WANTED – A CONSUMER PROTECTION STRATEGY

Mark Boleat

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Mark Boléat
Director General
Association of British Insurers
51 Gresham Street
London EC2V 7HQ

Tel: 0171 216 7300
Fax: 0171 216 7302
E-mail: Mark.Boleat@abi.org.uk

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INTRODUCTION

An essential function of government is to protect consumers from the consequences of the huge imbalance between the knowledge and bargaining powers of the individual consumer and those of most industrial and commercial organisations.

The consumer is protected in a variety of ways. There are some laws and regulations which apply to all goods and services. There are other measures which apply to specific goods and services.

There are many separate agencies which have responsibility for consumer protection, either generally or in specific areas.

The media and the climate of opinion generally also play an important part in forming attitudes, certainly of consumers but perhaps also of suppliers of goods and services and the government and regulatory bodies.

Reports by consumer bodies or government departments often point to failures on the part of commercial organisations to deliver goods or services properly, but is the government delivering consumer protection properly?

This short paper seeks to address this issue. It briefly describes and analyses the present position, then sets out some principles for reform.

Currently, individual regulatory bodies largely work independently of each other. The result is less than ideal for consumers, confusing for producers and distorting of competition.

The overriding theme of this paper is that the government needs to accept and properly discharge an overall strategy in respect of consumer protection.

SUMMARY

Currently, consumers in the United Kingdom are protected by a combination of specific and general legislation and regulations concerning prudential and/or conduct of business standards, which in turn are set to reflect the climate of opinion, and various enforcement and other agencies. Residual government responsibility rests with the Department of Trade and Industry and the Office of Fair Trading.

The present system is unsatisfactory. It is widely recognised that there is a significant overlap of powers and responsibilities between different existing regulatory agencies, and at the same time gaps in regulatory coverage. There are significant differences in policy between sectors; practices which in one sector are outlawed are regarded as quite acceptable in another without anyone having made a comparison of the two. There is also differential enforcement with some regulatory agencies having the power to fine or to "name and shame" while others do not have such powers. There is evidence of poor targeting of consumer protection measures and also of rivalry between regulatory bodies, lack of proportionality in dealing with specific issues and too great an emphasis on "popular" and easy to solve problems rather than those which really harm consumers.

Responsibility for consumer protection generally should be more concentrated in a single government department, probably the Department of Trade and Industry. It should exercise this role in a number of ways, including undertaking comprehensive analyses of consumer detriment so as to identify areas appropriate for regulatory intervention. The Department should try to ensure that specific regulators do not overlap and that they adopt a consistent approach. There is an important role for Parliament on this issue as MPs are well qualified to have a constructive input into the handling of consumer issues.

A report prepared by London Economics for the Office of Fair Trading usefully analyses markets where consumer detriment is most likely. It identified six indicators which signal potentially problematic markets and which can help regulators decide where intervention is appropriate. These indicators, the results of consumer surveys and input from regulatory bodies should be used and be seen to be used in the identification of areas needing regulatory action.

Consumer protection policy and practice needs to be more open than is currently the case. The government should publish the results of its research and the general principles for identifying areas where intervention is necessary. Regulatory agencies, when they decide to investigate or take action in respect of any area, should be under a duty to state why they have decided to do so in the light of the general principles. This should be in addition to the new requirement for regulatory impact assessments.

Openness would be assisted by a sensible consultation process using as its model the Cabinet Office publication "How to Conduct Written Consultation Exercises".

Trade associations have a role to play in protecting the consumer. Their primary role is to represent the interests of their members, but helping to protect the consumer can often assist in achieving this objective. Many sectors currently have unsatisfactory representative bodies. The Government can act as a catalyst to improve the quality of representative bodies.

Codes of practice and redress mechanisms can play an important part in protecting the consumer. Trade associations are in a strong position to promote codes and either operate or advise members on redress mechanisms. The OFT is seeking to take an important initiative in this area and the British Standards Institution is developing a standard for complaints mechanisms which will help both trade associations and individual companies seeking to improve arrangements in their own fields.

The Consumer Affairs Minister at the DTI revealed in November 1998 that he is developing a consumer strategy. This is very timely.

CHAPTER 1

WHY DO WE NEED CONSUMER PROTECTION?

Before asking the question of whether consumer protection is working adequately in the United Kingdom, it is first helpful to ask why consumer protection is necessary at all. Could we not manage with the competitive marketplace and the application of the law of contract?

The Value and Limitations of the Free Market

An economics textbook will describe how consumer welfare is maximised where there is a free market and will demonstrate how consumer welfare can be adversely affected if government policy limits the operation of a free market, for example by the imposition of price controls.

But a free market will maximise consumer welfare only if certain conditions are met, in particular that the buyer and the seller have the same information and bargaining power and that there are no barriers to entry into the market. In practice, these conditions can be met fully only for some basic low value items such as newspapers and branded food and drink products. For most goods and services, there is a divergence between the knowledge available to the customer and that available to the producer and considerable differences between the economic power of a single consumer and that of a large manufacturer or retailer. In some markets there are also barriers to entry.

Generally, consumer policy is designed to make competitive markets work. The government and specific regulators will generally make explicit their objective of removing market imperfections so that the consumer can benefit from a competitive marketplace. Regulatory action therefore properly seeks to give the consumer more information that is useful in the buying process, to even up the bargaining power between a producer and an individual consumer and also to limit anti-competitive practices which otherwise would enable producers or retailers to exploit the consumer.

Policy Instruments

Legislation can help ensure that the consumer has the information needed to exercise bargaining power. Regulators and government departments will generally cite this as justification for any new requirement for information to be given to the consumer. At a simple level, the requirement to state a price in relation to specific units for cheese or meat helps to give the consumer information to shop around if only in a particular supermarket. There are also requirements relating to advertising that prevent manufacturers or retailers claiming that a good or service can do something which it cannot.

The point about bargaining power is addressed through a number of devices including the legal aid system, the small claims court and enforcement work by trading standards officers. It is unrealistic to expect the individual consumer to be able to take legal action against someone who has provided poor service. Trading standards officers are able to play an important role here where there is clear evidence of a trader not complying with a contract which they have entered into.

Properly the government has also taken power to deal with anti-competitive practices which adversely affect the consumer. These have recently been enhanced through the Competition Act 1998.

The nature of some goods and services is such that general laws on trade descriptions or advertising may not be regarded as sufficient and, accordingly, there will be a demand for special regulation. Financial services has been singled out because the nature of many financial products is that their value cannot easily be ascertained until the end of a rather lengthy period of time, after which it is costly to attempt to undo the transaction. Similarly, there are also specific regulatory regimes for the utilities, recognising the quasi monopoly position that some of these have and the special nature of the industries, in particular they need to serve every customer, even those who might be uneconomic to serve because of their location. In some sectors, the government has also addressed the bargaining power point by providing for specific ombudsmen. These are most common in the public sector.

CHAPTER 2

THE PRESENT POSITION

The previous chapter has briefly explained why consumer protection measures are needed. This chapter builds on that approach to set out the relevant national laws and regulations, specific regulations and other means by which the consumer is protected.

National Laws and Regulations

There are several statutes which have application to the provision of all goods and services. These include legislation on fraud and misrepresentation, the Fair Trading Act 1973, the Sale of Goods Act 1979 and the Consumer Protection Act 1987. There are also non-statutory regulations governing advertising in the media. The most major recent addition to this armoury has been the Unfair Terms in Consumer Contracts Regulations 1994 made in response to a European Directive. The legislative framework is somewhat cumbersome and probably less than ideal but it generally provides a very satisfactory framework for consumer protection.

Responsibility for the enforcement of national laws and regulations rests variously with the police, local authorities and regulatory or quasi-regulatory bodies.

In many areas national regulation and legislation is influenced by the requirements of European directives.

Specific Regulations

In respect of a number of goods and services, there are specific regulatory requirements made under Act of Parliament.

For example, investment business is currently governed by the Financial Services Act 1986 and the regulatory mechanism set up under that Act. Utilities are subject to special legislation and each currently has its own regulator.

In addition, in many industries there are accepted codes of conduct, often made in response to government pressure and which are little different in their effect from statutory regulation. These are particularly prevalent in the financial services area and include codes in respect of the selling of general insurance, banking services and mortgages. The travel industry is another area where codes of practice are important.

Responsibility for the enforcement of specific regulatory measures generally rests with the relevant government or industry body. In the case of codes of practice promulgated by an industry body, it is often said that these are ineffective because the industry body is ‘toothless’. To an extent, this is true, but on the other hand the evidence suggests that some codes of practice have been successful in changing the behaviour of suppliers of certain goods or services. The work of the Portman Group on sales of alcohol is a good example. And industry bodies have increasingly been setting up independent enforcement bodies to make their codes more effective.

