

**EMPOWERING AND PROTECTING
CONSUMERS**

Consultation on institutional
changes for provision of
consumer information,
advice, education,
advocacy and enforcement

JUNE 2011

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Foreword

by Edward Davey MP, Minister for Employment Relations, Consumer and Postal Affairs



The Coalition Government believes in handing power over to people.

This means returning decision-making powers and services to those at local level best able to exercise them to meet public need and then giving citizens the ability to hold the local decision-makers to account.

It means giving people more control over the public services which they need – more choice and more opportunity to influence the way public services are delivered to them.

And it means making sure that markets work properly so that competition between businesses drives down prices and sparks innovation from which consumers benefit.

The empowerment of consumers is not just about making markets competitive, however, vital though that is. Even the most competitive markets will not always deliver the best results for consumers without a properly enforced framework of regulation to protect the consumer interest. Consumer law is a feature of all advanced economies because businesses investing in high quality goods and services need to know that they will not be undercut by rogue traders.

But we will not make the mistake that previous Governments have perhaps made in thinking that regulation is the only answer. If too intrusive it can impose costs on businesses and push up prices. It may also inhibit competition and innovation in markets and damage the economy.

The Government also needs access to lighter-touch tools to inform, educate and if necessary support consumers when they have to make difficult choices. In April we launched a strategy for light-touch consumer empowerment – how we can “nudge” people to make better choices. I have also asked officials to continue work, started under the last Government, on the simplification of the law to offer people a better chance to understand and stand up for their consumer rights. And I have given serious thought to how public money should best be spent to support those institutions that help consumers. That is the subject of this consultation.

There is currently a bewildering array of public, private and voluntary bodies with overlapping responsibilities. Each individual organisation does a very good job and is highly regarded. But, taken together, they form a complex landscape that is difficult for consumers to understand.

This duplication of effort also leads to waste and inefficiency in the use of public funds. It draws resources from the front line, resources which could better be used driving forward consumer empowerment directly – a key commitment in the Coalition’s programme for Government.

Trading Standards and the Citizens Advice service both enjoy high levels of public awareness and public trust. This is a significant benefit as we strive to inform people better and bolster front-line protection, so my preference is to focus almost all Government spending on consumer policy on these two groups.

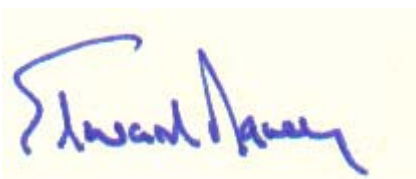
My vision for the future is one where national public funding is concentrated on the Citizens Advice service which will provide information and advice for the vulnerable and use the insights that this offers to act as the advocate for the consumer interest. Trading Standards will, meanwhile, continue to meet local threats under local political control, but will also come together with national budgetary support to collectively enforce consumer law against national and regional threats to the fair-trading environment. Consumers will know where to go for information and advice, advocacy will be evidence-based and efficient and enforcement will be consistent across the country and based on evidence of consumer harm.

I recognise that a reform of this magnitude represents a significant change. We are used to having a range of national consumer bodies to call on. The Office of Fair Trading, Consumer Focus and the various sectoral consumer bodies have developed skills and expertise. Their staff have performed their functions to a high standard and if we decide to take forward these changes, it should not be taken as a criticism of the role they have fulfilled. Where appropriate, I believe this expertise should be retained in the new landscape.

There are many important questions that are still to be resolved. For example, linkages between competition and consumer market analysis and enforcement of consumer law are complex. The trick will be to find the best and most cost-effective institutional set-up so that appropriate remedies can be brought to bear to address market failures, either on the supply or the demand side, whilst also tackling rogue traders head-on. This will bring benefits to consumers and honest businesses. Whatever the final division of roles, there will need to be strong links between the new single Competition and Markets Authority, Trading Standards, the Citizens Advice service and others such as Which? in the new environment.

There are many practical implications of the options and preferences set out in this document, which are therefore not set in stone at this stage. The responses to this consultation will be extremely valuable to us as we work to deliver the best outcomes for the consumer.

Edward Davey



Executive Summary

1. The Government's prime objective for consumer policy is to empower consumers to make wise decisions when purchasing goods and services. Empowered consumers demand choice and by exercising it, stimulate competition and innovation as well as high standards of consumer care. Without informed consumers driving a hard bargain, businesses can become complacent and lose focus on becoming more efficient or investing in better goods and services. This investment and quest for efficiency drives innovation and growth in the economy. Consumer empowerment is therefore a vital part of the Government's growth agenda as well as a key element of its broader citizen empowerment mission.
2. Empowerment depends upon an underpinning framework of competition and consumer law so that choices are offered fairly. And the law needs to be properly enforced. But it is vital that the law is not too prescriptive otherwise it runs the risk of dampening competition and innovation and of loading costs onto businesses which are then passed on to consumers in the form of higher prices. Excessive regulation may limit consumer choice and, even if intended to protect consumers, can end up costing them more than the benefit it brings.
3. For this reason, the Government supports flexible, non-regulatory approaches to ensuring consumers are empowered and protected. Good businesses have long developed voluntary codes of practice which go beyond the law, to reassure consumers and boost their confidence. Private organisations such as Which? and third sector bodies like Citizens Advice and Citizens Advice Scotland can play a key role in ensuring consumers have access to independent advice and information and they enjoy high levels of recognition and trust. In recent years, there has been a huge increase in the use of e-commerce and internet-based information and comparison sites by consumers to enable them to get the best deals.
4. The Government's Consumer Empowerment Strategy, *Better Choices: Better Deals*, published in April,¹ built on these developments by setting out proposals aimed at helping consumers help themselves. These will promote more open and accessible provision of information by businesses and service providers and they back new initiatives such as the promotion of collective purchasing.
5. There remains, however, a need for consumer advice and representation: to protect the most vulnerable consumers, who may not be able to access or interpret information; to ensure people have access to the right information in markets where the risks may not be apparent; to represent the interests of consumers in regulated markets such as energy, water and telecoms; and to ensure people are educated in the exercise of their rights. These functions do not need to be provided exclusively by central Government institutions. The Government is determined not to crowd out market-based solutions or those involving the voluntary sector and will draw upon the strengths of local government as well as such independent bodies wherever possible.

¹ BIS and Cabinet Office (2011), *Better Choices: Better Deals* <http://www.bis.gov.uk/better-choices>

6. Effective enforcement of consumer law is also critical to tackle rogue traders and sharp practice and to ensure markets are operating fairly and in the interests of consumers.
7. **The Government is proposing a number of reforms to the current institutional arrangements to ensure that consumer advice, representation and enforcement are delivered effectively and efficiently.** These proposals have been guided by the following objectives:
- **Reducing complexity of the consumer landscape.** At present, there is a plethora of publicly funded bodies involved in consumer advice and representation. Not all of these enjoy wide public recognition and it is not obvious to consumers where they should go to get the advice or redress they need. The Government therefore wants to simplify and streamline the institutional landscape.
 - **Strengthening the effectiveness of consumer enforcement.** Effective enforcement of the law is essential to protect consumers from rogue traders and unfair market practices. A recent National Audit Office (NAO) report² has identified the costs to consumers, and hence the economy, of sharp practices as £6.6 billion. At present, responsibilities for enforcement are split between Local Authority Trading Standards Services and the Office of Fair Trading. Trading Standards face particular challenges as a result of reduced local authority spending while the NAO has pointed to problems of overlap and lack of coordination between Trading Standards and the OFT. The Government therefore wants to clarify responsibilities and ensure better use of limited enforcement resources through more effective leadership and integration of effort around the country.
 - **More cost-efficient delivery, closer to the consumer front line.** Ensuring the cost-effectiveness of consumer advice, representation and enforcement is increasingly critical as public resources become more constrained. Streamlining bodies and maximising the benefits to be achieved by linking national activity to local intelligence and front-line delivery of advice and enforcement is one of the ways in which this can be achieved.
8. In order to achieve these objectives the Government is proposing that **in future, responsibility for each aspect of consumer advice, representation and enforcement should be clear and should rest principally with one of three key institutions** each of which would work in partnership (or as appropriate on a commissioning basis) with other organisations with specific expertise in particular areas:
- The **Citizens Advice service** comprising Citizens Advice and Citizens Advice Scotland. The Government proposes that almost all central government funding for consumer information, advice, advocacy and education will transfer to the Citizens Advice service which enjoys high recognition and trust among the public as well as a track record of effective advocacy. The Government would expect the Citizens Advice service to work closely with Which? and other organisations in developing and delivering its advice and advocacy functions.

² NAO (2011) *Protecting consumers – the system for enforcing consumer law*
http://www.nao.org.uk/publications/1012/protecting_consumers.aspx

- **Trading Standards** comprising Local Authority Trading Standards Services (LATSS), the Trading Standards Institute (TSI), the Association of Chief Trading Standards Officers (ACTSO) and the support infrastructure offered by the Local Government Group. The recent NAO report concluded that £4.8 billion (73 per cent) of consumer detriment from unfair and rogue practices arises as a result of threats that span more than one local authority area but Trading Standards are overwhelmingly funded by local authorities. The Government proposes to deploy national funding to facilitate a more integrated approach to national and cross-boundary threats. This activity would be more effectively coordinated at national level by Chief Trading Standards Officers to ensure that enforcement gaps do not arise and that activity overall is better targeted.
- The proposed new **Competition and Markets Authority (CMA)**, to be created by merging the competition functions of the OFT and the Competition Commission, would play a key role in ensuring that markets are operating fairly and in the interests of consumers.³ It would have powers to investigate markets in which there are, or may be, structural problems and to use competition or consumer law to resolve these.

Consumer information, advice and education

9. For consumers to be empowered it is essential that they have information about goods and services which they can use to exercise choice and that they understand their rights and how to exercise these when problems arise.
10. Businesses are the first point of call for information for most consumers. Most reputable businesses develop systems to ensure that they give accurate advice to consumers in order to inspire trust. Other businesses and third sector bodies have sprung up with a specialisation of comparing the offers of a range of suppliers. Organisations such as Which? and Moneysavingexpert.com produce respected consumer information materials. The exponential growth in e-commerce in recent years has spawned a host of business-driven models for analysing and comparing prices and other terms of supply as well as assembling consumer feedback and reviews. The Government should not spend public money generating consumer information where such materials are already freely available from an authoritative source.
11. Stimulating businesses and the third sector to provide the right information to consumers to enable them to exercise choice effectively is, however, a vital element of the consumer empowerment agenda. This is why the Consumer Empowerment Strategy sets out proposals, for example, to make personalised consumption data more accessible and to strengthen confidence in price comparison and consumer feedback data.
12. But the Government understands that some people are simply unable to process all the available information and to exercise choice effectively. These vulnerable consumers need impartial and independent advice provided by trusted sources. For example, Government funding has enabled Citizens Advice and other advice providers to help 403,000 people with debt problems since 2006 and is continuing funding this year. Education can also play a key part in ensuring markets are operating effectively by

³ BIS (2011) *Growth, Competition and the Competition Regime: A consultation on Possible Reform*; the consultation on these proposals has recently finished. www.bis.gov.uk/consultations

enabling citizens to assert their rights more effectively and ensuring businesses understand the law.

13. At present this advice and information is provided by a range of public bodies The OFT runs the national Consumer Direct advice line and has led national campaigns and provided materials online and to Trading Standards and other organisations. Consumer Focus, Citizens Advice, Citizens Advice Scotland and regional Scambuster and Illegal Money lending teams funded by the Department for Business, Innovation and Skills (BIS) carry out public information campaigns.
14. This can lead to confusion of roles and responsibilities and overlap and inefficiency. **The Government therefore proposes that the Citizens Advice service should in future have responsibility for publicly-funded national advice and education of consumers, working with other organisations as needed.** The Citizens Advice service enjoys high levels of awareness and trust among the public. Through its network of local Citizens Advice Bureaux across the country it has access to unique and detailed local information about the issues causing concern for consumers. Rationalising consumer advice and education in the Citizens Advice service therefore has the potential to reduce costs, ensure that activities are targeted on key areas of concern, and provide a more accessible and recognised point of access for citizens: **if you need information or advice, go to Citizens Advice.**

Consumer codes

15. Consumer codes, which are usually voluntary and industry led, can provide a highly effective, non-regulatory means of ensuring high standards for consumers. The OFT has operated a Consumer Codes Approval Scheme (CCAS) since 2001. Ten consumer codes have been approved with a further ten in the process of applying, at various stages of approval. Many CCAS-approved code promoters believe that OFT approval has been valuable to the companies that are members of the approved codes and has helped improve the welfare standard contained in the codes themselves, though most comment on the length of time it took to gain approval.
16. Under the Government's proposals to create a single Competition and Markets Authority, the OFT will be merged into the new body which will have a principal focus on competition and markets. A continuing role in consumer codes approval does not seem appropriate for the CMA.
17. The Government is therefore exploring other options for securing the same level of support for consumer codes. BSI is considering the development of a consumer welfare standard and is looking at how its Kitemark[®] accreditation system might be adjusted in future to endorse codes meeting the criteria as well as endorsing individual businesses.
18. The Government is also considering options under which a code promoter would seek endorsement under the Primary Authority scheme for regulatory compliance operated by Trading Standards. This and related options will be set out in a consultation document on extending a form of Primary Authority to trade associations to be published shortly.
19. There is also potential for non-public bodies such as Which? to play a bigger role in the development and promotion of consumer codes by business.

Consumer advocacy

20. Consumer advocacy is about representing consumer interests and promoting consumer rights on a wide spectrum with businesses, regulators and Government, the European Union and internationally. Effective advocacy requires strong research, analysis and investigation combined with effective influencing and negotiating skills to deliver better outcomes for consumers.
21. There can be a need for effective advocacy in all consumer facing markets. It is, however, particularly important in regulated sectors where choice may be more limited and the goods and services provided (energy, water, telecoms, transport) are essential to ensure quality of life and social inclusion, especially for the poorest and most vulnerable citizens.
22. The Government wants to create greater clarity for consumers about who is championing their rights. It also wants to enhance the impact that publicly-funded consumer advocacy has, domestically and internationally, on public policy and regulation. Finally, the Government is committed to reducing overlap or duplication of effort in consumer research and analysis while improving the use of local intelligence in informing national policy.
23. At present, responsibility for publicly-funded general advocacy is divided between Consumer Focus and the Citizens Advice service. The Government considers there would be significant benefit in creating a single voice. Combining the expertise of the two organisations and enhancing the link to local consumers should improve the evidence base and research capability and help ensure that the issues affecting consumers are effectively tackled.
24. **The Government therefore proposes that the Citizens Advice service should be the lead national, publicly-funded consumer advocate, building on its very well known brand and high levels of public trust. Accordingly, the Government proposes that Consumer Focus should be abolished.**
25. Responsibility for advocacy in the regulated sectors poses particular challenges. Sectoral regulators have a duty to promote the interests of consumers. However, this has to be balanced against a range of other duties.
26. Separate bodies, or panels within regulators, therefore also exist purely to advocate the interests of consumers. Consumer Focus has this responsibility for energy and postal services; Passenger Focus for rail, bus and tram services; the Aviation Consumer Advocacy Panel for air passenger services; the Consumer Council for Water in England and Wales and Waterwatch in Scotland (shortly to be replaced by Consumer Focus) for water-related services; the Legal Services Consumer Panel for legal services in England and Wales; and the Communications Consumer Panel for telecoms and broadcasting.
27. This patchwork of bodies can be confusing for consumers, and means that capability is fragmented. It produces widely differing approaches to consumer advocacy in different sectors which cannot necessarily be explained by different sectoral conditions or consumer needs. **The Government is therefore consulting on options to simplify and increase the impact of sectoral advocacy by integrating the functions of various bodies into a single regulated industries unit.** A number of benefits potentially flow from such integration including the ability to: develop stronger cross-sectoral expertise

and capability; consider the cumulative impact on consumers of price changes and other changes across sectors; develop an integrated ombudsman system to deal with complaints and redress; raise public awareness and understanding of who is representing their interests; and reduce overall costs and improve efficiency.

28. **The Government is consulting on whether it will be possible for the Citizens Advice service to take on these functions from Consumer Focus, and wherever possible other sectoral consumer bodies, alongside its enhanced role to provide information and advice and general consumer advocacy. This could be done in partnership, where appropriate, with sectoral and general consumer organisations.** Integrating this function within a single unit, which could commission or work with other organisations active in particular sectors on behalf of consumers, would have the further benefit of providing potential synergies between the national role currently carried out by Consumer Focus and other consumer panels and the extensive network of advice and support provided by local Citizens Advice Bureaux.
29. Taking on such functions from Consumer Focus and/or other sectoral consumer bodies would mean a substantial change for the Citizens Advice service, including an extension of its partnership approach with other private and public sector organisations active in this field. Appropriate powers would be needed, including powers to ask for information and rights to be consulted by regulators, and the Citizens Advice service would have to be publicly accountable for the use of those powers. Ensuring that consumer interests in these complex markets are fully represented would require the development of significant new capability including understanding of behavioural economics, an ability to understand complex technical and financial issues and an understanding of markets and regulatory trade-offs. The eventual decisions on the transfer of sectoral consumer bodies into the proposed arrangements are a matter for the relevant Departments and Devolved Administrations.

Enforcement

30. Unless the law is enforced effectively, rogue traders can undermine responsible businesses, unfair market practices can develop and consumers will not have the confidence to exercise choice sensibly and thus drive competition, innovation and growth.
31. Responsibility for consumer enforcement is split between Trading Standards officers, funded mainly by local government, and the OFT which enforces fair trading laws at the national level. BIS supports the enforcement effort through regional and national schemes, notably Scambusters and Illegal Money Lending teams. Trading Standards perform the vast bulk of the enforcement effort – 86 per cent of enforcement funding is controlled by local authorities – but Trading Standards accountability for tackling cross-boundary and national threats is not clear and OFT resources are limited with the result that enforcement gaps can appear.
32. Moreover, enforcement activity faces particular challenges. The Government's commitment to reducing the deficit is impacting on Trading Standards alongside other local services; local government funding for Trading Standards activity is expected to decline from an estimated £213 million in 2009 to an estimated £140–170 million in 2014.
33. This will result in reduced capability in an environment where capability already varies considerably across the country. Several authorities already have fewer than ten Trading

Standards officers and have limited ability to address the larger cross-boundary threats. The risk is that enforcement activity which crosses local authority boundaries or deals with a national rather than exclusively local problem, will be disproportionately cut. This could in turn have a disproportionate impact on consumers and market confidence since over 70 per cent of consumer detriment arises as a result of practices arising from cross-border activity.

34. BIS funding for regional activities such as Scambusters has helped to maintain cross-border capability as has the sharing of regulatory services between different local authorities in some places. However, a longer term strategy is needed to improve the effectiveness of enforcement against national and cross-border threats.
35. The interaction between Trading Standards and other enforcement authorities is also critical. The absence of a clear boundary between responsibilities allows some local authorities effectively to opt out of enforcement against all but the most local of threats. It also fails to place responsibility clearly on the national body or larger neighbouring Trading Standards teams to cover cross-boundary cases which are inadequately addressed as a result. Even the larger local Trading Standards teams and the BIS-sponsored regional teams are not always clear which cases should be passed up for the OFT to handle and which should not.
36. **The Government therefore proposes to strengthen consumer enforcement by improving the national leadership and coordination capability of Trading Standards and by clarifying its responsibility to tackle cross-boundary threats. It also seeks to ensure that there is more effective partnership working and prioritisation of activity between Trading Standards and the proposed CMA.**
37. There are a number of potential ways in which this could be achieved. **The Government's preferred approach** is as follows:
 - A new **Trading Standards Policy Board (TSPB)** would be created, made up of Chief Trading Standards Officers to provide leadership and coordination of Trading Standards in identifying and tackling regional and national threats. A proportion of the current OFT enforcement budget and BIS funding for national enforcement programmes would be combined and made available to Trading Standards through the TSPB. National and **cross-boundary threats**, other than those arising from structural market problems, would become the responsibility of Trading Standards. They could be tackled by expanded regional teams or by designated lead authorities with particular areas or sectors of expertise. In order to reduce the disincentive for individual authorities to take on more complex or risky cases, some provision for an indemnity fund or other mechanism for underwriting risk would be needed. The TSPB would be accountable to BIS for the way it spends national government money but there would also need to be appropriate political accountability through the Local Government Group.
 - The **Competition and Markets Authority** would have responsibility for investigating and tackling enforcement in markets in which there are **structural market problems**. This would include the retention of consumer law enforcement powers as an option in these cases. The CMA would have significant discretion to determine when such structural problems exist.

- The **TSI** would take on responsibility for consumer enforcement guidance, training, international liaison and policy functions, reporting to TSPB and thereby to BIS.
 - There would need to be arrangements for partnership between the CMA and the TSPB and also with the Citizens Advice service. This would have to cover the sharing of intelligence on consumer detriment as well as collective decision-making on how threats which crossed over institutional divides should be handled. They could include mechanisms such as a **joint coordination board, and/or a joint annual report** on the effectiveness of enforcement activity to encourage effective partnership working.
38. A key advantage of this approach is that it would result in clearer accountability between Trading Standards and the CMA. Trading Standards would have clear responsibility for all consumer law enforcement, other than in cases arising from structural market problems. This would make effective national leadership of Trading Standards imperative and thereby open up scope for greater efficiency of enforcement through improved coordination of local resources. It would also provide greater national resource and critical mass for Trading Standards to build its long-term capability for tackling national and cross-boundary threats.
39. However this would also require the transfer of significant resource and capability in tackling national threats from the OFT or the CMA which would be potentially disruptive and could result in temporary or permanent loss of capability in some areas. There is also a risk that seeking to clarify accountabilities would reinforce separation rather than promote partnership working.
40. Alternative approaches include: the status quo; the more radical step of giving the CMA responsibility for all cross-boundary enforcement; or giving Trading Standards responsibility for all consumer enforcement, including remedying structural problems in markets. These options are explored in the Impact Assessment that accompanies this consultation document (Annex F). But there are, of course, other variations possible between the status quo and the Government's preferred option.
41. One possible variation, for example, could be to create a **Joint Enforcement Board (JEB)** comprising representatives of the CMA and Trading Standards in equal numbers. The CMA and Trading Standards would retain current overlapping powers and responsibilities but the JEB would decide which cases would be prioritised and whether they should be pursued by Trading Standards or the CMA. Some of the capability for tackling national threats (for example expert lawyers) would be held within the JEB to be deployed as needed by the CMA or by Trading Standards, with other resources transferred to Trading Standards or retained within the CMA. The JEB would also identify opportunities for joint working between Trading Standards and the CMA in pursuing cases. The JEB could be either exclusively a decision-making body, with the JEB resources employed by the CMA or in some central body within Trading Standards, or it could be a new, stand-alone public body.
42. This variant would provide an alternative approach to partnership working. It would be less disruptive and would retain in one organisation most of the national consumer enforcement capability currently held by the OFT. However, lead accountability for national and cross-boundary enforcement would be less clear. Any creation of a third body sitting between the CMA and Trading Standards would add to organisational complexity. And it would not present the same opportunity to build the leadership and national capability of Trading Standards as responsibilities would continue to overlap and any resource transfer would be significantly more modest.

Devolution

43. Consumer policy is not devolved to Scotland and Wales but it is devolved to Northern Ireland, hence most of the proposals in this consultation do not apply to Northern Ireland. For Scotland and Wales, the Government's aim is to ensure consistency and effectiveness of consumer and national enforcement services across the UK whilst recognising the local differences which may exist and respecting the devolution settlements in each case.

Responding to the consultation

44. Responses to the consultation are invited by 27 September 2011. Details of how to respond are in Chapter 1 and a list of the consultation questions is at Annex A. Organisations consulted during the development of this consultation are listed in Annex E.

