on 1 March and received on 7 March.

11. During February ABTA also sent a completely revised version of their code of conduct for our consideration which included various changes in addition to the changes to financial protection. We did not engage in discussions with ABTA about these additional proposals in view of the fact we were considering withdrawing approval. However, we did give these proposals detailed consideration alongside the financial protection issue in the hope that agreement could be reached on both fronts. Some of the proposed changes would have meant that a number of the core criteria of the scheme would no longer have been met and it is likely that negotiations would have been fairly extensive. So while the proposals were not nearly as contentious as the financial protection issue, we do not agree with ABTA's description of them as "not substantive".

12. Prior to deciding whether or not to instigate withdrawal procedures we took legal advice and carried out a full analysis of the file due to the potential risk of challenge to our decision. On 6 April we received further legal advice to instigate the procedures at that stage, rather than request any further information from ABTA. This was on the basis that we were on strong ground to withdraw and also with the view to expediting the process and giving ABTA the earliest possible opportunity to make representations.

13. On 20 April we wrote to ABTA, in response to their request for comments on their proposed additional code changes, advising them that it was not appropriate for us to comment on these while we were "considering the serious implications that the imminent introduction of significant changes to ABTA's financial protection arrangements will have for OFT's ongoing approval of the code". ABTA's reply on 21 April included the acknowledgement that they had "presented the OFT with a significant number of issues to deal with over the last four months". On 24 April ABTA notified us of further, albeit non-substantive, planned changes to its financial protection arrangements.

14. On 26 April ABTA referred another significant code-related matter to us for comment. On 28 April we wrote to ABTA explaining that "our preliminary view is that the introduction of ABTA's new financial protection arrangements later this year is likely to mean that the revised ABTA Code of Conduct will not satisfy the core criteria . . . . . as a result we are considering implementing the procedures for withdrawal of OFT approval". We reiterated that it would not be appropriate to comment on such matters at that stage. This was three months after ABTA first provided us with details of their planned changes.

15. In our letter of 3 May to ABTA, in response to a query from them, we confirmed that they would be given the opportunity to make representations as to why its code should remain approved in the event that we instigated the withdrawal of approval procedures. We also provided a copy of these procedures. On 23 June we wrote to formally inform ABTA that we were commencing withdrawal of approval procedures. On 20 July ABTA wrote to inform us that they would be withdrawing from the scheme on 1 September 2006 (the date they were to introduce their revised code).

16. We did not rush to implement the formal procedures for withdrawal of approval because we were still in discussion with ABTA and we retained some hope that they could be influenced to change their mind regarding implementation of the changes. We believe it was right for us to allow time for both sides to explore the issue, especially as the existing code would remain in operation until the autumn. ABTA were well aware throughout the discussions from January onwards that we regarded the changes as very serious and that unamended the code was unlikely to remain compliant with the core criteria. When we did decide to implement the formal procedure, we had to ensure that it was not vulnerable to legal challenge.

17. This was a complex matter which involved very careful consideration given the seriousness of the consequences and we were concerned to ensure that all relevant matters had been taken into consideration in reaching a decision. Coupled with the fact that ABTA presented us with a significant number of issues within a short period of time which needed to be dealt with in tandem, and that no precedent existed for the consideration of a possible withdrawal of approval, we feel that the time frame in which we acted was reasonable.

