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RESPONSE OF THE ADVERTISING ASSOCIATION TO THE DEPARTMENT FOR BUSINESS, INNOVATION & SKILLS “CONSULTATION ON PROPOSALS FOR IMPLEMENTING THE CONSUMER CREDIT DIRECTIVE”

1. Preamble

1.1. The Advertising Association is a federation of trade bodies and organizations representing the advertising and promotional marketing industries, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry that was worth over £19 billion in 2007. Further information about the Advertising Association, its membership and remit can be found at the following location: <http://www.adassoc.org.uk/>

2. Introduction & Summary

2.1. The Advertising Association welcomes the opportunity to respond to the Department for Business, Innovation & Skills (DBIS) “Consultation on Proposals for Implementing the Consumer Credit Directive” (URN 09/876).

2.2. The title of URN 09/876 belies its wider scope, having as it does three strands. The first of these strands is indeed to seek views from stakeholders on the implementation of Directive 2008/48/EC “on credit agreements for consumers and repealing Council Directive 87/102/EEC”, more commonly referred to as the Consumer Credit Directive (CCD), which was adopted on 23 April 2008. Each Member State of the European Union (EU) is required to implement the provisions of the CCD and for it to apply in domestic law from 11 June 2010. Unlike the existing European legislation governing consumer credit¹, the CCD is a Single Market Directive and is therefore based on maximum harmonisation principles. This means that when each Member State transposes the provisions into domestic law, they cannot provide greater rights or broader or more stringent requirements than those set out in the CCD. In respect of advertising, the CCD is intended to harmonise the requirements for consumer credit products throughout the EU thereby rendering them more comparable for consumers. The protections for consumers contained within the CCD are complemented, as the Directive points out in Recital 18, by those contained within the Unfair Commercial Practices Directive² (UCPD), as implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2008³ (CPRs). The second strand of the consultation is to consider whether those consumer credit products that fall outside the scope of the CCD should be subject to the same standards. The third and final strand is to consider whether provisions contained within the secondary legislation made under the Consumer Credit Act 1974 (CCA)⁴, including such instruments as the Consumer Credit (Advertisements)

¹ Council Directive 87/102/EEC “for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit”

² Directive 2005/29/EC “concerning unfair business-to-consumer commercial practices in the internal market”

³ Statutory Instrument No. 2008/1277

⁴ The Consumer Credit Act 1974 was amended by the Consumer Credit Act 2006.

Regulations (CCARs)⁵, where DBIS has discretion to make its own regulatory choices should be maintained, amended or revoked.

2.3. In its response, the Advertising Association accepts that in respect of the first strand DBIS has little room for manoeuvre within the parameters set by the Directive, but has sought through the proposals made in this response to off-set so far as is possible the detrimental impact implementation of the CCD risks having on the advertising industry. In respect of the second and third strands, the Advertising Association has made the case for deregulating where possible in the interests of better regulation and to off-set the wider detrimental impact on the advertising industry that implementation of the CCD might be expected to have.

2.4. In its response, the Advertising Association:

- (a) sets out its views on the application of the standards contained within the CCD to a range of consumer credit products falling outside the scope of the Directive;
- (b) endorses the view of DBIS that the Annual Percentage Rate of charge (APR) should not be required to feature in all consumer credit advertisements;
- (c) proposes that DBIS considers the adoption of a value other than £1,200 (namely £1) as the base assumption on which representative examples of the cost to consumer of credit products are calculated, not least so as to avoid consumers being misled as to the availability (or otherwise) of certain loan amounts from the advertiser;
- (d) sets out how the organisation considers that the standards the CCD establishes in respect of the presentation of the mandated information making up the representative example should be reflected in any implementing legislation;
- (e) makes proposals as to how the regulatory burden imposed by the existing wealth warnings and other information requirements mandated by the CCARs might be off-set;
- (f) considers how the CCD impacts on certain media and requests that DBIS ensures that fuller account of this be taken when the European Commission comes to review the Directive in 2013;
- (g) sets out its principled opposition to DBIS requiring a new wealth warning in respect of unsecured loans, particularly in light of the lack of consultation or a prior assessment of the media impact of the proposal;
- (h) argues, if permissible under the CCD, for the retention of the tolerances contained within the CCARs where an APR is disclosed in a consumer credit advertisement but is inadvertently exceeded or undershot (without being considered a breach of the law);
- (i) advances the case for the least prescriptive approach towards the disclosure requirements placed on advertisements by credit intermediaries being adopted;
- (j) supports the proposal by DBIS not to require APRs to be shown in advertisements relating to overdrafts;
- (h) contends that DBIS should incorporate transitional provisions for non-broadcast and broadcast advertisements, modelled on those for long shelf-life publications contained within the CCARs;
- (i) comments on the Impact Assessment (IA) that DBIS published alongside URN 09/876, whilst providing statistics on advertising expenditure on personal loans for the period 1 January 2005 to 31 December 2008;
- (j) calls on DBIS to ensure that when drawing up the penalty regime the Department takes full account of the recommendations made in the so-called Macrory Review of Regulatory Penalties that was published in 2006; and,
- (k) calls on DBIS to take any Regulations implementing the CCD through Parliament under the affirmative procedure.