Chapter 1 – Introduction

Consumer policy

- 1.1 The Government's prime objective in pursuing and implementing consumer policy is to empower consumers to make wise decisions when purchasing goods and services. Empowered consumers embrace new products and services and demand choice, thereby stimulating competition and innovation from traders as well as high standards of consumer care. Sectors that have been exposed to improvements in consumer information and comparison, such as the insurance market, have seen big drops in prices and improvements in service quality. Without informed consumers driving a hard bargain, businesses can become complacent and lose focus on becoming more efficient by driving down costs and investing for increased productivity. It is this investment and quest for efficiency which drives innovation and growth in the economy. Consumer empowerment is therefore a vital part of the Government's growth agenda as well as a key element of its broader citizen empowerment mission.
- 1.2 Empowerment depends on an underpinning framework of competition and consumer law so that choices are offered fairly. The law needs to be properly enforced but it is vital that the law is not too prescriptive, otherwise it runs the risk of dampening competition. Either by limiting business flexibility and innovation or by loading costs onto businesses which are then passed on to consumers in the form of higher prices. Excessive regulation may limit consumer choice and, even if intended to protect consumers, can end up costing them more than the benefit it brings. It also runs the risk of becoming quickly out of date because parliamentary process makes changing the law a laborious and necessarily time-consuming process.
- 1.3 More flexible tools are therefore required to supplement the basic law. Businesses may also need to be "nudged" to help consumers to compare offers and understand the best deals. The vulnerable may need access to reliable, independent information and advice or to be able to allow others to act on their behalf. In some cases they may still need legal protection. Government published a strategy for consumer empowerment in April.⁴
- 1.4 While the State has a role to play in consumer empowerment, it does not follow that this role must be fulfilled by central Government institutions or even public bodies at all in some cases. The Government is determined not to crowd out market-based solutions or those involving the voluntary sector and it will devolve matters down to local government and draw on the strengths of local government bodies wherever possible.
- 1.5 Honest businesses with high standards also often develop voluntary codes of practice which go beyond the law, to reassure consumers and boost their confidence. Public bodies can help by developing or endorsing the standards which such codes seek to apply.

⁴ BIS and Cabinet Office (2011), *Better Choices: Better Deals* <http://www.bis.gov.uk/better-choices>

- 1.6 Empowering consumers will promote social justice and minimise the consumer detriment arising from the activities of rogue traders, scam operators and other businesses tempted to treat consumers unfairly. The Government believes that empowerment will also help consumers avoid becoming risk-averse, help them to have the confidence to buy high-value or innovative goods and services and thereby help stimulate growth in the economy. At the same time, this policy is aimed at protecting honest and fair businesses from unfair competition from illegal or sharp practices. It goes alongside a strong competition policy regime and aims to ensure that markets operate in a way that benefits the public and stimulates economic growth and prosperity in the UK.

Institutions involved in protecting consumers

- 1.7 Empowerment is promoted in a variety of ways: by businesses themselves offering choice; by independent companies offering services to help consumers to share offers and search for bargains; by charities and others volunteering to help vulnerable consumers; and sometimes through the actions of the State. Government establishes the legal framework, it helps ensure the provision of information, advice, education and advocacy on consumers' behalf and its agencies enforce the law against rogue traders and others tempted to dis-empower consumers by misleading them or treating them unfairly. These activities require institutions to carry them out and this consultation is concerned with making changes to publicly funded institutions in order to make the UK's protection for consumers more effective.
- 1.8 The key publicly funded institutions involved are summarised below. An illustration of how they fit into the landscape of bodies is at Figure 1. The scope of this consultation excludes those bodies active in financial services regulation or the provision of advice on financial services matters. The roles and responsibilities of the Financial Services Authority and its successor bodies the Financial Conduct Authority and Prudential Regulation Authority, the Money Advice Service and the Financial Ombudsman Service are not considered in this paper.
- 1.9 This paper also does not cover the regulation of consumer credit, as this matter was considered extensively in the Government's consultation *A new approach to regulation: Consultation on reforming the consumer credit regime*.⁵ It also excludes institutions focused on public services such as health.
- 1.10 **Local Authority Trading Standards Services (LATSS)** carry out the vast majority of enforcement of consumer legislation as well as being responsible for a range of other enforcement functions such as on animal welfare and weights and measures legislation. In some parts of England as well as in Scotland and Wales, LATSS are in unitary or metropolitan authorities along with other regulatory services (in particular Environmental Health). In other parts of England, where there is a two-tier local authority structure with responsibility divided between county and district authorities, Trading Standards services are provided at county level (although in some cases, districts perform certain functions such as control of doorstep selling). There are 27 two-tier counties and 123 unitary authorities in England, 32 unitary authorities in Scotland and 22 in Wales.

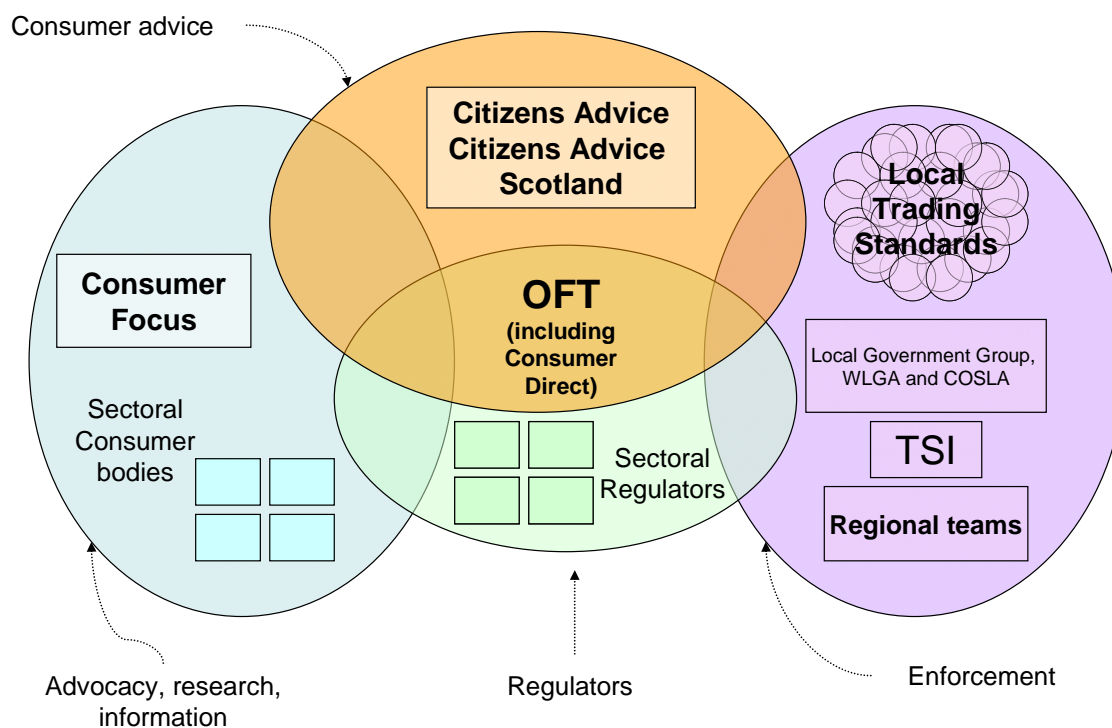
⁵ www.bis.gov.uk/policies/consumer-issues/consumer-credit-and-debt/consumer-credit-regulation

- 1.11 LATSS have developed mechanisms and resources on a regional and national basis in order to act collectively against threats which cross local authority boundaries. Regional intelligence officers and coordination units support and help coordinate local enforcement and regional investigation teams (Scambusters) can be used to support larger cases. The **Local Government Group** in England and Wales issues technical guidance and policy support and also supports the **Trading Standards Policy Forum** of chief trading standards officers which considers strategic policy challenges for Trading Standards as a whole. The Convention of Scottish Local Authorities (COSLA) has a similar role in Scotland. The chief officers also come together to form the **Association of Chief Trading Standards Officers**, the **Welsh Heads of Trading Standards** and the **Society of Chief Trading Standards Officers in Scotland** (ACTSO, WHoTS and SCOTSS) which sit within the **Trading Standards Institute** (TSI). TSI represents the wider trading standards profession and provides input on policy affecting its members as well as professional development and other services.
- 1.12 The **Office of Fair Trading** (OFT) is the UK's principal economic regulator. It enforces both competition and consumer protection laws, as well as undertaking studies to identify problems in specific markets. The OFT operates the national Consumer Direct helpline, runs consumer and business awareness-raising campaigns about scams and consumer rights, produces material to raise the business community's awareness of their legal responsibilities, coordinates support for local consumer educational activities and has a number of specific national enforcement functions. The OFT is a non-Ministerial Government Department.
- 1.13 **Consumer Focus** is a statutory consumer advocacy body which operates across the whole of the economy with specific responsibility for the gas, electricity and postal sectors. It has distinct operations in England, Wales and Scotland. It undertakes and publishes research about consumer matters which can help Government and sectoral regulators formulate policy. It has the power to investigate cases of complaints which are of general interest to consumers as a whole and, in the energy sector for example, the power to appeal certain decisions made by the regulator on behalf of consumers. It also provides advice to consumers and micro-businesses. It has an Extra Help Unit which provides assistance and advice for vulnerable gas, electricity and postal services consumers and for electricity and gas consumers who are facing difficulties because of disconnection, or possible disconnection, of supply. Consumer Focus is funded by a grant-in-aid from BIS and by gas, electricity and postal services licensees.
- 1.14 The Citizens Advice service comprises **Citizens Advice** and **Citizens Advice Scotland** which are independent, charitable membership organisations whose members, the Citizens Advice Bureaux, are themselves independent charities. They provide advice to consumers, and to citizens more generally, through a variety of mechanisms including telephone, online and face-to-face at the bureaux. Citizens Advice and Citizens Advice Scotland receive core funding from BIS by a grant-in-aid and for specific projects from UK and devolved Government Departments. In Scotland, a telephone helpline, Citizens Advice Direct, is funded by the Scottish Government to complement the online and face-to-face services of the bureaux. Local authorities, other charities and the private sector also fund bureaux across the UK.
- 1.15 Sectoral consumer bodies include **Consumer Focus**, the **Consumer Council for Water**, **Waterwatch Scotland**, **Passenger Focus**, the **Public Transport Committee in Wales**, the **Legal Services Consumer Panel**, the **Aviation Consumer Advocacy Panel**, and the **Communications Consumer Panel**. Most are wholly or partially funded by levies on

the sectors concerned and receive this funding via a sponsor Department or Devolved Administration.

- 1.16 In Northern Ireland, the **General Consumer Council for Northern Ireland** has responsibility for providing information, advice and education on consumer issues across all sectors except postal services. It is funded by the Department of Enterprise, Trade and Investment, Northern Ireland.
- 1.17 In addition to these publicly funded bodies there are independent consumer organisations such as **Which?** that carry out some of the same types of activities as the public bodies without receiving public funding.

Figure 1: Current Consumer Institutional Landscape



Focusing resources to help the front line

- 1.18 From this description, it can be seen that the institutional landscape of consumer bodies is quite complex with consumers' interests represented by an array of public, private and voluntary bodies. Sometimes these duplicate each other in their efforts to inform, educate and advise consumers of their rights.
- 1.19 This consultation sets out the Government's proposed reforms to publicly funded consumer institutions (it does not deal with those focused solely on the financial sector). The proposed changes are designed to simplify the institutional landscape and focus resources to help the front line, where they can achieve the most empowerment at the lowest cost.

1.20 The Coalition Government has set out its strong commitment to consumer and competition policy:

“The Government believes that action is needed to protect consumers, particularly the most vulnerable, and to promote greater competition across the economy. We need to promote more responsible corporate and consumer behaviour through greater transparency and by harnessing the insights from behavioural economics and social psychology.”⁶

1.21 It is also pursuing a policy across the whole public sector of reducing the number of public bodies in order to reduce complexity and overlap of functions, in some cases to increase accountability to Parliament, and in other cases to boost the participation of the third sector in public life and to save money.

1.22 In this context, the Secretary of State for Business, Innovation and Skills, Vince Cable, announced on 14 October 2010 that he was proposing to make a number of changes to the institutional landscape concerned with consumer and competition policy.

1.23 The Government wants a model that strengthens the front line for consumer empowerment and protection while cutting down the complexity, confusion and duplication that accompanies the proliferation of bodies. The proposals set out in this consultation have been guided by the following objectives:

- **Reducing complexity of the consumer landscape.** At present, there is a plethora of publicly funded bodies involved in consumer advice and representation. Not all of these enjoy wide public recognition, and it is not obvious to consumers where they should go to get the advice or redress they need. The Government therefore wants to simplify and streamline the institutional landscape.
- **Strengthening the effectiveness of consumer enforcement.** Effective enforcement of the law is essential to protect consumers from rogue traders and unfair market practices. A recent National Audit Office (NAO) report⁷ has identified the costs to consumers, and hence the economy, of unfair trading as £6.6 billion. At present, responsibilities for enforcement are split between local Trading Standards and the Office of Fair Trading. Trading Standards face particular challenges as a result of reduced local authority spending, while the NAO has pointed to problems of overlap and lack of coordination between Trading Standards and the OFT. The Government therefore wants to clarify responsibilities and ensure better use of limited enforcement resources through more effective leadership and integration of effort around the country.
- **More cost-efficient delivery, closer to the consumer front-line.** Ensuring the cost-effectiveness of consumer advice, representation and enforcement is increasingly critical as public resources become more constrained. Streamlining bodies and maximising the benefits to be achieved by linking national activity to local intelligence

⁶ Cabinet Office (May 2010) *The Coalition: our programme for Government*.

⁷ NAO (2011) *Protecting consumers – the system for enforcing consumer law*
http://www.nao.org.uk/publications/1012/protecting_consumers.aspx

and front-line delivery of advice and enforcement is one of the ways in which this can be achieved.

1.24 The reforms seek to clarify the responsibilities of the key institutions which will be involved in the consumer landscape in future and play to the strengths of each organisation:

- The Citizens Advice service comprising Citizens Advice and Citizens Advice Scotland. The intention is that over time almost all relevant central government resources for consumer information, advice, education and advocacy would transfer to the Citizens Advice service, which has high recognition and trust among the public as well as a track record of effective advocacy.
- Trading Standards comprising Local Authority Trading Standards services (LATSS), the TSI, the Association of Chief Trading Standards Officers, the BIS-funded regional and national specialist teams to support LATSS and the support infrastructure offered by the Local Government Group. The intention is to set up a Trading Standards Policy Board of Chief Trading Standards Officers to lead the network and deploy national Government funds to meet national and regional, as well as local threats. The increased leadership and coordination would address alleged inconsistency of enforcement practice and ensure that gaps in enforcement capability do not arise around the country.
- The proposed new Competition and Markets Authority (CMA) will be responsible for the analysis of markets and the proper functioning of competition within those markets. For this purpose it will continue to look at both supply and demand driven market failures and will retain powers to enforce consumer law against companies if this is the best way of resolving structural market problems.

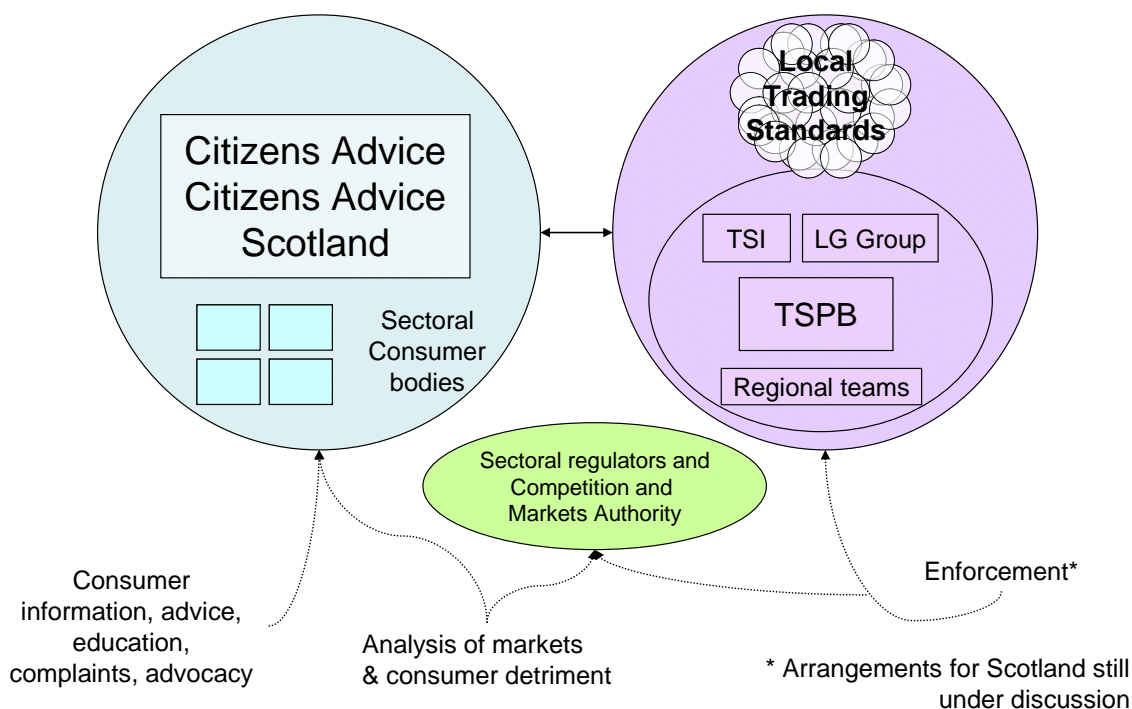
1.25 Both the Citizens Advice Service and Trading Standards have high public awareness and trust levels. Their activities reach very large numbers of consumers in practical ways and the Government therefore proposes to move most relevant central Government funding for consumer empowerment and protection towards these two organisations. The proposed new CMA will take over the internationally respected work of the Office of Fair Trading in ensuring that markets are understood and that competition in markets works optimally. It will continue to demonstrate the value of demand-side consumer detriment and supply-driven competition issues being considered together and will deploy consumer enforcement powers alongside its other remedies. Figure 2 illustrates the proposed new landscape.

1.26 Government is aware of the pressures being faced by the individual LATSS and the individual Citizens Advice Bureaux. One significant aim of the proposed landscape changes is to strengthen the central support structures which back up the local offices in order to ease those pressures.

1.27 The Government's vision for the future is one where the Citizens Advice service provides, through their central resources and their bureaux network, a seamless information and advice service to consumers – first online, second by telephone, and for those who need it, face-to-face. Consumers would know where to go for information and advice and be able to access it easily according to their need. From all this activity, intelligence on the concerns and experiences of consumers on the frontline would be garnered and assembled into a huge and valuable data set. LATSS, the proposed Competition and Markets Authority, sectoral regulators and the proposed Trading Standards Policy Board

for national consumer enforcement would have access to this information and intelligence from other sources such as Which? to facilitate their prioritisation and coordination of enforcement and market analysis activities. The Citizens Advice service would combine this with high-level market, economic and behavioural analysis across sectors and insight from sectoral experts to undertake powerful advocacy on consumers' behalf, working with other appropriate organisations.

Figure 2: Proposed Future Consumer Institutional Landscape



Devolution

1.28 Consumer policy is reserved to Westminster for England, Scotland and Wales but this consultation recognises that specific arrangements for implementation of the proposals may need to be made for Scotland and Wales. We look forward to receiving the formal views of the new administrations in those nations.

1.29 Consumer policy is devolved to the Northern Ireland Assembly where the situation is considerably less complex – the Department for Enterprise Trade and Investment is responsible for enforcement and the General Consumer Council for Northern Ireland is responsible for most provision of information, advice, education and advocacy. One proposal in this consultation affects Northern Ireland specifically – the transfer of postal advocacy work from Consumer Focus to the General Consumer Council for Northern Ireland (see Chapter 4).

The Public Bodies Bill

1.30 The Public Bodies Bill⁸ was introduced into the House of Lords on 28 October 2010, with the intention of giving effect to the proposals for public bodies reform. Provision was made to include the relevant consumer and competition bodies in the Schedules to the Bill with the intention that any changes to existing legislation that were needed would be made by secondary legislation. The Public Bodies Bill is undergoing Parliamentary scrutiny and has not yet received Royal Assent. Therefore, implementation of proposals in this consultation dependent upon legislative change will in turn rely either on the successful passage of the relevant parts of the Bill or the availability of an alternative legislative vehicle.

How to respond

1.31 When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents, and where applicable, how the views of members were assembled.

1.32 The responses must be submitted by 27 September 2011 and can be submitted via letter, fax or preferably by email to:

Email: david.a.evans@bis.gsi.gov.uk

David Evans
Consumer and Competition Policy Directorate
3rd Floor
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 0335
Fax: 020 7215 0357

Additional copies

1.33 This consultation can be found at: <http://www.bis.gov.uk/consultations> and is also available from the BIS Publications Orderline, ADMAIL 528, London SW1W 8YT, Tel: 0845 015 0020, Minicom: 0845 015 0030. You may make additional copies without seeking permission.

Confidentiality and data protection

1.34 Information provided in response to this consultation, including personal information may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004. If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory code of

⁸ services.parliament.uk/bills/2010-11/publicbodieshl.html

Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

- 1.35 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries

- 1.36 Questions about the policy issues raised in the document can be addressed to David Evans (contact details as above).
- 1.37 If you have any comments or complaints about the way this consultation has been conducted, these should be sent to:

Tunde Idowu,
BIS Consultation Coordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Tunde on 020 7215 0412
or e-mail to: Babatunde.Idowu@BIS.gsi.gov.uk

- 1.38 A copy of the Government's Code of Practice on Consultation is attached at Annex G.

Chapter 2 – Information, Advice and Education

Key Proposals:

- **The Citizens Advice service to lead on all publicly funded information and advice for consumers (outside financial services and health).**
- **The Citizens Advice service to take over responsibility for Consumer Direct.**
- **The Extra Help Unit for vulnerable consumers of energy and postal services to be transferred to the Citizens Advice service.**
- **The Citizens Advice service to take on national coordination of consumer education (except on financial services and health). Coordination of consumer education activities locally to be done by collaboration between the Citizens Advice service and the Trading Standards community.**

Information and advice

- 2.1. The Government agenda for publicly-funded information and advice to consumers is exciting and ambitious. It intends to integrate existing publicly-supported sources provided face-to-face (Citizens Advice Bureaux and Trading Standards), by telephone (Consumer Direct, the Citizens Advice service and sometimes Trading Standards) and online (direct.gov, OFT, Consumer Direct, the Citizens Advice service, BIS, Consumer Focus and Trading Standards) into a single public offering delivered through the Citizens Advice service.
- 2.2. This would have the huge advantage of simplicity for consumers, but also of helping advice to be provided through the most efficient route and thereby reaching a much greater number of consumers. Online advice tends to be much cheaper to administer than telephone-based advice which is in turn cheaper than face-to-face advice. Consumers capable of helping themselves would find what they need from the information and advice provided through online but more vulnerable consumers might need more active guidance and in some cases, face-to-face help, including from Trading Standards officers. Crucially, all consumer problems and advice needs would be logged on an integrated system providing a huge dataset on consumer detriment which would inform enforcers and policy-makers and feed back, in turn, to enable better advice.
- 2.3. This integration would help maximum use to be made of private and independent sources of advice and information from organisations such as Which?, the Money Advice Service and others. In turn, this would take the pressure off public expenditure and give greater efficiency.
- 2.4. Integration would also establish the infrastructure within the Citizens Advice service to provide efficient information and advice to citizens in all the other areas they cover such as social housing and social security benefits. This has the potential to transform the

capability of the Citizens Advice service to reach a much greater number of citizens with a much richer service offering across all their public service advice sectors. It would also greatly improve the evidence base about the ways citizens interact with Government which should improve policy-making.