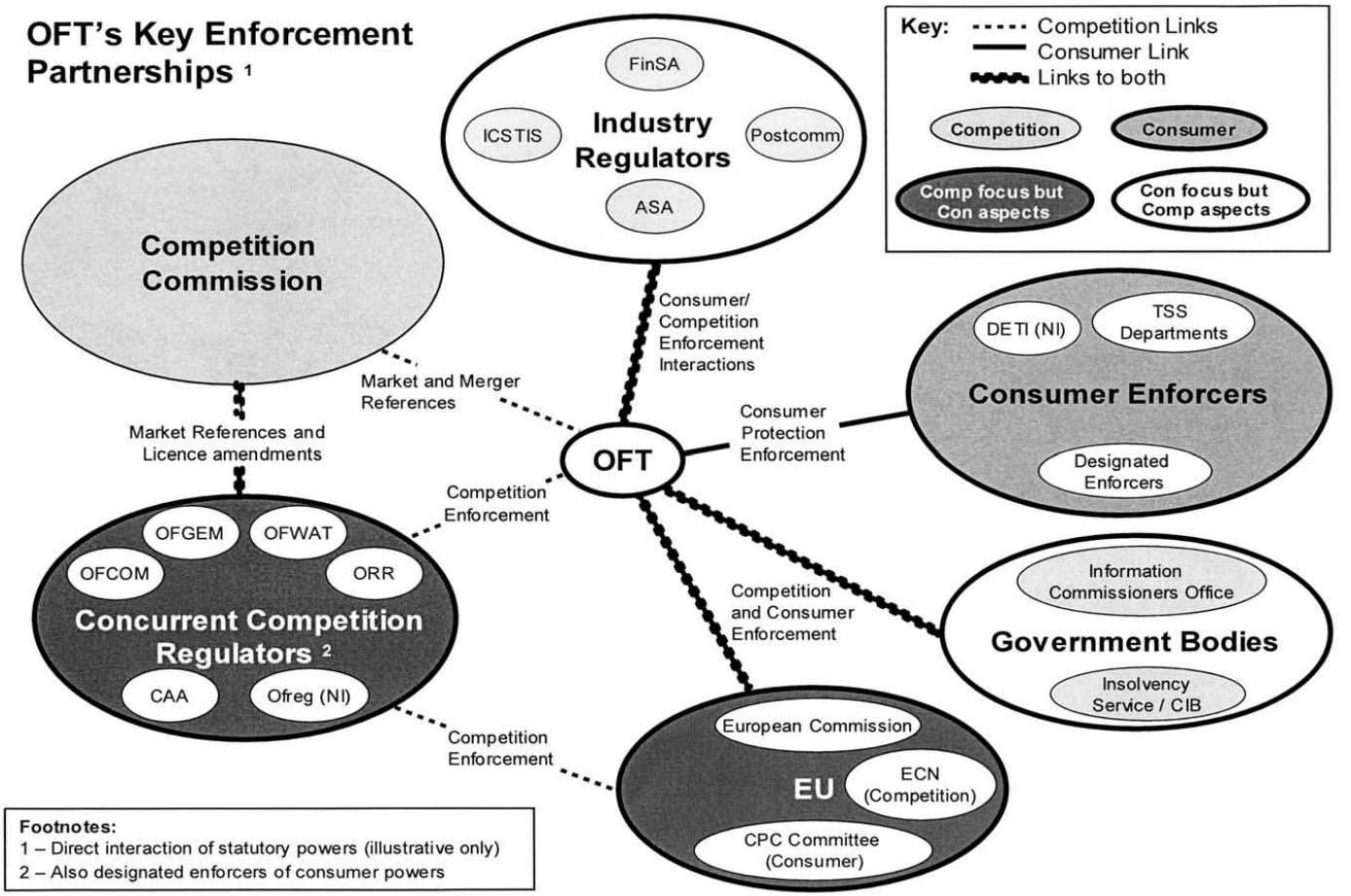
(c) *Lack of communication of our revised approach to financial protection requirements*

18. The intention of the revised approach to criterion 3J is to ensure that a formal protection mechanism exists in all instances other than where the consumer detriment arising from loss of deposits or prepayments relates to minor inconvenience and/or low financial loss or where code sponsors can provide evidence that there are proven, effective safety nets operating within the sector, for example, another business will fulfil the contract. In view of this we did not feel that this minor shift in our approach warranted any dedicated publicity in addition to publication of our response to the consultation and the revised guidance itself. Both of these documents were sent to all stakeholders including of course the code sponsors we work with.

