

**A Consultation Document on the Licensing Regime under
the Consumer Credit Act 1974**

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1. INTRODUCTION AND SUMMARY

1.1 PURPOSE OF CONSULTATION

In July 2001, we published a consultation document *Tackling loan sharks – and more!*¹ on proposals to review the Consumer Credit Act. That document identified five main drivers that led us to conclude it was right to undertake a review now:

- ❖ to implement the Government's manifesto commitment to tackle loan sharks
- ❖ the need for improvements in the current consumer credit licensing regime
- ❖ the Financial Services Authority (FSA) taking on the regulation of mortgages
- ❖ the European Commission consulting on a revised Consumer Credit Directive, and
- ❖ the possible need for changes to implement the outcomes from the Task Force on tackling overindebtedness

The document outlined the priority areas for reform of the Act:

- ❖ increasing / removing the financial limit under the Act
- ❖ making the early settlement regulations fairer
- ❖ enabling consumers to conclude credit agreements on line
- ❖ reforming the licensing regime
- ❖ making the extortionate credit provisions more effective
- ❖ simplifying the advertising regulations, including the regulations on APRs, and
- ❖ simplifying the rules on multiple agreements

This consultation document takes forward the fourth of those priority areas - reforming the regime for consumer credit licensing decisions and appeals to target rogue traders and practices which cause detriment to consumers - and seeks your views on options for:

- creating a visible and proportionate licensing regime that targets the activities of rogue traders, while minimising the bureaucratic burden on legitimate businesses;

¹ www.dti.gov.uk/ccp/consultpdf/loanshark.htm

- greater flexibility for the OFT to take action against rogue licence holders and those undertaking business practices detrimental to consumers;
- providing an appeals mechanism that does not involve the Secretary of State.

These aims reflect the approach likely to be proposed in the European Union, where the Commission is looking to increase consumer protection under a revised Consumer Credit Directive by ensuring that all lenders and credit intermediaries in the EU operate within a system of registration. We will want to ensure that the final EU regime provides for appropriate controls and adequate consumer protection.

There is widespread concern among the finance industry, the trading standards community and consumer bodies that the current licensing system is not appropriately resourced or structured to be both efficient and effective in keeping rogues out of the marketplace and consumers protected. The OFT is working in an environment where there are around 215,000 active consumer credit licences to police; limited information gathering powers; and a narrow, inflexible range of enforcement tools.

How any changes might be implemented through legislative change is uncertain at this early stage, as much will depend on the outcome of this consultation and those on the other priority issues.

1.2 WHAT WE WANT FROM YOU:

The main issues and options are set out in this consultation document, and include a number of questions on which we want your views. A summary list of the questions is in Chapter 3.

We also want your help in estimating the compliance costs and benefits of each option in this document – see Chapter 4.

As already stated this is a consultation on one of the priority areas identified for review. Consultees are therefore asked to confine their response to just the issues of reforming the licensing regime.

1.3 RESPONSES

You can respond to this consultation by emailing us at stephen.childerstone@dti.gsi.gov.uk or by writing to Stephen Childerstone, Consumer and Competition Policy Directorate, Room 407,

Department of Trade & Industry, 1 Victoria Street, London SW1H 0ET.
The deadline for responses is Wednesday 30th April 2003.

Your response to this consultation document may be made publicly available in whole or in part at the Department's discretion. If you do not wish all or part of your response (including your identity) to be made public, you must state in the response which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made available to any enquirer, including enquirers outside the UK, or published by any means, including on the Internet.

1.4 CONSULTEES

We are sending this document to the consultees listed in Annex A. Additional copies of this document may be made without seeking permission. Alternatively copies can be downloaded from the Department's website;

<http://www.dti.gov.uk/ccp/consultations.htm>

2. THE CONSUMER CREDIT ACT LICENSING REGIME

2.1 INTRODUCTION

The CCA licensing system is intended to protect consumers by ensuring that those traders who engage in a range of regulated consumer credit related business activities are fit persons to do so. Anyone intending to give credit or to hire out goods to the value of £25,000 or less, or to engage in certain ancillary credit activities, such as credit brokerage or debt collection services, must have a licence. Engaging in consumer credit activities without a licence is a criminal offence and carries a maximum penalty of two years imprisonment or a fine, or both. An agreement made by an unlicensed trader cannot be enforced by him unless the DGFT has otherwise ordered.

The licensing regime is administered on behalf of the Director General of Fair Trading (DGFT) by the OFT. The OFT issued 15,855 new standard licences in 2002; over half a million have been issued since 1976. There are also currently 15 Group Licences in existence.

Currently there are approximately 215,000 live licences covering the range of licence categories; consumer credit, hire, credit brokerage, debt adjusting and debt counselling, debt collection and credit reference agencies. Licence periods have varied since the Act came into force but the current duration is five years. Licence fees are £110 for a sole trader and £275 for a partnership or limited company.

An applicant must satisfy the OFT that he is a fit person to hold a consumer credit licence. The name in which the application is made must not be misleading or otherwise undesirable (s.25(1) CCA 1974). In essence, the fitness test means that an applicant must satisfy the OFT that he will trade honestly, lawfully and fairly with consumers. In practice, OFT will take into account a wide range of factors – including:

- any offence or conviction connected with the business or with anyone running it
- any evidence of discrimination on grounds of sex, colour, race, ethnic or national origin
- failure to comply with any requirement of the Consumer Credit Act or regulations, or any other consumer protection legislation
- consumer complaints
- business practices that could damage consumer interests

- information from other regulators, professional, trade or consumer organisations or other traders
- Insolvency, bankruptcy or disqualification as a director

A key source of information for the OFT is local authority trading standards departments (TSDs), which enforce the vast majority of consumer legislation, and which also have enforcement powers at the local level for breaches of the Consumer Credit Act. In theory, it is through this role as CCA enforcers that TSDs provide the OFT with evidence to inform decisions to issue consumer credit licences; and subsequently whether or not to revoke, suspend or vary licences in cases where the fitness of the holder has been called into question. In practice, the picture is more patchy – the flow of information from individual TSDs will be influenced by the resources that each of them is able to devote to the enforcement of the CCA.

