

Unfair relationships

**Enforcement action under Part 8 of the
Enterprise Act 2002**

OFT guidance

May 2008

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1 INTRODUCTION

- 1.1 The Consumer Credit Act 2006 (the 2006 Act) amended the Consumer Credit Act 1974 (the 1974 Act). One of the principal changes was the introduction of the concept of an unfair relationship.
- 1.2 This enables a borrower to challenge a credit agreement in court on the grounds that the relationship between the lender and the borrower in connection with the agreement is unfair to the borrower. This provision is in addition to an enhanced ability for consumers to take disputes to the Financial Ombudsman Service (FOS).
- 1.3 The unfair relationships provisions replaced previous provisions relating to extortionate credit bargains, which were generally held to be inadequate to protect consumers. The new rules applied to new agreements from 6 April 2007, and to pre-existing agreements from 6 April 2008. Agreements completed before the new provisions took effect remain subject to the extortionate credit bargains provisions.¹
- 1.4 Unfair relationships and the circumstances that give rise to them may also be addressed using enforcement powers under Part 8 of the Enterprise Act 2002 (Part 8). These powers cover situations where businesses infringe their legal obligations and as a result harm the collective interests of consumers.
- 1.5 The Office of Fair Trading (OFT) is one of the principal enforcement authorities in relation to Part 8, and we also co-ordinate the actions of other Part 8 enforcers including Local Authority Trading Standards Services.
- 1.6 A summary of the provisions of Part 8, and the OFT's approach to enforcement, can be found in *Enforcement of consumer protection legislation: Guidance on Part 8 of the Enterprise Act* (OFT512).² We have

¹ An agreement is completed if there is no longer any sum which is or may become payable.

² Available on the OFT website at www.oft.gov.uk

also issued a general statement of our enforcement principles in relation to consumer protection legislation.³

- 1.7 Section 140D of the 1974 Act⁴ requires the OFT to publish guidance indicating how we expect the unfair relationships provisions to interact with Part 8. This is intended principally as advice and information for businesses, their legal advisers or representatives, and consumer organisations.
- 1.8 The OFT published initial guidance in December 2006. We are now updating this in the light of developments – in particular, the issue of new fitness guidance under the 1974 Act⁵ and the implementation of the Unfair Commercial Practices Directive.⁶
- 1.9 The guidance does not seek to define what is an unfair relationship but rather to indicate how Part 8 powers might be used in this area. It is for a court to determine whether there is an unfair relationship in an individual case. The courts are not required to have regard to OFT guidance, although they may choose to do so if they consider it to be relevant in the particular case.
- 1.10 The guidance may nevertheless be helpful to businesses and consumers by indicating the kinds of factors that are likely to influence the OFT's consideration under Part 8. Such factors may also be relevant to the court's consideration in individual cases involving allegations of unfair relationships. The OFT will act under Part 8 only if we consider that there is a reasonable prospect of success in any court action, which in turn will depend upon how we believe a court would be likely to interpret and apply the unfair relationships test in the particular circumstances.

³ *Statement of consumer protection enforcement principles* (OFT964), November 2007 – available on the OFT website.

⁴ As inserted by section 22 of the 2006 Act.

⁵ See paragraph 4.49 below.

⁶ See paragraph 4.34 below.

- 1.11 The guidance does not bind other Part 8 enforcers but we will encourage them to have regard to it in any proposed actions under Part 8. We will also co-ordinate such actions to ensure that businesses are not subjected to unnecessary multiple approaches and that court proceedings are taken only where warranted. The procedures underpinning the OFT's approach to enforcement are summarised in chapter 5 of this guidance.
- 1.12 The guidance will be kept under review and may be further amended from time to time to take account of court judgments and other relevant developments.
- 1.13 In this guidance, references to borrowers should be taken to mean debtors (including hirers under hire-purchase agreements), and lenders should be taken to mean creditors (including owners under hire-purchase agreements).

2 THE UNFAIR RELATIONSHIPS PROVISIONS

- 2.1 The provisions relating to unfair relationships are set out in sections 140A to 140C of the 1974 Act.⁷ They replace the extortionate credit bargains provisions in sections 137 to 140 of the Act.
- 2.2 The unfair relationships provisions applied to new agreements from 6 April 2007. Where an agreement was entered into before that date, the provisions applied from 6 April 2008 unless the agreement was completed by then.⁸ Completed agreements remain subject to the extortionate credit bargains provisions.

The unfair relationships test

- 2.3 Section 140A provides that the court may determine that the relationship between a lender and a borrower arising out of a credit agreement (or the agreement taken with any related agreement) is unfair to the borrower because of:
- any of the terms of the credit agreement or any related agreement
 - the way in which the lender has exercised or enforced any of its rights under the agreement or any related agreement, or
 - any other thing done (or not done) by or on behalf of the lender either before or after the making of the agreement or any related agreement.
- 2.4 In making its decision, the court must have regard to all matters that it considers to be relevant, including matters relating to the individual borrower and lender. The court may also take account where appropriate of things done (or not done) by or on behalf of, or in relation to, an associate or former associate of the lender.

⁷ As inserted by sections 19 to 21 of the 2006 Act.

⁸ See footnote 1 above.

- 2.5 Associate is defined in section 184 of the 1974 Act. In the case of an individual, it includes that person's husband or wife (or civil partner), or a relative, or a person with whom he is in partnership (or a relative of such person). In the case of a body corporate it includes a controller (as defined in section 189 of the Act) and any other body which is controlled by that person. It does not otherwise include a business associate as referred to in section 25(3) of the Act.
- 2.6 Section 140A(1)(c) extends to things done (or not done) on behalf of the lender. This would include the lender's employees or agents. It may also include a broker or other intermediary, or a debt collector, where that person is acting on behalf of the lender. As such, his actions or inactions may be relevant to whether there is an unfair relationship. He may also be party to a related agreement (see below).
- 2.7 Section 140A(4) provides that a determination may be made by the court even if the relationship has ended.

Scope of the provisions

- 2.8 A credit agreement for these purposes means an agreement between an individual (the debtor) and any other person (the creditor) by which the creditor provides the debtor with credit of any amount.⁹ An individual includes a sole trader or partnership¹⁰ or other unincorporated body.¹¹ Credit includes a cash loan or other form of financial accommodation, including a hire-purchase agreement.
- 2.9 The unfair relationships provisions apply to credit agreements whether regulated or not. The sole exception is where an agreement is exempt under section 16(6C) of the 1974 Act because it is a regulated mortgage contract under the Financial Services and Markets Act 2000. The

⁹ The financial limit in section 8 of the 1974 Act was removed for new agreements from 6 April 2008, pursuant to section 2 of the 2006 Act.

¹⁰ Consisting of two or three persons not all of whom are bodies corporate.

¹¹ Not consisting entirely of persons who are bodies corporate.

provisions otherwise apply to agreements which are exempt under section 16 of the 1974 Act or section 16A (high net worth borrowers) or section 16B (business lending for more than £25,000).¹²

Related agreements

2.10 As noted above, an unfair relationship may arise by virtue of a related agreement. This is defined in section 140C as meaning:

- a credit agreement consolidated by the main credit agreement
- a linked transaction in relation to the main agreement (or a consolidated agreement), or
- a security provided in relation to the main agreement (or a consolidated agreement or linked transaction).

