

PARTIAL REGULATORY IMPACT ASSESSMENT (RIA)

**Transposition of the Unfair Commercial Practices Directive
concerning unfair business-to-consumer commercial
practices**

Contents

Executive Summary	3
Section 1 – overarching RIA	5
Section 2 – mini RIA on interpretation	28
Section 3 – mini RIA on enforcement	33
Section 4 – mini RIA on simplification	47
Annexe 1 – OFT Complaints Data	55
Annexe 2 – Perceived Gains: Case-Based Analysis by OFT	57
Annexe 3 – UCPD and timeshare/holiday clubs	59
Annexe 4 – UCPD and scams	61
Annexe 5 – UCPD and the Single Market	63
Annexe 6 – Indicative list of legislation affected by UCPD	64

Executive Summary

The Unfair Commercial Practices Directive (UCPD or “the Directive”) aims to:

- ensure that consumers are not treated unfairly by business; and
- improve the Single Market by making it easier for businesses to sell and consumers to buy across the EU.

The Directive achieves this first objective by introducing a general prohibition on traders engaging in unfair practices with consumers.

The Directive will improve the Single Market by making the same rules apply throughout the European Union, without allowing Member States to undercut or exceed the protections contained in the Directive. This is called maximum harmonisation.

There are options for implementing the Directive in the following three areas:

- Interpretation of the Directive (section 2)
- Enforcement methods (section 3)
- Simplification of existing overlapping legislation (section 4)

Section 1 of this RIA sets out the overall benefits and costs of the UCPD.

Overall Benefits and Costs of Introducing UCPD

The Directive introduces general, flexible rules on unfair commercial practices. This is because it is intended to catch a wide range of unfair conduct across all business sectors, including new and novel practices that might emerge in future. It therefore brings great benefits to both business and consumers.

However, these benefits require effective enforcement and awareness of the changes. Expected benefits include reduced consumer detriment through the adoption of a more comprehensive and robust legal framework. This should make it easier to tackle problem areas such as scams (which cost UK consumers an estimated £1 billion per year), holiday clubs and doorstep selling. UCPD should also improve the Single Market, bringing some tens of millions of pounds worth of additional spending to the UK by visitors from the EU. However, there will be some costs to business and enforcement bodies in adapting to new legislation.

Interpretation Options

Clarifying terms such as “invitation to purchase”, the “transactional decision test” and the relationship between the “average consumer” and the “vulnerable consumer” would appear to increase legal certainty. This would create the appearance of helping business and enforcers understand the law. However, elaboration may also constrain business’ freedom to respond to UCPD and enforcers’ flexibility to tackle

unfair practices. Excessive elaboration of such terms may also encourage compliance with the letter rather than the spirit of the law. And since courts will have to interpret the regulations in accordance with the Directive, any elaboration may be misleading.

Enforcement Options

An effective enforcement regime is essential to secure compliance and deter traders from breaking the law. None of the enforcement options impose costs on legitimate business, but they do have cost implications for public bodies, including enforcers. In addition, there are also options relating to the possibility of providing for private law rights.

Simplification Options

Existing legal provisions overlapping with the directive have to be amended or repealed. Repeal would make the law more simple than amendment. This would chime with the Government's intention to establish a more modern, simplified legal framework of consumer law. However, economic benefits arising from simplification are likely to be modest.

SECTION 1: OVERARCHING RIA

The DTI has a Public Service Agreement with HM Treasury to ensure that the UK framework for consumer empowerment and support is at the level of the best by 2008. The Government's Consumer Strategy¹, published in June 2005 set out the aim of establishing a legal framework that is flexible, fair and transparent. Introducing the general duty not to trade unfairly via implementation of the Directive is a key component of this. At the same time, the Government will proactively pursue simplification of EU consumer legislation through the review of the EU consumer acquis (8 consumer protection directives)².

The Unfair Commercial Practices Directive was published in the Official Journal on 11 June 2005. Measures to implement the Directive must be published by 12 June 2007 and come into force on 12 December 2007.

Purpose and intended effect of measure

The Directive aims to eliminate obstacles to the proper functioning of the Single Market for consumers by:

- reducing the barriers to cross-border trade from differences in laws on unfair commercial practices. Under UCPD businesses won't have to change their practices in different Member States.
- increasing consumer confidence to shop across frontiers. UCPD gives a high, common level of consumer protection for all transactions, removing uncertainty about the behaviour consumers can expect from traders in other Member States. It will ensure that consumers are not treated unfairly by business, particularly from misleading or aggressive behaviour, or otherwise have their freedom of choice impaired.

The Directive achieves this by establishing an EU-wide framework of legal principles regulating unfair business-to-consumer commercial practices. The Directive aims to deliver a high level of consumer protection and achieve legal certainty whilst remaining as simple and flexible as possible to adapt to market developments.

A supplementary objective in transposing the Directive is to achieve, if possible, some regulatory simplification. Transposition of the Directive has required a thorough review of the UK's consumer protection regime and has provided an opportunity to assess the scope for simplification and rationalisation of the UK's consumer protection regime.

¹ Extending Competitive Markets: Empowered Consumers, Successful Business, DTI 2005

² See <http://www.dti.gov.uk/consumers/policy/eu/review/index.html> for more details.

Devolution

The UCP Directive will apply throughout the UK. In general terms, consumer protection is a reserved matter in relation to Scotland and Wales. However, responsibility for certain legislation affected by the Directive is devolved. Consumer protection (other than safety in relation to goods) is a transferred matter in relation to Northern Ireland and would normally be the responsibility of Northern Ireland Executive Ministers. Whilst the Northern Ireland Assembly and Executive are suspended, these functions are discharged by Northern Ireland Departments subject to the direction and control of the Secretary of State for Northern Ireland. The relevant Northern Ireland Departments have agreed in principle that amendments to existing Northern Ireland legislation to implement the Directive should be taken forward within UK-wide implementing measures.

Maximum Harmonisation

The Directive applies maximum harmonisation to all laws on business-to-consumer commercial practices, subject to certain important exemptions (e.g. financial services). This should encourage the Single Market to realise its full potential.

Maximum harmonisation means that existing UK laws falling within UCPD's scope can't exceed its requirements. This means that affected national legislation is likely to require amendment or repeal. Laws affected include key consumer protection measures such as the Trade Descriptions Act 1968 and Part III of the Consumer Protection Act 1987.

Structure

The Directive sets out rules that determine when commercial practices are unfair. These rules fall into three distinct levels:

- a catch-all general prohibition on unfair business to consumer practices which includes;
- misleading actions and omissions and aggressive commercial practices; and
- an Annex of 31 specific prohibited practices such as prize draw scams which are estimated to cause UK consumers £150 million pounds of detriment a year.

Rules governing the general prohibition and misleading and aggressive practices are principles-based, and rely on the benchmark of the "average consumer" and the "material distortion" or "transactional decision" test for determining when a practice is unfair. By contrast, the Annex practices are not principle-based, and are always unfair.

Scope

The Directive applies across all business sectors. It applies before, during and after a commercial transaction with a consumer. The Directive does not apply to business-to-business commercial transactions. As a result, small businesses and sole traders do not fall within the definition of a consumer under the Directive.

Research into impacts

The DTI commissioned a study by leading legal academics to consider how concepts of fair trading are currently used in English law and the potential impact of an explicit general duty not to trade unfairly. The Report³ broadly concludes that while the Directive will have a considerable impact on English law, English courts already apply general principles of fair trading and that the application of general rules has not proven problematic for courts or business. The Report also highlights the potential for simplification and rationalisation of the current consumer protection regime.

In 2005 the DTI commissioned a further report⁴ on the application and scope of the Unfair Commercial Practices Directive. This considered the impact of key legal concepts on related UK concepts and identified laws that might potentially be affected by the scope of the Directive.

In February 2006, Durham Business School completed focus group research for the DTI, involving discussions with 41 businesses of different sizes (but mainly smaller businesses) to try to establish the implications for them of UCPD and simplifying consumer law. Consistent with more general reports on regulation⁵, the research finds that consumer legislation is not high on the list of priorities. Indeed, the research suggests little impact on day-to-day business. Nevertheless, businesses (particularly the smaller ones) raised concerns about uncertainty from a move to general principles and felt that where consumer problems arose in future, they could be more costly to address. The research is referred to in more detail later in this assessment.

Rationale for government intervention

Consumer protection

Research by the Office of Fair Trading (OFT) (2000⁶) estimated that the level of consumer detriment – defined as losses suffered as a result of defective goods, inadequate redress and poor information – is around £8.3 billion a

³ “The Impact of Adopting a Duty to Trade Fairly” by Professor Robert Bradgate, Professor Roger Brownsword and Dr Christian Twigg-Flesner.

⁴ An analysis of the application and scope of the Unfair Commercial Practices Directive, <http://www.dti.gov.uk/files/file32095.pdf>.

⁵ http://www.sbs.gov.uk/SBS_Gov_files/researchandstats/Regulation-Report.pdf this literature review is one example, illustrating the burdens of other types of legislation on SMEs.

⁶ “Consumer Detriment”, February 2000, OFT 296.

year⁷, excluding the emotional costs and stress which consumers may suffer. The OFT's research also shows that detriment suffered by low-income consumers causes a greater welfare loss than the same monetary loss for an average consumer⁸. The same research estimated the annual number of complaints consumers have about trading practices are around 85 million, although complaints reported to trading standards are typically around 1 million per year, of which a quarter relate to selling practices. More detail on the OFT complaints data is provided in Annexe 1. Much of the reported problems are covered by existing legislation, but the wide-ranging scope and principles-based approach of the Directive will in many cases enhance the ability of enforcers to take effective action.

For example, **doorstep selling** is one area where unscrupulous traders can use aggressive and high-pressure selling techniques, often without contravening current regulations. In excess of £2.5 billion worth of goods and services are sold on the doorstep every year⁹, and whilst the sales route has many benefits, there is evidence of harm to consumers¹⁰. There are an estimated 15,000¹¹ reported cases of bogus trading (i.e. the sale of overpriced and/or substandard goods or services on the doorstep as a result of customers being tricked or pressurised) every year, leading to in excess of £30 million being handed over to bogus traders every year¹².

Pressure selling is also a problem in the **timeshare sector**. The Organisation for Timeshare in Europe estimates that approximately 8-10 per cent of sales are lost to rogue operators in Spain out of total revenue of €431million per annum. Some timeshare-like products, such as holiday clubs, attempt to get around consumer protection legislation. These do not offer specific accommodation to the consumer, and only give them access to a pool of accommodation (that may not even be available)¹³. The Directive's impact on the timeshare sector is discussed in Annexe 3.

UCPD offers a far more comprehensive approach to rogue trading such as **scams** than existing legislation. The OFT estimates that prize draw scams, along with sweepstakes and foreign lottery mailings, cost consumers approximately £250 million a year¹⁴. The Directive will also provide new provisions for tackling dishonest and unfair practices, such as marketing

⁷ The OFT's quantification of consumer detriment at £8.3bn was subject to a margin of error of +/- £2.7bn. In order to be able to detect changes of 5 percent the sample size would need to be increased by a factor of about 50. [OFT296 Para 2.5 -2.6 refers].

⁸ <http://www.of.gov.uk/News/Press+releases/2000/PN+12-00.htm> For those consumers with limited incomes, a given level of financial loss will have a greater overall impact.

⁹ OFT Doorstep Selling Market Study, May 2004 – estimated value of at least £2.4 billion. Subsequent research suggests the figure is much higher as around £2.5bn worth of double glazing and door sales are made every year

¹⁰ This includes NACAB Evidence Report “Door-to-Door: CAB clients’ experience of doorstep selling”, September 2002 as well as evidence presented in the OFT’s Doorstep Selling Market Study.

¹¹ OFT Doorstep Selling Market Study, May 2004

¹² 15,000 x £2,000 = £30 million

¹³ Paradise Lost by Citizen’s Advice <http://www.citizensadvice.org.uk/paradiselost.pdf>

¹⁴ OFT Fair Trading magazine March 2005 <http://www.of.gov.uk/NR/rdonlyres/556C3C01-AD57-4C1A-8144-8751CF2D03FE/0/ft40scams.pdf>

scams, which in total cost UK consumers an estimated £1 billion a year¹⁵. Annexe 4 provides details of some of the most harmful scams currently in circulation.

The agreement of EU-wide rules means that the Directive will also help tackle rogue practices from anywhere in the EU. This is timely as the UK European Consumer Centre (ECC) and European Judicial Network (EEJ-Net) reported in 2005 there was a 142 per cent increase in the number of cross-border queries dealt with during the same period in 2004, which itself saw a 63 per cent increase in the number of queries from 2003¹⁶. As in previous years, the top number of queries related to traders based in Spain (32 per cent of queries), the top travel destination for UK residents, and the top enquiry category is queries relating to timeshare and holiday clubs (29 per cent).

Barriers to cross border shopping

In the Green Paper on EU Consumer Protection¹⁷, the Commission identified a number of barriers to a genuine Single Market for consumers. These include existing rules becoming outdated quickly, allowing 'rogue traders' to stay one step ahead of the law. Minimum clauses in EU Directives allow national legislation to go higher than the Directives, thereby creating barriers to cross-border trade.

The European Commission's Extended Impact Assessment (EIA)¹⁸ accompanying the original draft Directive reports that cross-border shopping has remained at relatively low levels. A Eurobarometer survey¹⁹, suggests that 13 per cent of EU consumers, and 14 per cent of UK consumers, made one or more cross-border purchases. The EIA argues that the low level of cross-border shopping limits consumer choice, reduces competitive pressure for efficient pricing and represent a lost opportunity in terms of economic growth.

A study prepared for the Commission argues that there is significant potential in the EU for cross border trade to develop. It notes that nearly 40 per cent²⁰ of European companies targeting final consumers estimated they would

¹⁵ OFT estimate, cited in the Guardian February 1 2005

<http://money.guardian.co.uk/scamsandfraud/story/0,13802,1403183,00.html>

¹⁶ http://www.euroconsumer.org.uk/euroconsumer_annual_report_2005.pdf Citizens Advice operates the UK European Consumer Centre and is partly funded by the European Commission.

¹⁷ Green Paper on EU Consumer Protection, 2 October 2001 (COM(2001)531 final)

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/fair_comm_greenpap_en.pdf

¹⁸ Commission staff working paper: Extended impact assessment on the Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Single market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), 26 June 2003 (1094/03 ADD 1)

http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/impact_assessment_en.pdf

¹⁹ Eurobarometer 57.2 / Flash Eurobarometer 128 'Public Opinion In Europe: Views On Business-To-Consumer Cross-border Trade' 2002

²⁰ GFA Management "Ex-ante Impact Assessment of the options outlined in the Green Paper on EU Consumer Protection" (B5-1000/02/000074) 2002

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/gfa_report_en.pdf

increase the proportion of their marketing and advertising budget given to encouraging cross-border sales with complete harmonisation of regulations on advertising, commercial practices and consumer protection. Nearly a half (46 per cent) thought that their proportion of cross-border sales would increase. The same study suggests that up to 80 million European consumers²¹ might buy more across borders if they were confident about making purchases from shops or sellers located in another EU country.