Policy context

- 2.5. For consumers to be empowered it is essential that they have information about their rights and are able to understand how to use this to prevent or sort out problems in buying goods and services. This can be achieved in three ways:
- providing information for people who are aware of the risks and the rewards of exercising choice and capable of choosing effectively and asserting consumer rights if pointed to the right material;
 - providing advice for people who need help in interpreting or applying information; and
 - providing education for people who may not be aware of the risks in relevant markets or the importance of exercising choice carefully or that they have particular rights as consumers.
- 2.6. Information and advice for consumers is usually provided by traders in the first instance. Many businesses have developed systems to ensure that their staff give accurate advice to consumers in order to inspire trust. Other businesses and third sector bodies have sprung up with a specialisation of comparing the offers of a range of suppliers. The exponential growth in e-commerce in recent years has spawned a host of business-driven models for analysing and comparing prices and other terms of supply, as well as assembling consumer feedback and reviews. UK consumers now leave more than 100 million items of online feedback each year and this has huge potential to help consumers make decisions that better reflect their preferences. Consumers can shortcut traditional accreditation schemes and instead get access to the opinions and experiences of people just like them.
- 2.7. Stimulating businesses and the third sector to provide the right information to consumers to enable them to exercise choice effectively is a vital element of the consumer empowerment agenda. That is why the Government's Consumer Empowerment Strategy published in April⁹ included a proposal to help consumers access, control and use data held about them by businesses. The programme is called *mydata* and involves over 20 leading businesses covering financial services, retail, utilities, telecoms and online platforms as well as Government. The aim is that a market in useful websites and mobile applications will be stimulated to help consumers analyse their data and to make choosing the best deal easier.
- 2.8. Consumers now have access to far more information than was the case in the past, but some can still find the information hard to process and may not know which information source to trust. Stimulating businesses and the third sector, which is often more trusted by consumers, to provide the right information to consumers to enable them to exercise choice effectively is a vital element of the consumer empowerment agenda. But

⁹ BIS and Cabinet Office (2011), *Better Choices: Better Deals* www.bis.gov.uk/better-choices

Government understands that some people are simply unable to process all the available information and exercise choice effectively. These vulnerable consumers need, above all, independent advice in order to be empowered. That is why Government has, for example, continued funding this year to enable Citizens Advice and other advice providers to deliver debt advice to those with unmanageable levels of debt. The Government is determined not to spend public money generating consumer information where such information is already available from an authoritative source and in an easily usable format. Organisations such as Which? and Moneysavingexpert.com produce respected consumer information materials and where these are freely available to the public, public money should not be spent on duplicating materials. But there is a case for publicly funded information on consumer rights in some cases and especially for targeted information designed to help more vulnerable groups to be aware of specific threats.

2.9. Successive governments and many local authorities have taken the view that the public goods of fairness and informed and empowered consumers which sustain competitive and innovative markets justify the minimal expenditure involved in supporting such provision. In the current environment, however, any such public expenditure must be driven down to the minimum necessary and used in the most cost-effective manner. In Great Britain, publicly funded information and advice is provided as follows:

- Information about general consumer rights and advice about making wise decisions in purchasing goods and services, as well as what to do when things go wrong, is provided by Consumer Direct through its contact centres and website.¹⁰ This is currently managed by the OFT and is delivered by a number of contractors around the country.
- In the regulated sectors, the independent regulators provide information about their sectors and some provide advice to consumers on topical issues. The sectoral consumer advocacy bodies described in Chapter 4 also provide information and advice to varying degrees as part of their advocacy roles.
- LATSS publish information for consumers about local issues and campaigns, usually online, together with material from Consumer Direct. Almost all calls to LATSS for information and advice are handled by Consumer Direct in the first instance. For cases where follow up is needed, Consumer Direct will make a referral back to the relevant LATSS.
- Citizens Advice and Citizens Advice Scotland provide information online¹¹ about consumer issues via a UK-wide, public facing website, Adviceguide, which received 12 million hits in 2010. Its consumer information is produced in-house from primary sources. Citizens Advice Bureaux provide advice to their clients through a variety of mechanisms including telephone and face-to-face advice on a wide range of topics including consumer issues.¹²

¹⁰ www.direct.gov/consumers

¹¹ www.adviceguide.org.uk

¹² Approximately six per cent of the face-to-face (second tier advice) cases handled by Citizens Advice Bureaux advisers concern consumer issues; the large majority of bureaux cases are currently concerned with access to benefits or debt.

- In Scotland, Citizens Advice Scotland has established a telephone advice line, Citizens Advice Direct, which is funded by the Scottish Government and will be expanded to cover the whole of Scotland during 2011.
- Consumer Focus has an Extra Help Unit which provides assistance and advice for vulnerable gas, electricity and postal services consumers and for electricity and gas consumers who are facing difficulties because of disconnection or potential disconnection of supply. This is a so-called “second tier” specialist advice service. Consumer enquiries are referred to this specialist team from Consumer Direct, from local authorities or Citizens Advice Bureaux.
- Consumer Focus in Scotland has published a range of Consumer Guides covering issues where there are distinct national differences, such as buying and selling a home, tenement management, education law and the Scottish legal system.
- The Consumer Council for Northern Ireland¹³ provides general and regulated sector-specific information and advice to consumers in the province. Citizens Advice Northern Ireland and the bureaux provide a similar service to that in GB. Consumer policy is devolved in Northern Ireland and public funding for consumer information and advice is the responsibility of the Northern Ireland Assembly.

2.10. In addition, the consumers' association Which? provides reviews of products and investigations of sales practices, reported through Which? magazine and online to members.¹⁴ It also provides services available to everyone including free advice guides, “first-look” reviews of new products, independent and unbiased switching sites for energy and mobile phones and a free ‘consumer rights’ mobile application. Which? also provides paid-for legal advice and is collaborating with Citizens Advice on consumer law issues, including a pilot partnership in Wales.

2.11. In respect of England, Scotland and Wales, where consumer policy is the responsibility of the UK Government, the Government's view is that the landscape of bodies involved in providing information and advice is complicated and confusing for consumers. That is not a criticism of the bodies involved but the Government's intention is to streamline the public funding that goes into these functions (Which? does not receive any public funding) and to focus these resources on the Citizens Advice service to reinforce a simple message to consumers – if you need publicly-funded information or advice, go to Citizens Advice.

2.12. The Government believes that the support provided by the Extra Help Unit for vulnerable consumers should continue under the new arrangements for the consumer landscape and that the unit and associated finance should be transferred to the Citizens Advice service.

2.13. Citizens Advice and Citizens Advice Scotland have been working to develop plans for a successor to the Consumer Direct service and are liaising with the OFT and representatives of LATSS to ensure the strengths of the current service are retained. This includes the appropriate access for organisations that need to use the data from the

¹³ www.consumercouncil.org.uk

¹⁴ www.which.co.uk

service. They will be finalising their plans for the new service in the coming months and it will go live on 1 April 2012. One of the objectives of the new system will be to help people to help themselves as much as possible, thereby boosting the capacity to provide one-to-one advice for those who really need it.

2.14. The Citizens Advice service and Which? are collaborating to develop a process which minimises duplication of effort and makes a consistently high level of consumer information available on each organisation's online platforms. This process should be invisible to users and it is hoped to have it in operation by April 2012 at which time responsibility for managing the consumer content on direct.gov will pass from the OFT to the Citizens Advice service. Public funding from this point will be strictly limited to producing materials that the Citizens Advice service, Which? and other reputable private and third sector bodies do not already have available. The Citizens Advice service will be given the responsibility to ensure that consumer information and advice is comprehensive and tailored to public need, especially targeting vulnerable groups, but where possible sourced from private and other voluntary organisations. Central Government and, if they so choose, local authorities, can then stop providing basic consumer information and advice altogether.

2.15. It would help the various bodies involved in planning for these changes to have feedback about the current services provided:

QUESTION 1. How do you think the provision of consumer information to consumers can be improved upon?

QUESTION 2. Do you agree that the OFT's consumer information role should be transferred to the Citizens Advice service?

QUESTION 3. Do you agree that the Extra Help Unit should be transferred to the Citizens Advice service?

Education

2.16. Education about consumer issues is for people who may not realise that they have a problem or that they have particular rights as consumers. Education activities fall into three categories:

- awareness-raising among the public at national and local levels about consumer rights, scams and rogue traders;
- direct education of the public and provision of materials to teachers; and
- educating businesses about their responsibilities to treat consumers fairly.

2.17. Much of the publicly-funded awareness-raising activity aimed at the public has been led by the OFT whose campaigns have included *Know Your Rights* and warnings on rogue traders and scams. These have been conducted through the media and reinforced by promotional material distributed to LATSS and through Citizens Advice and other organisations. In addition, Consumer Focus, Which? and Citizens Advice and Citizens Advice Scotland, as well as the Scambuster and Illegal Money Lending teams, also carry out public information campaigns.

- 2.18. The Government's intention is that responsibility for any such publicly-funded activity at national level should in future transfer to the Citizens Advice service. The efficiency gains from centralising all funding in one place will at least partially offset any pressure on national awareness-raising budgets. The activities Which? undertake are not dependent on public funding.
- 2.19. Consumer education activities for the public at a local level are usually carried out by Trading Standards officers or their colleagues in local government, sometimes using materials developed by the OFT. An example is *Skilled to Go* where the OFT has produced materials for teachers to help empower students in adult and secondary education, particularly in the context of literacy and numeracy education, about buying goods and services – it uses practical examples like buying a mobile telephone. LATSS offer extra support to teachers and make visits to schools and colleges. Many LATSS work closely with other local authority departments responsible for education, public information and protection of vulnerable people.
- 2.20. An example of another type of educational initiative taken by LATSS is direct contact with consumers on *No Cold Calling zones*. This would involve explaining the benefits of setting up a zone and canvassing interest followed up by monitoring, via calls to Consumer Direct or community contacts such as Citizens Advice Bureaux, to evaluate the success in reducing the incidence of rogue cold callers in the particular area.
- 2.21. The Government's intention is that local authorities should remain responsible for direct delivery of education to consumers at local level and that the OFT's national coordination role should transfer to the Citizens Advice service. The Citizens Advice service will need to work closely with the Trading Standards community to ensure that education provision is well coordinated, including the distribution of educational materials and sharing of best practice. The current Trading Standards Policy Forum and the TSI and its Consumer Education Liaison Group are already active in this area. The proposed new Trading Standards Policy Board and the TSI are the obvious candidates to work with the Citizens Advice service on this.
- 2.22. This consultation does not address financial education. The Money Advice Service was established in the Financial Services Act 2010 to promote understanding of the financial system and raise levels of financial capability across the UK. Other public services such as health services are also not covered.

QUESTION 4. Do you agree that the OFT's consumer education roles should be transferred to the Citizens Advice service? What are your views about the types of consumer education activity that are most valuable and how they should be managed and coordinated?

- 2.23. Educating businesses about their responsibilities to treat consumers fairly and uphold the law is something that OFT and almost all LATSS do. It is in everyone's interests for businesses to comply with legislation and to avoid enforcement action. In the large majority of cases, businesses that are advised by LATSS that they are acting illegally, or risk doing so, very quickly change what they are doing. The OFT supports LATSS in providing consistent advice on a national level through the provision of guidance and information materials for business. These materials are also provided to other organisations such as trade associations.
- 2.24. The Government is keen to ensure that LATSS continue to be able to educate in this way, as well as to take enforcement action when necessary, and the proposals set out in

Chapter 5 will contribute to that. The Government is also looking to the Trading Standards network in future to ensure that these activities are well coordinated, for example maintaining a source of up-to-date guidance material for businesses. As above, the Trading Standards Policy Board and the TSI are leading candidates to take on this role.

QUESTION 5. Do you agree that the proposed Trading Standards Policy Board and the TSI should coordinate and support business-facing educational activities?

Chapter 3 – Consumer Code Approvals

Key Proposals:

- **The proposed Competition and Markets Authority would not continue operation of the OFT's current Consumer Codes Approval Scheme.**
- **Alternative options for future accreditation of consumer code approvals to be explored further including roles for BSI, Trading Standards, LBRO and private and/or third sector organisations.**

Consumer codes

- 3.1. As noted earlier, if the Government's proposals on reform of the competition landscape are adopted³, a single Competition and Markets Authority will be created with a clear focus on securing competition in markets. Other than consumer enforcement and market analysis powers linked to its core competition and markets work, it is not currently envisaged that this new body will retain consumer policy roles. A consumer code approvals function for this new body is therefore not currently envisaged either.
- 3.2. The Government wholeheartedly supports self regulation and co-regulation as attractive ways of boosting consumer empowerment. Businesses undertake voluntarily to meet higher consumer welfare standards in order to boost consumer confidence overall and to gain a marketing advantage over less scrupulous rivals. In the case of co-regulation Government in some way endorses the higher standard or certifies that the standard is being met. This can help to give a scheme credibility with consumers and thus increase its marketing value whilst also encouraging businesses to aim for a higher standard in order to secure the Government's support.
- 3.3. Since 2001 the OFT has been operating the Consumer Codes Approval Scheme (CCAS) which aims to safeguard consumers' interests and raise standards in markets through the identification and promotion of self-regulatory business-to-consumer codes of practice. The OFT has statutory powers¹⁵ to approve and promote consumer codes of practice. The criteria for approval include the provision of clear pre-contractual information and fair contracts, compliance and monitoring procedures, protection of prepayments and independent redress schemes. There are currently ten approved codes, with a further ten working towards approval.
- 3.4. Other examples of co-regulation include:

¹⁵ Enterprise Act 2002 Part 1, Section 8

- Government endorsement of *Trustmark* – an accreditation scheme to give consumers the opportunity to identify tradespersons in the domestic building/home repair sector who agree to abide by minimum standards for trade competency and practice.
 - Local authority *Buy with Confidence* scheme – a scheme put together by a partnership of Local Authority Trading Standards Services to help consumers avoid rip-offs and cowboys by providing a list of reputable local businesses in a wide range of different trades.
 - The Advertising Standards Authority – the independent body responsible for resolving complaints about advertisements across all media and tackling non-compliance. Its advertising codes supplement legislation and fill gaps where the law does not reach – for example, they ensure that advertisements are tasteful, decent and contain measures which display a social responsibility.
 - Gas Safe Register – the official gas registration body for the UK appointed by the Health and Safety Executive who make sure all 120,000 gas engineers on the register are gas safe and qualified to work with gas.
 - The Bar Council, the Law Society, the General Medical Council – examples of arrangements for the self-regulation of professions which are largely industry-led but underpinned by a statutory regulator.
- 3.5. The OFT process for approving codes has proved to be a long and relatively labour-intensive with an average process of up to two years from application to code approval. The very stringent and rigorous requirements of the CCAS and its exacting nature provides consumers with confidence in the standards being sought and helps sponsors ensure compliance with the code among their members. But some code promoters have been frustrated by the “all or nothing” nature of the process and the length of time taken to gain approval. Whilst most CCAS members believe that OFT approval has been valuable to them, there are a relatively low number of approved codes. Indeed, most codes of practice do not have OFT approval but many are still promoted to consumers effectively.
- 3.6. Some code promoters believe that the prospect of OFT approval helps to persuade their members to adopt higher standards. In sectors where membership of an approved code is an important element of operating within a government-regulated environment, this can easily be seen. But in other sectors, where compliance with any code is entirely voluntary, it must depend on the consumer recognition of the OFT CCAS logo as that determines the value of the exercise for businesses.
- 3.7. It is possible that if the OFT no longer operated CCAS, the commercial and voluntary sectors with recognised brands that are respected and trusted by consumers would fill the gap. Many local authorities also run schemes which aim to give consumers a method for finding trustworthy businesses and some LATSS operate the *Buy with Confidence* scheme which does a similar job. One of the ways that these schemes are promoted is through the Local Authority Assured Trader Scheme Network.
- 3.8. But it is not clear that the full value of the OFT CCAS scheme would be recreated by the commercial and voluntary sector and by the existing local authority network in the event of CCAS being discontinued. The Government is therefore exploring alternative national

accreditation systems which could be put in place, including systems for existing CCAS members, and would welcome views on these.

- 3.9. As the UK's National Standards Body, BSI may be able to transpose existing CCAS-approved codes into British Standards or Publicly Available Specifications, subject to the agreement and participation of code sponsors and other industry parties. BSI already has a number of standards on issues of consumer concern such as on complaints handling and inclusive service provision together with industry-specific standards relating to consumer-facing services, for example home removals and vehicle repairs. BSI produces approximately 2,000 standards a year via a system of technical committees comprising industry experts and other key stakeholders. Its Consumer and Public Interest Network includes representatives of consumer organisations who take part in the standards process to ensure effective consumer representation in the standards-making process. All British Standards and Publicly Available Specifications are also subject to a fully open public consultation.
- 3.10. BSI is also a leading certification body, operating in a competitive market, and is the owner of the Kitemark[®], the certification mark that shows a product or service has been tested independently and audited to ensure it meets appropriate standards. BSI is willing to consider whether its Kitemark[®] certification system could offer code sponsors a suitable brand to promote their members' high standards. The Kitemark[®] was developed by the then British Standards Institution over 100 years ago and offers a very strong brand awareness with 88 per cent of the general population reportedly recognising and trusting the brand as a symbol of quality and reliability for the consumer.
- 3.11. Some code promoters value the feedback which they receive from OFT when going through the code approval process and after approval. This can cover guidance on legal compliance as well as challenge on how to ensure the high standards are met. One option for recreating this challenge model might be to offer the possibility of a "Primary Authority" arrangement between a code promoter and a suitable local authority trading standards service.
- 3.12. Primary Authority is a statutory scheme,¹⁶ administered by LBRO, that enables a local authority to become the lead regulator in respect of the businesses that trade across council boundaries. As the lead regulator, the Primary Authority verifies the systems and policies of the business for compliance with fair trading (or environmental health) law and issues assured advice that the business systems are accepted. No other authority can normally take enforcement action against the business unless the Primary Authority agrees and all subsequent inspection and enforcement activity is based upon the systems and policies of the business. The Primary Authority is able to recover its costs in providing these services.
- 3.13. The Government will be consulting shortly on expanding the Primary Authority scheme to enable organisations such as trade associations to access a form of Primary Authority. In the context of code certification, the Primary Authority arrangement would have to be with the trade association. Any complaints received from around the country against members of the code could be channelled through the Primary Authority and taken up by the code promoters who would have to take appropriate action against repeat offenders or lose the

¹⁶ The scheme does not apply to regulatory matters devolved to the Scottish Parliament.

benefit of their Primary Authority approval. In respect of regulatory interventions, these could be based upon the processes and systems in the code and any proposed enforcement action would have to take the code into account.

- 3.14. The Government believes that where possible, national recognition and standardisation of codes should be encouraged. One key issue to address in the context of a Primary Authority model for code certification would be how to ensure that the same standard was being applied around the country. This could be achieved through the use of the existing or new BSI standards with consumer relevance (see above). LBRO's oversight role of Primary Authority would ensure consistency and standardisation of the process.
- 3.15. If the Government's proposals on reform of the competition landscape are adopted and the CMA is created with only limited consumer policy roles, the Government will pursue the alternative approaches to code certification set out above. It hopes that code sponsors will engage with this process to explore alternative approaches to gain approval and develop new relationships to ensure their viability going forward. The Government continues to encourage businesses to set up codes of practice which offer the highest possible standards of consumer protection. Such voluntary schemes can make markets work better, protect consumers and offer an alternative to regulation. The Government is also committed to co-regulation, alongside self-regulation where its endorsement adds value to industry efforts to ensure high standards of consumer empowerment. However, in the absence of persuasive evidence that these matters cannot be picked up elsewhere, the Government is minded not to replace the OFT CCAS scheme within the CMA.

QUESTION 6. What are the best options for current and prospective CCAS members to consider in the event that the Government's proposed consumer and competition landscape proposals are adopted?

QUESTION 7. Do you think that the private and voluntary sectors, together with local authorities, will respond to any winding down of CCAS with effective alternative systems of accreditation?

QUESTION 8. What are the lessons learned from the operation of CCAS which may help in establishing (or revising) voluntary schemes in the future?

QUESTION 9. What is your view on transposing CCAS-approved codes into standards and related documents such as those published by BSI?

QUESTION 10. What characteristics would a Kitemark® based code certification process need to have to meet industry requirements?

QUESTION 11. What is your view on extending the Primary Authority concept to code certification?

Chapter 4 – Consumer Advocacy

Key Proposals:

- There should be a single focus for the coordination of publicly-funded consumer advocacy functions. A single unit, run by Citizens Advice and acting in partnership with other expert providers as appropriate, should take over responsibility for:
 - All Consumer Focus functions in relation to gas, electricity and (except Northern Ireland) postal services
 - Key, non-sector specific advocacy functions of Consumer Focus
 - Sectoral consumer bodies for water (in England and Wales), transport, communications and legal services, if the relevant Departments and Devolved Administration responsible for those bodies so decide
- Redress schemes could be set up by business for consumers in the water, rail, coach, bus and tram sectors to mirror those in the energy and postal services sectors, if the relevant Departments and Devolved Administrations so decide.
- Consumer Focus’s functions in respect of postal services consumers in Northern Ireland, undertaken by its committee known as Consumer Focus Post, should be transferred to the General Consumer Council for Northern Ireland.

Introduction

- 4.1 Consumer information, advice and education are all crucial in creating the conditions for consumers to buy with confidence. There is also a range of actual and potential consumer concerns that need to be addressed in the development of public policy and regulation, and in the increasingly complex interactions between suppliers and consumers. These concerns range from the immediate – “this is not right, not working, not fair” – to the medium and longer term developments in the market which are not yet apparent to consumers but which will affect them in the months and years to come.
- 4.2 These concerns are the stock in trade of consumer advocacy bodies. Advocacy is about representing consumer interests and promoting consumer rights on a wide spectrum, from businesses to regulators and Government, the European Union and internationally. The subject matter covers public sector and private sector providers of goods and services. Consumer advocacy tackles the issues with a range of activities, including research, analysis and investigations of particular cases which have general interest or where there is no established mechanism for redress.
- 4.3 In the UK, we have a broad range of consumer advocacy bodies. These range from statutory non-Departmental public bodies to charities, non-statutory bodies and consumer interest groups which may have an academic or sector focus. Consumer Focus, the Citizens Advice service and sectoral consumer bodies all have a good record of achievement for consumers in their areas of expertise. But there are many consumer advocacy bodies, they all need to capture the attention of consumers in order to be

visible, accessible, and effective and they all have back-office and other overheads to service before they can deliver front line benefits to consumers.

- 4.4 The Government believes that we can build on the achievements of these bodies by developing a more streamlined and effective consumer advocacy function, which would:
- be more easily identifiable and accessible for consumers;
 - put all consumers at the heart of the function, and recognises that problems are often inter-related;
 - be more joined-up and with a greater range of expertise to reflect the range of issues that affect consumers and to deal with them even more effectively;
 - be more authoritative, commanding a wider range of evidence and expertise in making representations; and
 - be more cost-effective, providing an efficient critical mass to keep and enhance front-line performance through better coordination and eliminating overlap of activities.
- 4.5 The Government wants to build on the achievement of Consumer Focus, Citizens Advice, Citizens Advice Scotland and other consumer bodies by streamlining and strengthening the ability of publicly funded consumer advocacy to deliver for consumers. This is against a background of severe pressure on Government funding and a rapidly changing marketplace which is constantly posing new challenges to, as well as positive opportunities for, the protection and promotion of consumers' interests.
- 4.6 We make a distinction in this chapter between general advocacy, which can apply to an individual market or across all markets, and sectoral advocacy which is focused on an individual regulated sector. Sectoral advocacy occupies a distinct role within the regulatory regime for sectors such as electricity, gas, postal services, water and telecommunications and is generally funded by licensed or authorised companies in the sectors concerned.

General Advocacy

- 4.7 Public funding for general consumer advocacy is currently directed mainly to Consumer Focus and the Citizens Advice service.
- 4.8 **Consumer Focus** is a statutory consumer body formed by the Consumers, Estate Agents and Redress (CEAR) Act 2007. The aim of the Act was to set out a new framework for consumer advocacy including provisions to establish new, statutory redress schemes to resolve consumer complaints in the gas, electricity and postal services sectors. Consumer Focus replaced three predecessor bodies – National Consumer Council, Postwatch and Energywatch – and operates across the whole of the UK economy with specific responsibility for the gas, electricity, and postal services sectors. Its Extra Help Unit provides advice to vulnerable consumers of these services (see Chapter 2). Since its establishment in October 2008, it has assisted 17,000 vulnerable consumers and won £1.9 million in compensation for them. Consumer Focus has a main board and separate Boards for Scotland, Wales and (for postal services only) Northern Ireland.