2.11 For these purposes an agreement is consolidated by a later agreement if:

- the later agreement is entered into, in whole or part, for purposes connected with debts owed under the earlier agreement, and
- the parties to the earlier agreement included the borrower under the later agreement and either the lender under that agreement or an associate or former associate of the lender.

2.12 Linked transaction is defined in section 19 of the 1974 Act. It includes where:

- the transaction is entered into in compliance with a term of the credit agreement

¹² The exemptions under sections 16A and 16B were implemented from 6 April 2008. The Department for Business, Enterprise and Regulatory Reform (BERR) is also proposing to make a Legislative Reform Order which will introduce a new exemption in respect of buy-to-let lending.

- the transaction is financed, or to be financed, by the agreement (where the latter is a debtor-creditor-supplier agreement), or
- the borrower (or a relative) enters into the transaction on the suggestion of the lender (or an associate or certain other persons¹³) to induce the lender to enter into the credit agreement, or for another purpose related to that agreement.

2.13 For example, many contracts for payment protection insurance (PPI) are likely to be linked transactions for these purposes.

2.14 Security is defined in section 189 of the 1974 Act. It includes any mortgage, charge, bond, indemnity, guarantee or other right provided by the borrower, or at his request (whether express or implied), to secure the carrying out of his obligations under the agreement.

2.15 Where security is provided in relation to a credit agreement or linked transaction, the person providing the security (the surety) can apply to the court under the unfair relationships provisions.

The court's powers

2.16 Section 140B sets out the powers available to the court where it determines that the relationship is unfair to the borrower. An order made by the court may do one or more of the following:

- require the lender, or an associate or former associate, to repay (in whole or part) any sum paid by the borrower (or a surety) by virtue of the credit agreement or any related agreement

¹³ These comprise a person represented in the negotiation of the transaction by a credit-broker who was a negotiator in antecedent negotiations for the principal agreement, or a person who, at the time the transaction is initiated, knows that the principal agreement has been made or contemplates that it might be made.

- require the lender, or an associate or former associate, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement
- reduce or discharge any sum payable by the borrower (or a surety) by virtue of the agreement or any related agreement
- set aside (in whole or part) any duty imposed on the borrower (or a surety) by virtue of the agreement or any related agreement
- alter the terms of the agreement or any related agreement
- direct the return to a surety of any property provided by him for the purposes of a security
- direct accounts to be taken between any persons.

2.17 An order may be made on an application by the borrower (or a surety) either as a stand-alone application or as part of court proceedings in relation to the credit agreement or a related agreement.

2.18 Section 140B(9) provides that if the borrower (or a surety) alleges that the credit relationship is unfair, it is for the lender to prove the contrary. In other words, the onus of proof is on the lender to show that the relationship is not unfair.

2.19 The court's powers to make an order under section 140B are not limited to matters arising after the coming into force of section 140A. The court may also have regard to matters arising before that date, other than in respect of certain related agreements which ceased to apply before the provisions came into force.

3 APPLICATION OF PART 8 TO UNFAIR RELATIONSHIPS

- 3.1 Section 140D of the 1974 Act requires that advice and information published by the OFT under section 229 of the Enterprise Act 2002 shall indicate how the OFT expects the unfair relationships provisions to interact with Part 8. This guidance is issued pursuant to that provision.

Part 8 of the Enterprise Act

- 3.2 Part 8 gives certain enforcers (including the OFT) powers to accept undertakings from, and where appropriate to seek court orders against, businesses that infringe their legal obligations.
- 3.3 Part 8 is injunctive in nature. Its purpose is to stop practices or actions which harm the collective interests of consumers and to deter traders from engaging in similar conduct in the future. It is not intended as a means of providing redress for individual consumers or enabling them to enforce their rights against a particular trader.
- 3.4 It is for consumers to seek redress for themselves as individuals. In the case of unfair relationships, this might be through an application to the court for an order against the business concerned, as described above.¹⁴ Alternatively, the consumer may make a complaint to the business, or (having done so) may seek resolution of the dispute by approaching the Financial Ombudsman Service (FOS) which will determine disputes according to what is fair and reasonable.¹⁵
- 3.5 In practice, the OFT anticipates that most consumers will be likely to seek out-of-court resolution of disputes rather than initiate court proceedings, which may be costly and time-consuming. Nevertheless, the unfair relationships provisions are an important additional protection

¹⁴ Information on the relevant court procedures may be found on the websites of the various Court Services, for example www.hmcourts-service.gov.uk

¹⁵ Further details are available from the FOS website at www.financial-ombudsman.org.uk

for consumers, and may be especially useful for borrowers facing court proceedings for enforcement or repossession.

The role of the OFT

- 3.6 The OFT cannot take up complaints on behalf of individual consumers. Our role is strictly regulatory – to act in the public interest, and on behalf of consumers generally, in monitoring and enforcing compliance with relevant legislation. Our aim in carrying out our functions is to make markets work well for consumers.
- 3.7 We have powers to take enforcement action under Part 8 where businesses infringe their legal obligations and as a result harm the collective interests of consumers. We also co-ordinate such actions by other enforcers such as Local Authority Trading Standards Services.
- 3.8 In addition, we administer the licensing system under the 1974 Act. This requires us to be satisfied that a person is fit to engage in consumer credit activities. In doing so we must have regard to all relevant matters including whether the trader, or an associate or former associate, has contravened relevant legislation or has engaged in business practices which are deceitful or oppressive or otherwise unfair or improper, whether unlawful or not.
- 3.9 The 2006 Act broadened the fitness test to include credit competence and to specify irresponsible lending as an example of an unfair or improper business practice. It also enables the OFT to impose requirements on individual licensees where we are dissatisfied with any matter in connection with the licensee's business or conduct, and to impose financial penalties where these are breached.¹⁶

¹⁶ See also paragraph 4.49 below.

The unfair relationships test

- 3.10 It is for the court to determine in an individual case whether the particular credit relationship is unfair to the borrower. In doing so the court must have regard to all relevant matters, which may include in particular the circumstances of the individual borrower and the nature of the relationship between the parties.
- 3.11 A finding in one case may not necessarily be repeated in another, even if the same terms or practices are involved, since the circumstances may be different. For example, in one case the lender may be found to have exploited the borrower's vulnerability or lack of understanding, or failed to provide relevant information, and so caused detriment to the particular consumer. Different facts may apply in other cases.
- 3.12 The Act does not define an unfair relationship beyond setting out in general terms the classes of factors which can give rise to such relationships. This provides the courts with maximum flexibility in considering unfairness, and avoids unduly constraining them in individual cases.
- 3.13 It is therefore not possible, in advance of cases decided by the courts, for the OFT to provide definitive guidance on the meaning of the unfair relationships test or how it is likely to be applied by the court. We will however consider amplifying the current guidance in the light of relevant court judgments as and when these come to our attention.
- 3.14 It is nevertheless possible to set out some general principles based on the formulation of the statutory test in section 140A. These will not in any way be binding on the court, but in the OFT's view may underpin the court's interpretation of the provisions in individual cases. They will in any case be relevant to the OFT's consideration of possible Part 8 action in relation to unfair relationships.
- 3.15 As noted above, an unfair relationship may arise by virtue of:
- (a) the terms of the credit agreement (or a related agreement)

(b) the way in which the lender has exercised or enforced its rights under the agreement (or a related agreement), or

(c) any other thing done (or not done) by or on behalf of the lender either before or after the making of the agreement (or a related agreement).