Appeals:

All licensing decisions by the OFT under the CCA – from initial refusals to grant a licence to subsequent revocations – are subject to a right of appeal. Such appeals are to the Secretary of State for Trade and Industry, but are heard on her behalf by an independent panel. Chapter 2.6 of this paper mentions how the appeals process might itself be reformed.

Enforcement action:

As already mentioned, prosecutions of offences under the CCA are normally brought by TSDs, although the OFT also has enforcement powers. The OFT's Annual Report for 2001 reveals that for the calendar year 2001 there were a total of 70 successful prosecutions by TSDs under various aspects of the CCA, resulting in fines totalling £83,350. (During the calendar year 2002 the OFT was notified (on a voluntary basis) of 18 successful prosecutions by TSDs under various aspects of the CCA, resulting in fines totalling £55,100)

Issues:

The licensing system is a key element in protecting consumers from harm. There is potential for serious detriment to consumers through irresponsible lending, high credit costs, misinformation, debt escalation, high pressure sales tactics, harassment and threats of violence. People's homes can be at risk if they default. The licensing system is there to ensure that those who lend money to consumers, advise consumers on

borrowing or collect debts are fit persons to do so by requiring them to meet certain criteria before they can enter the market and providing a basis for taking action against traders who cause detriment to consumers.

Without a licensing system, OFT's ability to provide effective guidance on unfair business practices and to track down and take action against those who fall short of the standard would be much reduced. But the present system is not as effective as it should be in achieving this objective. There are shortcomings both in the legal framework and in the way that the system operates.

It has been suggested that the test of fitness is set at a low level and there is limited checking of the information provided by applicants. The information OFT is able to collect from licence holders and others is insufficient to enable it to carry out risk assessment or to target action on those areas causing the greatest problems as effectively as it might. As a result, the system may be failing to tackle problem businesses.

The range of enforcement measures open to OFT to tackle rogue credit businesses or practices is limited. If it is satisfied that the licence holder is no longer a fit person, OFT can revoke the licence. As that could mean putting the trader out of business, in practice the standard for revoking a licence has to be set at a high level. However, that means that rogue traders can cause significant detriment to consumers before suffering a penalty, given the time required to gather evidence to a high standard and go through the process of warnings, hearings and appeals; or without suffering a penalty if the detrimental activity is not considered sufficiently serious to warrant removal of the licence. Since June 2001 OFT and Trading Standards Officers have also been able to take action under the Stop Now Regulations to prevent traders continuing with certain practices which breach the Consumer Credit Act.

The objective of the review is to create a regulatory licensing regime that is targeted, proportionate and effective in dealing with rogue traders, reducing the burdens on legitimate business and protecting consumers. This issue is a key priority in reforming the Consumer Credit Act (CCA) and delivering the manifesto commitment of tackling loan sharks.

A new licensing system needs to be designed to ensure:

- an appropriate entry test to ensure that licence holders are fit to hold a licence but which does not set disproportionate

requirements. [This might be different for different kinds of business, for example the test for a lender might need to be different from the test for a debt adviser.]

- provision to enable OFT to gather and verify sufficient and timely information to allow it to undertake proper risk assessment and effective enforcement
- burdens on legitimate businesses are minimised and action is targeted on rogue traders and practices
- an appropriate range of enforcement measures to address different levels of problems
- adequate resources for effective enforcement
- appropriate redress for consumers.

We have undertaken several focus group discussions with representatives from the lending industry, consumer bodies and regulators on the issue of amending the licensing provisions to tackle these issues. Through these groups we have been able to identify key problems and options that are set out in this consultation document. It should be noted that the options are not mutually exclusive, and therefore could be implemented in combination in order to ensure that the goal of dealing with the rogues, reducing burdens on legitimate lenders and protecting consumers is achieved.

Whereas regulators like the Financial Services Authority (FSA) operate authorisation regimes that place a great deal of emphasis on tests of competence and active checking and monitoring for determining whether an applicant is qualified to hold a licence, the consumer credit licensing system as administered by the OFT has traditionally applied a less rigorous test for qualification.

The following issues will be raised in the consultation:

- Is the current licensing system both efficient and effective in keeping unscrupulous traders out of the consumer credit market?
- Does it afford sufficient protection to consumers against credit industry malpractice?
- Could resources currently aimed at licensing be better targeted? Are more resources needed for enforcement?
- Do the regulatory structures in place have adequate enforcement powers at their disposal to combat rogue traders
- Should the Secretary of State be removed from the appeals process?

The following possible options for reform have been identified:

1. Introduction of a single form of open-ended consumer credit licence.
2. Introduction of a new, more focused test of fitness to hold a consumer credit licence.
3. Placing the OFT under a duty to issue statutory guidance on the behaviour expected of licence holders.
4. Introduction of variable licence fee rates to reflect both the size of the applicant business and the risk historically associated with the sector in which the licence is to be used.
5. Membership by an applicant of a trade association that has been approved by the OFT under its new Enterprise Act powers on industry codes of practices to be taken into account when judging fitness to hold a consumer credit licence.
6. Encouraging more formal relationships between the OFT and local authority trading standards departments (TSDs) for the enforcement of the Consumer Credit Act – including an enhanced role for TSDs in monitoring ongoing compliance by licence holders.
7. Creation of a new, more flexible range of enforcement powers under the Consumer Credit Act – short of revocation of a consumer credit licence.
8. Provision of an appeals process, not involving the Secretary of State, to decide on licensing and enforcement decisions by the OFT.

2.2 BACKGROUND TO THE CONSULTATION

Extent of the consumer detriment:

It is difficult to establish the true scale of consumer detriment in the UK consumer credit sector. Much of the evidence is anecdotal. A great deal of consumer detriment will never be reported as consumers are generally reluctant to lodge complaints. However, research² suggests that many millions of consumers (i.e. those with poor credit-worthiness) are using the ‘non-status’ markets where they may be more likely to suffer detriment. Datamonitor recently concluded that 8.3 million people (one in five adults) may be regarded as constituting the market for the “sub-prime” lending sector. The annual value of this market is estimated to be in the region of £16 billion. More generally, an OFT report in February 2000 estimated the overall level of consumer detriment in the UK economy to be £8.3 billion a year.³

The types of consumer detriment which consumers may experience are:

- Irresponsible lending
- High costs of credit
- Misinformation / lack of adequate or clear information (for example, in respect of early settlement)
- Debt escalation
- High pressure sales tactics
- Harassment and threats of violence

There is clearly a lack of hard evidence but we can identify defects in the current system that may allow rogue traders to operate.

