

**United States Federal Trade Commission Staff Comment on the  
United Kingdom Department of Business Innovation & Skills Consultation,  
*Empowering and Protecting Consumers: Consultation on institutional changes for provision  
of consumer information, advice, education, advocacy and enforcement*  
September 27, 2011**

Staff of the United States Federal Trade Commission (FTC)<sup>1</sup> appreciates this opportunity to provide input to the consultation issued by the U.K. Department of Business Innovation & Skills (BIS), *Empowering and Protecting Consumers: Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement*. This comment focuses on the issues raised in Chapter 5 of the consultation paper on the enforcement of consumer protection law. Based on the FTC's experience in online markets and international enforcement cooperation, we suggest that it is critical to have an institutional arrangement for consumer protection enforcement that includes a strong national consumer protection enforcement body equipped with the resources, skills, and legal authority to engage in sophisticated regulation, enforcement, and international cooperation.<sup>2</sup> Although we agree with the consultation paper's premise that all consumer protection enforcement need not take place at the national level, it is important to consider the areas, such as cross-border online marketing and international cooperation, that require a centralized national enforcement approach to drive innovation and growth, deter unfair and deceptive practices, and empower and benefit consumers.<sup>3</sup>

This comment is in three sections. Section I provides general background on the FTC and its enforcement activities, including online and international consumer protection, as context for FTC staff's responses. Section II provides details about the FTC's experiences working with the OFT. Section III contains FTC staff's conclusions and recommendation for a strong national consumer protection enforcement authority.

---

<sup>1</sup> This comment reflects only the views of FTC staff and not necessarily the views of the Federal Trade Commission or any individual Commissioner. On June 10, 2011, the FTC submitted a staff comment in response to the Government's companion consultation paper, *A Competition Regime for Growth: A Consultation on Options for Reform*. A copy of that comment is attached as Annex A.

<sup>2</sup> We do not offer an opinion on consumer protection enforcement involving more local issues such as doorstep selling or home repair scams. As in the U.K., in the U.S. the enforcement of consumer protection law occurs not only at the national level but also at the state level, chiefly through the states' Attorney Generals, and at the county level, through local agencies. The FTC works closely with the Attorney Generals' offices and often the states will work together to tackle widespread, nationwide problems. This multi-level approach helps to avoid significant enforcement gaps.

<sup>3</sup> In 2005, former FTC Chairman Deborah Platt Majoras submitted a comment in response to an earlier consultation on the U.K.'s consumer protection framework emphasizing the benefits of maintaining consumer protection and competition functions in a unified agency to maximize consumer welfare. See *Comment of Deborah Platt Majoras, [Former] Chairman, United States Federal Trade Commission on Proposed Consumer Trading and Standards Authority*, available at <http://www.ftc.gov/bc/international/docs/majorasresponsedti.pdf>. Many of the observations in that comment about the effectiveness of institutional arrangements that link consumer protection and competition functions apply equally to the current consultation.

## I. The FTC and International Consumer Protection

The FTC deals with issues that touch the economic life of every American. It is the only federal agency in the United States with both consumer protection and competition jurisdiction in broad sectors of the economy. It has a strong market orientation, grounded in the important role that enforcement of consumer protection and antitrust laws have played in maintaining the competitiveness of U.S. markets. The FTC pursues vigorous and effective law enforcement; develops policy and research tools through hearings, workshops, and conferences; and creates practical and plain-language educational programs for consumers and businesses in a marketplace that is increasingly global and characterized by changing technologies.<sup>4</sup>

In the consumer protection enforcement area, the FTC enforces a general prohibition against “unfair and deceptive acts or practices” in commerce as well as numerous specific consumer protection laws and rules.<sup>5</sup> To enforce these substantive provisions of law, the FTC Act authorizes the agency to file federal district court lawsuits seeking preliminary and permanent injunctions and equitable monetary redress for injured consumers. From April 2010 through March 15, 2011, the FTC filed 38 actions in federal district court and obtained 82 judgments and orders requiring the defendants to pay nearly U.S. \$368 million in consumer redress or disgorgement of ill-gotten gains.<sup>6</sup>