Investigations

In addition to enforcement agencies dealing with specific breaches of laws, regulations or codes of practice, the power to investigate is also important. This can draw attention to policies and practices which unfairly impact on consumers and can,

in some circumstances, lead to regulatory action. Investigations can be conducted by government agencies, such as the Office of Fair Trading, and private organisations such as the Consumers' Association.

The government also has the power to investigate particular practices or to draw attention to them using formal methods such as setting up a committee of enquiry or informal methods such as using the lobby system to criticise a product or an industry. A recent example is the announcement in November 1998 of an enquiry into the banking industry. Ministers also have substantial power, simply because they are ministers, to influence business practices.

Climate of Opinion

The climate of opinion plays an important part in consumer protection. It is influenced by the factors already covered in this chapter.

If the government or the Office of Fair Trading simply says that the consumer is being unfairly treated in a particular market, then this in itself is sufficient to generate a climate of opinion. It will probably be taken up by the media and also consumer organisations. Conversely, if the media decide to run a campaign on a particular issue, then this could well influence the government to launch its own investigation or to take action. Similarly, the consumer lobby can seek to influence the climate of opinion using either or both the press and the government.

Of course, the existence of consumer detriment is a key factor in influencing the climate of opinion, but one should not ignore the independent effect that government, the consumer lobby and the media are able to have. Perhaps the best example of this was the scare story over dangerous dogs a few years ago, when, as if by some magic, Rotweilers started biting children all over the country. This was a story worked up by the media during a quiet news period to which the government felt it necessary to respond with the seriously flawed Dangerous Dogs Act. The media now see themselves not so much as reporting events, but seeking to shape them. There is nothing necessarily wrong in this but it does need to be recognised.

MPs, individually and collectively, can significantly influence the climate of opinion. Some Select Committees have developed this role effectively. One individual MP, David Davis, has recently been influential in causing a review of the banking code of practice.

The final factor influencing the climate of opinion is developments at an international level. Given the increasing globalisation of the economy, developments at the European or international level increasingly impact on the sale of goods and services in Britain. European directives are, of course, important, as are international agreements, for example on environmental protection.

Institutions

Ministerial responsibility for consumer protection rests with the Consumer Affairs Minister, a Parliamentary Under Secretary of State of the DTI. A Grade 3 official has responsibility for this work. There are two consumer affairs branches, one dealing with consumer safety and trading standards and the second with other European and UK consumer affairs issues.

The main official body with responsibility for undertaking investigations is the Office of Fair Trading. The OFT has powers to promote and safeguard the economic

interests of consumers. The OFT's 1997 Annual Report says that in pursuit of these aims its Consumer Affairs Division –

- exercises the Director General's various statutory powers, including regulatory action against individual traders and firms, and advises the Government on fair trading issues generally;

- keeps the United Kingdom market for goods and services under review in order to identify and investigate trading practices that appear to affect the economic interests of consumers adversely;

- keeps in close touch with consumer concerns generally and with the concerns of business about consumer issues, and seeks to ensure that government policy takes them properly into account;

- provides information for consumers; and

- develops proposals for legislative or regulatory changes (or proposals for self-regulation) where consumers' interests are affected.

Another government agency is the National Consumer Council. This has no powers, but again does have the ability to investigate products and markets and to make recommendations. Because it is a government-established body with a good reputation for research, its views are generally given considerable weight.

Another arm of government with an interest in consumer protection is the Better Regulation Unit of the Cabinet Office. This is responsible for a programme of work in pursuit of the government's objectives to regulate only where necessary and ensure that the regulations are targeted, clear and simple to understand, applied consistently, are proportionate to the problem and are enforced effectively and constructively. The programmes include promoting guides to better regulation, monitoring the regulatory activities of government departments and promoting the principles of good enforcement. One of the recent outcomes of the work of the unit was a report on consumer law which addressed a wide range of issues including metrication, consumer credit, age-related sales and consumer guarantees.

At local authority level, the trading standards departments are the main bodies. Many duties are placed on them to enforce regulations and there are many more tasks that are discretionary.

At sectoral level there are a number of specific regulators, for example the Financial Services Authority, the utility regulators and the various transport regulators.

At European level, the European Commission, through Directorate General XXIV, is taking an increasingly high profile role on consumer policy. It can make proposals for a directive which then have to be agreed by member states and implemented through national legislation. This has already been done in Britain, for example, through the Unfair Terms in Consumer Contracts Regulations. Recently, the Commission has issued a proposal for a directive on distance selling which could well influence legislation in the United Kingdom in due course. Even where Commission proposals do not lead to legislation, the Commission and, indeed, the institutions of the European Union generally, are able to have an increasing influence on the direction of consumer protection policy in the UK.

While there might be hundreds of institutions, the actual resources devoted to consumer protection work are small. Using a rather narrow definition, the Office of

Fair Trading calculated that the total resources devoted to consumer affairs work was around £200 million a year in 1995. About half of this was accounted for by local authority trading standards departments the budgets of some of which are being cut. The OFT's direct expenditure on consumer affairs work is only a little over £4 million a year.

There are also private sector organisations which investigate markets and products. The best known is the Consumers' Association, but there are many others ranging from think-tanks to one-issue pressure groups. Among those in the 'As' section of the "PIMS Guide to Pressure Groups" are Action for Victims of Medical Accidents, Advocates for Animals, Age Concern, Air Safety Group, Alarm UK, Alcohol Concern, Anaphylaxis Campaign, Anglers' Conservation Society, Animal Aid, Animal Concern and Anti-Bullying Campaign. Many such pressure groups promote themselves as representing the interests of consumers.

CHAPTER 3

DEFICIENCIES OF THE PRESENT POSITION

The present position is not wholly satisfactory. It fails to deliver adequate consumer protection in some areas, while imposing unnecessary and burdensome regulation in others. The deficiencies mainly derive from the absence of an overall government strategy and institutional framework.

Overlapping Powers and Responsibilities

The previous chapter has been sufficient to indicate that there are a number of institutions concerned with consumer policy. It is therefore inevitable that there is some overlap. This was recognised by the Office of Fair Trading in its June 1996 consultation paper "Consumer Affairs Strategy" –

> Consumer affairs work in the United Kingdom is characterised by the large number of organisations – both governmental and non-governmental – involved in most of these activities. While in some areas the interfaces between the respective roles of organisations are well-defined, the difficulty of co-ordinating activities between a large number of organisations gives rise to the potential for both gaps and overlaps in coverage. In practice, our review to date suggests that there are few absolute gaps. However, it is not clear that the same criteria and standards are applied in each area, and there are a number of areas of overlap where the respective roles of the organisations involved are not as clearly defined as they might be, so that there is a possibility of duplication of effort.

This problem can usefully be illustrated by reference to pensions policy. In September 1996, the Office of Fair Trading announced an enquiry into pensions. The Director General of Fair Trading said: "Our research will cover consumer experience and the structure of regulation in the industry to see what lessons can be learned from the past and what changes can be made to improve consumer confidence and reduce the potential for consumer detriment." The OFT said that its report would make recommendations to ministers and to the self-regulating organisations and that the OFT would be seeking views from those groups.

Few subjects can have been as exhaustively investigated by official bodies as pensions. Following the Goode Report, a new regime was brought into place for occupational pensions under the Pensions Act 1995. The Department of Social Security is responsible for policy and the Occupational Pensions Regulatory Authority for supervision. The Securities and Investments Board and the Personal Investment Authority have been responsible for the regulation of personal pensions. However, the OFT press release said that the report would look at "methods used to foster public confidence in the industry". In effect, the OFT was not looking at the pensions industry but rather at the regulatory bodies.

If these organisations are not competent, then the government should deal with the problem directly. It is not helpful to have a second government agency, with no particular expertise in these areas, second guessing what other regulatory bodies have been established by Parliament to do or suggesting how government policy should develop. It may be argued that the OFT brings a different perspective by examining the issue from the consumers' point of view. But, regulatory agencies and government departments should also be able to do this. In the event the OFT's report on pensions policy was of very high quality and usefully contributed to the

public debate, but this does not alter the basic point that this was not an area which merited use of scarce OFT resources.

Inconsistency of Policy between Sectors

The quote from the OFT in the previous section referred to the possibility that different criteria and standards may be applied in different areas. This is undoubtedly the case. It applies particularly where there are specific regulators, but it also applies more generally. This can usefully be illustrated by a number of examples.

