

Enforcement of consumer protection legislation

Guidance on Part 8 of the Enterprise Act



The Enterprise Act 2002 received Royal Assent in November 2002. It came into force during the course of 2003.

The Act makes a number of significant reforms to competition law and consumer law enforcement in the UK. The new provisions work alongside the Competition Act 1998 and various pieces of consumer legislation, largely replacing the Fair Trading Act 1973.

The Act established the Office of Fair Trading (the OFT), replacing the former statutory office of the Director General of Fair Trading. The OFT will apply and enforce the new competition and consumer measures alongside the Competition Commission, the sectoral regulators, the Competition Appeal Tribunal, Trading Standards Departments and others.

Office of Fair Trading,
Fleetbank House,
2-6 Salisbury Square,
London EC4Y 8JX
Telephone 020 7211 8000
Fax 020 7211 8800

enquiries 08457 22 44 99
email enquiries@oft.gsi.gov.uk
web www.oft.gov.uk/enterpriseact.htm

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1 Introduction

This guidance

- 1.1** This guidance relates to Part 8 of the Enterprise Act 2002 (the Act). It deals with provisions for the enforcement of consumer protection legislation. This guidance is intended to explain the provisions and how the Office of Fair Trading (the OFT) expects them to work in practice. It applies throughout the UK.
- 1.2** This guidance also explains how the various enforcers empowered under the Act and other interested parties can work together in the most effective way. The guidance should not be regarded as a substitute for or definitive interpretation of Part 8 of the Act and should be read in conjunction with it.
- 1.3** Copies of this guidance and others which relate to other aspects of the Act can also be found on the OFT's website, www.oft.gov.uk
- 1.4** A copy of the Act and further details about it, including the Explanatory Notes, are available from the Department of Trade and Industry's (DTI) website, www.dti.gov.uk/enterprisebill. Copies of the Act can also be bought from Her Majesty's Stationery Office.

Who is the guidance for?

- 1.5** This guidance is intended principally to advise businesses, their legal advisors or representatives, and consumer organisations, of what will happen when enforcers use their powers under Part 8 of the Act. In due course, the OFT intends to produce concise advice leaflets for business and consumers.

Why issue guidance?

- 1.6** The OFT is committed to transparency and wants to explain how it expects Part 8 of the Act to work in practice. Moreover, section 229 of the Act requires the OFT to issue guidance explaining the consumer protection provisions and how they are expected to operate. This guidance fulfils that requirement.

- 1.7** In August 2002, the OFT published a consultation paper containing draft guidance on the consumer reforms contained in the then Enterprise Bill. This sought the views of enforcement bodies, business and consumer organisations. This guidance reflects the comments received. A summary of the responses is available at www.offt.gov.uk
- 1.8** Understandably, some respondents wanted detailed explanations and examples of the application of the new procedures. It is difficult to provide such examples because the powers are new. As experience builds we will add to or revise this guidance. The OFT will consult further on any significant changes as necessary.

What is in the guidance?

- 1.9** The guidance takes the following form:
- **Chapter 2** provides an executive summary of the Part 8 consumer protection provisions, who can use them and the main principles underlying the OFT's enforcement approach.
 - **Chapter 3** is the guidance itself. Part I seeks to provide business and other interested parties with a general explanation of the Part 8 provisions and how they apply. This includes details of other enforcers empowered under Part 8 of the Act and what their powers are. Part II outlines the OFT's general enforcement principles, approach to publicity, and details of action across borders.
 - **Chapter 4** provides details of the Consumer Regulations Website (CRW) project. The project is a partnership, led by the OFT, embracing a range of central and local government bodies which enforce consumer regulations. The CRW provides consumers and business with general information about the application and enforcement of consumer protection legislation specified for the purposes of Part 8 of the Act.
 - **Chapter 5** provides details of how to obtain further copies of this guidance and relevant contact details at the OFT.

2 Executive summary

2.1 It should be noted that this guidance is not a substitute for Part 8 of the Act and should be read in conjunction with it. It should not be regarded as a definitive interpretation of the Part 8 provisions.

What is the impact of Part 8 on consumer protection?

2.2 Part 8 of the Act improves consumer protection by giving enforcers strengthened powers to obtain court orders against businesses that do not comply with their legal obligations to consumers.

2.3 Part 8 establishes a consistent enforcement regime, with a more refined and efficient procedure. This regime will enable injunctive action to be taken against businesses infringing a wide range of consumer protection legislation.

2.4 Businesses that breach certain UK consumer protection laws will be affected by the powers afforded by Part 8.

What is the scope of Part 8?

2.5 Under Part 8 breaches of certain legislation are classed as two types of infringement:

- a domestic infringement, or
- a Community infringement.

2.6 Domestic infringements relate to breaches of a wide range of UK laws listed in a Statutory Instrument made under Part 8. Community infringements are acts or omissions that breach the UK's and other European Economic Area (EEA) states' legislation and other provisions implementing the European Directives listed in Schedule 13 to the Act. This is the same list¹ of Directives contained in Directive 98/27/EC on injunctions for the protection of consumers' interests (the Injunctions Directive)², as last amended by Directive 2002/65/EC. The Secretary of State has the power to specify by Statutory Instrument the particular UK laws that fall within the scope of a Community infringement.

¹ Please see paragraph B.3 of annexe B.

² The Injunctions Directive, including the list of directives it applies to, can be found at http://europa.eu.int/eur-lex/en/consleg/pdf/1998/en_1998L0027_do_001.pdf

The OFT's role

2.7 Part 8 gives the OFT lead enforcement responsibility for action taken in the UK in respect of either type of infringement, including the responsibility for the coordination of action by all enforcers. The OFT is also required to publish advice and information on how the consumer protection provisions of the Act will work.

Who are the enforcers?

2.8 There are three types of enforcers specified in Part 8. These are:

- general enforcers, namely the OFT, the Trading Standards Service in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland (DETI)
- enforcers designated by the Secretary of State, and
- Community enforcers.

General enforcement principles

2.9 The OFT seeks to ensure that business and all other enforcers are aware of its own general principles for the enforcement of this legislation. These principles are that:

- action is **necessary and proportionate**, as set out in the Enforcement Concordat, where there is evidence of a breach of the relevant consumer protection law and of consumer harm stemming from the breach
- business will normally be given **reasonable opportunity** to put matters right
- wherever possible court action will only be taken after undertakings have been sought
- proceedings will be brought by the **most appropriate body**:
 - with **proper regard for other statutory regulatory means and for non statutory mechanisms**, and
 - with regard to the **application of the Home Authority Principle**

- the OFT will ensure that any **action is coordinated** so that the business concerned is not subjected to unnecessary multiple approaches, and
- in line with the OFT's general approach to putting information into the public domain, **publicity** on Part 8 cases will be accurate, balanced and fair.

The OFT's coordination role

2.10 Part 8 gives the OFT a central coordination role to ensure that action is taken by the most appropriate body. The OFT has set up a coordination unit and a system for all enforcers to notify that unit of proposed action under Part 8.

2.11 Coordination and enforcement arrangements will in due course be set out in a formal memorandum between the OFT and all UK enforcers. These arrangements will appear on the OFT website (www.of.gov.uk).

International action

2.12 Part 8 gives effect to the Injunctions Directive in the UK and gives the OFT, other general enforcers and designated enforcers which are public bodies, the power to take action against businesses in certain other European countries that are infringing certain European based consumer protection legislation. In line with its general enforcement principles, the OFT will try to ensure that, wherever possible, enforcement action will be taken by the most relevant Community enforcer (or other regulatory body) in the country where the business is based.

3 The guidance

- 3.1** This guidance relates to Part 8 of the Act which concerns the enforcement of certain consumer protection legislation. Guidance on other Parts of the Act involving the OFT can be obtained from the OFT publications order line (0800 389 3158) or via the OFT website (www.offt.gov.uk).
- 3.2** Part 8 replaced Part III of the Fair Trading Act 1973 and the Stop Now Orders (EC Directive) Regulations 2001 in relation to the UK. Part 8 applies to a wide range of UK consumer protection legislation and also applies to the UK's and other EEA states' legislation implementing those European Directives specified in the Injunctions Directive³.
- 3.3** Part 8 creates a more consistent enforcement regime. This improves consumer protection by giving enforcers strengthened powers to obtain court orders against businesses that fail to comply with their legal obligations to consumers.
- 3.4** Part 8 imposes no new obligations on business. It provides a new enforcement tool and gives enforcement powers to bodies previously unable to take action in certain areas. These powers sit alongside existing regulatory and enforcement activities. Businesses that breach the law need to be clear about the general principles of enforcement that will be applied to decisions to take action under Part 8.
- 3.5** Consumers will benefit from the stronger consumer protection and enforcement regime provided by the legislation. Part 8 gives no new rights to consumers. Consumers who have a dispute will still need to seek redress through a court or an alternative means of dispute resolution. However, where consumers generally are harmed by a breach, the enforcement mechanism of Part 8 allows enforcers to stop the breach quickly so that the collective interests of consumers will be protected in the future.
- 3.6** This guidance will also help other enforcers to ensure a consistent approach to powers under Part 8.

³ Please see footnote 2 on page 4

Part I: Guide to the Part 8 provision

What is Part 8?

3.7 Part 8 of the Act enables specified enforcers to apply to the courts for an **Enforcement Order** to stop a business from breaching certain legislation, where the breach harms the collective interests of consumers. Such breaches are known as either 'domestic infringements' or 'Community infringements'. These are described in more detail at paragraph 3.15.

Collective interests of consumers

3.8 Part 8 is not a means of pursuing individual redress. It applies only to an infringement which harms the collective interests of consumers. It follows that the breach must affect, or have the potential to affect, consumers generally or a group of consumers. This must be established by the evidence gathered by the enforcer. The evidence must demonstrate how a particular infringement has, or may in the future have, an adverse effect upon consumers. It may include an assessment of the importance of the practice or provision in question or of the prevalence and likely impact of the infringement. Some isolated breaches may not be harmful to the collective interest of consumers. However, examples of individual consumer harm may be used as evidence. There is no obligation to establish a specific number of individual consumer complaints or incidents of infringement.

Definition of consumers

3.9 Generally speaking, in order for an enforcer to take action under Part 8 in respect of a breach of the law, the enforcer must be able to demonstrate harm to the collective interests of consumers. However, the types of people who are to be treated as consumers differ between a domestic and a Community infringement.

- 3.10** For a domestic infringement, a consumer is an individual who receives, or seeks to receive, goods or services from a supplier. The supplier must be acting in the course of a business, but does not need to have a place of business in the UK. So a consumer must be an individual who is not acting in the course of a business, although the definition does extend to individuals who are setting up businesses but have not yet begun to trade.
- 3.11** The definition of consumer was deliberately worded to include individuals setting up a business, in order to ensure that operations such as scam homeworking schemes and vanity publishers would be caught by the Part 8 enforcement mechanism. Except in this limited regard, business consumers are not covered.
- 3.12** For a Community infringement, the definition of a 'consumer' is taken from the Injunctions Directive and the European Directives listed in the annexe to that Directive. The specific definition will therefore depend upon the legislation that is being enforced. However, generally speaking a consumer will be a person not exercising a commercial, industrial, craft, or professional activity.
- 3.13** Although a consumer may have a slightly different meaning for the purposes of a Community infringement, Part 8 will not generally cover activities affecting businesses. Some of the legislation that is enforceable under Part 8, such as that dealing with misleading advertising, may also apply to or protect the interests of business. Action under Part 8 will not therefore be used in respect of breaches affecting only businesses. Any enforcement mechanisms contained in the specific legislation will continue to be used in such circumstances.

Definition of business

- 3.14** The definition of 'business' in the Act includes professional practices, activities conducted 'for gain or reward', and operations that charge for the supply of goods or services.

Domestic and Community infringements

3.15 As Part 8 replaced the Stop Now Orders (EC Directive) Regulations 2001, it contains all the necessary provisions to ensure the full implementation of the Injunctions Directive, including the facilitation of cross border enforcement. It is for this reason that the Act distinguishes between domestic infringements (which are concerned with ensuring a sufficient level of enforcement by UK based enforcers) and Community infringements (for which cross-border enforcement is created). The latter also covers domestic action by UK enforcers in respect of breaches of the UK legislation implementing the Directives covered by the Injunctions Directive.

Domestic infringements

3.16 A domestic infringement is a breach:

- that harms the collective interests of consumers in the UK
- that is committed by a person in the course of a business
- of legislation, specified by the Secretary of State in a Statutory Instrument, which is of a particular type as set out in section 211(2)(a) to (g), and must consist of:
 - a contravention of a law which imposes a duty, prohibition or restriction enforceable by criminal proceedings
 - an act or omission in breach of contract
 - an act or omission in breach of a non-contractual duty owed to a person by virtue of an enactment or rule of law and enforceable by civil proceedings
 - an act or omission in respect of which an enactment provides for a remedy or sanction enforceable by civil proceedings
 - an act or omission by a person supplying or seeking to supply goods or services which results in an agreement or security relating to the supply being void or unenforceable to any extent

- an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to exercise a right or remedy relating to the supply where the exercise of the right or remedy is restricted or excluded under or by an enactment
- an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to avoid (to any extent) liability relating to the supply in circumstances where such avoidance is restricted or prevented under an enactment.

3.17 The domestic legislation specified in the Statutory Instrument made under section 211 of the Act is:

Accommodation Agencies Act 1953

Administration of Justice Act 1970 Section 40

Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 Articles 131 to 135 and 168

The Business Advertisements (Disclosure) Order 1977

Business Names Act 1985

Business Names (Northern Ireland) Order 1986

Cancer Act 1939 Sections 4, 5 and 7

Charities Act 1992 Sections 60, 61 and 63

Children and Young Persons Act 1933 Section 7(1) to (2)

Children and Young Persons (Protection from Tobacco) Act 1991 Section 4

Children and Young Person (Protection from Tobacco) (Northern Ireland) Order 1991 Article 5

Children and Young Persons (Scotland) Act 1937 Section 18 (1) to (2)

Companies Act 1985 Sections 348, 349 and 351

Companies (Northern Ireland) Order 1986 Articles 356, 357, and 359

Consumer Credit Act 1974

Consumer Protection Act 1987 Part III

Consumer Protection (Northern Ireland) Order 1987 Part III

Consumer Transactions (Restrictions on Statements) Order 1976

Control of Misleading Advertisements Regulations 1988

Copyright, Designs and Patents Act 1988 Sections 107, 198 and 297A

Estate Agents Act 1979

Explosives Act 1875 Sections 31 and 39

⁴ The OFT believes this should refer to the Explosives (Fireworks) Regulations (Northern Ireland) 2002

Explosives (Fireworks) Regulations (Northern Ireland) 1999 Regulation 11(1)⁴
Fireworks (Safety) Regulations 1997 Regulation 6
Hallmarking Act 1973
Health and Personal Social Services (Northern Ireland) Order 1978 Articles 3 and 4
Intoxicating Substances (Supply) Act 1985
Lotteries and Amusements Act 1976 Part 1 and Section 14
Malicious Communications Act 1988
Malicious Communications (Northern Ireland) Order 1988
Misrepresentation Act 1967
Misrepresentation Act (Northern Ireland) 1967
Mock Auctions Act 1961
National Lottery Act 1993 Sections 13 and 16
Prices Act 1974 Section 4
Property Misdemeanors Act 1991
Protection from Harassment Act 1997
Protection from Harassment (Northern Ireland) Order 1997
Road Traffic Act 1988 Section 75 & 76
Road Traffic (Northern Ireland) Order 1995 Articles 83 and 84
Sale of Goods Act 1979
Supply of Goods (Implied Terms) Act 1973
Supply of Goods and Services Act 1982
Timeshare Act 1992
Tobacco Advertising and Promotion Act 2002
Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002
Torts (Interference with Goods) Act 1977 Section 12
Trade Descriptions Act 1968
Trade Marks Act 1994 Section 92
Unfair Contract Terms Act 1977
Weights and Measures Act 1985 Sections 21 to 23, 25, 28 to 32 and 50(5) and (6)
Weights and Measures (Northern Ireland) Order 1981 Articles 19(1)-(6), 20, 22, 25(2) and 32(5)

3.18 Annexe A gives a brief outline of the provisions.

Community infringements

3.19 A Community infringement is an act or omission which:

- harms the collective interests of consumers, and which:
- contravenes a Directive listed in Schedule 13 of the Act given effect by legislation or other provisions in the UK or any other EEA state, or
- contravenes such legislation or other provisions which provide additional permitted protections. These are consumer protection provisions that are provided in addition to the minimum protections required by the relevant Directives, but which are also permitted by those Directives.

