

Children's Online Games

Response to the
consultation



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Introduction

Following our announcement in April 2013 that we were investigating children’s online and app-based games, the OFT publicly consulted on a set of proposed industry Principles. The consultation on the Principles ran from 26 September to 21 November 2013. We received 40 written submissions, as well as receiving oral submissions from some stakeholders; a list of respondents is included in the annexe to this document. Most respondents supported our objectives and purpose in proposing the Principles and commended our consultative approach. This document summarises the responses we received and the changes we have made to the Principles to account for them, or our reasons for not accepting them.

We considered that a set of Principles would be the most helpful and proportionate approach to address the concerns we identified during our consultation because they clarify our view of the entire industry’s obligations under consumer protection law. The concerns we articulated were:

- a lack of transparent, accurate and clear up-front information relating, for example, to costs, and other information material to a consumer’s decision about whether to play, download or sign up to a game
- misleading commercial practices, including failing to differentiate clearly between commercial messages and gameplay
- exploiting children’s inexperience, vulnerability and credulity, including by aggressive commercial practices
- including direct exhortations to children to buy advertised products or persuade their parents or other adults to buy advertised products for them
- payments taken from account holders without their knowledge, express authorisation or informed consent

As we set out in our [September report](#), we have shared the Principles with our international consumer enforcement counterparts. We have had discussions on a European level with other Member States through the Consumer Protection Cooperation (‘CPC’) network – and on a broader international level through the International Consumer Protection and Enforcement Network (‘ICPEN’) – so that we could develop the Principles to allow them to be applied by other enforcement agencies when interpreting their own domestic consumer protection law. Although there are clearly differences in international consumer protection law outside the EU, there has been

significant agreement that the Principles strike a suitable balance and have helped to achieve consistency – as far as possible and where jurisdictional differences permit – in compliance and enforcement strategies.

Once the Competition and Markets Authority (CMA) acquires its powers in April 2014, it will pick up from where the OFT has left off. The CMA will continue to monitor the market to check whether the industry is complying with its legal obligations. Traders in the industry are therefore advised to satisfy themselves that they are in compliance with the Principles ahead of this next stage of the project. Failure to comply with the Principles could risk enforcement action.



General comments

In addition to the specific points outlined below, we received suggestions from respondents that we have reflected in the Principles. For example, we have made some small but significant amendments:

- to improve the Principles' clarity
- to enable them to have a greater degree of international relevance and applicability and
- to reflect requirements of the Consumer Rights Directive, which will apply to contracts concluded after 13 June 2014 and will be implemented in the UK by the Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 (see the legal annexe to the Principles). Enforcement action under the provisions of the Directive or the implementing Regulations will be taken only in respect of contracts that may be concluded after 13 June 2014. In most cases, we consider that, where relevant to the Principles, a breach of the Directive would in practice be likely also to amount to a breach of the principles-based provisions of the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs).

We also received suggestions for amendments to the Principles that we considered were beyond their scope and that of the relevant underlying legislative provisions.

Additionally, we received comments about the application of some of the Principles. We consider that the Principles are sufficiently clear to address the points raised, particularly given some of the clarifications we have made, and we have set out our interpretation of the legal provisions that underpin them such that traders should be able to follow and apply the Principles in practice.

Specific comments from respondents

There were many recurring comments on our proposed Principles in the consultation responses we received. This is our consideration of those comments, which, in some instances, have prompted us to amend the wording of the Principles, the examples that sit under them or the accompanying notes.

Is there evidence of sufficient consumer harm to warrant the OFT's intervention?

The OFT proposed Principles for the children's online games market because of a combination of factors, including our strategic objectives and complaints that indicated consumer detriment. One of the main benefits of issuing Principles is that they should improve compliance across the whole industry by providing guidance under existing consumer protection law without introducing additional or more burdensome regulation.

We committed to prioritising work in 2013-14 that reflected the themes of vulnerable consumers, pricing used as a barrier to fair choice, and novel and developing markets and business practices. We consider children to be inherently vulnerable because they are less experienced and more credulous than adults, and are less likely to complain – or know to whom to complain – when they suffer harm. In addition, we reviewed around 160 complaints or submissions from consumers during our investigation, which is a typical figure for an investigation of this nature. Those consumers – mostly parents of players of children's online games – were concerned about material loss resulting from unauthorised payments, and misleading and aggressive statements or practices used to describe games or contained in the games themselves.

