



IMPLEMENTATION OF THE UNFAIR
COMMERCIAL PRACTICES
DIRECTIVE

Government Response to
the consultation on how to
frame criminal offences

MAY 2007

URN 07/1046

Introduction

The DTI issued a consultation paper in December 2006 seeking views on which criminal offences in the regulations implementing the Unfair Commercial Practices Directive (UCPD) should be ones where no specific state of mind needs to be proven (strict liability offences) and which should require proof of a mental element (this is 'mens rea', which is Latin for guilty mind). The consultation also looked at the OFT's power to bring criminal prosecutions.

The closing date was 5 February 2007. 35 responses were received from consumer bodies, businesses and business organisations, local authority trading standards services (TSS), regulators, legal firms and individuals.

This document sets out the Government's formal response to the comments received. A list of respondees is attached at annex A. Annex B is a summary of the responses. Copies of the original responses are available on request. Please contact Peter Deft on 020 7215 0341 or via e-mail at peter.deft@dti.gsi.gov.uk for further information.

The DTI is grateful to respondees for their time and thought. Views expressed were carefully analysed and have substantially informed decision-making.

Executive Summary

In the regulations implementing the UCPD, the criminal offences relating to breaches of:

- the general prohibition on unfair commercial practices will require proof of a state of mind (knowledge or recklessness),
- the remaining prohibitions on misleading actions and omissions, aggressive practices and the specific unfair practices prohibited in the annex will be offences of strict liability,
- the prohibition on business to business misleading indications in the regulations implementing the Misleading and Comparative Advertising Directive (MCAD) will also be an offence of strict liability.

These offences will be reviewed 3 years after the regulations implementing the Directive come into force.

The Office of Fair Trading will have the power to bring criminal prosecutions under the regulations implementing the UCPD and MCAD.

Background

1. The DTI announced in December 2006 that most of the provisions in the regulations implementing the Directive will be enforceable by criminal (as well as civil) means.
2. Much of the consumer protection legislation that UCPD is replacing, and much regulatory law generally, is enforceable by strict liability offences. However, much general criminal law includes an element of mens rea, which takes account of the state of mind of the defendant, so that unintentional breaches of the law can not be punished. To convict for a strict liability offence it need only be shown that there has been a prohibited act or omission. For a person to be convicted of a mens rea offence, it must also be shown that the trader had a specified state of mind (typically knowledge or recklessness).
3. Business groups are concerned about the over-use of criminal offences. The higher evidential hurdle of proving mens rea might encourage enforcers to use civil (injunctive) sanctions. Business groups also argued that the purpose of the UCPD is to stop unfair practices and that this objective can often be better achieved through civil action.
4. Mens rea may be particularly appropriate for the new, very general offences, such as the general prohibition on unfair practices and the prohibition of omitting material information. Also, because of their breadth, it is difficult to put in place effective due diligence procedures for these offences, which would be required if they were strict liability offences.
5. However, enforcers (OFT and Trading Standards) are concerned that the additional evidential hurdle (of proving a certain state of mind) might make it too difficult to secure criminal convictions. In particular, they argue that unlike the police, TSS have neither the resources or powers (e.g. of arrest) to deal with mens rea offences which typically take twice as long to investigate and prosecute. Mens rea offences are particularly difficult to prove in relation to itinerant rogue traders and corporate entities.
6. We consulted on this in December 2006, and the consultation closed on 5 February 2007. The consultation paper recommended a mixed approach. It recommended that the offences for prohibitions that are most similar to ones which already exist in domestic law or that relate to prohibitions which concern particularly undesirable behaviour should be based on strict liability. It also recommended that the offences concerning the new and broad prohibitions should be mens rea offences. We consulted openly on the other offences.
7. The consultation also sought views on the OFT having the power to take criminal prosecutions.

Framing the criminal offences

8. The consultation responses were very much along the lines expected, although business respondents understood the opposing position, and accepted the mixed approach proposed in the consultation paper. Enforcers' responses were much firmer in strongly opposing mens rea for any of the offences. Business acknowledged that a culture change towards civil action is coming, but feel until this is widespread, a mens rea requirement should be added to the offences where these are broad with imprecise scope. Enforcers argue that criminal prosecutions are only brought as a last resort and only when it is in the public interest to do so. The DTI's decision on the offence for each provision is set out below.

The offence relating to the general prohibition on unfair commercial practices (Article 5), will include a mens rea element

9. This was the proposal in the consultation paper. This offence is very novel to UK law, and is very broad. For the first time traders will have to consider not only whether their practices are in particular misleading or aggressive but also more generally whether they meet accepted standards in their field of activity. Adding a mens rea requirement does mean that enforcers are far less likely to prosecute for breach of the prohibition (as opposed to taking civil proceedings for an injunction). However, only a very small number of cases would concern breach of this general prohibition, because almost all unfair commercial practices would primarily be caught under the more specific prohibitions (on misleading actions and omissions, aggressive practices or specific unfair commercial practices). The general prohibition was intended as the 'future-proofing' of the Directive – to tackle novel practices. It is appropriate that courts check that these practices require knowledge or recklessness by the trader, before the trader should be liable to a criminal conviction. The inclusion of mens rea in this offence will be reviewed three years after UCPD enters into force, to see if it has had any adverse effects on the enforcement of the UCPD.

The offence relating to the prohibition on misleading actions (Article 6) will be strict liability

10. This was the proposal in the consultation paper, and reflects the findings of a workshop held in January 2007. This article most closely approximates the strict liability provisions being repealed from the Trade Descriptions Act 1968 (TDA) and Part III of the Consumer Protection Act 1987 (which covers misleading prices). The majority of enforcement action under the regulations is likely to be taken against misleading actions.

The offence relating to the prohibition on misleading omissions (Article 7), will be strict liability

11. In the consultation paper we proposed that this prohibition should include a mens rea element. Enforcers have concerns that the higher evidential hurdle of mens rea means that it would be very difficult to get a successful prosecution in this important area, as proving a certain state of

mind is difficult and will increase their costs. There are other arguments, considered below in turn.