3.20 The Secretary of State has by Statutory Instrument specified the UK laws which give effect to the listed Directives and that which provide additional permitted protections.

3.21 The OFT takes the view that, as regards UK law, the scope of the Community legislation covered includes any provision which directly implements provisions in the Directives listed in the Injunctions Directive or provides greater consumer protection of a related kind.

3.22 The relevant EC Directives and the UK laws specified in the relevant Statutory Instrument made under section 212 of the Act are:

Directives	Specified UK laws
Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising	Control of Misleading Advertisements Regulations 1988 except article 4A (comparative advertisements)
Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises	Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987

Directives	Specified UK laws
Council Directive 87/102/EEC of 22 December 1986 for the approximation of laws, regulations and administrative provisions of the Member States concerning consumer credit as last amended by Directive 98/7/EC	Consumer Credit Act 1974 as it implements the Directive which does not include provisions applying to consumer hire agreements and sections 137 to 140 (extortionate credit)
Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours	Package Travel, Package Holidays and Package Tours Regulations 1992
Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts	Unfair Terms in Consumer Contracts Regulations 1999
Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis	Timeshare Act 1992 as it implements the Directive which does not include its application to timeshare accommodation in caravans.
Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (except article 10)	Consumer Protection (Distance Selling) Regulations 2000
Article 10	Telecommunications (Data Protection and Privacy) Regulations 1999 Part V (use of telecommunications for direct marketing purposes)
Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees	(i) Sections 9 to 11 of the Supply of Goods (Implied Terms) Act 1973, sections 13 to 15 and 15B of the Sale of Goods Act 1979, sections 3 to 5, 11C to 11E and 13 of the Supply of Goods and Services Act 1982 (implied terms as to quality and fitness) and any rule of law in Scotland which provides comparable protection to section 13 of the Supply of Goods and Services Act 1982 (implied terms as to quality and fitness) (ii) Sections 20 and 32 of the Sale of Goods Act 1979

Directives	Specified UK laws
	<p>(iii) Sections 48A to 48F of the Sale of Goods Act 1979, sections 11M, 11N and 11P to 11S of the Supply of Goods and Services Act 1982</p> <p>(iv) Regulation 15 of the Sale and Supply of Goods to Consumers Regulations (consumer guarantees) and articles 4 and 5 of the Consumer Transactions (Restrictions on Statements) Order 1976</p> <p>(v) Section 6(2), 7(1), 7(2), 20(2), 21 and 27(2) of the Unfair Contract Terms Act 1977 and article 3 of the Consumer Transactions (Restrictions on Statements) Order 1976</p>
<p>Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce')</p>	<p>Electronic Commerce (EC Directive) Regulations 2002 regulations 6, 7, 8, 9, and 11 (requirements as to information and orders)</p>

Provisions of Directives	Specified UK laws
<p>Articles 10 to 21 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities as amended by Directive 97/36/EC.</p>	<p>The provisions of the Broadcasting Acts 1990 and 1996 and the code specified below in so far as they implement articles 10 to 21 of the Directive.</p> <p>Broadcasting Act 1990 sections 6(1) in relation to advertising, 8, 9, 60 and 79(4) (rules as to advertising)</p> <p>Broadcasting Act 1996 sections 18(5), 25(5), 30(5) in so far as they apply the provisions of the Broadcasting Act 1990 specified above to digital programme services, digital additional services and qualifying teletext services.</p>
<p>Articles 86 to 100 of the Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use.</p>	<p>Medicines (Advertising) Regulations 1994</p>

3.23 Annexe B gives a brief outline of each area of UK law covered.

Overlap of domestic and Community infringements

3.24 Where legislation is specified as enforceable as a Community infringement, it is not usually also specified for the purposes of a domestic infringement. However, there are some cases where legislation is specified twice to ensure that legislation can be effectively or coherently enforced. For example, it is not possible to draw a clear distinction between some of the provisions of the Consumer Credit Act 1974 that implement the Consumer Credit Directive or which provide additional permitted protections and others that are outside the scope of the Directive.

3.25 The Secretary of State has the power to remove or add European Directives to the Act to reflect future changes to the Directives covered by the Injunctions Directive. As appropriate, any amendments to this guidance will be published on the OFT website.

Bodies empowered to act under Part 8

3.26 Under Part 8 of the Act three types of enforcers are identified:

- general enforcers
- designated enforcers
- Community enforcers.

3.27 In addition to the OFT, the Trading Standards Service in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland (DETI) are specified in Part 8 as having the power to act as **general enforcers**.

3.28 A **designated enforcer** is any public or private body in the UK which the Secretary of State designates in a Statutory Instrument, having identified that s/he thinks the person or body has the protection of the collective interests of consumers as one of its purposes.

3.29 The Secretary of State has designated the following public bodies as Part 8 enforcers by a Statutory Instrument:

- The Civil Aviation Authority
- The Director General of Electricity Supply for Northern Ireland
- The Director General of Gas for Northern Ireland
- The Director General of Telecommunications
- The Director General of Water Services
- The Gas and Electricity Markets Authority
- The Information Commissioner
- The Office of the Rail Regulator.

3.30 A public body will only be granted designated enforcement powers if it is independent. By granting a public body designated enforcement powers, it is deemed that the body is conclusively identified as a public body for the purposes of Part 8. A private organisation may be designated as an enforcer only if it fulfils the criteria specified by the Secretary of State in a Statutory Instrument. The DTI has issued guidance on the process for designating bodies as enforcers under Part 8 and the criteria to be fulfilled by such bodies (<http://www.dti.gov.uk/enterpriseact/pdfs/sec213guide.pdf>)

3.31 The Secretary of State may designate further bodies; the terms by which a body is designated may be limited to particular types of infringement, for example, within their particular sector.

3.32 A **Community enforcer** is a qualified entity for the purposes of the Injunctions Directive which is a body listed in the Official Journal of the European Communities, but which is not a general or a designated enforcer; thus, it will apply only to enforcers from other EEA states.

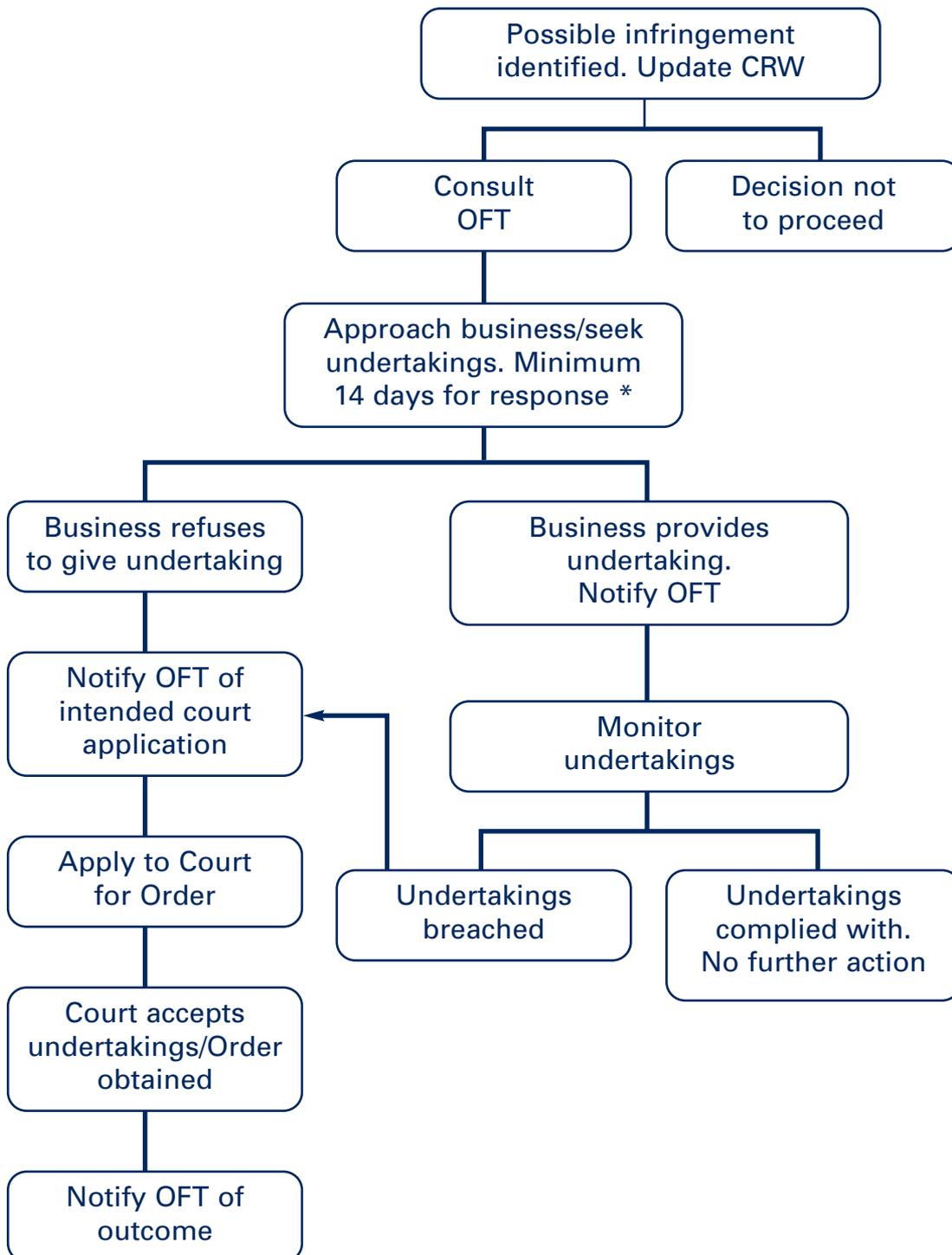
3.33 Any additions to the list of general or designated enforcers will be shown on the OFT's website.

What can the enforcers do?

- 3.34** Proceedings for an **Enforcement Order** can be brought where a business has engaged in conduct that constitutes either a domestic or a Community infringement or is likely to engage in conduct that constitutes a Community infringement. Where the infringer is a company, Part 8 action may be taken against an accessory; this means a person who has a special relationship with the company by virtue of being a director, manager, secretary or other similar officer (or person purporting to act in such a capacity) or a person who is a controller of the company who has consented to or connived in the infringement.
- 3.35** The type of infringement against which action which can be taken differs according to the category of enforcer:
- general enforcers and enforcers designated for all infringements can apply for an order in respect of **all** infringements detailed in Part 8
 - designated enforcers with a limited designation may make an application for an order **only** with respect to those infringements for which they have been designated
 - Community enforcers may make an application for an order **only** with respect to a Community infringement. The court may examine whether the purpose of the Community enforcer justifies it taking action in the particular case, and should the court think that it does not, it may refuse the application on that ground alone.
- 3.36** General enforcers and designated enforcers which are public bodies may make an application for an order in other EEA states in respect of Community infringements.

3.37 The diagram below details the steps that normally need to be followed by an enforcer.

Diagram 3.1: Procedure for Part 8 action by an enforcer



* Enforcers will typically give a business a minimum of 14 days to respond to an approach for consultation, except where the enforcer seeks an interim order, where a minimum of seven days will be given, or where immediate court action is warranted and the OFT considers the application should be made without delay.

Consultation with the business

3.38 All other UK enforcers must consult the OFT before applying to the court for an **Enforcement Order**. [See paragraphs 3.58 and 3.82.]

3.39 Before seeking court action, the OFT or any other UK enforcer will normally attempt to stop an infringement by consulting with the business [see paragraph 3.70]. Part 8 makes certain periods of consultation between an enforcer and business mandatory.

- Where an enforcer wishes to seek an **Enforcement Order**, a **minimum of 14 days** must be allowed for the consultation with the business.
- If the enforcer wishes to apply for an **interim order**, a **minimum of seven days** must be allowed for the consultation with the business.
- In **very urgent cases**, an immediate application can be made to the court with **no time** given for consultation with the business. The OFT must approve this action before a UK enforcer can dispense with the need to consult.

3.40 The OFT would be likely to approve or take immediate action without consultation if it were satisfied that the case was urgent and that immediate action was vital to safeguard consumers' interests. This is unlikely to be a frequent occurrence. In many cases, provided that a positive outcome appears possible, the consultation period may be longer than the minimum set out in Part 8.

3.41 Although the OFT will have an express duty normally to consult with a business before taking action⁵ this approach is not new. In all cases where the remedy could be an injunction the OFT's practice has been to approach businesses first to attempt to resolve matters without court action.

Undertakings

3.42 Undertakings can be given either to an enforcer or to the court.

⁵ See section 214 of the Act

3.43 An **enforcer** may accept an **undertaking** from any business against which proceedings could be brought. The undertaking would be from a business that has engaged, or is engaging, in conduct that constitutes an infringement or, with reference to a Community infringement, is likely to do so. Any breach of such an undertaking would be drawn to the attention of the court in any further action arising from a subsequent infringement. The court would have regard to this when determining whether to make an Enforcement Order.

3.44 In most cases the undertaking would be the outcome of consultation between the business and the enforcer. The OFT will consider on a case by case basis whether publicity should be given to any undertakings accepted. [see paragraph 3.85.]

3.45 The undertaking, whether to an enforcer or to the court [see paragraph 3.46 below], must require that the business:

- does not continue or repeat the conduct
- does not engage in the conduct in the course of his business, or another business, and
- does not consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship, for example, a director or a controller. [see paragraph 3.34.]