⁵ Statutory Instrument No. 2004/1484 as amended by The Consumer Credit (Miscellaneous Amendments) Regulations 2004 (SI No. 2004/2619) and The Consumer Credit (Advertisements) (Amendment) Regulations 2007 (SI No. 2007/827).

2.5. The Advertising Association is grateful to DBIS for granting it a short extension to the original deadline set by the Department for receipt of submissions. The Advertising Association also looks forward to publication by DBIS of the Government response to this consultative exercise, setting out the decisions taken in light of URN 09/876 together with a summary of the submissions it receives. No part of this submission should be treated as if it were confidential in nature.

3. Response of the Advertising Association to specific questions posed in URN 09/876

Q3. Do you agree with the approach to specific products which fall outside the scope of the CCD? Are there other specific categories of agreements outside the CCD's scope that would justify distinct treatment under the amended legislation? If so, how?

3.1. The Advertising Association notes that the definition of “consumer”⁶ contained within the CCD is narrower than that contained within the existing legislation in the UK governing consumer credit, whilst the range of products regulated under the CCA (and thus subject to the CCARs) is broader. Despite the narrower scope of the CCD⁷, the Advertising Association notes that DBIS intends applying the standards contained within the Directive, including those Articles⁸ within the European legislation having particular implications for the content of consumer credit advertisements, to virtually all the products falling outside its scope, but subject to the CCA. It is also important to note that those consumer credit products that DBIS proposes should continue to be exempt from the CCARs will remain subject to the CPRs, including the rules that that latter Statutory Instrument contains on misleading omissions. The CPRs, as they related to advertising, are reflected in the non-broadcast and broadcast advertising codes enforced by the ASA.

3.2. In the Impact Assessment that DBIS published alongside URN 09/876, the Department identifies those non-scope consumer credit product to which it does not intend to apply the standards of the Directive and those to which it does. The Advertising Association provides a commentary on the proposed approach by DBIS to each of these consumer credit product categories below:

Second charge mortgages

3.3. Second charge mortgages fall outside the scope of the CCD. In light of that and given the current (and complex⁹) regulatory regime for such products is currently the subject of a separate review by the UK Government, the Advertising Association shares the view of DBIS that it would not be appropriate to apply the standards contained in the Directive to this area. The Advertising Association comments further on advertisements for second charge mortgages in Paragraph 3.15 of this submission below.

Business loans

3.4. The Advertising Association notes that whilst business lending falls outside the scope of the CCD, the CCA does apply to business loans having a value of less than £25,000. No advertisements for business loans of whatever value are, however, subject to the

⁶ “Consumer” is defined in Article 3 (“Definitions”) of the CCD.

⁷ The parameters of the CCD are set out in Article 2 (“Scope”).

⁸ Specifically, these are: Article 4 (“Standard information to be included in advertising”); Article 19 (“Calculation of the annual percentage rate of charge”); and, Article 21 (“Certain obligations of credit intermediaries vis-à-vis consumers”).