- 3.16 The meaning of (a) and (b) is fairly straightforward. In the OFT's view category (c) is intended to be as broad as possible, to ensure complete flexibility for the courts. It encompasses both acts and omissions, such as where the lender (or an employee, agent or associate) has failed to take certain steps which, in the interests of fairness, he might reasonably be expected to have taken.
- 3.17 In our view, category (c) would include, for example, pre-contract business practices (such as advertising) and post-contract actions not based on a right (such as demanding sums of money the consumer has not agreed to pay). Relevant omissions might include failure to provide key information in a clear and timely manner (or at all), or to disclose material facts. Category (c) would also encompass acts or omissions which are non-commercial.
- 3.18 For the purposes of this guidance, it may be helpful to group the potential triggers for action under the unfair relationships provisions under two broad headings – **contract terms** and **business practices**. This is discussed further in chapter 4 of this guidance. It should be noted, however, that an act or omission may give cause for concern under section 140A even if it is one-off and so does not amount to a practice within the usual meaning.
- 3.19 There is no statutory definition of relationship but the meaning of this seems plain from ordinary usage. In our view it means a connection or association between people who have some link to or dealings with each other. A relationship is a continuing state of affairs, and involves and affects all aspects of the mutual dealings of the parties.
- 3.20 There is also no special definition of unfair in this context. However, this is not an unfamiliar concept in consumer protection generally, or the

regulation of financial services in particular. Closely related legislation¹⁷ and associated jurisprudence and guidance can provide tests and examples of unfairness which may be relevant to the court's consideration of a possible unfair relationship.

The scope for Part 8 action

3.21 The Enterprise Act distinguishes between two types of infringement:

- domestic infringements – acts or omissions in the course of business which are of a description specified by the Secretary of State by order and which fall into one or more of the categories set out in section 211(2)(a)-(g)
- Community infringements – acts or omissions which breach specified legislation implementing EU directives or providing permitted additional protections for consumers (section 212).

3.22 In each case the infringement must also harm the collective interests of consumers. This is considered further below.

3.23 In particular, section 211(2)(d) refers to an act or omission in respect of which an enactment provides for a remedy or sanction enforceable by civil proceedings. The 1974 Act is listed for Part 8 purposes in the Schedule to the Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003 (as amended), and section 140B provides for remedies enforceable by civil proceedings in respect of unfair relationships.

3.24 If enforcement action is brought under Part 8 against a lender on the basis that its terms or practices give rise to unfair relationships, it will be for the court to decide whether an enforcement order can be granted, having regard in particular to the following:

¹⁷ For example, the Financial Services and Markets Act 2000, see paragraph 4.60 below.

- whether any of the lender's acts or omissions, or other relevant facts, fall within section 140A(1) of the 1974 Act
- if so, whether an unfair relationship has arisen in the light of all the matters required to be considered by section 140A(2), and
- if so, whether an act or omission has occurred that, in consequence, falls within the scope of section 211 of the Enterprise Act.

3.25 Acts or omissions falling within section 140A(1)(a)-(c) may also be actionable under Part 8 by reference to other enactments or rules of law mentioned in the Domestic Infringements Order, or other relevant provisions of section 211(2), or as Community infringements under section 212. If enforcement action is brought on such a basis, there will be no need to satisfy the court in addition that an unfair relationship has arisen. However, any evidence tending to show unfairness to consumers may be relevant to the court's consideration of whether an enforcement order should be granted, and in what terms, as well as to the enforcer's decision on whether to initiate proceedings.

The collective interest test

3.26 Part 8 is not a means of pursuing individual redress. It applies only to infringements which harm the collective interests of consumers. This means that the breach must affect, or have the potential to affect, consumers generally or a group of consumers.¹⁸

3.27 The unfair relationships provisions in section 140A apply to an individual relationship between a lender and a borrower. However, the lender may enter into such relationships with more than one consumer, and in doing

¹⁸ A consumer for Part 8 purposes would not include a person acting in the course of a business. However, business customers may be individuals for the purposes of section 140C and so may take action on their own account under the unfair relationships provisions. See also paragraphs 2.8 and 2.9 above.

so may, by virtue of acts or omissions giving rise to unfairness, have an adverse effect on a number of them.

- 3.28 In considering the scope for Part 8 action based upon the unfair relationships provisions, the OFT would consider whether there is a common factor which is likely to make a number of individual relationships unfair and so harm the collective interests of consumers.
- 3.29 For example, a lender may use standard terms in its agreements with consumers, or may operate in a common manner in respect of borrowers generally or a group of borrowers. The term or practice may give rise to unfairness in each case, or in a number of cases, and so may harm the collective interest.
- 3.30 It would not be necessary for this to occur in all cases, or to have the same impact on each borrower. It may be sufficient that it gives rise to an unfair relationship in one case and has the potential to do so in others. Equally, the fact that a term or practice may not be unfair in a particular case, for example because of the borrower's knowledge or experience, may not mean that it would not be unfair in relation to other consumers who may be more vulnerable or susceptible to exploitation.
- 3.31 Each case would fall to be considered on its merits, having regard to all relevant facts and circumstances. The OFT would take into account in particular the circumstances of the individual borrower(s), the number and nature of borrowers likely to be affected, and the likely scope and impact of such adverse effects.
- 3.32 There is no specific minimum threshold in terms of the number of consumers affected, and no obligation under Part 8 to establish a specific number of complaints or incidents of infringement.

4 FACTORS IN CONSIDERING PART 8 ACTION

4.1 As noted above, the triggers for possible Part 8 enforcement action in relation to unfair relationships may (for convenience) be grouped under two broad headings, contract terms and business practices. These are considered further below.

Contract terms

4.2 Section 140A(1)(a) provides that an unfair relationship may arise by virtue of the terms of the credit agreement or any related agreement. In some cases unfair contract terms may be sufficient in themselves to give rise to an unfair relationship. In other cases it may be the combination of terms taken together with business practices (whether or not relating to the operation of the terms) or other acts or omissions of the lender.

4.3 In considering the unfairness or otherwise of contract terms, the OFT would have particular regard to whether the term is unfair for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs). These provide that a contractual term (if not individually negotiated) is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.

4.4 Infringement of the UTCCRs may be actionable both directly and via Part 8 of the Enterprise Act, as a Community infringement.

4.5 Account would also be taken where appropriate of the Unfair Contract Terms Act 1977 (UCTA). This limits the extent to which civil liability for breach of contract, or for breach of duty, can be avoided by means of contract terms.