Many of these cases deal with online (and now, increasingly, mobile) markets. They address breaches of consumer law refashioned for the online context such as undisclosed and “fake” product endorsements.<sup>7</sup> They also address Internet-enabled violations such as “scareware” that interferes with consumers’ computers.<sup>8</sup> The FTC has developed innovative approaches to insure that it has the necessary technical expertise, understanding of online markets, and tools needed to monitor, investigate, and combat such deceptive and unfair practices in the global, high-tech marketplace. It has held numerous workshops on law, policy, and technology, bringing together stakeholders from industry, consumer groups, and academia. It has hired a chief technologist. It has also pioneered the use of new investigative tools to detect and capture information, including an Internet Lab facility that contains computers with IP addresses not assigned to the government and evidence-capturing software, and a mobile lab, which contains devices spanning various platforms and carriers, along with the software and other equipment. The FTC has also explored

---

<sup>4</sup> Information about the FTC is available at <http://www.ftc.gov>.

<sup>5</sup> A brief overview of the FTC’s investigative and law enforcement authority is available at <http://www.ftc.gov/ogc/brfovrw.shtm>.

<sup>6</sup> See *The FTC in 2011* (Apr. 2011), available at <http://www.ftc.gov/os/2011/04/2011ChairmansReport.pdf>.

<sup>7</sup> See, e.g., *In the Matter of Reverb Comms.*, FTC File No. 092 3199, press release and available at <http://www.ftc.gov/opa/2010/08/reverb.shtm> (settling charges against video game developer for allegedly having employees pose as ordinary consumers posting game reviews at the online iTunes store, and not disclosing that the reviews came from paid employees working on behalf of the developers); *In the Matter of Legacy Learning Systems, Inc.*, FTC File No. 102 3055, press release available at <http://www.ftc.gov/opa/2011/03/legacy.shtm> (settling FTC charges against a guitar lesson company that allegedly advertised its products through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers). The OFT brought a similar enforcement action against Handpicked Media, Ltd. See Investigation into inadequate disclosures in respect of commercial blogging activity, available at [http://www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/handpicked\\_media](http://www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/handpicked_media). The challenged practices distort online product markets.

<sup>8</sup> *Federal Trade Commission v. Innovative Marketing, Inc. et al.*, Civil Action No.: 08-CV-3233-RDB (D. Md.), press release available at <http://www.ftc.gov/opa/2011/01/winsoftware.shtm>.

how to apply existing consumer protection laws to online markets, and has issued new rules, business guidance, and consumer education to allow consumers to benefit from emerging technologies and protect them from some of the risks.

International engagement is another important component of the FTC's consumer protection law enforcement efforts. The FTC has agreements and relationships with key foreign consumer protection enforcement agencies around the world, and works through several enforcement networks to exchange "best practices" and develop more effective methods of cross-border cooperation. Over the past five years, it has brought more than 100 cases with international components. In 2006, in response to a legislative recommendation from the FTC, the U.S. Congress passed the Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers beyond Borders Act of 2006 (SAFE WEB Act), which provides the FTC with enhanced tools in several key areas, including information sharing, investigative assistance, and cross-border remedial authority.<sup>9</sup> The FTC has repeatedly used these tools. As of September 1, 2011, the FTC has completed 56 information sharing requests from 14 agencies in six countries. In addition, the FTC has issued approximately 36 civil investigative demands (equivalent to administrative subpoenas) in nearly 20 investigations on behalf of nine agencies in five countries.<sup>10</sup>

These new powers have allowed the FTC to address practices that distort online markets for U.S. as well as foreign consumers. Using its SAFE WEB Act authority, the FTC has worked with its foreign counterparts to bring strong enforcement actions against practices such as unauthorized debiting, undisclosed negative option and affiliate marketing, domain name abuse, and spam and other technological abuses that harm consumers economically and undermine consumer confidence in online markets.<sup>11</sup>