Closing Comment

19. We are surprised and disappointed at ABTA's criticism of our response to its significant change in position on financial protection. We approved their code in September 2005 after a long approval process on which a large amount of resources were spent on both sides. Shortly after approval we financed a large celebrity-backed promotional campaign aimed at raising consumer awareness of the ABTA code. This launched on 12 January 2006. On the eve of that campaign (5 January) ABTA gave us the first indication that they were going to make changes to their code but did not provide details until 31 January, when they told us that the decision to implement these changes had already been made by its board and were therefore non-negotiable. We were surprised by this sudden decision by ABTA taken just at the time we were publicly promoting the existing scheme.

27 July 2007


OFT's Key Enforcement Partnerships 1
Key:
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FinSA
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Industry Regulators
Postcomm
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Competition Commission
Consumer/ Competition Enforcement Interactions
Market and Merger References
Market References and Licence amendments
OFT
Consumer Protection Enforcement
DETI (NI)
TSS Departments
Consumer Enforcers
Designated Enforcers
Competition Enforcement
OFGEM
OFWAT
OFCOM
ORR
Concurrent Competition Regulators 2
CAA
Ofreg (NI)
Competition and Consumer Enforcement
Information Commissioners Office
Government Bodies
Insolvency Service / CIB
Competition Enforcement
European Commission
EU
ECN (Competition)
CPC Committee (Consumer)
Footnotes:
1 – Direct interaction of statutory powers (illustrative only)
2 – Also designated enforcers of consumer powers

Memorandum submitted by Ofwat

Introduction on the Role of Ofwat

1. Ofwat (the Water Services Regulation Authority) is the economic regulator for the water and sewerage sectors in England and Wales. We regulate the 23 water and sewerage companies that operate in England and Wales, inset appointees and water supply licensees.

2. Water and sewerage services are, in most cases, provided by a series of vertically integrated regional and local monopolies. The regulatory regime is designed to act as a proxy for competition in the market for the supply of such services; to stimulate rivalry between firms; and provide benefits to customers that market competition would otherwise provide. Comparative competition underpins the way in which we regulate the water industry. We make cross-industry comparisons to set price limits, to monitor companies' ongoing performance, and to ensure all companies progress towards the best performance.

3. Since April 2005, Ofwat has had an explicit duty to exercise and perform its powers and duties in the manner in which it considers is best calculated, amongst other things, to further the "consumer objective". Namely, this is to protect the interests of consumers, wherever appropriate by promoting competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services. Ofwat also has certain powers, exercisable concurrently with the Office of Fair Trading (OFT), to enforce the Competition Act 1998 (CA98) in the water and sewerage sectors.

Call for Evidence

4. The committee published its call for evidence on 20 March 2007 and asked for written evidence on a number of issues including the OFT's relationships with other bodies involved in consumer protection and regulation of competition. We have set out our views on these issues below.

The Concurrency System

5. Ofwat's main interaction with the OFT is through our Competition Act 1998 (CA98) work. The OFT has prime responsibility for administering the CA98 in the United Kingdom. We have concurrent powers with the OFT to enforce the CA98 in the water and sewerage sectors in England and Wales. Before we can exercise formal powers under CA98, we must agree with the OFT which of us will take the case forward. Once agreement has been reached, no other regulator can exercise formal powers in respect of that case unless that case is formally transferred to it. We also have concurrent power with the OFT to make a Market Investigation Reference (MIR) to the Competition Commission. We can make a MIR where there are reasonable grounds to suspect that any feature of a market, prevents, restricts or distorts competition.

6. We are a member of the Concurrency Working Party (CWP), which consists of the OFT and other concurrent regulators.[33] This group was formed in 1997 to facilitate a consistent approach by the OFT and the concurrent regulators in the exercise of their powers under the CA98. The CWP also considers the practical working arrangements between its members and provides a forum for the discussion of matters of common interest. Outside of CWP meetings, there are frequent informal exchanges between the OFT and the regulators about matters of common interest. However, the information exchanged between concurrent regulators is limited by the confidentiality requirements of the Enterprise Act 2002.