These include:

- Licensing decisions based on little detailed information from the applicants and licence holders themselves; together with poor information flows from and the lack of widespread formalised co-operation arrangements with other regulators – in particular local authority trading standards departments, as well as Citizens Advice Bureaux;

² Elaine Kempson & Claire Whyley 1999 research for DTI into extortionate credit

³ “Consumer Detriment”, February 2000 [OFT 296]

- Data given to OFT may be aggregated – a combination of different complaints and is not consistent between TSDs; it is, however, useful for the purpose of helping to identify problem sectors.
- Trade organisations etc. conduct their own information gathering without necessarily passing this on. OFT has no power to obtain information from third parties and has limited access to information held on the Police National Computer; by the Criminal Records Bureau; and by the Insolvency Service, Companies Investigation Branch and Customs and Excise.
- The DGFT has a duty to ensure that licence holders remain fit throughout the duration of their licence. However, he is only entitled to require information at the time of an application / renewal or variation, and is therefore reliant on other sources, such as consumers and other enforcers for information on the performance of licence holders.

2.3 LICENCES

2.3.1 Background

When is a licence required?

A licence is currently required for conducting business concerning the provision of credit, or the hiring of goods, to the value of £25,000 or less under a regulated agreement to an individual or non-corporate body. A licence is also required to carry out certain ancillary credit businesses – such as credit brokerage or debt collection services, and to operate a credit reference agency.

Categories

A consumer credit licence can cover any or all of the following 6 categories of trading:

- Consumer credit
- Consumer hire
- Credit brokerage
- Debt adjusting and debt counselling
- Debt collecting
- Credit reference agencies

Most applicants ask for and are given a licence covering all six categories – and OFT encourages this approach.

Period of licence

A consumer credit licence is granted for 5 years after which time it must be renewed.

Changes

Licence holders have a duty (s.36 CCA) to notify the OFT of certain changes in their business. These include changes to the main business address or changes of personnel amongst company officers or controllers. Failure to do so is an offence.

Variations

Licence holders must apply to vary their licence, for example, if they wish to change the name of the holder; the trading name; or add or delete a category of business activity. It is an offence to trade in a name not specified in the licence or outside the licensed business category.

Currently, variations to a licence can be made free of charge at the date of renewal. A system of differential fees applies according to the variation at other times but in most cases the cost is £30. When a variation is made a new licence is issued. 4,765 variation applications were received in 2002.

2.3.2 Issues

Given the way the licensing system is operated, there may be a case for moving to a single licence category. On the other hand, retaining the six categories of licence would allow the fitness test to be applied and the relevant information requirements to be tailored to the relevant activity. The licence categories might, however, be reviewed to ensure that they are the most appropriate way to segment the market.

An alternative aid to managing the consumer credit licensing regime might be to categorise licence holders by reference to the nature and constitution of the business concerned and, more relevant still, the business sector in which they operate – e.g. second hand cars, etc. Access to this sort of information would enable the OFT to get a more accurate picture of the use to which licences are put in the economy; and would enable it better to target its enforcement activity on those sectors where the most problems arise – including the provision of information and pre-emptive guidance to at-risk sectors.

The OFT does not require detailed information on the application form about the credit activity, the size of the business or the number of staff employed. Were this information available, it might assist in determining what level of risk a given trader posed and what corresponding resource should be allocated to ensuring compliance.

As presently constituted, the process of renewing an existing licence is a bureaucratic burden on the OFT and detracts from its efforts to ensure that rogue traders are kept out of the market. Variations and changes to licences impose similar burdens. Moving towards an indefinite licensing period would substantially reduce these burdens but it would have an impact on funding. It would, however, need to be supported by an enhanced system of ongoing monitoring of the activities of licence holders, including powers to require information at any stage, and an obligation on licence holders to notify material changes as they occur. Proposals for enhanced monitoring are discussed below in Chapter 2.6.

2.3.3 *Options*

- Retain categories for licences, ensuring that they are defined in such a way that reflects the different aspects of the consumer credit market. This would also enable the OFT to concentrate its activities on those sectors where the most problems arise.
- Alternatively, consider consolidation into one single category of licence, which might speed up the application process.
- DGFT could be granted powers to restrict the activities of licence holders by imposing conditions on licences in certain circumstances both at the initial stage and at any time during the licence period designed to limit the scope of operation. These could include reporting requirements.
- With an enhanced monitoring system the duration of licences could be reviewed. Longer licensing periods would help to reduce the administrative burden placed on the OFT by the renewals process. For example, a licence might initially be issued for a period of five years and then, depending on the conduct of the licence holder during this probation period, renewed for a longer, or possibly even indefinite, period.

2.3.4 *Questions*

1. Should the existing six categories of consumer credit licence be replaced by a single form of licence, but subject to OFT powers to circumscribe what each individual licence permits? If separate categories of licence are retained, how might they be redefined?
2. Subject to enhanced monitoring of licence holders, should the existing licensing periods be reviewed? Is there scope for licences to be issued for an initial five year period and then, if the OFT is content with the conduct of the licence holder, renewed for a longer or indefinite period?

2.4 THE FITNESS TEST:

2.4.1 Background

Section 25(2) of the CCA provides that, in determining whether an applicant is a fit person to engage in any consumer credit activities, the OFT shall have regard to any circumstances appearing to it to be relevant, and in particular any evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present), or any controller, has:

- (a) committed any offence involving fraud or other dishonesty, or violence;
- (b) contravened any provision made by or under the Act, or by or under any other enactment regulating the provision of credit to individuals or other transactions with individuals;
- (c) practised discrimination on grounds of sex, colour, race or ethnic origins in, or in connection with, the carrying on of any business; or
- (d) engaged in business practices appearing to the DGFT to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not).