Legislation

The DTI 2003 comparative study of consumer protection regimes concluded that legislation in the UK was 'piecemeal and inflexible'²². Legislation is currently not responsive to changing market practices. A recent survey for OFT demonstrated that few firms could spontaneously name consumer legislation relevant to their organisation²³.

Consumers also find the regulatory framework complicated and perhaps not surprisingly, consumers do not see themselves as well informed about their rights. Indeed in a 2005 survey²⁴, only 10 per cent of consumers said they saw themselves as very and 49 per cent as fairly well informed of their consumer rights.

Consultation within Government

The Department formally consulted all Government Departments including the devolved administrations on the UCP Directive. We worked particularly closely with HM Treasury, Department for Constitutional Affairs, Office of the Deputy Prime Minister, Department for Transport, Department for Work and Pensions, Financial Services Authority, and the Office of Fair Trading. In addition, the Department circulated a working paper to all Whitehall departments outside of the formal consultation process, outlining the impact of the Directive and seeking views. There have also been discussions with the Commission and other Member States on implementing the Directive.

Public consultation

We carried out a series of workshops and stakeholder events for stakeholders from all affected sectors. Presentations to raise awareness of the DTI's consultation paper were held in London, Belfast and Glasgow in December 2005. In addition, five workshops were held at various times in London and

²¹ GFA page 76, using the result from Eurobarometer 57.2 to the question 'if you were equally confident to shop in another EU country as you are in your own, would you buy more?'. For the EU the results were that 32 per cent said they would either buy more, or 'it depends'; 32% x 255m people aged 15-64 = 80 million.

²² Comparative Report on Consumer Policy Regimes, October 2003

<http://www.dti.gov.uk/ccp/topics1/pdf1/benchmain.pdf>

²³ Competition Act and Consumer Rights, Synovate, April 2005. Prepared for OFT

<http://www.offt.gov.uk/NR/rdonlyres/46C61C94-BEBC-4798-BBB9-4227B2ABB97C/0/oft799a.pdf>

²⁴ Competition Act and Consumer Rights, Synovate, April 2005. Prepared for OFT

<http://www.offt.gov.uk/NR/rdonlyres/46C61C94-BEBC-4798-BBB9-4227B2ABB97C/0/oft799a.pdf>

Scotland to consider specific policy issues. The discussion of options on civil redress (section 3, option D) is largely informed by one such workshop.

There were three rounds of written consultation during negotiation of the Directive. The first was conducted on the basis of the Green Paper, the second in response to the Follow-up Communication and the third based on the draft Directive. Copies of the two documents and draft Directive were circulated widely amongst stakeholders (businesses and business organisations, consumer bodies and enforcement bodies).

We consulted most recently on the options for interpretation, enforcement and simplification in December 2005. A summary of responses to this consultation was published in June 2006²⁵. We have responded to these views in the Government Response accompanying this RIA. Views from consultees are referred to as appropriate in the detailed discussions on interpretation, enforcement and simplification in sections 2-4

Options for implementation

Maximum harmonization means that national measures within the scope of the Directive cannot impose more extensive requirements or prohibitions than the level in the Directive. It sets a standard, which has to be applied uniformly across all Member States. However, there are some implementation options in three distinct areas. Their costs and benefits are contained in the mini-RIAs in sections two to four. A summary of the options is below.

Section 2 on **interpretation** looks at how certain terms used in the Directive could be interpreted and also the extent to which they should be clarified in the legislation or in guidance.

Section 3 on **enforcement** considers setting up a new civil law regime, criminal sanctions, self-regulation, self-regulatory codes, and the possibility of providing civil redress.

Section 4 on **simplification** considers the value of amending or repealing existing UK legislation that overlaps with the Directive.

Overall costs and benefits

Sectors and groups affected

The Directive applies to all commercial practices directly connected with the promotion, sale or supply of a product to consumers. It will therefore apply to

²⁵ <http://www.dti.gov.uk/files/file30152.pdf>

all businesses that sell products or services directly to consumers. For example, there are approximately 320,000 firms in the retail sector, the great majority of which are small firms employing four people or fewer²⁶. There are also approximately 140,000 hotel and restaurant enterprises, the majority of which will be affected. Firms in a wide range of other sectors will be affected too, for example the real estate and services sectors. The practical consequences for most law-abiding firms will be very limited. However, the Directive will affect some sectors more than others. In particular, sectors where there is currently a problem with aggressive and high-pressure selling techniques, such as doorstep selling and timeshare.

Some dishonest and fraudulent practices are intentionally directed at consumers who are vulnerable for one reason or another to a particular practice or the underlying product. The Directive contains specific provisions intended to provide additional protection for certain vulnerable consumers.

The Department does not anticipate that the Directive will have a disproportionate effect, positive or negative, on any ethnic business or consumer groups.

The extent to which the benefits of the Directive are realised will depend on the effectiveness of the enforcement regime and business and consumer awareness.

Benefits from reducing consumer detriment: consumers

The UCPD will introduce a general prohibition on unfair practices across the EU which should fill gaps and loopholes in existing legislation (see Annexe 2 for examples). This should make it easier to tackle unfair practices originating in the UK and elsewhere in the EU.

The extent of UK consumer detriment was outlined in the 'rationale' section above. It showed that the total detriment caused by consumer problems could be considerably in excess of £8.3bn per year²⁷. Information from the OFT shows that around a quarter (26 per cent) of all the complaints that they record relate to selling practices²⁸, including those which will be covered by UCPD. Volume of complaints does not necessarily equate to value, but making that simplifying assumption would lead us to conclude that these selling practices cause consumer detriment of over £2 billion²⁹. If the improved protection that UCPD provides were to reduce these problems by as little as 5 per cent, this could result in a £100 million per year reduction in consumer detriment. While this figure is necessarily speculative, it does

²⁶ Source; Small Business Service statistics

<http://www.sbs.gov.uk/sbsgov/action/layer?r.l2=7000000243&r.l1=7000000229&r.s=tl&topicId=7000011759>. Data from the Inter-departmental Business Register gives a figure of 184,000 firms in the retail sector, but unlike the SBS statistics, this excludes a large number of sole traders that will not be registered for VAT.

²⁷ "Consumer Detriment", February 2000, OFT 296.

²⁸ OFT annual report 2003, Annexe E <http://www.offt.gov.uk/NR/rdonlyres/64911092-2EA6-4A4E-B5D4-5BC8FCB2ED4B/0/annexeee.pdf>

²⁹ 26% x £8.3 billion = £2.2 bn

illustrate the important fact that even a small improvement in consumer protection arising from the UCPD will result in very significant benefits for consumers. The precise reduction in consumer detriment will depend on the effectiveness of enforcement and consumer awareness. But the simple, principled rules which the UCP Directive will establish, together with its scope for simplification and rationalisation of the existing legal framework, should contribute towards increasing consumers' awareness of their rights.

In addition to the safety net protection provided by the general prohibition, the Directive will introduce a number of additional protections, in particular relating to aggressive selling practices. As noted previously, aggressive and high-pressure selling techniques are a particular problem in the doorstep selling sector (cf Annexe 2). This should provide a means of significantly reducing the estimated 15,000 cases of bogus trading and the associated consumer detriment of around £30 million³⁰.

The Department also expects the Directive to address some of the other problem areas discussed previously; timeshare and holiday clubs; scams, and especially prize draw scams. As noted above, the Organisation for Timeshare in Europe estimates that up to 40 million euros are lost annually to rogue traders. The OFT estimates UK consumers lose £250 million a year in prize draw scams and hundreds of millions more through other scams. Timeshare and holiday clubs are discussed further in Annexe 3 and scams in Annexe 4.

Benefits from reducing consumer detriment: business

The Directive's general prohibition and other provisions will be used to tackle instances of bad practice currently not caught under existing law. This should benefit those companies who currently lose customers to companies engaged in rogue practices. For example, if consumers spend less with rogue traders, a portion of this money might instead be spent with legitimate and honest firms. The Directive should level the playing field for firms that trade fairly and honestly.

Benefits and costs from enhancing the Single Market

Survey information³¹ indicates that there may be significant potential for further development of the Single Market. This potential exists both in terms of consumers extending their search activities when making purchases as well as businesses targeting other Member States' markets. Increased cross-border activity would result in increased competitive intensity in the provision of goods and services. Consumers would enjoy lower prices and greater choice and business would be driven to be more efficient and innovative and focused on giving consumers what they want at the best prices.

³⁰ NACAB Evidence Report "Door to Door: CAB clients' experience of doorstep selling", September 2002

³¹ See 'rationale' section above. Eurobarometer 57.2 / Flash Eurobarometer 128 'Public Opinion In Europe: Views On Business-To-Consumer Cross-border Trade' 2002

The success of the Single Market is already considerable. Research by the European Commission³² has shown that ten years after the completion of the Single Market Programme in 1992:

- GDP is 1.8% (€165bn) higher than it would otherwise have been;
- An extra 2.5 million jobs have been created; and
- Extra prosperity to the value of some €875 billion has been generated – equivalent to some an extra €5,700 per household.

There remains room for improvement. The survey responses indicate that the UCPD could play a part, albeit probably small, in realising further benefits.

Benefits and costs from enhancing the Single Market: consumers

The harmonisation of consumer protection legislation should increase consumers' confidence to shop across borders. Empowered consumers can increase competition, and in turn productivity, as they help drive up efficiency in firms. Survey responses³³ show that 79 per cent of less confident consumers said enjoying the same rights and protections abroad was very or fairly important to increasing their confidence.

The data indicates just how little current cross-border activities occurs. Only 14 per cent of consumers in the UK, and 13 per cent across the EU as a whole, had made a purchase from sellers located in another member state in the previous 12 months³⁴. Unsurprisingly, most purchases were made while the consumer was actually visiting another member state, there either on holiday, for business or on a dedicated shopping trip. In total, UK residents make nearly 50 million trips annually to other EU 25 states, spending nearly £18 billion, not including travel costs, in the process³⁵. But a significant proportion of UK consumers (see table below for details) also used remote shopping methods - the internet and mail order – to access goods and services in other states.

³² European Commission (2003) "The Single market – Ten Years Without Frontiers"

http://www.europa.eu.int/comm/internal_market/10years/docs/workingdoc/workingdoc_en.htm

³³ Eurobarometer 57.2 / Flash Eurobarometer 128 'Public Opinion In Europe: Views On Business-To-Consumer Cross-border Trade' 2002

³⁴ Op cit

³⁵ National Statistics Overseas travel and tourism survey MQ6 Q1 2005

<http://www.statistics.gov.uk/StatBase/Product.asp?vlnk=1905&Pos=&ColRank=1&Rank=240>

How consumers purchase goods and services cross border (percentage of those respondents who had bought cross border in the last 12 months – may add up to more than 100 per cent as multiple answers possible)

	UK	EU15
Holiday or business trips	60	57
Shopping trips	18	34
Internet	22	18
Mail order	14	9

Source Eurobarometer 57.2 / Flash Eurobarometer 128

Improvements to the Single Market will not only benefit UK consumers when they buy goods and services from sellers in other Member States. It will also benefit UK consumers in the domestic market as pressure from more active consumers elsewhere in the EU acts on UK businesses.

Benefits and costs from enhancing the Single Market: business

The Directive's benefits will depend on the extent to which businesses grasp the opportunity of harmonised rules and the degree of simplification achieved. Maximum harmonisation applies to all laws on business-to-consumer commercial practices, subject to certain exemptions. This should reduce regulatory barriers and lower the legal cost of ensuring compliance with different regimes. The extent to which cross-border trade is facilitated and barriers removed will depend in large part on how active the European Commission and ECJ are in ensuring that the Directive is applied consistently in all Member States.

A survey of EU businesses³⁶ found that 68 per cent think that harmonising national rules is a very or fairly efficient way of making sales and/or advertising easier throughout the EU. As a result 39 per cent expected to increase their cross-border marketing efforts. Of businesses in the UK, only just over half (52 per cent) agreed that harmonisation would make marketing more effective, and less than a quarter (22 per cent) thought that they would actually increase advertising and marketing aimed at encouraging cross-border sales. Just over a quarter of UK business (26 per cent) would expect to experience increased sales following harmonisation whereas nearly half (46 per cent) of firms in all the EU15 expect a sales boost.

UK businesses should benefit from the increased confidence felt by EU consumers when they visit the UK under the new consumer protection regime. In 2004, nearly 18 million visits were made to the UK by residents of other EU Member States, including around 3 million visits each from France,

³⁶ Eurobarometer 57.2 / Flash Eurobarometer 128 'Public Opinion In Europe: Views On Business-To-Consumer Cross-border Trade' 2002

Germany and the Irish Republic³⁷. Total spending by visitors from the EU25 was £5.7 billion. The table below shows how EU15 visitors allocate their spending when in the UK.

Proportion of spending by category by visitors to UK from EU15	
	%
Accommodation	34
Shopping *	27
Eating out and alcohol	23
Transport	8
Entertainment	3
Other	8

*clothing, groceries, souvenirs, household goods, books

Source: National Statistics (www.statistics.gov.uk) Travel Trends: a report on the 1998 International Passenger Survey

If we assume that these proportions, measured in 1997, are unchanged, it shows that visitors from the EU would have spent around £1.5 billion in UK shops last year³⁸. Surveys show that some consumers would feel more confident and as a result spend more in other Member States; 4 per cent of EU15 consumers said that they would spend 'a lot more' in other Member States and 15 per cent said that they would spend 'a little more' in other Member States if they felt equally as confident as they do in their home country. Using this and other survey information and making some conservative assumptions, we might expect spending in UK shops by visitors from the EU to increase by around £30 million³⁹ as a result of the UCPD. There might also be a rise in spending on eating out and entertainment. However, the effect of this is likely to be much smaller than that of shop spending, hence it is only this effect that is quantified.

Benefits from legislative change: consumers

There should be consumer benefit associated with the adoption of principles-based legislation. If the Directive is clearly understood by consumers, they are more likely to invoke their rights when faced with unfair practices. This benefit can be maximised by a strong supporting campaign to inform consumers of changes in the law. In collaboration with the OFT, the Department intends to launch such a campaign.