## **II. The FTC and the OFT**

Building and maintaining strong bilateral relationships with foreign agencies is a critical element in international cooperation. Over the years, the FTC and the OFT have had a close and highly beneficial relationship on consumer protection enforcement and policy issues. The FTC views the OFT as one of its leading enforcement partners, and has valued OFT's extensive enforcement and market-oriented approach in international consumer protection enforcement and policy discussions. In particular, FTC staff shares the OFT's view, expressed in its most recent annual plan, that "continuing online innovation must be met with strategic enforcement to tackle new and complex forms of unfair trading that harm both consumers and markets."<sup>12</sup>

---

<sup>9</sup> The SAFE WEB Act, which is incorporated into the FTC Act, is available at [http://www.ftc.gov/ogc/FTC\\_Act\\_IncorporatingUS\\_SAFE\\_WEB\\_Act.pdf](http://www.ftc.gov/ogc/FTC_Act_IncorporatingUS_SAFE_WEB_Act.pdf).

<sup>10</sup> See FTC, *The U.S. SAFE WEB Act, The First Three Years: A Report to Congress* (Dec. 2009), available at <http://www.ftc.gov/os/2009/12/P035303safewebact2009.pdf>, for a summary of SAFE WEB actions through December 2009. The FTC provides updated information on its use of its SAFE WEB authority each year in the agency's Annual Reports, which are available at <http://www.ftc.gov/os/annualreports/index.shtm>.

<sup>11</sup> *Id.*

<sup>12</sup> OFT, *Office of Fair Trading Annual Plan 2011-2012* (2011), available at [http://www.offt.gov.uk/shared\\_offt/about\\_offt/ap12/oft1294.pdf](http://www.offt.gov.uk/shared_offt/about_offt/ap12/oft1294.pdf).

The FTC and OFT are parties to two memoranda of understanding that address consumer protection issues and have worked together on numerous investigations and cases.<sup>13</sup> In one of the earliest examples of coordinated Internet enforcement cooperation between the two agencies, the FTC and the OFT brought parallel actions against a London-based trader alleging misleading advertising for domain names that could only be accessed through difficult-to-locate alternative networks.<sup>14</sup> In another case involving an online pyramid scheme that affected consumers in more than 200 countries, *FTC v. SkyBiz.com, Inc.*, the FTC and the OFT worked together to locate more than 25,000 U.K. consumers eligible for monetary redress.<sup>15</sup> More recently, the OFT provided the FTC with investigative assistance in an international pay day lending case, *FTC v. Cash Today, Ltd.*, involving U.K.-based defendants who targeted U.S. consumers using unfair and deceptive debt collection tactics.<sup>16</sup> The FTC alleged that the defendants engaged in abusive behavior, improperly disclosed consumers' purported debts to third parties, and failed to make written disclosures to before consummating a consumer credit transaction, such as the amount financed, the annual percentage rate, payment schedule, total number of payments, and any late payment fees, in violation of U.S. federal statutes. The FTC obtained a \$1 million settlement from the defendants and strong injunctive relief.

Earlier this year, using its authority under the SAFE WEB Act, the FTC reached a settlement in *FTC v. Javian Karnani* with a California-based Internet marketer that sold cameras, video games, and other electronic goods to thousands of U.K. consumers.<sup>17</sup> Because the defendants used website names such as [www.bestpricedbrands.co.uk](http://www.bestpricedbrands.co.uk), [www.bitesizedeals.co.uk](http://www.bitesizedeals.co.uk), and [www.crazycameras.co.uk](http://www.crazycameras.co.uk), consumers believed they were buying from a company operating in the U.K., and were therefore protected by manufacturer warranties that were valid there. The FTC's complaint, filed in a federal court in 2009, alleged that when consumers received the goods, they discovered they had been charged unexpected import duties, were left with invalid warranties, and would be charged draconian cancellation and refund fees if they attempted to return the merchandise. The defendants promised fast shipping dates, but usually did not meet those dates. Without the prior consent of consumers, the defendants allegedly shipped the goods much later than promised. When customers tried to cancel these delayed orders, they were often unable to do so. Ultimately, the defendants agreed to a settlement order prohibiting them from misrepresenting the location, quality, quantity, characteristics, and model numbers of products they sell, their policies regarding cancellation, exchange, or return, and the existence of product warranties, among other provisions.