Use of civil action

12. Businesses prefer mens rea because the higher evidential threshold would focus enforcement attention on the worst abuses rather than on inadvertent or minor breaches. It might also encourage enforcers to take civil actions, and they feel that the enforcement community need further encouragement down this route.

13. However, there are an increasing number of measures in place that aim to ensure that Enforcers take proportionate action. Almost all Trading Standards Services (TSS) have published enforcement policies which they must follow, and which require that criminal enforcement should be targeted only at cases where action is needed. Most TSS have adopted the Cabinet Office's Concordat on Good Enforcement which sets out best practice and commits enforcers to discuss cases with businesses before formal action is taken if possible. Also, a statutory compliance code will be introduced in April 2008, at the same time as the regulations implementing the UCPD. This will embed the 'Hampton principles' of proportionate, targeted and risk-based enforcement and inspection, and all TSS will have to have regard to the code. These are much more direct ways of changing enforcers' behaviour, rather than through making criminal prosecutions more difficult (by adding a mens rea requirement).

Large companies

14. Enforcers have said repeatedly that mens rea offences are very difficult to prove against large companies, because it is difficult to show that the controlling mind of a large company has a particular state. However, in such situations, enforcers would still have the option of taking civil action against a company.

Overlap with misleading actions

15. There is a blurred overlap between misleading omissions (Article 7) and misleading actions (Article 6). Most misleading omissions will also result in misleading actions. This is because what has been said will often have been made misleading by the omission of material information. In these cases, both the prohibition on misleading actions and on misleading omissions may apply. Only in the case of pure omissions (where material has been omitted but nothing which is actually said is made misleading) will the prohibition on misleading omissions exclusively apply. Pure omissions are likely to be a much smaller proportion of misleading commercial practices than misleading actions.

16. The OFT and TSS oppose the offences for these two types of misleading practices being framed differently. The overlap would encourage enforcers to try to use Article 6, which is easier to prove, and may make Article 7 redundant. This happens under TDA, where enforcers try wherever

possible to bring prosecutions under section 1 (strict liability) rather than section 14 (which requires proof of mens rea).

Conclusion

17. The regulations implementing the UCPD will come into force when the Compliance Code becomes mandatory. This, along with the proposed Regulatory Enforcement and Sanctions Bill¹, should all ensure that business and enforcement are working well together in the future. This makes it appropriate that this should be a strict liability offence.

There should be no separate offence for prohibitions relating to failing to give information in an invitation to purchase

18. Article 7(4) of the Directive covers a subset of all misleading omissions, called 'invitations to purchase', which are likely to include much advertising. The Directive gives a list of the information that will always be considered material in an invitation to purchase, and so must always be provided.

19. The consultation paper didn't propose whether 7(4) should be a mens rea or strict liability offence, but did leave open the possibility of having this as a separate offence from that applying generally to a breach of the prohibition on misleading omissions, in case it was appropriate that it should be framed differently.

20. Many consultees argued that the offences in article 7 were too interlinked to be treated separately. The OFT has long held the view that this cannot be treated as a separate offence.

The offence relating to the prohibition on aggressive practices (Articles 8 and 9) will be strict liability

21. This was the recommendation in the consultation paper, and was supported by almost all consultation responses.

The offences relating to the annex of prohibited practices will be strict liability

22. In the consultation paper we recommended that the black-list of practices (the 31 practices prohibited in all circumstances, and listed in the annex to the Directive) should be framed as strict liability offences, because they are all worded quite specifically. Some businesses pointed out that not all the practices are worded specifically, and they should be considered on a case-by-case basis. However, we agree with the OFT that the Annex practices were designed specifically to deal with the worst and most damaging practices and that the offences relating to them should be strict liability.

¹ This was published for consultation on 15 May. For more information see: <http://www.cabinetoffice.gov.uk/regulation/enforcement%5Fsanctions%5Fbill/>

The offences relating to the prohibition of business to business misleading indications in the regulations implementing the amended MCAD will be strict liability

23. In the consultation paper we did not give a view about how these offences should be framed. This will be the business-to-business protection equivalent to the UCPD. Most respondents felt that this should be framed in the same way as the offence relating to the UCPD prohibition on misleading actions (strict liability) so that there is no reduction in business-to-business protections. Small businesses are often no better placed to protect themselves than consumers. The CBI, BRC and the Newspaper Society said that this should be a mens rea offence.

Giving the OFT the power to bring criminal prosecutions

24. The OFT's enforcement role has expanded considerably in the last ten years through the increased use of civil law (injunctive) sanctions to enforce consumer law. They have a coordinating role to ensure that actions are taken by the most appropriate enforcer.

25. TSS said that consumer protection is generally best enforced at local level. They nevertheless accepted that there are circumstances where prosecution would be best brought by the OFT. They therefore supported giving the OFT the power to bring prosecutions, provided procedures are put in place to establish when this should happen.

26. The CBI, BRC and the Newspaper Society expressed concern about giving the OFT these powers in a piecemeal way, and without reviewing the organisation and its purpose as a whole. However, we believe that providing the OFT with criminal powers will enable OFT and TSS to deliver consistent enforcement action. We therefore maintain the position that the OFT should have a duty to enforce the regulations and the power to bring criminal prosecutions.

LIST OF CONSULTEES

1. Advertising Association
2. Birmingham City Council
3. Brian Smith, Angus Council
4. British Retail Consortium (BRC)
5. Carpetright plc
6. Central England Trading Standards Authority (CEntSA)
7. Citizens Advice
8. Confederation of British Industry
9. Direct Marketing Association
10. East of England Trading Standards Association
11. Energy Retail Association
12. Glasgow City Council
13. Institute of Credit Management
14. Julian Edwards (Individual)
15. Keeble Hawson (Solicitors)
16. LACORS
17. London Trading Standards Authorities' (LoTSA)
18. Luton Borough Council
19. Mail Order Traders Association
20. National Consumer Council (NCC)
21. National Grid
22. Newspaper Society
23. OFT
24. Oxfordshire TSS
25. Scottish and Southern Energy
26. Society of Chief Officers of Trading Standards in Scotland (SCOTTS)
27. Society of Chief Trading Standards Officers
28. South Ayrshire TSS
29. SWERCOTS (Trading Standards Partnership (South West))
30. Trading Standards East Midlands
31. Trading Standards Institute (TSI)
32. Trading Standards North West and Liverpool TS
33. Trading Standards South East
34. Wirral Trading Standards
35. Yorkshire and the Humber Trading Standards Group (YAHTSG)

