

**GOVERNMENT RESPONSE TO THE
OFFICE OF FAIR TRADING (OFT)
MARKET STUDY ON THE SECOND-
HAND CAR MARKET**

Response to recommendations
aimed at Government contained
in the OFT report, 'The second-
hand car market'

5 AUGUST 2010

GOVERNMENT RESPONSE TO THE OFFICE OF FAIR TRADING MARKET STUDY REPORT ON THE SECOND- HAND CAR MARKET

Introduction

1. The Government welcomes the Office of Fair Trading's (OFT) report on second-hand cars which was published on 18 March 2010. This market study was formally launched on 7 May 2009 following concerns about the large number of consumer complaints relating to the sector. In 2008, more than 68,000 consumers complained to Consumer Direct about issues with second-hand car sales. The report covers the whole of the UK.

2. The OFT found that the second-hand car dealer market is often not working well for consumers. Although many dealers provide high standards of service and comply fully with the law, there continue to be high numbers of complaints to Consumer Direct which are often due to dealers refusing to deal with legitimate complaints or provide appropriate redress. We were pleased to note that the OFT concluded that there is existing relevant legislation which can be used to address abuses in this sector, but more needs to be done to ensure that dealers are aware of the law, consumers are aware of their rights and dealers who fail to comply face a real threat of effective enforcement action by Trading Standards and the OFT. The main findings were that:

- nearly 70% of problems emerged within the first month of the purchase of a second-hand car from a dealer, which suggests that the cars may not have been of satisfactory quality and may therefore be the dealers' responsibility to fix. Despite this, nearly 30% of buyers surveyed had not had the problems rectified. The estimated cost to consumers in fixing problems that dealers have a legal obligation to resolve but fail to do so is at least £85 million per year.
- Consumers could potentially over-pay by up to around £580 million a year as a result of clocking, i.e. adjusting a vehicle's mileage to mislead a purchaser.
- Some dealers may be in breach of the law by pretending to be private sellers to evade their legal obligations. This may account for an estimated £40 million of second-hand car sales annually.
- One in eleven car dealers rely on disclaimers about the car's history and condition, many of which are illegal.
- Many dealers fail to disclose what mechanical and other pre-sale checks have been carried out.

3. "Clocking" is a criminal offence and the OFT believes that the occasions where there are legitimate reasons to correct a car's mileage are very rare. The OFT has made one recommendation to Government concerning businesses which offer mileage correction services.

- Consideration should be given to the introduction of legislation to outlaw mileage correction services (unless for specific legitimate reasons) and their

advertising. Alternatively, legislation should be introduced requiring such businesses to be registered.

4. The OFT can make recommendations affecting consumer protection across the UK. Legislation in this area is devolved to Northern Ireland and reserved for Scotland and Wales.

5. The OFT has also made three further recommendations regarding the sharing of mileage data with commercial vehicle check companies. These recommendations are addressed, respectively, to the Vehicle and Operator Services Agency (VOSA), the Driver and Vehicle Licensing Agency (DVLA) and to car auction houses. The sharing of data would make it easier for dealers, consumers and trading standards officers to check a vehicle against a comprehensive source of mileage data. The VOSA and DVLA are considering their respective recommendations separately.

6. We welcome the new guidance which the OFT issued on 30 June, following consultation with the car industry, to help second-hand car dealers comply with the Consumer Protection from Unfair Trading Regulations (CPRs) and the Sale of Goods Act 1979 (as amended) (SoGA). Like the OFT, we also hope that this guidance will improve business practices in the market and reduce complaints. We note that if matters do not improve, the market study has provided the OFT with clear enforcement priorities. We also welcome the fact that the OFT will be enhancing the information available on the Consumer Direct website about buying a second-hand car to make it a more comprehensive source of advice for car buyers.

7. The remainder of this paper looks in more depth at the recommendation aimed at Government and sets out the Government's response.