The Joint Regulators Group

7. Ofwat also works with the OFT and other regulators through the regular meetings of the Joint Regulators Group (JRG).[34] These meetings are usually attended at Chief Executive or Director level. The group discusses issues of common interest to regulators, which are wider than the CA98 issues discussed by the CWP for example keeping each other informed about developments in price reviews.

Mergers

8. The OFT obtains and reviews information relating to merger situations and, where necessary, refers any relevant mergers to the Competition Commission (CC) for further investigation. This includes the mandatory reference to the Competition Commission of mergers involving two or more water undertakers that meets the tests set out in the Water Industry Acts 1991 (as amended by the Enterprise Act 2002 and the

[33] Other concurrent regulators are Ofcom (Office of Communications), Ofgem (Office of Gas and Electricity Markets), ORR (Office of Rail Regulation), Ofwat (Water Services Regulation Authority), CAA (Civil Aviation Authority) and OfReg (the Northern Ireland Authority for Utility Regulation). Although it is not a concurrent regulator, Postcomm (Postal Services Commission) sits as an observer on CWP.

[34] Current members of the JRG are: Ofwat, Ofgem, ORR, Postcomm, Ofcom, Ofreg, OFT, CAA, Office of the PPP Arbiter (OPPPA) and WICS (Water Industry Commission for Scotland).

Water Act 2003). Ofwat works closely with the OFT when a merger involves a water undertaker but does not itself have any formal powers in relation to the water merger regime or the general merger regime in the United Kingdom.

Relationship with the OFT

9. We consider that we have a good working relationship with the OFT on CA98 and merger issues. The process for deciding who deals with a particular CA98 complaint currently works well. There have been no instances of Ofwat and the OFT failing to agree on jurisdiction. When conducting our investigations and work on appeals, we have liaised with the OFT and other regulators on specific issues. We have an effective working relationship with the OFT on merger issues.

10. Outside of CWP meetings, there are frequent informal exchanges between the OFT and other regulators about issues of common interest. As the OFT has the main responsibility for the application of the CA98 in the United Kingdom and carries out many more investigations than us, we find drawing on the OFT's experience useful for our own CA98 work. The OFT also learns from us about water-related issues, especially when it receives water-related enquiries. These exchanges have allowed us to develop productive working relationships.

11. We consider our relationship with the OFT at senior level is also working well. The JRG provides a regular, informal forum for discussion and outside the meetings we have good relationships with our counterparts.

Further Improving our Relationship with the OFT

12. In May 2006 the DTI and HM Treasury published a report on concurrent competition powers in sectoral regulation. The report recommended improvements to how concurrency works. We sent our response on 13 December 2006 and we worked with the other CWP members on a joint response, which was sent to DTI on 18 December 2006.[35] These included the following action points:

- The CWP will set up working groups to consider areas of common interest with a view to stimulating discussion, learning from one another and identifying best practice.
- The CWP will set up a voluntary system of focused peer review of particular issues arising in cases.
- The CWP will organise case seminars, where the relevant regulator will present to other regulators the key elements of a recent case and discuss the key issues.
- CWP members will consider opportunities for case-specific co-operative working on a case by case basis.

We are currently working with other CWP members to follow up these recommendations and we have already started implementing them.

13. From this summer the OFT, after consulting with CWP members, will report on an annual basis to the JRG about whether competition law is being applied consistently and pro-actively across all sectors. We will co-operate fully with the OFT in this exercise.

Conclusion

14. We consider that we work well with the OFT and benefit from sharing knowledge and experience. This enables us to ensure consistency and transparency between our applications of competition law. We will maintain this good relationship and work with the OFT to implement the recommendations of the DTI/HMT report. We will maintain our effective relationship with the OFT on merger issues.

26 April 2007

[35] These documents are available on our website at the following address: http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/Content/navigation-Reportonconcurrency

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