SUMMARY OF RESPONSES

GENERAL COMMENTS

Merits of raising the evidential threshold

1. Enforcers and consumer bodies were opposed to the proposal to increase the use of civil sanctions by raising the evidential threshold of criminal offences from strict liability to *mens rea*. Strict liability strikes the right balance between protecting consumers and regulating businesses. Strict liability is a tried and tested method of framing regulatory offences where what needs to be tackled is the unfair conduct, irrespective of the state of mind of the trader. It is cost effective for enforcers, and businesses are well placed to demonstrate their compliance processes. Due diligence defences, together with the innocent publication defence, allow fair-dealing businesses to provide evidence that they took appropriate steps to avoid breaching the law and therefore avoid the risk of prosecution.

2. Raising the evidential threshold to *mens rea* does not protect this balance. It will make offences disproportionately harder to prove and, as a consequence, could result in a lessening of consumer protection. It is therefore the wrong approach to encourage greater use of civil sanctions. This would be better achieved through adherence to enforcement policies and other safeguards. Also, in order for TSS to make best use of the new civil sanctions it is vital that they are given rights of audience in civil courts. Without this right of audience there is likely to be a burden on local authorities. The process of delegated authority should ensure the accountability and competence of staff so authorised.

3. On the other hand, business respondents said if traders are to be prosecuted and possibly face a criminal conviction and criminal record, with the accompanying reputational issues, it is appropriate that the evidential hurdles should be high and that the state of mind of the trader should be part of the requirement of the offence. This is particularly true where the legal provisions are vague and unclear as to what is required of business. They maintained their view that criminal sanctions should be sought only in really serious cases where it is clear that civil sanctions are inadequate and that there is a public interest in pursuing a criminal prosecution.

4. For existing safeguards to be sufficient to prevent inappropriate prosecutions it is essential that the Hampton principles are truly embedded in the enforcement approach of all TSS and the OFT. This will need a full commitment on the part of enforcement authorities to apply those principles and the Codes which will give effect to them. Concern was therefore expressed that the Regulator's Compliance Code which will underpin the Hampton principles is not expected to be in place until April 2008.

Offences

5. Enforcers and consumer organisations were unanimous in favouring the introduction of strict liability offences with the associated due diligence and

innocent publication defences for breaches of all of the provisions of UCPD and (revised) MCAD which are to be criminalised, including the general prohibition (Article 5) which is intended to future-proof the Directive.

6. Businesses respondents said they recognised there is a balance to be struck between *mens rea* and strict liability, always providing that strict liability carries with it due diligence defences which enables legitimate traders to prove that reasonable steps have been taken to avoid committing the offence. In addition, where a Hampton approach to enforcement is in operation, prosecution should be a rare event for a compliant business. For this reason a clear majority of business respondents agreed that offences for breach of Articles 6, 8 and the Annex prohibitions should be subject to strict liability offences. However, some such respondents suggested that consideration should be given to differentiating between those Annex practices which are framed broadly and those structured more specifically, and to consider adding a *mens rea* requirement to those framed broadly.

7. However, business respondents said that the offences in respect of Articles 5 and 7 (including Article 7(4)) should be accompanied by a *mens rea* requirement because their scope is so wide that they require considerable interpretation in any given case; and it would therefore be difficult to construct effective due diligence procedures.

8. Business respondents were divided over whether the misleading advertising provisions of the MCAD should be a strict liability offence or require proof of *mens rea*. A majority of such respondents favoured a strict liability offence. This would ensure consistency with offences for breach of UCPD Article 6, and also reflects the equal treatment accorded to business-to-consumer and business-to-business activities under the Trade Descriptions Act 1968 (TDA). However the CBI, BRC and the Newspaper Society said that the offence should include a *mens rea* requirement.

9. All respondents agreed that if *mens rea* were introduced for some offences then the 'knowledge or recklessness' approach currently in section 14 of the TDA would seem to be a good way forward.

The OFT's power to bring criminal prosecutions

10. The OFT, TSS, consumer organizations and a majority of business respondents supported giving the OFT powers to bring criminal prosecutions for breaches of the UCPD and the (revised) MCAD. However, trading standards said that as a general rule consumer protection legislation is best enforced at local authority level and that OFT involvement should be limited to, for example, serious national cases that require criminal enforcement. There would also need to be an agreed protocol or guidance on how the OFT and local authority TSS will deal with criminal enforcement of the UCPD and MCAD. Businesses who supported the OFT having criminal powers said this was conditional on robust processes being in place to ensure that there is no risk of both TSS and OFT bringing actions against a trader for the same offence.

11. In Scotland only the Crown Office and the Procurator Fiscal Office Service can bring criminal prosecutions. Consequently what would be needed in Scotland is for the OFT to be acknowledged as a “Reporting Agency” who could submit reports on alleged criminal breaches of the UCPD and MCAD to the Procurator Fiscal recommending that a person or entity be prosecuted.

12. However, the CBI, BRC and the Newspaper Society were opposed to giving the OFT criminal powers because it would change the whole role and nature of the OFT. These respondents said that whether the OFT should be granted criminal prosecution powers should be considered in the round and on its merits, and not in the narrow context of one specific piece of legislation.

DETAIL

Chapter 2: Controls on criminal prosecutions

Question 1. Do you think these safeguards are sufficient? If not why not?

13. Trading standards respondents said that existing safeguards and the soon to be introduced Regulators’ Compliance Code are sufficient to prevent inappropriate prosecutions. Local authority enforcement policies, based on the Enforcement Concordat and the Code for Crown Prosecutors, require that careful consideration is given to any enforcement activity. As a result, the majority of actions taken by trading standards are in the form of advice and guidance. Formal action will only be taken where there is severe consumer detriment or unfair business activity.

14. The case of *R v Adaway* (where the prosecution failed because the enforcement authority failed to follow its published enforcement policy) shows that businesses are able to successfully challenge local authority decisions to prosecute where appropriate.