4.6 Schedule 2 to the UTCCRs comprises an indicative and non-exhaustive list of terms which may be regarded as unfair. For example, a term may be unfair if it has the object or effect of:

- requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation
- enabling the supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract, or
- excluding or hindering the consumer's right to take legal action or exercise any other legal remedy.

4.7 There have been a number of court decisions in relation to the UTCCRs and the UCTA. In addition, the OFT has published regulatory guidance setting out our approach to enforcement of the UTCCRs.¹⁹ This emphasises that the requirement of good faith embodies a general 'principle of fair and open dealing'²⁰ with suppliers being expected, in drafting contracts, to respect consumers' legitimate interests. Contractual imbalance may arise, to the detriment of the consumer, wherever a term gives powers or safeguards to the supplier which could put the consumer at a disadvantage, whether or not actual harm is caused.

4.8 The UTCCRs guidance is arranged according to the categories of unfair terms listed in schedule 2, with two additional categories covering other types of unfairness. The guidance explains why the OFT considers certain standard contract terms used with consumers to be potentially unfair under the UTCCRs.

4.9 In relation to financial penalties (paragraph 1(e) of schedule 2), the guidance notes that it is unfair to impose disproportionate sanctions for breach of contract. A requirement to pay more in compensation for a breach than a reasonable pre-estimate of the loss caused to the supplier is one kind of disproportionate sanction, and will also normally be void as a penalty under common law. A clause may also be unfair if it allows

¹⁹ *Unfair contract terms guidance* (OFT311) – available on the OFT website at www.offt.gov.uk

²⁰ Court of Appeal decision in *Director General of Fair Trading v First National Bank plc* [2000] 2 AU ER 759

the supplier excessive discretion to decide the level of a penalty, or if it could have that effect through being unclear or misleading.

- 4.10 In relation to price variation clauses (paragraph 1(l) of schedule 2), the guidance states that, in the OFT's view, a discretionary right to vary the price after the consumer has become bound will generally be unfair, unless the consumer is free to terminate the contract without penalty. In addition, a price variation clause may be unfair even if it is not discretionary, and the guidance sets out a number of factors which may be relevant to this. These include whether increases are linked to an external index, the scope for the supplier to decide the level and timing of any increase, and whether details are clearly and adequately drawn to the consumer's attention.
- 4.11 The OFT has also issued guidance on the application of the UTCCRs in relation to particular market sectors or types of contract term, some of which is relevant to credit agreements or related agreements.
- 4.12 For example, we have issued a statement setting out our view on calculating fair default charges in credit card contracts.²¹ This sets out a number of general principles which are also likely to be relevant to default charges in other standard agreements with consumers, such as those for mortgages, store cards or bank accounts. In relation to credit card default charges, the statement indicates that, as an administrative priority, OFT action is more likely where the charge exceeds £12, since this is likely to exceed the lender's reasonable costs arising on default unless there are exceptional factors.
- 4.13 All transactions between commercial lenders and consumer borrowers will normally involve terms which are subject to the UTCCRs, and the OFT has no reason to suppose that the courts will give a meaning to the concept of unfairness in relationships which is fundamentally different from that given in the context of contract terms.

²¹ *Calculating fair default charges in credit card contracts: A statement of the OFT's position* (OFT842), published April 2006 – available on the OFT website at www.offt.gov.uk

- 4.14 It is important to emphasise, however, that a term may be unfair under the UTCCRs without necessarily giving rise to an unfair relationship. For example, the term may be insufficiently central to the relationship between the parties as to make the relationship as a whole unfair to the borrower. This will depend upon the facts of the individual case.
- 4.15 Equally, a term may not be unfair for the purposes of the UTCCRs but may still trigger consideration of whether there is an unfair relationship within the meaning of section 140A. In particular, the UTCCRs preclude an assessment of fairness in relation to terms which define the main subject matter of the contract, or which relate to the adequacy of the price or remuneration, provided that they are expressed in plain intelligible language. These are commonly referred to as core terms. Such terms may nevertheless give rise to, or contribute to, a finding of an unfair relationship in an individual case. They may also be relevant to an assessment of the fairness of other terms.
- 4.16 The test of unfairness under the UTCCRs also does not apply to terms which have been individually negotiated between the parties. However, there is no such restriction in section 140A(1)(a) and the court could have regard to such terms in the context of unfair relationships.

Rates and charges

- 4.17 The interest rate or APR under a credit agreement, or other charges falling within the total charge for credit, would normally be core terms and so, if clearly expressed, would not themselves be subject to an assessment of fairness under the UTCCRs.²² This would not however preclude the court from taking such terms into account in deciding whether the relationship is unfair to the borrower. Equally, the OFT or another enforcer would be entitled to have regard to such terms in deciding whether to take Part 8 action.

²² See paragraph 4.15 above

- 4.18 A term providing for variations in the interest rate would not in the OFT's view constitute a core term within the meaning of the UTCCRs as it does not relate to the adequacy of the initial price.
- 4.19 The unfair relationships test in section 140A does not refer expressly to rates or payments, in contrast to the previous extortionate credit bargains provisions. Section 138 provided, among other things, that a credit bargain was extortionate if it required the debtor to make payments which were grossly exorbitant, having regard to interest rates and other relevant considerations.
- 4.20 Nevertheless, in the OFT's view there is clearly scope for the court to find that a credit relationship is unfair on the grounds that it involves excessive costs for the borrower. Section 140A(2) requires the court to have regard to all relevant matters and these could include the cost of the credit agreement or any related agreement. This appears to be endorsed by Ministerial statements in Parliament during the passage of the 2006 Act.²³
- 4.21 For example, the rate of interest charged under a credit agreement, or the rate or amount of other fees or charges, may be so much higher than those applicable generally in the particular market sector, or payable by borrowers in similar situations, as to make the relationship as a whole unfair to the borrower. They may also, in the particular circumstances, be oppressive or exploitive of the individual borrower even if they are in line with rates prevailing at the time in the particular sector.
- 4.22 In addition, excessive prices may be accompanied by other unfair terms or practices which may contribute to an unfair relationship as well as being susceptible to possible Part 8 action in their own right.
- 4.23 For example, the borrower may be unaware that a fee would be charged in a particular case, or the level of the fee, or how this might impact on the debt. He may also be unaware that rates might increase in particular

²³ For example, Hansard 9 June 2005, column 1411.

circumstances, or were unlikely to reduce in line with changes in the market. The lender may have failed to disclose relevant information, or may have done so in a false or misleading manner, misrepresenting key elements. The information may also have been unclear or ambiguous, and so may not have been readily comprehensible.

- 4.24 As a result, the consumer may not have entered into the transaction in full knowledge of the facts. He may also have had, in the circumstances, no real choice as to acceptance of the particular terms, or may have been subject to aggressive marketing.
- 4.25 In advance of relevant court judgments it is difficult to anticipate how the courts will interpret and apply the unfair relationships provisions in relation to unfair rates or charges. The OFT will monitor the development of caselaw and in the light of that may amend or expand the current guidance.