In practice, the current application process focuses on the collection of limited types of information, such as business name, address, past applications, criminal convictions and county court judgments, and bankruptcy. It is questionable whether this is enough for the OFT to be able to build up a detailed view on the fitness of an applicant to hold a consumer credit licence. For example, the fitness test as applied has not tended to examine whether a trader is professionally or otherwise qualified or has relevant experience to work in consumer credit. Indeed, the OFT do not always have complete information on behaviour that may cast doubts on the fitness of an applicant to hold a licence. This may be a result of either inadequacies in the information requirements themselves, inadequacies in information gathering and investigatory powers, or applicants providing incomplete information.

On the face of it, the statutory test set out in the Financial Services and Markets Act – that the applicant must be a “fit and proper” person – is very similar to the CCA fitness test. Differences begin to emerge, however, in how these statutory tests have been applied. When exercising its regulatory functions, the Financial Services Authority (FSA) applies a test of suitability assessed against its regulatory

objectives. The FSA regime requires far more detailed information, including bank and credit references; details of professional qualifications and membership of professional or industry associations; evidence of any failed applications for such associations; and any current legal actions against the applicant. The FSA would also expect a firm's business or strategy plan to take into account the interests of consumers and demonstrate that it is ready, willing and organised to comply with all relevant requirements.

The emphasis of the FSA process is also more forward-looking. The FSA must ensure the person will satisfy and continue to satisfy the conditions, whereas the CCA fitness test tries to predict future conduct on the basis of past events.

There are arguments why the FSA and the OFT tests should be different. The FSA regime was developed for investment business, where the trader has the consumer's money in his possession and there is a risk of loss through the investment process. This is very different from the credit market, where generally the consumer has the trader's money and the costs are largely set at the outset.

Detailed guidance on the FSA authorisation process is contained in the FSA handbook. The guidance provided by the OFT on the CCA licensing regime is much more limited. The OFT have published general guidance for licence holders and applicants. The leaflet: *Consumer Credit Licences: Guidance for holders and applicants* supplements the statutory fitness test in the Act. It is less detailed than the FSA Handbook, and could be expanded or supplemented with guidance linked to specific licensable activities (e.g. lending or broking or debt collection). Indeed, this was the intention when the leaflet was first published in February 2001. Guidance has since been issued in relation to debt management services (currently under review) and, in draft form, on debt collection practices. Further guidance in respect of used cars will follow shortly. There will also be a review of the non-status lending guidelines. In all of this guidance, applicants will be advised of the minimum standards expected in these sectors and informed that their licences will be in jeopardy if they do not match up to these basic requirements. There is also a case for giving this guidance a statutory basis, so that it has clear legal effect.

In the FSA, the extent of verification of a particular applicant depends on the scale and nature of the applicant and may include face-to-face interviews. Under the Consumer Credit Act, the OFT generally writes to

the applicant's local Trading Standards Office to check whether the trader is known to TSDs and whether there is anything adverse affecting the trader's fitness. The OFT also checks the register of convictions. The response of Trading Standards is variable depending on how well resourced they are and to what extent credit related matters are prioritised at the local level. The OFT may make further enquiries of the applicant – including by way of a formal notice under the CCA, face to face meetings with the OFT itself or meetings with the local TSD.

2.4.2 Issues

There is a widespread and general perception that consumer credit licences are not difficult to obtain or to retain. The figures cited in Chapter 2.6.1 on the small number of applications that are denied and licences that are revoked would seem to support this view. The question is whether this is a symptom of the construction of the existing fitness test, or has more to do with how it is applied by the OFT – perhaps as a consequence of inadequate information gathering and investigatory powers.

A key objective of the review is therefore to ensure that we have a 'fitness test' that can be applied in a way that ensures that licences cannot be obtained by rogue traders. Once a licence has been granted, it is also important to ensure that the holder remains fit to retain it throughout its currency.

Establishing that an applicant is unfit to hold a consumer credit licence is clearly a difficult task. Consumers, however, will assume that the holding of a licence in itself means the trader is reputable and bona fide. In the absence of a more pro-active system of positive vetting of applications, this cannot always be relied on.

In reviewing the fitness test, there are three guiding principles –

- to align the test more closely with the FSA authorisation criteria listed in the FSA Handbook;
- to make clear to firms what is expected of them and how the DGFT is likely to interpret and apply the fitness test;
- to facilitate a change of emphasis within the OFT as regards the factors to be taken into account and the information sought from applicants.

When applying the fitness test, there will be key pieces of information relating to the bona fides of the applicant that need to be ascertained if potential rogue traders are to be excluded from the market place. Examples of what these might be are set out below. These might provide the basis of a new, more prescriptive fitness test. At the same time, however, the test will need to be flexible enough to allow any relevant factors to be considered.

Many questionable applications are withdrawn or otherwise deterred as a result of queries by the OFT. If, as a result of checking the information provided, seeking clarification of information is already a deterrent then it is reasonable to assume requiring more official data will act as a further deterrent and an initial quality sift of applicants. Care will need to be taken that an appropriate balance is struck between the protection of consumers through tougher checks; and placing unnecessary additional burdens on both legitimate businesses and regulators. It may be necessary to review the penalties in s.7 of the CCA in respect of the provision of false information.

An extended fitness test of this kind may put additional burdens on legitimate business at the initial application stage. However, once an application has been subjected to an enhanced system of checks, the ability of the DGFT to continue the checks during the period of the licence will result in a significant improvement in the standard of licence holders. More rigorous testing will deter rogue traders from entering the market and as such provides an ultimate benefit to legitimate traders who will not be subject to unfair competition from rogues.

The extension of the FSMA regime to mortgage brokers and general insurance intermediaries will extend the FSA's jurisdiction to a much larger number of businesses, including many small traders, and many of these will also be credit brokers. Alignment of the FSMA and CCA regimes and a more consistent approach to how they are applied would therefore be a natural step. One way in which this might be achieved would be by providing that those who have been authorised by the FSA would not subsequently have to go through all of the stages of the OFT licensing process. Rather, authorisation by the FSA would create a presumption in favour of receipt of a licence under the CCA. There would need to be safeguards, for example, the FSA would need to inform the OFT whenever anyone was de-authorised under its regime.

2.4.3 Options

Amend the fitness test to include extended provisions such as in the FSA regime to ensure business is conducted with integrity and in compliance with proper standards; whether it has or will have a competent and prudent management; and whether it conducts itself with due care, skill and diligence.