FTC staff have also worked side by side with OFT staff to develop sophisticated consumer protection strategies for online markets. In 2010, as part of its International Fellows program,

---

<sup>13</sup> For a list of the FTC's international cooperation agreements, see <http://www.ftc.gov/oia/agreements.shtml>.

<sup>14</sup> See *FTC v. TLD Network, Inc. et al.*, Case No. 02 CV 1475 (N.D. Ill.), press release and stipulated final judgment available at <http://www.ftc.gov/opa/2002/12/tld3.shtml>; see also

OFT, Press Release, *Misleading domain name ads stopped* (Aug. 29, 2002), available at [http://www.oft.gov.uk/news-and-updates/press/2002/pn\\_53-02](http://www.oft.gov.uk/news-and-updates/press/2002/pn_53-02).

<sup>15</sup> OFT, Press Release, *Skybiz victims sought: US redress system could benefit UK victims of scam* (June 20, 2005), available at <http://oft.gov.uk/news-and-updates/press/2005/111-05>.

<sup>16</sup> *FTC et al. v. Cash Today, Ltd. et al.*, Case No.3:08-CV -590-RCJV PC (D. Nev.), available at <http://www.ftc.gov/opa/2009/09/cash.shtml>.

<sup>17</sup> *FTC v. Javian Karnani et al.*, Civil Action No. 09-CV-5276 (C.D. Cal.), available at <http://www.ftc.gov/opa/2011/06/bestbrands.shtml>.

the FTC selected an OFT attorney to join the FTC's Division of Advertising Practices for five months and work on Internet enforcement issues.<sup>18</sup> The FTC also sent one of its investigators to London for several months to work with the OFT's Internet Enforcement team.

The FTC has also worked closely with the OFT through joint enforcement networks such as the International Consumer Protection and Enforcement Network (ICPEN) and through two U.S.-Canada-U.K. law enforcement partnerships. In addition, in 2004, together with the FTC, the OFT co-founded the London Action Plan (LAP), an international public-private network that fights spam and other high-tech messaging abuses. The LAP now includes over 40 public authorities, including consumer protection, telecommunications, and data protection regulators, from 27 countries.<sup>19</sup>

More recently, the FTC and OFT have been working in parallel on matters such as negative option marketing. This marketing practice occurs whenever a marketer takes a consumer's silence as agreement to continue a transaction, such as billing monthly for membership in an Internet discount buying club. While these offers can provide benefits to consumers, they also pose a high risk of deception. Unscrupulous marketers use negative options that are not adequately disclosed to trap consumers in a cycle of recurring charges for goods or services they do not want and never knew they purchased.<sup>20</sup> The FTC has filed several civil law enforcement actions to stop these practices.

Just a few months ago, for example, the FTC filed suit against an individual defendant, Jesse Willms, and ten companies he controls for using deceptive negative option marketing for everything from acai berry weight-loss pills, teeth whiteners, and colon cleansers to work-at-home schemes, government grants, free credit reports, and penny auctions over the Internet.<sup>21</sup> In *FTC v. Willms et al.*, the FTC alleges that consumers provided their credit and debit card numbers to cover small shipping and handling fees, but many were then charged for the "free" trial plus a monthly fee – typically \$79.95 – and for additional products and "bonus offers." Significantly, as the FTC's complaint alleges in that case, Willms used entities incorporated in the U.K. as part of his operation, and marketed these negative options to large numbers of U.K. consumers. He ultimately took in more than \$450 million from consumers in the Australia, Canada, New Zealand, the U.K., and the U.S.

