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5 October 2006

Dear Martin

**OFT Consultation Document on Draft Guidance Regarding Unfair Relationships – Enforcement Action Under Part 8 of the Enterprise Act 2002**

FLA (Finance & Leasing Association), the principal representative of the asset, motor and consumer finance sector in the UK, would like to comment upon the draft guidance prepared by OFT on how it expects the unfair relationships provisions in the Consumer Credit Act 2006 to interact with Part 8 of the Enterprise Act 2002 (“Part 8”). We apologise for the short delay in responding to your consultation exercise on the draft guidance.

We broadly welcome the draft guidance and the general approach and level of detail included in the draft. On the whole, we believe that the draft presents a broadly accurate summary of the law and a useful indication of how OFT may approach enforcement in this area under Part 8.



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We do, however, have some concerns about parts of the draft and hope that these can be taken on board when preparing the final draft of the guidance. These are as follows:

## **Tone**

As you indicate in parts of the draft, the guidance is advisory in nature and does not – and indeed, cannot – seek to define the meaning of the unfair relationships provisions. Nor can the guidance bind enforcers of Part 8. We therefore welcome the broad thrust of the introductory comments in, for example, paragraphs 1.4 and 1.5 of the draft. We believe, however, that the tone of the draft is, in places, a little too strident and has the danger of creating a misleading impression and of being misconstrued. We have in mind, in particular, references to how a court may deal with allegations that a relationship is unfair and references to matters of interpretation. In these areas, it is important, we believe, that you stress that your view is just that - your view. We therefore suggest that you amend the draft as set out below. Suggested additions are underlined and deletions marked by strikethrough.

Para 1.4 - “Such factors may, in the OFT’s view, also be relevant to the court’s consideration in individual cases...”.

Para 3.16 - “There is no statutory definition of ‘relationship’, so a court would most likely interpret the meaning of this word using its ordinary usage ~~but the meaning of this seems clear from ordinary usage.~~”

Para 3.27 - “~~It would not be necessary~~ In some cases, OFT may not be required to necessarily demonstrate that there is more than one ‘unfair relationship’...”

Para 3.28 - Again, it is may not be necessary for the practice to occur in all cases...”



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## **Relationships Covered**

We understand why, for ease of reading, you have referred throughout to “lenders” and “borrowers”. However, these words need some further clarification. As you know, the unfair relationships provisions apply to hire-purchase as well as credit: see s.140C(1). The creditor under a hire-purchase agreement is not, strictly speaking, a “lender”. Similarly, the debtor or consumer under a hire-purchase agreement is not, strictly speaking, a “borrower”. We therefore suggest that you include some introductory text highlighting that references to “lender” and “borrower” include owners and hirers as appropriate.

For the sake of completeness, we also believe that the draft could benefit by a short explanation that the provisions also extend to sureties and that, for example, an application to the court to make an order that a relationship is unfair may be made by a borrower (as defined) or by a surety.

## **Rates and Charges**

We agree that, given the scope of ss.140A -140C, the provisions are probably sufficiently wide to catch “agreements involving excessive costs and borrowing”, but not for the reasons you describe. We are afraid that we do not agree with your analysis of the legal position as set out in paragraph 4.14 and believe that the logic here is flawed.

On our reading of the law and on our understanding of the legislative history, it is, in our view, wrong to suggest that ss. 140A – 140C somehow incorporate or build upon the defunct provisions on extortionate credit bargains (ss 137-140). The new provisions are entirely, and intentionally, different from ss 137 -140.

We also doubt the correctness of your views on disclosure set out in paragraph 4.17. In our view, the consumer credit regulations made in 2004 - particularly The Consumer Credit (Disclosure of Information) Regulations 2004, The Consumer Credit (Agreements) (Amendment) Regulations 2004 and, to some extent, The Consumer Credit (Advertisements) Regulations 2004 – set out a complete, detailed and comprehensive statutory regime dealing with disclosure



and transparency both at the pre-contact and agreement stages. Failure to disclose “relevant information” or to have done so in “an unclear or misleading manner” are matters covered by those regulations, which provide that consumers must get clear and detailed information about their credit agreements from their lenders before they sign up.

## **Court Judgments**

We note from paragraph 5.25 that you may consider imposing a requirement on licensees to notify OFT of “relevant court judgments and supporting information”. Whilst we note that you intend to consult separately about this, we would like to take this opportunity to make some early comments on the idea.

There is the real danger that any proposal along the lines suggested would be unnecessarily intrusive and disproportionate. Imposing an obligation on licensees to supply the OFT with details of relevant court judgments and supporting information needs to be proportionate (particularly given the wide scope of unfair relationships provisions). Disclosure of judgments alone would need much consideration. Are default judgments to be included? If so, why, given the limited utility of such information? The disclosure of “supporting information” presents similar difficulties and may be theoretically wide in scope. What would OFT seek to learn from such material? What are the limits of disclosure and how is the analysis of such material to be performed? Also to be considered are issues regarding the licensee’s duty of confidentiality owed to the consumer, whether contractual or otherwise. How are these to be overcome and how are competing duties and obligations to be balanced?

We also do not understand how the proposal differs from or fits with recent changes to Civil Procedures Rule 5.4C which now permits the public and media access to any statement of case filed at court, including particulars of a claim and the defence.



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Finally, we should add that we are members of CBI and, having seen its response to the consultation document, agree with the points made in that response.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ashley Holmes', with a horizontal line extending to the left and another to the right.

Ashley Holmes

*Head of Legal Affairs & Policy Development*



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