- Increase the amount of information required by asking the applicant what type of work he wishes to engage in and the type of work he has been involved in before. The applicant might be required to show some knowledge and understanding of his responsibilities to the consumer under the Act, for example in the form of a business plan.
- An increase in general information on the application form could include basic checks such as:
 - Information on previous business and personal addresses for the preceding 5 years;
 - Proof of address;
 - Bank references;
 - Credit references;
 - Details of professional qualifications or membership of industry associations;
 - Whether entry to these associations has ever been refused;
 - Birth certificates, passports, driving licence and national insurance numbers;
 - Any legal action in progress against the applicant.
- Some of the basic necessary checks by the OFT once an application has been received could be:
 - Electoral roll to check identity; CRA files; CCJ register; Register of Directors; checks on criminal activity
 - May require more resourcing of TSDs at a local level to cover their part in the checking process. [Issues connected to an enhanced role for TSDs are explored in more depth in Chapter 2.6]
- The CCA could enable or require the DGFT to lay down statutory rules of conduct, breach of which may lead to licensing action, including fines. The FSA is able to issue conduct of business rules

and associated guidance subject to prior consultation and cost – benefit analysis.

- The DGFT’s power to issue further guidance to firms on the nature and application of the test might be made into a formal duty to do so. This would build upon the guidance previously issued and, supported by guidance for particular types of business or sector or for each licence category would set out the matters to which the DGFT is likely to have particular regard and the kinds of information that will generally be sought. Such guidance would be subject to pre-implementation consultation.

For a programme of sector-specific guidance to be effective, the information requirements on the licence must extend to requests to enter the areas of businesses engaged in – e.g. second hand car sales, etc. Licence holders should be required to update this information as appropriate.

The DGFT might be given the power to issue a licence, but subject to certain conditions or limitations on the freedom of the holder to act within the consumer credit sector. Such conditions would reflect any concerns on the part of the DGFT arising from the information provided by the applicant.

2.4.4 *Questions*

3. Should there be a more focused test to establish whether an applicant is fit to hold a consumer credit licence – based on the criteria applied by the Financial Services Authority, which pay particular attention to the history and qualifications of the applicant?
4. Should the OFT be given the power to carry out background checks on applicants?
5. Should the OFT be given a duty to issue guidance notes (which may be sector-specific) on the criteria against which it will judge the fitness of applicants?

2.5 LICENCE FEES

2.5.1 Background

The OFT currently charges £110 for a sole trader's application and £275 for a partnership or limited company for a five year licence. Group licences of up to 1,000 cost £4,000; up to 5,000 cost £10,000; above 5,000 cost £20,000. In 2002, 15,855 licences were granted. These fees are amongst the lowest for a licensing system that we have encountered in our research, by a large margin in many cases.

It is difficult to predict future trends as there is a degree of volatility in all licensing. For example, new applications experienced a large growth between 1996 and 1998. Since 1998 there have been decreases in new applications of between 4% and 11% per year. However, the figure for new applications in 2002 of 16,754 shows a 2.6% increase on the number of applications received in 2001.

In accordance with Treasury guidelines, fees must be set at a level that recovers the full cost of providing the service concerned – unless statute specifically provides otherwise. Therefore, an increase in licence fees is permitted only if costs rise or if the OFT is able to justify additional resources for credit licensing.

2.5.2 Issues

Treasury guidelines mean that the administration of the CCA licensing regime must be financed solely from licence fee revenues. The corollary of that requirement is that – within reason and with Treasury approval – the level of fees should be set to cover all administrative and enforcement costs under the Act.

Elsewhere, this paper sets out proposals for new approaches to the granting and policing of consumer credit licences designed to tackle the rogue traders. It follows that any such enhanced administrative and enforcement obligations of this kind could need to be matched with an extended budget. Since the income from licence applications wholly funds the consumer credit licensing enforcement functions of the OFT, one obvious source of new funding would be through an increase in licence fees.

A further question relates to how the burden of fees ought to be distributed, both in terms of timing and the characteristics of the

applicant. For example, the FSA “front-loads” its fees regime – a relatively high fee is charged in respect of initial applications; a lower fee for subsequent renewals.

It might also be appropriate to set fees on the basis of the perceived risk associated with the applicant.

2.5.3 Options

- Application fees could be considered separately from the renewal fee. The greater amount of time needed at the initial stage would justify the split fee level. A larger amount would be requested at the initial stage with subsequent renewal fees set at a lower rate.
- If arrangements for indefinite licence periods were agreed, a fee could be payable every 3 - 5 years. This would be less resource-intensive for the OFT than the present five year term.
- Fees could be based on the size or turnover of the applicant. The current system of just two levels of licence fee may be insufficiently flexible and unfairly advantage the big companies and banks. Fees based on size would cater for much higher, but still affordable rates for the larger businesses, but a fairer amount for smaller enterprises.
- Alternatively, link fees to different licensable categories or business sectors. Fees could be based on the work necessary to enforce or investigate a particular category or sector. If certain categories or sectors necessitate a higher proportion of enforcement time, those licences might cost more.

2.5.4 Questions

6. Should the level of application and renewal fees vary according to the size or turnover of the applicant?
7. Should the level of fees be related to specific licence categories or business sectors – determined by the amount of enforcement activity generated by particular categories or sectors?
8. Should the fee structure be front-loaded – with most of the fee payable at the time of the initial application (to reflect the workload

at this stage); and lesser amounts payable periodically to keep the licence?

9. Should membership of a recognised trade association (which should reduce the work required to establish fitness) qualify the applicant for a reduced fee?

2.6.1 SANCTIONS, ENFORCEMENT AND AN ENHANCED ROLE FOR TRADING STANDARDS DEPARTMENTS

2.6.1 Background

Sanctions:

Essentially, the OFT has only two formal enforcement options – do nothing or revoke the licence.

In many cases where enforcement activity might otherwise be justified, it will be seen as inappropriate – because the wrongdoing, while deserving of punishment, would not merit the withdrawal of the licence and with it the threat to the trader’s livelihood.