We also scrutinised 38 children's online games during our investigation. Most of those games contained, in their descriptions or in gameplay itself, commercial practices that we considered were likely to breach consumer protection law. We encountered some practices that we considered aggressive in that they placed, in our view, undue influence on children to make purchases or contained direct exhortations to them to do so. We were also concerned that there were industry-wide commercial practices that had the potential

to mislead consumers as to the true cost of a game. A particularly common example was the use of 'free' to describe a game that encouraged, or even required, consumers to make purchases to play the game in the way that they would reasonably have expected from its initial description in an app store.

Given our commitment to ensuring that new, online and high-innovation markets develop in ways that protect and deliver benefits to consumers, our Principles are designed to be a preventative measure. They are intended to ensure that the areas of non-compliance we have identified do not become embedded as standard practice in the industry. By ensuring compliant practices are adopted by businesses in this emerging market, the Principles ought to help businesses to minimise consumer detriment, develop a strong reputation for the industry and establish consumer confidence.

There is a risk of competitive disadvantage for UK companies if the Principles apply an overly restrictive interpretation of the EU law from which they derive

The Principles do not impose any burdens on businesses that extend beyond existing legal obligations under UK and EU consumer protection law; they merely seek to clarify, in our view, what the law requires. They are therefore intended to provide greater clarity to businesses on their legal obligations.

Throughout our investigation and while developing the Principles, we have been very conscious of the importance of ensuring the Principles are not only consistent with the requirements of EU law but also, where possible, with wider international consumer law. We understand that consistency helps businesses to operate across international borders – a particularly important concern, given the nature of the industry – and helps international enforcement agencies to develop suitable compliance and enforcement strategies.

On a European level, we have discussed the requirements of the Principles throughout their development with our equivalents from other Member States via the Consumer Protection Cooperation ('CPC') network. Those discussions have informed the Principles and

have helped to ensure their consistency with EU law, particularly the Unfair Commercial Practices Directive. Agencies from other Member States have agreed with the approach we have set out in our Principles and have indicated that they would take a similar position in their domestic enforcement strategies.

We have also discussed the Principles with our wider international counterparts through the International Consumer Protection and Enforcement Network ('ICPEN'). We have shared the Principles in this way to allow other agencies to apply them when interpreting their own domestic consumer protection law. Although the requirements on businesses vary under different jurisdictions, there has been significant agreement that our Principles strike a suitable balance to indicate how businesses in the children's online games market should treat its consumers. Many ICPEN member agencies have told us that they could interpret their own consumer protection law by having regard to our Principles in whole or part.

The legal basis for the Principles is unclear

We have added to the Principles an annexe that sets out the relevant provisions, in EU and domestic law, that underpin each Principle.

The OFT considers that a child is likely to be considered a person under the age of 16, which is arguably too old as younger children may be capable of understanding commercial intent and commercial messages

In support of this point, respondents highlighted amongst other issues that:

- there was no clear legal basis for our definition: neither the CPRs nor the UCPD include one

- domestic and international data protection law refers to children under the age of 12 or 13
- children of 13 are, under UK law, legally allowed to have a part-time job and so they have the ability to understand the value of money
- there is some research into children’s perceptions of advertising that, from the age of 12, children begin to develop a critical understanding of advertising

There are arguments that the upper age limit of what constitutes ‘a child’ could be any age between 12 to 18, given the relevance of similar law and regulatory rules, including data protection law, rules on advertising and the age at which a person reaches majority. We have approached this issue by considering how a judge would apply the relevant provisions in the CPRs. We consider a likely starting point would be that, under English contract law, it is not possible to enter into binding contracts with minors (persons under 18 years old), with some limited exceptions. Our view that a child for the purposes of the Principles – and therefore for the underlying legal provisions – is likely to be considered a person under the age of 16 is based on consistency with the Committee of Advertising Practice and Broadcast Committee of Advertising Practice’s Advertising Standards Codes, which we considered to be the most relevant comparable regulatory standard: both our Principles and those Codes relate to the placement and content of commercial messages that children may encounter, and both derive from the CPRs and UCPD.