Business practices

- 4.26 Section 140A(1)(b) and (c) provide that an unfair relationship may arise by virtue of the way in which the lender has exercised or enforced its rights under the credit agreement (or a related agreement) or any other thing done or not done by or on behalf of the lender either before or after the making of the agreement. For convenience, we group these together under the heading **business practices**.²⁴
- 4.27 For these purposes it is immaterial whether the practice in question is itself a breach of the law, or may be actionable as such, although this may be relevant in determining the OFT's enforcement priorities and the appropriate mechanism for dealing with the issue.
- 4.28 Nevertheless, it may be helpful to sub-divide business practices according to whether they contravene the law, or involve issues of unfairness but without necessarily infringing any legal requirement.

²⁴ But see paragraph 3.18 above.

Practices in breach of the law

- 4.29 An act or omission giving rise to an unfair relationship may also be in breach of the 1974 Act or other consumer protection legislation. As such, it may constitute a domestic or Community infringement in its own right and may be actionable as such under Part 8.
- 4.30 The whole of the Consumer Credit Act is specified in the Domestic Infringements Order,²⁵ and some aspects also constitute Community infringements.
- 4.31 For the purpose of considering Part 8 action in relation to unfair relationships, relevant provisions of the 1974 Act may include the following:²⁶
- section 45 relating to credit advertisements
 - sections 49 and 154 relating to canvassing off trade premises
 - section 51 relating to unsolicited credit-tokens
 - section 58 relating to withdrawal from a prospective land mortgage
 - sections 62-63 relating to the supply of copy agreements
 - section 64 relating to notice of cancellation rights
 - section 75 relating to joint and several liability
 - sections 77-78 relating to the provision of information
 - sections 90-93 setting restrictions on the remedies for default.

²⁵ See paragraph 3.23 above.

²⁶ This list is non-exhaustive.

- 4.32 Regulations made under the 1974 Act include those relating to advertising, pre-contract information and the form and content of credit agreements and other documentation. There are also provisions in respect of default under a regulated consumer credit agreement, and termination or early settlement.
- 4.33 The 2006 Act introduces further requirements in respect of post-contract information. These include provisions relating to annual and other periodic statements, notices of sums in arrears, notice of default sums, and post-judgment interest.²⁷

The Consumer Protection from Unfair Trading Regulations

- 4.34 The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) implement the Unfair Commercial Practices Directive (UCPD).²⁸ The CPRs are due to come into force (subject to Parliamentary approval) on 26 May 2008, and involve significant changes to UK legislation with the overall effect of broadening protection for consumers.²⁹
- 4.35 The CPRs introduce a general prohibition on unfair commercial practices. A commercial practice means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a relevant transaction.
- 4.36 Regulation 3 provides that a commercial practice is unfair if –
- it contravenes the requirements of professional diligence, and
 - it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer.

²⁷ The post-contract information provisions are due to be implemented from 1 October 2008.

²⁸ Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

²⁹ The CPRs were laid in Parliament on 3 March 2008..

4.37 In addition, a commercial practice is unfair if –

- it is a misleading action within regulation 5
- it is a misleading omission within regulation 6
- it is aggressive within regulation 7, or
- it is listed in schedule 1 (which comprises a list of commercial practices which are in all circumstances considered unfair).

4.38 For example, a commercial practice may be a misleading action if it contains false information and is therefore untruthful in relation to specified matters, or if it deceives or is likely to deceive the average consumer in relation to such matters, and in either case it causes or is likely to cause the consumer to take a transactional decision he would not otherwise have taken. The matters specified include the nature of the product, its main characteristics, the status of the trader and the extent of his commitments, the nature of the sales process, the price or the manner in which it is calculated, and the consumer's rights or the risks he may face.

4.39 A commercial practice may be a misleading omission if it omits or hides material information, or if it provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not otherwise have taken. Information is material if the average consumer needs it to take an informed transactional decision.

4.40 A commercial practice may be aggressive if it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product through the use of harassment, coercion or undue influence, and it thereby causes or is likely to cause the consumer to take a transactional decision he would not otherwise have taken. For example, any threat to take any action that cannot legally be taken.

- 4.41 The commercial practices listed in schedule 1 to the CPRs, which are prohibited in all circumstances, include ignoring a consumer's request to leave or not to return to the consumer's home, or making persistent and unwarranted solicitations by telephone, fax, e-mail or other remote media, except in circumstances and to the extent justified to enforce a contractual obligation.
- 4.42 Breach of the CPRs may be actionable under Part 8 in the same way as other Community infringements. In addition, certain breaches give rise to criminal offences.
- 4.43 The OFT and the Department for Business, Enterprise and Regulatory Reform (BERR) have jointly published guidance on the CPRs.³⁰ We will have regard to such guidance in deciding whether to take Part 8 action in respect of unfair relationships.

Practices not necessarily in breach of law

- 4.44 As noted above, practices can contribute to unfair relationships even if they do not themselves involve any contravention of the law. In considering the unfairness of such practices the court might have regard to whether they are of a kind that has been identified as unfair in the past (whether by a court or in a regulatory context) or which is recognisably unfair according to established tests of fairness.
- 4.45 Regulatory guidance on what is or is not acceptable business practice may therefore be helpful in identifying lender behaviour falling within section 140A(1)(b) or (c) and which might attract enforcement action under Part 8 in respect of unfair relationships.
- 4.46 Section 25 of the 1974 Act requires the OFT, in assessing fitness to hold a consumer credit licence, to have regard to any matters appearing to be relevant, including those specified in section 25(2). These include

³⁰ *Consumer Protection from Unfair Trading Regulations 2008 – Interim guidance* (March 2008) – available on the OFT website at www.oft.gov.uk

(among other things) evidence tending to show that the trader, or any of its employees, agents or associates (whether past or present), has engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper, whether unlawful or not.³¹

- 4.47 Such practices may relate to any aspect of the business. This could include the marketing, conclusion or operation of credit agreements or related agreements, or their enforcement. It may also include business activities which are not in themselves licensable under the Act.
- 4.48 Section 25(2B)³² specifies as an example of an unfair or improper business practice a practice in the carrying on of a consumer credit business that appears to the OFT to involve irresponsible lending.
- 4.49 Section 25A³³ requires the OFT to publish guidance, following consultation, on how we propose to determine whether traders are fit to hold a consumer credit licence. We published general guidance on fitness and requirements in January 2008,³⁴ and have also previously issued guidance in respect of non-status lending, debt collection, debt management and car dealers.
- 4.50 The fitness guidance sets out the OFT's general approach in relation to irresponsible lending. In particular, lenders should take reasonable care in making loans or advancing credit, having regard to the interests of the borrower. They should undertake proper and appropriate checks on the borrower's creditworthiness and ability to repay the loan and to meet the terms of the agreement. The checks should be proportionate, taking account of the type of agreement, the amounts involved, the nature of the lender's relationship with the consumer, and the degree of risk to the consumer.

³¹ Section 25(2A)(e) as inserted by section 29(2) of the 2006 Act.

³² As inserted by section 29(2) of the 2006 Act.

³³ As inserted by section 30 of the 2006 Act.