- **Recommendation:** Consideration should be given to the introduction of legislation to outlaw mileage correction services (unless for specific legitimate reasons) and their advertising. Alternatively, legislation should be introduced requiring such businesses to be registered.

GOVERNMENT RESPONSE

8. The OFT Report states that it had found over 50 businesses in the UK openly offering 'digital mileage correction services' through websites, online auctions, or other business directories. Their advertisements often hint at the type of customer they are aimed at, describing the services being offered as 'discreet' or 'untraceable'. The adverts also often include a standard disclaimer that the business takes no responsibility for the misuse of their services for illegal activities.

9. Based on discussions and feedback from the reputable car servicing and repair industry, the OFT said it believed that occasions where there are legitimate reasons to correct a car's mileage are very rare. It therefore has a strong suspicion that many mileage correction businesses adjust mileages for illegitimate reasons. The OFT therefore recommends that consideration should be given to the introduction of legislation to outlaw mileage correction services (unless for specific legitimate reasons) and their advertising.

10. The Government shares the concerns of OFT that “car clocking” is a serious matter which causes significant losses for consumers and gains for dishonest traders. But as the OFT describes, there already exists legislation under which prosecutions can be brought against traders who engage in this practice. The Government therefore must first consider whether this existing legislation is sufficient to deal with the abuses identified and is being appropriately enforced.

11. The provision of mileage correction services is, like car clocking by a car dealer, capable of constituting an offence under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

12. The CPRs prohibit unfair commercial practices which are directly connected with the promotion, sale or supply of goods and services to consumers. Mileage correction may be a misleading action because it results in false information about the car being communicated to consumers (regulation 5 of the CPRs). Alternatively or in addition, it may contravene the requirements of professional diligence because it is not commensurate with honest market practice and good faith (regulation 3(3) of the CPRs).

13. In the case of each of misleading actions and breach of professional diligence, for an offence to be committed it must (broadly) be likely that the mileage correction would cause the (hypothetical) average consumer to take a different decision about the car. This different decision might be a decision to buy a car which the consumer would not otherwise have bought, or to pay a higher price than the consumer would otherwise have paid. This element of the offence is in many cases not likely to be difficult to satisfy. If the mileage displayed by the car has been materially and illegitimately corrected, it is well known that this is likely to affect consumer decisions because the mileage is an important element of the value of a car. There is evidence for this in the OFT’s report.

14. In order for a practice to be an offence under the CPRs, it must be “directly connected with the promotion, sale or supply of a product to or from consumers”. This requirement will normally be easily satisfied in the case of a car dealer who himself clocks a car without good reason in preparation for sale to the public. Mileage correction businesses will not normally be directly engaged with the consumers who may suffer as a result of a correction which is made for illegitimate reasons. However, the CPRs do contemplate that offences may be committed by traders who do not themselves deal with consumers, if their conduct is directly connected with an onward sale or promotion to consumers. Most cars will at some stage be sold to a consumer, who may well be adversely affected by a clocked mileage. The main issue in any particular case is therefore likely to be whether the connection between the clocking and the onward sale or promotion to a consumer is sufficiently direct.

15. A mileage correction business may seek to protect itself through the use of disclaimers or confirmations by its customers that a correction is being made for a legitimate purpose. However, the courts may not allow a mileage correction business to rely on this sort of disclaimer or confirmation if the surrounding circumstances show that it is just a matter of form and not genuine. For example, the business’ marketing practices or communications with car dealers may make it

obvious that the main purposes of the mileage corrections offered are likely to be illegitimate.

16. Where the breach of the CPRs relates to the requirements of professional diligence, the commission of an offence requires knowledge or recklessness on the part of the trader. This is not necessary where the breach is a misleading action, but there is a defence where, broadly, the commission of the offence was outside the control of the trader and the trader took all reasonable precautions and exercised all due diligence to avoid the commission of an offence. As the OFT report indicates, where the other elements of the offence are present, reliance on this defence is likely to require more of the mileage correction business than the use of a standard disclaimer. The due diligence defence should, however, be available to a mileage correction business which corrected the mileage on a car for legitimate reasons which it had taken reasonable steps to verify.