- 4.9 In addition to bringing together the three predecessor bodies to form Consumer Focus, the Act established new statutory redress schemes to resolve complaints in the gas, electricity and postal services sectors. As a result, although Consumer Focus performs a general advocacy function across Scotland, England and Wales, and has specific consumer advocacy responsibility for gas, electricity and postal services,¹⁷ it does not deal with routine consumer complaints in these sectors because they are resolved by the redress schemes. It does, however, have the power to investigate any complaint which may be of general interest.
- 4.10 Consumer Focus has powers to make “supercomplaints” to regulators where markets are failing consumers. It also has powers to request information from Government, regulators, a profession, businesses supplying goods or services, any local or public authority or any other public body.
- 4.11 Consumer Focus underpins its advocacy work by undertaking research and analysis on consumer matters. In 2009/10, it conducted around 60 research and engagement projects using a mixture of quantitative, qualitative and deliberative techniques. Research topics have ranged from public services to mobile phones.
- 4.12 Through its advocacy programme, Consumer Focus seeks to achieve positive change for consumers across the economy. It influences businesses, trade bodies, regulators, competition authorities, devolved and UK governments, local authorities and European Union institutions with analysis of consumer detriment and arguments to improve markets and services in both the private and public sectors. Consumer Focus provides an online empowerment tool for consumers through its dedicated unit Consumer Focus Labs.
- 4.13 Across the economy, it is able to intervene wherever it sees areas of significant detriment or market failure that are not being addressed effectively by other bodies, working for people ranging from tenants to jobseekers and bank customers to lawyers’ clients, and identifying common problems and solutions that cut across markets. It performs research into consumer experiences, attitudes and expectations in order to analyse, critique and propose practical solutions. An example of a recent success is in working with an energy company to secure the repayment of £70 million to 2 million consumers.
- 4.14 **The Citizens Advice service** comprises **Citizens Advice** (which operates across England and Wales) and **Citizens Advice Scotland**. These are umbrella organisations which support some 500 Citizens Advice Bureaux across Great Britain, providing front-line advice and information for consumers and clients in their local High Street. There are national policy and support functions in main offices in Edinburgh (for Citizens Advice Scotland) and London and Cardiff (for Citizens Advice), alongside online and telephone advice services. In Northern Ireland, the Northern Ireland Association of Citizens Advice Bureaux has a head office in Belfast. In Wales, Citizens Advice Cymru (part of Citizens Advice) has a dedicated staff member supporting the Welsh bureaux. There is a sub-committee of the main Citizens Advice Board that considers Wales-specific advice and advocacy issues.
- 4.15 The Citizens Advice service collects and analyses evidence from bureaux clients to influence Government and business policies on behalf of citizens locally, regionally and

¹⁷ The postal services remit extends to Northern Ireland as well as Scotland, England and Wales.

nationally. From this local intelligence, it is able to horizon scan, spot trends and collate evidence of policies or services which are not working. The Citizens Advice service writes and researches evidence reports and detailed responses to consultations and also provides numerous briefings for MPs, MSPs and Welsh Assembly Members. Volunteer campaigners or social policy coordinators in local bureaux play a key role in collating evidence and raising the profile of policy concerns locally, regionally and nationally. Like Consumer Focus, Citizens Advice and Citizens Advice Scotland may make supercomplaints to the relevant regulators about failing markets. A recent example has been on marketing and charging practices used by businesses offering credit brokerage and debt services.

- 4.16 The **Office of Fair Trading** also conducts consumer-oriented research about the functioning of particular markets. The OFT does not consider itself to be a consumer advocacy body as such, but to the extent that it conducts “pure” consumer market research where there is no competition element, its activity overlaps with Consumer Focus and others. Government proposals in relation to OFT consumer market studies are set out in Chapter 5.
- 4.17 There are other organisations that undertake advocacy on behalf of consumers. **Which?**, for example, is a prominent advocacy body. It is well known for investigations of sales practices and campaigns for redress – for example on mis-sold payment protection for insurance. Which? also provides services which are freely available to consumers, including free advice guides, “first look” reviews of new products, and independent and unbiased switching sites for energy and mobile phones.

Sectoral advocacy

- 4.18 In regulated sectors, firms devote substantial resources to working with and influencing their regulator. If views from regulated firms were the only organised external input, there would be insufficient challenge to the regulatory relationship. A strong consumer voice is therefore needed to provide a different perspective to the regulator and a more rounded evidence base upon which to make decisions. There needs to be effective consumer engagement with regulators (for example through research), formal representation of consumers and their representatives in regulatory processes such as price control reviews and policy work that is independent of regulators in terms of both the choice of topic and the analysis. Early and informed consumer input into the EU policy-making process is also essential if overarching regulatory frameworks are to evolve and develop appropriately.
- 4.19 The following bodies currently undertake sectoral advocacy work in the UK.
- **Consumer Focus** (gas, electricity, and postal services functions in England, Scotland, Wales and, for postal services alone, Northern Ireland). Consumer Focus is also due to take on the functions of Waterwatch Scotland (which represents the interests of users of water and sewerage services in Scotland) in the summer of 2011. In the regulated utility markets, Consumer Focus identifies and where possible tackles immediate consumer detriment as well as drawing attention to the long term consequences of failings in market and regulatory structure. It draws upon experience in network regulation, price control processes and market transformation, allied to a substantial programme of consumer research and engagement. This work is funded by the companies in the relevant regulated sectors.

- **Consumer Council for Water** (CCWater; water and sewerage services in England and Wales) is a statutory consumer body representing water and sewerage consumers in England and Wales.¹⁸ It seeks to ensure that the collective voice of water consumers is heard in national water debates, and that consumers remain at the heart of the operation of the water industry. CCWater also takes up complaints by consumers if they have tried and failed to resolve issues with their water companies. CCWater has a national board comprising a Chair, a Chief Executive and eight members, and a Wales Committee comprising a Chair and seven members. In addition, there are four regional committees covering England and overall there is a total of 54 local committee members. The organisation operates from a head office in Birmingham and eight local offices, with 86 staff. CCWater is funded by grant-in-aid by the Department for Environment, Food and Rural Affairs (defra) and the Welsh assembly Government, drawn from contributions made by water and sewerage companies. In 2010 defra and Welsh Ministers announced a review led by David Gray of CCWater and of Ofwat, the economic regulator for the water industry. David Gray's formal report was presented recently to defra and Welsh Ministers.
- **Passenger Focus** (rail services consumers in Great Britain and coach, bus and tram consumers in England) is a statutory consumer body, which aims to get the best deal for passengers in the rail, bus, coach and tram sectors.
- The **Legal Services Consumer Panel** (legal services in England and Wales) is an independent arm of the Legal Services Board and comprises eight lay members supported by two executive staff. The Panel provides evidence-based advice to the Legal Services Board in order to help them make decisions that are shaped around the needs of users. The Panel has legal powers to publish its advice and the Legal Services Board has a legal duty to explain its reasons when it disagrees with the advice that the Panel publishes.
- The **Communications Consumer Panel** (telecommunications in the UK) is the independent policy advisory body on consumer interests in telecommunications, broadcasting and spectrum markets (with the exception of content issues). The Panel provides evidence-based advice to Ofcom, the communications regulator, the Government, the EU and others on how to achieve a communications marketplace in which the communications interests of consumers and citizens are protected and promoted. Following recent changes, the Panel comprises six part-time members (including the Chair) and has a dedicated member of staff. Ofcom is in discussion with the Panel about its future role. BIS is exploring options for consumer representation in communications to be enhanced within the new consumer landscape model.
- The **Aviation Consumer Advocacy Panel** was recently set up by the Civil Aviation Authority to replace the Air Transport Users Council. It mainly provides specialist advice to consumers.

¹⁸ The Welsh Assembly is now able to introduce primary legislation relating to consumer representation in water and sewerage services. This power was provided for in the Government for Wales Act 2006 and was implemented following a referendum on extending the law-making powers of the Assembly on 3 March 2011.

- **Which?** also undertakes a range of advocacy activities in regulated sectors and related services and can also bring supercomplaints – a recent example has been on surcharging of payments made by credit or debit card.

4.20 The **financial services sector** is not within the scope of this consultation but the Financial Services Authority's consumer panel promotes consumers' views and interests when reviewing and advising on regulatory initiatives. Going forward, the new Financial Conduct Authority, as the regulator of conduct of business with responsibility for consumer protection, will also have a similar representative body.

4.21 There are separate policy discussions in the **health sector** about regulation of competition and consumer representation in the future healthcare landscape in England and this sector is also not within the scope of this consultation.

Table 1. Sectoral advocacy bodies (2011/12 figures except where indicated)

Body	Sector(s) in which the body undertakes advocacy	Annual cost (£'000)	No. of staff	Funded by
Consumer Focus	Electricity, Gas	5,774	174 (total staff, including general advocacy)	Electricity and gas licensees
	Postal Services (plus general advocacy)	3,124		Postal services licensees
Consumer Council for Water	Water in England and Wales (includes dealing with consumer complaints and telephone enquiries)	5,480	77	Water and sewerage licensees
Waterwatch Scotland	Water in Scotland	723 (2009/10)	9 (2009/10)	Customer levy
Passenger Focus	Rail (GB) plus coach, bus and tram (England) (includes dealing with consumer complaints)	4,700	62 (2009/10)	Department for Transport
Legal Services Consumer Panel	Legal services in England and Wales	73	2	Legal Services Board
Communications Consumer Panel	Communications in GB	303	1	Authorised companies in the sector

The Government's vision and approach

4.22 The Government wants to create greater clarity for consumers and others about who is championing their rights. It also wants to increase the impact that publicly funded consumer advocacy has domestically and internationally. Finally, the Government wants to reduce the possibility of overlap or duplication of effort in consumer research and analysis while enhancing the available evidence base with local intelligence.

General advocacy

4.23 Recognition of an advocacy body by the public is important. For maximum impact, the work that it does needs to be visible and identified with a brand that is widely recognised and trusted. Of the different advocacy bodies, Citizens Advice and Which? are probably the most widely recognised. Consumer Focus' "brand awareness" is likely to have increased as a result of recent high-profile successes but remains significantly below either Citizens Advice or Which?.

4.24 Consumer Focus and the Citizens Advice service are both active and highly respected in EU and international consumer fora. They have established strong reputations for leadership and effective engagement in consumer issues which are of widespread interest and importance. With the rising pace of globalisation, and the use of e-commerce bringing trans-boundary issues to greater prominence as a result of consumers taking advantage of global purchasing opportunities, the importance of an effective consumer advocate at EU and international level has never been more important. The Government believes there would be significant benefit in creating a single powerful voice for all consumers across Great Britain.

4.25 Currently, Consumer Focus, Citizens Advice and Citizens Advice Scotland support their advocacy roles in different ways to ensure that they reflect consumers' interests. The work of Consumer Focus is supported in particular by extensive research, market analysis, data from Consumer Direct, mystery shopping and on-site investigations to gain a clearer understanding of the issues, including at a local level. The Citizens Advice service is able to augment its own national research with feedback about clients' experiences via its network of local bureaux. Embedded at the heart of communities, the Citizens Advice service is able to show how markets affect different client groups, as well as how different types of problems interact with each other, potentially escalating consumer detriment.

4.26 Government believes that there is an opportunity to derive benefits by bringing together these types of research and analysis, thus eliminating overlaps in research, and strengthening the research capability on behalf of consumers. Combining the front-line intelligence base and face-to-face interaction of the network of Citizens Advice Bureaux with a powerful central research and analysis capability, acting in partnership with organisations such as Which?, Age UK, Shelter, the National Consumer Federation and others, should present an ideal opportunity to create a really powerful consumer advocacy body.

4.27 An important role of a consumer advocacy body is to influence the policies of Government and regulators by making informed and constructive responses to consultations. At present, many consultations inevitably draw separate responses from Consumer Focus and the Citizens Advice services. The Government believes that the consumer input on

general advocacy matters would be more effective if it was delivered as a single, seamless message. Also, both Consumer Focus and the Citizens Advice services are active in analysing relevant legislation that comes before Parliament, and are diligent in providing briefing to members of both Houses and the media. It should likewise increase the impact of this work if it is joined up to provide a single authoritative voice for consumers on general advocacy matters.

- 4.28 Government's favoured approach is therefore that the Citizens Advice service should be the publicly funded consumer champion and lead on consumer advocacy, building on its very well known brand and its trust by the public. For general advocacy work the proposal is to transfer to the Citizens Advice service funds that would otherwise have gone to Consumer Focus for this purpose. Combining the expertise of the two organisations and enhancing the link to local consumers should improve the evidence base and research capability and help ensure that the real issues affecting consumers are effectively tackled.
- 4.29 Similarly, if the Government preferred approach for the new CMA is followed, funds that would otherwise have gone to the OFT for market studies purely on consumer issues would be transferred to the Citizens Advice service (and Trading Standards; see Chapter 5).
- 4.30 Under this approach, the Citizens Advice service would also be funded to take on activities in areas such as international and European advocacy and advocacy in Scotland and Wales where this goes beyond what Citizens Advice and Citizens Advice Scotland currently undertake.
- 4.31 Alternative approaches might involve other organisations such as Which? who, as described above, already have advocacy capability and also have a strong relationship with consumers.

Sectoral advocacy

- 4.32 Consumers in the sectors subject to economic regulation require particularly effective advocacy, representation and empowerment as these are generally sectors of particular importance to consumers and are typically characterised by large, often dominant firms. Because of the essential nature of the services provided in the regulated sectors, the decisions taken by businesses and regulators affect almost every domestic and business consumer across the country. Major investments in infrastructure are planned in these sectors over the next five to ten years with a considerable impact on energy and other utility bills. The cumulative impact on consumers of these plans must be understood and assessed in the context of wider pressures on consumers.
- 4.33 The Government wants to increase the impact of sectoral advocacy while cutting total costs by integrating the functions of a number of currently separate bodies. This should help the public to understand who is representing their interests and build on the "one stop shop" for advice described in Chapter 2.
- 4.34 The following principles should guide the design of such a regulated industries unit:
- It should have clear **aims and objectives**, focused on protecting and promoting the needs of all UK consumers, future as well as present, small business customers as well as domestic customers, with particular attention being paid to vulnerable groups.

- It should have appropriate **powers** to enable it to represent consumer interests effectively. This should include information gathering powers, rights to be consulted by economic regulators on matters which affect consumer interests, rights of appeal where appropriate against high impact regulatory decisions, and powers to initiate supercomplaints. It should be held directly accountable for the use of these powers.
- In setting and pursuing its agenda and priorities, it should be **independent** of Government, regulators and regulated companies, and seen to be so.
- It should have adequate **resources** to fulfil the advocacy role, funded by the sectors concerned, and accountable to those sectors for the efficient expenditure of this money.
- It should have the **capability** to look at emerging issues in order to anticipate and shape future policy and where possible forestall consumer problems before they arise. There should be relevant sector-specific expertise as well as the ability to detect synergies across and between sectors. It should have flexible capacity to undertake research, investigations, empowerment and advocacy and where possible draw on shared services. It should be scalable to advocate on behalf of consumers in additional sectors if required.
- It should have strong **links** with and wherever appropriate, act in **partnership** with consumer advocacy bodies within local, regional and national communities.
- It would need to work closely with other **European** consumer organisations and directly with European institutions and regulatory bodies, to ensure that the consumer voice across the UK is heard when policies are being developed in Europe and internationally.

4.35 These design principles lead to a clear and simple model for a regulated industries unit, ensuring that information and advocacy start with consumers and involving partners, Government, regulators and businesses. An important part of this model is that intelligence gathering is both “top-down” through investigations, research and dialogue with experts, partners and consumer groups and “bottom-up” through direct interactions with individual consumers using multiple channels and methods of engagement.

4.36 Such a model would meet the core Government consumer advocacy reform objectives of strengthening the front line and taking advantage of economies of scale and integration with existing services across Great Britain while reducing duplication and complexity in the system.

4.37 Proper use of levy funds must be ensured and accounted for by focused expert sectoral teams which could draw on shared services and partner organisations. A single data set used across the regulated industries unit would ensure that a consolidated evidence base could be used to make links between problems. Consolidating consumer representation would promote best practice in advocacy, including the ability to bring together experts and evidence across the full range of its work, making links between sectors. A particular benefit here would be to assess the combined impact of infrastructure investment, combining this holistic view with on-the-ground, real-time information about the practical challenges consumers face.

- 4.38 For sectoral advocacy work done in bodies other than Consumer Focus, it will be for the Department or Devolved Administration responsible for each relevant sectoral advocacy body to decide on the merits of whether to transfer their functions or not. These decisions have not yet been taken and this consultation only seeks views on the overall vision and principle of a single, integrated, sectoral advocacy body.
- 4.39 For Scotland and Wales, the Government's aim is to ensure that it creates a structure which provides consistency of advocacy provision for consumers while recognising the national, regional and local differences which may exist and also respecting the devolution settlements in each case. Energy, postal services and communications are all sectors which must be viewed in a UK context. But each also has significant Scottish, Welsh and Northern Irish dimensions which need to be properly assessed and taken into account in pursuing consumer advocacy. Even where policy issues are reserved, the Government recognises and respects the need for a distinctive consumer voice from the devolved nations.
- 4.40 Taking all these factors into consideration, the Government's favoured approach is to transfer the functions of Consumer Focus and as many as possible of the sectoral consumer bodies to the Citizens Advice service, operating in partnership with other sectoral and general consumer organisations wherever they have expertise to contribute.
- 4.41 Bringing together sectoral advocacy functions with the Citizens Advice service would provide a significant local presence for sectoral advocacy which could not be replicated economically on an individual sectoral basis. It would support consumers by providing local face-to-face advice services on sectoral issues for those who are not comfortable with telephone or online services. It would also add value by informing the priorities for consumer advocacy based on current information from the front line. For Consumer Focus, it is proposed that all their functions in relation to gas, electricity and (except for Northern Ireland) postal services should therefore be transferred to the Citizens Advice service. If the Government's favoured option is pursued, Citizens Advice Scotland and Citizens Advice Cymru will be key to its success.
- 4.42 The remit of Consumer Focus in Northern Ireland is confined to postal services. The General Consumer Council for Northern Ireland (CCNI) represents the interests of consumers in the province in relation to energy, water, transport and other general consumer issues. As part of this consultation, we are inviting views on proposals to transfer the postal services functions of Consumer Focus in Northern Ireland to CCNI (see below).
- 4.43 The Government has considered a number of alternative approaches before reaching its preferred view. Maintaining the status quo would leave sectoral consumer bodies and Consumer Focus separate from the Citizens Advice service. This option would provide continuity of existing boards, committees and staff and it would not require additional resources for planning and transition. However, it would not resolve the problems of overlapping roles in providing general advocacy or the lack of integrated, direct, local input into consumer advocacy. There is one further difficulty: in the current economic climate, individual consumer bodies are likely to come under pressure to reduce their budgets. In some cases, this budget pressure is likely to be severe and the status quo will not be a realistic option. The Government believes that transferring functions from Consumer Focus to the Citizens Advice service would create a body with the critical mass to cope better with budget pressures, as well as more efficient and effective consumer advocacy, but is seeking views on whether others agree with this assessment.

4.44 A further alternative might involve moving responsibility for sector advocacy to an organisation such as Which? which, as for general advocacy, has an established track record in identifying problems and campaigning on behalf of consumers in specific sectors.

QUESTION 12. Do you consider that, subject to decisions by individual Departments, the vision of combining as many sectoral advocacy functions as possible in the Citizens Advice service is the correct one?

QUESTION 13. Do you agree with the design principles for the regulated industries unit as set out in paragraph 4.34?

QUESTION 14. In the light of all these considerations, do you agree that Consumer Focus should be abolished and its sectoral and some of its general advocacy functions be transferred to the Citizens Advice service? What are your views on alternative approaches?

QUESTION 15. What do you consider to be the best way of reflecting the Scottish, Welsh and Northern Irish interests in the models for the new consumer institutional landscape?

Statutory powers and functions

4.45 Consumer Focus and sectoral advocacy bodies have a range of statutory powers and functions for which they are accountable to Parliament. If the Government's proposals go ahead, there would need to be a decision taken about these. They could be considered individually for each sector and some powers or functions may no longer be relevant. For example, the power to make supercomplaints to the OFT and other regulators is already shared by Citizens Advice and Citizens Advice Scotland. These and the other functions and powers of Consumer Focus are set out in the CEAR Act 2007 while those of the other sectoral advocacy bodies are set out in separate primary legislation.¹⁹

4.46 For organisations such as Citizens Advice and Citizens Advice Scotland to take on statutory powers and functions, they would need to satisfy themselves that the powers and functions were consistent with their charitable purposes, aims, principles and strategies. Likewise, Government would need to be satisfied that appropriate arrangements were in place for accountability of these powers and functions.

Information gathering powers

4.47 One specific power of Consumer Focus is worth considering in detail. Consumer Focus has the power to require information from a range of regulators, businesses and any person that supplies goods or services in the course of a business. Where a person who supplies goods or services refuses to provide the information, Consumer Focus can refer this to the relevant regulator (if the person is a regulated provider) or can apply for a court order. This power clearly gives Consumer Focus leverage when taking forward investigations on issues which concern consumers.

¹⁹ Supercomplaint powers derive from the Enterprise Act 2002

- 4.48 Information provided as a result of exercising this power is protected by Part 9 of the Enterprise Act 2002. Section 237 contains a general restriction on the disclosure of information. Where information has been obtained under a specific provision and it relates either to the affairs of an individual or to a business or undertaking, the information cannot be disclosed unless expressly permitted by Part 9. Disclosure is permitted if the relevant parties consent, if it is for the purpose of exercising statutory functions or complying with European Community obligations or for civil and criminal proceedings. Even where disclosure is permitted the public authority must have regard to the need to exclude commercial or personal information that may cause significant harm if released.
- 4.49 In considering how the information gathering power might be made available to a regulated industries unit in an organisation such as the Citizens Advice service in support of their proposed new responsibilities, there are two main options:
- (a) Transfer the power and rely on the protections of Part 9 of the Enterprise Act 2002 and of provisions in the Consumers, Estate Agents and Redress Act 2007 to place restrictions on the use of the power if necessary. This option would allow full use of the powers across all markets, subject to the restrictions in legislation. Concerns have been expressed in some quarters about the placing of what is essentially a public function power designed specifically for Consumer Focus in the hands of private charitable organisations such as the Citizens Advice service. On the other hand, subject to this consultation, the Citizens Advice service is being given responsibility for a number of public functions and money by Government to undertake activities which coincide with its own charitable remit. So to the extent that the powers are necessary to fulfil the functions, an argument can be made for a transfer. This option would also help prevent “regulatory capture” since the consumer advocacy body would have the powers to investigate whether regulators were acting in the interests of consumers.
- (b) Transfer the power to a public body or bodies, such as the sectoral regulators, to be used at the request of the regulated industries unit. This would limit the powers to the exercise of advocacy in the special sectors of energy and post (and others if other sectoral bodies are consolidated into the regulated industries unit). The unit would have to persuade the regulator that it needed to exercise such powers to fulfil its specific statutory functions, but if this model is to work, the regulator would have to give good reasons for any refusal.

QUESTION 16. What are your views on these options for the transfer of information gathering powers? Which is preferable and why? Are there any other options for information-gathering powers?

Redress schemes

- 4.50 If the relevant Departments decide that the functions of CCWater or Passenger Focus should transfer to the regulated industries unit, redress schemes in the respective sectors would have to be considered as these bodies have the handling of complaints by consumers as part of their functions. Redress schemes operate independently of businesses and consumers and adjudicate on complaints put to them. They can order compensation or specific action to be taken by businesses. They are free for consumers to use and are funded by business. Their rules and procedures are approved by the relevant sectoral regulator which also monitors the outcomes from the redress scheme. The function is different from the Consumer Focus Extra Help Unit which provides

guidance and support to vulnerable consumers who need assistance with their queries and complaints in the gas, electricity and postal services sectors.