³⁴ *Consumer credit licensing: General guidance for licensees and applicants on fitness and requirements* (OFT969) – available on the OFT website at www.of.gov.uk

- 4.51 The guidance also notes the OFT's intention to engage in separate consultation with a view to producing follow-up guidance setting out examples of practices that could amount to irresponsible lending.
- 4.52 The Annexe to the general fitness guidance includes examples of business practices which are likely to be regarded as unfair or improper for the purposes of section 25(2A)(e). These include the following:
- using false or misleading statements in order to induce consumers to enter into a contract
 - hiding important details about credit deals in the small print
 - requiring consumers to sign credit agreements that are not easily legible and are difficult to understand
 - failing to comply with the requirements of the Act or the regulations on advertising and agreements
 - failing to perform contractual obligations to consumers, or to give any or adequate redress when in breach of duty to consumers
 - marketing or targeting loans explicitly at consumers in debt
 - using unacceptably high-pressure selling techniques or engaging in other aggressive commercial practices
 - misrepresenting the form, nature, purpose or long-term implications of loan agreements.
- 4.53 The non-status lending guidelines³⁵ apply to secured lending to non-status borrowers – those with impaired or low credit ratings and who would find it difficult generally to obtain finance from traditional sources on normal terms and conditions. The introductory note, however,

³⁵ *Non-status Lending – Guidelines for lenders and brokers* (OFT192), revised November 1997 – copies can be obtained via the OFT website at www.oft.gov.uk

encourages all lenders and brokers to consider the extent to which the principles of good business practice contained in the guidelines may be applied to all aspects of their business activity.

4.54 The principles in question³⁶ include the following:

- transparency in all dealings with borrowers, with full and early disclosure and explanation of terms and conditions and fees/charges
- no high-pressure selling, with adequate time allowed for the borrower to reflect and to obtain independent advice
- responsible lending, with all underwriting decisions subject to a proper assessment of the borrower's ability to repay, taking full account of all relevant circumstances
- lenders should take reasonable steps to ensure that brokers and other intermediaries regularly marketing their products do not engage in unfair business practices, or act unlawfully.

4.55 Specific practices highlighted in the non-status lending guidelines as unfair or improper include the following:

- failure to disclose status or potential conflicts of interest, such as where a fee or commission is payable to a broker
- applying unreasonable pressure on consumers to sign agreements, in particular when dealing with them face to face
- misrepresenting or concealing the terms of the contract, or making false representations, for example as to the borrower's obligations
- irregular or incomplete documentation, or falsification of income or other details, or knowingly permitting such information to be provided

³⁶ Paragraph 6 of the non-status lending guidelines.

- encouraging the consumer to replace unsecured debt with secured debt, unless this is in the borrower's interests and is explained fully to them
- failure to check information or to obtain sufficient evidence regarding the borrower's financial position and ability to repay
- failure to deal with arrears sympathetically and positively, or imposing excessive charges on default.

4.56 The debt collection guidance³⁷ may also be relevant to the question of whether there is an unfair relationship. As noted above, section 140A extends to the way in which the lender exercises or enforces its rights under the credit agreement (or any related agreement) and any other thing done (or not done) by or on behalf of the lender – for example by a debt collector – in relation to the agreement.

4.57 Examples of unfair or improper business practices specified in the debt collection guidance include the following:

- misrepresentation of legal position or authority to act
- contacting debtors at unreasonable times or at unreasonable intervals
- unreasonably refusing to deal with third parties acting on the debtor's behalf, such as a citizens advice bureau or money adviser
- imposing collection charges which are unreasonable or disproportionate or for which there is no contractual provision.

Other relevant matters

4.58 Issues of fairness also arise in a number of other contexts, which may be relevant to whether business practices which do not themselves infringe the law may nevertheless involve acts or omissions giving rise to an

³⁷ *Debt collection guidance* (OFT664) – available on the OFT website at www.offt.gov.uk

unfair relationship and potentially also Part 8 action. There may also be breaches of other legislation, such as the Data Protection Act 1998.

4.59 In particular, we would take into account whether there has been a breach of the rules or principles of the Financial Services Authority (FSA), for example in relation to linked insurance products such as payment protection insurance which may have been sold with the loan.

4.60 The concept of fairness is central to the FSA's regulation under the Financial Services and Markets Act 2000 (FSMA). One of the FSA's regulatory objectives under the FSMA is the protection of consumers, and a number of its general principles are directly relevant to fairness. These include:

- Principle 6 – a firm must pay due regard to the interests of its customers and treat them fairly
- Principle 7 – a firm must pay due regard to the information needs of its customers, and communicate information to them in a way which is clear, fair and not misleading
- Principle 8 – a firm must manage conflicts of interest fairly, both between itself and its customers, and between a customer and another client.

4.61 The FSA has published a series of papers, as part of its Treating Customers Fairly (TCF) initiative, which set out certain factors that firms should consider in ensuring that they treat their customers fairly.³⁸ These might also be relevant to an assessment of unfairness in an individual case under section 140A. The FSA has defined the customer outcomes that TCF should achieve for consumers, including:

³⁸ See for example the FSA document *Treating customers fairly: Measuring outcomes* (November 2007), available from the FSA website at www.fsa.gov.uk/tcf

- consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture
- products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly
- consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale
- where consumers receive advice, the advice is suitable and takes account of their circumstances
- consumers are provided with products that perform as firms have led them to expect, and the associated service is both of an acceptable standard and also as they have been led to expect
- consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

4.62 In considering possible Part 8 action in relation to unfair relationships, the OFT would take into account where appropriate whether the firm had complied with the principles underlying the TCF initiative, and with other generally accepted standards of fairness.

4.63 We would also take account of evidence of compliance with industry codes of practice. A number of such codes³⁹ include specific provisions in respect of fairness and responsible lending, which members are expected to comply with. In some instances the codes have been supplemented by guidance or best practice principles issued by the relevant trade association or other code sponsor. Account may also be taken of relevant findings by self-regulatory bodies such as the Advertising Standards Authority (ASA).

³⁹ For example, the Banking Code.

- 4.64 In addition, we would have regard to findings by the Financial Ombudsman Service (FOS) in individual disputes between borrowers and lenders. Where such cases highlight underlying principles in assessing the fairness or otherwise of transactions, we will take these into account as appropriate in our enforcement activities including under Part 8.
- 4.65 We have drawn up a memorandum of understanding (MoU) with the FOS, setting out our respective responsibilities and how best we can work together.⁴⁰ The MoU includes provisions relating to cooperation and information sharing. In particular, the FOS will notify the OFT if it has concerns about the fitness and propriety of a consumer credit licensee or is aware of issues that may require action by the OFT. The FOS may also disclose other information for the purpose of assisting the OFT to discharge its functions.

⁴⁰ Available from the FOS website at www.financial-ombudsman.org.uk

5 PROCEDURES IN APPLYING PART 8

- 5.1 The OFT intends to act under Part 8 in relation to unfair relationships in much the same way as we do in respect of breach of other legislation, with the overall aim of making markets work well for consumers.
- 5.2 The principles and procedures governing such action are summarised below and in the OFT's general guidance on Part 8 and our statement of enforcement principles.⁴¹ In particular, we will weigh up the costs and risks of such action against the likely benefits for consumers and for businesses generally, and will act in a reasonable and proportionate manner. We will take account of any complaints or other evidence that we may receive, although receipt of complaints is not a precondition of Part 8 action.