Court proceedings

3.46 The OFT or any enforcer may apply for an **Enforcement Order** where:

- resolution is not possible through undertakings, or
- it is a matter of urgency. [see paragraphs 3.40 and 3.73.]

3.47 Where proceedings are brought against a business, the **court** may accept an **undertaking** from the business instead of making an enforcement order. As part of the undertaking to the court the business may be required to publish, in a manner that the court thinks appropriate, the terms of the undertaking (in full or in part) and a corrective statement. A subsequent breach of an undertaking to the court could result in contempt of court proceedings, but this is not the case with an undertaking given to an enforcer.

- 3.48** The case will be heard in the High Court or County Court (the Court of Session or Sheriff Court in Scotland). If the OFT or the enforcer establishes its case and an order is made or undertakings given, the business will normally be required by the court to pay the enforcer's costs. If the OFT or the enforcer does not succeed and no order is made, the enforcer will normally be ordered by the court to pay the business's costs. Further details of the court procedures and information about costs are available at www.courtsservice.gov.uk for England and Wales, at www.scotcourts.gov.uk for Scotland, and at <http://www.courtsni.gov.uk> for Northern Ireland. More detailed information on the Civil Procedure Rules can be found at www.lcd.gov.uk.
- 3.49** The business will be informed about the proceedings and will always have the opportunity to dispute the enforcer's case and to make representations to the court. If the circumstances warrant it, the court may be asked to make an interim order [see paragraph 3.39]. This is a temporary order made to continue until the court finally determines whether or not to make an enforcement order. Such an order is normally therefore made to last until the final hearing. At the final hearing, if the OFT or enforcer succeeds, the court will make a final order, known as an **Enforcement Order**, to require the cessation of or otherwise prohibit the infringement. The court may also make an order against an accessory to prevent him or her from carrying out the conduct, whether in the current business or any other business and from consenting to or conniving in the carrying out of such conduct by any other body corporate with which he has a special relationship.
- 3.50** An order made in a court in one jurisdiction of the UK (i.e. England and Wales, Scotland or Northern Ireland) has effect in any other jurisdiction of the UK as if it were made by a court in that jurisdiction.
- 3.51** Failure to comply with the Enforcement Order could be found by a court to be contempt of court, which could lead to a fine or imprisonment.

Orders against bodies corporate

3.52 If the court makes an order, or an interim order, against a body corporate, the court may direct that the order is binding upon all other members of any group of interconnected companies of which it is a member. If the company that is subject to an order, or interim order, becomes a member of a group of interconnected companies after the order is made, or an existing group of which it is a member is enlarged, the OFT has the power to apply to the court for the order to be binding on all other members including new ones. Two bodies corporate are interconnected if one of them is a subsidiary of the other, or if both are subsidiaries of the same company.

Access to information

3.53 Part 8 provides the OFT and other general and designated enforcers which are public bodies with a statutory power to require information, including documents, by means of a notice served on any person⁶.

⁶ See sections 224 and 225 of the Act

3.54 A notice requiring information can be sent for a number of purposes. It can require information to enable the enforcer to establish whether to exercise its powers under Part 8. For example, certain information may be required to determine whether a complaint is the result of an isolated mistake by the trader or part of a deliberate pattern of unfair conduct.

3.55 A notice can also require information for the purpose of monitoring compliance with orders, interim orders, and undertakings.

3.56 General enforcers and designated public enforcers can only require information for the purposes of exercising or considering whether to exercise their own functions under Part 8 or to monitor compliance with an order or undertaking they have obtained. The OFT has wider powers to require information to assist Community enforcers or designated enforcers that are private bodies who do not have the power to require the information themselves.

3.57 If a person fails to provide the information requested within the specified time, the enforcer may apply to the court for an order requiring the person to provide the information. Should the court make such an order, it may award costs against the person or, if the person is a corporate body or an association, against any of its officers responsible for withholding the information.

Coordination provisions

3.58 Part 8 gives the OFT a central coordination role to ensure that action is taken by the most appropriate body and is not duplicated⁷. General and designated enforcers who want to apply for an enforcement order must first consult with the OFT as well as with the business against which they want to proceed. If more than one enforcer is contemplating bringing proceedings, the OFT may direct which body may bring proceedings or that only the OFT may do so. The OFT will do its best to assist the coordination of proceedings under Part 8 by making appropriate arrangements with other enforcers. These arrangements, in the form of memoranda of understanding, will be made public on the OFT's website (www.of.gov.uk).

3.59 Although the OFT must be consulted by all general and designated enforcers, it is not envisaged that the OFT will usually become directly involved in the discussions with the business.

International proceedings

3.60 As Part 8 is the means by which the Injunctions Directive has effect in the UK, it contains provisions providing a statutory enforcement mechanism for action across national borders in respect of Community infringements. This means that action is possible on a Europe wide basis to protect consumers in one Member State from the unlawful activities of businesses based in another. This provides an important additional means of consumer protection. Those states implementing the Injunctions Directive include all parties to the EEA Agreement - the Member States of the European Union and three of the four Member States of the European Free Trade Association. A full list is on the OFT's website (<http://www.of.gov.uk/Business/Enterprise+Act/default.htm>).

⁷ See section 216 of the Act

- 3.61** All general enforcers and public designated enforcers will be able to bring proceedings in other EEA states for an order stopping or prohibiting Community infringements. For this purpose, they may cooperate with Community enforcers in those other states.
- 3.62** UK general and designated enforcers may cooperate with Community enforcers in other EEA states when that Community enforcer takes Part 8 action in the UK in respect of Community infringements.
- 3.63** General enforcers and enforcers that are designated in respect of Community infringements are able to take action in the UK to prevent Community infringements. This means that they can apply to the court on behalf of Community enforcers from other Member States to enable the protection of consumers in those Member States.
- 3.64** When a business in another Member State harms the collective interests of UK consumers, the OFT will, in normal circumstances, ask the most relevant Community enforcer in the Member State where the business is based, to take enforcement action on behalf of the OFT for the protection of UK consumers. Where a business in the UK harms the interests of consumers in another EEA state, a Community enforcer may ask a UK general enforcer or a relevant designated enforcer to take action on its behalf. However, it should be noted that a Community enforcer is entitled to bring proceedings before a court in the UK without the consent of the OFT. Any Community enforcer doing so must consult with the OFT and the business in the same way as any UK enforcer [see paragraph 3.82].

3.65 There is scope within Part 8 for cross border protection of consumers in respect of domestic infringements where goods or services are supplied wholly or partly outside the UK. In such cases, they are taken to be supplied to or for a person in the UK if the arrangements are made by any means, including electronic, and:

- at the time the arrangements are made the person seeking the supply is in the UK, or
- at the time the goods or services are supplied (or should be supplied as specified in the arrangements) the person responsible for the supply is in or has a place of business in the UK.

However, although this enables UK enforcers to take action to prevent infringements in such cases under the domestic infringement provisions, it does not give any powers to those enforcers to apply to the courts abroad to prevent these breaches.

Notification of convictions and judgments

3.66 Under Part 8, courts in the UK have the power to notify the OFT of convictions and judgments which are relevant to the OFT's functions under Part 8 and under the Estate Agents Act and of which it might not otherwise be aware. The purpose of this is to enable the OFT to decide whether to exercise its functions under Part 8 or those under the Estate Agents Act. The Consumer Credit Act contains its own similar provision for functions exercised by the OFT.

Part II: How the OFT expects the Part 8 provisions to operate

General enforcement principles

3.67 Through this guidance the OFT seeks to ensure that all enforcers are aware of the OFT's own general principles for the enforcement of the provisions of Part 8. The OFT has the power to coordinate and will do its best to ensure that consistency in enforcement is achieved. But in many respects each enforcer has to make its own decisions on enforcement action.

3.68 The principles that the OFT will itself apply and will encourage others to follow are that:

- action is **necessary and proportionate**, as set out in the Enforcement Concordat, where there is evidence of a breach of the relevant consumer protection law and of consumer harm stemming from the breach
- business will normally be given a **reasonable opportunity** to put matters right
- wherever possible court action will only be taken after undertakings have been sought
- proceedings are brought by the **most appropriate body**:
 - with **proper regard for other statutory regulatory means and non-statutory mechanisms**, and
 - with regard to the **application of the Home Authority Principle**.
- the OFT will ensure that any action is coordinated so that the business concerned is not subject to unnecessary multiple approaches, and
- in line with the OFT's general approach to putting information into the public domain, **publicity** on Part 8 cases will be accurate, balanced and fair.

Necessary and proportionate action

3.69 The OFT, the Trading Standards Service and some of the designated enforcers have publicly accepted the principles of good enforcement set out in the Cabinet Office's **Enforcement Concordat**. The full text of the concordat and the current list of subscribers can be seen at www.cabinet-office.gov.uk/regulation/publicsector/enforcement/concordat.htm. The OFT and all who subscribe to the concordat are committed to good enforcement policies and procedures. On the basis that prevention is better than cure, enforcement includes helping businesses to meet their obligations through giving advice and assistance with compliance. But where the risks, as shown by the evidence, and the potential for consumer harm are greater because businesses are uncooperative, then more formal enforcement action will be taken proportionate to the risks to consumers.

Reasonable opportunity

3.70 Except where urgent action is necessary, businesses will always be given a reasonable opportunity to stop the infringement before the OFT seeks an Enforcement Order. The effect of Part 8 is that in many cases there will be a **minimum period of 14 days** for consultation with the business. If the enforcer wishes to apply for an interim order, the period can be shortened to at least seven days. In very urgent cases, an immediate application can be made to the court without consultation with the business, but the OFT **must** approve this action before an enforcer can dispense with the need to consult. The OFT expects that immediate applications would only be sought in exceptional cases. The OFT or any other enforcer may accept an undertaking from any person against whom it can bring proceedings. Such an undertaking would be the outcome of consultation between the business and the enforcer.

- 3.71** In most cases the process will begin with a letter to the business. This letter will:
- provide details of the business activity or practice causing concern
 - clearly state the consumer protection laws the business activity or practice breaches
 - give a brief explanation of the Part 8 provisions being used, and state what is the minimum period available for consultation in that case
 - refer business to this guidance for more information on Part 8
 - invite the business to open a dialogue, and
 - outline the consequences to the business of a failure to respond to this request.
- 3.72** Some of the relevant factors in assessing whether the business activity warrants action are:
- the intent of the business - was the breach deliberate?
 - the history of breaches by the business - is this a problem trader?
 - the damage being done to consumers - for example, is there targeting of consumers who will suffer considerable detriment or be otherwise harmed unless action is taken?
- 3.73** The OFT does not expect that many cases would warrant action dispensing with the minimum periods for consultation. An example of the kind of situation that might warrant such action would be if a business who had in the past committed serious breaches of the law was about to launch a new marketing campaign that would mislead consumers about their rights. Under the Stop Now Regulations, at the date of publication of this guidance, no cases have arisen where the OFT has taken this action.
- 3.74** If a satisfactory undertaking were accepted, no proceedings would be brought against the person giving and complying with the undertaking.

3.75 Where no satisfactory undertaking has been accepted, or where breaches are more serious, proceedings may be taken for an Enforcement Order.

Proceedings brought by the most appropriate body

3.76 The OFT will follow the principle that action under Part 8 should be taken by the most appropriate body and will encourage others to do the same. This means that, in nearly all cases, where local or sectoral action is required to prevent what is a local or sectoral problem, the relevant local or sectoral enforcer will take the action. Where the coordination procedure reveals that a number of enforcers are contemplating action against a single business, the OFT may direct which enforcer should bring the proceedings or that only the OFT may do so. This will avoid the possibility of simultaneous multiple actions against a business failing to comply with the relevant legislation.

Proper regard for other statutory and non-statutory mechanisms

3.77 In instances where there are well established and effective systems of statutory and non-statutory regulation in place in the UK, for example, medicines and broadcast advertising, the OFT will refer complaints and cases about UK businesses to the relevant regulator for them to take action. The OFT will encourage other enforcers to do the same. Where action is sought against the practices of a business in another EEA state and the relevant UK regulators do not have effective powers to act, the OFT, other general enforcers and any relevantly designated public enforcers may be better placed to act.

3.78 Similarly, the Control of Misleading Advertisements Regulations 1988 (the 1988 Regulations) require the OFT to have regard to whether the misleading advertising can be stopped by the **established means** before itself considering the matter. The established means prior to the 1988 Regulations were the British Codes of Advertising and Sales Promotion Advertising enforced by the Advertising Standards Authority (ASA) and the powers of the Trading Standards Service to prosecute offences under the Trade Descriptions Act and Part III of the Consumer Protection Act 1987 (misleading pricing). The OFT has

agreed case handling principles with the ASA which provide that the OFT will normally refer cases to the ASA and will encourage other enforcers to consider doing so too. In exceptional cases, however, where there is clear evidence of an act contrary to the relevant legislation, which harms the collective interests of consumers, the OFT may consider it needs to act straightaway using the Part 8 powers. The OFT will discuss with the ASA in advance the use of Part 8 powers where these are considered best suited to deal with the problem rather than referral to the ASA.

Application of the Home Authority Principle

- 3.79** The **Home Authority Principle** (the Principle) has been developed by LACORS (Local Authorities Coordinators of Regulatory Services), to ensure good enforcement practice. The home authority acts as a valued source of advice and information for businesses about compliance issues. The Principle commands the support of local authorities, central government, trade and industry associations, and consumer and professional regulatory bodies. It encourages an authority to place special emphasis on the legal compliance of goods and services produced by a business in its area by providing businesses with a source of guidance and support. It supports efficient liaison between local trading standards departments and provides a system for the resolution of problems and disputes at source, including the taking of action to prevent and stop infringements of the law and protect the public. The text can be seen at <http://www.lacors.gov.uk/pages/trade/HAPrinciple.asp>
- 3.80** It is not intended that Part 8 will change the circumstances when a local trading standards department might consider bringing a prosecution where there are breaches of existing consumer protection legislation. The OFT would expect local trading standards departments to continue to take primary responsibility and to have regard to the Principle as well as to the Enforcement Concordat when doing so. The OFT would itself have regard to the Principle and expect all enforcers to do the same.

3.81 The OFT will encourage enforcers to use the home authority as a valued source of advice and information about businesses and recommends that the home authority should be consulted about the business well in advance of any action. However, the Principle is voluntary and each enforcer must make its own decisions on enforcement action.

Action is coordinated

3.82 The OFT has set up a coordination unit and a system for all enforcers to notify proposed action under Part 8. This fulfils its role as central coordinator and assists the consultation process. The objective is to avoid multiple actions against a business. Other enforcers and the OFT will work together with businesses to try to bring an end to the infringement.

3.83 The OFT, in partnership with LACORS and DTI, has established a training programme to help trading standards officers to use the Stop Now Regulations effectively. Similar arrangements will be made for Part 8. Also, the OFT, in partnership with other enforcers, has developed the Consumer Regulations Website to enable enforcers to coordinate action⁸.

3.84 The OFT is drawing up memoranda of understanding or concordats with all the other enforcers so that the principles that the OFT will apply to its own work under the Part 8 provisions are set out clearly. The arrangements for coordination will also be set out. The signed memoranda will be made public and placed on the OFT's website.