15. Also, in Scotland cases are submitted to the Crown Office Procurator Fiscal Service (COPFS) who decides whether it is in the public interest to prosecute. The Procurator Fiscal can also use Procurator Fiscal warning letters instead of prosecutions where he deems a prosecution not to be in the public interest.

16. For these reasons trading standards respondents said they did not believe that *mens rea* offences are necessary to ensure criminal prosecutions are only brought where it is in the public interest. *Mens rea* offences are likely to make interpreting the legislation and taking appropriate action in individual cases more complex.

17. The OFT said it fully supported the wish to see greater use of civil enforcement, but disagreed that raising the evidential threshold from that of strict liability to *mens rea* was the way to achieve this. Enforcers need to have ready access to the full range of sanctions, all of which must be practicable in their application, in order to be in a position to deploy the most proportionate and effective one. The best way to encourage enforcers to increase use of civil powers was to have safeguards as to when criminal powers are used.

18. The OFT said that there are other factors, which if not addressed, could result in cases being enforced using criminal sanctions, when other enforcement routes may be more appropriate. First, there is a greater perceived risk of enforcers being ordered to pay costs for unsuccessful actions in civil cases than in criminal prosecutions. Also, in Scotland, the costs of court proceedings are usually met from other budgets, such as that of the Procurator Fiscal. Second, without rights of audience in civil courts, trading standards officers are forced to employ lawyers to represent them in civil actions. In some cases the costs incurred may be disproportionate to the outcome and hence affect the decision to take civil action. Creating *mens rea* offences rather than strict liability offences will not address these problems and may reduce consumer protection as enforcers may not consider either civil or criminal action to be a viable option because of the difficulties involved.

19. Consumer organisations agreed that existing safeguards seemed adequate, and create an environment where business and enforcers are fully aware of the circumstances where criminal sanctions can and cannot be successfully applied.

20. Business respondents said that in assessing whether the safeguards are sufficient it is essential that the Hampton principles are truly embedded in the enforcement culture of all TSS and the OFT. This will need a full commitment on the part of enforcement authorities to apply those principles and the Codes which will give effect to them. However, at present not all TSS have published enforcement policies. Also, there is a lack of compulsion to observe either the Enforcement Concordat or the Code for Crown Prosecutors.

21. The Enforcement Concordat is to be supplemented by the Compliance Code which will be binding on all regulators within its scope. This will be a helpful safeguard in ensuring that enforcement is compliance led and proportionate and will act as a useful check against criminal prosecutions being taken except in a serious case or where it is manifestly in the public interest. But the Code is not due to take effect until April 2008, whereas the UCPD is due to come into force on 12 December 2007.

22. To avoid this gap a leading business organisation said that sections 21 and 22 of the Legislative and Regulatory Reform Act and the Compliance Code should be brought in without delay. A number of other business organisations suggested that the DTI draw up interim guidance for enforcers, of which they will be obliged to take account before they can launch a criminal prosecution.

23. Business respondents said it would also be necessary for the Code of Crown Prosecutors to be universally adhered to by both TSS and the OFT. For this reason a leading business organisation suggested that the Code for Crown Prosecutors should be incorporated into the Compliance Code which would make it automatically binding on regulators. Another leading business organisation said the Compliance Code should also embrace key elements of the Enforcement Concordat and its statutory nature should be such that failure to observe its requirements would lead to failure of the prosecution.

Chapter 3: Advantages and Disadvantages of *Mens Rea* Offences

Question 2. Do you have any comments on the Government's analysis of the advantages and disadvantages of mens rea offences?

24. Trading standards respondents said that strict liability offences are a feature of legislation intended to deliver a broad public policy objective, in this case consumer protection and fair competition between businesses. This is because in regulatory matters what needs to be tackled is the unfair conduct, irrespective of the state of mind of the trader. Strict liability offences can encourage businesses to act responsibly, complying with the legislation and maintaining systems to ensure that they satisfy due diligence defences. This has the attraction that it provides safeguards for business but does not place the burden of proof with the prosecutor and should therefore not be as costly to enforce.

25. The existence of due diligence systems can also assist in reducing burdens on business, particularly in respect of the number of regulatory visits that the business is subjected. This is because such systems allow TSS to appropriately risk assess the business in the light of that system. By reducing the risk associated with a business, the frequency of inspection can be safely reduced.

26. On the other hand, mens rea offences can often be difficult to investigate and prosecute especially by small local authorities with limited resources. Bodies charged with the enforcement of serious mens rea offences, such as police have the training, experience, resources and powers enabling them to achieve this function. Such resources and powers are not available to TSS. For example, TSS have no power of arrest and cannot bring in suspects for questioning. If a suspect refuses to be interviewed it can be very difficult to obtain evidence of mens rea.

27. With mens rea requirements the greater costs and longer time taken to investigate, and the higher evidential hurdle could potentially result in offences which should rightly be dealt with in a more severe manner, either not proceeding to court at all, or failing due to the prosecutor not being able to meet the evidential burden. This could lead to inconsistent enforcement – picking off the easy meat and avoiding tough cases. This may militate in favour of larger companies who can afford much higher legal defence bills than small businesses.

28. The introduction of mens rea also has the potential to increase disruption to business operations due to seizure of books, documents, computers, etc required by the investigators to prove the necessary state of mind, but also required by the business to operate. Not only could this have potentially devastating consequences for the businesses but would increase the cost of the investigation to the public purse significantly. Also once a matter proceeds to court, the case is likely to take longer, with no real evidence that the sentencing outcome will be affected (see para 33 below).

29. Furthermore, mens rea offences link to the controlling mind of the company. Although civil enforcement may be the most appropriate route to take against corporate entities in many cases it may not be appropriate in all cases, especially as an increasing number of rogues take on the guise of a limited company. Criminal offences must remain a viable option to tackle more serious breaches of the UCPD. Also, where a director is convicted for consent, connivance and neglect offences, the conviction has the added advantage that it allows the court to prohibit him from acting as a company director. This would seem to serve the public interest. However, mens rea offences could make it more difficult to secure convictions against corporate entities.