- Newspapers frequently point to huge differences between the prices of cars in Britain and in other European countries. Yet there are much wider disparities between the price of, say, The Times or The Daily Telegraph in London and the price just a few hundred miles away in France.

- There is much attention on what is the most appropriate mortgage loan to take out when buying a house, in particular whether the loan should be fixed rate or variable rate or repayment or endowment. In practice, there is no simple answer, and given an efficient marketplace (and the marketplace for mortgage loans is very competitive), the various products should be of equal value at the outset. However, in the event, a fixed rate loan may prove better value than a variable rate loan if interest rates rise, and an endowment-linked loan may be better value than a repayment loan if inflation runs at a high level. These are variables that simply cannot be forecast 25 years ahead. But far more important is that the decision as to which type of loan to take out is of trivial significance compared with the more important decisions as to whether a house should be bought at all, if so whether it is the right house for the circumstances of the family and so on. Someone buying a house is very much concerned about whether it is the right dwelling, whether they are paying the right price, whether they may be gazumped, whether there are hidden defects and so on, but these issues receive virtually no attention. Instead, media and regulatory attention is on the aspects of the purchase about which the public are not greatly concerned – that is the choice of mortgage.

- Churning of financial products is quite properly condemned and strong regulatory action is taken where there is evidence of this. By contrast, churning of replica kit by football clubs is regarded as sound commercial business even though it is aimed at impressionable, often low income, consumers.

One can attempt to rationalise all these inconsistencies. A common rationalisation is that it doesn't matter if the consumer is badly treated in respect of a small purchase but that it does matter if he is making a large purchase. While there is an element of truth in this, it is a dangerous proposition because it rather implies that if traders want to rip off the customer and make abnormal profits, they are best to concentrate their efforts by selling lots of low value goods rather than a few high value goods. It is perhaps significant in this context that where a restaurant charges ten times the retail price for a bottle of fizzy water, that this is not regarded as anything other than brilliant management, but when, say, a bank wishes to charge for providing a service through expensive branches, many regard this as quite improper. At the end of the day, every producer of a good and service is competing for capital. If regulatory action makes it difficult to make a profit in one area, then the market does not respond through accepting a lower level of profitability while providing the same service, but rather the supply of the service declines.

Differential Enforcement

Differential enforcement naturally follows on from the structure outlined in the first chapter of this paper. The position is well illustrated in the financial services sector. The so-called self-regulating organisations set up under the Financial Services Act have had power to fine their members. This power has been used most enthusiastically by the Personal Investment Authority and the Investment Management Regulatory Organisation. Fines guarantee massive publicity in the press, although this soon wears off and ever-bigger fines are needed to maintain the same number of column inches. Those organisations providing financial services which chose to exercise their right to be regulated by the Securities and Investments Board, could not be fined. This is a clear inconsistency and has been pointed out as such by the press. In fact, it is of little material consequence as the amount of the fines is small in relation to the costs of dealing with regulatory action by the regulators and, where appropriate, providing redress. Nevertheless, those companies which have been fined have had more unwelcome publicity compared with those which have not.

One can argue that the financial services industry clearly is managed badly because institutions have been fined by regulators, but in most other sectors the regulators have no power to fine. The Bank of England was not able to fine banks, and, indeed, had a reputation for operating by raising eyebrows. In most sectors, there are no specific regulatory bodies and there are no powers to fine. The reason why financial services companies have been fined for mis-selling and poor administration but garages have not been fined for poorly repairing cars is that regulatory bodies have been set up to fine financial services companies but they have not been set up to fine garages.

It would be possible to produce many other examples of inconsistency in respect of enforcement. For example, a few years ago the mortgage lending industry had a problem in that some trading standards officers took a particularly restrictive view of regulations governing the advertising of mortgages and sought to take action against mortgage lenders. The same advertisements in different areas attracted no attention at all.

Poor Targeting

The OFT has accepted that it could improve its targeting. Paragraph 7.40 of its 1996 consultation paper "Consumer Affairs Strategy" said: "We recognise also that, while we do select issues for investigation on the basis of a number of defined criteria – there is scope for us to adopt a more systematic approach towards identifying those areas where the use of our resources can be of greatest benefit to consumers."

At that time, the OFT was presumably operating according to criteria which had been published in its 1991 publication "Consumer Strategy". More than two years elapsed between the publication of the OFT's consultation paper on its consumer affairs strategy in June 1996 and the publication (in a very muted way) of its final strategy in October 1998. In this paper, the principles the OFT uses in targeting its work are set out. They are summarised as follows –

> The OFT's investigations are informed by monitoring market behaviour and complaints, and by maintaining good contacts with interested bodies. Investigations are selected by considering the size of the potential detriment suffered by consumers, the vulnerability of consumers to abuse, the scope to make an impact, the possibility of remedy, the quality of the evidence

available, and the likely cost of the study. Good liaison with other bodies interested in this work plays an important role.

The report includes an annex setting out investigation criteria in detail. This is reproduced as the appendix to this paper.

It will be noted that of the six criteria listed, two are concerned with consumers and four are concerned with the convenience of the Office of Fair Trading. The key points should surely be for the size of the potential detriment suffered by consumers and the vulnerability of consumers to abuse. On these two criteria, much attention would be focused on difficult areas such as car and house repairs. However, the other criteria are really nothing to do with consumers. Even if a practice leads to substantial detriment on the part of vulnerable consumers, then if a study is going to be expensive and it is difficult for the OFT to make an impact, then there will be little OFT action. This might explain why OFT work has concentrated on the popular, high profile issues which the media can understand. Typically, these would be where there are strong trade bodies which may be capable of delivering some action which the government cannot itself deliver.

It may be argued that it would be futile for the OFT to waste its time when it did not have the scope to make any impact, but, if this is the case, it is an indictment of the process. It is rather like the police saying that because it is so difficult to catch people who have committed major crimes such as fraud and murder, they will concentrate their resources on areas where they can make an impact such as parking on double yellow lines.

Having said this it is accepted that the OFT is itself in a difficult position because it is, in effect, powerless to deal with bad practices in industries characterised by small suppliers and where there is a significant information gap between vendor and purchaser. Under Part III of the Fair Trading Act, the Director General of Fair Trading has legal powers to take action against rogue traders but these powers are cumbersome and virtually impossible to use. The Director General is seeking amendments to the legislation so as to allow him to issue “stop orders” after a more streamlined legal process. This point is as much a criticism of the framework within which the OFT operates as it is of the OFT itself.

Subsequent sections of this paper analyse what criteria regulatory bodies should use to define whether regulatory investigation or enforcement action is necessary. It is sufficient at this stage to observe that, at the very least, the OFT, which has something of a “sweeper” role, should concern itself primarily with areas which are not covered by other regulators and where there is evidence of consumer detriment. At first sight, the OFT has not targeted its work in this way. This can be illustrated using its own most published information.

An article in the 21st issue of the OFT publication “Fair Trading” revealed that in 1997 there were 859,000 consumer complaints reported to Trading Standards Departments. In the final quarter of 1998 the top ten sources of complaint were –

Other personal goods and services (in particular homeworking schemes)	24,900
Secondhand cars	22,100
Radio, TV, other electrical goods	18,200
Home maintenance, repairs and improvements	15,000
Clothing and clothing fabrics	13,300
Major appliances	10,900
Food and drink	9,500
Upholstered furniture	8,900
Other recreational goods and services	7,700
Double glazing products and installation	7,400

In terms of complaints per £million of consumer expenditure the major "culprits" are laundry and dry cleaning; major appliances; radio, TV and other electrical goods; furniture, and footwear repairs.

The figures must, of course, be very heavily qualified in that they exclude complaints received by regulatory bodies, trade associations and so on. They also take no account of issues where consumers do not know they are badly treated. Nevertheless, they are indicative of the areas where there are grounds for complaint and where there are no specific regulatory bodies which can deal with those complaints.

The OFT says that it takes this information into account in deciding where to concentrate its efforts. Whether it does so sufficiently is perhaps open to question.

Its annual report for 1997 shows that the OFT has concentrated its resources in different areas. The first and longest section deals with financial services covering the mortgage lending code and the banking code (for which the Treasury has an oversight role) and pensions (the responsibility of the DSS, OPRA and the financial services regulators). Other sections cover holiday caravans, pre-paid funerals, photocopier leasing, extended warranties on electrical goods, resale of tickets for live public entertainment, the estate agents' ombudsman scheme and used cars. The rationale for covering used cars is certainly clear, but it is difficult to understand why the other areas have been selected and why some of those, which are the subject of considerable consumer complaint (for example home maintenance, repairs and improvement), do not seem to be areas for OFT action. It is also significant that the Director General's report does not explain how the OFT decided the areas on which it should concentrate its resources.