⁸ The website partners are OFT, Consumers' Association, the Information Commissioner, Financial Services Authority, OFTEL, the Office of Gas and Electricity Markets and the Trading Standards Service in Great Britain. See chapter 4.

Policy on publicity for completed Part 8 cases

3.85 The OFT is committed to transparency and will usually put information on completed Part 8 cases into the public domain. Publicity will be accurate, balanced and fair. The factors that may be taken into account when considering publicity on Part 8 cases are:

- any legal restrictions on disclosure of information
- public accountability
- monitoring the future conduct of individual businesses
- deterring other businesses from engaging in the kind of conduct covered by the orders or undertakings obtained
- warning consumers about practices that are detrimental to their interests
- increasing consumers' awareness of their rights and how to exercise them
- facilitating complaints about further breaches, and
- educating the market.

3.86 In the case of undertakings to the OFT where no infringement is necessarily admitted, the OFT may still publish the undertakings. However, care will be taken to indicate accurately, the full circumstances and the basis upon which the undertaking was given. Information about completed cases will be publicised by placing it on the public part of the Consumer Regulations Website (see chapter 4) or by issue of a news release. Publicity will not be given to cases where the OFT considers that no breach could properly be established and where no undertaking was obtained from the business.

International action

Where UK consumers have complaints about a business based in another Member State

3.87 In accordance with its general enforcement principles, the OFT will try to ensure that wherever possible, enforcement action will be taken by the most relevant Community enforcer in the state where the business is based. In these cases the role of the OFT will be to collate and provide evidence of a Community infringement to the relevant Community enforcer, where we have the disclosure powers to be able to do so, and to liaise and cooperate in order to facilitate the most appropriate course of action. But where no Community enforcer exists, or none is willing to take action, the OFT will consider initiating proceedings in another Member State. In doing so, the OFT will follow the legislative and judicial procedures of the host state. Unless the case warrants immediate Part 8 action, the OFT will, in accordance with its general enforcement principles, seek to achieve a cessation of a breach in consultation with the business.

Where consumers in other Member States have complaints about a business based in the UK

3.88 When a Community enforcer refers a case, the OFT will review the evidence provided and assess whether it supports evidence of a Community infringement. Where it is appropriate to bring a case in the UK, the process adopted will be the same as that which the OFT would apply to cases of infringements harming UK consumers. Where it is decided that the evidence does not support action, the Community enforcer will be advised accordingly. Where the case is relevant to another general or designated enforcer, as set out in the general enforcement principles, the case may be referred to them. The OFT expects that, in most cases, it or another enforcer will seek to stop the infringement through consultation. There may be occasions, however, where a need to bring proceedings without delay is identified. Although the OFT must be notified and consulted, as must the business (unless the OFT directs otherwise), a Community enforcer is entitled in all cases where an infringement is demonstrated to bring proceedings before a UK court without the consent of the OFT.

3.89 An order obtained in one EEA state against a particular business is generally not enforceable in another EEA state. The enforcer would either have to go back to the court that made the order to enforce it or bring fresh proceedings in the second EEA state.

Further information and advice

3.90 This guidance may be subject to amendment, revision or replacement. In the case of major revisions or amendments, the OFT will consult such persons as it thinks are representative of those affected by Part 8 of the Act.

3.91 It should be noted that this guidance is not a substitute for Part 8 of the Enterprise Act 2002 and should be read in conjunction with it. It should not be regarded as a definitive interpretation of the Part 8 provisions.

3.92 As Part 8 is applied and experience develops, further advice and information will be published.

4 Consumer Regulations Website project

- 4.1** The OFT recognises the importance for business, enforcers and consumers to be able to access information about Part 8 of the Act and subsequent enforcement action. It is therefore expanding the Consumer Regulations Website (CRW) to meet those needs.
- 4.2** The CRW contains general information about the application and enforcement of Part 8 of the Act. There is guidance to help businesses comply and information for business and consumers about the outcome of formal and informal action already completed. The CRW has a restricted password protected area where Part 8 enforcers can share information about investigations, possible actions and outcomes. This will assist coordination and consultation with businesses under investigation, and will help to avoid multiple actions against a business.
- 4.3** The CRW has been developed stage by stage to ensure that the system is successful and provides the expected benefits. The full system was implemented across an initial pilot group of 20 partners in September 2002. In April 2003 the CRW was extended to all qualified enforcement partners⁹. A separate training programme was provided to enable all enforcement partners to participate fully in maximising the use of the CRW as a regulatory tool.

⁹ The term 'enforcement partners' is used to emphasise the joint partnership between members of the enforcement community who are all committed in sharing enforcement information. These partners include the Part 8 enforcers and the Qualifying Bodies under the UTCCRs.

5 Contacts at the OFT

5.1 Further copies of this guidance and the *Response to the Consultation on the Consumer Reforms* can be downloaded from the OFT's website at www.offt.gov.uk/enterpriseact.htm

5.2 The Enterprise Act Part 8 case coordination and liaison section was set up to allow all enforcers to notify the OFT of proposed action under the Part 8 reforms. They can be contacted by:

writing to Enterprise Part 8 Case Coordination and Liaison Section
 Consumer Regulation Enforcement Division
 Office of Fair Trading
 Fleetbank House
 2-6 Salisbury Square
 London
 EC4Y 8JX

phoning 020 7211 8198

faxing 020 7211 8150

5.3 The Special Investigations and Projects section provides guidance on the application of consumer legislation. They can be contacted by:

writing to Special Investigations and Projects
 Consumer Regulation Enforcement Division
 Office of Fair Trading
 (address as above)

phoning 020 7211 8198

Annexe A

Areas of law covered by domestic infringements

- A.1** The following is intended only to be a brief summary of the relevant law which has been specified by the Secretary of State as covered by the domestic infringement provisions contained within Part 8 of the Enterprise Act 2002. You should seek legal advice if you need more detailed information about the legislation. Your local authority Trading Standards Department or Business Link may also be able to provide advice. The OFT publishes free guidance booklets on some of the legislation.
- A.2** Whilst legislation may already contain provisions for the prosecution of offences or other means of enforcement of obligations, under Part 8 any general or designated enforcer (if such action is within the scope of its designation) can take action against businesses in respect of the infringements detailed below.

Accommodation Agencies Act 1953

- A.3** The Act makes it an offence to demand or accept money for registering or undertaking to register the name or requirements of anyone looking for a property to rent. It is also an offence to demand or accept money for supplying or undertaking to supply the details of a property to let. A further offence is committed under this Act by the issuing of any advertisement, list or other document describing any house as being to let without the authority of the owner of the property or their agent.
- A.4** Responsibility for prosecuting these offences is not specifically allocated, but in practice the Trading Standards Service generally prosecutes the offences.
- A.5** The Act extends to Great Britain; there is no equivalent legislation in Northern Ireland.

Administration of Justice Act 1970 Section 40

- A.6** Section 40 of the Administration of Justice Act 1970 is concerned with prohibiting the unlawful harassment of debtors or alleged debtors. This not only includes making threatening demands but also false representations that criminal proceedings can be brought for failure to pay, or pretending to have official status, in collecting debts.
- A.7** Contravention of the prohibition above is an offence. Prosecutions may be brought by the Trading Standards Service.
- A.8** Section 40 of the Act extends to England and Wales.

The Business Advertisements (Disclosure) Order 1977

- A.9** The Business Advertisements (Disclosure) Order 1977 provides protection for consumers against traders masquerading as private sellers. The Order prohibits traders from advertising goods for sale unless it is reasonably clear to consumers that they are acting in the course of a business. This may be indicated by the contents of the advertisement, its format or size, the place or manner of its publication or otherwise. The Order applies whether the advertiser is acting on his own behalf or on behalf of someone else.
- A.10** The Order does not apply to advertisements for sales by auction or competitive tender or to advertisements for the sale of agricultural products and game produced or taken by the seller.
- A.11** Contravention of the prohibition above is an offence. Prosecutions are brought by the Trading Standards Service.
- A.12** The Order applies to the whole of the UK.

Business Names Act 1985

- A.13** The Act requires businesses which trade under a name other than the proprietor's true name (the individual's surname with or without forenames or initials, all the partners' surnames with or without forenames or initials or the full company name as the case may be) to prominently display the names and addresses of the proprietor or proprietors at business premises, to clearly state them on business stationery and documentation and to provide them in writing to any person dealing with the business who asks for them.
- A.14** The Act also controls the use of certain specified words that may be used in business names (for example, 'university' and 'charity') or other names that may give an impression that the business is connected with government.
- A.15** Breach of the provisions above is an offence and there are also civil remedies available for certain breaches. Responsibility for prosecuting these offences is not specifically allocated, but in practice the Trading Standards Service generally prosecutes breaches.
- A.16** The Act extends to Great Britain. The equivalent provisions in Northern Ireland are the Business Names (Northern Ireland) Order 1986.

Cancer Act 1939 – Sections 4, 5 & 7

- A.17** Under the Cancer Act 1939 certain advertisements which purport to offer cures or treatment for cancer or prescribe any remedy, or give and advice in connection with its treatment are prohibited.
- A.18** Contravention of the above is an offence.

A.19 The usual routes for dealing with claims as to the treatment of and cures for cancer include action by the Medicines Control Agency, the Advertising Standards Authority, Trading Standards Departments and the OFT. In tackling any type of misleading claim the OFT would ordinarily rely in the first instance on the 'established means' as referred to in Regulation 4(3) of the Control of Misleading Advertisements Regulations 1988 (i.e. the Advertising Standards Authority).

A.20 This Act extends to Great Britain only.

Charities Act 1992 – sections 60, 61 and 63

A.21 Section 60 of the Charities Act 1992 makes it an offence for certain professional fund raisers to fail to indicate the institutions benefiting and if more than one is benefiting the proportions in which each institution will benefit. This includes a clear and visible statement of the name(s) of the institution, and in general terms how the fundraiser's pay will be calculated. Where certain professional fundraisers seek money for particular charitable purposes it will also be an offence to fail to indicate clearly that the money will not benefit a particular charitable institution, or to fail to state the method which will be used to work out how the proceeds will be split between different charitable institutions, or in general terms how the fundraiser's pay will be calculated. It is also an offence for a person raising money as an addition to their normal business to fail to state what proportion of the money made from his business or promotional venture will be given to charitable institutions.

A.22 Section 60 creates an offence for any failure by broadcasters when fundraising for charities in certain circumstances to inform of the right to a refund within seven days of payments of £50 or more made via a credit or debit card. Section 61 creates the right to such a refund when a donor notifies the fund-raiser in writing that they intend to cancel the payment.

A.23 Section 63 prohibits false statements relating to charitable institutions which are not registered charities. Any person soliciting money or other property for the benefit of an institution which it is claimed is a registered charity, when it is not, commits an offence.

A.24 This Act extends to England and Wales only.

Children and Young Persons Act 1933 – Section 7(1) to (2) and Children and Young Persons (Scotland) Act 1937 - Section 18(1) to (2)

A.25 These provisions make it an offence for anyone to sell tobacco or cigarette papers to a person under 16 years of age whether from a shop or a vending machine.

A.26 These provisions extend to England, Wales and Scotland only. The equivalent provisions in Northern Ireland are articles 3 and 4 of the Health and Personal Social Services (Northern Ireland) Order 1978.

Children and Young Persons (Protection from Tobacco) Act 1991 – Section 4

A.27 The 1991 Act strengthens the law regarding the sale of tobacco to persons under 16 years of age.

A.28 Section 4 of the 1991 Act makes it an offence to fail to display in a prominent position at the point of sale of tobacco the following warning

**‘It is illegal to sell tobacco products to anyone
under the age of 16’**

A.29 The Act also provides that all vending machines selling tobacco must carry a warning sign.

A.30 This Act extends to Great Britain only. The equivalent provision in Northern Ireland is Article 5 of The Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991

Companies Act 1985 – Sections 348, 349 & 351

- A.31** Sections 348 and 349 of the Act require companies to put their names up outside every place where they carry on business and to state the company name on business letters, notices, official publications and other business documentation. Section 351 requires that the place of a company's registration, its registration number and its registered office address be stated on all business letters and order forms.
- A.32** Contravention of the provisions above is an offence. Prosecutions are usually brought by the Trading Standards Service.
- A.33** The Act extends to Great Britain. The equivalent provisions in Northern Ireland are Articles 356, 357 and 359 of the Companies (Northern Ireland) Order 1986.

Consumer Credit Act 1974

- A.34** The Act regulates the full scope of consumer credit activities and includes detailed requirements on a range of matters such as documentation, advertising, and the calculation of the cost of credit and rebates which apply on early settlement of credit agreements. The Act also includes a licensing regime under which the OFT licenses those who are fit to engage in a credit business; a licence is required to engage in a range of credit activities. The Act sets out rules, not just for credit providers, but also for others involved in the credit industry.
- A.35** Certain requirements in the Act, if breached, are enforceable through civil proceedings, which in some cases may result in unenforceable credit agreements. Also, breach of certain provisions in the Act amount to criminal offences. However, breach of any provision of the Act may be the subject of Part 8 action in respect of domestic infringements. Thus, for example, Part 8 action may be taken for infringement of the advertising or documentation provisions.

A.36 The OFT has the main role of superintending enforcement of the Act and share powers to prosecute offences with the Trading Standards Service; however, in practice it is the Trading Standards Service that takes such action.

A.37 The Act extends to the UK.

Consumer Protection Act 1987 Part III

A.38 Part III of the Act prohibits misleading price indications in relation to any goods, services, accommodation or facilities, including the sale of new homes. A trader commits an offence if, in the course of any business, he gives (by any means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available (whether generally or from particular persons).

A.39 Under the Act an indication given to any consumers is misleading as to a price, if it conveys, or if consumers might reasonably infer from the indication or any omission from it that:

- a price is less than in fact it is
- the applicability of the price does not depend on facts or circumstances on which it does in fact depend
- the price covers matters in respect of which an additional charge is in fact made
- a person who in fact has no such expectation:
 - expects the price to be increased or reduced (whether or not at a particular time or by a particular amount), or
 - expects the price, or the price as increased or reduced, to be maintained (whether or not for a particular period), or
 - the facts or circumstances by reference to which the consumers might reasonably be expected to judge the validity of any relevant comparison made or implied by the indication are not what in fact they are.

A.40 The Trading Standards Service is responsible for prosecuting the above offences.

A.41 The Act extends to Great Britain. The equivalent provisions in Northern Ireland are contained in Part III of the Consumer Protection (Northern Ireland) Order 1987.