30. Mens rea offences may be used to effectively distance the corporate body from market decisions of the business in order to prevent a criminal prosecution. Trading standards authorities have found that some companies refuse to come to interview or complete an interview questionnaire. In these circumstances, if no information is made available it would be impossible to prove guilty knowledge.

31. Even for serious regulatory matters which might require criminal proceedings, it is unlikely that directors will be aware of the circumstances of offences that have been committed by a business and prosecution will become unlikely if the offence requires a guilty mind to be proved. This will be to the detriment of consumers generally and unfair for other reputable businesses and competitors. Imposing strict liability on businesses would encourage them to maintain standards of 'good practice' by their employees.

32. Trading standards respondents said that introducing a requirement of *mens rea* for offences would also render the prosecution of itinerant traders difficult if not impossible as by the nature of their trading they are not in a place long enough to establish a trading history and for the enforcement authority to prove the state of mind of the trader from previous dealings. It would be an impossibility to show that the trader has previously been warned of his conduct, or that civil action has been taken against him, and that he has subsequently disregarded that advice

33. Trading standards respondents further said that there is no evidence to support the assertion that the making of offences subject to mens rea will increase sentencing outcomes. The penalties obtained in most cases would seem to be in line with sentencing policy in general (which, amongst other things, takes into account the defendant's means when setting fines), and not peculiar to 'regulatory' crime. The level of fine imposed should not therefore be used to determine the effectiveness of legislation. If the prosecutor can prove mens rea and seeks a greater sentence, there are other mechanisms for this: eg pursuing offences under Theft Act, Fraud Act, etc.

34. Most trading standards respondents said that while there is some merit in the argument that mens rea reduces uncertainty where offences are very broad and their impact uncertain, it seems to be based on the incorrect assumption that prosecutors will be over zealous in their enforcement of the UCPD. TSS are proportionate in their enforcement of regulatory offences. For

example, there is no evidence to substantiate the view that enforcers turn too readily to criminal enforcement for cases which might be better handled using civil procedures. Civil remedies for tackling unfair trading practices are a relatively new option to TSS (e.g. Enterprise Act 2002) which has not yet had sufficient time to demonstrate its full potential. Some trading standards respondents said that they believed civil procedures will be used with increasing frequency in future years and that this will meet the Government's expressed desire.

35. Moreover, the vast majority of infringements of consumer law are dealt with by advisory and educational measures which do not involve formal action of either a civil or criminal nature. The UCPD is aimed at dealing with unfair commercial practices and artificial hurdles should not be placed in the way of effectively dealing with practices which are detrimental to consumer interests.

36. The OFT and consumer organisations also said they had serious reservations about the suitability and effectiveness of the proposal to increase the use of civil sanctions by raising the evidential threshold of criminal offences from strict liability to *mens rea*. The OFT said that a *mens rea* requirement for any of the prohibitions in the UCPD would conflict with the Macrory principles by making many breaches (including some of the most serious) significantly harder, and in some cases impossible, to prove even where pursuit of criminal sanctions is otherwise the most appropriate course.

37. The OFT said that strict liability offences are included in almost all the consumer protection laws that the Government will repeal on implementation of the UCPD. A move towards *mens rea* would therefore have the unintended effect of reducing the current level of consumer protection. If *mens rea* requirements are introduced for any of the offences then this should be reviewed after the introduction of the full Macrory 'toolkit'.

38. A consumer organization said the imbalance in knowledge and power between consumers and businesses justifies a different sanctioning approach for consumer law compared to general criminal law. Historically, strict liability was adopted in consumer law to balance consumer protection with the regulation of businesses by recognising the additional hurdles faced by enforcers when proving *mens rea*. This imbalance remains just as relevant today.

39. A successful criminal prosecution, and the subsequent reputational damage, could act as a greater disincentive than increased financial penalties. The likelihood that strict liability, with a lower evidential threshold, would be more likely to work in such cases is a factor that should not be ignored when looking at how effective these proposals would be as a deterrent to rogue traders.

40. Most business respondents said the civil route should be the usual enforcement route. For this reason it is appropriate that *mens rea* should be required at the very least in respect of those UCPD infringements where there is a lack of clarity in the legal provisions and where a degree of interpretation will be needed. If businesses are not entirely clear what behaviour will be

caught by certain of the UCPD's provisions it is difficult to construct effective due diligence procedures. In these circumstances it is equitable that the onus should be on the prosecuting authority to prove the offence with the necessary mens rea. Those that lack the required mens rea, and are therefore less culpable, will face the still effective, but less socially condemned, civil proceedings. Also mens rea offences would be unsuitable for administrative penalties (fines) which carry with them civil law levels of proof.

41. Having to establish mens rea will also concentrate the mind of the enforcement agency, ensuring that it has fully considered alternative action, in particular the injunctive route. The civil route is a powerful enforcement weapon and carries an equal reputational risk to business. The potential deterrent effect of unlimited fines and imprisonment for contempt should not be underestimated.

42. To encourage greater and more effective use of the civil route a leading business organisation said that a greater range of investigative powers should be attached to civil proceedings and that TSS should be given rights of audience in civil courts and not just in magistrates courts.

43. Businesses respondents agreed that having to establish mens rea of a controlling mind would make it more difficult bring criminal prosecutions against a corporate entity. However they regarded the civil enforcement as generally the more appropriate route against corporate entities.

44. However they strongly disagreed that a mens rea requirement would make it more difficult to secure convictions against itinerant rogue traders. The difficulty with itinerant traders is to track them down in the first place. Once they have been identified it should not be a significant additional hurdle to prove mens rea. This is because one of the defining characteristics of an itinerant rogue is that he is reckless as to the consequences of his actions.

Chapter 4: Criminal Sanctions in the UCP Regulations

Question 3. Do you agree with the proposal to add a mens rea requirement to the provisions creating offences for breaches of Articles 5 and 7(1) and (2)?

45. Enforcers and consumers were unanimous in opposing the introduction of a mens rea requirement in the offences for breaches of Articles 5 (general prohibition of unfair practices) and 7(1) and (2) (misleading omissions).