- 4.51 Redress schemes have been operating in a number of sectors for many years: twenty years in financial services and eighteen years in telecommunications, for example. The CEAR Act 2007 required relevant businesses to establish statutory redress schemes for gas, electricity and postal services consumers. The core role for a redress scheme is to investigate and resolve complaints. The model established in the Act is for a redress scheme to take on dispute resolution activity. The Act provided for these statutory arrangements for redress in gas, electricity and postal services to be underpinned by powers for the relevant sectoral regulators to set standards of complaint handling for businesses in each sector. Ofwat also has these powers for the water and sewerage services sector.
- 4.52 In common with those in the rest of the United Kingdom, postal services consumers in Northern Ireland benefit from having right of access to the Postal Service Redress Scheme (POSTRS). The Government's preferred approach is that this right should remain unchanged by the proposed transfer of postal services advocacy functions described below.
- 4.53 In several regulated sectors such as communications, gas, electricity and post, providers that have domestic or small business customers are also required to be a member of a dispute resolution body.
- 4.54 The redress scheme operated by Ombudsman Service: Communications, for example, is an independent one approved by Ofcom and is underpinned by legislation in the Communications Act 2003. It determines complaints cases – findings are binding on companies but not consumers – which are referred by consumers where there is failure to reach agreement on resolution of a complaint. The scheme is partly funded by subscription from the companies and partly by a charge on the relevant service provider for each complaints case referred for action. Consequently, there is a very strong incentive for service providers to resolve complaints from customers efficiently. The redress scheme was the first established for electronic communications. A similar scheme has been set up – the Communications and Internet Services Adjudication Scheme – and others may be set up in the future by the industry, subject to the approval of the regulator.
- 4.55 In financial services (not within scope of this consultation), the Financial Ombudsman Service operates in a broadly similar way. It is funded partly by subscription from member companies and partly by a charge on the relevant service provider for each complaints case referred for action.
- 4.56 In the gas and electricity sectors, a non-statutory redress scheme was established by the industry in 2006 and it continued until a statutory requirement to be a member of a redress scheme was introduced in 2008. Generally, scheme decisions on individual complaints are binding on the service provider but only on the consumer if the consumer accepts them. Consumers retain the option to reject the recommended solution and adopt a different resolution route, perhaps through action in the courts.
- 4.57 A vital feature of the redress model established in the CEAR Act 2007 and also in sectors such as legal and financial services is that dispute resolution by the independent ombudsman is separated from sectoral advocacy. Sectoral consumer bodies do not have the same statutory powers to determine outcomes for consumers, in part because they do

not have the same degree of neutrality. Their principal role is to act as an advocate for consumers.

- 4.58 Extending redress schemes from electronic communications, financial services, electricity, gas, and postal services to the water, and transport sectors could offer the following benefits:
- strong incentives for companies themselves to resolve complaints effectively and efficiently (complaints handling standards have been an important part of the model for energy and post since 2008);
 - consumers having certainty that a complaint will be taken forward and a decision made on it;
 - compensation and redress for consumers where this is warranted;
 - companies would be given a direct stake in the process of resolving service complaints;
 - adjudication in each dispute would be by an independent Ombudsman separate from the consumer advocacy body for the sector, which might be perceived to be biased towards the consumer's perspective;
 - the entire cost of the scheme would be borne by the relevant companies who would gain control of the administrative costs of complaints resolution; and
 - the service would be entirely free to consumers and although companies would be bound by the decisions of the ombudsman, consumers would not and would be free to pursue further action, usually through the courts, if they did not wish to accept a decision.
- 4.59 There is existing legislation for a statutory redress scheme for water and sewerage services provided by the CEAR Act 2007. Redress schemes for rail and other transport sectors could be established on a non-statutory basis in the first instance, as was the case with the Energy Ombudsman, with statutory provision following on if necessary.
- 4.60 Establishing redress schemes in new sectors may be difficult. While the redress scheme exerts a discipline on the participating companies because costs of cases are in their own hands, there are also setting-up and running costs. A voluntary scheme would require the active participation of all of the major companies in the sector with the sectoral regulator being responsible for approving the terms and operation of the scheme and for subsequent monitoring. This would have resource implications for the regulators. Such a scheme would also need to be able to cope with variations in demand (although existing schemes have developed flexible capacity).

QUESTION 17. What are your views on whether redress schemes such as those established in electronic communications, financial services, energy and postal services should be extended to other sectors?

Transfer of functions from Consumer Focus Post in Northern Ireland to the General Consumer Council for Northern Ireland

- 4.61 Consumer Focus Post in Northern Ireland (CFPNI) was established in October 2008 as one of the three territorial committees of Consumer Focus under the terms of the CEAR Act 2007.
- 4.62 The General Consumer Council for Northern Ireland (CCNI) was established in 1985 under Northern Ireland statute and is sponsored by DETI. At the time of Consumer Focus's creation, consideration was given to whether responsibility for consumer advocacy in postal services should be transferred to CCNI. While this decision was not taken at the time, provision was made in CEAR Act 2007 for the transfer of functions from CFPNI to another body at a later stage should that be desirable.
- 4.63 CFPNI's remit covers postal issues only for consumers in Northern Ireland. CFPNI works closely with other teams at Consumer Focus on a range of issues including CFPNI's key areas of concern. They develop their own campaigns and projects on behalf of Northern Irish postal consumers. Responsibility for other consumer issues in Northern Ireland largely falls to CCNI.

Rationale

- 4.64 CCNI and CFPNI in Northern Ireland, the Consumer Focus Board in London, DETI and BIS are all in favour of transferring CFPNI's functions to CCNI because of the benefits for Northern Irish consumers of having all their interests represented by a single national body. As overall responsibility for postal issues is reserved to the UK Government, it is envisaged that CCNI will report directly to BIS on postal issues should this transfer take place.

CFPNI's functions and benefits of transfer to CCNI

- 4.65 The transfer of the responsibilities of CFPNI to CCNI would, in the Government's view:
- create a single, unified consumer body for Northern Ireland and provide direct, local management lines creating a more efficient and responsive business environment;
 - allow the development of tailored programmes for consumers of mail and post office services in Northern Ireland; and
 - create a single, holistic approach in Northern Ireland to issues of disadvantage, vulnerability, exclusion, accessibility to services in rural areas and sustainability.
- 4.66 After discussion with partners, we have identified two possible ways of transferring functions (including redress schemes):
- (a) CFPNI is transferred to CCNI with the operation of the POSTRS redress system remaining as it is now and still operating in Northern Ireland. CCNI would take on the role currently carried out by CFPNI. Responsibility for advice and assistance to Northern Irish consumers on postal issues currently dealt with by Consumer Direct would transfer to CCNI.

(b) CFPNI is transferred to CCNI and a new redress scheme for Northern Ireland is developed and approved under sections 47 or 49 of the CEAR Act 2007, which would either be approved by Postcomm (or Ofcom, following enactment and implementation of the Postal Services Bill) or designated by the Secretary of State.

4.67 It is a requirement of the EU's Postal Services Directive that Member States ensure that a suitable postal redress scheme is in place.

4.68 The Government's view is that option (a) would be the most straightforward option. It would leave POSTRS in place giving mail service consumers in Northern Ireland access to exactly the same redress mechanism as consumers in the rest of the United Kingdom. The alternative would add a level of complexity and inconsistency to the UK system. Option (b) would require development of a new and additional redress scheme for Northern Ireland only, as set out above. It could prove more complex and costly for postal companies who may be expected to join both redress schemes. It could also prove complex and confusing for consumers.

QUESTION 18. Do you support the transfer of the functions of Consumer Focus Post Northern Ireland to the General Consumer Council for Northern Ireland and agree that as a result Consumer Focus Post Northern Ireland be abolished?

QUESTION 19. Do you agree that the Postal Services Redress Scheme should continue to apply in Northern Ireland to ensure that Northern Irish consumers retain the same access to redress as consumers elsewhere in the United Kingdom?

Chapter 5 – Enforcement of Consumer Protection Legislation

Key Proposals:

- To establish a Trading Standards Policy Board (TSPB) to lead the prioritisation and coordination of national, regional and cross local authority boundary consumer enforcement work in England and Wales.
- In England and Wales, national enforcement to be undertaken by Primary or Home Authorities and by expanded regional teams supported by a small number of lead regions and/or authorities with specialist areas of expertise. Money for enforcement against national and cross boundary threats to be ring-fenced for this purpose.
- The proposed new Competition and Markets Authority (CMA) to retain a market studies role in relation to markets where there may be both structural competition issues and consumer-related (demand-side) market failures.
- The CMA to retain powers to take action against breaches of consumer law wherever these breaches may inhibit the effective functioning of competition in markets.
- Powers to make supercomplaints to CMA to be retained by existing bodies.
- The TSPB, CMA, Citizens Advice service and Which? to be transparent about enforcement and market analysis priorities and to share work plans as far as possible, working in partnership on cases which risk crossing over the boundaries between them.
- The TSI to take on the OFT's current guidance, training, international liaison and policy functions.
- "Established Means" code of practice promoters to be able to formally request action against businesses breaking the relevant laws which the TSPB would have a duty to consider.
- If the creation of the CMA is delayed, these consumer enforcement landscape changes should go ahead with OFT taking the role proposed for the CMA.

Why enforcement of consumer law is important

- 5.1 Even when consumers are fully empowered to exercise choice, there will still be risks from businesses which do not comply with the law. Quite apart from the potential harm and unfairness in individual transactions, there is a wider concern that confidence in markets would be lost if non-compliance with the law, or illegal behaviour to frustrate transparency became commonplace. In many cases, a targeted approach to compliance closely linked to the *threat* of enforcement action, may be appropriate. Enforcement action itself may still be necessary, however, for those who choose to flout the rules or who disempower consumers by misleading them or treating them unfairly and make no

attempt to change. In particular, this includes rogue traders and other scam operators that are often criminal enterprises. Such enforcement action benefits legitimate businesses by prosecuting those who threaten to undermine them by breaking the law.

- 5.2 The Government therefore believes that consumer enforcement activity must be sustained at a certain minimum level across the entire country. Consumers and business increasingly trade across a wide geographic area. Residents of one local authority could suffer in the event of inadequate enforcement or compliance work by the Trading Standards service in another. Additionally, areas where enforcement is weaker could potentially attract rogue businesses and this may draw further on limited resource creating a vicious circle.
- 5.3 The level of consumer detriment arising out of breaches of consumer law is hard to calculate with precision. However, in 2008 the OFT estimated that one type of detriment – that suffered by consumers post-transaction – amounted to £6.6 billion per annum arising out of an estimated 26.5 million cases of consumer mistreatment. Consumer Focus estimated in 2009 that the annual cost of consumer detriment arising out of unfair commercial practices alone was £3.3 billion. Detriment can also arise when markets have structural failings, notably when competition fails to drive prices down or when consumers are not empowered to exercise choice effectively.
- 5.4 Without robust enforcement of consumer law, consumer confidence could drop, depressing economic activity. If consumers become risk-averse there will be an impact on purchasing decisions and a move away from higher-value or innovative products. Additionally, if companies who deceive customers or deliver unsatisfactory goods and services are allowed to operate without challenge, honest businesses are undercut and do not obtain the revenue to invest in further innovation and better customer service. The process of innovation and investment by consumer-facing business in a competitive market is an important driver for the economy and if the correct incentives are missing then business cannot effectively deliver growth. Over time, international competitiveness will be affected and fair competition undermined.
- 5.5 The NAO in its recent report *Protecting consumers – the system for enforcing consumer law*²⁰ estimates that expenditure on enforcement was £247 million in 2009/10 comprising expenditure by LATSS – £213 million, by BIS – £8 million and by the OFT – £26 million (including £13 million for Consumer Direct).²¹

²⁰ NAO (2011) *Protecting consumers – the system for enforcing consumer law*
http://www.nao.org.uk/publications/1012/protecting_consumers.aspx

²¹ Total expenditure for Trading Standards Services covers all consumer activities. Fair trading enforcement costs are not reported separately, but BIS estimates these to be less than 50 per cent of the total. The OFT figure is an estimate of recent spend and should not be taken as an indication of the level of funding that would be transferred in the event of any of the proposed reforms being taken forward. The OFT did not provide the NAO with details of its expenditure on consumer enforcement work. BIS estimates that this costs in excess of £13 million per annum.

The current enforcement landscape

a) Local

- 5.6 The vast majority of consumer enforcement is undertaken by Local Authority Trading Standards Services (LATSS) which are provided and funded by local authorities. In some parts of England as well as in Scotland and Wales, LATSS are in unitary or metropolitan authorities along with other regulatory services, in particular environmental health. In other parts of England where there is a two-tier local authority structure, Trading Standards services are provided at county level, although in some cases, districts perform certain functions such as control of doorstep selling. There are 27 two-tier counties and 123 single-tier authorities in England, 32 unitary authorities in Scotland and 22 in Wales.
- 5.7 LATSS functions include: fair trading, animal health and welfare, product safety, weights and measures, under-age sales, food standards, consumer credit, petroleum licensing, regulation of e-commerce, control of poisons and explosives, doorstep lending and street trading. They liaise or work directly with a number of other enforcers, including the OFT, local environmental health services²² and the Health and Safety Executive. The Local Better Regulation Office (LBRO) has been coordinating work on national priorities for local enforcement.²³
- 5.8 In practice, LATSS in the “fair trading” area undertake of a mixture of:
- reactive enforcement work such as responding to complaints;
 - proactive, intelligence-led enforcement and compliance work such as investigative work, information analysis, visiting business premises; and
 - compliance/education work such as advice to consumers and business and visits to local fora such as schools.
- 5.9 Reactive enforcement is normally seen as core business but pro-active enforcement, often identified through collaboration with other enforcement agencies, is also an important element of an advanced LATSS operation.
- 5.10 Many LATSS act as a Home Authority where they provide a single point of contact for advice for large companies that have their headquarters in the relevant authority area. This benefits the companies concerned and reduces duplication by coordinating in one place information and intelligence about a particular company. In 2009, building on the foundations of these voluntary agreements, the Primary Authority scheme administered

²² In single-tier authorities, trading standards and environmental health services are provided by the same authority and common practice has been to join them together into generic regulatory services divisions.

²³ One of LBRO’s statutory responsibilities is to manage the national enforcement priorities for England and the separate priorities that exist in Wales. LBRO are currently refreshing the list in respect of England. Following a formal consultation process undertaken by the Welsh Assembly Government, the first national enforcement priorities for Wales were prepared by LBRO and published in July 2010. More information can be found at: www.lbro.org.uk/resources/integration-with-local-and-national-priorities.htm

by the LBRO was introduced in England and Wales to coordinate inspection and enforcement activity for participant businesses that trade across local authority boundaries. These new arrangements enable local authorities to recover the costs of providing advice services to businesses and for the costs associated in coordinating local regulatory activity.

- 5.11 Primary Authority arrangements are now in place for a significant number of high street businesses with the number of partnerships far out-stripping initial expectations. Where these arrangements are in place, local authorities must have regard to inspection plans and consult the Primary Authority prior to pursuing enforcement action. However, although Primary Authority arrangements are becoming more common and BIS expects these to grow substantially in future, many companies have not yet established Primary Authority relationships. The Government will be consulting shortly on ways in which the benefits of the Scheme may be extended further, including, for example, the provision of assured advice on compliance to the micro-business and small and medium enterprise members of trade associations.
- 5.12 The Trading Standards Institute (TSI), the professional body for Trading Standards professionals, and the OFT published a workforce survey in June 2010²⁴ which estimated that the total budget for all LATSS operations throughout the country was approximately £213 million in 2009/10. In the current financial year, the figure is probably somewhat lower and over the Government's Spending Review period 2011-2014 it is expected to decline by a further 20-30 per cent. On this basis, BIS estimates that the total amount spent by local authorities on Trading Standards work could amount to between £140 million and £170 million by 2014. Of course, this amount is spread across all LATSS functions. Estimates vary, but fair trading work probably accounts for something less than half of this.
- 5.13 In terms of LATSS performance and coordination, local authorities have had access to the services provided by the Local Government Group, in particular Local Government Regulation (LGR; formerly Local Authorities Coordinators of Regulatory Services). LGR has been responsible for providing specialist advice and guidance, promoting good practice, influencing and lobbying on behalf of local government and leading and partnering initiatives to enhance the reputation of regulatory services. It has provided secretariat support and organised the Trading Standards Policy Forum (TSPF). The TSPF comprises Heads of Service elected by each region/country plus representatives from the Association of Chief Trading Standards Officers (ACTSO) and TSI. It helps LGR to:
- propose priorities on trading standards matters, including enforcement and consumer education and advice, affecting the English regions and Devolved Administrations;
 - challenge, support and advise relevant government departments and government-supported agencies; and
 - promote continuous improvement and best practice in delivering local trading standards services.

²⁴ TSI (2010), *Trading Standards Workforce Survey 2009*
www.tradingstandards.gov.uk/policy/policy-pressitem.cfm/newsid/479

5.14 LGR currently produces a comprehensive *Guide to Good Practice in Trading Standards* for all councils setting out minimum standards as well as good and best practice in many fields including:

- leadership of regulatory services;
- service promotion and accessibility;
- partnerships and joined-up working;
- consumer advice, information and education;
- business services, advice and education; and
- enforcement activities.

These form part of the LGR/LBRO *Excellence Framework for Regulatory Services*,²⁵ which is the over-arching statement of high performance in local authority regulatory functions that span Trading Standards and environmental health.

5.15 The Local Government Group is in the process of rationalising its structure with significant reductions in most service areas including support to regulatory services. It is likely it will continue to support the TSPF in some way. The Welsh Local Government Association representing the 22 local authorities in Wales works closely with the Local Government Association (LGA; part of the LGR). The LGA has no locus in Scotland.

5.16 Since 2007, Scottish local authority delivery outcomes have been set out in the Scottish Government's umbrella concordat with the Convention for Scottish Local Authorities (COSLA) and Single Outcome Agreements with individual local authorities. The Scottish Government has no remit to develop or enforce consumer policy because this is a reserved policy area (although BIS has been working with the Scottish Government, COSLA and the representative body for Trading Standards officers, the Society of Chief Officers of Trading Standards in Scotland; SCOTSS).

5.17 In Northern Ireland, consumer policy is devolved and enforcement work is performed by the Department of Enterprise, Trade and Investment (DETI) rather than by local authorities. However, in the past they have worked very closely with the OFT on large cases, reflecting the OFT's status as a national enforcer, and with LATSS in Great Britain.

b) Regional

5.18 Many companies that are targets of enforcement action engage in activities outside their local authority area but most individual authorities still invest the time to pursue them, knowing that their citizens will also benefit from the enforcement actions of other authorities. The NAO report estimates that the volume of cross-border (across local authority boundaries) detriment is in excess of £4.8 billion – more than 70 per cent of the estimated total of detriment suffered by consumers post-transaction – so it is inevitable that a large proportion of the work of LATSS should be directed against threats which go wider than their individual authority.

²⁵ www.lbro.org.uk/resources/docs/ef-overview.pdf

- 5.19 LATSS participate in regional coordination networks to share best practice and ensure consistency of enforcement across a region. Most regions have a shared regional intelligence function which helps coordinate activity and many Trading Standards officers have commented on how valuable this shared intelligence is. Within these networks, some LATSS have specialist teams who serve or assist other authorities besides their own. Such activities depend on reciprocal effort from all local authorities which they generally give freely and fairly. LATSS thus act as a responsible network and collectively aim for a seamless service. Despite the disincentives (see below) the larger Trading Standards teams in particular do pursue cases of regional or national importance.
- 5.20 Determined rogue traders are sometimes harder to catch and prosecute than businesses that are generally compliant but which might have been tempted into sharp practice or which have fallible systems for ensuring compliance. The more resources that are needed to tackle a particular rogue business and the weaker its connection with an individual authority area, the more difficult it is for an individual LATSS to justify pursuing an investigation and, if necessary, prosecuting an offence when the ultimate benefit may be primarily to the region or country as a whole.
- 5.21 Unfortunately LATSS have few incentives to tackle cross-boundary threats. They are accountable to their own local authorities, which provide almost all of their funding, and the cost of pursuing prosecutions against larger rogue traders can be high, especially for the smaller authorities. Larger cases can occasionally cost £200,000 or more which, according to the NAO report, would constitute over 40 per cent of the annual budget of around half of the UK's Trading Standards offices. There is also no formal legal duty on Trading Standards to take up cross-boundary cases.
- 5.22 BIS funding is therefore targeted at gaps in enforcement action that may occur at national and regional levels and at encouraging local authorities to invest resources in activities that have wider benefit. This funding is designed to support capacity building in a bottom-up way – incentivising LATSS to come together to build the necessary capacity through collaboration between local authorities. This is done by:
- **Scambuster teams.** These are specialist Trading Standards teams that target the worst rogue trading practices and raise awareness by alerting consumers in their area who may be targeted by a particular activity. Scambuster teams have had funding of approximately £2.5 million per annum in recent years. This will increase to £3.2 million for 2011/12.
 - **Illegal Money Lending teams.** These tackle loan sharks and other sources of illegal credit, backing this work up with awareness campaigns and referrals to financial support services. The teams currently have funding of approximately £5.2 million per annum; this has been confirmed for 2011/12 with a new structure based around three national teams.
 - **Internet Enforcement.** In 2009 a specialist OFT enforcement unit and a Trading Standards virtual centre to train staff was established, as well as funding for test purchasing and to purchase stand alone equipment. BIS provides funding to enable work with the police and other enforcers to tackle more complex online breaches of consumer law such as misleading information or price comparisons and also to tackle online crimes such as ticketing scams and bogus websites that, by their nature, operate across local authority boundaries. Funding in 2010/11 was £1.35 million, split between the OFT and Trading Standards.

- **Ports funding.** This is aimed at product safety sampling and testing by local authorities at ports to remove sub-standard and dangerous products from the supply chain as they enter the UK and before they reach the shops. A small number of port authorities provide a service which benefits the entire country. BIS funding for 2010/11 was £150,000.
- **Fighting fund** for regional and national threats. Taking large cases to court can lead to high up-front costs for LATSS. BIS has therefore dedicated money to a fighting fund to allow authorities to take action in cases of regional or national significance which they would otherwise struggle to afford. The fund is currently worth £250,000 per annum.

5.23 An independent interim evaluation of the Illegal Money Lending project published in October 2010²⁶ found that there has been a significant increase in the use of illegal money lenders as a result of the recession. However, the evaluation concluded that the project has made an excellent start towards reducing the social detriment of this practice, which has given vulnerable victims relief from financial burdens and a climate of fear. Based on this, the evaluation showed a compelling rationale to continue to fund the intervention based on a social need. The analysis showed that larger teams, such as those in Birmingham and Wales, are more successful than smaller ones and the report recommended a move towards fewer, larger teams.

5.24 BIS is conscious that its financial interventions so far, important though they are, can only affect a part of the enforcement landscape. The NAO found that 86 per cent of enforcement funding is provided to local enforcement teams through local authority budgets.

c) National and International

5.25 Currently, the OFT undertakes national consumer enforcement action against a range of priorities as set out in its prioritisation principles. In determining the high level focus of these priorities, the OFT must consult on them in draft and publish them in an annual plan. The OFT's responsibilities cover both competition and consumer law and it has been internationally recognised as a leader in these fields.

5.26 The OFT's consumer enforcement activities range from a small number of formal enforcement actions (mainly civil injunctive actions in the higher courts rather than criminal prosecutions), to more informal pressure on individual businesses to stop non-compliant behaviour, to compliance-oriented communications to businesses in general about consumer law (for example by producing detailed guidance on how to comply with new legislation). The OFT acts as the principal source of detailed guidance on the law relevant to enforcement action against unfair contract terms and unfair commercial practices, drawing on its experience of working with the Government on legislation and taking enforcement action in the higher courts.

5.27 The OFT is also the UK's Single Liaison Office and national Competent Authority under the EU Consumer Protection and Cooperation (CPC) regulations, dealing with cases referred from other EU member states and where necessary taking enforcement action

²⁶ www.bis.gov.uk/files/file37025.pdf

abroad. It pursues international collaboration to secure effective action against overseas traders who are causing consumer detriment in the UK.

- 5.28 The OFT's draft Annual Plan for 2011²⁷ sets out two broad themes: delivering high impact enforcement and influencing the behaviour of business, consumers and the Government to make markets work well. The draft annual plan proposes focusing on economic infrastructure sectors, online markets (which it believes, of all the priorities, is likely to lead to the largest amount of consumer enforcement work), high innovation markets, public services markets and protecting vulnerable consumers. It indicates that the OFT should address "the most serious national consumer problems, maximising the deterrent effect of our actions and taking precedent setting cases".
- 5.29 The prioritisation of OFT's enforcement effort against national threats that arises from this process, combined with the weakness of incentives and lack of clear responsibility for LATSS to take action against the remaining cross-boundary or national threats creates the potential for an enforcement gap. According to the NAO, two out of 15 formal referrals to the OFT from Trading Standards between July 2009 and January 2011 met the OFT's prioritisation criteria. This perhaps indicates that interpretations of the National Intelligence Model vary. Where OFT assesses that a referred case does not meet the national threat level allocation criteria, it does not follow that any individual LATSS is therefore responsible for the case.
- 5.30 Forty one per cent of trading Standards officers responding to a survey used by the NAO for their report considered that the referral system between OFT and Trading Standards was not very or not at all effective, though this still leaves a majority finding the routine, successful collaboration which goes on between OFT and Trading Standards on an ongoing basis to be effective.
- 5.31 In the financial year 2011-12, the OFT's total budget (excluding self-financing activity) is £59.8 million. This budget is made up of front-line resource supported by various administration and support groups, including dedicated legal and economics groups as well as economists and specialists in competition and consumer law embedded in front line teams. There are also groups which also undertake the OFT's international liaison role and policy-influencing roles. OFT budgets are not broken down between consumer and competition activities.
- 5.32 Separately from the OFT, consumer enforcement in the regulated sectors is performed by the respective regulator for that sector. Consumer enforcement in this area may cover issues under general consumer law²⁸ but may also require sector-specific legislation.