³⁷ National Statistics Overseas travel and tourism survey MQ6 Q1 2005

<http://www.statistics.gov.uk/StatBase/Product.asp?vlnk=1905&Pos=&ColRank=1&Rank=240>

³⁸ $27\% \times £5.7bn = £1.539bn$

³⁹ There are 17.7m visits annually to the UK from EU25 with total spend of £5.7bn. 27% is spent on shopping. Assume that spending is equal across all visitors. Assume that the 4% who would spend 'a lot more' actually spend an extra 25% and the 15% who would spend 'a little more' actually spend an extra 5%. Total extra spending is $(5.7bn \times 27\%) \times ((4\% \times 25\%) + (15\% \times 5\%)) = £26.8m$

Benefits and costs from legislative change: business

The flexible principles-based approach of the UCPD should adapt to changing market practices, thereby reducing (if not entirely eliminating) the need for new legislation. For example, a more flexible and simple legal framework could guarantee consumers' rights in all transaction types. It would strengthen confidence in the current growth in internet trading and e-commerce, and guarantee protection in the event of changing methods of transaction. Simplification also means fewer pieces of legislation for businesses to comply with and for enforcers to enforce. By contrast, sector-specific legislation often suffers from loopholes that are exploited by unscrupulous traders.

Businesses are likely to incur some one-off adaptation costs. Companies may incur costs in familiarising themselves with new legislation and taking legal advice to ensure their existing practices are fair. Companies are likely to deal with this in different ways and incur different costs as a result.

Making a series of assumptions, it is possible to indicate a range for one-off familiarisation costs if every business went through this process of £10million - £25 million. This is based on 750,000 enterprises (an estimate based on the number of retail, hotel and restaurant, automotive, and personal services enterprises⁴⁰), of which about 99% are small businesses (the majority of which employ less than 5 people), assuming between one and two hours of a manager's time⁴¹ is spent on this function.

For larger businesses, the length of time could be longer and the function is more likely to be carried out by legal advisers or in-house legal teams. Durham Business School's research suggests that many businesses do not refer to consumer legislation as a matter of course, so it is likely that for many, the familiarisation costs are incurred first when they are dealing with difficult consumer problems.

Administrative burden implications of UCPD

UCPD offers an opportunity to simplify consumer legislation. There will be some reductions of the administrative burden imposed on businesses from existing legislation that is affected. Section 4 examines this in more detail.

⁴⁰ Source: Small Business Service statistics

<http://www.sbs.gov.uk/sbsgov/action/layer?r.l2=7000000243&r.l1=7000000229&r.s=tl&topicId=7000011759> It is not possible to precisely estimate the number of businesses affected, therefore this analysis has focused on sectors which are most likely to contain businesses engaging in business-to-consumer transactions (from SIC codes 50, 52, 55, 71.1, 71.4 and 93).

⁴¹ The Annual Survey of Hours and Earnings (found at <http://www.statistics.gov.uk/StatBase/Product.asp?vlnk=13101>) suggests that the average hourly pay for a retail and wholesale manager is £10.89. Adding one-third non-wage labour costs, we multiply this by the number of enterprises to get £10.6m, if the time taken were 2 hours, the figure would be £21.2m. A small proportion of these enterprises (approx 1%) employ more than 50 people. These enterprises are likely to take more time and employ legal advisors or use in-house legal teams for this purpose, hence the range for familiarisation costs is broadened to £10-£25m.

As well as removing existing information obligations as discussed in section 4, UCPD may impose new ones on business. Article 7 of UCPD (misleading omissions) sets out information obligations that businesses must comply with. Some of these information obligations will replicate existing business practices and are not additional costs for business.

The new information requirements imposed by the UCPD vary according to whether or not a commercial practice is an invitation to purchase. Both situations are considered below.

Commercial practices where there is no invitation to purchase

The directive provides, in article 7.1, that traders must not omit information, which in the context is material to the average consumer, from commercial practices. The class of activity covered by the definition of 'commercial practice' is extremely broad and the definition in article 2(b) captures anything a trader does or does not do which is directly connected with the promotion, sale or supply of a product to consumers. Under article 7(1), whenever a trader performs any commercial practice he has to consider whether there is any information which he has omitted from that commercial practice which is in the context material.

It is not possible to sensibly estimate the cost to business of supplying additional information of this sort. In order to quantify this obligation every action or inaction which can be defined as a commercial practice must be examined. The context of the commercial practice must be assessed as well as the materiality of the information to the average consumer. The medium used to make the commercial action must be known. Finally, we would have to look at any other means by which the omitted information may be brought to the attention of the consumer. Given the scope of these factors we believe it is highly unrealistic that this cost can be estimated. As the majority of businesses already deal fairly with their customers, we expect few businesses are not complying with this. Therefore any additional costs here are likely to be very small.

Commercial practices where there is an invitation to purchase

Article 7(4) lists the types of information that are always regarded as material when an invitation to purchase is made. The Directive defines an invitation to purchase as a commercial communication that indicates the characteristics of a product and the price and thereby enables the consumers to make a purchase.

This concept is ambiguous and open to different interpretations. It could apply to any commercial communication that indicates the product and price. However, the UK's current view is that such a commercial communication does not form an invitation to purchase unless it also allows the consumer to make a purchase.

The UK currently takes the view that the commercial communication must place consumers in a situation that allows them to make a purchase. This will depend on the context and the nature of the product. The UK is continuing to discuss this concept with the European Commission and other Member States and our understanding of its impact may change in future. This will be reflected in guidance.

The information that is material under article 7(4) of UCPD is summarised below:

1. the main characteristics of the product, to an extent appropriate to the medium and the product;
2. the geographical address and the identity of the trader
3. the price inclusive of taxes along with any after sales additional costs (if appropriate);
4. the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
5. for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

The cost to business of each of the above information obligations has been estimated separately. The cost estimates are of the time spent by employees to insert the above information into invitations to purchase. **These are very approximate estimates based on the standard cost model, due to the nature of the information and the practices being quantified.**

1. The main characteristics of the product.

UCPD limits this obligation by taking into consideration the medium used and the product. Therefore for the majority of businesses that sell relatively simple products, the information currently provided by traders will probably suffice. Businesses who sell complex products may need to describe more characteristics in any activity that represents an invitation to purchase. We need to calculate how many businesses sell complex products and need to change their information practices

A conservative assumption is that 10 per cent of all non-food retailers will face additional costs due to describing the main characteristics of a product in more depth⁴². We assume that 20 per cent of firms who sell automotives or related parts, hotels and restaurants and personal service enterprises⁴³ will incur additional costs due to this information obligation. We estimate that

⁴² Food products are assumed to be simple products and it is likely that the main characteristics of the product will be apparent from the context.

⁴³ It is not possible to precisely estimate all the firms that will be affected therefore this analysis has focused on businesses that are most likely to engage in business to consumer transactions (SIC codes 50,52, 55, 71.1, 71.4 and 93).

around 90,000⁴⁴ businesses will face additional costs and that this will cost business in the region of £1.3-2.5 million each year⁴⁵.

2. The geographical address and trading name.

If the firm is acting on behalf of another agent they must reveal the identity of that trader. This information obligation has some overlaps with the Business Names Act 1985, which applies to companies trading under a name which is not their corporate name. Potential areas of overlap include disclosing your company name on business letters and displaying this name in premises. There may be additional costs to business as under UCPD, in every invitation to purchase for traders who operate under a name other than their own businesses they must reveal their corporate name⁴⁶. We assume that for all businesses that trade from a physical premises it will be apparent from the context for consumers who the trader is as there is likely to be a shop sign indicating the traders name outside the premises.

The Companies Act 1985 requires every company to have its name mentioned legibly in all its business letters and 'in all its notices and official publications'. The latter requirements may capture some invitations to purchase. Finally, for businesses that sell over the internet, the e-Commerce Directive 2000/31/EC (implemented in the UK by the Electronic Commerce (EC Directive) Regulations 2002) and the Distance Selling Directive 97/7/EC (implemented in the UK by the Consumer Protection (Distance Selling) Regulations 2000, "the Distance Selling Regulations") provides some existing overlap with this information obligation.

We therefore assume that only a small fraction of businesses potentially affected by UCPD will incur additional admin costs. We estimate that the cost to business from this information obligation will be approximately £0.05-£0.1 million each year⁴⁷.

⁴⁴ Using SME statistics (found at <http://www.sbs.gov.uk/sbsgov/action/layer?r.l2=7000000243&r.l1=7000000229&r.s=tl&topicId=7000011759>) there are around 320,000 retail firms (we assume that half of these firms sell predominately non-food products as ONS retail sales data reveals that half of retail sales are from non-food). The SME statistics indicate that there are around 40,000 enterprises that sell automotives (this figure only includes businesses with employees). Around 3,000 enterprises rent automobiles or personal and household goods (this figure only includes businesses with employees). There are around 185,000 personal service enterprises and 140,000 hotels and restaurants. The estimate of 90,000 = $(320,000 * 0.5 * 0.1) + 0.2 * (40,000 + 3,000 + 185,000 + 140,000)$

⁴⁵ We assume that it will cost businesses the equivalent of 1-2 hours of a manager's time per annum to ensure that this information obligation is satisfied. The range of hours reflects that larger businesses will have a greater number of invitations to purchase per annum compared to smaller sized businesses. According to the Annual survey of hours and earnings a retail and wholesale managers wage costs £10.89 per hour. Adding on 30% of non-wage costs and multiplying by 90,000 firms we obtain a cost estimate of around £1.3-2.5m per annum.

⁴⁶ The Business Names Act stipulates, amongst other things, that businesses must reveal their corporate name and there will only be an overlap with the UCPD requirement if a business letter is used as an invitation to purchase.

⁴⁷ In the business sectors affected section of the RIA it was estimated that around 750,000 enterprises would be affected by UCPD. We have assumed that 1% of these enterprises will incur additional costs and that this cost will be equivalent to ½ - 1 hour of a managers time per annum (the range reflects that larger businesses will spend more time compared to smaller businesses as they will have a greater

3. Traders must state prices inclusive of taxes, if the price of a product cannot be easily calculated in advance traders must indicate the method of pricing. Where appropriate traders must inform consumers of any additional charges (for example postal or delivery charges).

We believe that only a small proportion of businesses will be additionally affected by this information obligation as it partially overlaps with the Price Marking Order and Price Marking (Food and Drinks Services) Order 2003.

4. Traders must provide information about the payment, delivery, performance and compliant handling procedure if they depart from the requirements of professional diligence.

Where traders follow market norms, they are not required to provide any additional information. Also, the Distance Selling Regulations overlap with this requirement so most traders will already provide this information to consumers. Current practice is that this type of information may be given to consumers after they purchase a product. UCPD may require that this information be given to consumers earlier.

5. Inform consumers about right of withdrawal, or cancellation of such a right, where these exist.

Rights of withdrawal and cancellation rights are limited to very specific types of sales. Where they exist, the relevant legislation normally already requires that consumers should be informed of them. Examples are the Distance Selling Regulations and the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987.

We expect that the combined cost to business of these three information obligations (3-5 above) will be minimal given the overlap with existing legislation and that businesses in many cases already provide this type of information to consumers. Our conservative assumption for illustrative purposes is that a potential 7,500 enterprises⁴⁸ will incur significant admin costs estimated to cost business around £ 0.05-0.1million each year⁴⁹.

Overall costs

The **estimations** above are of the admin costs placed on business as a result of employees spending time to insert additional information into invitations to purchase. In addition there may be costs to business from actually inserting additional information in invitations to purchase. For example some

number of invitations to purchase). Multiplying 7,500 firms by £14.16 (the equivalent of 1 hours of a retail and wholesale managers hourly wage plus non-wage labour costs) gives £0.05-0.1million a year.

⁴⁸ We have assumed that 1% of the potential firms affected by UCPD will incur additional admin costs.

⁴⁹ We estimate that the cost to business will be equivalent to ½-1 hour of a manager's time per firm per annum (this range reflects that larger businesses will have a greater number of invitations to purchase compared to smaller sized businesses). Multiplying 7,500 firms by a retail and wholesale managers wage (plus non-wage labour costs) gives £ 0.05-0.1million a year.

advertisements may meet the UK view of the meaning of invitation to purchase but may not contain enough information to satisfy article 7(4). The formal guidance for traders is yet to be finalised and at the time of drafting this RIA we cannot predict what types of invitations to purchase will require the insertion of additional information. Case law will only emerge after the implementation of UCPD. For these reasons the estimates presented here are necessarily illustrative and speculative in nature.

The Advertising Association (AA) provides the most comprehensive data source for advertising expenditure⁵⁰. The AA have annual estimates for advertising spend by media type (for example Television, National Newspapers, Internet etc). This data forms the basis for the following estimates. We need to estimate the number of adverts which satisfy the invitation to purchase condition and fail to satisfy the information obligations in article 7(4). However, we believe that the additional costs imposed by UCPD will not be excessive. The Price Marking Order (2004) already states that prices should be given inclusive of value added tax in adverts. In addition to this the British Code of Advertising requires its members to truthfully report any information that they communicate in adverts. Using advertising expenditure data from the Advertising Association we estimate that inserting additional information in advertisements will cost business £9.5-19.1 million per annum⁵¹. This reflects a modest rise in total costs as it represents 0.05-0.1% of total advertising expenditure in 2004.

We estimate that the overall additional admin burden to business will be around £ 11 - 22 million per annum. This is an approximate estimation based on the standard cost model methodology. The aim is to give an indication of the order of magnitude of the likely burdens, rather than the exact figure.

The total changes to the administrative burden on businesses is a saving of £7-35m each year stemming from changes to domestic legislation. This is calculated in section 4 on simplification.

⁵⁰ http://www.adassoc.org.uk/AA_Detailed_statistics_2004_Warc_Source.pdf

⁵¹ Businesses may incur additional costs of supplying more information in advertisements through, for example, increasing the size of a newspaper advertisements or increasing the length of a radio advert. Using 2004 advertising expenditure data from the Advertising Association we illustratively assume that 5-10% of advertising expenditure in national and regional newspapers, television, outdoor and transport adverts is spent on adverts which represent an invitation to purchase but need to have more information inserted before satisfying UCPD information obligations. We assume that 10-20% of advertising expenditure spent on consumer magazines, direct mail and Internet represent invitations to purchase and would require more information. We increased the amount of advertising expenditure affected for these latter categories compared to the previous categories as we felt the latter types of advertising include a greater amount of complex products which satisfy the invitation to purchase condition. We assume that only 2-5% of advertising spend on radio and cinema advertisements will be affected by UCPD information obligations. It was assumed that it would be difficult for consumers to have easy access to purchase products after watching an advertisement in a cinema or after listening to a radio advert. Finally, we assume that UCPD will add 1% to the advertising expenditure identified above.

We have assumed in all of our calculations that all firms will be complying with the law. In reality there will be some non-compliance. Our cost estimates are therefore likely to slightly overestimate the burdens.

We expect that there will be no additional costs to business through enforcement visits, as UCPD will not increase the frequency of enforcement visits.

General Costs and Risks of the UCPD

The UCP Directive imposes few positive obligations that a trader has to comply with to show that he is trading fairly. (The main exception is where there is an invitation to purchase, discussed below). Rather its main impact is to establish a framework of principles for determining whether a practice is unfair. This means that legitimate businesses should not normally have to change the way they operate. The UCPD replicates the effect of a number of existing laws. For example, many unfair commercial practices that are prohibited under the UCPD are already misleading advertisements under the domestic Control of Misleading Advertisements Regulations 1988.