Consumer Transactions (Restrictions on Statements) Order 1976

A.42 Under the Order, businesses are prohibited from doing the following in relation to certain transactions with consumers, including sales and hire purchase agreements:

- displaying notices, publishing advertisements, supplying documents or supplying goods, any of which bear a statement which would be void under the Unfair Contract Terms Act 1977 as purporting to exclude or restrict liability for breach of the implied conditions as to the supplier's title to, satisfactory quality of, fitness for a particular purpose of and conformity with description and sample of goods thereby supplied
- supplying to a consumer goods bearing, or furnishing a document bearing a guarantee unless there is in close proximity a clear and conspicuous statement that the guarantee does not affect the consumer's statutory rights
- in circumstances where the business knows or should expect that the goods will subsequently be the subject of such a transaction, supplying to another person goods bearing a guarantee or statement excluding or restricting the business' liability in relation to the goods, or supplying goods with a document bearing such a statement, unless there is in close proximity a clear and conspicuous statement that the guarantee does not affect the consumer's statutory rights.

A.43 Contravention of the prohibitions above is an offence. Prosecutions are brought by the Trading Standards.

A.44 The Order extends to the whole of the UK.

Control of Misleading Advertisements Regulations 1988

- A.45** The Control of Misleading Advertisements Regulations 1988 (as amended by the Control of Misleading Advertisements (Amendment) Regulations 2000) (CMARs) implement Council Directive 84/450/EEC as amended by 97/55/EC. The CMARs provide protection against misleading and unacceptable comparative advertisements and empower the OFT to apply to court for an injunction to end continued publication of such advertisements. Although the CMARs protect the interests of consumers, other businesses and the public at large, Part 8 only provides for action to protect the collective interests of consumers. Consequently neither the OFT nor any other enforcer can take Part 8 action to prevent misleading advertising aimed only at business. Of course, the OFT continues to have the power to apply for an injunction under the CMARs regime in all other cases and will use it where appropriate.
- A.46** Comparative advertising which is inaccurate is often misleading and, where it may mislead consumers, a Part 8 order can be obtained.
- A.47** Under the CMARs, an advertisement is widely defined as 'any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of goods or services, immovable property, rights or obligations' (Reg. 2(1)). An advertisement is misleading 'if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote' (Reg. 2(2)).
- A.48** Under the CMARs, the OFT's role is to support and reinforce existing advertising controls or 'established means', such as the Advertising Standards Authority (ASA), which ensures compliance with the British Codes of Advertising and Sales Promotion, and the Trading Standards Service. The Trade Descriptions Act 1968 and other more specific legislation, e.g., Part III of the Consumer Protection Act 1987 (misleading price indications), allows the Trading Standards Service to

take action against false or misleading advertising. Before the OFT considers a complaint, it may require the person making the complaint to satisfy it that the 'established means' (eg, ASA, etc) of dealing with the complaint have been tried and that, despite being given reasonable opportunity to do so, those means have not dealt with the complaint adequately. The OFT's powers have therefore generally been used as a last resort. The OFT will continue to apply the principle of established means when considering enforcement action in relation to misleading advertisements under Part 8 and will expect other enforcers to do the same

A.49 The Regulations extend to the whole of the UK.

Copyright, Designs and Patents Act 1988 Sections 107, 198 and 297A

A.50 The Act contains provisions relating to the nature and licensing of copyright and other intellectual property rights and exceptions to those rights. The Act also contains remedies for rights holders in relation to an infringement of their rights.

A.51 Section 107 of the Act makes it an offence to make for sale or hire, or import otherwise than for private domestic use, without the licence of the copyright owner, an infringing copy of copyright material. Section 198 establishes a criminal offence for making for sale or hire, importing for supply, or distributing illicit recordings of performances, or causing such a recording to be shown or played in public or broadcast without sufficient consent. Under Section 297A it is an offence to make and deal in unauthorised decoders for conditional access transmissions such as pirate decoders for satellite television.

A.52 Contravention of certain prohibitions contained within the Act is an offence. Prosecutions are brought by the Trading Standards Service.

A.53 The provisions of the Act referred to extend to the whole of the UK.

Estate Agents Act 1979

A.54 The Act provides safeguards for members of the public buying and selling property through obligations that it places upon those engaged in estate agency work. The Act deals with matters such as the handling of clients' money and the requirements for estate agents to tell clients about fees and charges in writing and to disclose any personal interest that they or a connected person may have in the sale of a property on their books. The legislation also requires estate agents to pass on promptly and in writing to vendors accurate details of offers made on their property. Estate agents are also required not to make written or oral false statements about prospective purchasers or offers on a property, to disclose services that they or a connected person may offer to a prospective purchaser and not to discriminate against those prospective purchasers who do not wish to take such services.

A.55 Where an estate agent breaches certain provisions of the Act or has been convicted of certain criminal offences he can be banned by the OFT from doing estate agency work if the OFT considers him unfit to carry on such work. The OFT can also issue a Warning Order against an agent who has breached certain provisions of the Act, where such a breach is not serious enough to cause him to be prohibited but if repeated would be. In addition, the Act provides for a number of criminal offences. The OFT and the Trading Standards Service share powers to prosecute such offences; however in practice it is the Trading Standards Service which takes such action. In addition to these enforcement powers, breaches of the Act will now also be enforceable by Part 8 action.

A.56 The Act extends to the whole of the UK.

Explosives Act 1875 – Sections 31 and 39 in their application to the sale in Northern Ireland of the fireworks listed in Schedule 1 to the Explosives (Fireworks) Regulations Northern Ireland 2002.

A.57 These sections have the effect of prohibiting the sale of all fireworks classified under British Standard BS 7114 to persons under the age of 16 in Northern Ireland.

A.58 This provision applies to Northern Ireland only.

Regulation 11(1) the Explosives (Fireworks) Regulations (Northern Ireland) 1999¹⁰

¹⁰ The OFT believes this should refer to the Explosives (Fireworks) Regulations (Northern Ireland) 2002

A.59 Regulation 11(1) the Explosives (Fireworks) Regulations (Northern Ireland) 1999 requires the display in a prominent position at every premises at which fireworks are sold by retail a notice stating –

‘It is illegal to sell fireworks to anyone under the age of 16’.

A.60 The regulation also stipulates the colour and size of the notice to be displayed and requires it to be easily read by persons at the point of sale.

A.61 This Regulation extends to Northern Ireland only.

Fireworks (Safety) Regulations 1997 – Regulation 6

A.62 Regulation 6 of the Fireworks (Safety) Regulations 1997 prohibits the sale of fireworks to persons who are apparently under 18 within Great Britain. This does not apply to the sale of caps, cracker snaps, novelty matches, party poppers, serpents or throwdowns.

A.63 These Regulations extend to Great Britain only.

Hallmarking Act 1973

A.64 The Act, which provides protection for purchasers in relation to the marking and description of articles of or containing precious metals, makes it an offence, subject to certain exceptions, to supply or market an unhallmarked article with a description that it is wholly or partly made of gold, silver or platinum. It is also an offence to counterfeit dies and marks.

A.65 Prosecutions for the above offences are brought by the Trading Standards Service.

A.66 The Act extends to the whole of the UK.

Intoxicating Substances (Supply) Act 1985

A.67 The Act makes it an offence to supply or offer to supply a substance, other than a controlled drug, to a person under eighteen if there is reasonable cause to believe that the substance or its fumes are likely to be inhaled by that person for the purpose of causing intoxication.

A.68 This Act extends to England, Wales and Northern Ireland only.

Lotteries and Amusements Act 1976 – Part I and Section 14

A.69 Part I of the Act provides that all lotteries and raffles, except as authorized by the Act or the National Lottery etc Act 1993, are unlawful and involvement in any such lottery in any of a number of specified ways is prohibited. The 1976 Act authorizes small lotteries incidental to exempt entertainments, private lotteries, lotteries of certain registered societies and local authority promoted lotteries which in each case satisfy the conditions prescribed by the Act.

A.70 Section 14 of the Act prohibits certain prize competitions through newspapers or in connection with any trade or business or the sale of any article to the public. It provides that it is unlawful to conduct:

- any competition where prizes are offered for the forecast of a future event (or of a past event whose result has not yet been ascertained or made known), or
- any other competition where success does not depend on the exercise of skill.

A.71 Contravention of the above prohibitions is an offence.

A.72 This Act extends to Great Britain only. The equivalent provisions in Northern Ireland are Articles 131 to 135 and 168 of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985

Malicious Communications Act 1988

A.73 The Malicious Communications Act 1988 creates an offence for anyone to send to another person a letter, electronic communication or article of any description which conveys a message which is indecent, grossly offensive (or of an indecent or grossly offensive nature), a threat or containing information which is false and known or believed to be false by the sender. A person is guilty of an offence under the Act if their purpose, or one of their purposes, in sending the communication was to cause distress or anxiety to the recipient or to any other person to whom it is intended that its contents or nature should be communicated.

A.74 Under the Act electronic communication means any oral or other communication by means of a telecommunication system or any communication that is in an electronic form.

A.75 This Act extends to England and Wales only. The equivalent legislation in Northern Ireland is the Malicious Communications (Northern Ireland) Order 1988

Misrepresentation Act 1967

A.76 The Misrepresentation Act 1967 extends the legal remedies to which consumers are entitled where they have entered into a contract after a misrepresentation has been made. The Act widens the circumstances in which a consumer may cancel a contract for an innocent or negligent misrepresentation and provides the remedy of damages where a consumer enters a contract following a negligent misrepresentation. Under the Act, the consumer has a damages claim for loss caused by any misstatement inducing him to enter a contract unless the maker of the statement is able to prove that he had reasonable grounds to believe, and did believe up to the time the contract was made, that the facts represented were true.

A.77 The remedies conferred by the Act may be enforced by the consumer directly through civil proceedings.

A.78 The Act extends to England and Wales. The equivalent legislation in Northern Ireland is the Misrepresentation Act (Northern Ireland) 1967.

Mock Auctions Act 1961

A.79 The Mock Auctions Act 1961 prohibits promoting, conducting or assisting with mock auctions (sometimes referred to as 'one-day sales'). A mock auction is a sale where goods are sold by competitive bidding if one or more of the following events occurs during the sale:

- the buyer of a lot pays less than the amount of his highest bid
- part of the price of a lot is repaid
- the right to bid is restricted to persons who have bought or agreed to buy any articles
- any articles are given away or offered as gifts.

A.80 Under this Act 'competitive bidding' means 'any mode of sale whereby prospective purchasers may be enabled to compete for the purchase of articles, whether by way of increasing bids or by the offer of articles to be bid for at successively decreasing prices or otherwise'.

A.81 It is an offence to contravene the above prohibition. Responsibility for prosecuting these offences is not specifically allocated but in practice the Trading Standards Service and the police generally prosecute for these offences.

A.82 The Act extends to Great Britain. There is no equivalent legislation in Northern Ireland.

National Lottery Act 1993 – Sections 13 and 16

A.83 Section 13 of the National Lottery etc Act prohibits the contravention of regulations made in relation to the promotion of lotteries that form part of the National Lottery.

A.84 Section 16 prohibits persons advertising lotteries or other competitions from giving a false indication that it forms part of, or is otherwise connected with, the National Lottery.

A.85 Contravention of the above prohibitions is an offence. Whilst prosecutions under these specific provisions would normally be brought by the Office of the National Lottery, the OFT may look to cite convictions in taking action against specific rogue traders who have breached the Act or Regulations made under it as part of a case of unfair trading.

A.86 This Act extends to the UK as a whole.

Prices Act 1974 – Section 4

A.87 Under the Prices Act 1974 the Secretary of State has the power to make Orders to control the display of pricing information of goods and services. Price Marking Orders made under the Act can require how and where the prices of products, from tins of food to cars, and of food and drink bought in pubs and restaurants should be displayed.

A.88 Contravention of an Order made under Section 4 is an offence. Prosecutions are brought by the Trading Standards.

A.89 This Act extends to the UK as a whole.

Property Misdescriptions Act 1991

A.90 The Act prohibits the making of false or misleading statements about specified matters relating to property in the course of estate agency and property development businesses. The matters to which the Act applies are set out in the Property Misdescriptions (Specified Matters) Order 1992.

A.91 Contravention of the prohibition contained in the Act is an offence. Prosecutions are brought by the Trading Standards Service.

A.92 The Act extends to the whole of the UK.

Protection from Harassment Act 1997

A.93 Under the Protection from Harassment Act 1997 it is an offence for a person to pursue a course of conduct which they know, or ought to know, amounts to harassment of another. The Act also provides that a person who knows, or ought to know, that their course of conduct causes another to fear on at least two occasions, that violence will be used against them will be guilty of an offence.

A.94 Whilst the Act provides that a breach is a prosecutable offence, it also provides that the same breach may be the subject of a civil claim by the victim. There is also scope to take restraining orders against any person convicted of an offence under the Act.

A.95 Under the Act a course of conduct must involve conduct on at least two occasions.

A.96 Sections 1 to 7 of the Act apply to England and Wales only; Sections 8 to 11 extend to Scotland only. The equivalent legislation in Northern Ireland is The Protection from Harassment (Northern Ireland) Order 1997.

Road Traffic Act 1988 Sections 75 & 76

A.97 Section 75 of the Road Traffic Act makes it an offence for anyone to sell or offer to supply a vehicle or trailer in an unroadworthy condition unless that person can show that he had reasonable cause to believe that the vehicle was not to be used on a road in Great Britain. A vehicle is considered unroadworthy if its use on a road would breach specified regulations laid by the Secretary of State with regard to brakes, steering gear or tyres, or the construction, weight or equipment of vehicles, or would involve a danger of injury.

A.98 Under Section 76 it is an offence to fit or supply for fitting to a vehicle any part such that use of the vehicle on a road would involve a contravention of the above-mentioned regulations on construction and use requirements, or would otherwise involve a danger of injury.

A.99 Contravention of prohibitions above is an offence. Prosecutions are brought by the Trading Standards Service.

A.100 The Act extends to Great Britain. The equivalent provisions in Northern Ireland are Articles 83 and 84 of the Road Traffic (Northern Ireland) Order 1995.

Sale of Goods Act 1979

A.101 The Sale of Goods Act 1979 (SGA) sets out the law governing contracts for the sale of goods and governs a wide range of matters such as formation of contract, implied terms, the parties' rights including remedies for breach of implied terms and other breaches of contract, transfer of ownership in the goods and performance of the contract. For the purposes of part 8 action, the most relevant provisions are likely to be those relating to implied terms and remedies for their breach in consumer contracts.

A.102 The following conditions (or terms in Scotland) are implied into such contracts:

- in a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description
- where the seller sells goods in the course of a business and the buyer makes known to the seller any particular purpose for which the goods are being bought, there is an implied term that the goods are reasonably fit for that purpose
- in a contract for sale by sample, there is an implied term that the bulk will correspond with the sample in quality, and
- where the seller sells goods in the course of business, there is an implied term that the goods will be of satisfactory quality taking account of all relevant circumstances. Relevant circumstances includes the price of the goods, any description and, in a consumer sale, any public statements on the specific characteristics of the goods made by the seller, producer or his representative, particularly in advertising or on labelling.

A.103 However, any such public statements will not be a relevant circumstance if the seller can show that:

- at the time of the sale he was not, and could not reasonably have been, aware of the statement in question
- by the time the contract was made the statement had been withdrawn or corrected in public, or
- the decision to buy the goods could not have been influenced by the statement.