⁹ Second charge mortgages (and advertisements for them) are currently subject to regulation both under the CCA and the Financial Services and Markets Act 2000.

requirements of the CCARs. The organisation would support the current view of DBIS that the standards contained within Article 4 of the CCD, of which the objective is to offer protection to consumers, should not apply to advertisements for such loans and that any amendment to the CCARs resulting from implementation of the Directive should continue to reflect that settled position. Given that explicit consumer protection objective, the Advertising Association can see little reason why the disclosure requirements in respect of the status of credit intermediaries under Article 21 should apply to advertisements for small business loans, which the Impact Assessment appears to suggest should be the case¹⁰. The Advertising Association therefore considers that the *status quo* should apply in respect of the treatment of advertisements for small business loans: in that they remain entirely exempt from the CCARs. Advertisements for business loans are in any case subject to other regulatory standards, not least those contained within the non-broadcast and broadcast advertising codes that are enforced by the ASA, reflecting as they do the Business Protection from Misleading Marketing Regulations 2008¹¹ (BPRs). (Consumers also benefit from the existence of the BPRs, regulating as they do comparative advertising amongst other matters.)

Loans with a value of less than €200

3.5. The Advertising Association notes that DBIS intends to retain its current 'light touch' approach towards the regulation of loans amounting to less than £50, but that loans in excess of that amount, but less than €200, should be subject to all the advertising-related requirements contained within the CCD. The Advertising Association considers that DBIS should consider aligning the approach of the CCA with the CCD in respect of low value loans. In order to arrive at a relevant sterling equivalent for €200, the Advertising Association has relied on Article 28 ("Conversion of amounts expressed in euro into national currency") of the CCD – this generates a figure of approximately £160¹²: the Directive allows a degree of rounding. In the interests of better regulation and given the small values involved, the Advertising Association considers that a good case can be made to simplify slightly what is a complex body of law. The reason for suggesting this proposal is that such a simplification would also be of benefit to the advertising industry. The Advertising Association considers that a persuasive case can be made that all loans with a value of less than £160 should be subject to the existing 'light touch' regime (as DBIS describes it). The current value of £50, below which loans are subject to the existing 'light touch' regime appears to date from The Consumer Credit (Increased Monetary Limits) Order 1983¹³ ('the 1983 Order'). Using the Bank of England inflation calculator¹⁴, £50 in 1983 would be the equivalent of over £126 in 2008. By the time the CCD comes into force in the UK on 11 June 2010, a further increase on the figure of £126 might be anticipated, such that the gap between the lower limit of the threshold in the CCD and the upper limit of the value contained in the 1983 Order adjusted for inflation would be less than £30. Consequently, the Advertising Association would propose that DBIS amend the 1983 Order to provide loans of less than £160 to be exempted from regulation under the CCA, thereby simplifying the existing (extremely complex) regime in the UK and aligning it with the CCD.

Loans with a value in excess of €75,000

3.6. The Advertising Association shares the view of DBIS that it is proportionate, logical and more straightforward for loans with a value in excess of €75,000 to be regulated under the

¹⁰ Impact Assessment of the Consumer Credit Directive [DBIS, April 2009: 38]

¹¹ Statutory Instrument No. 2008/1276

¹² Article 28 specifies that the exchange rate on the date of adoption of the CCD – 23 April 2008 - should be used, when any amounts referred to in the Directive are converted into currencies of Member States not within the Eurozone. The effective exchange rate on that day was €1 = £0.80345, which produces a figure of €200 equating to £160.69.

¹³ Statutory Instrument No. 1983/1878

¹⁴ <http://www.bankofengland.co.uk/education/inflation/calculator/flash/index.htm>

CCD rather than for such credit to be subject to different regulatory requirements under the CCA.

Modifying credit agreements

3.7. The Advertising Association considers that the consumer protection case advanced by DBIS in URN 09/876 in respect of such agreements, which will often involve vulnerable consumers, not to make use of the 'light touch' provisions that the CCD theoretically permits is logical and sensible. The Advertising Association also supports the decision of DBIS not to require full information requirements in respect of unilateral concessions made by the lender to the consumer.

Interest-free credit repaid within twelve months

3.8. The Advertising Association supports the decision of DBIS, as permitted by the CCD, to exempt agreements offering interest-free repayment within twelve months from the provisions of the CCA. Please see Paragraph 3.9 immediately below in respect of the view of the Advertising Association on charge cards offering credit on those terms.