We do not consider it relevant to the definition of a child for the Principles that, under UK law, children of 13 may have a part-time job. Irrespective of whether a child aged 13-15 has a part-time job – and clearly not all children in that age bracket do – we consider children of that age are still relatively inexperienced, less able critically to evaluate commercial messages and may be more vulnerable to certain commercial practices than adults. While children aged 13-15 may have a more developed ability to recognise and understand commercial messages than younger children, we consider that they are still nevertheless inherently vulnerable.

To explore this issue, which is particularly relevant in the context of Principles 6 and 7, we have conducted a literature review of relevant academic research into, *inter alia*, the impact of commercial messages on children. There is a considerable body of academic research on the influential and persuasive effect of advertising and marketing. That research mainly focuses on the effect of advertising through traditional media, such as television and non-broadcast media; there is, however, a more limited body of research into the impact on children of online advertising and commercial messages in online games.

It is clear that television advertising has a significant effect on children's consumption behaviour [Andreyeva et al (2011), p. 1]. Academics argue that children's ability to recognise television advertisements as such may not have developed until the age of 10-12. Carter et al (2011) finds that the 'selling' intent of television advertising was identified by about 90 per cent of 11 to 12 year olds. However, the awareness of its 'persuasive' intent was identified by only about 40 per cent of the same age group. Therefore, vulnerability to television advertising may persist until children are far older than previously thought [Carter et al (2011), p.962]. We consider that it may be more difficult for children to identify and understand the purpose of commercial messages in online games than in television advertising, which is, by virtue of Ofcom's Code on the Scheduling of Television Advertising, clearly delineated from programme content [Rule 11, Ofcom's Code on the Scheduling of Television Advertising]. Evidence has shown that advergaming influence consumption choices of five to 12 year olds [Mallinckrodt and Mizerski (2007), p. 93]. Teenagers' consumption choices are also influenced by advergaming: Reijmersdal et al (2010) find that interactive brand placement in a game leads to a more positive attitude towards the game, as well as more positive brand image and more favourable behavioural intentions among 11 to 17 year old girls [Reijmersdal et al (2010), p. 1787]. Academics argue that children know relatively little about new, alternative marketing strategies, such as forms of online advertising, and lack the cognitive skills to evaluate them critically [Owen et al (2013), p. 2]. Therefore, in the absence of specific evidence relating to children's ability to identify and understand commercial messages contained in online games, it is reasonable to assume that children are likely to be older than 12 when they start to identify them and fully recognise their purpose.

Should enforcement action or case law address the issue in the future, the definition of a child for the purposes of the Principles may be reconsidered.

It is unclear how an assessment of a game's likely appeal to a child would be made and it is arguable that the list of criteria included in the notes to the Principles is too broad

We have amended the notes to the Principles to clarify how an assessment of a game's likely appeal to children might be made.

First, we have indicated that a significant determinative factor is whether children are known to play a particular game or whether a game is marketed to children. We had previously listed that among the other factors but, on reflection, we now consider it likely to be the most important factor in making such an assessment.

Second, we have added to the illustrative and non-exhaustive list of other determinative factors whether a game is featured in a children's section of an app store. Although we consider it possible that a game that does not feature in an app store's children's section may nevertheless appeal to children, it is a factor that may be influential in considering a game's likely appeal.

There is too wide a gap between the examples under the Principles of behaviour 'more likely to comply' and 'less likely or unlikely to comply'

The examples under the Principles are intended to give guidance on the OFT's view of how consumer protection law is likely to apply to businesses in the children's online games industry in practice. It is not possible for the OFT to give certainty on how the law would apply in specific circumstances. Further, we are keen to stress that the examples provided under each Principle illustrate how a business could, in our view, comply with their legal obligations. The examples are not intended to mandate how businesses should operate, which we consider would be overly prescriptive and could risk imposing requirements beyond those in law. We would encourage businesses where possible to act in ways that provide the best environment for consumers, not simply to meet minimum compliance requirements. The examples provide ways in which the OFT considers businesses could do that; there may equally be other ways in which compliance could be achieved.

Should future enforcement decisions and/or case law provide the ability to offer additional examples or guidance, the Principles may be amended to reflect them.

There should be greater clarification of the extent of the responsibilities of platform operators and games providers

We have amended note iii to the Principles to give a clearer outline of our view on how the responsibility for compliance with Principles 1-3 should be shared between platform operators and games providers.