A.104 Where goods are supplied to a consumer in breach of an implied term, he is entitled to reject them and claim a refund of the price if he acts before he is deemed to have accepted them. Where a consumer has lost his right to reject goods, he may claim damages in respect of the non-conformity of the goods with the implied terms.

- A.105** The Act provides additional remedies to consumers where goods do not conform to the contract of sale at the time of delivery. This occurs when there is a breach of an express contractual term or of one of the implied terms listed above. In most circumstances, goods which do not conform to the contract at any time up to 6 months after delivery will be presumed not to have conformed to it on the delivery date unless the seller can show otherwise.
- A.106** The additional remedies are that the consumer has a right to require the seller to repair or replace the goods. Where that would be impossible or disproportionate in comparison to the other remedies the seller must give a full or appropriate partial refund.
- A.107** Where the consumer requests repair or replacement, the seller must comply within a reasonable time and without causing significant inconvenience to the buyer. The seller bears any costs incurred in doing so. If the seller fails to do so, the consumer is entitled to a full or appropriate partial refund.
- A.108** This Act applies to the whole of the UK.

Supply of Goods (Implied Terms) Act 1973

- A.109** The Supply of Goods (Implied Terms) Act 1973 ('SG(IT)A') applies to contracts for the hire-purchase of goods. The Act implies certain conditions (or in the case of Scotland, terms) in respect of the goods which are supplied under such contracts. These terms/conditions broadly correspond with those set out above in relation to the Sale of Goods Act. In the case of a breach of an implied term, the consumer can reject the goods and recover any sums already paid under the agreement if he acts before he is deemed to have affirmed the agreement. Where a consumer has lost his right to reject goods, he may claim damages in respect of the non-conformity of the goods with the implied terms.

Supply of Goods and Services Act 1982

A.110 The Supply of Goods and Services Act 1982 ('SGSA') makes provision for terms to be implied into contracts under which goods are transferred other than contracts of sale (such as contracts for work and materials including contracts for the installation of goods where this is not a sale of goods contract within the meaning of the Sale of Goods Act), hire contracts and contracts under which services are supplied.

A.111 The SGSA implies certain conditions (or terms in Scotland) in respect of the goods transferred under such contracts. The conditions broadly correspond with those set out above in relation to the Sale of Goods Act.

A.112 In the case of a breach of such an implied term, the consumer can cancel the contract and recover any sums already paid under the agreement if he acts before he is deemed to have affirmed the agreement. Where a consumer has lost his right to cancel, he may claim damages in respect of the non-conformity of the goods with the implied terms.

A.113 In the case of a contract for a service by a supplier, the following terms are implied:

- that the work will be carried out with reasonable care and skill
- that, where no time for the work has been agreed, it will be carried out within a reasonable time, and
- that, where no charge for the work has been agreed, a reasonable charge will be payable.

A.114 The Act also gives consumers additional statutory remedies similar to those detailed above under the Sale of Goods Act. The remedies apply where goods which are the subject of a contract for the transfer of goods do not conform to the contract. This will be the case where there is a breach of an express contractual term or of one of the implied terms relating to goods. This also applies where installation of the goods forms part of the contract and the goods were installed by the supplier (or under his responsibility) in breach of certain legal requirements relating to the installation work, in particular the implied term that the work should be carried out with reasonable care and skill.

A.115 Parts I and II apply to England, Wales and Northern Ireland. Part IA applies in relation to Scotland and Part IB and Part III apply to the whole of the UK.

Timeshare Act 1992

A.116 This Act regulates certain aspects of timeshare sales and was amended and extended by the Timeshare Regulations 1997, in order to implement Directive 94/47/EC on timeshare contracts. The amended Act gives protection to consumers who purchase timeshare rights in property anywhere, where the agreement is concluded in the UK or at least one of the parties is in the UK. The Act also applies to any timeshare sales in respect of property in the UK and where the property is in another Member State of the EEA but the consumer is ordinarily resident in the UK. The rights and protections provided by the Act generally apply where consumers buy timeshare rights under contracts with those acting in the course of a business.

A.117 The protection includes rights to information about the timeshare before the agreement is entered into where this is requested by the consumer. The availability of this information must be mentioned in any advertising of the timeshare rights. That information and further prescribed matters must be included as terms of the contract which must be in writing and in a language prescribed by the Act. The business must also provide written notice of cancellation rights in the specified form as a result of which the consumer has a cooling-off period within which he can cancel the agreement. During the cooling-off period, the business may not demand or accept any deposit from the consumer. Cancellation by the consumer of the timeshare agreement within this period will result in cancellation of any related credit agreement provided by the business or by another lender as a result of an arrangement with the business.

A.118 Certain duties imposed by the Act on business may be enforced by the consumer directly through civil proceedings and breach of certain provisions is an offence. Prosecutions are brought by the Trading Standards Service.

A.119 The Act extends to the whole of the UK.

Tobacco Advertising and Promotion Act 2002

- A.120** The Tobacco Advertising and Promotion Act 2002 prohibits press, billboard and most Internet advertising of tobacco products and the promotion of smoking through free distribution of tobacco products, coupons and mailshots within the UK. The Act also created an offence to promote tobacco products through the sponsorship of sporting and other events and controls brandsharing (indirect advertising whereby non-tobacco products use the branding of a particular tobacco product as a means of promoting that tobacco product or vice versa). Through the use of regulations it will also be possible to place restrictions on point of sale advertising,
- A.121** Under the Act a tobacco advertisement is defined as an advertisement whose purpose or whose effect is to promote a tobacco product.
- A.122** Under the Act an exception is made for specialist tobacconists to advertise specialist products (not cigarettes or hand rolling tobacco) within, and on the outside of, their premises. A specialist tobacconist is defined as a retailer who specialises in tobacco products and more than half of whose sales come from the sale of cigars, snuff, pipe tobacco and smoking accessories.
- A.123** Under section 13 it is the duty of every Trading Standards Service to enforce the provisions of this Act and the regulations made under it in England, Wales and Scotland. In Northern Ireland it is the responsibility of District Councils.
- A.124** This Act extends to the UK as a whole.

Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002

A.125 These Regulations implement Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ No L 194 18.7.2001, p 26) ('the Directive'). The Directive repeals Council Directive 89/622/EEC (as amended by Directive 92/41/EEC) concerning the labelling of tobacco products and Council Directive 90/239/EEC concerning the maximum tar yield of cigarettes.

A.126 The Regulations:

- prohibit the supply of tobacco products which do not comply with the Regulations and provide that for enforcement purposes (both by criminal proceedings and otherwise) the Regulations are to be treated as safety regulations and safety provisions under the Consumer Protection Act 1987
- provide the maximum permitted yields of tar, nicotine and carbon monoxide in cigarettes. This regulation will apply to cigarettes for supply in the United Kingdom and European Economic Area on 1st January 2004 and for those to be exported outside the European Economic Area on 1st January 2007
- provide that a producer of cigarettes is required to ensure that each packet of cigarettes carries a statement of the tar, nicotine and carbon monoxide yields
- provide that producers of tobacco products ensure that packets of their products carry specified warnings. The Regulations also specify the size and appearance of those warnings
- prohibit the supply of tobacco products which carry any name, text or other representation or sign which suggests that that product is less harmful to health than others (this comes into force on 30th September 2003)
- provide that an importer of tobacco products from another EEA State is to be treated as complying with the regulations if the product complies with the equivalent requirements of that EEA State, adopted to implement the Directive.

A.127 These Regulations revoke the Cigarettes (Maximum Tar Yield) Regulations 1992 (in accordance with regulation 1(c) the revocation takes effect on 1st January 2004) and of the Tobacco Products Labelling (Safety) Regulations 1991 and the Tobacco Products Labelling (Safety) Amendment Regulations 1993.

A.128 The Regulations extend to the UK as a whole.

Torts (Interference with Goods) Act 1977 Section 12

A.129 Section 12 sets out the circumstances in which a bailee of goods may sell uncollected goods and certain procedures that must be followed beforehand. A bailee is a person who, whilst not the owner, has possession of goods. An example of bailees to which this section applies is a dry cleaning shop holding customer's clothing for collection by the customer when cleaned, a shoe repairer or a storage business.

A.130 Section 12 applies to England, Wales and Northern Ireland.

Trade Descriptions Act 1968

A.131 This Act makes it an offence for a trader to -

- apply a false trade description to any goods; or
- supply or offer to supply any goods to which a false trade description is applied; and
- knowingly or recklessly make a false statement about certain aspects of any services, accommodation or facilities provided in the course of a business.

A.132 The offences described at sub-paragraphs a) and b) above are strict liability offences so that the trader commits an offence whether or not he is aware that the trade description is false. However, a trader commits the offence at sub-paragraph c) only if he knows the statement to be false or he makes the statement regardless of whether it is true or false.

A.133 Prosecutions for the above offences are brought by the Trading Standards Service.

A.134 The Act extends to the whole of the UK.

Trade Marks Act 1994 Section 92

A.135 The Trade Marks Act 1994 contains provisions relating to the registration of trade marks, including remedies for infringement of rights held by trade mark holders. Section 92 of the Act makes it an offence, with a view to gain or to cause loss to another, to apply to goods or their packaging a sign identical to or likely to be mistaken for a particular trade mark, or to supply or offer to supply goods bearing such a sign, without the trade mark owner's consent. There are a number of other related offences set out in section 92.

A.136 Responsibility for prosecuting these offences is not specifically allocated but in practice the Trading Standards Service generally brings prosecutions.

A.137 The Act extends to the whole of the UK.

Unfair Contract Terms Act 1977

A.138 Under the Unfair Contract Terms Act 1977 certain contract clauses and other notices excluding or restricting liability are made unenforceable whilst others are subject to a reasonableness test.

A.139 A trader dealing with a consumer cannot exclude or restrict his liability for breach of contract or allow himself to provide a substantially different service or to not provide full service unless he can show that the clause satisfies the test of reasonableness. Nor can a trader require a consumer to indemnify (cover) him or any other party against any loss that he or the other party may incur through their negligence or breach of contract unless the trader can show that the clause satisfies the same test.

A.140 The Act also prevents any person excluding or restricting liability for death or personal injury caused by negligence, and subjects clauses/notices excluding or restricting liability for other loss or damage to the test of reasonableness. Traders are also prevented from excluding or restricting liability for breach of the implied terms as to supplier's title to, satisfactory quality of, fitness for a particular purpose of and conformity with description and sample of goods sold or supplied under a goods and services contract, a hire-purchase contract or a hire contract.

A.141 Only a court can ultimately determine whether a term is or is not unreasonable. If a term were to be challenged, it would be for the party relying on it to demonstrate to the court that it was reasonable.

A.142 Part I of the Act extends to England, Wales and Northern Ireland; Part II applies in relation to Scotland; Part III applies to the whole of the UK.

Weights and Measures Act 1985 – Sections 21 to 23, 25, 28 to 32, 50(5) and (6)

A.143 The Act, which forms the backbone of the work of the Trading Standards Service in ensuring fair trade in the marketplace, gives weights and measures inspectors powers to test weighing and measuring equipment and makes it an offence in sales of relevant goods to deliver short weight or measure.

A.144 Section 21 gives effect to very detailed provisions in Schedules 4 to 7 of the Act which regulate the sale of a large number of specified products with regard to matters such as quantity measurement and quantity labelling.

A.145 Under Sections 22 and 23, the Secretary of State may by order and by regulations respectively, regulate the sale of such goods as may be specified as regards similar matters. A number of orders and regulations have been made under these provisions. Owing to the amount of detail in the provisions covered by sections 21 to 23, a full summary is beyond the scope of this guidance.

A.146 Section 25 sets out a number of offences where certain requirements in part IV of the Act, including the provisions mentioned in the foregoing paragraph, are not complied with.

A.147 Sections 28 to 32 make it an offence:

- when selling goods by weight or other measurement or by number to deliver to the buyer a lesser quantity than that purported to be sold or a lesser quantity than corresponds with the price charged
- to make any misrepresentation whether oral or otherwise as to the quantity of the goods, or to otherwise seek to mislead a person buying or selling the goods as to the quantity of the goods
- to sell or agree to sell, or have in one's possession for sale, any goods pre-packed in or on a container marked with a statement in writing with respect to the quantity of the goods, where the quantity of the goods is at any time found to be less than that stated
- in the case of any goods required by the Act to have associated with them a document containing particular statements, to insert in a document any statement which is materially incorrect knowing or having reasonable cause to suspect that statement to be materially incorrect.

A.148 Where any such offence was caused by the act or default of another person, that person will also be guilty of an offence.

A.149 Subsections 50 (5) and (6) concern 'regulated packages' which are containers of goods prescribed by the Secretary of State. Those provisions make it an offence:

- for a person to have in his possession for sale, to agree to sell, or to sell a regulated package which is inadequate and either he is the packer or importer of the package, or he knows that the package is inadequate
- for the packer of a regulated package, which is inadequate, and which was made up by him in the course of carrying out arrangements with another person for the packer to make up packages, to deliver the package to a person to whom it falls to be delivered in pursuance of the arrangements.

A.150 Prosecutions for the above offences are brought by the Trading Standards Service.

A.151 The Act extends to Great Britain. The equivalent provisions in Northern Ireland are Articles 19(1) to (6), 20, 22 and 25(2) and 32(5) of the Weights and Measures (Northern Ireland) Order 1981.

Rules of law

An act done or omission made in breach of contract for the supply of goods or services to a consumer.

A.152 This would include breaches of terms implied by the Sale of Goods Act 1979, the Supply of Goods (Implied Terms) Act 1973 and the Supply of Goods and Services Act 1982 as to supplier's title to, satisfactory quality of, fitness for a particular purpose of and conformity with description and sample of goods sold or supplied under a goods and services contract, a hire-purchase contract or a hire contract. It will also cover breach of the implied terms in the Supply of Goods and Services Act 1982 that a business supplying a service should carry it out with reasonable care and skill, within a reasonable time (if no time is provided for by the agreement) and for a reasonable charge (if no price was agreed or provided for by the agreement).

A.153 In addition to breach of terms implied by statute, this covers breach of any contract term which has been expressly agreed by the consumer and supplier, whether orally, in writing or through any other medium of communication.

An act done or omission made in breach of a duty of care owed to a consumer under the law of tort or delict of negligence.

A.154 This could include, for example, a supplier who puts consumers' shopping in flimsy bags which break under the weight causing the contents to break and the duties in the law of tort owed to consumers who are not the purchasers.

Conclusion

A.155 Any additions to the legislation specified by the Secretary of State as covered by the domestic infringement provisions contained within Part 8 of the Enterprise Act 2002 will be shown on the OFT's website.