Charge cards

3.9. The Advertising Association would recommend that charge cards continue to be regulated to the standards required under the CCA rather than under the CCD, as provided for under Article 2(2)(f) of the Directive. The Advertising Association notes that DBIS has yet to come to a final view in respect of charge cards offering interest-free credit, but considers that there is a strong case for treating them in the same way as other agreements offering interest-free credit through exempting from the provisions of the CCA (as the CCD permits).

Hire purchase agreements

3.10. The Advertising Association notes that one of the effects of implementing the UCPD in the UK was that the provisions on hire purchase agreements were excised from the CCARs, via Paragraph 108 of Part 2 ("Amendments to other legislation") of Schedule 2 ("Amendments") of the CPRs. The Advertising Association is therefore unclear as to the basis upon which DBIS proposes re-regulating hire purchase agreements, especially as there is no explicit reference to such arrangements within the CCD. The Advertising Association anticipates that there may well be a logical explanation behind the proposal, but, if so the organisation considers that DBIS has yet to articulate it. The Advertising Association looks forward to DBIS addressing this issue, when it comes to drawing up the Government response to the submissions it receives to URN 09/876.

Pawnbroking and agreements resulting from court settlements

3.11. DBIS sets out in its Impact Assessment that it proposes applying Articles 4, 19 and 21 of the CCD to pawnbroking as well as agreements resulting from court settlements, despite such arrangements falling outside the scope of the Directive. Disappointingly, in light of the rationales it has provided in respect of its other proposals, DBIS offers no rationale in URN 09/876 for extending the standards contained within the CCD to products outside the scope of the Directive in respect of pawnbroking and agreements result from court settlements. If DBIS does choose to apply the standards contained within the CCD, the Advertising Association considers it incumbent upon the Department to make strong case for pursuing this course of action in the Government response to URN 09/876.

Comments on DBIS Impact Assessment in respect of scope

3.12. The Advertising Association notes that DBIS has quantified the impact of its proposals in respect of one-off costs to the consumer credit industry within the range £5m to £17m, whilst it quantifies the annual recurring costs to lenders resulting from implementation of the CCD within the range £0.5m to £1.7m. The Impact Assessment does not provide how those figures break down, including in respect of the impact of the extension of CCD advertising standards to products falling outside its scope on either lenders or the media that carry their

advertisements, if the Department has attempted this at all. The Advertising Association considers, however, that the detrimental impact on advertising media would be reduced if the proposals set out above were pursued and therefore commends them to DBIS. The Advertising Association makes one final proposal in respect of the treatment of the advertising of those products where DBIS has discretion and this is set out in Paragraph 3.13 immediately below.

Application of UCPD approach to information requirements

3.13. Article 7(3) of the UCPD states: "Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted." The Advertising Association understands from DBIS officials that during the negotiations around the Directive, they proposed such an approach to off-set the impact on certain media – radio, in particular - but that this was ultimately rejected. The Advertising Association considers, however, that DBIS should give consideration to allowing this approach in respect of the application of the Article 4, Article 19 and Article 21 requirements to advertisements for those products that fall outside the scope of the CCD, thereby minimising the wider detrimental impact of extending the Directive's standards to non-scope products.

Q5. Do you agree that the Advertisements Regulations (as amended to implement the CCD) should continue to apply to the existing range of credit agreements?

3.14. Subject to the comments made in response to Question 3 about the intention of DBIS to treat, in the majority of cases, those credit agreements that are currently subject to the CCA as if they were within scope of the CCD, the Advertising Association agrees that the CCARs should continue to apply to the existing range of credit agreements. As the Advertising Association outlines in Paragraph 3.13 above, however, the organisation considers that the provision of information requirements could be dealt with slightly differently to relieve the scope for detrimental impact on advertising media.

3.15. Meanwhile, in order to avoid rendering a complex regulatory regime even more so, the Advertising Association supports the decision of DBIS to retain the existing framework for second charge mortgages, rather than applying the standards contained within the Directive to such non-scope products, not least given the ongoing Government review into this sector¹⁵. The Advertising Association trusts that the review of this regime currently being conducted by the Government will result in improvements, not least the avoidance of regulatory duplication, given the current split of responsibilities between the Financial Services Authority (FSA) and the Office of Fair Trading (OFT) in respect of such products, and the complications this raises in respect of advertising. As the Advertising Association has iterated on a number of occasions previously in the interests of regulatory certainty, the organisation would ideally want to see responsibility awarded to the FSA, with its single interpretation of requirements, rather than the several hundred different possible interpretations by trading standards services around the UK.