The OFT's role under Part 8

- 5.3 The OFT has powers to take enforcement action under Part 8 in respect of domestic or Community infringements falling within sections 211 or 212 of the Enterprise Act.⁴² We also co-ordinate such actions by other enforcers.
- 5.4 There are three types of enforcer in relation to Part 8:
- general enforcers – the OFT, Local Authority Trading Standards Services (TSS) and the Department of Enterprise, Trade and Investment in Northern Ireland (DETINI)
 - designated enforcers – a body designated by the Secretary of State including the Financial Services Authority (FSA), the Information Commissioner and the utility regulators
 - Community enforcers – a designated entity in another EEA state.

⁴¹ See paragraph 1.6 above.

⁴² See paragraph 3.21 above.

- 5.5 A designated enforcer may be limited to particular types of infringement or those arising within a particular market sector. Currently all designated enforcers are designated in respect of all types of domestic and Community infringement within the UK.

The OFT's approach to enforcement

- 5.6 The OFT is committed to good enforcement policies and procedures in line with the recommendations of the Hampton Report⁴³ as implemented by the Legislative and Regulatory Reform Act 2006 (LRRRA).
- 5.7 Part 2 of the LRRRA requires regulators to have regard to certain principles of good regulation, namely that regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent, and should be targeted only at cases where action is needed. The Act also enables Ministers to issue a statutory code of practice for regulators. This has been implemented through a Regulators' Compliance Code which came into force in April 2008.⁴⁴
- 5.8 The Code stresses the need for regulators to adopt a positive and proactive approach towards ensuring compliance by helping and encouraging regulated entities to understand and meet regulatory requirements more easily and by responding proportionately to regulatory breaches. There are specific obligations in respect of economic progress, risk assessment, advice and guidance, inspections and other visits, information requirements, compliance and enforcement actions, and accountability.
- 5.9 The OFT acts in accordance with the Code and the Hampton principles in carrying out enforcement activities. In particular, we seek to ensure that enforcement action is taken only where necessary and

⁴³ *Reducing Administrative Burdens: Effective Inspection and Enforcement* (Philip Hampton, March 2005) – available from the HM Treasury website at www.hm-treasury.gov.uk

⁴⁴ *Regulators' Compliance Code – Statutory Code of Practice for Regulators* (December 2007) – available from the BERR website at www.berr.gov.uk

proportionate, having regard to the risks of detriment to consumers. We also publish guidance in order to assist businesses to meet their obligations under legislation.

5.10 In addition, we seek to ensure that our use of enforcement sanctions is consistent with the principles set out in the Macrory Report⁴⁵ as proposed to be implemented by the Regulatory Enforcement and Sanctions Bill.⁴⁶

5.11 In considering possible enforcement action under Part 8, the OFT has particular regard to the following principles:⁴⁷

- action is necessary and proportionate
- businesses will normally be given reasonable opportunity to put matters right
- wherever possible court action will only be taken after undertakings have been sought
- proceedings will be brought by the most appropriate body
- action is co-ordinated.

5.12 We also encourage other enforcers to follow these principles.

Necessary and proportionate action

5.13 As noted above, we seek to ensure that enforcement action is taken only where necessary and proportionate, having regard to the risks of detriment to consumers.

⁴⁵ *Regulatory Justice: Making Sanctions Effective* (November 2006) – available from the BERR website at www.berr.gov.uk

⁴⁶ The Bill was introduced to Parliament on 8 November 2007 – see www.parliament.uk

⁴⁷ Chapter 2 of the OFT's general guidance on Part 8, see paragraph 1.6 above.

- 5.14 We will take particular account of the level of risk and the likelihood of a successful outcome, and whether the resource requirements of the proposed action are proportionate to achieving the desired results. We will consider the direct and indirect effects of our action on consumer welfare and the working of the market, and whether the action will be effective in dealing with the issue and deterring others. We will have particular regard to the interests of vulnerable consumers.
- 5.15 We will consider all available enforcement options. We will generally seek to use compliance options in the first instance, unless the circumstances indicate that formal enforcement action is the appropriate first step. We will take account of the circumstances of the individual case including knowledge of the business's intent and past behaviour.

Reasonable opportunity and seeking undertakings

- 5.16 Except where urgent action is necessary, businesses are always given a reasonable opportunity to stop the infringement before an enforcement order is sought. In general there is a minimum period of 14 days for consultation with the business. This can however be shortened to seven days if an interim order is required. In very urgent cases, an immediate application can be made without consultation, but such action is limited to the most exceptional cases.
- 5.17 Dialogue will also allow an opportunity to discuss any differences in interpretation of the relevant legislation, so that these can be considered before any action is taken.
- 5.18 The OFT or other relevant enforcer may accept undertakings from a trader in lieu of court proceedings. An undertaking, whether to the OFT or another enforcer or to the court, will require the trader not to continue or repeat the conduct, or to engage in such conduct in the course of any business, or to consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship (for example, as a director or a controller).

Proceedings by the most appropriate body

- 5.19 We follow the principle that action under Part 8 should be taken by the most appropriate body. This means that normally where local or sectoral action is required, we would expect the relevant local or sectoral enforcer (such as a TSS home authority) to be best placed to take the action. We may however act ourselves where significant legal or national issues are involved.
- 5.20 Where a number of enforcers may have scope for action we may direct which enforcer will take the action or may act ourselves. In the latter case we may decide in the event that further action is inappropriate and may close the file. Where there are established systems of statutory or non-statutory regulation in place that are likely to be effective we will generally refer complaints to the relevant regulator for action.
- 5.21 In view of the nature of the unfair relationships provisions, we anticipate exercising regulatory leadership by taking any initial actions under Part 8. Other enforcers may however take action where they are the most appropriate body to do so, and we will encourage them to have regard to this guidance.

Action is co-ordinated

- 5.22 We ensure that any action is co-ordinated so that businesses are not subjected to unnecessary multiple approaches, and court action is taken only where warranted. We also actively seek to promote consistency in enforcement between ourselves and other enforcers.
- 5.23 We have set up a co-ordination unit and a system for enforcers to notify proposed actions under Part 8. We have also developed a number of mechanisms to co-ordinate action including the Consumer Regulations

Website (CRW).⁴⁸ This includes a restricted password protected area where Part 8 enforcers can share information about investigations.

Access to information

- 5.24 The OFT and other general enforcers have powers under Part 8 to require the provision of information (including documents) by means of a notice served on any person. We may also in appropriate cases act on behalf of a designated enforcer in requesting information. This is in addition to enhanced information-gathering powers under the Consumer Credit Act.
- 5.25 A notice can be sent to enable the enforcer to establish whether to use its enforcement powers. A notice can also require information for the purpose of monitoring compliance with orders, interim orders or undertakings. If a person fails to comply with a notice within the specified time, the enforcer can apply to the court for an order requiring the person to provide the information.
- 5.26 In addition, we may receive information from other regulators, or from consumers or businesses or their representative organisations. This may assist in establishing evidence of acts or omissions giving rise to possible Part 8 action, and in progressing cases. It may also be helpful in forming a view of the likely impact on consumers and the degree of priority that should therefore be accorded to the case.