17. As the OFT report also indicates, in some circumstances car clocking may also result in an offence being committed under the Fraud Act 2006. Of particular relevance are section 2 (fraud by false representation), section 6 (possession of articles for use in frauds) and section 7 (making or supplying articles for use in frauds).

Conclusion

18. In its report, the OFT acknowledges that there have been two significant changes to the regulatory framework since it last looked at the second-hand car market in 1997 and recommended that consideration should be given to the introduction of legislation to outlaw mileage correction/alteration services and their advertising. The implementation in 2003 of Part 8 of the Enterprise Act 2002 provided enforcers with a new enforcement tool against businesses that do not comply with their legal obligations to consumers. The CPRs, which came into force in May 2008, are a fundamental move away from prescriptive regulation towards a principles-based consumer protection regime. As the OFT states, their wide scope and deliberately flexible provisions are designed to plug gaps in existing UK consumer protection legislation and set standards against which new practices are automatically judged. The CPRs also increased the range of enforcement tools available to enforcers like the OFT, strengthening investigative powers and enabling the OFT to take criminal proceedings and to seek financial penalties, alongside existing civil enforcement and compliance tools.

19. Given these changes, it is the Government's view that provisions are already in place under existing law which are available to enforcers in order to pursue offences, such as illegal clocking, which may be committed by mileage correction businesses. The Government notes the OFT's comment that it found very little evidence of enforcement action having been taken against mileage correction businesses in the past ten years. However, as mentioned previously, the CPRs were only made quite recently in 2008. They are a relatively new tool available to the enforcement agencies which we might expect to take some time to bed-in. The Government does not believe that it is necessary or proportionate at this stage to legislate to create new offences which overlap with existing offences.

20. Any new legislation in the future would also need to be considered against the need to comply with EU law and within the context of the Government's new better regulation agenda and the 'one-in, one-out' rule whereby no new regulation is brought in without other regulation being cut by a greater amount.

21. The OFT has alternatively recommended that legislation should be introduced requiring such businesses to be registered. This would involve additional costs for those businesses carrying out mileage correction services for legitimate reasons, and for the DVLA or whichever other body were to administer the scheme.

22. Whilst the Government has some sympathy with the inference drawn by the OFT that only a small proportion of mileage correction is carried out for legitimate reasons, we note that it has (understandably) not been possible to measure the extent of legitimate business, or necessarily to identify all the legitimate reasons for which correction may be carried out. It may not be necessary to subject legitimate businesses to a registration scheme if the existing law is enforced against those businesses correcting mileage for illegitimate reasons.

23. Although the OFT said it had found very little evidence of enforcement action having been taken against mileage correction businesses in the past ten years, we are pleased to note that it is encouraged by the fact that prosecutions in relation to the most serious offences connected with second-hand cars (including clocking) are being regularly taken by TSS. The OFT report says that since the CPRs came into force in 2008, it has been notified of ten completed prosecutions for breaches of the CPRs and eight formal cautions with a further 24 ongoing prosecutions. Of these 42 cases, we understand from the OFT that 16 related to false mileage readings in some way. This practical experience of the enforcement agencies in using the CPRs to combat clocking will provide valuable evidence in any future review of the effectiveness of the CPRs. In this connection it is worth noting that the Unfair Commercial Practices Directive (which is implemented in the UK by the CPRs) is due to be reported on by the European Commission by June 2011, and this may then result in revision of the Directive within the following two years. The Government will be able to take account of the experience of enforcement agencies in considering any such revision. For example, there may be a case for arguing that (for the sake of more consistent treatment with practices which are similar in their consumer detriment and are already banned) car clocking should be added to the Directive's (and CPRs') list of commercial practices which are considered unfair in all circumstances.