It should be noted that this principle-based approach to regulation is the exception in UK law and creates some issues for business compliance and enforcement. For instance, the Directive does not specify what information is required for a practice not to mislead by omission. This means that the information that must be provided for a practice not to be considered unfair may depend on the circumstances.

Durham Business School's focus group research for the DTI revealed concerns amongst businesses about the principles-based approach of the Directive. In addition, there were fears that consumers would make more false or bogus claims against businesses, raising their costs. Whilst not anticipating a rise in day-to-day costs as a result of UCPD, many participants in the research were concerned that it would be more difficult to resolve problems.

The UCPD introduces certain new provisions and strengthens other existing ones (eg on aggressive selling). This may create costs for enforcers, though the extent of this is uncertain given that many unfair practices would have been dealt with less successfully under existing legislation. In addition, enforcement costs may vary according to enforcement options chosen (see section 3). There will also be costs involved in mounting consumer and business awareness campaigns, as well as in producing guidance.

Consultation with small business: the small firms' impact test

We sought volunteers from a database of small businesses to conduct a small firms impact assessment. We held telephone conferences with two small businesses and had a further meeting with small business representatives. We asked for impressions of the overall impact of the Directive and for

specific issues raised by the implementation options.

As small businesses have fewer resources than large businesses, changes to legislation absorb a disproportionately greater amount of available time and resource. In addition, larger businesses often employ people specifically to monitor and deal with legislative changes.

The consensus view was that the Directive should not impact on those companies operating fairly. Consultees emphasised the importance of guidance that is clear, brief and includes a version targeted especially at small businesses. They also indicated a preference for enforcement options that secured the greatest reduction in activity by rogue traders.

Consultees expressed less interest in existing legislation and interpreting terms and definitions. This was because small businesses tend to focus on guidance and not on the underpinning legislation. However, consultees noted that simplification might be beneficial for new small businesses if this resulted in less guidance material.

The Department also received useful feedback on methods for disseminating information and guidance to small businesses.

Competition Assessment

A competition filter test has been conducted. Overall, the UCPD should have a positive effect on competition. It should empower consumers, level the playing field for honest business by weeding out rogue traders and sharpen competitive pressure in many sectors through its positive effect on the European Single Market.

The Directive will apply to all firms that provide products (goods and services) directly to consumers across the whole range of markets. The effects of the Directive may not be felt equally **across** all markets, as different markets have different levels of consumer detriment and different patterns of business behaviour, but it should have a similar impact on traders **within** any given market. In this respect, it will not distort competition in any given market either by disproportionately assisting or disproportionately disadvantaging any firm relative to any other. The exception to this is those traders who break the law in respect of consumer protection rules or who otherwise treat consumers unfairly. The effect of the UCPD will be to make their unfair practices unattractive and uncompetitive. It should make consumers better protected and more confident.

As noted previously, some sectors such as those involved in doorstep sales or holiday clubs may face higher costs as a result of the UCPD as it will tackle rogue practices particularly prevalent in those sectors. But all firms within these sectors will be affected proportionately.

Firms that operate in tradable sectors of the economy are likely to experience increased competition from elsewhere in the EU and will be better able to apply pressure in EU markets themselves. The heightening of competitive pressure within the EU is unlikely to distort competition within markets although there may initially be regional differences.

Across the board, new traders will not face a greater burden than existing traders, and are more likely to find entry barriers (in particular customer inertia) lowered. Regulatory simplification from UCPD could reduce the initial burden which new business face in familiarisation with consumer protection legislation.

The proposals will not restrict the ability of traders to choose the price, quality, range or location of their products.

Compliance and monitoring

The OFT already records all Enterprise Act 2002 actions and complaints from Trading Standards Departments. This activity will continue, but will also record UCPD cases. Furthermore, complaints data will be closely monitored from calls to Consumer Direct. Whilst complaints data cannot be taken as a reliable indicator of levels of consumer discontent, the DTI and OFT will be monitoring the data to see whether there is an impact on complaints from UCPD. In particular, this will assess whether there are any improvements in relation to doorstep selling, scams and holiday clubs.

The European Commission is required to submit to the European Parliament and the Council a comprehensive report on the application of the UCPD no later than four years from the date on which Member States must adopt and publish their national laws implementing the Directive. This report must cover in particular:

- the permanent derogations from maximum harmonisation in relation to financial services and immoveable property;
- the operation of the Single Market aspects of the Directive;
- the Annex list of practices which will be considered unfair under all circumstances;
- the scope for further harmonisation and simplification of the EC consumer protection *aquis*; and
- any measures that may need to be taken to ensure that essential consumer protections are not lost when Member States are no longer able to rely on minimum clauses in existing EC directives.

In addition, plans to evaluate the operation of the UCPD in the UK are being drawn up as part of the transposition of the Directive.

Summary table of costs and benefits

Business	
Benefits	Costs
Tackling rogues and reduced consumer detriment	
Better tools for the authorities to tackle rogue traders with will level the playing field for honest business and reduce the amount they currently lose to companies who engage in unfair practices. More confident consumers will benefit business.	No anticipated costs to honest businesses.
Single Market	
Less complex for UK business to trade and market goods and services in other Member States and increased opportunities for trade. Retailers supplying EU shoppers visiting the UK could benefit by an estimated £30 million.	Potential for transition costs – businesses that are less competitive could lose out.
Reduced complexity of legislation	
The straightforward principled approach of UCPD should make it easier for business to interpret their responsibilities toward consumers. Reduces the risk of future legislation in this area. Savings of £28.6-£45.6 million from reduction of admin burdens (see page 54).	Businesses will incur one-off familiarisation costs. Will need to review their existing practices against the Directive and amend their practices where necessary. These costs, which are likely to be small, will be incurred on a one off basis. Scale of the costs will depend on the transposition options and on the degree of regulatory simplification, but could amount to £10 - £25 million in one-off costs. May be additional one-off costs where firms need to train staff in the new rules. Greater simplification and a legislative framework based on general principles could mean legal uncertainty for business, thereby increasing short-term costs. There will be a cost of around £11-22m from new admin burdens imposed by the UCPD.
Total: £58.6-£75.6 million	Total ongoing costs: £11-22 million Total one-off costs: £10-25 million

Consumers	
Benefits	Costs
Reduced consumer detriment	
If the UCPD led to 5% fall in consumer detriment caused by selling practices this could equate to a £100 million reduction each year. Reduced aggressive and high-pressure selling practices will reduce the estimated £30m lost to bogus traders each year by UK consumers.	There are no anticipated costs to consumers.

Section 1: overarching RIA

Should tackle other significant problems e.g. with scams, holiday clubs.	
Single Market	
Consumers should have greater confidence to shop cross border. This will give them access to a greater range and choice of products and services across the EU. It should also force business both in the UK and in the rest of the EU to improve quality, to innovate and to keep prices low.	There are no anticipated costs to consumers.
Reduced complexity of legislation	
The simple principled approach of UCPD should make it easier for consumers to understand when they have been subject to unfair practices and therefore increase their confidence and empowerment.	There are no anticipated costs to consumers.
Total: £130million	

Public sector bodies	
Benefits	Costs
There are no anticipated economic benefits to public sector bodies, but they will profit from an enhanced ability to tackle cases already falling under their responsibility.	Extending consumer protection to include new areas such as aggressive selling will result in one-off familiarisation costs to enforcers. There may be some ongoing costs to Trading Standards authorities and the courts, as well as costs for running awareness-raising campaigns and producing guidance.

£ million	Annual Benefits	Annual Costs	One-off costs
Business	58.6-75.6	11-22	10-25
Consumers	130		
Totals	188.6-205.6	11-22	10-25
Overall annual net benefit: £167-£195 million ⁵² This doesn't take into account the non-quantified costs above, or dynamic effects.			

⁵² 188.6-22=166.6, 205.6-11=194.6

SECTION 2: MINI-RIA ON IMPLEMENTATION

Introduction

Interpreting and applying the UCPD will not always be straightforward for enforcers, business or consumers. The Directive introduces a principles-based framework that applies to all business sectors. Because of its scope, its provisions have deliberately been designed to be flexible and adaptable, which can be confusing or ambiguous. In addition, the Directive introduces certain concepts and definitions that are new to UK law. All of this highlights the desirability of achieving an appropriate clarification of the Directive's provisions. This needs to be set against the constraint that the Directive sets a standard that has to be implemented and applied uniformly across all Member States.

Any combination of options set out in the subsections below is feasible. The Government may choose to provide guidance and/or clarification in the implementing legislation in certain instances and not in others.

The options considered below on are about:

- (A) Terms in the Directive
- (B) The relationship between the average and vulnerable consumer benchmark
- (C) The application of the average and vulnerable consumer benchmarks to Articles 6-9
- (D) The list of misleading actions, Article 6(1)

(A) Terms in the Directive

A1 – Use copy-out – transpose the Directive as currently drafted

Enforcers, businesses and consumers all need a degree of certainty about what is covered by the legislation and how each other and the courts are likely to interpret it. Copying out directly from the Directive without elaboration of ambiguous phrases might leave in place a degree of legal uncertainty.

This uncertainty could also reduce the effectiveness of UCPD by inducing unnecessary caution. Enforcement bodies might be unwilling to take action, even if they believed a practice was unfair, if they considered that there was a reasonable risk that the court might make a different interpretation. Equally, businesses may be put off from innovating in the way that they sell and market their goods and services to consumers if they are unsure how both enforcers and the courts will view their practices. Finally, consumers may not feel empowered if they do not understand the Directive or if they feel that enforcers are constrained by uncertainties over its interpretation.

Option A2 – As A1 but in addition, define terms more clearly in guidance

Additional guidance would give greater certainty on how the Government and enforcers think the Directive should be applied. Enforcers would have a clearer idea where to apply themselves and not unnecessarily risk taking cases that would be unsuccessful in the courts. Businesses could develop new approaches to advertising, marketing and selling practices on the understanding that these are unlikely to be unfair to consumers. Consumers would have a clearer understanding of their rights and whether particular practices are unfair. However, there is a risk that additional guidance could have the effect of constraining business behaviour by encouraging compliance with the letter rather than the spirit of guidance. Ensuring that guidance is drafted in a non-prescriptive manner could mitigate this, but it would still only be guidance.

Option A3 – Define terms more clearly in legislation

This option might seek to achieve greater legal certainty than described in option A1. However, the legal risks associated with greater clarification should not be underestimated. The Directive sets a standard that has to be applied uniformly across all Member States. The scope for clarifying ambiguities in the text is therefore constrained because the courts will be required to apply the implementing Regulations in conjunction with the Directive. In the case of a conflict, the Directive's interpretation will prevail and the certainty that the implementing regulations sought to achieve would prove illusory. Further, there is a possibility that such elaboration would lead to differences in applying the Directive in other Member States. These differences might lead to infraction proceedings being taken against the UK.

There are also downsides associated with introducing a high level of precision to the Directive's definitions and meanings. Such precision could be constraining. Business in particular may find that their freedom to respond to the Directive as they see fit is reduced and this may impose some costs as a result of potentially unnecessary clarifications. Enforcers may feel that too great precision will limit the number of instances where action can be taken against unfair practices. And greater elaboration arguably contradicts the spirit of the Directive, by encouraging compliance with the letter rather than the spirit of the law.

Conclusion

Respondents to the DTI consultation agreed that the best approach would be to copy-out the Directive in most circumstances and limit the amount of elaboration to a minimum. This would minimise the risk of inadvertent gold-plating. In light of the Directive's importance, they also thought that additional guidance would be essential. Guidance should be concise and non-prescriptive, and not seek to establish legal certainty. The DTI has therefore primarily opted for Option A2, though some minor elaborations may be needed. Where not highlighted already, these will be consulted on when the DTI consults on draft legislation early in 2007.

(B) The relationship between the average and vulnerable consumer benchmark

General costs, benefits and risks set out in (A) apply to these options, but there are additional issues. In deciding whether a practice is likely to distort the economic behaviour of consumers, the Directive uses the comparator of the “average consumer”. The “average consumer” is thus a critical concept in the UCP Directive. This average consumer has strong parallels with the “reasonable person” of English law, or the “man on the Clapham omnibus”.

During negotiations, Member States expressed concern that the application of the average consumer benchmark did not of itself provide sufficient protection for vulnerable consumers. For that reason, additional protections were included for certain classes of vulnerable consumer. However, some stakeholders subsequently expressed concern that the addition of these protections undermines the status of the average consumer as the primary benchmark underpinning the Directive. This matters because adopting the benchmark of the vulnerable consumer would require extensive changes to many traders’ business practices, notably by requiring them to provide more information to consumers.

Option B1 – Use copy-out: transpose the Directive as currently drafted

Concerns about legal certainty are particularly great with respect to this provision. Without clarification, some traders might feel that practices which would not be unfair when judged against the average consumer benchmark could nonetheless still fall foul of the vulnerable consumer benchmark. This may be more likely because it is always reasonably foreseeable that some credulous consumers will be misled, even by honest market practices. This may cause some traders to unnecessarily change their marketing behaviour.

Option B2 – Clarify that the professional diligence test applies to the “vulnerable consumer” benchmark

Clarifying that the professional diligence test applies to Article 5(3) would establish that practices could not be unfair unless they were not professionally diligent. This would render it less likely that traders would misinterpret the Directive and feel obliged to provide more information than was strictly necessary, thereby improving legal certainty. The risk of infraction with this option ought to be relatively low, as it is arguably implicit in the Directive that the professional diligence requirement applies to the whole of Article 5.

Conclusion

Respondents to the DTI consultation agreed with the Department’s view that the professional diligence test applies to the vulnerable consumer benchmark in Article 5. They also thought it important to clarify this in the implementing legislation. The DTI will therefore adopt option B2.

(C) The application of the average and vulnerable consumer benchmarks to the specific clauses of misleading and aggressive practices, Articles 6-9

Articles 6-9 set out in greater detail how misleading and aggressive practices are defined. Much like Article 5, these also make use of the concept of the “average consumer” in establishing whether a practice is unfair. However, Articles 6-9 do not explicitly state whether the modulations of the average consumer benchmark (art 5.2) and the vulnerable consumer benchmark (Art 5.3) apply to them. Given that the majority of unfair practices will be dealt with via the specific clauses on misleading and aggressive practices, rather than the general duty, it is important that their operation should be clearly understood.

Option C1 - Use copy-out: transpose the Directive as currently drafted

Copying out without further elaboration should not make much difference to the ultimate decision of whether a practice is unfair. However, there is a risk that enforcers and traders would misinterpret the Directive and fail to understand that the vulnerable consumer test also applies to Articles 6-9. This could increase compliance costs for businesses because they would always be required to assess the impact of a practice on the vulnerable against the broader principles of the general prohibition. Similarly, enforcers may incur additional costs trying to understand how to take forward an action for breach of the Directive. A way of mitigating this might be to clarify in guidance.