There is a clue on this point in the OFT report "Raising Standards of Consumer Care", published in February 1998. This deals predominantly with codes of practice. Paragraph 2.4 of the report comments that the OFT has chosen to support only a small minority of industry codes of practice: "Many of these were initially encouraged by the OFT as an alternative to legislation in problem sectors, such as travel, electrical goods, and the motor trade. The building and home improvements area (other than the double glazing industry) has proved to be the major exception, escaping because of the fragmented nature of its trade representation." This can be interpreted as meaning that the way to avoid industry codes of practice, admittedly often a light form of regulation, is to have weak trade associations. Conversely, the way to attract the attention of the OFT, and to enable it to secure industry agreement, is to have strong trade associations. If this is the message, then it is contrary to the

one which the government is trying to give generally about the need for strong representative bodies.

The problem of poor targeting is also evident from the 1998 Annual Review of the National Consumer Council. The articles of the NCC urge it to have special regard for the poor and disadvantaged, and this is reflected in much of its work. However, this also means that it covers much the same ground as other departments, and where it does not it is operating in the same field as statutory regulators.

One sector of the economy which is very well regulated is public utilities where Parliament has provided for specific regulators reorganising the monopoly nature of the industries. The NCC annual review has a long section on public utilities from which it is clear that much of its work is directed at influencing the government and the regulators. For example, the NCC expressed concern about soaring water bills and water charging systems. The NCC also expressed its concern to the Lord Chancellor's Department about his proposals on legal aid, and in common with other consumer bodies its report has a long section on financial services. Again, this was primarily concerned with seeking to influence other regulators, with the NCC expressing concern about the establishment of the Financial Services Authority and what it was or was not going to cover. The NCC became involved in a debate on insurance regulation where its proposal has been roundly rejected by the government. In this area, the NCC allied itself with an organisation which represented only a very small section of the market.

The annual review has a good section about shopping for goods and services, covering areas which manifestly are of concern to consumers, including rogue traders. However, throughout the report there is no information about how the NCC decides what areas to comment on. Issues which consumers are known to be concerned about, in particular car and house repairs and second-hand car sales are scarcely mentioned. The impression one gets from the report is that the NCC is seeking to influence other regulatory agencies.

It is also interesting to observe that the NCC sees itself as having a particular role in respect of vulnerable consumers at the same time as the OFT is doing work on this subject and the government has made it a priority through establishing the Social Exclusion Unit. The Personal Investment Authority has also entered this market. This confirms the pattern of regulatory and consumer bodies following each other round on "popular" subjects and, to a large extent, duplicating each other's work.

Regulatory Rivalry

It is an inherent part of human nature that individuals or organisations operating in the same area tend to compete with one another. Regulators are not immune from this. Indeed, because they are not subject to the normal constraints of the marketplace, the tendency to compete can be even greater. It is difficult to interpret the OFT's wish to involve itself in personal pensions other than as one aspect of regulatory rivalry (although the point has already been made that the OFT report was a good one and perhaps helped to serve its purpose of indicating the lack of coherent government policy on this important area).

The Financial Services Act 1986 created a two-tier regulatory system which had built within it the scope for regulatory rivalry. This has been widely recognised and has been used to justify the creation of the single new regulatory body, the Financial Services Authority. It was well known that there were tensions between the SROs (in particular, IMRO and the PIA) on the one hand and the Securities and Investments Board on the other. This was freely admitted by the previous Chairman of the SIB,

Sir Andrew Large. In a speech on 20 May 1997, he commented: "I have often felt that it would take a psychologist to explain fully what happens in a system where there are three self-governing bodies, each with its own board and executive, each keen on its independence, a system in which there is little sense of collegiality, no incentives to co-operate, and few penalties for not doing so. I imagine the psychologist would conclude that the Act sought to create a system that might be described as self-governing (dare I say self-regulatory?) rather than one which sought to make regulation work."

Lack of Proportionality

Lack of proportionality is a problem in any regulatory system. Regulatory action may frequently be required, but it is important to ensure that the cost of the regulatory action is not out of all proportion to the problem it is trying to deal with. In many parts of government, this issue is now being properly addressed through cost-benefit analysis of proposed policy measures. For example, this was done by the Personal Investment Authority in respect of its proposals for disclosure of costs for unit trusts and pension products. A study commissioned from outside consultants showed that the benefits of the proposed measure easily outweighed the costs. Of course, the study was open to challenge, and if it had so wished the insurance industry could have challenged the study. It chose not to do so, recognising perhaps its validity.

But in other areas regulatory agencies are still able to take action without going through this sort of exercise. Recently, for example, the Office of Fair Trading in its May 1998 report "Health Insurance" has asked insurers to develop, in four months, "core term products" for certain health products on the basis of a very short paper, with no proper analysis of the costs and benefits of going down this particular road and with no precedents to follow.

Lack of proportionality will always be a problem unless there is a duty imposed on regulators to undertake a proper cost-benefit analysis and to publish the results of it. The government has recently taken a significant step forward in this respect. In the summer of 1998, the Better Regulation Unit of the Cabinet Office published "The Better Regulation Guide and Regulatory Impact Assessment". A regulatory impact assessment (RIA) is a short document published with regulatory proposals and new legislation which describes the issue that has given rise to the need for regulation and compares various possible options for dealing with that issue. The costs and benefits of each option are identified. An RIA must accompany any published new legislation and any consultation papers on regulatory proposals. It remains to be seen how the concept will work in practice. However, it will not deal with decisions by regulators to conduct investigations or mount campaigns. It is also difficult to see how the concept can be applied to wide-ranging legislation such as that establishing the Financial Services Authority.

Unhealthy Media/Regulator Interaction

This paper is questioning why regulatory agencies seek to investigate certain practices or industries. It has already been illustrated that there seems little correlation between areas where there is consumer detriment and areas where the regulators choose to mount investigations or take action. Of course regulators must use their judgement, and it cannot simply be a mechanical operation to log the number of complaints and then initiate action.

But there does seem to be an unhealthy interaction between the media and regulators. Regulators and, indeed, politicians, wish to be seen to be dealing with problems that are in the public domain. To some extent, these can be real problems,

but they can also be problems that are in the public domain because the press have chosen them to be so. Of course the press do not act in a vacuum and to a large extent genuinely reflect public policy concerns. But, other factors also influence the volume of press comment. The financial services industry is a cause of its own problems in this respect. There is a huge volume of advertising of financial services which merits special supplements in the weekend press. The advertising has to be matched by editorial content, and there is a limit to the amount of news that can be reported on a weekly basis. Inevitably, some of the reporting deals with problems, and when there is perceived to be a problem, other newspapers will then quickly join in reporting on it.

The volume of media comment could encourage MPs and even regulators to take an interest in the subject and even regulators. This may influence regulators in their decisions as to what subjects they should be addressing, and then regulatory action in itself generates further adverse publicity.

Indeed, it is a well-known tactic for journalists to run a campaign on a particular issue, to send a "dossier" to the Office of Fair Trading or to a regulatory agency and to demand an enquiry. The normal response of any regulatory agency would be that it will consider any evidence given to it of malpractice. This then leads to the newspaper headline of "government announces probe into…..".

It is not suggested that the media determine what the regulators do, but, nevertheless, it does seem to be the case that media comment does have some influence on the action of regulators.

There has recently been an interesting example of media/politician/regulator interaction in respect of supermarkets. The Sunday Times has decided to conduct a lengthy campaign against the major supermarket chains. Politicians have joined in with critical speeches, and the Office of Fair Trading has responded by mounting an investigation. Even if the results of the investigation are satisfactory as far as the supermarkets are concerned, they are having to endure substantial adverse publicity.

Narrow Perspective

It is, to some extent, inevitable that, where a regulator is charged with dealing with a specific sector, then they will focus on that sector, become expert on it and apply rules and regulations which they think appropriate to it. This is all valid to a large extent, but it runs the risk of regulatory agencies viewing issues in a very narrow perspective.

This has been illustrated already in the short section on inconsistency of policy between sectors. But the problem can be greater in respect of the implementation of policy. The financial services industry has, with some justification, been the subject of special regulatory attention, but it can claim that the regulators are taking a narrow perspective when dealing with it.