Annexe B

Areas of law covered by the community infringements

- B.1** The following is intended to be a brief summary of the legislation and other provisions specified by the Secretary of State as giving effect to the listed Directives of the Injunctions Directive or providing additional permitted protections and which is therefore covered by the Community infringement provisions contained within Part 8 of the Enterprise Act 2002. You should seek legal advice if you need more detailed information about the legislation. Your local authority Trading Standards Department or Business Link may also be able to provide advice. The OFT publishes free guidance booklets on some of the legislation.
- B.2** Whilst legislation may contain provisions for prosecution of offences and other means of enforcement of obligations, under Part 8, any general, designated (if such action is within the scope of its designation) or Community enforcer can take action against businesses in respect of the infringements detailed below.
- B.3** We have, in the guidance, referred to the list of Directives contained in Schedule 13 of the Act as being the same as the list of directives contained in the annex to the Injunctions Directive. However, by virtue of Article 128 of Directive 2001/83/EC on the Community code relating to medicinal products for human use, references to Council Directive 92/28/EEC on the advertising of medicinal products for human use are now construed as references to Articles 86 to 99 of Directive 2001/83/EC. Whilst Article 19 of Directive 2002/65/EC on distance marketing of financial services amends the Annex to the Injunctions Directive, it does not yet appear in Schedule 13 to the Enterprise Act as Member States do not have to implement it until 9 October 2004. A copy of Directive 2002/65/ is available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_271/l_27120021009en00160024.pdf.

Control of Misleading Advertisements Regulations 1988 except article 4A (Comparative Advertisements)

- B.4** The Control of Misleading Advertisements Regulations 1988 (CMARs) implement Council Directive 84/450/EEC. The CMARs provide protection against misleading advertisements and empower the OFT to apply to court for an injunction to end continued publication of such advertisements. Although the CMARs themselves protect the interests of consumers, other businesses and the public at large, Part 8 only provides for action to protect the collective interests of consumers. Consequently neither the OFT nor any other enforcer can take Part 8 action to prevent misleading advertising aimed only at business. Of course, where the OFT continues to have the power to apply for an injunction under the CMARs it will use it where appropriate.
- B.5** The Regulations also cover unacceptable comparative advertisements but the Community infringement provisions in Part 8 do not cover this aspect. However, comparative advertising which breached the CMARs might well be misleading and, where an advert may mislead consumers, an enforcement order can be obtained.
- B.6** Under the CMARs, an advertisement is widely defined as 'any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of goods or services, immovable property, rights or obligations' (Reg. 2(1)). An advertisement is misleading 'if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote' (Reg. 2(2)).

- B.7** Under the CMARs, the OFT's role is to support and reinforce existing advertising controls or 'established means', such as the Advertising Standards Authority (ASA), which ensure compliance with the British Codes of Advertising and Sales Promotion, and the Trading Standards Service. The Trade Description Act 1968 and other more specific legislation, e.g. Part III of the Consumer Protection Act 1987 (misleading price indications), allows the Trading Standards Service to take action against false or misleading advertising. Before the OFT considers a complaint, it may require the person making the complaint to satisfy it that the 'established means' (e.g. ASA, etc) of dealing with the complaint have been tried and that, despite being given reasonable opportunity to do so, those means have not dealt with the complaint adequately. The OFT's powers have therefore generally been used as a last resort. The OFT will continue to apply the principle of 'established means' when considering enforcement action in relation to misleading advertisements under Part 8 and will expect other enforcers to do the same.
- B.8** The Regulations extend to the whole of the UK.

Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987

- B.9** Known informally as the 'doorstep selling Regulations', these Regulations (as amended) implement Council Directive 85/577/EEC and are intended to protect consumers in respect of certain contracts made at the consumer's home or otherwise concluded away from the trader's business premises. The Regulations cover most contracts for goods and services where the total cost is over £35. They apply to a contract (other than an excepted contract) which is made during an unsolicited visit by a trader, including visits to which a consumer has agreed following an initial unsolicited visit or telephone call by the trader during which the trader has indicated his willingness to visit or further visit the consumer.

- B.10** Where the Regulations apply, they provide a cooling-off period of seven days enabling a consumer to cancel the contract by giving a notice of cancellation. Doorstep sellers are required to give their customers written notice of cancellation rights and certain information including the name and address of a person against whom they can be exercised, together with a cancellation form. Breach of this requirement is an offence.
- B.11** The Regulations contain civil remedies exercisable by the consumer; for example, by making contracts unenforceable where written information about the right to cancel in the required form has not been given. Breach of certain provisions of the Regulations is an offence. Prosecutions are brought by the Trading Standards Service.
- B.12** The Regulations extend to the whole of the UK.

Consumer Credit Act 1974 as it implements the Consumer Credit Directive which does not include provisions applying to consumer hire agreements and sections 137 to 140 (extortionate credit)

- B.13** The Consumer Credit Act 1974 and Regulations made under it implement Council Directive 87/102/EEC as last amended by Directive 98/7/EC. The Act regulates the full scope of consumer credit activities and includes detailed requirements on a range of matters such as documentation, advertising, and the calculation of the cost of credit and rebates which apply on early settlement of credit agreements. The Act also includes a licensing regime under which the OFT licenses those who are fit to engage in credit business; a licence is required to engage in a range of credit activities. The Act sets out rules, not just for credit providers, but also for others involved in the credit industry.
- B.14** Provisions of the Act and the various Regulations made under it are capable of enforcement by action under the Community infringement provisions of Part 8 where they give effect to provisions in the Consumer Credit Directive or provide additional protections to consumers as permitted by the Directive.
- B.15** The legislation extends to the whole of the UK.

The following provisions of the Broadcasting Acts 1990 and 1996 in so far as they implement articles 10 to 21 of the Broadcasting Directive:

sections 6(1) in relation to advertising, 8, 9, 60 and 79(4) of the 1990 Act and sections 18(5), 25(5), 30(5) in so far as they apply the above provisions of the 1990 Act to digital programming services, digital additional services and qualifying teletext services.

B.16 The Broadcasting Directive (Council Directive 89/552/EEC as amended by Directive 97/36/EC) provides for minimum harmonisation of the laws of the Member States in relation to television broadcasting activities to facilitate the flow of television programmes across frontiers. Articles 10 to 21 include provisions that set a number of minimum requirements in relation to television advertising, sponsorship and tele-shopping; limit the scheduling of advertising; prohibit tobacco advertising; and lay down rules for the advertising of alcoholic beverages and advertising in relation to children.

B.17 Under the UK's broadcasting arrangements, responsibility for what is broadcast on television and radio rests with the broadcasters and the broadcasting regulatory bodies. The Broadcasting Act 1990 makes it the statutory duty of the Independent Television Commission (ITC) and Radio Authority (RA) to publish and enforce codes of practice on the content, amount and distribution of television and radio advertising and on programme sponsorship. These codes apply to all television and radio programme services licensed by the ITC and RA under the Broadcasting Acts 1990 and 1996, including the BBC. Further guidance on how these areas of legislation are currently enforced has been issued by the ITC (http://www.itc.org.uk/itc_publications/codes_guidance/index.asp) and the RA (<http://www.radio.gov.uk/rahome.htm>).

B.18 This area is therefore covered by existing enforcement regimes operated by bodies with special expertise. The OFT does not envisage that Part 8 proceedings will generally be taken in this area by itself, other general enforcers or designated enforcers. If a Community enforcer proposed to act in this area under the Injunctions Directive powers, the OFT would, where appropriate, seek to persuade it that the existing mechanisms would resolve the problem quickly and effectively.

B.19 The legislation extends to the whole of the UK.

Package Travel, Package Holidays and Package Tours Regulations 1992 (PTRs)

B.20 These Regulations (as amended) implement Council Directive 90/314/EEC. They regulate the sale and performance of packages sold or offered for sale in the UK. Packages are defined as the pre-arranged combination of at least two of the following:

- transport
- accommodation
- other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package

when sold or offered for sale at an inclusive price and when the service covers a period of more than 24 hours or includes overnight accommodation.

B.21 The PTRs set out what information must be given to the consumer before the contract is concluded and information that must be given to the consumer in good time before the start of the journey. They also cover the information and manner in which information is to be given in brochures, and the circumstances in which particulars given in the brochure are binding. They prevent descriptive matter relating to packages from being misleading and make requirements as to the form and content of the contract.

- B.22** There are also provisions allowing consumers to transfer their bookings in certain circumstances and restrictions placed on the circumstances in which price revisions may be made. The PTRs make the organiser and/or retailer (as the case may be) liable to the consumer for the proper performance of obligations under the contract irrespective of whether such obligations are to be performed by them or by other suppliers of services. They set out the steps to be taken by the organiser where there is a significant alteration to an essential term of the contract and the steps to be taken where the consumer cancels as a result or where the organiser cancels the package before the agreed date of departure. The PTRs deal with the actions to be taken by an organiser where, after the date of departure, a significant proportion of the services contracted for are not provided.
- B.23** The PTRs also require that security is provided by the other party to the contract for the refund of money paid over in the event of insolvency as well as for repatriation of the consumer in this event.
- B.24** The PTRs contain civil remedies exercisable by consumers. Breach of certain provisions of the Regulations is an offence. Prosecutions are brought by the Trading Standards Service.
- B.25** The Regulations extend to the whole of the UK.

Medicines (Advertising) Regulations 1994 as they implement articles 86 to 100 of the Directive on the community code relating to medicinal products for human use which does not include their application to homeopathic medicinal products

- B.26** The Regulations (as amended) implement Council Directive 2001/83/EC, and establish a common framework for all pharmaceutical advertising. The Regulations prohibit certain types of claim within an advertisement as well as ensuring they meet certain basic criteria (e.g. they have to be accurate, up-to-date and verifiable as does any supplementary information used in support of claims made, such as statistics, etc).
- B.27** The advertising of medicines is controlled by a combination of statutory measures (with both criminal and civil sanctions) enforced by the Medicines Control Agency (MCA), and self-regulation through codes of practice for the pharmaceutical industry, administered by trade associations. For further guidance on the enforcement of this legislation please refer to the Medicines Control Agency.
<http://www.mca.gov.uk/>
- B.28** The RA, ITC or the S4C Authority, as appropriate, may also consider complaints about broadcast advertisements containing material prohibited by Regulation 9 of the Medicines (Advertising) Regulations 1994. These bodies have power under the Broadcasting Act 1990 to prevent transmission or further transmission of an advertisement.
- B.29** Just like television broadcasting, this area is adequately covered by existing enforcement regimes operated by bodies with special expertise. The OFT does not envisage that Part 8 proceedings will generally be taken in this field by itself or other UK enforcers. If a Community enforcer proposed to act in this area under the Part 8 powers, the OFT would, where appropriate, seek to persuade it that the existing mechanisms would resolve the problem quickly and effectively.
- B.30** These Regulations extend to the whole of the UK.

Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)

- B.31** These Regulations implement Council Directive 93/13/EEC. They apply, with certain exceptions, to terms which have not been individually negotiated in any contract concluded between a consumer and a person who is acting for purposes relating to his trade, business or profession. They therefore apply in particular to standard form contracts used with consumers, but may also apply to verbal terms which have not been individually negotiated. An unfair term is one which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. No assessment of fairness is to be made in relation to any term insofar as it defines the main subject matter of the contract, nor as to the adequacy of the price or remuneration payable for the goods or services supplied. Any term that is found to be unfair is not binding on the consumer. This means that a consumer may himself allege that a term is unfair and therefore not binding on him. If the business disagrees and enforces the term against the consumer, the consumer may raise the issue for determination by the Court in any proceedings involving the term, whether instituted by the consumer or the business. The remainder of the contract however shall continue to bind the parties if it is capable of continuing in existence without the unfair term.
- B.32** In contracts to which they apply, the UTCCRs additionally impose an obligation on businesses to express any written contract terms in plain and intelligible language.
- B.33** Under the UTCCRs, the OFT together with other specified bodies (known as 'qualifying bodies') have the power to take action to prevent the continued use of an unfair term. Qualifying bodies include some sectoral regulators, the Trading Standards Service and the Consumers' Association. Where the OFT or a qualifying body considers that a business is using unfair terms in contracts with consumers, it may apply to Court for an injunction restraining continued use of those terms or other terms having similar effect, or alternatively accept an undertaking from the business to cease using or recommending use of them. Ultimately however, only the Courts can determine whether a term is unfair under the UTCCRs.

B.34 Under Part 8, the OFT and other enforcers may take action against businesses using or recommending unfair terms or terms which are not in plain and intelligible language in their contracts with consumers. Under the UTCCRs, the Consumers' Association is the only private body which is empowered to take enforcement action. However, action against unfair terms under Part 8 may be taken by any body designated as an enforcer, within the scope of its designation.

B.35 These Regulations extend to the whole of the UK.

Timeshare Act 1992 as it implements the Timeshare Directive which does not include its application to timeshare accommodation in caravans

B.36 This Act regulates certain aspects of timeshare sales and was amended and extended by the Timeshare Regulations 1997, in order to implement Directive 94/47/EC. The amended Act gives protection to consumers who purchase timeshare rights in property anywhere, where the agreement is concluded in the UK or at least one of the parties is in the UK. The Act also applies to any timeshare sales in respect of property in the UK and where the property is in another Member State of the EEA but the consumer is ordinarily resident in the UK. The rights and protections provided by the Act generally apply where consumers buy timeshare rights under contracts with those acting in the course of a business.

B.37 The protection includes rights to information about the timeshare before the agreement is entered into where this is requested by the consumer. The availability of this information must be mentioned in any advertising of the timeshare rights. That information and further prescribed matters must be included as terms of the contract which must be in writing and in a language prescribed by the Act. The business must also provide written notice of cancellation rights in the specified form as a result of which the consumer has a cooling-off period within which he can cancel the agreement. During the cooling-off period, the business may not demand or accept any deposit from the consumer. Cancellation by the consumer of the timeshare agreement within this period will result in cancellation of any related credit agreement provided by the business or by another lender as a result of an arrangement with the business.

B.38 Certain duties imposed by the Act on businesses may be enforced by the consumer directly through civil proceedings. Breach of certain provisions is an offence. Prosecutions are brought by the Trading Standards Service. It should be noted that the community infringement provisions of Part 8 only apply to the Act insofar as it implements the Timeshare Directive and will not therefore cover the application of the Act to timeshare accommodation in caravans.

B.39 The Act extends to the whole of the UK.

Consumer Protection (Distance Selling) Regulations 2000

B.40 The Distance Selling Regulations implement Directive 97/7/EC. Subject to some exceptions, they apply to all contracts for goods and services supplied to consumers where the contract is made exclusively by means of distance communication and pursuant to an organised distance supply scheme. Under the Regulations, consumers are entitled to specified information before entering a contract, they are also entitled to confirmation of certain information together with additional information in a durable form, and to a cancellation period of seven working days beginning with the day after that on which the goods are received or the service contract is concluded. The business must perform the contract within 30 days beginning with the day following that on which the consumer sent the order to the business, or within such other period as the parties agree. If the business is unable to do so owing to unavailability of the goods or services, it must inform the consumer of that fact and provide a full refund of all charges.

B.41 If the consumer exercises his right of cancellation, the business must reimburse the cost of the goods or services together with most other charges payable in connection with the contract as soon as possible and in any case within 30 days of the day of notice of cancellation. Notice of cancellation has the effect of also cancelling any related credit agreement as defined under the Regulations. Provided that the consumer repays the credit within a month of cancellation or before the first instalment is due, no interest is payable.