²⁷ www.offt.gov.uk/shared_offt/consultations/oft1294con.pdf

²⁸ The regulators with concurrent consumer enforcement powers (as designated enforcers under Part 8 of the Enterprise Act) are Ofcom, Ofgem (and Northern Irish counterparts), Ofwat, the Financial Services Authority, the Office of the Rail Regulator, the Civil Aviation Authority and the Information Commissioner's Office. Additionally, CAA, FSA, Ofcom, the Secretary of State for Health (and Northern Irish equivalent) and Independent Committee for the Supervision of Standards of the Telephone Information Services are also designated enforcers for the purposes of the Consumer Protection Cooperation regulations

The issue

- 5.33 Because traders are mobile and operate well beyond local authority boundaries, enforcers must be able to work collectively and have efficient mechanisms for targeting regional and national threats as well as local ones. If individual local authorities are tempted to reduce enforcement work and free ride off the efforts of others, they risk creating havens for rogues and undermining the solidarity inherent in the system from which all benefit. This inter-dependence displays the value of shared regional intelligence resources that appear to deliver considerable support at low cost to each LATSS, and of LGR's current coordination activity.
- 5.34 According to evidence from representatives from the LATSS network, supported by statistics from the Chartered Institute of Public Finance and Accountability (CIPFA), it is apparent that several authorities already have fewer than ten Trading Standards officers. The Government is concerned that very small, stand-alone Trading Standards services appear to have difficulty fulfilling statutory obligations, let alone other useful services such as second-tier advice, support for compliance, consumer education or enforcement work in bigger, resource-intensive cases. This creates the potential for a growing enforcement gap. This concern is supported by the results of a review of Trading Standards in Scotland by Consumer Focus.²⁹ The review found a lack of consistency in the services offered to consumers and to businesses with no effective national system in place to measure the effectiveness of the service and that resources to support trading standards services differed enormously across Scotland's 32 councils. Although the review was limited to Scotland, similar issues may be prevalent in the rest of the UK.
- 5.35 Given the budgetary pressures currently facing LATSS, there is a threat that more and more local councils will no longer be able or willing to prioritise larger, cross-boundary cases. Where these cases are precedent-setting or raise market-wide issues the OFT may prioritise them. However, given its own reduction in resources, the OFT will not be able to fill this gap, especially in respect of the action against larger-scale rogue traders, which is one of the Government's priorities. Maintaining the status quo therefore carries a high risk that the LATSS network will splinter with an increasing number of local authorities reining back activity to focus only on the most local of cases and thereby undermining consumer confidence in markets.
- 5.36 The proposed reduction in coordination of LATSS work arising out of the proposed abolition of LGR and the reduction in resources allocated to regulatory services within the Local Government Group accentuates the threat. Mechanisms to coordinate activity and sustain the self-interest and collective confidence in an effective system undertaking cross-boundary enforcement work must be maintained.

²⁹ Consumer Focus Scotland (2010), *Up to standard: a review of trading standards services in Scotland* www.consumerfocus.org.uk/assets/3/files/2009/10/CFS-Up-to-Standard.pdf

Reform

Options for reform of consumer enforcement powers and responsibilities

5.37 The Government has considered 3 main options for reform of consumer enforcement powers and responsibilities:

- Option 1: All of the OFT's current consumer enforcement functions (and associated funding) are transferred to Trading Standards
- Option 2: All enforcement other than at a local level is undertaken by the proposed Competition and Markets Authority
- Option 3: The majority of OFT's current consumer enforcement functions are transferred to Trading Standards which develops a new national leadership and coordination function for cross-boundary and national enforcement, but with some consumer enforcement powers being retained by the CMA³⁰

5.38 In addition, the Government has considered how maintaining the status quo in terms of roles and responsibilities could be combined with significant reform to deliver better coordination between OFT and Trading Standards than exists at present. It may be possible, for example, for the OFT/CMA and Trading Standards to retain largely overlapping enforcement powers and for the CMA to retain consumer enforcement capacity across the board, but to set up a Joint Enforcement Board (JEB) between Trading Standards and CMA to direct that capacity, such that decisions on how to enforce against national and cross-boundary threats could be taken collectively.

Option 1: Transfer all of OFT's enforcement functions and associated funding to Trading Standards

5.39 This option would involve the transfer of all OFT's current consumer enforcement functions, and associated funding, to Trading Standards who would take on responsibility for prioritisation of enforcement cases and the lead role.

5.40 Government does not favour this option because of the likely loss of the deterrence effect where in cases involving complex markets, breaches of consumer law may be arising out of structural problems in those markets. The businesses involved may doubt the capacity of Trading Standards to analyse the markets with sufficient sophistication to collect the necessary evidence for successful enforcement.

5.41 Linked to this, there could be significant costs attached to any loss of integration between market analysis and enforcement of consumer and competition policy. In particular, it is important that markets can be analysed with an open mind as to whether they are functioning well or whether there may be market failures on either the supply or the demand side. Where markets are not functioning well, it is also important to have available a range of remedies for addressing any competition problems. Mainstream competition law remedies only offer a solution where problems are caused by abuse of

³⁰ For example, as an optional instrument for resolving problems of competition in markets following market studies or investigations.

market dominance or by anti-competitive agreements between companies such as cartels. That is why the Competition Commission currently has a range of other remedies available to it for use where problems of competition in markets are more complex or where the cause is impossible to prove.

5.42 Consumer law enforcement is currently a remedy available to the OFT to use where it finds problems of competition in markets. Consumer enforcement capacity in these cases can be seen as an alternative tool for effective delivery of competition as well as consumer policy. Removal of such a tool from the competition enforcement body or bodies could therefore be seen as undermining effectiveness of competition policy delivery, which is not the Government's intention.

Option 2: All supra-local enforcement undertaken by the CMA

5.43 Under this option, all responsibilities for enforcing consumer legislation beyond the local level would be transferred to the proposed CMA. Enforcement at the local level would be dealt with, as now, by LATSS but with no expectation that LATSS should act against threats which went beyond local authority boundaries.

5.44 This would eliminate any uncertainty over the split in roles and responsibilities which currently exists between Trading Standards and OFT as everything beyond the local level would be dealt with by the national enforcement body. However, the extent to which such an arrangement might address the enforcement gap identified earlier would depend on the resourcing and prioritisation decisions of the CMA, influenced by overall Government policy.

5.45 This option would entail significant enhancement of current OFT resources, including inevitably the establishment of a network of regional offices to handle supra-local, but sub-national, consumer cases which form a significant proportion of the total. It is not clear to what extent it would be possible to transfer out of local authorities the funding necessary to support this increased national enforcement role. Since cross-boundary case handling is not clearly statutory, it is likely that LATSS resources currently allocated by local authorities to the enforcement of consumer law would be reallocated to other areas, for example to animal welfare, environmental health or local threats. Arrangements would have to be made with local authorities on sharing of intelligence which might introduce further consultation costs. New links would have to be established with local networks and significant new skills and enforcement techniques learned.

5.46 Finally, a dispersed and national consumer enforcement operation on this scale would have a major impact on the character and balance of the CMA, which might detract from its proposed focus on making competition work in markets.

Option 3: Transfer the majority of OFT's consumer enforcement functions to Trading Standards with some consumer enforcement powers being retained by the CMA.

5.47 Under this option, some of the OFT's current consumer enforcement and compliance functions, and the resources currently used by the OFT in performing these functions, would transfer to the Trading Standards network. The relevant proportion of the OFT

budget would be combined with relevant BIS funds currently supporting consumer enforcement and be directed at strengthening the capacity, leadership and coordination of LATSS in order to support more effective action against cross-boundary threats, especially, but not exclusively, rogue traders and scam operators.

- 5.48 However, under this option the CMA would retain consumer enforcement powers relating to the operation of markets and the resources relating to such activity. The Government wants to preserve links between consumer and competition policy because supply and demand-side market failures can interact in complex ways and because consumer law enforcement can be an effective way to resolve structural problems in markets. The CMA would be much better placed than Trading Standards to understand complex structural market problems and pursue enforcement in such cases. The Government is therefore proposing that the CMA should retain responsibility for analysing markets with structural problems, whatever the nature of those problems, that it should have significant discretion over what constitutes a structural market problem and that it should have continuing powers to use consumer law enforcement to resolve such problems.
- 5.49 The new funds for Trading Standards would be used to supplement the money that local authorities currently spend on LATSS by building additional capacity to take on national and cross-boundary cases and to ensure an effective support service. The money would be ring-fenced for national consumer policy outcomes rather than simply being added to the Revenue Support Grant available for local authorities to use as they see fit across a range of purposes. The money would **not** be to support local activity against local threats but to provide the capacity for Trading Standards to act **collectively** against national and regional threats.
- 5.50 This additional central government funding for Trading Standards should deliver greater efficiency in the way that local authority enforcement budgets are spent by improving leadership and coordination of effort between authorities and by raising sights, based on improved intelligence, towards targeting the highest-priority sectors and infringements with the greatest consumer detriment.
- 5.51 The necessary leadership on cross-boundary enforcement would come from Chief Trading Standards Officers acting together. BIS envisages the creation of a Trading Standards Policy Board (TSPB). The TSPB could be located within TSI with appropriate governance including the LG Group and ACTSO. It would need a small secretariat providing administrative and technical support. In principle, the Government thinks that the Trading Standards Policy Board should be chaired by an elected Head of Service with membership drawn from Heads of Service from all regions and nations, as appropriate.

The role of the TSPB

- 5.52 The TSPB would be able to exert significant influence over the entire Trading Standards system because of its authority – it would be led by Chief Trading Standards Officers appointed to represent their regions – and its ability to deploy a considerable budget in support of its objectives. It would be essential that this was linked to, although separated in budget terms from, the ongoing activity carried out by individual local authorities. It would also be key that there was sufficient political scrutiny at both the local and national level which would best be delivered via the LG Group on the one hand and BIS, on the other. The accountability to the LG Group could either be directly to one of its programme board members or through a separate political oversight mechanism utilising appropriate LG Group board members.

5.53 In Scotland, BIS will work with COSLA, SCOTSS, the Local Government Improvement Service and the Scottish Government to identify suitable governance and operational models. This work is still ongoing to develop models for the delivery of these functions in Scotland.³¹

5.54 BIS has determined a number of operational principles that it believes would be essential for the TSPB to deliver successfully in the national interest:

- Firstly, it would be essential that the TSPB was willing and able to identify and take responsibility for all relevant cases including large complex cases which may, for example, raise novel legal issues across the UK. This would be necessary, among other reasons, to ensure that the UK's duties under European law were adequately fulfilled.
- Secondly, there would need to be a case management system to ensure that cases were designed and delivered effectively and that there was coordination to maintain consistency, manage duplication and prioritise national resources on the greatest need. Outcomes of cases should be monitored and this should include prosecutions and civil cases, but also undertakings or other compliance agreements or methods of resolution.
- Thirdly, the model should follow the Principles of Good Regulation and specifically the requirements of the Regulators' Compliance Code. It should be able to demonstrate that actions taken are proportionate and in line with these principles, avoiding duplication and ensuring use of the most appropriate compliance and enforcement tools so that consumers are effectively protected with minimum harm to legitimate business. This must include developing a strong partnership with business representative bodies in order to ensure dialogue and feedback. This could be achieved, for example, through LBRO's Business Reference Panel which could facilitate engagement of TSPB with business representatives or help in prioritisation.
- Finally, national funding should only be used to combat genuine regional and national and international threats and should not become a "crutch" or bail out for local authorities that simply fail to invest enough resource in their core LATSS operations.

5.55 The new Trading Standards Policy Board would have clear policy responsibility and corresponding funds to allocate for combating all regional and national threats except those relating to structural market failings, which would be for the CMA. Working through its regional representatives the Board should be in a position to mobilise the wider Trading Standards community around a common agenda. This should improve the efficiency with which local authority funding of LATSS is spent by counter-balancing any temptation to retreat into small-scale actions against low-level threats and instead mobilising LATSS resources to act against the most economically important targets. By devolving power to local government to set the strategic direction, albeit collectively, this would reflect the Government's strong commitment to localism.

³¹ For example, COSLA already has an integrated approach developed within other areas such as the Business Gateway and myjobScotland and it may make sense to develop links with this infrastructure.

- 5.56 **Prioritisation and coordination of national enforcement cases**³² would be the main function of the new TSPB. It would include operational integration of effort between regional, local and national teams and liaison with individual local authorities and enforcement policy in the LBRO and LGR. Day-to-day coordination and case allocation would be undertaken by the small secretariat supporting the TSPB. This unit would also maintain enforcement databases and monitor case management to ensure consistency, lack of duplication and the correct use of resources. The unit would act in support of whichever local authority was nominated as the Single Liaison Office under a mandate from BIS or a lead local authority as the relevant Competent Authority. This role would require it to allocate requests to relevant authorities or the designated competent authority where appropriate, and could also perform a similar function in relation to requests from non-EU countries.
- 5.57 The primary objective would be to enhance the collective capacity of LATSS to enforce cross-boundary cases against rogue traders and other scams whilst broadly maintaining existing capacity to enforce at national level against other businesses tempted to overstep the limits of what is legal. Prioritisation of cases should be informed by the successor to Consumer Direct operated by the Citizens Advice service³³ as well as other intelligence – for example, information received from OFT/CMA market studies, from other organisations such as Which? and the Intellectual Property Office and from international consumer networks. The TSPB should also institutionalise periodic discussions on enforcement priorities with business organisations.
- 5.58 **National enforcement work** in England and Wales would be undertaken by a combination of expanded regional teams with individual local authorities backed, as necessary, by a financial risk underwriting mechanism and dealing, as now, with companies headquartered on their territory. There would also be a small number of the regional teams or particular authorities with specialist areas of expertise. The members of the regional teams would continue to be employed by local authorities with powers to take on the cross-boundary investigative work required by most regional and national-scale cases. The lead regions or authorities would cover issues such as estate agency and internet enforcement as well as technical areas of consumer law such as unfair contract terms legislation where a more detailed understanding would be needed than is likely to be available in most individual local authorities.
- 5.59 Taking on national roles by individual or regional Trading Standards teams would require changes to Trading Standards' statutory powers. This would include how a lead authority with appropriate ring-fenced national funding might take on OFT's functions under the Estate Agents Act or act as a competent authority to take on cases referred from other Member States. This might require consequential changes to the Local Government Act 1972 to allow an individual authority to take action even when there was a minimal link to the interests of the inhabitants of its area.³⁴ Any such change would be limited to the

³² This is separate from the LBRO's National Enforcement Priorities Work (see paragraph 5.7) and other Trading Standards policy drivers which affect current enforcement action by local authorities and which will remain unchanged.

³³ See Chapter 2 for more information on the proposals for consumer advice.

³⁴ To enable such a change to be effective, these actions would need to be funded via the new mechanism.

exercise of powers formally transferred from the OFT and not be extended to cover existing Trading Standards powers. Separately, BIS is currently undertaking a wider review of Trading Standards officers' powers looking at issues such as cross-boundary authorisation of officers where there may be benefits in creating a simpler system. If that review indicates a need for legislative change, any proposals will be subject to consultation at the appropriate time.

- 5.60 In order to overcome financial dis-incentives against the taking up of large national cases by individual or lead authorities, the Government is considering setting up either an indemnity fund or a scheme for pooling legal risk or a combination of the two. The purpose would be to purchase or provide insurance against the potential risks of long, drawn-out cases or of losing a large case. However, some element of risk management would be necessary both directly by the teams responsible for the case and at national level to ensure that spurious or ill thought-through cases were not taken. This could be achieved at national level by guidance on when a case would be considered suitable to be backed by the risk-sharing mechanism coupled with an element of peer review. The Chief Trading Standards Officer seeking to bring the case would have to satisfy a committee of his or her peers in the TSPB that the case was an enforcement priority, that it was proportionate and well-founded, that it was being properly managed and that it would merit support. This would introduce an element of quality control and collective decision-making into LATSS enforcement work which has been limited in the past. The Government is still working with relevant stakeholders to develop the best model for this risk-sharing mechanism but recognises it is a priority.

Choice of option for reform of enforcement powers and responsibilities

- 5.61 The Government considers that Option 3 is the best reform option. It offers the best prospect of **both** improving leadership and coordination of Trading Standards enforcement across local authority boundaries **and** maintaining the advantages of integrated analysis of markets at national level from both a competition and a consumer perspective.
- 5.62 Strengthening central allocation of casework within LATSS and establishing clear responsibility for addressing all threats in an integrated way should go a long way to addressing the criticism that UK consumer enforcement is inconsistent and un-coordinated.
- 5.63 Greater leadership, peer review and collective decision-making should all help to reduce the burden on business of regulatory compliance.

Improving the status quo without changing powers and responsibilities

- 5.64 The most realistic alternative to Option 3 is to broadly maintain the status quo in terms of powers and responsibilities but with provision made for reform of the way collaboration between Trading Standards and OFT takes place. The capacity for national enforcement and enforcement policy currently located in OFT would be largely retained to reduce the loss of expertise and disruption of shifting functions between organisations and the transitional costs of change. The CMA would have the same consumer policy scope as the current OFT. The CMA would still decide how much resource to allocate out of its overall budget towards consumer enforcement.

- 5.65 In order to improve leadership and coordination of Trading Standards and integrate enforcement at local, regional and national levels, the CMA would relinquish control over the deployment of some of its national enforcement resources in favour of a Joint Enforcement Board (JEB) which would comprise representatives of the CMA and Trading Standards in equal numbers with perhaps an independent chair. In one variant of the model, the CMA would continue to employ the relevant individuals and supply the secretariat for the Board.
- 5.66 The JEB would fulfil the same role as the TSPB in Option 3 above in terms of considering intelligence and making operational decisions on how cases should be pursued and by whom. As in the TSPB model, this would **not** include cases addressing structural market problems, which would be entirely under CMA control. The JEB could see enforcement resources being deployed more flexibly on other cases with CMA expert lawyers, for example, assisting Trading Standards case handlers or Trading Standards staff brought in to work on CMA enforcement cases. The JEB would share the potential of the TSPB to join up consumer enforcement strategy from national through regional to the local level with two-way flow of issues and cases. In addition, it could institutionalise integration with the remaining consumer enforcement role of the CMA addressing structural market problems.
- 5.67 Another variant on the JEB model would be for it to acquire legal personality, employ its own secretariat and potentially employ directly the resources for national enforcement which would be given up by the CMA. This would require the creation of a new public body, however, probably with some overhead costs. It would create a need for delineation of the role of the JEB, as distinct from the CMA. If the JEB was operationally distinct from the CMA, there would be the same need for coordination with the CMA as exists for the TSPB model.
- 5.68 A further variant would be for some or all of the national resources to be deployed within Trading Standards, all in one place in a central body such as TSI but subject still to the JEB decisions on operational deployment. This would look more like a variant on Option 3 above but with a CMA role in decision-making across all cross-boundary consumer enforcement and no integration of the national resource into regional and local centres of excellence within Trading Standards.
- 5.69 There are two main issues with these various JEB models compared with Option 3 above. The first would be the resources available to be integrated into regional and local centres of expertise within the Trading Standards network. BIS funding could still be made available to the JEB in the same way as it would be made available to TSPB in Option 3 but the resources retained under the JEB would obviously not be available for creating national and regional enforcement infrastructure in LATSS. The JEB would also not be controlled solely by Chief Trading Standards Officers and could not be held accountable in the same ways. The JEB would be more distant from individual LATSS, especially if the enforcement resources remained in the CMA. It would also have less scope to bind in the various Trading Standards regions through financial transfers and to draw on their expertise to perform national enforcement and policy roles around the country. So the leadership role it aspires to would be more difficult to achieve. Without investment in Trading Standards infrastructure, the ability of the network to come together effectively in a national body such as JEB would also be much less certain.
- 5.70 The second issue would be the continuing overlap of powers and responsibilities and the consequent absence of clear responsibility for Trading Standards to deliver the majority of

cross-boundary enforcement. Without clarity of responsibility as well as control of substantial, national enforcement resources within the Trading Standards network, it would be much harder to engage Trading Standards in cross-boundary enforcement in any integrated national system.

5.71 Because some variants of the JEB model would not involve any regulatory change, they could be implemented quickly, possibly as early as April 2012, but that is not the case if the JEB were to acquire statutory legal personality.

QUESTION 20. Which option for reform of enforcement powers and responsibilities do you prefer, if any, and why?

QUESTION 21. In relation to Option 3, do you agree with the Government's principles for the operation of the new TSPB? Do you think this model would deliver effective enforcement against large businesses tempted to break the law? Which areas of enforcement activity should warrant specialist national teams? Do you think that an indemnity fund to enable local authorities to take the risk of losing cases is desirable and deliverable?

QUESTION 22. Would you prefer to maintain the status quo in terms of powers and responsibilities, but with improved collaboration between OFT/CMA and Trading Standards? If so, would one of the JEB models be the best solution? Which one and why?

QUESTION 23. In relation to the various JEB models, how would you ensure effective Trading Standards participation in the JEB? Do you think that this option would deliver integration of enforcement across local, regional and national levels? Should other organisations be involved in the JEB, either as members or as participants in discussions? Would retention of such unrestricted consumer enforcement powers and responsibilities affect the CMA's singularity of purpose and distract it from its core competition remit?

QUESTION 24. How can your preferred new model best work with businesses?

The role of the proposed Competition and Markets Authority

Consumer enforcement

5.72 The Government is proposing that a single, streamlined, expert Competition and Markets Authority be created by the merger of the Competition Commission and the competition and markets investigation functions of the OFT. This new body would have greater effectiveness and efficiency to investigate mergers, markets, cartels and anti-competitive practices. It would also retain the function of independent market investigation and analysis which cuts across the consumer and competition spheres. The recently completed consultation on the CMA included a chapter on its intended scope indicating the intention that it should be primarily competition focused.³⁵ The primary role of the

³⁵ BIS (2011) *Growth, Competition and the Competition Regime: A consultation on Possible Reform*; Chapter 9 www.bis.gov.uk/consultations

CMA would be to ensure fair and effective competition between companies and to promote competitive markets conducive to stability, growth, innovation and consumer welfare. But this does not exclude some consumer enforcement role.

- 5.73 Where competition in markets is not working well there may be situations where enforcement of consumer law offers the most pragmatic and fair solution. It is not hard to think of breaches of consumer law that might affect competition in markets. Unfair contract terms might become disincentives to switching suppliers, for example, or hidden or additional fees that operate on a market-wide basis could have the effect of restricting consumers' ability to choose a fee structure that was most appropriate, clearly inhibiting normal competition. In a similar vein, misleading statements or actions to boost sales may be replicated across a range of suppliers to reinforce incumbents and deter market entry.
- 5.74 Such effects may be complex and require detailed market analysis in order to be uncovered and understood. Following such detailed analysis, consumer enforcement action to remedy a problem would be a legitimate way of achieving a competition objective. Therefore, the Government has proposed that the CMA should retain powers to enforce consumer law where it is the most appropriate remedy to a problem of the effective functioning of a market. A preliminary analysis of which sorts of consumer law enforcement cases could continue to be brought by the CMA on this basis (from those brought by OFT in recent years) is at Annex D.
- 5.75 In Option 3 above, the CMA consumer enforcement powers should be restricted to the remedying of structural problems in markets, they should not be used for pursuing individual breaches of the law or remedying a perceived unfairness in the way certain consumers are treated when this is unrelated to competition and broader market concerns. The question therefore arises of what sort of limit, if any, should be placed on the CMA's powers to enforce consumer law in this context. The requirement is to balance the need for consumer law to be used only where it is remedying a structural problem in markets with the ability to use consumer enforcement powers as flexibly as possible once such problems have been clearly identified.
- 5.76 This could be achieved, for example, by restricting the use of consumer enforcement powers to cases where market studies or market investigations had already been carried out. From a practical perspective, enforcement action would only be possible following detailed analysis of the problem in many cases. Another option might be to introduce a threshold whereby the use of consumer enforcement powers would depend upon *prima facie* evidence of a competition problem in the relevant market or of a structural market problem as opposed to an isolated case of illegality. Annex D looks at some options for how this divide could be articulated. The Government invites views on how this might best be achieved.
- 5.77 On balance, the Government's initial view is that a procedural restriction might be excessive and constrain flexibility on how to address market problems. Its preference is for the CMA to have significant discretion to determine when it thinks there is a structural problem in a market and the flexibility to use its consumer enforcement powers as it sees fit as soon as it determines that such structural problems exist.