Q6. Should an APR be required for all credit advertisements? If not, would there be merit in requiring it for any specific categories of loan – e.g. high-cost loans?

3.16. No, inclusion of the annual percentage rate of charge (APR) should not be required in all advertisements for credit. The Advertising Association notes that the CCD provides

¹⁵<http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=395627&NewsAreaID=2&NavigatedFromDepartment=True>

Member States with discretion to decide which products should display the APR applying to them in advertisements.

3.17. Equally, however, the second paragraph of Article 4(1) of the CCD permits Member States to require the inclusion of a representative APR in all credit advertisements, irrespective of whether an implied claim is made or not. The Advertising Association supports the decision of DBIS to require the inclusion of the relevant APR only under those same circumstances already presently foreseen by the CCARs (and clearly where dictated by the CCD itself) on the basis that requiring it in all circumstances would not be meaningful for consumers, whilst imposing an additional information load on advertisements. For the same reasons, the Advertising Association opposes the option of applying the APR requirement to specific product categories, such as high-cost loans.

3.18. The Advertising Association notes, however, that DBIS (notwithstanding the approach set out in Paragraph 3.17 immediately above) does intend to make use of the discretionary power provided to Member States within the second paragraph of Article 4(1) to require the APR be given in advertisements. DBIS envisages this covering, for example, those circumstances where an advertisement indicates that credit is available to persons who might otherwise consider their access to credit restricted. The Advertising Association would support such an approach, but only if the provision is implemented in such a way, as indeed DBIS proposes, that it does not trigger the inclusion in the advertisement of the other pieces of standard information contained within Article 4(2). The Advertising Association notes that DBIS is required to inform the European Commission of its decision to exercise this regulatory choice under Article 26 (“Information to be supplied to the Commission”).

Q7. Do you agree with the proposals concerning the requirement for a representative example of the standard information for advertising – and in particular the proposals concerning the representative APR and the use of the €1,500 (£1,200) assumption in respect of the representative APR? Should a different figure be considered?

Meaning of “representative example” under Article 4(2)

3.19. The Advertising Association notes the uncertainty to date, as indeed expressed by DBIS in URN 09/876, as to the exact meaning of “representative example”, as referred to in Article 4(2) of the CCD. The organisation shares the view of DBIS that the phrase should be taken to mean one over-arching example of a particular offer. In order to describe the offer, four items will always be required, these being: borrowing rate (whether fixed, variable or both); charges included in the total cost of credit to consumers; total amount of credit; and, the APR. (The Advertising Association assumes that the means for calculating the total cost of credit to consumers, including in respect of which items make up the cost and the methodology for conducting the calculation will be the same as that which has been refined over many years in the UK - most recently by the CCARs - and with which industry is familiar.) The following items may also be required under Article 4(2), where applicable: the duration of the agreement – sub-Article 4(2)(d); the amount of the cash price / advance payment for goods or services – sub-Article 4(2)(e); the total amount payable and the amount of the instalments – sub-Article 4(2)(f).

Implications for existing typical APR approach under CCARs of “representative example”

3.20. The Advertising Association shares the view of DBIS that to be “representative”, the agreement would need to be offered to at least half the consumers who take up the offer in the advertisement. For the avoidance of any doubt, the Advertising Association would recommend that in order to be representative it would need to be available to 51% of consumers who enter into the agreement as a result of the advertisement. That proportion of consumers should pay no more than the charge indicated and be subject to a rate of interest at or below that indicated in the credit advertisement concerned. The Advertising

Association shares the view of DBIS that the current requirement in Regulation 1(2) of the CCARs that the advertised “typical APR” be available under at least 66% of the agreements that consumers enter into goes well beyond what the CCD – a maximum harmonisation measure – mandates and would therefore be impermissible.

3.21. The Advertising Association also supports the decision of DBIS not to apply the 51% rule in respect of the information requirements set out in sub-Articles 4(2)(d), (e) and (f), where these are required to be incorporated in advertisements. In respect of sub-Article 4(2)(d), the Advertising Association agrees with DBIS that the provision of the average duration of the credit on offer should be sufficient to meet the test that the information so given is representative. Given that the information required under sub-Articles 4(2)(e) and (f) will already be known to the advertiser and presumably be standard in respect of the agreement being advertised, the information so given will be actual rather than simply representative.