- B.42** The Regulations also provide the consumer with extra protection from unauthorised use of his payment card in connection with a distance contract in that he is entitled to cancel such payments or be re-credited or repaid the sum in question.
- B.43** In defined circumstances where a consumer is sent unsolicited goods, he may treat them as an unconditional gift. It is an offence for any business to demand payment from a consumer in respect of unsolicited goods or services or to otherwise threaten or take certain enforcement action against him.
- B.44** Under the Distance Selling Regulations the OFT and the Trading Standards Service are responsible for enforcement. They are given the power to apply to Court for an injunction to secure compliance with the Regulations or to accept an undertaking in lieu of such action. Such action can be taken against any business which appears to be responsible for a breach consisting of a failure to fulfil a requirement of, or a breach of a prohibition of, the Regulations. Under Part 8, any general, designated (if such action is within the scope of its designation) or Community enforcer can take action against businesses in respect of breaches of the Regulations.
- B.45** These Regulations extend to the whole of the UK.

Telecommunications (Data Protection and Privacy) Regulations 1999 Part V

- B.46** The provisions of Part V of the Telecommunications (Data Protection and Privacy) Regulations 1999 give effect to Article 10 of Directive 97/7/EC. The provisions prohibit the use of automated calling systems (which do not require human intervention) and fax machines for direct marketing purposes where the individual being called has not given prior consent to being contacted in this way. Furthermore, they prohibit use of publicly available telecommunications services for the purpose of making unsolicited calls to individuals for direct marketing purposes where the individual has previously indicated to the caller that he/she does not wish to receive such communications or where the individual is on a register of individuals who do not wish to receive unsolicited calls for direct marketing purposes.
- B.47** The Information Commissioner has power to enforce the above provisions by serving an enforcement notice requiring the recipient to take specified steps to comply with those requirements of the Regulations. Failure to comply with such a notice is an offence. Prosecutions may be brought by the Information Commissioner or by or with the consent of the Director of Public Prosecutions (in Northern Ireland the Director of Public Prosecutions for Northern Ireland).
- B.48** These Regulations extend to the whole of the UK.

Regulation of the Sale and Supply to Consumers of Goods and Related Services, and Guarantees

The terms implied by sections 9 to 11 of the Supply of Goods (Implied Terms) Act 1973, Sections 13 to 15 and 15B of the Sale of Goods Act 1979 and Sections 3 to 5, 11C to 11E and 13 of the Supply of Goods and Services Act 1982, and any rule of law in Scotland which provides comparable protection to Section 13 of the Supply of Goods and Services Act 1982 (implied terms as to quality and fitness).

B.49 These provisions imply a number of terms in contracts for the sale, hire-purchase or transfer of goods other than sale.

B.50 The Sale of Goods Act 1979 ('SGA') applies to contracts for the sale of goods. The specified provisions imply the following conditions (or terms in Scotland) into such contracts:

- in a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description (section 13)
- where the seller sells goods in the course of a business and the buyer makes known to the seller any particular purpose for which the goods are being bought, there is an implied term that the goods are reasonably fit for that purpose (section 14)
- in a contract for sale by sample, there is an implied term that the bulk will correspond with the sample in quality (section 15), and
- where the seller sells goods in the course of business, there is an implied term that the goods will be of satisfactory quality taking account of all relevant circumstances. Relevant circumstances includes the price of the goods, any description and, in a consumer sale, any public statements on the specific characteristics of the goods made by the seller, producer or his representative, particularly in advertising or on labelling (section 14).

B.51 However, any such public statements will not be a relevant circumstance if the seller can show that:

- at the time of the sale he was not, and could not reasonably have been, aware of the statement in question
- by the time the contract was made the statement had been withdrawn or corrected in public, or
- the decision to buy the goods could not have been influenced by the statement.

B.52 These provisions extend to the whole of the UK.

B.53 Where goods are supplied to a consumer in breach of an implied term, he is entitled to reject them and claim a refund of the price if he acts before he is deemed to have accepted them. As regards Scotland, these rights are contained in section 15B. Where a consumer has lost his right to reject goods, he may claim damages in respect of the non-conformity of the goods with the implied terms.

B.54 Section 15B extends to Scotland only.

B.55 The Supply of Goods (Implied Terms) Act 1973 ('SG(IT)A') applies to contracts for the hire-purchase of goods. The specified provisions imply certain conditions (or in the case of Scotland, terms) in respect of the goods which are supplied under such contracts. These terms/conditions broadly correspond with those set out above in relation to the SGA. In the case of a breach of an implied term, the consumer can reject the goods and recover any sums already paid under the agreement if he acts before he is deemed to have affirmed the agreement. Where a consumer has lost his right to reject goods, he may claim damages in respect of the non-conformity of the goods with the implied terms. Section 9 of the SG(IT)A relates to correspondence with description, section 10 relates to satisfactory quality and fitness for a particular purpose and section 11 relates to correspondence with sample.

B.56 These provisions extend to the whole of the UK.

- B.57** Sections 3 to 5 of the Supply of Goods and Services Act 1982 ('SGSA') apply to certain contracts under which goods are transferred other than contracts of sale. They apply to contracts for work and materials including contracts for the installation of goods where this is not a sale of goods contract within the meaning of the SGA. The provisions imply certain conditions in respect of the goods transferred under such contracts. The conditions broadly correspond with those set out above in relation to the SGA. In the case of a breach of an implied term, the consumer can cancel the contract and recover any sums already paid under the agreement if he acts before he is deemed to have affirmed the agreement. Where a consumer has lost his right to cancel, he may claim damages in respect of the non-conformity of the goods with the implied terms. Section 3 of the SGSA relates to correspondence with description, section 4 relates to satisfactory quality and fitness for a particular purpose and section 5 relates to correspondence with sample.
- B.58** Sections 11C to 11E of the SGSA provide for equivalent implied terms in Scotland.
- B.59** Sections 3 to 5 of the SGSA extend to England, Wales and Northern Ireland only and sections 11C to 11E extend to Scotland only.
- B.60** Section 13 of the SGSA provides that in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.
- B.61** This provision applies to England, Wales and Northern Ireland only but any comparable rule of law in Scotland is covered.

Sections 20 and 32 of the Sale of Goods Act 1979 (Passing of risk and acceptance of goods)

- B.62** By virtue of section 20 of the SGA, in consumer contracts of sale all goods remain at the seller's risk until property in the goods (ownership) is transferred to the consumer, at which point risk passes to the consumer whether or not delivery of the goods has taken place. However, if delivery is delayed through fault of the seller, the seller bears responsibility for any loss which might not have occurred without such fault.
- B.63** By virtue of section 32, delivery of the goods by the seller to a carrier where authorised or required under the contract is deemed to be delivery to the consumer. However, the seller must make a reasonable agreement with the carrier having regard to the nature of the goods and other circumstances, and if he fails to do so and the goods are lost or damaged in transit, the seller may be held responsible.
- B.64** These provisions extend to the whole of the UK.

Sections 48A to 48F of the Sale of Goods Act 1979 and 11M, 11N and 11P to 11S of the Supply of Goods and Services Act 1982 (additional remedies for consumers)

- B.65** Sections 48A to 48F of the SGA provide additional remedies to consumers where goods do not conform to the contract of sale at the time of delivery. This occurs when there is a breach of an express contractual term or a term implied by sections 13, 14 or 15 of the SGA. In most circumstances, goods which do not conform to the contract at any time up to 6 months after delivery will be presumed not to have conformed to it on the delivery date unless the seller can show otherwise.
- B.66** The additional remedies are that the consumer has a right to require the seller to repair or replace the goods. Where that would be impossible or disproportionate in comparison to the other remedies the seller must give a full or appropriate partial refund.
- B.67** Where the consumer requests repair or replacement, the seller must comply within a reasonable time and without causing significant inconvenience to the buyer. The seller bears any costs incurred in doing so. If the seller fails to do so, the consumer is entitled to a full or appropriate partial refund.
- B.68** These provisions extend to the whole of the UK.
- B.69** Sections 11M to 11S of the SGSA provide additional remedies similar to those contained in sections 48A to 48F of the SGA. The remedies apply where goods which are the subject of a contract for the transfer of goods do not conform to the contract. This will be the case where there is a breach of an express contractual term or a term implied by sections 3, 4 or 5 of the SGSA. This also applies where installation of the goods forms part of the contract and the goods were installed by the supplier (or under his responsibility) in breach of certain legal requirements relating to the installation work, in particular the requirement in section 13 of the SGSA that the work should be carried out with reasonable care and skill.
- B.70** These provisions extend to the whole of the UK.

Regulation 15 of the Sale and Supply of Goods to Consumers Regulations 2002 and articles 4 and 5 of the Consumer Transactions (Restrictions on Statements) Order 1976 (consumer guarantees)

B.71 Regulation 15 of the Sale and Supply of Goods to Consumers Regulations applies to consumer guarantees which are freely offered when goods are sold or otherwise supplied to consumers and sets out the duties owed by the guarantor and in certain circumstances the supplier. The regulation provides that:

- the guarantee takes effect at the time the goods are delivered as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and any associated advertising
- the guarantor shall ensure that the guarantee sets out in plain and intelligible language the contents of the guarantee and the essential particulars for making a claim under the guarantee
- on request by the consumer, the guarantor and/or supplier shall within a reasonable time make the guarantee available in writing (or another durable medium available and accessible to the consumer)
- where consumer goods are offered for sale with a guarantee within the UK, the guarantor must ensure that the guarantee is written in English.

B.72 This provision extends to the whole of the UK.

B.73 Article 4 of the Consumer Transactions (Restrictions on Statements) Order 1976 prohibits supplying to a consumer under a sale or hire-purchase agreement goods with a statement of guarantee by the supplier (either on the goods themselves or on a separate document) unless there is close proximity to that statement another clear and conspicuous statement to the effect that the guarantee does not affect the consumer's statutory rights. In circumstances where a business knows or should expect that certain goods will subsequently be the subject of sale or hire-purchase to a consumer, Article 5 prohibits supplying to another person goods bearing a guarantee or statement excluding or restricting the business' liability in relation to

the goods, or supplying goods with a document bearing such a statement, unless there is in close proximity a clear and conspicuous statement that the guarantee does not affect the consumer's statutory rights.

B.74 These provisions extend to the UK as a whole.

Sections 6(2), 7(1), 7(2), 20(2), 21 and 27(2) of the Unfair Contract Terms Act 1977 and article 3 of the Consumer Transactions (Restrictions on Statements) Order 1976 (anti-avoidance measures)

B.75 As a result of sections 6(2), 7(1), 7(2), 20(2) and 21 of the Unfair Contract Terms Act 1977, in a consumer contract for the sale, transfer or hire-purchase of goods, a term is void and ineffective insofar as it seeks to exclude or restrict the seller or supplier's liability to the consumer for breach of the implied terms or conditions as to the goods' correspondence with description or sample, quality and fitness for a particular purpose.

B.76 The effect of section 27(1) is that in the case of contracts concluded in the UK with UK consumers, the Act generally still applies even if the contract is expressed to be governed by non-UK law.

B.77 Sections 6(2), 7(1), 7(2) extend to England, Wales and Northern Ireland only. Sections 20(2) and 21 extend to Scotland only. Section 27(2) extends to the whole of the UK.

B.78 Article 3 of the Consumer Transactions (Restrictions on Statements) Order 1976 prohibits businesses, in connection with consumer sale and hire-purchase transactions, from displaying notices, publishing advertisements, supplying documents or supplying goods any of which bear a statement which would be void under the Unfair Contract Terms Act 1977 as purporting to exclude or restrict liability for breach of the implied conditions as to the supplier's title to, satisfactory quality of, fitness for a particular purpose of and conformity with description and sample of goods thereby supplied:

B.79 This provision extends to the UK as a whole.

The Electronic Commerce (EC Directive) Regulations 2002, regulations 6 - 9 and 11 (requirements as to information and orders)

B.80 These Regulations implement the main requirements of Directive 2000/31/EC on electronic commerce.

B.81 The Regulations govern the provision of Information Society Services, a term that covers any service normally provided for payment, at a distance, by means of electronic equipment at the individual request of a recipient of a service. This means any business which:

- sells goods or services to consumers (and business) on the Internet, by email or text message (the goods and/or services do not have to be provided electronically)
- advertises on the Internet, by email or text message
- conveys or stores electronic information for customers or provides access to a communications network.

B.82 The Regulations do not apply to:

- online activities which are not of a commercial nature
- to the goods themselves, or the delivery of the goods or services not provided online
- the offline elements (e.g. the conclusion of a hardcopy contract) of any transaction that began online (e.g. in response to an advert on a website).

B.83 Regulations to which Part 8 action is applicable:

Regulation 6

B.84 Information to be supplied – where a business refers to prices of goods and/or services, these have to be clearly shown, including whether this is inclusive of any tax and/or delivery costs. In addition, business has to clearly identify itself to consumers, including name, corporate identity, geographic address, contact details (including e-mail), details of certain trade or professional bodies they belong to, relevant online business authorisation schemes and their VAT registration number. Obviously, some forms of communication (text messages for example) have limited space. The criteria may be regarded as met if the information is provided by alternative means such as referring to a website.

Regulations 7 & 8

B.85 Commercial Communications – the Regulations define these in a way that can generally be regarded as advertising. Such communications of goods and/or services have to be clearly identifiable as such, indicating the business they have come from and stating any promotional offers and the terms clearly. The OFT is currently of the view that all unsolicited commercial communications by email must be clearly identifiable as such as soon as they are received, i.e. the consumer does not have to open the email to know it is an unsolicited communication.

Regulations 9 & 11

B.86 Contracting online – when concluding a contract online the business has to inform the consumer of the technical steps needed to conclude the contract; whether the contract will be filed (and if it will be accessible); how the consumer can correct input errors; and what language the contract will be in. This information must be provided clearly and prior to the placing of the order. The business must also state any codes of conduct they adhere to; if they provide terms and conditions to do so in a way that allows the consumers to store and reproduce them; and acknowledge receipt of orders without undue delay.

B.87 These Regulations extend to the whole of the UK.

Conclusion

B.88 Where the Injunctions Directive is amended to include further consumer protection EC Directives then the Part 8 Community Infringement provisions will be amended accordingly. Additions will be shown on the OFT's website.

Enterprise Act publications

Throughout 2003 the OFT issued a series of guidance booklets on various aspects of the Act. New guidance may be published and the existing guidance revised from time to time. For an up-to-date list of guidance booklets:

check www.offt.gov.uk/enterpriseact.htm
email enquiries@oft.gsi.gov.uk
or telephone enquiries on 08547 22 44 99

All guidance booklets can be ordered or downloaded from the OFT's website <http://www.offt.gov.uk/enterpriseact.htm>. Or you can request them by:

phone	0800 389 3158
fax	0870 60 70 321
email	oft@ecgroup.uk.com
post	EC Group, Swallowfield Way, Hayes, Middlesex UB3 1DQ

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