Procedures under Part 8

- 5.27 Where we suspect that there has been an infringement harming the collective interests of consumers we will consider carefully whether enforcement action may be warranted under Part 8. In doing so we will follow the procedures outlined above.

⁴⁸ The CRW may be accessed at www.crw.gov.uk

5.28 Once a decision has been taken to proceed, we (or the relevant enforcer) will normally write to the business concerned. This letter will include:

- details of the activity or practice causing concern
- the nature of the infringement and why this is considered to harm the collective interests of consumers
- an explanation of Part 8 and reference to relevant guidance
- an invitation to engage in dialogue with a view to the business putting things right
- the consequences of failure to respond.

5.29 Any subsequent dialogue will help to determine whether enforcement action would be appropriate and what form it should take. Factors to consider will include the nature of the infringement, the intent of the business and any previous history of regulatory action. We will also take into account the nature and extent of any adverse effects on consumers. For example, whether there is targeting of consumers who are vulnerable or may suffer considerable detriment.

5.30 If formal action is warranted, and satisfactory undertakings are not received, we will consider initiating court proceedings under Part 8.

Publicity for Part 8 cases

5.31 We are committed to transparency and will usually put information on completed Part 8 cases into the public domain. Publicity will be accurate, balanced and fair, having regard to any legal constraints on the disclosure of information including the importance of confidentiality to individual businesses.

5.32 The factors taken into account when considering publicity on Part 8 cases include:

- facilitating the monitoring of compliance with undertakings or orders

- deterring other businesses from engaging in similar conduct
- warning consumers about practices detrimental to their interests
- increasing consumers' awareness of their rights and how to exercise them
- facilitating complaints about future breaches
- educating the market.

5.33 Information about completed cases is publicised by placing it on the public part of the CRW.⁴⁹ A press release may also be issued. Publicity will not normally be given to cases where we consider that no breach could properly be established, or where the case has not yet been completed, unless there are sound reasons for doing so.

Choice of enforcement mechanism

5.34 As noted above, the acts or omissions giving rise to unfair relationships may be actionable in their own right under Part 8 as a breach of other legislation. In particular, Part 8 action may be taken against unfair contract terms by reference to the UTCCRs,⁵⁰ and against unfair commercial practices by reference to the CPRs.⁵¹ In addition, certain acts or omissions (including most breaches of the CPRs) may constitute criminal offences, raising the possibility of criminal proceedings.

5.35 In such circumstances, the OFT and its enforcement partners will have a choice of enforcement mechanism, and will decide on a case by case basis which is the more appropriate. There may, however, be a limited number of cases where action is possible only in relation to the unfair relationships provisions.

⁴⁹ See paragraph 5.23 above.

⁵⁰ See paragraph 4.3 above.

⁵¹ From 26 May 2008, see paragraph 4.34 above.

- 5.36 Where Part 8 action is possible in respect of breach of more than one legislative provision, we will assess whether to seek undertakings covering all relevant breaches or to confine the action to one or more elements. This will depend upon the facts of each case including the nature and extent of the harm to consumers and the trader's willingness to remedy the position, for example by compensating consumers who have suffered detriment. We will also look at the trader's overall behaviour in deciding on enforcement priorities and the appropriate enforcement mechanism.
- 5.37 In the case of unfair relationships, it may be more straightforward in terms of legal argument and procedure to demonstrate that a particular term or practice is in breach of the UTCCRs or the CPRs, than to show that it gives rise to an unfair relationship. This may particularly be the case until such time as the courts make judgments under section 140A indicating how in practice they interpret and apply the provisions.
- 5.38 On the other hand, there may be a public interest consideration in taking action also in relation to the unfair relationships provisions, insofar as this may assist in clarifying the scope of the provisions which may be to the benefit of consumers, businesses and enforcers alike. We will consider each case on its merits, having regard to such wider issues.

Overlap with credit licensing

- 5.39 The acts or omissions giving rise to unfair relationships may also reflect on fitness to hold a consumer credit licence. In considering fitness, the OFT will have regard to any evidence of unfair relationships, for example arising from court judgments. The revised application form for consumer credit licences⁵² includes a specific question regarding orders made under section 140A, and the relevant general notice⁵³ requires all licensees to notify such details to the OFT on an ongoing basis.

⁵² Available from the OFT website at www.offt.gov.uk

⁵³ General Notice No 75, published March 2008 – available on the OFT website.

- 5.40 In some cases it may be appropriate to take licensing action in place of enforcement action under Part 8. In particular, it may be clear that the trader is no longer fit to hold a consumer credit licence, and that undertakings or an order under Part 8 would not be sufficient to address our concerns. There may also be circumstances where the imposition of a requirement under section 33A of the 1974 Act⁵⁴ may be preferable to Part 8 action, for example because it may involve positive obligations on the trader rather than merely a commitment to comply with the law.
- 5.41 On the other hand, there may be situations where Part 8 action is preferable to licensing action. For example, it may be a more targeted and proportionate way of addressing the particular conduct giving rise to detriment to consumers, or may be more likely to lead to an early resolution of the issues. It may also be capable of extending to a broader range of business activities.
- 5.42 The choice of which legislation to use at which stage in a particular case will depend upon the individual facts and circumstances. We will ensure that any action is proportionate and does not subject businesses to unnecessary multiple approaches, although there may be a limited number of cases where it may be appropriate to take action against a business under the licensing regime and under Part 8.

⁵⁴ As inserted by section 38 of the 2006 Act.

6 PUBLICITY AND FURTHER GUIDANCE

- 6.1 We are publishing this guidance on the OFT website and by sending copies to key stakeholders including trade and consumer organisations. Copies are also available on request from the OFT.⁵⁵
- 6.2 We intend to keep the guidance under review, and will consider adding to it on an ongoing basis in the light of court judgments and other relevant developments. In any event, we intend to review the guidance after a further period of two years – in April 2010 – to take account of practical experience of operation of the Part 8 provisions in relation to unfair relationships and any developments in the OFT's enforcement approach and priorities.
- 6.3 We will publicise details of any orders or undertakings obtained under Part 8 in accordance with the procedures outlined in chapter 5 above. The guidance may be revised accordingly to include examples of cases where Part 8 action has been taken or might be considered. Such examples may be illustrative rather than actual.
- 6.4 We will also seek to obtain details of court judgments in individual cases under section 140A, where these involve a finding of an unfair relationship. Where such judgments may be helpful in illustrating how the courts have interpreted and applied the unfair relationships provisions, we may publicise details so as to inform consumers and businesses.
- 6.5 Any queries regarding matters raised by this guidance may be addressed in the first instance to Martin Goulden on 020 7211 8702 or by e-mail to martin.goulden@oft.gsi.gov.uk.

⁵⁵ Individual copies are available by contacting 0800 389 3158 or via the OFT website at www.oft.gov.uk