As a result, in practice few consumer credit licences are revoked or refused. The DGFT must amass a significant amount of evidence before issuing a minded to revoke notice (MTR). It brings with it the threat to the livelihood of the trader. In 2001- 2002, the OFT refused 27 of 16,293 applications for a licence and 20 of 11,974 renewal applications. It also revoked 19 of an estimated 205,000 active licences.⁴

Details of the same statistics for the three previous financial years are as follows:

	1998/99	1999/00	2000/01	2001/02
Refused	15	32	32	27
Applications for new licences	21,200	18,907	16,312	16,293
Renewals refused	1	21	32	20
Applications for renewals	10,000	8,224	7,312	11,974
Revocations	18	21	32	19
Live licences	150,000	174,208	190,191	205,670

[N.B. The increase in the number of licence renewals in 2002-2002 was the result in the reduction in the length of a licence from 15 to five years.]

⁴ Draft report of the Comptroller and Auditor General, to be published on 6th March 2003

The CCA also grants the OFT powers to suspend a licence or to compulsorily vary its terms. However, these are also rarely used. There have been five suspensions, all between 1984 and 1990. Three licences were suspended indefinitely and two were suspended for a specified period.

The OFT views suspension as seriously as it does revocation, since the practical effect can be the same – to deprive the trader of his livelihood. It therefore applies the same evidential requirements and regard for the trader's legitimate interests in respect of suspension as it does for revocation. The OFT also takes the view that if a person is judged currently unfit to participate in credit trading, it will be very rare for that unfitness to be both temporary and certain to come to an end after an identifiable period.

Seven licences have been compulsorily varied by the OFT, all between 1979 and 1985. The OFT will use its powers of compulsory variation where it considers that a trader is fit to engage in some licensable activities but not others, or if it has concerns regarding trading names. The OFT does, of course, have the option of taking informal enforcement action, such as the issuing of warning letters.

In a wider context, the CCA enforcement powers have recently been augmented by the power granted to the OFT and TSDs to seek Stop Now Orders where traders have breached their legal obligations in a way that harms the collective interests of consumers. Where a court grants a Stop Now Order, or where a trader gives a formal undertaking in lieu of an order, this will prescribe the way in which he can conduct his business in the future. This represents a move towards more flexible sanctions that fit with the idea of keeping even those who have been the subject of enforcement action within the wider community of licensed traders where their future behaviour can be more easily monitored.

Enforcement:

It is essential to OFT's success as a licensing authority that a system of adequate information gathering is in place to ensure that it is able to make informed decisions about the fitness of licence holders and applicants.

TSDs are key partners in collecting this evidence, and the OFT relies heavily on the co-operation of local authority trading standard departments who have a role in enforcing the CCA at a local level.

The CCA grants the OFT and TSDs investigatory powers – to enter premises and inspect books and other records. However, these are limited to circumstances where the enforcement authority has reasonable cause to suspect that a breach of the Act has been committed. They do not apply in respect of unfair business practices or other matters that, while not constituting a breach of the CCA could, nevertheless, have a bearing on a person’s fitness to hold a licence.

Other regulators already adopt a more hands-on approach to managing their licensing regimes. For example, the FSA continues to monitor newly authorised members, although there is no specific probation period.

Appeals:

If the OFT makes an adverse licensing decision, including refusal of a licence application or revocation of an existing licence, the trader has a right of appeal to the Secretary of State. Such appeals are heard on her behalf by a panel of suitably qualified, independent persons appointed for the purpose. The Secretary of State makes her decision on the appeal after considering the recommendations of the panel. An appellant can make a further appeal to the High Court on a point of law (to the High Court in Northern Ireland, and in Scotland to the Court of Session).

2.6.2 Issues

Generally speaking, a continuing process of fitness checking is desirable, with an enhanced system of sanctions where it is felt the trader is not complying with his statutory obligations as a licence holder.

Sanctions:

The sanctions available under the CCA do not provide enforcers with the flexible set of enforcement tools that they need. What is required is a range of sanctions that allow enforcers to take enforcement action that is proportionate to the wrongdoing of the licence holder. This should recognise that there will be circumstances where the revocation of a licence is the proper response; but also that lesser penalties designed to rectify the trader’s behaviour – perhaps including some type of “three strikes and you’re out” approach – should be the backbone of the enforcement regime.

The OFT has developed informal practices such as warning letters to licence holders and seeking undertakings about future practices, but those actions do not carry the same weight as a statutory power. While it is now possible to use Stop Now Orders in many cases to stop the offending conduct, they cannot be relied upon to cover all cases. What is therefore needed in the CCA itself is a more flexible set of enforcement tools.

Fines would be an additional and speedier way of both punishing the trader and deterring similar conduct in the future, as well as being proportionate to the level and severity of the offence.

Fines might be levied on a sliding scale, to reflect the seriousness of the breach and within the limits available to the magistrates courts. The licence holder would have the right of appeal.

Enforcement:

A co-ordinated approach by the OFT and TSDs is essential for effective enforcement under the CCA. However, the number of credit cases referred by TSDs to the OFT has fallen from 469 cases in 1995-1996 to 77 in 2001-2002). A feeling that their information is not contributing to positive outcomes may be deterring TSDs from passing on information.

To foster and promote a culture of joined up working and information exchange, TSDs need to be confident that the OFT can respond effectively and efficiently to complaints, and that the information that they provide will be put to good use.

At present, there is no consistent approach to co-operation between the OFT and individual TSDs. Joint working is largely on an ad hoc basis. This means that the extent and quality of the evidence available to the OFT will vary from case to case.

There are also funding implications connected with giving TSDs an enhanced role. TSDs are an arm of local government, and any new duties placed on them must be matched by additional funding. There will therefore need to be arrangements for the OFT to properly fund any new CCA enforcement role that it may ask TSDs to take on. There may also be scope to tie this initiative into the DTI's work on the modernisation of the trading standards service, the new National Performance Standards for TSDs and encouraging joined-up working across local authority boundaries.