Implications of selecting £1,200 as assumption for calculation of “representative example”

3.22. The Advertising Association notes that Article 19(5) of the CCD provides that if the credit limit or amount of credit is unknown or has yet to be agreed, for the purposes of calculating the APR, the ceiling value chosen may not exceed €1,500, as established in Paragraph 3 of Annex 1 Part II(g) of the Directive. €1,500 equates to approximately £1,200 using the provisions contained in Article 28 of the CCD¹⁶. Although the CCD would permit lenders to decide the most appropriate amount for the representative example calculation (under the €1,500 ceiling), DBIS is understandably keen to ensure that consumers are in a position readily to compare different offers of credit. Were lenders allowed to set different values, however, this would be less conducive to consumer understanding than a more standardised approach that facilitated comparisons between products. (The Advertising Association does, however, support the proposal of DBIS to allow lenders to provide additional representative amounts, based on alternative amounts of credit if they so wish.)

3.23. Whilst the £1,200 figure has much to commend it – not least as lenders are already conversant with using a similar amount in respect of running account credit (£1,500) under the CCARs – significant downsides may also be identified. The use of the £1,200 value becomes problematic in those cases where the specific amount of credit to be lent is unknown, but where the amount on offer will always be less than £1,200 because, for example, the lender has a policy of only ever lending relatively small amounts of money. In such a scenario, DBIS identifies two possible solutions, these being to make it permissible for lenders to base the representative example on the lower amount that is actually offered or to apply the 51% rule described in Paragraph 3.20. Although lenders would be better placed to come to a view, application of the 51% rule appears preferable, superficially at least, as it allows a more obvious base for comparison for consumers. The problematic nature of this situation is rendered even more pronounced in those circumstances where lenders may only ever loan amounts in excess of the €1,500 / £1,200 ceiling established by the CCD. The £1,200 ceiling would mean that the advertiser would almost certainly have to clarify in their advertisement that a loan of that amount was not actually available from them in order that they did not fall foul of the requirements on misleadingness contained within the CPRs. This would risk bringing the implementing Regulations into disrepute and impose yet another burden on media owners, given the space required for an additional statement – the issues raised by the mandatory inclusion of information in advertisements is dealt with comprehensively elsewhere in this submission and does not bear repetition here. If such a sub-optimal outcome can be avoided by application of the 51% rule then this should be pursued, but the Advertising Association has doubts as to whether this represents a comprehensive solution.

¹⁶ See Footnote 12.

Implications of selecting £1 as assumption for calculation of “representative example”

3.24. The Advertising Association considers that another option might be to take a notional £1 as the basis for calculating the representative example. This would have a number of benefits for consumers. It would provide a single basis for comparison across all loans and it would allow consumers to extrapolate through multiplication from the £1 (and the standard information around it) to the amount they actually envisage borrowing and the related costs. Furthermore, given that it would be obvious that no provider would offer a loan of £1 and no consumer seek one, there would be no need to clarify that a loan of that amount was not actually available. To ensure that it was absolutely clear that the representative example calculated around £1 was entirely notional, the example could, for example, be introduced in the subjunctive, along the lines: “Were the loan amount £1,...”. The Advertising Association appreciates this is an entirely new proposal, but considers that it merits active consideration by DBIS. Indeed, it might be assist consumers to conceptualise better the implications of taking out a loan, if they were thinking in terms that for every pound borrowed, it would cost them that proportion (expressed in pence, perhaps in the form £0.01) per month to service the debt.

3.25. Thus using £1 as the base for an imagined representative example, the sum of the total amount payable might be expressed as £1.20 and the amount of the, say, twelve instalments as £0.12. If a greater degree of precision is required the figures provided could be rendered to four decimal places (i.e. presented as £0.000). The Advertising Association considers that consumers would be sufficiently financially literate to extrapolate from those figures the costs attached to the loan. Alternatively, and arguably a solution where actually it becomes more difficult for the less financially literate consumer to extrapolate the costs involved would be to use an assumption of £100. Thus, if £100 was the base for the representative example, the sum of the total amount payable might be expressed as £120.12 and the amount of the, say, twelve instalments as £12.01. The concern the Advertising Association has about using £100 as the base rather than £1, is that we return to the problem that a statement that the loan amount contained in the representative example would not necessarily be available to prospective borrowers. To reiterate, this would be implicit in the £1 assumption – given that a consumer would never seek, nor the lender offer a loan for such a small amount.