46. A general concern was expressed that introducing different evidential thresholds for different Articles may increase the risk of enforcers 'defaulting' to those offences that are easier to prove. For example, it was noted that section 14 of the TDA contains a partial mens rea requirement, and as a result has been infrequently used in comparison with the strict liability section 1 of the same Act. They also suggested that the mens rea requirement had been difficult to interpret.

47. Enforcers and consumer organisations accepted that the novelty and breadth of Article 5 may give rise to some legitimate concerns about certainty.

However, they considered these could be adequately met by alternative means (notably guidance) were Article 5 to be made a strict liability offence. A strict liability obligation would be underwritten with due diligence and this should provide business with adequate safeguards from prosecution.

48. Article 5 is the primary 'safety net' provision to tackle novel practices which develop and cause detriment to consumers. Lessening the deterrent effect of criminal sanctions by introducing *mens rea* runs a risk of rendering this element of the UCPD unworkable, or significantly impairing the genuineness of its availability. This would undermine the effectiveness of the 'principle-based' concept and could potentially leave consumers more vulnerable to emerging scams and unfair practices designed to take advantage of the evidential difficulties associated with *mens rea*.

49. Enforcers and consumer organizations said misleading omissions are the very type of offence for which it would be most desirable to use criminal sanctions. Refraining from disclosing facts vital to consumers making value judgments is one of the most common misleading practices relied upon by rogue traders, and should be easily actionable. The strict liability option is therefore the most appropriate because it would be extremely difficult to prove a particular state of mind in relation to the absence of information. This would be especially true in relation to corporate entities. This may encourage businesses to scrap established due diligence systems that have been developed for the good of the business and its customers

50. The OFT said it could, in practice, prove to be highly problematic if these Articles are dealt with inconsistently by introducing a strict liability offence for misleading actions and a *mens rea* offence in the case of omissions. Their concern is that such a difference in treatment would suggest they are always distinct and mutually exclusive practices, when this is not the case, and result in a reduction in consumer protection in relation to omissions.

51. How a misleading practice is characterised should not have any material effect on its prosecution. In principle, acts and omissions are two sides of the same coin. In practice, their impact on consumers is the same – they mislead.

52. In their drafting, Articles 6 and Article 7(2) specifically acknowledge this overlap between actions and omissions. Article 6, for example, covers practices which deceive even if the information in them is factually correct (including, for example, those practices where factually correct statements are rendered deceptive by the omission of other information). Article 7(2), meanwhile, deals with misleading omissions but covers situations where the information in question is, in fact, hidden rather than omitted (in other words, is included, but not clearly).

53. The inconsistent treatment of these two provisions could provide a perverse incentive for traders to omit information in the hope of a diminished likelihood of successful prosecution, rather than risk more certain prosecution for providing potentially inaccurate information.

54. Business respondents said that Articles 5 and 7(1) and 7(2) should be accompanied by a mens rea requirement not so much because they are new but because their scope is so wide that they require considerable interpretation in any given case.

55. The requirement in Article 5 not to engage in an unfair commercial practice is not only open ended in itself but those practices are defined by reference to other novel and uncertain concepts such as that of professional diligence which leave scope for interpretation. Nor will it be clear what exactly is required of business from Articles 7(1) and (2).

56. If businesses are unsure of exactly what commercial practices may fall within the scope of these new provisions and run the risk of a criminal prosecution and criminal record if convicted, it should be necessary for the prosecution to prove that a business deliberately flouted the law. If these were strict liability offences it is likely to be extremely difficult for business to mount a due diligence defence given the vagueness of the relevant provisions and the lack of clarity over what is required of them under the legislation.

Question 4. Do you agree that offences for breach of most of the prohibitions contained in UCPD Articles 6 and 8, and in UCPD Annex I should not require proof of any particular state of mind of the trader?

57. All enforcers and consumer organisation said the offences for breach of most of the prohibitions in Articles 6 (misleading actions), 8 (aggressive commercial practices) and in Annex 1 should be strict liability.

58. These respondents said the prohibition in Article 6 closely mirrors offences in existing legislation such as section 1 of the TDA and Part III of the Consumer Protection Act 1987. Hence a strict liability offence would maintain existing consumer protection, particularly as experience of enforcement of the TDA suggests that a mens rea requirement would render the vast majority of appropriate prosecutions impossible.

59. It was noted that this would mean that the current limited mens rea requirement for offences regarding misleading statements as to services currently contained within section 14 of the TDA would no longer apply in the context of the equivalent new offence under UCPD. However as the consultation points out the Government itself had often proposed abolishing the mens rea requirement for section 14.

60. Enforcers and consumer organisations said because of the very real detriment and distress caused by aggressive practices any new offence implementing this provision should be one of strict liability. Article 8 aggressive practices should not be seen in the context of section 1 of the Protection from Harassment Act 1997 (where the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other) but as (unfair) excessive pressure applied in the course of a commercial transaction – and

the prohibition in Article 8 is therefore appropriately dealt with by a strict liability provision.

61. The Annex practices are intended to prohibit the worst and most damaging unfair behaviour. Some Annex practices replicate existing (strict liability) offences. Others, whilst new, do not warrant a different approach and should also therefore be dealt with as strict liability offences.

62. Business respondents broadly accepted there is a balance to be struck between mens rea and strict liability, always providing that strict liability carries with it due diligence and innocent publication defences. Strict liability in those circumstances enables a business to protect itself with effective procedures as long as there is recognition in the courts of the nature of these defences.

63. For these reasons a clear majority of business respondents agreed that offences for breach of Articles 6, 8 and the Annex prohibitions should be subject to strict liability offences rather than requiring proof of mens rea. Associated defences would, at a minimum, need to cover the same scope as sections 24 and 25 of the TDA.

64. Nevertheless these respondents stressed that the workability of strict liability offences will depend crucially on the adoption of the Hampton principles by TSS and across the board. If there is a genuine commitment to these principles in practice enforcers should enter into discussions with businesses and work together to sort out any possible infringements well before court action is considered, and that where formal enforcement is necessary the civil route will generally be preferred. On that basis criminal prosecutions will be limited to the rogue trader element.