2.6.3 Options

- More flexible enforcement powers could be granted to the OFT:
 - Fines – appropriate for breaches of the licensing regime that do not warrant revocation of the licence. If set at an appropriate level, such fines would deter breaches of licensing rules. Revenues to be used to fund the OFT’s regulatory functions under the CCA
 - Undertakings/injunctions – building on the Stop Now powers currently available to the OFT and TSDs to clearly set out the future conduct that will be expected of the trader. Breaches would constitute grounds for formal action to revoke, or replace conditions on the use of the licence
 - A streamlined process for attaching conditions to the licence – setting out how the licence holder will be expected to conduct his business; prescribing certain areas of consumer credit business that the licence holder is not permitted to engage in
 - The OFT to be empowered to issue an immediate suspension of a licence, pending a definitive decision, if the threat of detriment to consumers was considered sufficiently serious to justify such action.
- The fitness test in section 25 of the CCA might be amended to make it explicit that the imposition of a custodial sentence for an offence governed by the CCA, or one that involves fraud, dishonesty or violence, will automatically result in revocation of an existing licence (or refusal of a new licence until the conviction becomes spent), unless the trader can show good reasons why this should not be the case. At present, section 25 merely states that such convictions are amongst the relevant matters that the DGFT should have regard to when exercising his discretionary judgment on an applicant’s fitness.
- Enable the DGFT to require licence holders to provide information relevant to fitness at any stage during the currency of a licence. The existing power is limited to the time of a licence application, renewal or variation, and this significantly restricts the Office’s ability to investigate allegations or evidence casting doubt on fitness. A power for the OFT to obtain information on an applicant’s fitness from third parties would also facilitate more effective enforcement. There would need to be penalties for non-compliance by traders.

- The CCA could provide an express power for the DGFT to request TSDs to make on-site visits to applicants or licence holders and to require them to report to him after any such visit on the suitability of the person either to be granted a consumer credit licence or to continue to hold one. Many TSDs do undertake such work, but others lack the resources to do so, and in the absence of any specific requirement may choose to devote resource to other areas. One way in which such an enforcement partnership might be funded would be for the OFT to conclude service level agreements or other contractual relationships with TSDs.
- The OFT should build much closer working relationships with TSDs. These might be in the form of service level agreements, Memoranda of Understanding or other formal relationships with TSDs or groups of TSDs to give them a strong steer as to what is expected of them; and what the OFT will provide in return. The aim would be two-fold:
 - to provide a formal mechanism for the expertise and local knowledge that TSDs have about potential licence applicants to be fed into the administration of the licensing process;
 - to make the TSDs full partners in the post enforcement process, both by bringing cases for breaches of the CCA themselves; and by providing the evidence the OFT requires to take enforcement action that impacts directly on the status of the licence.
- There is an associated question as to whether TSDs should have the full range of enforcement powers – including the power to fine and to accept formal undertakings – at the local level.
- Remove the Secretary of State from the process of appeals against the OFT’s licensing and licence enforcement decisions.

2.6.4 Questions

10. Should there be enhanced powers to enter premises and inspect books and other records? Should TSDs and OFT be empowered to make compliance visits to licence holders?
11. Should the OFT be authorised to lay down rules of conduct for licence holders, breach of which would open the way for enforcement action?

12. Should the OFT be given a new range of intermediary enforcement powers – short of revocation of a licence, but including administrative fines and the attaching of conditions to a licence?
13. Should the OFT establish closer relationships with TSDs for the enforcement of the Consumer Credit Act? Should this include a power for the OFT to request that TSDs undertake certain work?
14. How can the funding of enforcement work under the CCA be made to reflect the respective responsibilities of the key partners in the enforcement process?
15. Should the appeals process from licensing and enforcement decisions made by the OFT cease to involve the Secretary of State?
16. Should the imposition of a custodial sentence under the Consumer Credit Act result in the revocation of the offender's consumer credit licence?

3. SUMMARY OF QUESTIONS

1. Should the existing six categories of consumer credit licence be replaced by a single form of licence, but subject to OFT powers to circumscribe what each individual licence permits? If separate categories of licence are retained, how might they be redefined?
2. Subject to enhanced monitoring of licence holders, should the existing licensing periods be reviewed? Is there scope for licences to be issued for an initial five year period and then, if the OFT is content with the conduct of the licence holder, renewed for a longer or indefinite period?
3. Should there be a more focused test to establish whether an applicant is fit to hold a consumer credit licence – based on the criteria applied by the Financial Services Authority, which pay particular attention to the history and qualifications of the applicant?
4. Should the OFT be given the power to carry out background checks on applicants?
5. Should the OFT be given the power to issue guidance notes (which may be sector-specific) on the criteria against which it will judge the fitness of applicants?
6. Should the level of application fees vary according to the size or turnover of the applicant?
7. Should the level of fees be sector-related – determined by the amount of enforcement activity generated by particular sectors?
8. Should the fee structure be front-loaded – with most of the fee payable at the time of the initial application (to reflect the workload at this stage); and lesser amounts payable for renewals (if these are retained)?
9. Should membership of a recognised trade association (which should reduce the work required to establish fitness) qualify the applicant for a reduced fee?

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4. REGULATORY IMPACT ASSESSMENT

There are 25 million households in the UK and domestic consumer spending runs at over £400 billion a year.

The OFT works closely with 200 local authority trading standards services, other regulators, other government departments and consumer organisations. The OFT employs around 180 (200) staff on consumer protection, and allocated £6.2 million for consumer protection enforcement in 2001-02⁵. Of this £5 million is spent on consumer credit licensing, which is recovered from businesses through licence fees. No Regulatory Impact Assessment (RIA) has been made at this stage as this consultation document is exploring a number of options, rather than a defined proposal, for increasing the financial limit and changing the agreements exempted from the Act. Therefore it is difficult for us to quantify the costs and benefits arising from each option. However, we would be grateful if respondents could consider the possible implications of the various proposals and provide us with information about compliance costs and benefits that would result from these (please refer to section 6.6 above for the specific questions we would like respondents to address.)

Following consideration of the responses to this document a further consultation will be undertaken on specific proposals for reforming the Act. An RIA will be included in that consultation and will draw on the compliance costs and benefits identified in this exercise.