### **III. The Need for a Strong U.K. National Enforcer**

Based on our experiences detailed above with respect to Internet marketing and enforcement, and with cross-border consumer protection cooperation, we believe there is a critical need for a strong consumer protection enforcement body at the U.K.'s national level. Such a governmental enforcer is not only necessary for domestic consumer enforcement cases on systemic or market-

---

<sup>18</sup> FTC, *The FTC in 2010*, available at <http://www.ftc.gov/os/2010/04/2010ChairmansReport.pdf>. The International Fellows program provides opportunities for counterparts from foreign agencies to spend several months working directly with FTC staff on investigations, subject to appropriate confidentiality protections.

<sup>19</sup> Information about the LAP is available at <http://www.londonactionplan.com>.

<sup>20</sup> For background on negative option marketing, see FTC, *Negative Options: A Report by the staff of the FTC's Division of Enforcement* (Jan. 2009), available at <http://www.ftc.gov/os/2009/02/P064202negativeoptionreport.pdf>.

<sup>21</sup> *FTC v. Willms, et al.*, Case No. 2:11-cv-00828 (W.D. Wa.), press release and complaint available at <http://www.ftc.gov/opa/2011/05/jessewillms.shtm>.



wide issues, as suggested in the consultation paper, but also for consumer protection violations that cross international borders, most often in the online world.

U.K. consumers are concerned about online marketing. In its December 2010 online enforcement strategy, the OFT cited research showing that one in four U.K. consumers worries more about online shopping than offline and, overall, one in seven consumers has experienced a problem when buying online, of whom 37% have indicated reluctance to make another purchase online.<sup>22</sup> Similarly, in a March 2011 survey conducted by the private research firm YouGov, 21% of U.K. shoppers said they had been the victim of an online financial fraud and 67% were worried that this was something that could happen to them.<sup>23</sup> The FTC also has over 100,000 cross-border complaints in its Consumer Sentinel Network including more than 5,000 complaints from U.K. consumers lodged between October 1, 2009 and September 30, 2010. In 2010, U.K. consumers were the third largest contributor of complaints to e-consumer.gov, a cross-border portal for electronic commerce-related complaints developed by ICPEN.<sup>24</sup>

These numbers underscore the need for the national enforcer to have broad consumer protection authority. Such authority should not be limited only to structural market problems or require *prima facie* evidence of a competition problem, as proposed in the consultation. It should also include authority over a wide range of conduct in online markets that undermines consumer confidence in the global electronic marketplace.

We also believe that it is important to vest the national enforcer with appropriate resources, information sharing powers, and capacity to carry out cross-border functions, especially enforcement cooperation on complex, Internet-based, matters. If the national body is limited in using its consumer protection powers only as an alternative tool for effective delivery of competition, there may not be an enforcement entity that has the sophistication, capacity, and resources to develop the tools to address enforcement challenges in online markets as the FTC, and the OFT, have already done.

We are also concerned that the Government's proposal to have Local Authority Trading Standards Services (LATTSS) handle enforcement cases that contain an "international dimension," with oversight by a Trading Standards Policy Board (TSPB) located within the Trading Standards Institute (a non-governmental professional body), will lead to delay, inefficiency, and serious enforcement gaps. In an age of limited resources, it would be difficult for an agency like the FTC to work quickly and efficiently with a multiplicity of LATTSS. Even more importantly, under the U.S. SAFE WEB Act, the FTC may only share certain categories of

---

<sup>22</sup> OFT, *Protecting consumers online – a strategy for the UK* (Dec. 2010), available at [http://www.of.gov.uk/shared\\_of/consultations/eprotection/OFT1252.pdf](http://www.of.gov.uk/shared_of/consultations/eprotection/OFT1252.pdf).