Most providers of goods and services are free to seek to maximise profits as long as they operate within the law. Positively harmful products (tobacco for example) can be sold, differential pricing is widespread (compare the subscription price of most journals with the news-stand price), superficial improvements (or changes) to persuade customers to buy a new model (golf clubs for example) are standard, blatant churning is regarded as sound commercial practice (football shirts for example), the press connive in churning in an entire sector (fashion) and when supermarket outlets are closed making the chain inaccessible to those without cars, this is applauded in the financial press. But in the financial sector those selling some

products are required to give 'best advice', price differences are challenged and bank office closures are regarded as denying people access to a service.

It is readily accepted that some financial services are different. It does not matter greatly if people are deceived into buying a new set of golf clubs; it does matter greatly if they are deceived into buying the wrong pension. But not all financial services come into this category – bank accounts do not for example. The key point is that there should be clarity as to why a sector or product is so different that it is singled out for special treatment.

Emphasis on Information/Redress/Compensation/Commission

Certainly in the financial services area, and to some extent in other areas as well, one can almost produce a model regulatory document which could apply to a wide range of goods and services. The consumer lobby, and to a lesser extent regulators, invariably want –

- more information to be disclosed to the consumer about the product
- an adequate redress mechanism if the product is unsatisfactory
- compensation arrangements if the product is unsatisfactory and the manufacturer is no longer in business
- disclosure of commissions by those involved in the sales process.

It is natural that these will be features in most regulatory reports because the people writing them are all expert on these issues, in particular in dealing with words. However, little research has been done on the extent to which people read information (and what research has been done suggests that they do not), use redress mechanisms and are interested in disclosure. For the most part, these points are of use to the more affluent, more sophisticated middle class customer. The vast majority of the population would never consider pursuing a formal complaint against an organisation, still less are they able to understand much of the information which is given to them. The Association of British Insurers recently commissioned a report on the quality of insurance company literature. The report, which covered pensions, travel and contents insurance came to the following broad conclusions –

> On the whole it appears that literature plays a low-key role in terms of product communication across all three product areas and largely across all distribution channels. Most consumers prefer to gain their information by verbal communication than through literature. This is primarily because of the effort and time involved in reading material and the fact that many feel they have insufficient knowledge of a particular product area (particularly travel and contents). Customers only want to obtain the key and necessary information by way of literature since they need to be able to discuss individual queries and obtain a price/quote through making personal contact anyway.

The more important points are whether products achieve their desired purpose and do not "rip off" the customer. If one wishes to hide anything, then the best way to do so is to provide as much information as possible. A product can be provided with voluminous information about how it works, how it is constructed and so on, there can be a complex redress mechanism in place allowing people to complain at every stage, an insurance backed compensation system and full disclosure of costs at every stage of the process, but it can still be a rip-off for the customer.

Generally, the public are not greatly interested in how the costs of a product are made up, but they are interested in obtaining a product at a fair price that they value in their own minds, and have little wish to make complaints or seek compensation if something goes wrong. Life is too short.

CHAPTER 4

RESPONSIBILITY FOR CONSUMER POLICY

Having established the present position in respect of consumer policy, and, more importantly, its deficiencies, it is now necessary to go on to suggest a strategy for the future. There are several elements of this strategy. This chapter deals with ownership, and subsequent chapters deal with principles for intervention, openness and the role of industry associations.

Overall Strategy

Responsibility for overall strategy on consumer protection can rest only with central government or an agency of government. It is always tempting to have a lengthy debate on institutional structures rather than strategy. It is the strategy which is most important, but this cannot be divorced from the institutional arrangements. By its very nature, consumer protection cuts across all government departments. Unless the strategy is owned and managed in a satisfactory way, then it is unlikely to be effective in practice.

The issue of ownership was usefully addressed in the OFT consultation paper on consumer affairs strategy, published in June 1996 –

> Before dealing with these individual activities, however, there is a more general role to be defined. Many of those to whom we have spoken in the course of our review so far have recognised a need for greater co-ordination of consumer affairs work in the United Kingdom. This would involve attempting to establish the major issues and the work which needs to be done; to identify the people and organisations best placed to carry that work forward, and to encourage them to do so; and to support them in their work. It also involves taking an overview of the consumer affairs field as a whole, highlighting gaps and overlaps, and setting the general directions in which policy should be moving. Some of those to whom we have spoken have said expressly that they believe that the Office is the body best placed to take on such a role.
>
> We do indeed believe that this is an appropriate role for the Office. We recognise, however, not only that there are areas where our expertise is limited, but also that other bodies have their own proper independence which we cannot and should not constrain. We can only operate by consent, and we recognise that this may require more openness, discussion and consensus-building than we have sometimes shown in the past.

It is not surprising that the OFT feels that it should have the overriding responsibility for consumer protection. This is one possibility, but the OFT is currently not well structured to take on this responsibility. Effectively, it has two functions – consumer affairs and competition policy. It is debatable whether there is great synergy between the two. Obviously there must be some synergy as there is between different functions in any organisation. However, those who deal with the OFT find that on the whole the two sections work very differently. At the very least it seems reasonable to conclude that if the functions were completely separated then there would not be a significant loss in terms of synergy.

“Ownership” of the consumer affairs function is, in effect, divided between the Director General of Fair Trading and the Director of Consumer Affairs. One effect of

the newly enacted Competition Act is that the weight of the OFT's work will shift significantly towards its competition policy responsibilities. If the OFT is to be the lead agency on consumer protection, then it needs to be restructured by having, in as far as it is legal, a second director general with responsibility solely for consumer protection. Longer term it might well be desirable to split the OFT into its two functions, but this may require primary legislation, and the importance of the strategy is such that the issue should not be left until a slot becomes available for legislation.

If a suitably restructured OFT is not the appropriate body to handle consumer protection issues, then the obvious alternative is the Department of Trade & Industry. In many ways, this is the most logical body as it is a department of state under ministerial control with responsibility to Parliament. The Corporate and Consumer Affairs Command of the department is headed by a director general, with consumer affairs and competition policy each being the responsibility of a director supported by two directors with specific responsibilities. These resources would not be nearly sufficient to undertake the work envisaged in this paper. If the DTI is to be the lead organisation, then the OFT's role should be diminished even further.

The one problem with the DTI having responsibility in this area is very similar to the problems which the OFT faces. The DTI's emphasis is on competitiveness, not on consumer protection. Ministerial responsibility for consumer protection rests not with the Secretary of State for Trade and Industry or one of the four ministers of state, but rather with a parliamentary under secretary of state who also has responsibility for competition policy.

If responsibility for consumer protection does stay within the DTI, then it will never get quite the weight that it deserves. However, it will be assumed for the purposes of this paper that, at least initially, the DTI should take responsibility for consumer protection policy. It already has some of the necessary powers but more resources would probably need to be devoted to the area. Interestingly, the DTI seems to be moving in this direction. In a letter published in the Sunday Times on 29 November 1998, the Consumer Affairs Minister, Dr Kim Howells, revealed that since his appointment three months previously "my prime task has been the construction of a consumer strategy".

The National Consumer Council raised the possibility in a recent discussion paper as to whether there should be a separate ministry for consumer affairs with representation in the Cabinet and which would provide a countervailing weight to other departments which are seen to represent the producer interest. This proposal was misguided. It worked neither in theory given the nature of democratic government in Britain, nor in practice. The interests of consumers and producers are not diametrically opposed, and setting up one department to oppose all others simply would not work.

There is, interestingly, one other contender for responsibility for consumer protection issues – that is the Cabinet Office. The Charter Programme Unit has recently been taking the lead on government consultation with industry, while the Better Regulation Unit seeks to have an impact across the whole of government by ensuring that regulation is done efficiently with the interests of business as well as of consumers in mind. One or other of these units could be expanded to take on responsibility for consumer protection which would entail taking over some of the work currently done by the DTI. Obviously, there would need to be a minister with responsibility for this area.

The OFT paper usefully outlines what the co-ordination role involves. This should be to establish the major issues and the work that needs to be done, to identify who is to take that work forward and to encourage and support them to do so.

The key part of this work should be a regular comprehensive review of consumer problems and how they are being handled. Perhaps the best model would be annual reviews but perhaps with a major review every three years or annual reviews but with particularly detailed analysis of, say, complaints or consumer views or the views of consumer bodies in particular years. The review should draw on –

- A theoretical analysis of areas where there is likely to be consumer detriment using the analysis set out in the next chapter.

- The results of consumer surveys seeking to identify areas where consumers need more protection.

- Analyses of complaints to trading standards departments and CABx.

- The views of regulatory agencies (but allowing for the fact that they had a vested interest).

- The views of consumer bodies but with narrowly focused groups being given less weight than widely focused groups.