⁵ Draft report of the Comptroller and Auditor General, to be published on 6th March 2003

List of consultees approached:

CHARITABLE BODIES

Age Concern
Help The Aged
Money Advice Trust
National Council for Voluntary Organisations

CONSUMER ORGANISATIONS

Birmingham Settlement Money Advice Services
Consumers Association
Consumers in Europe Group
Federation of Information Advice Centres
General Consumer Council for Northern Ireland
Institute of Consumer Affairs
International Consumer Policy Bureau
Money Advice Association
Money Advice Scotland
National Association of Bank & Insurance Customers
National Association of Citizens Advice Bureaux
National Association of Citizens Advice Bureaux (North Region)
National Consumer Council
National Federation of Consumer Groups
Scottish Association of Citizens Advice Bureaux
Scottish Consumer Council
Welsh Consumer Council

CREDIT AND HIRE INDUSTRY ORGANISATIONS

Association for Payment & Clearing Services
British Bankers Association
British Cheque Cashers Association
British Vehicle Rental & Leasing Association
Building Societies Association
Construction Plant Hire Association
Consumer Credit Association
Consumer Credit Trade Association
Corporation of Finance Brokers Limited
Council of Mortgage Lenders
Credit Card Research Group
Credit Industry Fraud Avoidance Systems
Credit Services Association

Finance and Leasing Association
Hire Association Europe
Institute of Credit Management
The National Consumer Credit Federation
National Pawnbrokers Association

CREDIT REFERENCE AGENCIES

Credit Data and Marketing Services
Dun and Bradstreet Limited
Equifax Limited
Experian Limited

EUROPEAN COMMISSION/GOVERNMENT

Bank of England
Building Societies Commission
Cabinet Office
Charity Commission
Commission for Racial Equality
Department of Economic Development (Northern Ireland)
DTI Competitiveness Unit
DTI Small and Medium Enterprise Policy Directorate
Equal Opportunities Commission
European Commission
Lord Chancellor's Department
The National Assembly for Wales
The Office of the Information Commissioner
Scotland Office
Scottish Executive
HM Treasury
UKREP
Welsh Office

JOURNALS

Consumer Law Today
Trading Standards Review

LEGAL PROFESSION AND SIMILAR BODIES

Association of District Judges
Faculty of Advocates
The General Council of the Bar
Law Centres Federation
Law Commission
The Law Society

The Law Society of Northern Ireland
The Law Society of Scotland
Scottish Law Commission
Sheriffs Association
Society of Public Teachers At Law

LOCAL AUTHORITIES

Birmingham City Council
Essex County Council
Glasgow City Council
Hertfordshire County Council
Kent County Council
Surrey County Council

LOCAL AUTHORITY ASSOCIATIONS

Association of County Councils
Association of District Councils
Association of Local Authorities in Northern Ireland
Association of London Authorities
Association of Metropolitan Authorities
Convention of Scottish Local Authorities
Local Government Association
London Boroughs Association
Welsh Local Government Association

OMBUDSMEN

The Financial Ombudsman Service
The Ombudsman for Estate Agents

ORGANISATIONS REPRESENTING SMALL FIRMS

Alliance of Independent Retailers and Businesses
Association of Independent Businesses
Federation of Small Businesses
The Forum of Private Business
The Independent Food Retailers Confederation
London Personal Finance Association
The Union of Independent Companies

OTHER BODIES, BUSINESSES OR INDIVIDUALS

Abbey National PLC
Anthony Sharp Associates

Berwin Leighton Paisner
Birmingham Midshires Building Society
BOC Limited
Anthony Bradley
Rodney Brazier
Cameron McKenna
Campaign for Plain English
Peter Cartwright
Clifford Chance
Cornhill Insurance PLC
Denton Wilde Sapte
Paul Dobson
Dundas & Wilson
Professor Sir Roy Goode
Geraint Howells
igroup Limited
JCB Finance Limited
Kensington Mortgage Company
Kent Reliance Building Society
Key Business Finance Corporation PLC
Lester Aldridge
Lloyds of London
Prof. Eva Lomnicka
Professor Macleod
Mercedes Benz Finance Limited
Mortgagecheck
Norwich Union Group Legal
Malcolm Padgett
Palmer Hart
Mr John Patrick
Clifford Payton
Personal Finance Research Centre
Politics International Limited
Premier Writers
Mr John Purcell
Renault UK Limited
RGMR
Ross & Co
S & U PLC
Salans Hertzfeld & Heilbronn HRK
Sonnenscheins
John Stephens
Swift Advances PLC

Time Retail Finance
Christian Twigg-Flesner
Mr Edward Vaizey
Virgin Management Limited
W & J Burness
Mr A I Warwood
Yorkshire Building Society

OTHER ORGANISATIONS OR BODIES REPRESENTING BUSINESS

The Association of British Chambers of Commerce
Association of British Insurers
British Insurance and Investment Brokers Association
British Retail Consortium
Confederation of British Industry
Direct Marketing Association
House Builders Federation
Institute of Directors
ISBA - the Voice of British Advertisers
The Institute of Management
The Mail Order Traders Association
The Radio Advertising Bureau
Retail Motor Industry Federation
Scottish Grocers Federation
Scottish Motor Trade Association
Society of Motor Manufacturers and Traders Limited

REGULATORY OR SUPERVISORY BODIES

Advertising Standards Authority
Broadcast Advertising Clearance Centre
Direct Mail Services Standards Board
Finance Industry Standards Association
Financial Services Authority
Independent Television Commission
Office for the Regulation of Electricity and Gas (Northern Ireland)
Office of Fair Trading
Office of Gas and Electricity Markets
Personal Investment Authority
Radio Advertising Clearance Centre
Radio Authority

TRADING STANDARDS

Institute of Trading Standards

Local Authorities Co-ordinating Body on Food and Trading Standards

THE CONSULTATION CRITERIA

1. *Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.*
 2. *It should be clear who is being consulted, about what questions, in what timescale and for what purpose.*
 3. *A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.*
 4. *Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.*
 5. *Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation*
 6. *Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and the reasons for decisions finally taken.*
 7. *Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.*
- The complete code is available on the Cabinet Office's web site, address www.cabinet-office.gov.uk/servicefirst/index/consultation.htm.*

COMMENTS OR COMPLAINTS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to Mr P Martin, DTI Consultation Co-ordinator, Room 550, 1 Victoria Street, London SW1H 0ET or telephone him on 020 7215 6509 or [mail to: Philip.Martin@dti.gov.uk](mailto:Philip.Martin@dti.gov.uk)