65. A number of business organisations did however have some reservations about applying strict liability to all practices which fall within Annex I. Although the majority of the Annex practices are framed in reasonably specific terms, some are framed in broad terms or contain provisions whose meaning and application are uncertain. These respondents suggested that consideration should be given to differentiating between those practices which are framed broadly and those structured more specifically with a view to determining whether individual practices deserve treatment as strict liability offences or should require proof of *mens rea*. Nevertheless these respondents agreed that the majority of the practices within Annex I should be subject to strict liability offences given their relative specificity. But even then there is a need for appropriate offences to cover eventualities such as, for example, act or default of another person or other cause beyond the control of the accused as well as standard due diligence and innocent publication defences.

Question 5. Do you consider that the new offence for breaching the information obligations in Article 7(4) should be one of strict liability or should it require proof of a state of mind of the trader on the same basis as the proposal for article 7(1) and 7(2)?

66. A majority of all respondents said that because Article 7(4) belongs to the same family of offences – namely misleading omissions – as Articles 7(1) and (2) it should, for consistency, be treated identically.

67. Furthermore, a number of enforcers said that they disagreed with the implication in the consultation paper that Article 7(4) could be interpreted as a standalone prohibition, and that it should not be treated as such by framing it as a separate offence. Article 7(4) provides clarification of information that is always required (because it is viewed as 'material' for the purposes of Articles 7(1) and 7(2)) in certain situations - where there are invitations to purchase - the omission of which will breach Article 7(1) and/or Article 7(2).

68. However all enforcers and consumers organizations said that if Article 7(4) is framed in the implementing regulations as a separate offence, it should be one of strict liability in line with their recommendations for Articles 7(1) and 7(2). The obligations in Article 7(4) are more specific than those in Article 7(1) and to that extent the trader has more opportunity to reflect on the implications of his statements and to correct any omissions. It is therefore wholly appropriate that the business should be exposed to a strict liability offence under Article 7(4). Without strict liability current enforcement of areas such as misleading price indications e.g. flight and computer prices, will be weakened due to increased flexibility in providing information. This will result in difficulty in enforcing such issues which are already highly 'typical' of current consumer complaints.

69. On the other hand business organisations said that Article 7(4) it is not as precise as it might at first appear. One problem is that there is no clarity or consensus on when there is an invitation to purchase, on which the provision of this information is contingent, and indeed it may vary depending on the product involved and where the invitation is located. Whether the information is already 'apparent from the context' may also be open to debate, as may what is the 'extent appropriate to the medium and the product'. Yet the information is only required if there is an invitation to purchase so that the definition of an invitation to purchase would be key to any prosecution. Article 7(4) also provides traders with a degree of flexibility as to how information should be given thereby opening it up to different interpretation.

Question 6. Do you consider that a new offence in relation to the publication of misleading advertisements in provisions implementing the MCAD should be one of strict liability or should it require proof of a state of mind of the trader?

70. All enforcers and consumer organisations said that breach of the misleading advertising provisions of the (revised) Misleading and Comparative Advertising Directive (MCAD) should be a strict liability offence. This would ensure consistency between the amended MCAD and UCPD Article 6 in order to avoid discrepancies in how practices that potentially affect businesses as well as consumers are brought before the courts. Also, many small and medium sized businesses (and particularly sole traders without the administrative resources to make exhaustive enquiries) may be equally as vulnerable to misleading advertising as individual consumers and, as such, should be afforded the same protections as individual consumers.

71. The OFT said if the criminal offences relating to UCPD Article 6 and the MCAD are strict liability offences, that is another reason for the same also to apply to the criminalisation of UCPD Article 7. If the latter is treated differently, then, to the extent the MCAD offence would cover misleading omissions as well as actions, such offences would be easier to prosecute in business-to-business situations than in business-to-consumer ones. Businesses would, in effect, derive more protection from the criminal law than consumers.

72. Business responses were divided. Some such respondents agreed it would be desirable to have consistency between the offences for breach of UCPD Article 6 and the misleading advertising provisions of the MCAD and that the latter should therefore be one of strict liability. This also reflects the equal treatment accorded to business-to-consumer and business-to-business activities under the TDA. If the provisions on the publication of misleading advertisements within MCAD were to become out of line with the treatment of UCPD Article 6, there might be a risk of rogue business-to-consumer activities simply migrating to the business-to-business side.

73. An organisation representing the interests of the advertising industry said that the equivalent provision within the rump MCAD to Article 6(2)(b) of the UCPD should be treated in the same manner. In other words no criminal offence should be created in respect of commitments contained within codes of conduct covering business-to-business commercial activities.

74. However the CBI, BRC and the Newspaper Society said that the offence should involve mens rea as this would be least likely to undermine existing self-regulatory processes.

Chapter 5: Types of *Mens Rea*

Question 7. Do you agree that the mens rea offences for breaches of the UCPD should be “knowledge or recklessness”?

75. Enforcers and consumer organisations said they hoped the Government will be persuaded to a strict liability approach for all infringements. However, enforcers said that if mens rea is introduced for some infringements then the ‘knowledge or recklessness’ approach currently in section 14 of the TDA would seem to be a good way forward. It is familiar to businesses and enforcers and on that basis alone it has much to commend it.

76. Trading standards enforcers said that any standard of recklessness should be derived from the judgment of Widgery LCJ in *MFI Warehouses Ltd v Natrass* [1973] 1 All ER 762 (a matter under section 14 of the TDA).

77. A majority of trading standards respondents suggested that the approach should be extended to include ‘negligence’ so as to reflect the full state of mind. Indeed, the TDA already contains negligence in respect of offences of consent, connivance or neglect of a company officer, and so would prove the most straightforward of the mens rea types to be enforced by trading standards. Inclusion of ‘negligence’ would also place some

requirement on businesses to maintain adequate systems which promote consumer protection.

78. The OFT disagreed saying that in practice 'negligent' traders are more likely to be dealt with via the civil route.

79. Business respondents also agreed that “knowledge or recklessness” would be the appropriate levels of mens rea. One such respondent agreed that there is logic to carrying over the type of *mens rea* requirement contained within section 14 of the TDA, given that UCPD will effectively directly replace that legislation in the business-to-consumer context.