The review should, where possible, identify the agency responsible for each particular area where intervention is felt to be necessary. However, it is accepted that in some areas this will not be easy and legitimately there can be scope for more than one agency to look at a particular problem. However, where this happens it should be by design rather than by accident or competition. The review and supporting research should be published in full with interest groups being allowed to challenge what is proposed, their views being taken into account in the following year.

The review process could be assisted by an advisory committee which should include appropriate representatives of consumer bodies, local authorities and industry organisations. This committee could, perhaps, be a reconstituted National Consumer Council. In any event, the role of the NCC should usefully be reviewed. Resources devoted to consumer protection work are limited, and currently they are dissipated between a number of separate organisations. There seems little point in the NCC using its resources to mount an investigation if the OFT is also doing an investigation. The NCC's distinguishing feature is that it is able to give an independent consumer voice. It should concentrate on this activity by playing a major role in conducting and analysing surveys of public opinion and mobilising and co-ordinating the views of other bona fide consumer organisations.

Having established what needs to be done, the DTI should also ensure that the appropriate organisations are, indeed, dealing with relevant areas and are not spending their time on peripheral matters. This will involve some co-ordination with other government departments where there are specific regulatory bodies, for example the Treasury in respect of financial services. Where there is no specific regulatory body, then under current legislation the Office of Fair Trading should be the responsible organisation.

Specific Regulators

There is no suggestion in this paper that specific regulators should be abolished. They should continue operating under the existing legislation and largely maintaining their existing work programmes. However, they would be expected to take note of the DTI annual survey, and in their own publications to make clear how they are operating in accordance with this or, if they are not, justifying why this is the case.

There will be occasions when specific regulators may take a different view from the DTI, but if this is to happen then at least the regulator has to explain this rather than simply saying it is a matter for them and no one else.

As far as possible, all ministers with responsibility for regulatory agencies should ensure that they do not work in a way which overlaps with that of other regulatory bodies. Where there is a threat of an overlap, then ministers should decide who is to be responsible. Running a business is difficult enough without two regulators taking different views. On this basis, the OFT, for example, would not have been allowed to undertake its survey into pensions as this is unambiguously the province of other regulatory bodies and government departments. Also in the financial services area, the opportunity should be taken with the Financial Services and Markets Bill to remove the role of the OFT in vetting regulations made by the Financial Services Authority. This has been one of the many nonsenses with the current regime under the 1986 Financial Services Act where regulators have proposed rules only to find the OFT disagreeing with these, and the Treasury ultimately making a direction.

Where regulators are working in related fields, then the DTI or relevant government department should make sure that, as far as possible, they are working together harmoniously and are not adopting substantially different standards to deal with similar problems. This is, for example, particularly true in the case of the utility regulators, although there is the sensible move to merge the gas and electricity regulators given that electricity and gas compete and that electricity companies can provide gas and vice versa.

Trading Standards Departments

Trading standards departments should, like the OFT, have a “long-stop” role. They should not deal with areas that are the responsibility of specific regulatory bodies. For example, they should not be concerned with the sale of financial services as this is adequately covered by the regulators in this industry. Similarly, they should not be concerned with electricity and gas distribution and servicing because there are specific regulatory bodies dealing with these areas.

However, local authority trading standards departments are an essential part of the overall machinery of consumer protection. They may well be aware of problems in relation to a specific supplier of goods or services or a generic problem before the principal and industry regulator. Their duty here should be to inform the regulator. There should also be effective mechanisms for trading standards departments collectively to be able to discuss issues that concern them with industry regulators.

House of Commons Committee

The House of Commons is, in many ways, now of little relevance to the conduct of consumer protection policy. This is unsatisfactory, partly because it is contrary to the principles of democracy, but also because consumer protection issues are one area where MPs are uniquely qualified to contribute sensibly to the debate through their own postbag, constituency surgeries and knowledge of what goes on in their constituencies and more widely. Parliament should play a much more important role in consumer protection policy.

Traditionally, Parliament has a role through approving secondary legislation, by receiving reports from regulatory bodies, by questions to ministers and, occasionally, by the work of select committees. Such parliamentary scrutiny is generally ineffective. MPs have few resources available to them to adequately hold institutions to account, and, in any event, they, like consumer and regulatory bodies, tend to

concentrate on popular and easy subjects rather than the real issues of concern to consumers.

If the House of Commons is to play a major role in this respect, then there should be a permanent sub-committee of the Trade and Industry Select Committee charged with having an oversight over consumer policy issues. It should be adequately resources with its own specialist staff. It should regularly call before it the relevant DTI minister and officials and representatives of the regulatory bodies, and it should also play its part in determining what areas consumer protection regulation should focus on.

CHAPTER 5

PRINCIPLES FOR INTERVENTION

The point has been made earlier in this paper that government seems to intervene to protect consumers in a haphazard way that is not easy to predict. There should be an agreed set of principles which should be used by government and regulatory agencies to decide when

Fortunately, a major study is available which gives the necessary theoretical basis for this work. In August 1997, the Office of Fair Trading published "Consumer Detriment Under Conditions of Imperfect Information", a report prepared for it by London Economics. The introduction to the report helpfully sets out the importance of this issue –

> The Office of Fair Trading (OFT) asked London Economics to undertake research into this area [consumer detriment] with the aim of clarifying thinking about the general issues involved in its consumer protection work. This clarification is important because, without such clarification, there is scope for confusion and inconsistency in the conduct of enquiries. However, such enquiries, and the policy implementation which may depend on them, also require a method of measuring the scale of consumer detriment. Without such a measure it is more difficult to justify any legislative proposals which are put forward.

The report comes to a cautious conclusion that it is impossible to develop a comprehensive checklist which would lead to unambiguous results in testing the extent to which consumer detriment occurs. It suggests the best approach is some form of cost-benefit analysis, although even here it recognises that there are problems.

The report identifies three main ways in which consumer detriment may occur:

- Consumers may not buy the product or service at the cheapest price available to them.

- Consumers may not buy the most appropriate product given their tastes and preferences.

- Consumers may purchase a product or service which is not of the quality they assumed ex-ante.

It is noted that each of these effects is common in markets characterised by imperfect competition.

The report identified six indicators which signal potentially problematic markets and which could help the OFT (and presumably other regulators) target where a closer inspection may be necessary –

- The existence of price dispersion for seemingly similar products or services. This in itself suggests that consumers do not engage in sufficient search and do not effectively compare prices. The example given in the report is extended warranties for electrical goods where the price dispersion is significantly greater than for electrical goods themselves. The report does, of course, make the point that lack of price dispersion does not indicate there is no consumer detriment as this could result from monopoly or anti-competitive behaviour.

- Focal points of competition, that is products being sold on the basis of just one part of the total price. The example given is of photocopiers where the focal point of competition was cost per copy rather than the overall cost. The focal point seems to make price comparison easy, but, in reality, can disguise the overall cost of the product.

- Bundling of primary and secondary purchases and after-markets. This is very much linked with the issue of focal points of competition. The report suggests that the OFT should ask questions such as whether there is economic rationale for the primary and secondary product to be sold by the same supplier, what prevents new entrants getting into the market, are the prices of secondary products as well known to the consumer as primary products and would disclosure of secondary product prices be easy to implement?

- Commission payments, in particular those paid by upstream firms to salespeople or advisers to encourage the sale of a specific product or service.

- Complex products which, by their very nature, present potential information problems for consumers. If consumers cannot understand the nature of the purchase, there may be scope for suppliers to exploit this ignorance through high prices or low quality.

- Infrequent purchases or credence goods. Consumers can learn by buying and using a product. However, if these mechanisms do not operate well because the purchaser cannot judge quality even after purchase, or because the consumer makes very infrequent purchases, then learning is hindered and there are informational problems.

The report suggests that there are a small number of markets which satisfy the characteristics and indicators suggested above and where problems tend to occur on a regular basis. Reproduced below is a table from the report which provides a possible application of the suggested indicators to a number of goods and services.

Markets where information problems appear frequently						
	Indicators					
Market	*Price Dispersion*	*Focal Points*	*Secondary purchases*	*Commissions*	*Complex Products*	*Infrequent or credence purchases*
Life insurance	X	-	-	X (plus ties)	X	X
Pensions	-	-	-	X (plus ties)	X	X
Mortgages	-	X	X	X (plus ties)	X	X
Extended warranties	X	-	X	-	-	X
New cars	-	X	X	Ties	X	X
Second hand cars	X	X	-	-	X	X
Building services	X	-	-	-	X	X
Plumbers	X	-	-	-	X	X
Mobile phones	-	X	-	X	X	X
Appliance repairs	X	-	-	-	X	X
Photocopiers	X	X	X	X	X	X
Package holidays	-	X	X	X (plus ties)	-	-
Domestic appliances	-	-	X	-	-	X
Funerals	X	X	X	-	-	X
Contact lens solutions	X	-	X	-	-	X

The report compared its conclusions with an analysis of complaints completed by the OFT in 1996 (similar to that described in the previous chapter). This analysis suggested that the major areas of concern were building work, motorcars and accessories and repairs and servicing of all types, each of which scored at least three indicators in the table.