Option C2 – Clarify that the modulations of the “average consumer” and “vulnerable consumer” benchmarks also apply to Article 6-9

Enforcers, business and consumers would benefit from the increased legal certainty of being able to assess the impact of a practice on vulnerable consumers against the more specific provisions on misleading and aggressive practices. Furthermore, the risk of infraction proceedings is likely to be low, as this is arguably implicit in the Directive. Adopting C2 is unlikely to decrease the flexibility available to business, enforcers and the courts.

Conclusion

In the interest of legal certainty, the DTI has opted for Option C2. This approach was endorsed by the majority of consultation responses.

(D) The list of misleading actions, Article 6(1)

Article 6 provides that information is capable of being misleading if it is false; or, although factually correct, it is deceptive. For Article 6 to apply, information must be deceptive in relation to one or more of the elements specified in that article, for example in relation to price. Practices that contain information that is deceptive in relation to matters not specified in Article 6 have to be assessed for fairness against the general clause (Article 5).

Although the drafting of Article 6(1) is not wholly clear, the Department considers that the list of elements also applies to information that misleads because it is false. This is because the list of elements is intended to reinforce the maximum harmonisation approach of the Directive.

Option D1 – Use copy-out: transpose the Directive as currently drafted

If the copy-out approach was adopted, then traders and enforcers could potentially be uncertain about how the Directive worked in this regard. This might lead to inconsistent application of the Directive in particular by enforcers when attempting to take forward cases against rogue traders who might wish to challenge the basis on which the action had been brought. This could lead to delays and an increase in court costs. However, it is unlikely that this would affect whether or not a practice would be unfair because the outcome should be the same irrespective of whether or not the false information is assessed against the list of wide-ranging matters in that Article.

Option D2 – Clarify that a false statement relates to the elements listed in Article 6(1)

The alternative option is to clarify that the list of elements applies to false as well as deceptive information. This would remove the legal uncertainty described above and ensure consistent application. The risk of infraction is likely to be low here.

Conclusion

In the interest of legal certainty, the DTI has opted for Option D2.

SECTION 3: MINI RIA ON ENFORCEMENT

The Directive will need to be effectively enforced if it is to realise the general benefits outlined in section 1. As the Hampton Review⁵³ notes, if businesses do not face an effective deterrent it may be rational for them to break the law because the benefits of non-compliance may outweigh the costs of being caught. There are a number of options for enforcing the Directive. Their costs and benefits are considered below.

The options considered below for enforcement are:

- (A) Setting up a civil law regime
- (B) The use of self-regulation options
- (C) Responsibilities of code owners
- (D) Criminal sanctions for breaching the directive
- (E) Providing a route for civil redress

(A) Setting up a civil law regime

The Directive sets out a number of requirements and options establishing how the Directive must or can be enforced.

Article 11 sets an overarching requirement to ensure that “adequate and effective means exist to combat unfair commercial practices”. These means must include enabling persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices to take legal action or bring such actions before an administrative authority competent to decide on such complaints or initiate legal proceedings. The Directive gives Member States the flexibility to decide which of these facilities should be available.

In addition, Article 16(1) adds the UCPD to the Annex of the Injunctions Directive (98/27/EC) in place of the Directive on the Control of Misleading and Comparative Advertising (CMAD). The Injunctions Directive permits consumer protection bodies (‘qualified entities’) designated by the Member States to apply to the courts or competent administrative authorities for orders to require traders to cease conduct that constitutes a breach of any of the consumer protection directives listed in the Annex thereto and that harm the collective interests of consumers.

Part 8 of the Enterprise Act 2002 implements the Injunctions Directive in the UK. This will accordingly require amendment, by adding the UCPD in place of the CMAD.

The enforcement regime in Part 8 of the Enterprise Act 2002 broadly satisfies the requirements of Article 11 of the UCPD. This raises the possibility that Article 11 of the UCPD could be implemented via Part 8 of the Enterprise Act,

⁵³ “Reducing Administrative Burdens: effective inspection and enforcement,” Philip Hampton, March 2005

although some changes would be required to Part 8 to fully comply with Article 11. The main difference between Part 8 and Article 11 is that Part 8 only applies to infringements that harm the “collective interests of consumers” whereas the enforcement regime required by Article 11 makes no reference to the word “collective”. However, as set in the Government Response, we believe this does not matter in practice.

There are therefore two options for implementing the civil law enforcement requirements of the UCPD.

Option A1: Add the Directive to Part 8 EA02 and rely, with some modifications, on this meeting the requirements of Article 11.

Option A2: Set up a new injunctive regime meeting the requirements of Article 11, whilst also adding the Directive to Part 8 2002.

Costs and Benefits

Option A1: this option has the advantage of maintaining a single, coherent enforcement regime across the consumer field. Consultation with enforcers suggests that use of enforcement orders under Part 8 of the Enterprise Act is becoming both more common and more effective and does not impose burdens on legitimate businesses that comply with the law. However, there is a risk that the use of the Part 8 civil regime may not be seen as fulfilling the UK’s legal obligations transparently and failing to implement the Directive properly. It could also cause confusion over whether injunctions could be sought following one-off breaches of the Directive, as there is some current confusion in this regard with respect to Part 8 orders.

Option A2: having a separate injunctive regime would ensure that the Government had transparently met its legal commitments. It would also remove any residual uncertainty that the enforcement regime should be capable of stopping or preventing individual breaches of the Directive. However, establishing another route for enforcement could create confusion between the operation of two similar, but slightly different, civil enforcement mechanisms. Enforcement authorities might incur additional costs as a result of the need to train staff in the operation of two regulatory systems covering the same type of unfair behaviour that causes the same type of detriment.

Conclusion

Most respondents to the DTI consultation agreed with the Department’s view that the differences in terminology between the UCPD and the Injunctions Directive did not matter in practice. They thought the legal risk of infraction was therefore slight. In addition, many argued that establishing a separate, parallel enforcement regime would be unnecessarily complicated and confusing for business and enforcers. The DTI now agrees that the risk of non-compliance appears slight, and has therefore chosen Option A1.

A(iv)⁵⁴ Giving the OFT and Trading Standards Departments a duty to enforce and/or consider complaints

Existing consumer legislation often imposes a duty to enforce on certain bodies. For instance, the Trade Descriptions Act 1968 imposes a statutory duty on every local weights and measures authority to enforce its provisions (s25). Given the central role the Directive will play in the UK's consumer protection framework, there is a good case for including a duty to enforce on the OFT, trading standards services in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland trading standards services. This duty would be contained in the implementing legislation.

An alternative approach would be to introduce a duty to consider complaints. Existing Regulations implementing EC Directives, and which provide for their own system of injunctive relief⁵⁵, contain an obligation on the OFT and, in certain cases, other named enforcers to consider any complaint made to them (unless frivolous or vexatious) about a breach of those Regulations and to give reasons for their decision to either apply or not apply an injunction. No comparable obligation to consider complaints exists on the OFT or other general or designated enforcers under Part 8 of the Enterprise Act 2002. That is because Part 8 is intended as an additional enforcement mechanism to that which exists in the specified legislation to which that Part applies. The Government does not propose to make any changes to Part 8 in this respect.

Option A(iv)1: Do not impose a duty on OFT and trading standards departments to enforce the UCPD or consider complaints.

Option A (iv)2: Impose a duty on the OFT and trading standards departments to enforce the UCPD, but not consider complaints.

Option A(iv)3: Impose a duty both to enforce the Directive and consider complaints on the OFT and trading standards authorities

Costs and Benefits

Option A(iv)1: Not imposing either a duty to enforce or to consider complaints might be viewed as signalling a lack of commitment by the Government to place this key piece of legislation centre-stage in combating unfair practices. There is also a risk that resource-strapped enforcers may choose not to prioritise this core piece of legislation. This option would incur no costs.

Option A(iv)2: Imposing a duty to enforce would follow precedent in certain

⁵⁴ The RIA published with the consultation paper in December 2005 set out a number of sub-options in relation to Option A2. As Option A1 has been adopted, these are not included here. For ease of reference the numberings in this RIA follow those in the previous RIA.

⁵⁵ Control of Misleading Advertisements Regulations 1988, Unfair Terms in Consumer Contracts Regulations 1999, Consumer Protection (Distance Selling) Regulations 2000 and the Financial Services (Distance Marketing Regulations 2004

consumer law and signal the importance the Government places on this Directive. Although this goes beyond the requirements of the Directive, not imposing the duty would weaken consumer protection. Its adoption also avoids the risks of the Directive being under-prioritised by enforcers.

Not imposing a duty on the OFT and trading standards departments to consider complaints would be a departure from certain precedent and might be perceived as a weakening of Government resolve to have effective enforcement of consumer protection laws. On the other hand, the absence of such a specific duty in Part 8 of the Enterprise Act has not prevented the EA from becoming an effective enforcement tool.

Option A(iv)3: Imposing a duty on the OFT and trading standards departments to consider complaints under the UCPD could have quite significant resource implications given the very wide scope of the Directive. As with option A(iv)2, this would be going beyond what is required by the Directive. Some have argued that a dedicated team, comparable to the Unfair Contract Terms Unit, would have to be established at the OFT to consider and deal with such complaints. On the other hand, it could be argued that imposing a duty to consider complaints would signal the Government's determination to set the UCPD centre-stage in combating unfair practices.

Conclusion

Most consultation responses agreed that there should not be a duty to consider complaints. To do so would mean over-stretching enforcers who have scarce resources. Some disagreed, however, as some respondents felt that there are certain areas that are not adequately enforced. The Department does not share these views, and has therefore ruled out Option A(iv)3.

Most consultation responses also agreed that there should be a duty to enforce. However, the OFT did not think that a duty to enforce should apply to itself. It feared that this would hamper its autonomy to choose its enforcement priorities. The Government disagrees and has opted to place a duty on OFT and trading standards departments.

(B) The use of self-regulation options

Article 10 of the UCPD contains a provision giving Member States the option to allow the control of unfair commercial practices through the use of voluntary codes of practice. This is provided statutory enforcement mechanisms exist.

The type of arrangement envisaged in Article 10 is similar to that which currently exists in the UK in relation to misleading advertising in the non-broadcast and broadcast media. Here, the Advertising Standards Authority is responsible for ensuring compliance with three Advertising Codes for TV, radio and non-broadcast advertising and sales promotions. Under the Control of Misleading Advertisements Regulations (CMARs) 1988 the OFT is empowered to apply for injunctions to stop the use of misleading non-broadcast advertising. For advertising in the broadcast media, OFCOM is the

legal enforcer for CMARs. In exercising its powers these enforcers have regard to encouraging the control by self-regulatory bodies of advertisements.

The Government proposes to encourage the control of unfair commercial practices through self-regulatory codes where these contain effective means to ensure compliance with the code. In particular, it is the Government's intention not to affect the self-regulatory regime that exists in relation to misleading advertising in the non-broadcast and broadcast media, operated by the Advertising Standards Authority (ASA).

Option B1: Do not use certain codes to control unfair commercial practices.

Option B2: Use certain codes to control unfair commercial practices.

Costs and Benefits

B1: Failure to encourage control by self-regulatory bodies would risk placing much greater burdens on public enforcers. For instance, the Advertising Standards Association (ASA) deals with thousands of complaints about misleading advertisements each year. In the absence of the ASA, the burden of investigating these complaints would fall entirely on the OFT and other designated enforcers. This would be likely to lead to a much less effective enforcement regime.

B2: This will ensure that other established means of dealing with complaints continue to be supported and play an important role in combating unfair commercial practices for the benefit of consumers generally. It would also ensure that the resource implications of enforcement on the OFT and other enforcers are minimised as a wider range of bodies would be able to secure the cessation of unfair commercial practices, especially misleading advertising. It would also signal the Government's commitment to furthering the use of responsible self-regulation.

Conclusion

Business and enforcers thought that some codes should be used to combat unfair commercial practices. Consumer groups were more cautious about the use of codes, arguing that this was the role of statutory enforcers. In line with its commitments to encourage the use of self-regulation, the DTI has opted for B2. At this point in time, appropriate codes are the Codes of Practice enforced by the ASA.

(C) Responsibilities of code owners

Article 11(1) of the UCPD allows Member States to decide whether enforcement action can be taken against a code owner where the relevant code promotes non-compliance with legal requirements.

C1: Do nothing.

C2: Make it possible for civil action to be taken against code owners where their codes promote non-compliance with legal requirements.

C3: Make it possible for civil action to be taken against all persons, including code owners, who promote non-compliance with legal requirements.

Costs and Benefits

C1: Not allowing action to be taken against code owners where codes promote non-compliance with the UCPD partially reflects the current legal situation that prevents public authorities from taking action against code owners in the majority of instances (one exception is where a code owner deliberately incited their members to commit a criminal offence).

C2: This goes further than the Directive requires. This is justified because the ability to bring a civil action against a code owner where the relevant code promotes non-compliance with legal requirements under the UCPD would be a more proportionate and cost-effective response than bringing actions against individual traders who may inadvertently use unfair commercial practices by following the advice given in a code. Though there is a small risk that this option might deter code owners from operating, this risk is likely to be low. That is because code owners are unlikely to knowingly promote non-compliance with legal requirements and therefore any inadvertent non-compliance would normally be resolved through voluntary agreement with an enforcer. Only in the very unlikely event that agreement could not be reached would formal court action be considered. This reflects the approach taken in the Unfair Terms in Consumer Contracts Regulations 1999, which provides for action to be taken against any person (including a code owner) recommending use of an unfair term in a standard form contract between a business and a consumer.

C3: This goes further than the Directive requires. This would be a deterrent against any person who might promote the use of an unfair commercial practice. This follows more closely precedent in the Unfair Terms in Consumer Contract Regulations 1999 and closes a potential loophole in enforcing the law.

Conclusion

Some stakeholders, especially enforcement stakeholders, agreed that being able to take action against persons would allow them to tackle potential harm at source. In particular, this would avoid having to take action against traders who were merely following the advice provided by code bodies. Others disagreed, however. They expressed concern that Options C2 and C3 would inhibit the use of self-regulation, notably in relation to pre-clearance advice. The DTI disagrees with this view. Sanctions for breach of this option will be civil injunctions only, and not criminal penalties. And Part 8 of the Enterprise Act establishes that, except in serious instances, enforcers are obliged to discuss potential infractions with those responsible before they can seek a

court undertaking. This should avoid injunctions for innocent or accidental breaches of the law. Nonetheless, we agree with concerns raised by stakeholders about potential gold-plating in relation to Option C3. For this reason, we have opted for Option C2.