80. A leading business organisation said it did not believe that the lower level of burden of proof requiring only negligence would be sufficient, given the lack of clarity attaching to the offences involved. A positive degree of knowledge or recklessness should be required to be demonstrated by any enforcer.

Chapter 6: The Office of Fair Trading’s (OFT) power to bring criminal prosecutions

Question 8: Do you agree that the OFT should have the power to bring criminal prosecutions for breaches of the UCPD and the MCAD?

81. Trading standards respondents said that consumer protection legislation is usually best enforced at a local authority level. However, some forms of consumer detriment cross authority boundaries and it will not always be possible or expedient for an individual local authority TSS to deal with such matters. Also, given the resources and remit of the OFT as a national enforcement body it may be appropriate for it to take responsibility for some serious national cases that require criminal enforcement.

82. Therefore on balance TSS supported giving the OFT the same powers as local authorities to bring criminal prosecutions. The OFT already has a close working relationship with TSS, and with the move towards the broad toolkit of sanctions envisaged by Professor Macrory, it seems very appropriate that the OFT’s powers should mirror those of local authorities.

83. A strict policy of when the OFT would be involved would be required. Therefore, the OFT would require a robust enforcement policy and an agreed protocol or guidance on how the OFT and local authority TSS will deal with criminal enforcement of the UCPD. OFT staff will also require effective training on criminal investigations and proceedings and appropriate funding to undertake criminal investigations.

84. The decision on whether a local authority will take enforcement proceedings must remain with the local authority. Local authorities should not have to seek authority from the OFT to take criminal proceedings. Nor should the OFT have the power to take over or curtail a criminal investigation or prosecution undertaken by a local authority. Furthermore, the OFT would not

be expected to start proceedings where a local authority TSS prosecution is available and more normally appropriate.

85. One trading standards respondent said that where a TSS decides to institute criminal legal proceedings proportionate notification arrangements might exist with the OFT. This would also have the advantage of making them a co-ordinator in national investigations which may lead to more effective action.

86. In Scotland only the Crown Office and Procurator Fiscal Office Service can bring criminal prosecutions. It would be logical for the OFT to be acknowledged as a "Reporting Agency" who could submit reports on alleged criminal breaches of the UCPD and the MCAD to the Procurator Fiscal recommending that a person or entity be prosecuted. However, some Scottish TSS said the OFT's role in reporting cases to the Procurator Fiscal should be limited to cases that have a national dimension where the breaches affect consumers from different trading standards areas. If the breaches are local then the local TSS should be the sole agency that can report the matter to the Procurator Fiscal as they have the knowledge of the trader's trading history, and any previous advice given or warnings issued that would have a bearing on whether a criminal case is in the public interest. This is not available to the OFT.

87. Consumer organizations also supported giving the OFT the power to bring criminal prosecutions for breaches of the UCP regulations and MCAD. These respondents said it would be inconsistent for the OFT not have the same powers in criminal law as TSS. This would act as an artificial barrier to true flexibility and proportionality in enforcement action. The flexibility to use criminal as well as civil tools is important, particularly where evidence of greater harm may only come to light part way through an investigation.

88. Furthermore, as a national consumer protection enforcement body with increased responsibilities for the championing TSS and providing regulatory leadership and assistance, the OFT is best placed to work with a local TSS to meet these aims.

89. Business responses were mixed. Some such respondents supported giving OFT powers to bring criminal prosecutions provided robust processes are in place to ensure that there is no risk of both TSS and the OFT bringing actions against a trader for the same offence. Also, the OFT's role would need to be clearly defined to ensure actions are taken by the most appropriate enforcer.

90. However, two leading business organization were opposed arguing the case for this has not been made out. These respondents said that whether the OFT should be granted criminal prosecution powers should be considered in the round and on its merits, and not in the narrow context of one specific piece of legislation. At the very least there should be a debate on whether additional powers are justified and necessary and, if they are, what additional resources the OFT might need to fulfil its new role. For example, it will need case officers, lawyers and support staff if it is to be effective in undertaking criminal

investigations, not least those with mens rea. It should be required to observe the Enforcement Concordat.

91. These same business organisations disagreed that OFT needs the same criminal enforcement powers as the TSS whose activities they will be co-ordinating. The OFT can ensure that consistent and proportionate enforcement action can be taken by virtue of its co-ordinating role in respect of TSS; this would be strengthened if it had the power to direct the most appropriate TSS to act. It does not itself need those powers to take criminal prosecutions as long as it can ensure that proportionate action is taken by the relevant enforcement authority.

92. One of the above business organisations also disagreed that criminal prosecution powers are needed to target national cases. Penalties which can be obtained as a result of criminal prosecutions are unlikely to be more powerful or act as more of a deterrent than those gained through the civil injunctive route. A criminal sanction obtained against a company affects the company. An injunction under Part 8, however, can go wider and be obtained against individuals, for instance the directors of the company. Not only does that focus the minds of those responsible for the direction of companies, but it is also a powerful aid in fighting phoenix companies.

93. If powers to take criminal prosecutions are granted to the OFT they should be subject to the same safeguards as TSS.

94. The OFT said that its lack of criminal powers when enforcing consumer based legislation had made it difficult for it to pursue and ultimately bring to justice fraudsters who target criminal activities towards consumers. Providing it with the ability to take criminal prosecutions will therefore better enable OFT and TSS to deliver consistent enforcement action. The OFT said its clearly stated desire is to make use of civil sanctions wherever possible but that there will be cases where criminal action is necessary and can be justified. The need for an overarching enforcement policy, covering both civil and criminal action, is obvious and to this end it has made a commitment in its 2007-08 Annual Plan to work towards a comprehensive policy.

95. Providing the OFT with criminal powers will therefore ensure the most appropriate enforcement action is taken by the right enforcer, taking into account all enforcement policies and safeguards, using the civil route as a default position and only pursuing criminal action when it can be justified.

Other - Enforcement powers

96. Trading standards respondents said that it is essential that the UCPD implementing legislation will ensure that local authorities should continue to have access to enforcement powers similar to those that will be repealed in the TDA. This is essential but it provides a great opportunity for the Government to update enforcement powers which are nearly 40 years old. For example, information is now routinely stored on computers yet there is no power in the TDA to require its production in hard copy format.

END