The analysis in this section has been somewhat theoretical, but, nevertheless, helpfully indicates areas where problems are likely to occur. It has already been suggested that consumer surveys should be another source of information. However, these are imperfect as often consumers may not know that they have suffered detriment. This was true, for example, in the case of pensions mis-selling, an issue which hardly registered with the public even though it was accepted as a major problem by the industry and the regulators. Accordingly judgement needs to be exercised, but at the very least the product or market should either lend itself to consumer detriment using the London Economics analysis or consumers should say that they need additional protection.

CHAPTER 6

OPENNESS

The government and regulatory agencies properly expect commercial organisations to be open, particularly in terms of the information they give to customers. But the government should also be open in its policy towards consumers, and it should insist on openness by regulatory agencies.

The Centre

Chapter 3 set out a new role for the Department of Trade & Industry in identifying areas where there should be intervention to protect the consumer, ensuring that the appropriate agencies are taking the appropriate action and that there is no overlap between them, and conducting research and using an advisory committee to identify areas of consumer detriment.

The whole of this process should be open with the DTI's conclusions and supporting research being published in full.

The proposed advisory committee and House of Commons Committee would both facilitate this openness through having a specific responsibility to challenge the DTI's work.

Agency Reports and Activities

Five major obligations should be placed on all regulatory bodies and consumer organisations which have government funding.

The first is that they should publish and make widely available a comprehensive report on their activities. In fact, almost all such organisations already do this.

Secondly, and more importantly, before deciding to investigate any area, the regulatory agency should state why it is deciding to take this action in the light of the principles set out in the previous chapter and the review conducted annually by the DTI. It should not be sufficient for the agency simply to decide to investigate something and justify this with a lame statement to the effect that the agency has received a number of complaints about a particular subject. Where an agency is seeking to investigate a particular practice or company, then the relevant industry body or company should be given an opportunity to explain why it thinks the investigation is unnecessary on the basis of the agreed criteria.

Thirdly, in all investigative and regulatory work, the agency should have a duty to analyse the problem in the context of all other goods and services and not in isolation. If the agency considers that special protection is necessary for some goods and services, then it should say clearly why this is the case. The agency should compare what it is proposing for any particular good or service with the regime applying to other comparable goods and services and justify any differences.

Fourthly, agencies should publish the results of any research which they are using to justify regulatory action. Government and regulatory agencies properly take no account of industry representations that consist of assertions unsupported by any evidence. However, regulators themselves sometimes seem quite willing to make assertions and to refer to research which backs them up without making that research available.

Finally, regulatory agencies should, like government departments, be obliged to produce a regulatory impact assessment in respect of new regulations, and, more generally, should commission and publish the results of cost benefit analyses for any proposals which they make. This is already standard practice in the best regulatory bodies, but it should be universal.

Meaningful Consultation

The government and regulatory agencies now generally have good arrangements for consulting interested parties. This involves not only formal consultation but also, as necessary, informal consultation with the organisations most affected by a proposal. However, there is scope to further improve the consultative process. A good starting point is the publication "How to Conduct Written Consultation Exercises" published by the Service First Division of the Cabinet Office in July 1998. The guide is addressed to central government but it is clearly intended to cover agencies as well as government departments. The introduction to the guide states: "Following the best practice principles contained in this guide will be the responsibility of individual departments, agencies and other relevant bodies. Where they do not follow the best practice for a particular consultation exercise, they must satisfy themselves that, if asked, they have good reasons for not doing so."

The guidelines are, for the most part, common sense, covering, in particular, the format of consultation documents, response time, confidentiality and dissemination of the results of consultation.

The paper suggests that those responding to consultation documents should "explain who they are and, where relevant, who they represent (to help ensure that responses from representative bodies are properly weighted)". Subsequently, the paper says that views should be adequately weighted with particular attention to "representative bodies such as trade associations representing businesses in the sector, trade unions, widely representative consumer groups and those mostly affected by the proposals." There is scope to develop these points to improve the consultative process in respect of consumer protection measures.

The public, the media and no doubt government and regulatory agencies can be easily deceived by the name of an organisation. The Association of Widget Consumers may sound as though it represents all widget consumers, and its views may be taken as representative of that large group of people. It is important that regulatory agencies in government know precisely who this organisation does represent. Does it have 100,000 paid up members or does it have 28 members of whom 17 have the same surname? Similarly, the Association of Widget Producing Companies might sound as though it represents widget manufacturers even if it has only one member.

All representative bodies should be required to state in some detail their membership and who they purport to represent. Where this information is not given, then submissions should properly be ignored, and if the information given is incorrect, then submissions should also be ignored. It would also be important to distinguish membership from representation. The Consumers' Association may have 500,000 members, but that does not mean that it represents them. Most people join the Association to subscribe to the magazine "Which?" (indeed, that is the only way which one can subscribe to it). Similarly, the AA has millions of 'members' but they join to take advantage of the rescue service. It would therefore be dishonest for the Consumers' Association or the AA to claim that they represent the views of their members in the same way as it would be dishonest for a mutual building society or mutual life company to claim that somehow it represents the views of its members.

All of this is not to say that views of unrepresentative organisations should be ignored. A well argued submission by an individual should properly be taken into account, but organisations should not be allowed to get away with purporting to represent an industrial sector or large group of consumers when this is not the case. If they represent only a small group, their views will be taken on their merits and taking account of who they represent. It will always be the case that a good quality submission from an unrepresentative group should be given greater weight than a poor quality representation from a more representative group.

Those responding to consultation exercises should, as the Cabinet Office guidance suggests, be obliged to make their responses public unless there is a very good reason why they should not. Government departments and regulatory agencies should feel free to comment critically on submissions made to them, particularly from principal representative bodies and from bodies which seek publicity in the press.

Who Represents the Consumer?

There are any number of organisations that purport to represent the consumer either collectively or individually. Numerous official bodies now have "consumer" representatives. In a recent discussion paper, the Financial Services Authority has actually referred to consulting consumers "and their representatives". This is a difficult area and one that many people choose to ignore for that reason. It cannot be assumed that merely because somebody is labelled "consumer" they represent consumers. In practice, many organisations find it very difficult to obtain people of adequate quality to be the "consumer representatives". All too many are rather good on principles but not so good when it comes to dealing with points of detail and having to make real decisions. Those that are good are avidly sought after and quickly become, if they are not careful, full-time "consumerists", thereby running the risk of cutting themselves off from their background. Where consumer representatives have an established position, then, quite often, after a time, the views they put forward are increasingly their own with different consumer representatives putting forward different views.

To some extent, this is inevitable, but if the trend towards increasing consumer representation is to continue, then the position has to be improved. The points made in the earlier section of this chapter are important. Those purporting to represent consumers by virtue of being a member-based organisation should quite explicitly say just how many members they have and, indeed, whether people join to be represented or rather whether they are joining for another purpose.

There is a need to increase significantly the pool of people from whom consumer representatives are chosen. Under the "Nolan rules", increasingly positions are advertised. This may bring forward some good candidates, but it is also likely to bring forward a lot of very bad candidates. The early indicators are that the effect has been favourable. Local authority councillors are well qualified to be consumer representatives. They are elected by the people, they have to deal with consumer issues and they are experienced in working on committees. However, it would be quite wrong if political groups or local authority associations were asked to nominate people who might serve as consumer representatives. A possible approach would be for vacant positions to be advertised among local councillors on a regional basis.

It is also essential to secure rotation among consumer representatives on official bodies. One option, for example, is to have, say, fixed five year terms and with no prospect of renewal. Equally it is important to have fixed and limited terms of office for chairmen of consumer bodies. There are a number of examples of where

somebody has obtained the chairmanship of a consumer body and they hang on to it far too long because that is their main position in life and they wish to retain it.

CHAPTER 7

THE ROLE OF INDUSTRY ASSOCIATIONS

Trade associations are the representative bodies for individual sectors of industry and commerce. They have a major role to play in consumer protection issues in a number of different ways. They must exercise their representative role in ensuring that the interests of members are properly represented to government and regulatory bodies. But many trade associations also have a more direct influence on the conduct of their members by operating codes of practice and redress arrangements. It is tempting to see trade associations as being on the opposite side of the fence to consumer and regulatory bodies but generally this is not the case. Most trade associations are keen to raise standards within their particular sectors, recognising that the worst performers in the sector can often have a damaging effect on the whole sector in terms of image and perhaps also regulatory action. For the government and regulatory bodies, trade associations can facilitate more effective consumer protection measures without the need for formal regulatory action.