(D) Criminal sanctions for breaching the directive

The Directive allows Member States to introduce and/or maintain criminal sanctions for the use of unfair commercial practices. Criminal sanctions currently exist for many areas of consumer law covered by the UCPD, such as the Trade Descriptions Act 1968 and Part III of the Consumer Protection Act 1987. If criminal offences are to be maintained for breaches of such non-EC derived legislation that fall within the scope of the UCPD and its maximum harmonisation requirements, then this legislation will, at the very least, need to be amended to conform with the Directive's requirements. This would mean introducing the transactional decision test based on the benchmark of the average consumer before an offence was established.

In addition, the UCPD introduces legal provisions that are new to the UK. Notably, these include: the general prohibition; specific rules on misleading omissions and aggressive practices; and many of the outright prohibitions contained in the Annex. Alternative options therefore include making breach of some or all of these provisions criminal offences.

D1: Repeal all provisions giving rise to criminal sanctions in non-EC derived legislation falling within the scope of the Directive and its maximum harmonisation requirements, and rely instead solely on the civil enforcement regime underpinning the UCPD.

D2: Amend criminal sanctions in existing non-EC derived legislation to conform with the requirements of the UCPD.

D3: As option D2, but also introduce criminal sanctions in the Regulations implementing the UCPD for engaging in aggressive commercial practices.

D4: As option D3, but extending criminal sanctions to include breaches of other new provisions of the UCPD, e.g. the Annex practices which are prohibited under all circumstances; and/or misleading omissions; and/or aggressive practices.

D5: Make it a criminal offence to breach all provisions of the Regulations implementing the UCPD.

Various combinations of these options are also possible, depending on the methods chosen for implementing the UCPD into UK law. For example, stakeholders might indicate a preference to amend certain key pieces of existing legislation (such as the Trade Descriptions Act and Part III of the Consumer Protection Act) to comply with the requirements of the UCPD; while repealing other legislation. Enforcement options are dependent on the choices made in this regard.

Costs and Benefits

D1: Removing criminal sanctions might save money both in terms of court and prison costs. The continuing availability of civil sanctions to enforce the UCPD should still allow the realisation of many of the general benefits described in section 1. In the period April 2005 to March 2006, there were 389 prosecutions under the Trade Descriptions Act 1968 and 24 prosecutions under Part III of the Consumer Protection Act 1987⁵⁶. Of these prosecutions, 19, all under TDA, resulted in custodial sentences (typical length of time might be three months). Each prison place costs approximately £27,850 per year⁵⁷, and criminal procedures impose court costs on the public purse and are more expensive than civil routes. Furthermore, having just one sanctions regime for UCPD could make it easier on an ongoing basis to enforce – meaning that savings could be even greater than envisaged here.

The lower burden of proof in civil proceedings may mean that enforcement authorities are more likely to have cases that they feel more confident of winning, and hence be prepared to take to court. Hence we might expect an increase in civil court cases. It should be noted, though, that the vast majority of civil disputes where action is begun by trading standards departments are resolved by voluntary agreement without ever reaching the courtroom.

However, enforcers have voiced concerns that removing criminal sanctions would result in a less effective enforcement regime. This in part because criminal sanctions are thought to have an important deterrent effect. It is also because civil sanctions are argued to be less effective against those few traders who deliberately flout the law and who do not easily reveal their true identities to enforcement authorities unless threatened with police arrest for a criminal offence. Enforcers argue that removing criminal sanctions might reduce the Directive's ability to lessen consumer detriment.

Finally, there are likely to be one-off costs to enforcers in training and familiarisation with the new regime. By contrast, ongoing costs to enforcers should be the same or lower.

D2: Amending criminal sanctions in non-EC derived consumer legislation would still ensure that these would continue to be available to punish traders for the worst practices currently dealt with under, for example, the Trade Descriptions Act (TDA). The TDA is used for a wide range of offences including misdescription of second-hand cars and home repairs. If the Government decided to repeal such legislation (see Section 4), then it would aim to retain these offences and associated powers of investigation and defences as best possible in the legislation implementing the Directive.

⁵⁶ Source: OFT Annual Report and Resource Accounts 2005-
<http://www.oft.gov.uk/News/Annual+report/resource.htm>

⁵⁷ Cost per prison place taken from HM Prisons Service Annual Report 2004-05, this figure is for state-run prisons <http://www.hmprisonservice.gov.uk/assets/documents/10000DFDappendices1-5.pdf>

As with all options, there would be one-off costs to central Government to implement changes and one-off costs in terms of training and education for trading standards departments. These costs are likely to be lower than for options D3, D4 and D5 as this option requires the fewest changes to the enforcement regime.

One possible drawback with this option is that it does not introduce criminal sanctions for new provisions of the UCPD such as aggressive practices. This could mean that provisions for aggressive practices are not subject to a strong-enough deterrent for true rogue traders, whereas the harm caused to consumers by such practices can be significant.

D3: Whilst civil sanctions work well for most businesses, there are concerns that a different approach is required for those few unscrupulous traders who have little regard for the law. Introducing criminal sanctions to the provisions on aggressive practices would ensure that these traders could be punished for aggressive behaviour and might act as a stronger deterrent. In addition, criminal sanctions provide enforcers with greater investigative powers. Persistent offenders can cause considerable harm to – often elderly and vulnerable – consumers, so it is important that enforcement activity can address these problems (an illustration of which is the amount of money lost to bogus traders every year, as detailed in section 1). This view was strongly echoed by enforcers at workshops hosted by the DTI (see box below).

However, there are higher costs associated with criminal sanctions. For example if 10 people⁵⁸ per year were to receive custodial sentences of 3 months each, the additional cost to the National Offender Management Service would be approximately £70,000⁵⁹. In addition there would be higher court costs relative to the costs for bringing civil action, and these would fall on the public purse (though court costs can be reclaimed by trading standards departments in England & Wales following successful prosecutions). Further, there is a higher burden placed on businesses that are subject to criminal investigation, though the vast majority of these businesses will be acting unlawfully. Finally, we would expect one-off costs to enforcers in adapting to the new regime.

⁵⁸ This is a low estimate. See first paragraph of D1 above.

⁵⁹ Again assuming a cost per prison place of £27,850 taken from HM Prisons Service Annual Report

Criminal Sanctions and Aggressive commercial practices – feedback from an enforcers' workshop

Doorstep selling, aggressive practices: workshop participants looked at a case where a trader had used aggressive selling techniques, normally taking the form of staying in consumers' homes, to persuade them to take out contracts to buy beds. In all cases notices of cancellation rights were given and no other offence was committed. Participants felt that the new provisions of UCPD were potentially powerful new protections for consumers. However, there were some concerns about the practicalities of proving that an offence had been committed. Participants argued that it would not be possible to ascertain the identity of rogue, often itinerant, traders commonly involved with this sort of practice unless they were able to threaten them with arrest for a criminal offence. For such traders, it was felt that criminal sanctions were required if the new provisions were to act as an effective deterrent against aggressive practices.

D4: extending criminal sanctions also to cover breaches of other new provisions (e.g. the general prohibition; and/or misleading omissions; and/or some or all of the Annex prohibitions) could further strengthen the overall effectiveness of the enforcement regime. For example, many of the practices associated with mis-selling holiday clubs described in Annexe 3 would be prohibited under UCPD. As noted for option D3, there are concerns that civil enforcement routes does not adequately punish rogue traders who persistently flout the law. However, this option would involve higher costs than option D3 in terms of additional court time and increased custodial sentences.

D5: These sanctions might result in a reduced probability of getting caught as enforcement resources get channelled into the search for evidence in a few cases in order to bring a case before the courts. And the benefits associated with criminal sanctions need to be kept in perspective. Evidence suggests that, for many purposes, voluntary undertakings backed where appropriate by enforcement orders or undertakings to the court or, in most cases, the enforcer (civil routes) are proving effective for limited resource costs. Nonetheless, with higher penalties for all infringements of the UCPD, this option could provide a strong deterrent effect and a good way to realise the general benefits set out in section 1. Prosecutions are already primarily focussed on problem sectors. In 2004-05, 29% of TDA prosecutions were in relation to transport, of which the vast majority (almost 80%) were in relation to second-hand car sales⁶⁰. This indicates that the problem of prosecutions being taken for minor wrongs appears to be small. And one area where additional protections, as represented by Option D5, might prove particularly beneficial is in relation to mock auctions, an area of notorious consumer detriment.

⁶⁰ Source: OFT Annual Report and Resource Accounts 2005
<http://www.of.gov.uk/News/Annual+report/resource.htm>

It is expected that the majority of infringements of UCPD will fall under the categories of misleading or aggressive practices. As a result, the additional costs of imposing criminal sanctions in option D5 will not be much greater than with option D4.

There will also be some one-off costs of implementation, such as in changing legislation and training enforcers, as well as educating the business community.

Conclusion

The Government Response to the last consultation set out its view of the appropriate enforcement regime for fair trading law. This included retaining criminal sanctions for dealing with the most serious and egregious offences. This conclusion is in line with the findings of the Macrory Review of Regulatory Justice, which emphasises the importance of providing enforcers with a wide range of enforcement tools so that enforcers can deal effectively with the entire range of enforcement activities, from assisting compliance to prosecuting truly criminal or rogue operators.⁶¹

In light of this, and given the Government's intention to repeal substantive pieces of consumer law, notably including the TDA, it has primarily opted for D5. However, as noted in the Government Response, certain provisions will not be subject to criminal offences where this might appear to undermine self-regulatory mechanisms.

Some stakeholders have expressed concern that criminal sanctions might undermine the use of self-regulation. This is because traders would be reluctant to adopt codes and the higher commitments they impose if they might be prosecuted for doing so. This is despite the fact that existing self-regulatory regimes exist side by side with criminal offences, such that any misleading descriptions made in relation to goods and services is already a criminal offence. For instance, the use of false trade descriptions in advertisements is currently a criminal offence.

The Government consequently does not agree with these concerns. We do not believe that these proposals substantially alter the current enforcement regime, where the division of responsibilities between enforcers and self-regulatory bodies generally works extremely well. And in certain, serious circumstances, we consider it appropriate for enforcers to be able to prosecute where self-regulatory bodies prove unable to take effective action. Nonetheless, in order to mitigate these concerns we propose introducing a provision into the implementing regulations to the effect that enforcers are to have regard to the desirability of encouraging control by self-regulatory bodies when enforcing the prohibitions. Such a provision is new: it does not currently exist in relation to the criminal enforcement. In addition, breaches of certain

⁶¹ *Regulatory Justice: Sanctioning in a post-Hampton World*, Cabinet Office Better Regulation Executive

Annex practices⁶² and Art. 6(2)(b) (breaches of commitments in codes of conduct) will not be made offences. This should help counter fears that enforcers would prosecute traders who inadvertently breached code commitments.

Other stakeholders disagreed with the Government's vision of a fair trading regime that included criminal sanctions. They argued that fair trading offences should best be dealt with by civil sanctions only. If not, then offences should only be committed where intent or recklessness could be proven (*mens rea*), rather than as at present for strict breach of a substantive provision (strict liability).

The Government agrees that the primary mechanism for dealing with fair trading enforcement offences should not be criminal prosecutions. Our view is that in a modern fair trading framework the main enforcement mechanism for non-serious breaches ought not to be criminal prosecutions. Alternative tools, including civil sanctions, will normally be more appropriate. Yet there continues to be a need for criminal sanctions and associated investigative powers to tackle true rogue and unfair trading activities. For these reasons, the UCPD will be enforceable both by civil injunctive action and by criminal prosecutions.

We will consult on whether this should be achieved by making the UCP offences subject to a *mens rea* requirement.

(E) Providing a route for civil redress

The Directive leaves it to Member States to decide whether to provide individuals with a private law right to seek redress for economic loss suffered from an unfair commercial practice.

Consideration is limited here to economic loss, rather than other harm such as distress or anxiety.

E1: do nothing. There are existing routes for consumers to seek redress for economic loss in law. For example, a consumer harmed by a misleading communication could seek redress through an action for breach of contract. However, the UCPD introduces new protections and strengthens existing protections, for example in relation to aggressive practices, so pursuing this option could leave consumers without a route for redress in these areas.

E2: provide a cause of action for some breaches of the UCPD, including aggressive and misleading practices. This option could reduce risk of spurious or opportunistic claims by focusing on specific aspects of the Directive.

⁶² Annex practice 11 (using editorial content to promote a product without making that clear to consumers); and practice 28 (directly exhorting children to buy advertised products or persuade their parents to do so).

E3: provide a cause of action for all breaches of the UCPD. This would have the advantage of simplicity in providing consumers with rights for any breaches of the Directive.

Costs and Benefits

E1: not introducing a right of action for consumers would avoid the small risks of consumers pursuing frivolous claims. There is already a considerable body of law protecting consumers in the UK, and much of that provides individuals with the opportunity to obtain civil redress. Given existing rights, some might question the added value of a new right for individuals. In addition, there is arguably a small risk that providing a new right of action could make the existing legal framework more difficult to understand.

E2: There may be certain areas where providing a new private law right could have greater risks of unintended consequences than others. For instance, some may argue that providing a right of action for breach of the general prohibition could lead to spurious claims. That is because the general prohibition is phrased flexibly, and is therefore more open to being interpreted in differing ways. Similar concerns may arise in relation to misleading omissions. By contrast, these concerns appear to be less strong in relation to misleading actions, aggressive commercial practices and the 31 practices that are unfair under all circumstances. For this reason, this option represents a lower risk to honest traders than option E3.

In addition to consumers benefiting from redress, introducing individual rights to certain areas could strengthen overall enforcement. This is because the threat of having to pay compensation to consumers as well as the increased probability of being caught may act as a stronger deterrent to traders not to act unfairly.

Improving enforcement through this route should not impose costs on the public purse because the civil courts are self-financing. Consumers will have to pay court fees to bring an action, whilst businesses defending cases will need to fund that defence. However, costs of defending actions should rarely fall on traders that treat customers fairly as the need for consumers to pay to bring an action makes them likely to pursue only strong cases, thereby minimising the risk of frivolous claims.

E3: Making the entire Directive actionable arguably has merit in terms of simplicity. This means that when a consumer suffers economic harm, both advisors and consumers would only need to refer to the one piece of legislation, rather than consider whether causes of action existed in many areas of law. This would in turn make it easier to empower consumers to understand and enforce their rights.

However, with this option there is an increased risk of spurious or frivolous claims relative to option E2. As with option E2, the cost of taking the action will fall on the consumer and the trader to defend. Realisation of the benefits will depend on consumers using their rights.

Conclusion

Stakeholder responses were divided on this issue. Business stakeholders argued that a right of action added little value over and above existing causes of action. Consumer and enforcer stakeholders disagreed. They thought that the cause of action would be useful in areas where the Directive covered new ground – notably in relation to misleading omissions and aggressive commercial practices. They also thought that concern over court action would make traders more likely to comply with the law.