It is unclear how Principles 1-3 apply when, for example, an app is updated

We have amended note iii to the Principles to explain more clearly our view of when information that changes after initial download should be brought to a consumer's attention. It is important that any material information that significantly changes – that is, information that would influence the average consumer's transactional decision – should be highlighted, allowing the consumer to make an informed decision as to whether to accept or reject the changes.

It is unclear what constitutes 'material information', whether some of the examples of such information are necessarily 'material' and at what point it should be provided

We have amended the wording of Principle 2 to reflect the fact that what constitutes material information may depend on context.

Material information should be provided to consumers in a timely manner to enable them to make informed decisions. In practice, the point at which that information should be provided may depend on context, particularly the format of the game and the ways in which a

consumer is likely to access it. For example, we consider that material information about a 'free' app game should be provided to consumers before they download that game. If a game must be purchased before a consumer can play it, we consider that material information should be provided to the consumer before he/she makes that purchase. Similarly, we consider material information about a game that requires consumers to create an account before they can play should be provided before a consumer creates such an account. We consider that that is the reasonable interpretation of Principle 2 as worded.

We have added to Principle 2 the requirement that the main characteristics of the item(s) the consumer will receive through an in-game purchase should be made clear in a prominent manner and directly before the consumer places his/her order. We have added that to reflect requirements from the Consumer Rights Directive, which will apply to contracts concluded after 13 June 2014 (see general comments, above, and the legal annexe to the Principles).

The benefit of providing to consumers information about the range of purchases that may be made in an app is unclear

We have given, as an example of behaviour 'more likely to comply' under Principle 1, an app-store description of a game which lists the cheapest and most expensive available in-game purchases. Information about the range of purchases that can be made in a game may be useful to consumers when deciding whether to download that game.

As we have outlined, the examples of behaviour 'more likely to comply' are not behaviours that we would mandate but are merely examples of how we consider a business could comply with consumer protection law. It may therefore not be necessary for an app-store description of a game to be given in exactly the manner suggested in that example to comply with relevant provisions. It is ultimately for businesses to determine how they should comply with the Principles and the law from which they derive.

Mobile devices, on which children’s online games are often played and which typically have small screens, could present practical difficulties in displaying to consumers the information required under Principles 1-3

Note iii makes clear that, under Regulation 6 of the CPRs, a commercial practice is a misleading omission if, in its factual context, taking account of limitations of the medium used (including limitations of space), it omits, hides or presents in an unclear or untimely manner material information and causes or is likely to cause the average consumer to take a transactional decision that he/she would not have taken otherwise. Such limitations could include the medium’s small screen sizes. However, the OFT considers that the technology and user interfaces exist to ensure that that information is provided to consumers despite small screen sizes. We therefore consider that small screen sizes do not amount to a significant limitation of space because it is possible to provide information through, for example, pop-up boxes, links from a main menu, drop-down lists and the like.

During our investigation, we saw examples of existing app-store descriptions of games that we considered were likely to comply with Principles 1-3 and the law from which they derive. We therefore consider that it is possible for businesses to comply despite the small sizes of screens on which games are typically played.

List of respondents

Advertising Association
Apple UK Ltd
Australian Competition and Consumer Commission
Belgian Competition Authority
Children's Charities' Coalition on Internet Safety
Children's Media Foundation
Communications Consumer Panel
Fluid Games Ltd
Information Commissioner's Office
Google Inc.
International Social Games Association
Japanese Consumer Affairs Agency
Mind Candy Ltd
Netherlands Authority for Consumers and Markets
Norwegian Consumer Ombudsman
National Society for the Prevention of Cruelty to Children
OutFit7 Ltd
Swedish Consumer Agency
The Independent Game Developers Association
Trading Standards Institute
UK Interactive Entertainment
The Walt Disney Company

18 private individuals

Related documents

Top tips for consumers on online games – OFT1516

www.offt.gov.uk/shared_offt/consumer-enforcement/oft1516.pdf

Children's Online Games - A survey of Literature – OFT1518

www.offt.gov.uk/shared_offt/consumer-enforcement/oft1518.pdf

The OFT's Principles for online and app-based games – OFT1519

www.offt.gov.uk/shared_offt/consumer-enforcement/oft1519.pdf

Annexe to the OFT's Principles for online and app-based games - relevant legislative provisions – OFT1519a

www.offt.gov.uk/shared_offt/consumer-enforcement/oft1519a.pdf

References

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www.offt.gov.uk/shared_offt/consumer-enforcement/oft1506.pdf