Representation

The previous section has commented on the need for government departments and agencies to have an effective consultative mechanism which ensures that the views of industry and commerce are taken into account. But the duty is two-way - commercial organisations have a duty to provide their views to the government and to regulatory agencies. It is fair to say that in many sectors this representation is performed badly. Most trade associations are poorly resourced and often not wholly representative of their sector because many firms choose not to join. The government is known to be concerned at the poor quality of representation and it is right to be concerned. Where the views of those affected by regulatory measures are not adequately fed into the system, there is a danger that poor quality regulation will result. This will not then achieve its intended purpose and will lead to criticism of the government. Industry and commerce will not blame themselves for not having become adequately involved in the representative process but are more likely to seek to blame the government and to complain not only about the substance of what the government has done but also about the consultative process.

It is all too easy to put the sole responsibility on companies to ensure that they are adequately represented by trade associations. The reality of the situation however is that there is no effective mechanism for this to happen. It is certainly true that in some sectors leading companies have recognised that the trade association needed to be strengthened and have taken steps to do so, often by replacing senior executives and providing more funding. But in other sectors there is insufficient leadership for this to happen. The industry continues to be poorly represented. The government can take three steps which would help ensure that not only trade associations but all representative bodies were both more representative and more effective.

The first point, already covered in the previous chapter, is that those who purport to represent the views of others should be required to state clearly who their membership is and what share of the market they have. This might be a salutary lesson to some members of the association when they see just how small their association is and what a modest share of the market it has. The government cannot reasonably be expected to give the same weight to a trade association representing 20 per cent of the market as to one representing 90 per cent of the market. In saying this, it is of course recognised that it can sometimes be difficult to define precisely any particular market.

Secondly, officials should selectively respond to policy representations, asking for evidence to support assertions and challenging inconsistencies in submissions. This would encourage better quality input from representative bodies.

Finally, officials should identify sectors that are badly represented, either because there is one ineffective association or several ineffective associations (it is very difficult to have more than one effective association in a sector). This is not difficult. Officials know very well which associations are effective and which are not. If the minister calls in industry leaders, tells then that they are being badly represented, as a result of which the industry suffers from adverse regulation, then there will be a response. The industry leaders could be asked to report back in a few months with their plans for improving the position. This could act, at least in some sectors, as a powerful catalyst. Ministers have that power and they should use it.

The good trade association does not simply represent the views of its members to the government and regulatory agencies. This would require very little in the way of resources but would add no value. The good association must represent the interests of its members and, as far as possible, must ensure that the interests coincide with the views. The good association will therefore devote resources to telling members what is going on in the rest of the world relevant to it, what action they need to take, what regulatory issues they might need to address and so on.

Strong trade associations are in the interests of industry and consumer protection generally and commerce on the one hand and government, regulatory agencies on the other. The primary responsibility for strengthening trade associations must lie with industry and commerce, but the government can exercise an important catalytic role.

Codes of Practice

Many trade associations operate codes of practice. These vary in quality from those than can be regarded as little more than advertising for the members to those that really do bite on all members and are as effective as regulation imposed by law. The Office of Fair Trading has a statutory duty to encourage associations to prepare and adopt codes of practice. It is recognised that the way that this has been done has been less than satisfactory.

In February 1998, the OFT published a paper “Raising Standards of Consumer Care”. This argued that trade associations, through the drawing up of codes of practice, had laid much of the groundwork towards the raising of standards to consumers. However, it argued that the overall regime does not command sufficient support from all interested parties. Generally the role of protecting members’ interests and regulating their standards of service under codes, especially when members are in competition with non-members, do not sit well together. The OFT has proposed a new system.

The report makes twelve recommendations for carrying this issue forward –

- There is a need for a core standard to cover the generality of trader behaviour towards consumers and mutual responsibilities.

- A suite of sector-specific standards, based on the terms and principles of the core standard, should be drawn up, focusing first on known problem sectors.

- The standards should be drawn up under the auspices of an independent, authoritative body, with input from traders and consumers.

- The standards to be introduced to replace the current codes of practice regime should be made under the auspices of the British Standards Institution.

- A new approval body needs to be set up if the standards-based regime, to replace codes of practice as the primary means of improving the levels of trader behaviour, is to function effectively.

- Registration to the scheme, to the core standard or to the sector-specific standard where this exists, could be allowed both to firms formally accredited or by annual public self certification, using an itemised pro-forma compliance letter signed by the chief executive. This should bind the firm to abide by the standard in all its business dealing with consumers, and to accept promptly judgments made by the alternative redress mechanism.

- Regulatory bodies could be told of all applications for membership, or at least those where there was no third-party accreditation, and should be able to object to membership being granted, subject to appeal.

- The scheme could be funded by annual subscription from registered traders.

- A single cross-sectoral, high-profile 'better trader' logo could be developed and marketed to enable consumers to identify traders registered with the scheme.

- A continuously updated directory of firms registered with the scheme could be published together with the standards, including a brief synopsis of consumer law.

- The standards must include an independent scheme for redress, perhaps under the auspices of an ombudsman, to remedy problems which cannot be resolved by the trader and consumer.

- Traders who generate either serious or numerous complaints could be deregistered by the standards body, subject to appeal, and their misdemeanours and expulsion made public.

In principle, the OFT suggestions are sensible, in particular by providing a single framework for codes of practice. However, the proposals as they stand are impractical and unduly rigid. For example, there is no apparent mechanism to establish the new approval body and no workable criteria for delineating products or markets.

Redress Mechanisms

The OFT's proposals for codes of practice cover redress mechanisms but these are, in any event, a very important part of consumer protection. Trade associations can play an important role here, in some cases by establishing redress mechanisms themselves and, at the very least, by disseminating information to their members.

The insurance industry provides a good example here; the industry was the first to establish a voluntary ombudsman scheme. However, this is only a part of a redress mechanism. More recently, the Association has commissioned an independent study of internal complaints procedures in insurance companies. It is has published the results of that study, which have wider application to other industry sectors.

Another valuable initiative in this area has been the drawing up of a British standard for complaints mechanisms. This has now been published in draft form and again will help both industry sectors and individual companies to put satisfactory arrangements in place.

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APPENDIX – OFT INVESTIGATION CRITERIA

[Reproduced from the Annex to the OFT report "Consumer Affairs: the way forward" (October 1998)]

When deciding whether to launch an investigation into a market or trading practice, the OFT will consider some or all of the points listed. These are not exhaustive and must be used flexibly.

Identifying the problem

This involves an assessment of the:

i consumers of the product;
ii type of detriment allegedly suffered;
iii characteristics of the market and trade practices; and
iv characteristics of the product.

i) Consumers

a the target group and their potential vulnerability;
b their level of reliance on the product;
c the information already available to them;
d their likely level of expertise compared with the sellers';
e where they purchase the product;
f the methods used to sell the product; and
g the redress mechanisms already available.

ii) Detriment

a the number of individuals potentially affected;
b the potential level of detriment for each individual (which may exceed the monetary cost of purchase); and
c the gravity of the problem.

iii) Market

a the size of market share of consumer spending;
b whether there is wide price dispersion for apparently similar products;
c whether there are 'focal points' of competition which may obscure the true situation;
d the existence of commission payments or other vested interests which might distort information or advice to consumers;
e the dependence on high-pressure or questionable sales techniques; and
f whether it is an emerging market.

iv) Product

a complexity (of the product itself or of contract terms);
b its novelty;
c its cost;
d the risk (of fraud, for example);
e the infrequency of purchase;

f the likelihood of repeat purchase from the same supplier;
g the time between purchase and use;
h the difficulty of determining quality even after purchase ('credence goods');
I the bundling of primary and secondary purchases, or the existence of after-markets.

What can the OFT contribute?

i Does the OFT have, or can it obtain, sufficient evidence of detriment to form a basis for the work?

ii Does the OFT have, or can it acquire at reasonable cost, the necessary expertise and resources?

iii Is the OFT the body best placed to investigate the issue?

iv Is the issue better addressed under consumer rather than competition legislation powers? (A competition investigation may be more appropriate when problems are a consequence of market power on the part of the supplier.)

v Is there a reasonable prospect of an investigation identifying a solution to the problem?

Vi If the solution depends on action by others (industry, consumers or government), are they likely to be willing to act?

[DGMB\MISC]