Consumer market studies

- 5.78 The largest gains from integrating consumer and competition functions in a single organisation arguably derive from the unity of analysis of markets where competition and consumer-related effects can be hard to disentangle. Around 25 per cent of OFT market studies have considered consumer issues alongside competition issues where the market failure may arise from both types of issue, or an interaction of the two or where the cause of a market failure is not immediately clear. More broadly, studies of competition issues in markets may highlight a problem that is rooted in consumer law and needs to be addressed through consumer remedies or enforcement.
- 5.79 It is clear that the CMA may need to consider both supply-side (market structure) and demand-side (consumer behaviour) factors in assessing failures in markets in order to identify a particular problem and the action that should be taken to remedy the adverse effects that arise. This will necessarily include examining a wide range of markets, services and practices that are important to consumers and which impact on choice, quality and price. Many of the OFT's market studies, such as payment protection insurance, home collected credit and new car warranties started out as such mixed studies.
- 5.80 It is therefore proposed that the CMA should retain responsibility for such mixed market studies at least until such time as it becomes clear that there are no structural market problems or issues of effective competition in the relevant market.
- 5.81 In recent years approximately 20 per cent of OFT market studies have focused solely on consumer issues where consumer detriment has been investigated for reasons other than a lack of competition in markets. Examples of such market studies include door step selling, second hand cars and internet shopping. Such market analysis will need to continue in a reformed competition and consumer landscape. There is an issue, however, of whether this should fall to the CMA in future.
- 5.82 Particularly if Option 3 is chosen, the Government's preference is that such "pure" consumer market studies should not, in future, be conducted by the CMA. They relate to analysis of consumer detriment arising out of potential breaches of consumer law. They may consider patterns of business practice and of consumer behaviour but do not address structural market problems or problems of effective competition.
- 5.83 The reforms set out in Chapter 4 of this consultation cover the transfer of Consumer Focus functions to the Citizens Advice service. These bodies already undertake some market analysis in their role as advisers to regulators, or, where appropriate, in order to bring forward a supercomplaint. For example, Citizens Advice and Consumer Focus have published a wide range of analytical reports on consumer matters including consumer debt, the housing market and the consumer experience of buying digital goods. If the research and analysis capacity of Consumer Focus and the Citizens Advice service were combined, as is proposed, the Citizens Advice service would have the capacity to analyse consumer behavioural trends in markets and to look at patterns of consumer detriment arising out of breaches of consumer law. The TSPB could also finance studies of patterns of consumer law breaches or conduct research using its own network of enforcement officers in order to improve its intelligence.

- 5.84 In an Option 3-based model, the Government would therefore invite the Citizens Advice service, rather than the CMA, to take on the market analysis role in relation to pure consumer market analysis.
- 5.85 In this approach, the point at which the CMA would determine whether it should pursue a case or instead refer it to the relevant consumer body would vary according to the case. In some cases, an impact on competition in markets might be ruled out at the start or early on in which case the CMA market study would never start or would stop early. It would then be for the TSPB or the relevant Trading Standards enforcer to identify whether enough evidence existed to proceed with enforcement action, and for the Citizens Advice service to decide whether the perceived consumer detriment was such that further analysis should be carried out solely on consumer policy grounds.
- 5.86 In other cases, the CMA may only be in a position towards the end of a study to determine that the market under review is not affected by competition problems at which point it might make sense for the CMA to present a completed analysis. If so, that analysis might lead directly to a recommendation for some sort of consumer enforcement action in which case, if the problem was not structural, the findings and evidence might be presented directly to the TSPB in its role coordinating national consumer enforcement. The Government is confident that the TSPB would consider the findings and studies of the CMA very seriously in deciding on potential priorities for enforcement and that discretion rather than a duty to consider findings from the CMA would be sufficient, but seeks views.

QUESTION 25. Do you agree that the CMA should retain a consumer enforcement role in those cases where a potential breach of consumer law may be connected to a structural market problem?

QUESTION 26. In an Option 3-based model, should this enforcement role be subject to procedural limitations?

QUESTION 27. Do you agree that the CMA should enjoy significant discretion over when a market has structural problems, such as to give rise to its consumer enforcement powers?

QUESTION 28. Do you agree that the CMA should retain responsibility for mixed market studies where there may be competition and consumer issues (supply and demand side market failures) present on the relevant market?

QUESTION 29. Do you agree that in an Option 3-based model, the Citizens Advice service should in future be responsible for pure consumer detriment analysis and that the CMA should not perform pure consumer market studies? In such a case, do you agree that the CMA should stop performing market studies once it identifies that there is no structural problem in such markets and do you think there should be a duty on the Trading Standards Policy Board to prioritise cases referred by the CMA?

Cases that cross over institutional boundaries

- 5.87 Some individual cases will inevitably be capable of being handled in several ways. It is vital that resources are not wasted through duplicative actions by more than one institution and equally vital that cases are not dropped because each authority imagines that it is someone else's responsibility to take action. A further risk is one of delay as

cases can be passed from one organisation to the next and back again as each body is unwilling to prioritise the dedication of its own resources to the task.

- 5.88 One way of minimising this risk would be to make responsibilities clear with as little overlap as possible. Option 3 attempts to make roles clear and responsibilities sit, as far as possible, squarely within one organisation. Another way of achieving this aim would be by institutionalising joint decision-making on priorities as is proposed in the model for improving the status quo through a Joint Enforcement Board.
- 5.89 But even in an Option 3 scenario, regardless of how carefully the different responsibilities of the different organisations were delineated, there would be crossover points. This would be especially in cases involving dynamic markets where it was not clear, for example, whether a given market faced or would face a structural problem weakening competition or rather a case of breach of consumer law by one or a small number of businesses. The most appropriate course of action could be for the CMA to launch a market study or for the Citizens Advice service to analyse the level of consumer detriment arising or for Trading Standards to proceed directly with one or more individual enforcement actions.
- 5.90 In these cases the Government proposes that all three organisations (CMA, the Citizens Advice service and TSPB) should collectively discuss and where possible agree the way forward from the start. In some cases, Which? may offer a further option for a voluntary solution by agreeing to pursue its own enforcement action using its power to seek injunctions under the Enterprise Act.
- 5.91 For this to work there would first need to be transparency about the plans of each body. Each of the others could then be in a position to request a discussion on any matter arising. In practice, the regular meetings of the TSPB would provide a good forum for such discussions to take place. As stated above, each session would involve (perhaps start with) a consideration of intelligence on consumer detriment presented by the Citizens Advice service. There would also be reports from the Trading Standards regional intelligence teams. CMA could also be invited to present its recent analysis and work plans before enforcement priorities were determined. Which? could also be invited to present any evidence it had on consumer detriment.
- 5.92 There is also a case for having some resource for market investigations that would require the joint agreement of the TSPB, CMA and possibly the consumer advocacy bodies where it was not clear at the outset what the nature of the problem was. The budget could be formally held by any one of the bodies but require sign-off by others for its use. This mechanism would ensure that the bodies coordinated closely and that enforcement and advocacy gaps were avoided.
- 5.93 Ultimately, the Government considers that the CMA would need to decide where it believed there was a structural problem in a market and when it wished to investigate such a market or act to address any such problem through enforcement. It would need to have discretion to make this assessment and to this extent would need to have prime responsibility for taking a decision on issues within its responsibility in the event of any dispute. If the CMA determined that there was not a structural problem or that it did not want to pursue any such problem, then that must be final.

QUESTION 30. Do you agree that the Government's proposed approach is a sensible way of ensuring effective collaboration between the various bodies in the proposed new landscape?

QUESTION 31. Do you agree that it would be helpful to have some resource that required joint agreement between the CMA, TSPB and consumer advocacy bodies for its release, to be used to investigate or address consumer and market issues that would otherwise risk an enforcement or advocacy gap? If so, at what level should such funds be set and how best should they be administered?

Other current OFT roles

- 5.94 Some cases require a strong national brand to take enforcement action. One example would be as a last resort following use of an industry-led compliance scheme such as that operated by the Advertising Standards Authority.
- 5.95 Here, the cases may not be large or complex and they will not generally have a competition angle but there is a clear value to the strong deterrence effect offered by the threat of enforcement. It is important that the threat be seen as genuine and, in the event that the proposed CMA is restricted to consumer enforcement actions which relate to competition in markets, the TSPB would need to be aware of this in its coordination role and ensure that LATSS sustained or acquired the necessary reputation and credibility. It would also need to work closely with key stakeholders such as the Advertising Standards Authority, PhonepayPlus and bodies such as Which? to identify where compliance schemes needed to be backed up by enforcement action in order to retain an effective deterrent.
- 5.96 The Government is committed to ensuring the success of self-regulatory schemes such as that run by the Advertising Standards Authority and PhonepayPlus. One option to sustain the level of threat of national enforcement against companies which are in repeated breach of such code requirements, would be to offer any “Established Means” of self-regulatory enforcement (under the Consumer Protection from Unfair Trading Regulations; CPRs) the right to demand that the relevant enforcement body should consider any case which they refer. This would be similar to a current supercomplaint power to the OFT and would imply a duty on the TSPB or JEB to consider any case referred from these sources and then either to direct a regional team or request a relevant local authority to take effective enforcement action or to give reasoned justification for any refusal or lack of progress. Other options might include the creation of a national enforcement squad under the CPRs somewhere within the Trading Standards network to bring such cases.

QUESTION 32. Do you believe that an enforcement model branded as run by Local Authority Trading Standards Services would deter illegal behaviour? If not, how could the threat of enforcement needed to back up self-regulatory schemes be made more credible?

- 5.97 **Guidance and training** for Trading Standards professionals and guidance for business on enforcement and compliance practice could be provided by TSI under the new system. The OFT currently publishes a substantial range of guidance documents relating to unfair terms legislation, for example. If the proposed CMA indeed has a consumer enforcement role limited to resolving problems of competition in markets, it would probably make sense for the current OFT role providing business guidance to be passed to the Trading Standards network as well.
- 5.98 As the professional body for Trading Standards professionals, TSI currently acts as the lead point of contact and advice for professional issues. The Common Competency

Framework which LBRO is developing across regulatory functions to provide common and transparent professional standards of competency³⁶ will secure the position of the professional bodies, including TSI, as the leaders in ensuring professional standards are maintained. TSI is also well placed to partially compensate for any downsizing of the role of LGR following reforms to the Local Government Group, if the necessary finance is available. Its role does not currently extend to providing advice and guidance on the substance of the law but the Government and stakeholders agree that given its expertise and reputation for providing professional guidance, TSI would be able to build up its expertise and rise to this challenge, notably by seconding in experts from individual LATSS to bolster its own resources where necessary.

QUESTION 33. Do you agree the TSI would be the appropriate home for the OFT's professional guidance and training functions in the event of creation of a new single Competition and Markets Agency?

5.99 **Most international liaison and OFT's general consumer policy work³⁷** on consumer enforcement matters would also logically transfer to the Trading Standards network if the CMA has a limited consumer enforcement role. The policy work most commonly concerns discussions on enforcement across international borders and can relate to a number of issues, notably:

- coordination of intelligence and of enforcement efforts against rogues operating across borders;
- sharing experience of enforcement techniques;
- sharing experience of legal precedents and implications of legal differences, giving rise to policy discussions; and
- sharing understanding of market developments, latest market research and implications of new technologies for consumer detriment

5.100 In the first three cases a CMA limited to using consumer enforcement to resolve problems of competition in markets would probably not be the most suitable body to lead on broad consumer enforcement policy for the UK. In the case of shared market understanding, Government would expect the CMA to stay up to date with all the latest trends and intelligence from around the world, to the extent that they impinge on problems of competition in markets, through active participation in international competition policy networks.

5.101 Government believes that the best body within the Trading Standards family to take on any new policy roles would be TSI, acting on behalf of a lead local authority answerable

³⁶ The Common Competency Framework is comprised of a core regulatory skills competence framework containing skills which are generic to any regulator, underpinned by a series of technical knowledge frameworks specific to areas of regulation and sectors. Further details are at: www.lbro.org.uk/lbro-projects-professional-competency.html

³⁷ Excluding market studies

to the TSPB or on behalf of BIS. With such a mandate, TSI would thus represent the UK at meetings of the European Consumer Protection Cooperation network and the International Consumer Protection and Enforcement Network (ICPEN). TSI already represents the UK in international fora on product safety issues and has a strong understanding of the issues. The Government is confident that it would be able to undertake the necessary elements of these functions. Alternatively, this function could sit with the TSPB secretariat.

QUESTION 34. Do you agree that the TSI is the most appropriate home for the OFT's international liaison and general policy functions in the event that the CMA has only a limited consumer enforcement role?

5.102 Other consumer functions of the OFT include:

- **Exercising formal powers of direction** on LATSS' and other designated enforcers' court orders (S216 Enterprise Act) to avoid duplication of enforcement activity. Subject to being able to achieve it via a relevant legislative mechanism, the Government is inclined to remove the formal requirement for direction by a central body in the event that the TSPB is created. Coordination of use of the Enterprise Act would fall to the TSPB as for all other enforcement coordination.
- **Concurrency with other regulators.** The OFT currently chairs a consumer concurrencies group consisting of the relevant regulators with concurrent consumer enforcement powers and Which? (as designated enforcers under Part 8 of the Enterprise Act) with the aim to improve clarity of overlapping areas of responsibility and to learn lessons from international best practice. The Government believes that this role may be best exercised by the CMA given that the types of consumer enforcement cases likely to be considered by the sector regulators are similar to the sorts of structural market problems which the CMA would address.
- **Supercomplaints.** A number of designated consumer bodies can currently make supercomplaints to the OFT and other regulators. These supercomplaints must be made in a prescribed form and those with the duty to respond to supercomplaints are required to publish a reasoned response within 90 calendar days from the day after a complaint is received. The subjects of supercomplaints vary and they can be related to a range of issues in a market from competition to regulation to consumer enforcement, but there appears to be a requirement that the market problems are structural in nature (see Annex D). The majority of supercomplaints are used to highlight market failings where further analysis is necessary, and, as a result, should be retained by the CMA. Nevertheless, it may be appropriate also to have a fast-track process by which the designated bodies could request enforcement action from the TSPB or a response as to why it will not be taken similar to that proposed for established means, above. The Government therefore seeks views on this.

QUESTION 35. Do you think the requirement for LATSS' and other designated bodies' (under Part 8 of the Enterprise Act 2002) court orders to be directed by a central body needs to be retained in the new consumer enforcement model and if so, why?

QUESTION 36. Do you agree that responsibility for chairing the consumer concurrences group should remain with the CMA?

QUESTION 37. Do you agree that the current supercomplaints system to the OFT should be retained in respect of the CMA if the proposed changes go ahead?

QUESTION 38. Do you think that the supercomplaints process should be extended to require the Trading Standards Policy Board to issue a reasoned response if the subject matter of the complaint relates to consumer enforcement?

- **Estate Agency:** Under the Estate Agents Act 1979 the OFT has a number of formal roles and functions in relation to the estate agency market (buying and selling). In particular, the OFT has the power to issue warning and prohibition orders to agents who breach certain provisions of the Act and associated secondary legislation. After conducting a fitness test, the OFT can ultimately prohibit those persons it considers “unfit” to carry on doing estate agency work. Linked to this, the OFT also monitors the estate agency sector to ensure compliance with anti-money laundering laws.³⁸ The Government believes that subject to a power to act outside their authority and access to the necessary legal expertise and development of specialist procedures, these roles could be carried out by a lead LATSS using evidence provided by other LATSS. General oversight of the use of these powers could be undertaken by the TSPB to ensure they are properly used in line with Hampton requirements, since a power to ban traders is potentially disproportionate if deployed where, say, a “stop now” injunction would suffice.

QUESTION 39. Do you think that a lead local authority could take on the OFT’s estate agency and related anti-money laundering functions?

What if the proposed CMA is delayed?

5.103 The Government’s intention to set up the proposed CMA was flagged in the announcements on 14 October 2010 and was described in detail in the consultation document referred to above. The proposals are subject to the passage of appropriate legislative authority and may therefore be delayed. The question therefore arises of to what extent the proposed changes in the consumer landscape should go ahead anyway.

5.104 The Government’s assessment of the looming enforcement gap between LATSS activity at local level and OFT national activity is unaffected by any decisions which might be taken on the CMA. The Government still believes that there would be an urgent need to focus new resource on an enhanced leadership and coordination function within Trading Standards, which, it believes, would catalyse greater efficiencies across the enforcement system as a whole.

³⁸ Estate agents are required to be registered with the OFT for anti-money laundering purposes and pay fees to cover reasonable costs. Carrying on estate agency business without being registered is a criminal offence. The OFT will also report to the Serious Organised Crime Agency any suspicions it has of money laundering taking place.

5.105 The Government would therefore propose to advance as fast as possible with the proposed changes to the consumer enforcement landscape even if the formation of the CMA is delayed.

QUESTION 40. Do you agree that the proposed changes to the consumer enforcement landscape should go ahead if the creation of the CMA is delayed? If not, why not?

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Annex B – Glossary of Terms

ACTSO	Association of Chief Trading Standards Officers
AUC	Air Transport Users Council
BIS	Department for Business, Innovation and Skills
CAA	Civil Aviation Authority
CCAS	Consumer Codes Approval Scheme
CCNI	General Consumer Council for Northern Ireland
CC Water	Consumer Council for Water
CEAR Act	Consumers, Estate Agents and Redress Act 2007
CFPNI	Consumer Focus Post Northern Ireland
CMA	Competition and Markets Authority
COSLA	Convention of Scottish Local Authorities
CPC	EU Consumer Protection Cooperation Regulation
CPRs	Consumer Protection Regulations
defra	Department for the Environment, Food and Rural Affairs
DETI	Department for Enterprise, Trade and Industry (Northern Ireland)
JEB	Joint Enforcement Board
LATSS	Local Authority Trading Standards Services
LBRO	Local Better Regulation Office
LGA	Local Government Association
LG Group	Local Government Group
LGR	Local Government Regulation
NAO	National Audit Office
OFT	Office of Fair Trading
POSTRS	Postal Services Redress Scheme
SCOTSS	Society of Chief Officers of Trading Standards in Scotland
TSI	Trading Standards Institute
TSPB	Trading Standards Policy Board
TSPF	Trading Standards Policy Forum
UTCCRs	Unfair Terms in Consumer Contracts Regulations
WHoTS	Welsh Heads of Trading Standards
WLGA	Welsh Local Government Association

Annex C – Statutory Powers and Functions

Advocacy powers and functions of Consumer Focus (Chapter 4)

Section	Subject	Notes
Consumers, Estate Agents and Redress Act 2007		
Section 5	Forward work programmes	Requirement to publish and consult on forward work programmes
Section 6	General provision about functions	
Section 7	Annual report	
Section 12	Investigation of complaints made by vulnerable designated consumers	Underpins operation of “Extra Help Unit”
Section 13	Investigation of complaints relating to disconnection of gas or electricity	Relates to operation of the “Extra Help Unit”
Section 14	Reference of matters to the Gas and Electricity Markets Authority	
Section 15	Reference of matters to the Postal Services Commission	
Section 16	Investigations relating to public post offices	
Section 24	Provision of information to the Council	Information gathering powers
Section 25	Enforcement by regulator of section 24 notice	
Section 26	Enforcement by court of section 24 notice	
Section 27	Provision of information by the Council	
Section 28	Exemptions from requirements to provide information	
Section 29	Disclosure of information	
Utilities Act 2000		
Section 20 (5) and (6)	Publication of statistical information	Information on energy suppliers’ standards of performance

Additional functions are planned in the energy and postal services sectors, in legislation currently before Parliament. There is also a range of functions in respect of water consumers in Scotland, but these functions have not yet been legally commenced by Scottish Ministers.

Annex D – Analysis of Consumer Enforcement Powers and Recent Consumer Law Enforcement Cases

National consumer enforcement in a new consumer and competition landscape

Introduction

1. Traditionally, consumer protection legislation was enforced by Local Authority Trading Standards Services (LATSS) through criminal prosecutions. The OFT's powers were provided by the Fair Trading Act 1973, Part III and related to traders persistently breaching civil or criminal law in their dealings with consumers. There is also a long history of the specific responsibilities in terms of consumer credit and estate agency where there are also licensing (or in the case of estate agency, negative licensing) arrangements which are administered by the OFT.
2. The proposal is that most of OFT's current consumer functions would be moved either to Trading Standards or to the Citizens Advice service. It is accepted, however, that the CMA should retain consumer enforcement powers where these may be the most appropriate instrument to combat problems of competition in markets.
3. This Annex outlines the consumer enforcement powers in question and sets out what this approach might mean in practice with reference to the types of consumer case recently brought by OFT. It considers what sorts of cases would then remain with the CMA and which would be dealt with by Trading Standards in the new environment. Finally it looks at some alternative criteria for deciding which enforcement cases would fall to CMA and what potential impact these would have.

The current state of play

OFT consumer enforcement powers

4. Appendix 1 outlines the current enforcement role of OFT and Trading Standards.
5. In brief, OFT shares with LATSS a duty to enforce a variety of consumer protection legislation. Examples include the Consumer Protection Regulations 2008 (CPRs), Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), Distance selling Regulations 2000, Consumer Credit Act 1974 and Estate Agents Act 1979.
6. OFT's main enforcement instrument is Part 8 of the Enterprise Act 2002. This gives the OFT, LATSS and other designated enforcers the power to apply to a court for an enforcement order (like an injunction) to stop breaches of a wider range of consumer law, where these breaches harm or are likely to harm the collective interests of consumers. This is a civil enforcement remedy. The OFT also has criminal prosecution powers under the CPRs. LATSS have criminal powers under almost all consumer protection legislation. They can also bring actions under Part 8 and sometimes do so but more commonly they enforce using the criminal powers.

7. Roles unique to OFT, and relevant to this paper include:

- exercising a duty under the UTCCR 1999 to consider complaints about the fairness of contract terms drawn up for general use;
- acting as a coordinating body under Part 8 EA 2002; and
- acting as Single Liaison Office and Competent Authority for handling cases referred from other European countries under the EU Consumer Protection Cooperation (CPC) regulation.

Demarcation of OFT and Trading Standards enforcement roles

8. Under the current regime, OFT has lead responsibility for national consumer enforcement and coordination of action by all types of enforcers including LATSS.
9. Generally speaking LATSS will take on all cases with a strong local dimension and those with a national or regional dimension that are not particularly legally complex or which OFT has chosen not to pursue. These have tended to be cases under the CPRs and product safety legislation.
10. OFT are highly selective about which cases to pursue. They tend to take on cases with a national interest that are complex, either legally or because they involve multiple parties. They might be prompted to bring enforcement action following a market study which has identified systematic failings across a whole sector. Or they might be responding to a request for enforcement action by another Member State under the CPC regulation.
11. But it is not always so clear cut. Between local LATSS and the OFT there are a number of BIS-funded regional teams working with LATSS to provide investigative capacity to take larger, more resource-intensive cases. And in practice, LATSS often take on more complex cases, including doorstep crime, and handle international enquiries.³⁹ At the same time, the OFT has investigated markets and led on cases where Trading Standards are also active, for example, selling gold by post and lottery scams.
12. There are frequently discussions about whether cases should be taken up by the OFT or not. Where OFT chooses not to prioritise action, the problem is referred back to Trading Standards. The fear is that in many such cases in future, Trading Standards will also be unable to act, because of budgetary pressures and/or requirements to focus on locally-driven priorities. This will create an enforcement gap. There are already signs of many smaller LATSS being unable to pursue the full range of consumer enforcement responsibilities.
13. The business community's main criticism of the UK's consumer enforcement system is that it is inconsistent. This was also the conclusion of an academic report commissioned by BIS which reported in 2008.⁴⁰ The academics generally considered that the UK consumer

³⁹ Warwickshire Trading Standards, for example, are prosecuting an individual that was manufacturing counterfeit car manuals outside of the UK.