The Government has consequently decided not to adopt any of these options. Whilst there are potential benefits associated with enhancing existing rights, it shares concerns about potential unintended and adverse consequences and the impact of introducing new rights on existing rights. We are therefore in discussion with the Law Commission to seek their assistance in considering this issue further.

SECTION 4: MINI RIA ON SIMPLIFICATION

Existing legislation affected by the Directive's maximum harmonisation requirements has, at the very least, to be amended to conform with UCPD's tests and principles.

Such legislation will need to incorporate the "transactional decision" test based on the benchmark of the "average consumer" (or in certain cases the "vulnerable consumer"). Prescriptive information requirements will only be permitted where there is an "invitation to purchase". Any additional information requirements will either need to be repealed or amended. They would be amended so that they only apply in circumstances where failure to disclose the information in question is, in the context of the representation, an omission of material information for an average consumer to take an informed decision. However, amendment rather than repeal would result in a complicated offence for no gain.

Wide-ranging simplification

The UK could comply with maximum harmonisation by making the minimum changes outlined above. However, the current consumer protection framework is fragmented and lacks coherence⁶³. We have committed ourselves to simplifying consumer legislation where possible, in particular when transposing the UCPD. Such simplification would bring legal clarity, making it easier for consumers to understand their rights. It would also make it easier for business to understand their obligations. And enforcers would only need to look at one piece of legislation in order to gauge when traders were behaving unfairly. An indicative list of the laws that will require amendment is at Annexe 6.

The impacts on business

Although larger businesses welcome the move to fewer and more general laws, the research carried out by Durham Business School found that the majority of smaller business were reluctant to see such changes because:

- they are familiar with the current law and don't want to see new law, even though they estimated that the costs of new law to them would be negligible;
- they prefer prescriptive law which tells them exactly what they need to do, rather than having to interpret what they should do to stay within the law.

Options for simplifying existing legislation

The main options for dealing with existing legislation are:

(A) Do nothing

⁶³ A Fair Deal for All: Extending Competitive Markets: Empowered Consumers, Successful Business, DTI June 2005, pp. 8-9

- (B) Amend existing legislation to conform with the UCPD.
- (C) Repeal existing legislation that overlaps with UCPD.

Different options may be suitable for different pieces of legislation. We can repeal some pieces of legislation and amend others. We have considered all the pieces of legislation separately in the Government's response. Below is a general look at the type of costs and benefits from the options. In this mini RIA we look at two pieces of legislation in detail (the Trade Descriptions Act 1968 and the Consumer Protection Act 1987) for illustrative purposes.

Option A: Costs

Failure to make any of the required changes to existing legislation would lead to infraction proceedings against the UK for breaching EC law. Furthermore, it would not tackle the problems of consumer detriment and Single Market barriers outlined earlier in the RIA. It was precisely because of this need to improve the functioning of the Single Market that the Directive adopted the maximum harmonisation approach.

Option A: Benefits

Doing nothing would mean the benefits described below would not be realised. It would not create new costs.

Option B: Costs

This offers no simplification of the current law and would complicate the law further, which may confuse users of the law.

Option B: Benefits

Amending existing legislation is likely to be the lowest cost option for business and enforcers in the short-run because this option involves the least change.

Option C: Costs

The drawback of this option is that rules with which business and traders are familiar will be replaced with untried and untested legislation. This problem is enhanced by the more general principals-based nature of the Directive, as opposed to the more prescriptive nature of much existing legislation. Together this may result in legal uncertainty for several years until case law is established.

Legal uncertainty can be relieved through guidance. The DTI is currently drafting guidance with the Office of Fair Trading, to be published before the Directive comes into force. We will consult on a draft of this guidance early in 2007.

Option C: Benefits

This option will achieve simplification of legislation. It will not reduce consumer protection, as business will need to comply with the Directive's requirements.

Benefits will primarily come from not having to check compliance against several pieces of overlapping legislation. This will bring improved business understanding of legislation and enhance consumers' understanding of their rights

The Durham Business School study suggests that financial savings for existing businesses from having to consider less legislation are likely to be extremely modest. New businesses looking at the legislation for the first time are more likely to benefit. Also, consumers' should find it easier to understand their rights. It is likely that the benefits of this option will accrue over the longer term.

Business to business practices

In addition to the options above there is also an issue about parallel regimes. UCPD only covers business-to-consumer legislation. Some of the overlapping 29 pieces of legislation cover both business-to-consumer and business-to-business practices. For these pieces of legislation we also need to decide what to do with the business-to-business provisions.

If they are not altered or repealed (in the same way as the business-to-consumer practices are as in the options above) then additional parallel regimes would be created. In practical terms, this means that traders will need to consider whether their practice is part of a business-to-business transaction or a business-to-consumer transaction to know which law to apply. This could also make enforcement more difficult as unscrupulous traders challenge enforcement action on technicalities about whether their practice is directed at consumers or businesses. These issues are considered in more depth in the section 4 (a) below on the Trades Descriptions Act 1968.

Decisions on repealing or amending

We have decided to partially⁶⁴ or wholly repeal 22 pieces of legislation and retain the remaining 7. The explanations for these decisions are given in detail in the Government Response. As an example we have included a detailed look at the TDA and the CPA Part III in the text box below.

Trade Descriptions Act 1968

The Trade Descriptions Act 1968 (TDA) protects businesses and consumers by ensuring that they have the correct information when considering buying a good or service. It contains two main offences (1) applying a false trade

⁶⁴ Where the repeal is only partial, this is because the UCP only replaces sections of the legislation and not the whole thing. To avoid losing consumer protections, in these cases the repeal has to be partial.

description to goods or supplying goods with a false trades description and (2) knowingly or recklessly making a false statement about services, accommodation or facilities.

In addition the Control of Misleading Advertising Regulations 1988 (CMARs, implementing EU Directive on Misleading and Comparative Advertisements, MCAD) prohibits misleading business to business trade descriptions and provides the business protections from the TDA.

In all the options below the UCPD will also govern unfair practices towards consumers under the Unfair Commercial Practices Regulations (UCPR) which will provide the consumer protections from the TDA.

Option 1. Amend the business to consumer aspects of the TDA. This would require adding a transactional decision test to the TDA for when a false trade description or statement is directed at consumers. This would not need to be introduced for false descriptions aimed at businesses. Doing so would create different regimes under the TDA for false descriptions towards consumers and businesses. The TDA would also exist alongside UCPR and CMARs.

Option 2. Amend all of the TDA. This would require a transactional decision test to cover all the TDA. UCPR and CMARs would also apply.

Option 3. Repeal the business to consumer aspects of the TDA. In this case, false descriptions and statements directed at consumers would be assessed against the UCPR. However, this would include provisions equivalent to the TDA's criminal sanctions, powers and defences into the UCPD if its effect is to be fully reproduced for business-to-consumer practices. Business to business practices would continue to be assessed against the TDA and CMARs.

Option 4. Repeal all of the TDA. The UCPR would be relied on to provide the TDA's protections for consumers and CMARs for businesses. As before, the TDA may only be completely replicated if the corresponding criminal offences, powers and defences were imported into provisions implementing the UCPD (and also CMARs in this case). As the UCPD covers only business-to-consumer practices there may be some resentment from legitimate businesses that would see these changes as unnecessary.

	Business to consumer law	Business to Business law	Number of different sets of rules
Option 1 Amend B2C TDA	Amended TDA & UCPR	TDA CMARs	4 (2 new)
Option 2 Amend all TDA	Amended TDA & UCPR	Amended TDA CMARs	3 (2 new)
Option 3	UCPR	TDA	3 (1 new)

Repeal B2C TDA		CMARs	
Option 4 Repeal all TDA	UCPR	CMARs	2 (1 new)

Conclusion: Option 4 (repealing all of the TDA) provides the simplest system.

Part III of the Consumer Protection Act 1987

Part III of the Consumer Protection Act 1987 (“the CPA”) makes it an offence for a trader to give consumers a misleading price indication about goods, services, accommodation or facilities. It applies however a price is given – whether in a TV or press advertisement, on a website, in a catalogue or leaflet, on notices, price tickets or shelf-edge marking in stores, or if given orally, for example on the telephone. This piece of legislation is quite flexible and is backed up by a code of practice.

The Code of Practice for Traders on Price Indications Approval Order 2005 is intended to guide traders in avoiding giving misleading price indications and to promote best practice. Not complying with the Code is not a criminal offence. However, it has evidential effect in court to establish whether a person has committed an offence under Part III of the CPA.

Option 1. Amend Part III of the CPA (keep the code). This would require adding a transactional decision test to the CPA and amending certain definitions to bring them into line with the UCPD (the Code may also need amending). Part III would then co-exist alongside the UCPD and provide similar protections. The Code would continue to have evidential effect in any prosecutions brought for contraventions of Part III of CPA.

Option 2. Repeal Part III of the CPA (remove the Code). This approach has the advantage of reducing the number of laws that traders have to comply with. This approach would mean that that the Code would also have to be repealed because it would lose its statutory basis. Options then would be:

Option 2a. Not replacing the code. Rely instead on the guidance accompanying the regulations implementing UCP Directive. This might provide high-level guidance only.

Option 2b. Reproduce the code. The detailed guidance contained in the Code could be reproduced (possibly as part of UCPD guidance). Unlike the Code this guidance would cease to have evidential effect specified in legislation. The courts may still wish to take it into account in deciding whether a trader has committed a misleading action

	Part III of CPA	Status of Code
Option 1	Amended so overlaps	Would still have evidential

	with UCPD	effect
Option 2a	Repealed – UCPD only	Use high-level UCPD guidance only
Option 2b	Repealed – UCPD only	Reproduce code as guidance only

Conclusion: Option 2b results in the simplest legislative situation and retains the code for guidance, which consultees said they wished to see. This was the option preferred by stakeholders.

Assessment of administrative burden reductions

A Government-wide exercise has been carried out to provide Departments with an indication of the costs each regulatory administrative burden imposes on business. External consultants (PricewaterhouseCoopers, or PwC) have measured the cost associated with complying with administrative tasks contained in all legislation in force before May 2005. The results of this exercise for DTI will be published later in the year⁶⁵.

The administrative costs associated with the 22 pieces of legislation which will be repealed by the UCPD are £11.6m. In the short term, business is likely to adopt a conservative approach, and continue carrying out the obligations that have been removed, in order to reduce the risk of engaging in an unfair commercial practice. This expectation is based on focus group research by Durham Business School and extensive consultation with businesses. This is the case because, although UCPD does not impose many specific obligations⁶⁶, businesses must not engage in unfair commercial practices. Many businesses are likely to continue carrying out the obligations that are removed, at least in the short term, in order to reduce the risk of engaging in an unfair commercial practice.

For example, the Code of Practice for Traders on Price Indications currently provides detailed advice on how not to give a misleading price indication. Some businesses may consider this the most cost-effective way to meet the requirement not to engage in unfair commercial practices and so continue the practice.

Longer-term savings

We expect that in time businesses may alter their practices so that they comply with the new, flexible provisions in a more cost-effective way. These changes in behaviour will be led by innovative businesses. But as new case-

⁶⁵ Department of Trade and Industry, Administrative Burdens Measurement Exercise, 2006

⁶⁶ see earlier text on commercial practices where there is an invitation to purchase in section 1, page 18

law develops, and as businesses see how their experimental competitors act, we hope the changes will become widespread.

Other practices might be abandoned in the future. We have made some estimates of these savings. Larger businesses with in-house legal expertise are likely to innovate in the way they comply with the law. This will reduce the cost of complying with those information obligations that remain (i.e. £309m - £11.6m that we assume is saved from the Price Marking (Food and Drink Services) Order). At this stage, a reasonable assumption is that this might be a reduction of the order of 5% -10%. This might result in approximately £15m - £30m of savings.

Some additional savings are likely to come from easier familiarisation with the law. In order to comply with some information obligations affected by UCPD, businesses face ongoing⁶⁷ familiarisation costs which have been estimated to be at least £20 million⁶⁸ per year. If we assume that, as UCPD will replace several rules, these familiarisation costs will be reduced by 10-20%, we have an indicative saving of approximately £2-£4m.

In order to get a better understanding of the true impact of UCP on administrative burdens we will conduct a review in 2010, when the legislation has been in place for 2 years and practices are likely to have changed. This will give more accurate indications of the savings than the estimates above.

Total savings

The DTI Simplification Plan to be published later this year reflects admin burden savings for business in the order of £7-35m per annum. This range is calculated by considering the range of new costs (£11-£22m, calculated on page 22) and the range of savings (£28.6-£45.6 million⁶⁹). This gives an overall range of £6.6 (28.6-22) to £34.6 (45.6-11) million.

⁶⁷ Rather than one-off familiarisation costs of the new legislation, as considered in section 1 page 17.

⁶⁸ This is a conservative estimate based on some example information obligations considered in the PwC study.

⁶⁹ $15+2+11.6 = 28.6$, $30+4+11.6 = 45.6$

Annexe 1 – Breakdown of OFT complaints data⁷⁰

Table 1. Top ten complaints by sector – all complaints

Home maintenance, repairs and improvements	83,069
Second-hand motor vehicles	63,608
Other personal goods and services	49,142
Radio, TV and audiovisual equipment etc.	35,496
Large white goods and major fixed appliances	34,950
Other professional services	33,847
Upholstered furniture	33,519
Food and drink	29,722
Personal computers and related hardware	29,339
Clothing and clothing fabrics	28,498

Source: OFT annual report 2003

Table 2. Top ten complaints by sector – selling techniques

Other professional services	22,934
Other personal goods and services	20,195
Betting, competitions and prize draws	18,341
Second-hand motor vehicles	13,695
Home maintenance, repairs and improvements	12,524
Food and drink	11,337
Clothing and clothing fabrics	7,831
Holidays	6,707
Mobile phones and services	6,595
Radio, TV and audiovisual equipment etc.	4,768

Source: OFT annual report 2003

⁷⁰ Consumer complaints relating to inadequate goods and services are available from a number of different sources. Figures presented here are compiled by the local authority trading standards service, local authority environmental health departments and some advice agencies. These organisations voluntarily submit quarterly returns to the OFT systematically classified by the specific goods and services and the trading practices that gave rise to the complaint.

Most, but not all, local authorities provide returns and the number of returns varies slightly from year to year. The figures reflect only those complaints brought to the attention of trading standards, environmental health departments and advice agencies which are reported to the OFT. They exclude complaints made to regulatory bodies (eg OFCOM, OFWAT, OFGAS), government departments (other than the Northern Ireland Department of Economic Development Trading Standards Branch), representative bodies (eg National Consumer Council), and trade associations.

Most occasions when consumers are dissatisfied go unreported, while not all complaints raised with local authorities are justified. The figures cannot therefore be interpreted as a record of the overall level of consumer dissatisfaction.

<http://www.offt.gov.uk/NR/rdonlyres/64911092-2EA6-4A4E-B5D4-5BC8FCB2ED4B/0/annexeee.pdf>

We use 2003 figures as more recent statistics for 2004 have been affected by the introduction of Consumer Direct.