<sup>23</sup> YouGov, *Security for Online Shoppers* (Apr. 14, 2011), available at <http://today.yougov.co.uk/consumer/security-online-shoppers> (article) and <http://today.yougov.co.uk/sites/today.yougov.co.uk/files/yg-archives-ewise-payo-onlinepayments-140211.pdf> (poll results).

<sup>24</sup> FTC, *Cross-Border Fraud Complaints, January – December 2010* (Apr. 2011), available at <http://www.ftc.gov/sentinel/reports/annual-crossborder-reports/crossborder-cy2010.pdf>. This report includes complaints filed through the econsumer.gov website, which is available in seven languages, at <http://www.econsumer.gov>.

information and provide investigative assistance to governmental enforcers.<sup>25</sup> The FTC would not be able to use the Act's authority to cooperate with a professional body like the Trading Standards Institute or any body, like the proposed TSPB, located within it. This could create enforcement gaps that would harm both U.S. and U.K. consumers.

This view is shared by the larger international community. In 2003, the Organisation for Economic Co-operation and Development (OECD), of which the U.K. is a member, issued *Guidelines for Protecting Consumers from Fraudulent and Deceptive Practices Across Borders*.<sup>26</sup> They set forth a consensus view on the necessary ingredients for international consumer protection cooperation including effective domestic frameworks. In the *Guidelines*, the OECD called on its member countries to “introduce and maintain an effective framework of laws, consumer protection enforcement agencies, institutions, practices, and joint initiatives designed to limit the incidence of fraudulent and deceptive commercial practices against consumers.” Significantly, the *Guidelines* call for the consumer protection enforcement agency to be a “national public body.”<sup>27</sup> We believe that the U.K., in considering proposals for reform of its consumer landscape, should keep these principles in mind and ensure that the U.K. maintains a national consumer protection authority equipped with the resources, skills, and legal authority to engage in sophisticated regulation, enforcement, and international cooperation in an increasingly global and online world.

FTC staff again appreciates the opportunity to submit this comment. Please feel free to contact Hugh G. Stevenson, Deputy Director for International Consumer Protection in the FTC's Office of International Affairs, at [hstevenson@ftc.gov](mailto:hstevenson@ftc.gov) or +1 202-326-3511, or Stacy Feuer, Assistant Director for International Consumer Protection in the same office, at [sfeuer@ftc.gov](mailto:sfeuer@ftc.gov) or +1 202-

---

<sup>25</sup> The FTC Act, as amended by the U.S. SAFE WEB Act, defines “foreign law enforcement agency” as follows:

“Foreign law enforcement agency” means—

(1) any agency or judicial authority of a foreign government, including a foreign state, a political subdivision of a foreign state, or a multinational organization constituted by and comprised of foreign states, that is vested with law enforcement or investigative authority in civil, criminal, or administrative matters; and

(2) any multinational organization, to the extent that it is acting on behalf of an entity described in paragraph (1).

15 U.S.C. § 44, available at [www.law.cornell.edu/uscode/html/uscode15/usc\\_sec\\_15\\_00000044----000-.html](http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000044----000-.html).

<sup>26</sup> OECD, *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* (2003), available at <http://www.oecd.org/dataoecd/24/33/2956464.pdf>.

<sup>27</sup> *Id.* (emphasis added). The OECD 2003 Guidelines define “consumer protection enforcement authority” in Section I.3.D:

For the purposes of these Guidelines, “consumer protection enforcement agency” means any national public body, as determined by each Member country, that has as a principal mission implementing laws against fraudulent, misleading, or unfair commercial practices affecting consumers and has powers (a) to conduct investigations or (b) to pursue enforcement proceedings, or both.”

The Guidelines also recognize the need for consumer protection enforcement agencies to have the “necessary authority to obtain evidence sufficient to investigate and take action in a timely manner against fraudulent and deceptive commercial practices, including the ability to obtain necessary information and relevant documents.” Sec. II.B.

326-3072, if you have any questions or would like any additional information about the issues raised in this Staff Comment.