⁴⁰ University of East Anglia (2008), *Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries* www.bis.gov.uk/files/file50027.pdf

protection system compared well to other countries, but it suffered from two main weaknesses – overly complex law and inconsistent enforcement.

Consumer enforcement in a new consumer landscape

14. Under current BIS proposals for the new consumer landscape, it is intended that much of the OFT's national consumer enforcement role will be transferred to LATSS. This policy is designed to prevent the emergence of a large enforcement gap, to bring greater leadership and consistency to the work of Trading Standards and to engage local resources better and more efficiently in combating larger threats. It will involve building capacity, capability and expertise within Trading Standards in order to undertake larger, more complex enforcement cases through:

- **The creation of a new Trading Standards Policy Board (TSPB)**, led by Chief Trading Standards Officers to coordinate and lead the enforcement effort against regional and national threats and to deploy national funding to support such efforts. The TSPB would take on OFT's current coordination role under Part 8 EA 2002 and would guide whichever authority is named as the Single Liaison Office (SLO) for cross-border infringements under the Consumer Protection Cooperation regulation.
- **An enhanced role for cross-boundary Trading Standards teams** and particular local authorities to deal with threats and take enforcement action in the interests of consumers from other authorities, the national interest, and where European law so requires, the interest of consumers that are resident in other EU Member States. This would include designating lead LATSS to act as the competent authority and SLO for dealing with cross-border infringements and taking on OFT's current roles under the UTCCRs (for example, a duty to assess fairness). This would involve LATSS acting for the interests of consumers outside their own areas and BIS is therefore planning, in collaboration with CLG, necessary amendments to the Local Government Act 1972.
- **Establishing an indemnity fund or mechanism for underwriting risk** to incentivise individual authorities to take on more complex or risky cases.
- **Structural links to a strengthened Citizens Advice service which will undertake analysis and gather evidence on where consumer detriment is occurring to guide enforcement priorities.** The Citizens Advice service and Consumer Focus already publish a wide range of reports on consumer matters, such as consumer experience in buying digital products and the impact on consumers of changes in the housing markets. A strengthened Citizens Advice service would play a key role in horizon-scanning and identifying consumer threats and would work with the TSPB and the CMA, where appropriate, to remedy these. The plan is that the Citizens Advice service will start every meeting of the TSPB with a presentation on where consumer detriment is occurring and what it therefore sees as the enforcement priorities.
- Giving the new **Competition and Markets Authority** Part 8 consumer enforcement powers equivalent to those enjoyed by OFT to be used in limited circumstances, namely to provide remedies to problems of competition in markets. The CMA would only use these powers where it identified a market with structural weaknesses such that competition was not working properly.

15. A role for the CMA in this area is vital because consumer and competition issues are in many cases hard to disentangle. Problems of competition in markets may not always be easily addressed through enforcement of competition law and Government wants its

competition authority to have the flexibility to deploy a range of tools to make markets work properly.

16. But questions remain about how far the CMA role should extend in the new environment. Concerns have been raised that any reduced role in consumer enforcement for the CMA, compared to that currently held by OFT, might result in less effective consumer protection. Some have expressed doubts about the capacity of Trading Standards to bring certain types of cases, suggesting that the CMA should have a wider role. On the other hand, fears have been expressed that unless the bulk of OFT consumer enforcement responsibility is transferred, the gains of increased leadership, consistency and efficiency within Trading Standards will not materialise and in addition the CMA itself will lack focus. This paper is designed to make things clearer and look at alternative formulations and their implications.

What the current proposals would mean for actual cases

17. Analysis of OFT's national consumer enforcement cases in recent years suggests one can draw a distinction between those that involved structural market problems, where there was probably an issue of competition in the relevant market as well as a potential breach of consumer law, and those that did not. Appendix 2 looks at a selection of recent OFT cases and seeks to identify which ones were "pure" consumer law enforcement cases against a single trader or group of traders accounting for a relatively limited market share and those which were structural market cases where the alleged breach was part of a structural problem and where there was a threat to the proper competitive functioning of the whole market.
18. Based on the cases described in Appendix 2 the following types of cases and characteristics of these cases can be distinguished:

Type of case	Examples of types of cases
<p>Regional or national scale scams generally against smaller companies or individuals, without any wider market failure</p>	<p>Current Regime</p> <p>Proposals in the new Consumer / Competition Landscape</p>
	<p>Examples:</p> <p>Lottery scams, pyramid selling, illegal money-lending.</p>
	<p>Current Regime:</p> <p>Trading Standards or OFT</p> <p>New Landscape:</p> <p>TSPB would allocate responsibility for such cases within the Trading Standards network. Scambusters and Illegal Money-Lending teams are both examples of how LATSS work together currently to achieve this.</p>
<p>International dimension cases</p> <p>These are mostly cases where some national concentration of resource is needed to cope with practicalities, expense, and international dimension, but the exercise is one of enforcement against a rogue trader or individual company breaking the law.</p> <p>Some international cases might fall into one of the other categories below.</p>	<p>Examples:</p> <p>Overseas firm with UK websites that allegedly sold to UK consumers deceptively. OFT assisted US investigation and advised consumers of chargeback rights.</p> <p>Sale of counterfeit car manuals by UK trader outside of the UK – Warwickshire Trading Standards</p>
	<p>Current Regime:</p> <p>Traditionally the OFT have led on such cases, but in recent years Trading Standards has also taken on some cases with an international dimension. Notably Trading Standards are also responsible for product safety investigations both internationally and domestically</p>
	<p>New Landscape:</p> <p>TSPB will allocate responsibility for such cases within the Trading Standards network.</p>
<p>Regional/national or potentially international cases against larger companies or groups of traders with no structural market issues but often</p>	<p>Examples:</p> <p>Cases under the UTCCRs</p> <p>2006 Ryanair unfair terms case</p>

<p>raising complex legal issues.</p>	<p>Current Regime:</p> <p>Usually OFT</p> <hr/> <p>New Regime:</p> <p>A lead local authority will take on OFT's current responsibility to consider complaints and enforce the UTCCRs</p> <p>TSPB will allocate responsibility for other cases such as Ryanair within the Trading Standards network, deploying regional Trading Standards teams for investigative and possibly legal resource if especially complex.</p> <p>BIS will develop an indemnity fund to support individual authorities in such cases as long as the case is endorsed for such support by a Committee of experienced chief Trading Standards officers.</p>
<p>Regional/national or potentially international cases where the alleged breaches represent or arise out of a structural market failure and suggest problems of competition in the relevant market</p>	<p>Examples:</p> <p>Bank Charges case where initial OFT investigation was launched against the background of competition concerns as well as consumer protection issues</p> <p>Retirement homes, where OFT opened cases against 26 firms with a combined 80 per cent market share, for requirements to pay fees for the sale of their properties.</p> <p>Airlines drip-pricing cases where OFT took action initially against 13 airlines with collectively high market share that did not include all fixed, non-optional costs such as taxes, in its website prices</p> <p>These are examples of cases where breaches of consumer law were standard practice across an industry sector, or otherwise had serious effects on consumer choice or market entry.</p> <hr/> <p>Current Landscape:</p> <p>Although OFT has powers to refer cases that potentially have “an adverse affect on competition” to the Competition Commission (CC) it may instead (and often chooses to) address such concerns using consumer enforcement powers (which are not shared by the CC).</p>

	<p>New regime</p> <p>The CMA would pursue these cases</p>
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Defining the threshold correctly

19. The challenge is to articulate the test for deciding when the CMA can properly exercise its consumer enforcement powers. Pitch that threshold too low, and the leadership, efficiency and consistency gains from Trading Standards will be put at risk and an enforcement gap may open up, especially in relation to combating larger-scale rogue traders. Pitch it too high and the CMA risks losing an important weapon in its armoury and an alternative enforcement gap may open up because of lack of Trading Standards capacity to address structural problems in markets.
20. **The current preferred test is based on a requirement for the CMA to identify a structural market problem which means that competition is not working properly.**
21. Potential alternative bases for distinguishing between the cases to be carried forward by the CMA as opposed to LATSS are many and varied. Some could be drawn from existing concepts in competition and consumer law. For example:
- a) **The market investigation reference test**
- “...Reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or part of the United Kingdom.”⁴¹
22. In the Government’s view this test will probably be too high. Whilst this test might have been met in all of the examples above, the requirement for prevention, restriction or distortion of competition may be hard to satisfy in some cases where it is clear that competition is not working properly in a market, but there may be no evidence of any prevention, restriction or distortion of competition. On this basis cases such as retirement homes and airlines drip pricing might fall outside CMA competence.
- b) **The super-complaint test**
- “... any feature, or combination of features, of a market in the United Kingdom for goods or services appears to be significantly harming the interests of consumers.”⁴²
23. In the Government’s view this test by itself is probably too low as it does not require there to be evidence of any impact on competition. When set in context, it does appear to require, however, that there be a structural market weakness, which may come close to the same

⁴¹ Section 131 Enterprise Act 2002

⁴² Section 11 Enterprise Act 2002

thing in practice. It is possible that on this basis cases such as Ryanair might fall within the CMA scope of powers. As a test for the use of enforcement powers, the requirement would probably have to be for evidence, not just an appearance, of harm to consumers.

24. An alternative would be to develop a new test on some other basis. For example:

c) Market share or market dominance test

The CMA could bring consumer enforcement cases wherever the targets of such enforcement action accounted for at least 40 per cent market share (for example) of the relevant market or wherever the target business(es) were individually or together dominant on the relevant market, even if there was no evidence of breach of competition law.

25. This would allow the CMA to use consumer law as a remedy wherever there was a strong risk of a problem of competition in markets but it would perhaps be rather rigid and arbitrary.

d) Consumers in general test

CMA to focus on issues that "affect markets or consumers in general"

26. In the Government's view this test is much too low – its scope is unclear but it might well catch larger scale scams as well as cases with structural market issues and probably any cases against large companies. This would effectively be maintenance of the status quo. The CMA would not have the resources to bring all such cases, few if any resources would transfer and the new leadership role for the TSPB would be called into question.

Other issues

27. Whatever the test for allocation of cases, it is clear that in the future consumer landscape there will be a need for bridges between the various bodies. Arguments about who has the lead could be made less important if proper consultation and referral of issues was put in place. A variety of mechanisms could be considered to make this easier. For example:

- The CMA could be given guaranteed access to the TSPB meetings or even a power to refer cases for enforcement, which could only be refused in writing with reasons
- The TSPB could be required to invite the CMA to comment on its published enforcement priorities. Trading Standards could be required to inform the CMA of its approach to international cooperation, and vice versa, in view of possible crossovers with international competition policy work

Appendix 1. OFT enforcement of consumer laws

History

1. Traditionally consumer protection legislation was exclusively enforced by Local Authority Trading Standards Services (LATSS) through criminal prosecutions. The OFT had no enforcement role. The exceptions were in relation to consumer credit and estate agency where there are also licensing (or in the case of estate agency, negative licensing) arrangements which are administered by the OFT.

Consumer Credit and Estate Agents Acts

2. The OFT share with LATSS a duty to enforce the Consumer Credit Act 1974 (CCA) and the Estate Agents Act 1979 (EAA). The OFT also have a duty to supervise the working and enforcement of both these Acts.

Licensing – Credit

3. Some consumer credit financial institutions are licensed by the OFT – generally those who are offering credit which is regulated by the Consumer Credit Act 1974.

Licensing – Estate Agents

4. Estate agents do not have to be licensed as such but OFT does have the power to make orders prohibiting unfit persons from engaging in estate agency work. Orders can be made against individuals, partnerships and companies, and anyone employed by them. The OFT can also issue orders warning an estate agent he or she can be banned if the conduct that resulted in the warning order is repeated, or if there are breaches of other parts of the EAA.

Anti-Money Laundering

5. The OFT is currently the supervisory authority for estate agents and for consumer credit financial institutions. To comply with European obligations, OFT must effectively monitor those entities and take the steps necessary to ensure they are complying with the requirements of the Directive. This can include spot-checks and requiring the production of information.
6. OFT are in the early stages of setting up registers of those they are supervising. This is discretionary – they do not have to set up a register but have taken the view that this is the most effective way of monitoring estate agents and credit institutions.

European dimension

7. The OFT's increased enforcement role in recent years was driven largely as result of EU legislation which effectively requires the UK to put in place a system of injunctive relief to stop breaches of consumer protection directives regardless of whether the consumers affected are in the UK or another Member State. As there is no general right of representative action in the UK that role was initially given exclusively to the OFT (misleading advertising in 1988 and unfair contract terms in 1994). Subsequently, similar enforcement powers were given to a wider range of enforcement bodies starting with the remaking of the Unfair Terms in Consumer Contracts Regulations (UTCCR) in 1999.

Unfair contract terms

8. The UTCCR maintains the duty on the OFT, contained in the 1994 regulations, to consider any complaint made to it about the fairness of any contract term drawn up for general use. OFT may, if it considers it appropriate to do so, seek an injunction to prevent the continued use of that term or of a term having like effect. The OFT is required to give the complainant reasons for its decision to apply or not to apply for an injunction.

9. The UTCCR provide that named qualifying bodies (LATSS, statutory regulators and Which?) may also apply for an injunction to prevent the continued use of an unfair contract term provided they have notified the OFT of their intention at least 14 days before the application is made (unless the OFT consents to a shorter period). This notification requirement reflects a similar optional requirement in the Injunctions Directive which is currently implemented by the Community infringements regime under Part 8 of the Enterprise Act 2002. A named qualifying body is under a duty to consider a complaint if it has told the OFT it will do so.
10. The OFT has produced range of guidance on the UTCCR, including its views on why it believes certain types of terms commonly used by particular trade sectors have the potential to cause unfairness under the Regulations. This guidance includes: holiday caravan agreements, package holiday contracts, consumer entertainment contracts, tenancy agreements, health and fitness club agreements, care home contracts and home improvement contracts.

Distance selling

11. A similar enforcement regime exists under the Consumer Protection (Distance Selling) Regulations 2000 except that enforcement is limited to OFT and LATSS, and that both enforcers are under a duty to consider complaints about a breach of the requirements of the Regulations.

Part 8 of the Enterprise Act 2002

12. The OFT's main enforcement instrument is Part 8 of the Enterprise Act 2002. This gives the OFT, LATSS and other designated enforcers the power to apply to the courts for enforcement orders (similar to injunctions) to stop breaches of a wide range of domestic and Community inspired consumer protection (mainly fair trading) laws where these breaches harm, or are likely to harm, the collective interests of consumers. Enforcement bodies are empowered to accept formal undertakings to avoid the need for court action.

OFT's coordination role under Part 8

13. To ensure that businesses do not face a multiplicity of actions on the same or related issues, and that enforcement bodies efforts are not duplicated, the OFT is given a strong coordination role.
14. LATSS and designated enforcers are required to give the OFT 14 days notice of their intention to apply for an enforcement order. The OFT has the power to consent to a shorter period if urgent action is necessary to safeguard the interests of consumers.
15. If the OFT believes that an enforcer or enforcers other than itself intends to apply for an enforcement order in respect of a particular infringement, it may direct which enforcer may bring such proceedings, or that only it may do so. Where the OFT directs that only it may bring such proceedings it may take into account whether the infringement could be stopped by other means (for example by the Advertising Standards Authority) in deciding whether or not to bring court proceedings. This provision is intended to stop LATSS and designated enforcers from by-passing the Authority's successful system of self- and co-regulation. It is a provision to which the Advertising Standards Authority attaches great importance.

16. LATSS and designated enforcers are required to notify the OFT of any undertakings given to it and the identity of the person giving it. They are also required to inform the OFT of any enforcement order made by, or undertakings given to, the court. LATSS in England and Wales are also required to give the OFT 14 days notice of their intention to start criminal proceedings for an offence under the legislation to which Part 8 applies and to notify the OFT the outcome of those proceedings.
17. The OFT has also agreed enforcement concordats with other enforcement bodies to ensure that action is taken by the body best placed to act, for example LATSS in relation to local matters.

Cross border infringements

18. The OFT is also the UK's Single Liaison Office and a Competent Authority under the EU Consumer Protection Cooperation (CPC) Regulation. The CPC Regulation creates an EU-wide network of national enforcement authorities with similar investigation and enforcement powers. Under the CPC system, each of these authorities are able to call on other members of the network for assistance in investigating possible breaches of specified consumer laws and in taking action against rogue traders targeting consumers living in other EU countries. To the extent that the CPC Regulation required national implementing measures these were mainly incorporated into Part 8 of the Enterprise Act 2002.
19. LATSS are designated CPC enforcers under Part 8 of the Enterprise Act 2002 but are not competent authorities notified to the EU Commission under Article 4 of the CPC Regulation.

Consumer Protection and Business Protection Regulations

20. More recently the OFT, along with LATSS, have a duty to enforce the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Business Protection from Misleading Marketing Regulations 2008 (BPRs).
21. The CPRs prohibit traders in all sectors from engaging in misleading, aggressive and other unfair trading practices with consumers. The BPRs prohibit misleading business-to-business advertising and set out the conditions under which comparative advertisements (any advertisement which identifies a competitor or a competitor's product) are permitted.
22. Although the OFT's preferred enforcement route is through undertakings or enforcement orders under Part 8 of the Enterprise Act 2002, after lobbying hard for and getting criminal prosecution powers under the CPRs, the OFT has brought criminal charges against a number of people in connection with its investigation into a suspected unlawful pyramid scheme. The OFT is working closely with South West Scambusters, Bristol Trading Standards and Avon and Somerset Police in this ongoing case.

Summary

23. In all areas where the OFT have enforcement powers to bring civil or criminal proceedings in respect of breaches of consumer protection laws these are now shared with LATSS (and in some cases also the statutory regulators and Which?). However for civil enforcement, OFT is the lead enforcement body with a strong coordination role. It also regularly organises training sessions for LATSS on the use of civil enforcement powers.

24. For cross-border infringements the OFT is the UK's Single Liaison Office under the CPC Regulation. It is also a Competent Authority for the purposes of Article 4 of those Regulations. Although LATSS are designated as CPC enforcers for the purposes of Part 8 of the Enterprise Act 2002 they are not competent authorities notified to the Commission under Article 4.
25. The OFT has exclusive powers to issue warning or prohibition orders to estate agents who are found to have breached certain provisions in the EEA or in secondary legislation. After conducting a fitness test the OFT alone can ban those persons it considers unfit to carry out estate agency work.

Appendix 2. OFT recent case examples

Legislative references:

EA 2002 Enterprise Act 2002

CMARs Control of Misleading Advertising Regulations (repealed in 2008)

CPRs Consumer protection from unfair Trading Regulations 2008

UTCCRs Unfair Terms in Consumer Contracts regulations 1999

CCCHPRs Cancellation of Contracts made in a Consumers Home or Place of Work Regulations 2008

CASE	SUMMARY	Is there a competition angle?
Incentive Leisure Group Ltd and others	<p>Part 8, EA 2002, CPRs, UTCCRs and CCCHPRs</p> <p>OFT brought court action in December 2010 following a referral from a regional Scambusters team and receipt of consumer complaints. It involved allegations of misconduct in the marketing or sale of holiday products (including misleading information and aggressive sales techniques and failure to provide cancellation rights)</p>	No
Purely Creative Ltd and others	<p>Part 8 EA 2002 and CPRs</p> <p>OFT obtained an injunction (in March 2011) for breach of the CPRs. Examples of breach included creating the impression that the recipient had won a prize when in reality the consumer was being given the chance to purchase a low value item, by erroneously describing a holiday voucher as a prize.</p>	No
Selling gold by post	<p>S214 and 224 EA 2002, CPRs, UTCCRs</p> <p>The OFT investigated the business practices of a number of companies who offered to buy gold from consumers using the postal service. Concerns included lack of adequate pricing information, lack of information about return of gemstones, misleading statements about value of gold to be paid.</p>	No

Foxtons	<p>UTCCRs</p> <p>In February 2008 the OFT issued proceedings against Foxtons seeking a declaration of the application of the UTCCRs to certain terms in their letting agreements with consumer landlords, and an injunction to prevent them using such terms in the future. The courts agreed that OFT (as well as consumers) could seek injunctive relief and, subsequently, that certain terms were unfair.</p>	No – OFT is “following up with other national estate agency firms” but no evidence of widespread practice
Retirement Homes	<p>UTCCRs</p> <p>This is an ongoing investigation into the use of contract terms requiring owners of retirement homes to pay fees on the sale or other disposal of their properties. The focus is on the information provided to the consumer during the sales process, whether the firms made the charges known to the consumers and whether consumers understood the liability.</p>	Probably – cases opened against 26 firms. OFT Q&A indicates that these firms account for 80 per cent of the market in retirement homes.
Unarranged overdraft charges	<p>UTCCRs</p> <p>Following an investigation into the fairness of personal current account unarranged overdraft charges, OFT brought a test case to clarify whether it could assess such terms for fairness under the UTCCRs. The Supreme Court overturned the Court of Appeal in deciding that it could not.</p>	Yes – widespread practice and suspicion of market entry barriers. Business model of banks predicated on this. Initial market study was launched against the background of competition concerns as well as consumer protection issues.
Pyramid selling	<p>CPRs, Gambling Act 2005</p> <p>OFT charged 11 individuals in relation to alleged unlawful pyramid schemes operating in the SW of England and South Wales. This followed investigations carried out by OFT and SW Regional Scambusters.</p>	No
Handpicked Media Ltd – commercial blogging	<p>EA 2002, CPRs</p> <p>The OFT opened an investigation following concerns that individuals were being engaged to publish online content which promoted the activities of that company, without sufficient disclosures to make it clear to consumers that the promotions had been</p>	No

	paid for. The company undertook not to repeat the conduct of concern.	
Airlines and misleading holiday pricing	<p>Part 8 EA 2002, CMARs</p> <p>Following the OFT's warning to the holiday and travel industry in February 2007, the OFT successfully took action against 13 airlines that did not include all fixed, non-optional costs such as taxes, in website prices.</p>	Probably – action was taken against a large part of the industry as this pricing model was widespread and undermined effective consumer choice of other options
Ryanair	<p>UTCCRs</p> <p>Working closely with the Air Transport Users Council the OFT persuaded Ryanair to amend certain terms it considered unfair, including terms relating to exclusion of liability for damage to certain equipment, and liability for baggage claims.</p>	No
Vance Miller – mis-selling of kitchens		No
Best sales and TV Direct	Proceedings taken in Belgium and Netherlands to stop misleading mailings (consumers, believing they had won a prize, were pressured into placing orders).	No
Overseas firms with UK websites	Investigation into a US company that the US authorities allege deceptively posed as a UK online trader to sell electronics to UK consumers.	No

Annex E – List of organisations consulted during preparation of this document

Advertising Standards Authority
Air Transport Users Council
Association of Charitable Foundations
Association of Chief Trading Standards Officers
BEUC the European Consumers Association
British Chambers of Commerce
British Retail Consortium
Citizens Advice
Citizens Advice Scotland
Charity Commission
Charity Commission for Northern Ireland
Civil Aviation Authority
Confederation of British Industry
Consumer Council for Northern Ireland
Consumer Council for Water
Consumer Focus
Convention of Scottish Local Authorities
Cornwall Energy Associates
Energy Networks Association
Energy Retail Association
European Commission
Federation of Small Businesses
IDRS Limited
International Consumer Protection and Enforcement Network
Legal Services Board
Local Government Association
Local Government Regulation
Mail Competition Forum
MoneySavingExpert.com
National Consumer Federation
Ofcom
Office for the Scottish Charity Regulator
Office of Fair Trading
Office of the Rail Regulator
Ofgem
Ofwat
Ombudsman Services
Passenger Focus
Postcomm
Royal Mail
Shareholder Executive
Society of Chief Officers of Trading Standards in Scotland
Trades Union Congress
Trading Standards Institute
Welsh Heads of Trading Standards
Water UK
Which?

Annex F – Consultation Impact Assessment

The Impact Assessment accompanying this consultation document can be obtained at the following url:

www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-981-consumer-landscape-review-impact-assessment

Annex G – The Consultation Code of Practice Criteria

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

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