Table 3. Ten sectors with highest proportion of complaints related to selling techniques

	% of complaints in that sector relating to selling techniques
Betting, competitions and prize draws	83%
Other professional services	68%
Time sharing	66%
Home working schemes	63%
Other financial services	62%
Estate agency, house purchase, surveying, etc.	56%
Ancillary credit business	50%
Books, newspapers and magazines	49%
Mortgages and other secured credit	48%
Life insurance	47%

Source: OFT annual report 2003

Annexe 2 - Perceived Gains: Case Based Analysis by OFT

The following examples have been provided by the Office of Fair Trading (OFT) to illustrate its views of areas where the UCPD could help enforcers tackle unfair practices

Estate agents and Ring Fencing

Under the Estate Agents Act, the OFT has had some problems tackling “ring fencing”, a practice where the agent colludes with the purchaser contrary to the interests of the vendor.

Ring fencing is a bribe and constitutes a breach of the agent’s fiduciary duty. However, such a breach of duty is not a ‘trigger event’ under the Act. Similarly, although the agent provides a service to the purchaser that was not disclosed to the vendor, the information an agent must disclose about services does not cover this situation.

Although the above conduct would not appear to constitute a breach of the Estate Agents Act, it would appear to constitute a breach of the UCPD. The conduct of the agent was ‘contrary to the requirements of professional diligence’ and it materially impacted on the economic behaviour of his client. There is also a case for applying Article 7 relating to misleading omissions to this behaviour.

Vulnerable consumers, Health Claims and Sweepstakes

The OFT has seen a number of cases relating to the marketing of ‘miracle’ health products (such as magnetic devices, an eye bath that cures depression etc). These products are frequently marketed in the same way as, or in conjunction with, prize draws. The companies concerned compile mailing lists with purchase details of the consumer respondents. This information often includes age, amount spent on types of products, likelihood of responding to sweepstakes, date of last purchase. These lists are rented out to other traders for mail shots. The more savvy companies mail to a broad cross section of the community in full knowledge that certain vulnerable groups will respond. In one case the trader included terms and conditions in light grey size 6 font on the inside of the envelope.

It appears that these traders are specifically aiming to exploit the vulnerability of their respondents. Judged against an ‘average consumer’ such a practice might not be said to be misleading whereas the vulnerable consumer test in UCPD contains a clear legislative message that such practices designed to exploit vulnerabilities are illegal.

Pressure Sales

One of the most significant gains in the UCPD is likely to be the ability to tackle practices involving the use of pressure sales that the current array of consumer protection legislation does not deal with adequately. Pressure sales are used in a number of sectors, most notably doorstep selling and presentation marketing (investments, property sales, holiday clubs and timeshare).

In one case of doorstep selling investigated by the OFT, sales reps often verbally coerced and unduly influenced elderly consumers into buying their products, possibly causing them to take a transactional decision that they would not have taken otherwise.

- a) The timing of visits was often late in the day, sometimes for as long as 6 or 7 hours.
- b) Reps would use all kinds of devices to levy undue influence or coercion - often focussing on a consumer's lack of independence and external help.
- c) The company involved were often seen to be trying to prevent consumers from exercising their legitimate rights to cancel the contract. They were reported as often bullying consumers who phoned up to cancel by offering further discounts or even suggesting that the consumer's relatives, in encouraging cancellation, cared more for their inheritance than the consumer's health. In one case the sales rep said that the consumer's cancellation letter that had been sent by registered post had to have been 'in the manager's hands' for it to be effective.

Annexe 3 – Timeshare and Holiday Clubs and UCPD

The Organisation for Timeshare in Europe estimates that approximately 8-10 per cent of sales are lost to rogue operators in Spain out of total revenue of €431million per annum.

While the Timeshare Directive has tackled some of the misbehaviour in this sector, problems still remain, with rogue traders exploiting loopholes and definitional weaknesses in the law. For example, unscrupulous traders have only to modify the product slightly to be outside the legislation. Timeshares lasting 36 months or more are caught by the legislation but 35 month contracts are not. Similarly, a timeshare in a building is caught whilst timeshares in a boat are not. Consumers purchasing 35 month timeshares or boat timeshares have no cooling off rights or rights to mandatory information⁷¹.

In some cases products such as Holiday Clubs attempt to circumvent the consumer protection legislation. They do not offer the consumer any certainty of being able to use specific accommodation, only access to an unidentified (and possibly non-existent) pool of accommodation that may or may not be available. Lump sum initial payment and periodic payments are demanded and the product is still sold as a means of accessing cheap holidays. However, the lump sums have been found by the OFT to be between £3,000 and £12,000⁷².

OFT have provided two examples of where UCPD could be useful in dealing with some of the issues faced in timeshare (this would also apply to similar situations in other sectors).

Example 1: Scam Holidays – “Deposit Takers”

Agents of a provider of holiday club membership cold called consumers telling them they had won a holiday to be collected at a presentation to discuss the benefits of membership of the holiday club.

Consumers attended the presentation at a local hotel and were subject to what complainants felt to be a pressurised sales presentation to induce them to sign up. The company provided a website through which they claimed members could obtain high quality, low cost holidays around the world. Subsequent use of the site by many consumers indicated that these claims were misleading in respect of the cost, quality and availability of holidays available using their website.

Provisions in the UCPD in relation to bait advertising has relevance to this type of conduct as these marketers are inviting consumers to purchase products (holiday club membership) with a reasonable knowledge that they

⁷¹ Paradise Lost by Citizen’s Advice <http://www.citizensadvice.org.uk/paradiselost.pdf>

⁷² Reported in Paradise Lost by Citizen’s Advice

would not be able to deliver. This is even clearer in the case of 'deposit takers' who sell a service on the basis that when the consumer finds out that it is not what is promised they will cancel the contract but will not be able to reclaim their deposit.

Example 2: Posing as a private seller

This provision in the UCPD will tackle the problem of trader's seeking to avoid consumer protection law by posing as private sellers. There are particular problems with this in regard to internet auctions and timeshare.

The OFT has seen a number of cases of timeshare developers seeking to avoid the Timeshare Directive by claiming that they are 'reselling' property or acting as a sales agent for a private vendor, and using third party trustees to receive deposits during cooling off periods.

This conduct raises two UCPD issues. When the developer is actually acting merely as an agent in law (which does not trigger the Timeshare Directive) then failure to reveal this might be a misleading omission under the UCPD. Where the developer is claiming to consumers that they are acting as agents for a private vendor and actually not acting in this capacity (ie where they are selling reclaimed stock) the behaviour is addressed with the annex provision against posing as a private seller, Annex I para 20(a).

Annexe 4 - Scams and the UCPD

Scams are an unfair deception of a consumer causing him/her financial detriment. They come in numerous guises and are not necessarily unlawful. The most prevalent and profitable are those misleading and/or fraudulent marketing practices perpetrated on a mass scale by mail, phone, e-mail or text message, which undermine confidence in legitimate direct marketing. Below is a list collated by the OFT of some of the most common and costly current scams.

The OFT estimated that total consumer harm caused by the ten most prevalent scams was around £1 billion. This figure was calculated by extrapolating known losses to the number of known scam operations and collating estimates from other government and law enforcement agencies in the UK and overseas.

In some cases, the UCPD will provide protection to consumers where there is very little protection at the moment. In other cases, the UCPD will tighten up existing legislation and open up new enforcement possibilities to the authorities.

Telephone Lottery Scams

The victim is told that before they can claim the prize, they must send money to pay for taxes and processing fees. These scams include the 'Canadian Lottery Scam' and the 'El Gordo Spanish Lottery Scam'. The OFT estimates that telephone lottery scams could be worth up to £150m a year.

Email Lottery Scams

Lottery scam emails are increasing at an alarming rate. The OFT estimates that the average loss to this scam is between £2,000 and £10,000.

Prize draws, Sweepstakes and foreign lottery mailings

Many typical scams take the form of prize draws, lotteries or false promises of 'government payouts' designed to trick the unwary. These are estimated to cost consumers £250 million per annum. The UCPD may not help with dealing with scams from outside the EC.

Premium rate telephone number scams

The Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS) received over eighty thousand complaints last year from consumers about unexpected charges for premium-rate numbers on their phone bills. These scams often work by persuading the unwary to telephone a premium rate number by informing the consumer they are a winner of a desirable prize such as a holiday, a car or luxury consumer good.

They then have to listen to a long recorded message in order to claim their prize. In most cases most consumers receive a cheap 'give away' item or a holiday with strings attached.

The OFT estimates that this type of scam is worth £150m per year through extrapolating known consumer losses to the number of known similar promotions.

ICTIS report a similar type of scam using premium rate fax numbers⁷³.

Investment Related Scams

A call may 'come out of the blue' from somebody with an invitation to invest in shares, fine wine, gemstones or other soon-to-be rare commodity. These investments often carry very high risk and may be worth a lot less than is paid.

The DTI estimates that overall, this scam could be costing UK consumers £350m including £10million invested in art, £50m in wine and £100m in other bogus schemes including shares⁷⁴.

Pyramid Schemes

Pyramid schemes promise a financial return based on the number of people that a participant is able to recruit to enter the scheme. No new money is created in pyramid schemes. Investors who get in early take their profits from investors who join later. At some point, no new investors can be found and as a result the last investors, who are at the bottom of the pyramid, lose their money. Pyramid schemes are doomed to failure because all they do is circulate money between participants. This means that for every £1 someone makes, somebody else loses £1. BBC Watchdog estimated that over the past few years more than £3bn has been lost by investing in these schemes⁷⁵.

Matrix Schemes

Websites offering the latest expensive hi-tech gadgets as a 'free gift' in return for buying a low-value product are the subject of an OFT warning to consumers. The 'matrix' schemes, which are being promoted by a growing number of websites, promise people the chance of getting a valuable 'free gift' by spending a relatively small amount on a low-value product. Consumers who buy the product become members of a waiting list to receive their chosen 'free gift'. The matrix works by sending the person at the top of the list their 'free gift' only after a prescribed number of new recruits has signed up.

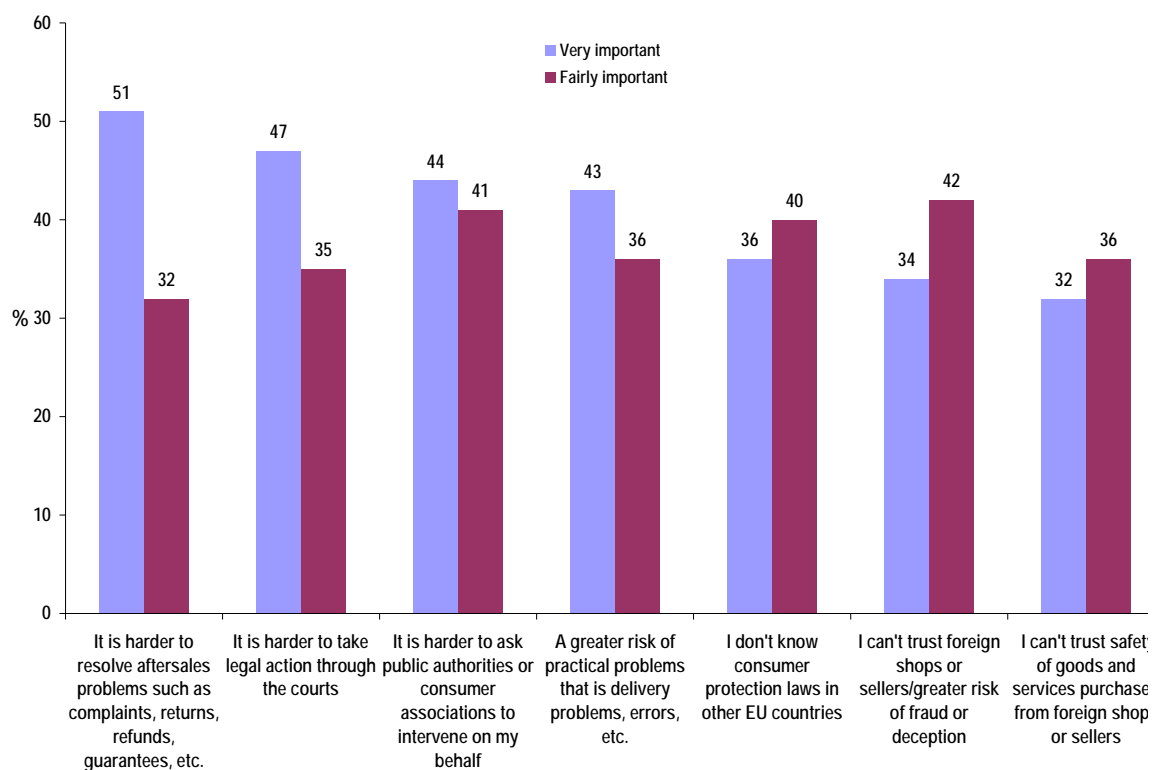
⁷³ <http://www.readersdigest.co.uk/magazine/fax4.htm>

⁷⁴ <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=101057&NewsAreaID=2&NavigatedFromDepartment=False>

⁷⁵ http://www.bbc.co.uk/watchdog/scambusters/programme_1.shtml

Annexe 5 – The UCPD and the Single Market

Chart 1. Reasons given for lack of confidence in cross-border shopping



Source: Eurobarometer 57.2 / Flash Eurobarometer 128 'Public Opinion In Europe: Views On Business-To-Consumer Cross-border Trade'

Annexe 6: Indicative List Of Legislation That May Require Amendment To Comply With The Principles in UCPD

This Annexe contains an indicative list of legislation that will be repealed or otherwise changed.

- Administration of Justice Act 1970, section 40
- Business Advertisements Order 1977
- Consumer Credit Act 1974 - in so far as it applies to commercial practices in relation to consumer hire
- Consumer Credit (Advertisements) Regulations 2004 - insofar as they apply to consumer hire
- Consumer Protection Act 1987, Part III
- Consumer Protection (Code of Practice for Traders on Price Indications) Approval Order 2005
- Consumer Transactions (Restrictions on Statements) Order 1976
- County of Cleveland Act 1987, section 23
- Fraudulent Mediums Act 1951, section 1
- Kent County Council Act 2001, section 13
- Medway County Council Act 2001, section 13
- Mock Auctions Act 1961
- North Yorkshire County Council Act 1991, section 6
- Nottingham City Council Act 2003, section 12
- Price Indications (Method of Payment) Regulations 1991
- Price Indications (Resale of Tickets) Regulations 1994
- Price Marking (Food and Drinks Services) Order 2003
- Tourism (Sleeping Accommodation Price Display) Order 1977
- Trade Descriptions Act 1968
- Trade Descriptions (Sealskin Goods) Information Order 1980
- Trading Representations (Disabled Persons) Act 1958
- Weights and Measures Act 1985, section 29

End

DTI December 2006