Q8. Do you have views on the presentation of information required under Article 4.2?

3.26. Article 4(2) of the CCD requires that the standard information to be included in advertising by way of a representative example be provided “in a clear, concise and prominent way”. The Advertising Association comments below on how DBIS intends reflecting these CCD standards in any implementing Regulations. The Advertising Association notes, meanwhile, that Article 4(4) establishes that the provisions in the CCD concerning the inclusion of standard information within consumer credit advertisements as being without prejudice to the UCPD.

Clarity

3.27. The Advertising Association considers that the proposal by DBIS to maintain the requirements contained within sub-Regulations 3(a) and 3(b) of the CCARs as to the legibility and intelligibility of promotional material for all aspects of credit agreements in order to reflect the clarity requirement within the CCD on clarity is proportionate. Arguably, the standards set out in those two sub-Regulations, which apply universally to any credit advertisement, are already broadly reflected in the standards applied to advertisements more generally under the non-broadcast and broadcast advertising codes enforced by the ASA. The Advertising Association accepts, however, that DBIS must be seen to reflect the “clear” standard somewhere in the implementing Regulations and accepts that the route proposed is the most obvious one.

Concision

3.28. The Advertising Association is unclear as to how DBIS intends reflecting this requirement in the CCD, but would support the principle that where the Directive mandates that information appears in advertisements, that data should be provided in as concise a form of possible: brevity is a virtue in this regard. The Advertising Association considers that this concision standard can best be achieved by allowing advertisers to use their initiative rather than through DBIS being overly prescriptive. That point is reiterated on a number of occasions elsewhere in this submission.

Prominence of standard information: APR-specific

3.29. The Advertising Association agrees with DBIS that Regulation 8 (“APR”) of the CCARs, which sets requirements as to the specific prominence accorded to the APR in credit advertisements, goes beyond what is permissible under the CCD, given the status of that Directive as a maximum harmonisation measure.

Prominence of standard information: general

3.30. The Advertising Association accepts that the standard information specified in Article 4(2) of the Directive must be prominent. Prominence is, however, a relative concept. It does not necessarily mean that the mandated information should in some way be larger or louder than other non-mandatory information in the advertisement, not least headlines and other promotional messages, merely that it should be noticeable, in other words: be likely to come to the attention of the consumer. The Advertising Association commends the approach adopted in Paragraph 8(1)(c) of Schedule 2 of the Gambling Act 2005. This relates to the prominence accorded to free entry routes into prize competitions in order to ensure such mechanisms avoid classification as lotteries. Paragraph 8(1)(c) sets out that the choice must be publicised in such a way as “to be likely to come to the attention of each individual who proposes to participate...”. A sub-optimal solution might be to use terminology that talks of “no less prominent” or “as prominent as”, thereby ensuring promoting parity with equivalent non-mandatory information. Such an approach will also render the effect of this requirement media-neutral (unlike that contained within the existing CCARs), by not requiring different media to be treated differently in this particular regard, thereby further simplifying regulation in this complex field. The Advertising Association also makes observations and proposals in response to Question 9 below in respect of how the requirements on the prominence accorded to the standard information interacts with the highly prescriptive ‘wealth warnings’ contained within the CCARs that DBIS proposes retaining following implementation of the CCD.

Effect of maximum harmonisation status of CCD on existing “together as a whole” standard

3.31. Although URN 09/876 does not refer to the issue, the Advertising Association takes the view that the requirement contained within Regulation 4 (“Content of advertisements”) that the standard information that the CCARs mandates be presented “together as a whole” would exceed what is permissible under the CCD. (See also Paragraph 3.48 of this response below.)

Disclosure requirement where a credit agreement is dependent on an ancillary service

3.32. Although not related to the presentation of information under sub-Article 4(2) of the CCD on which views are sought by DBIS in Question 8, the Advertising Association considers it appropriate (as the opportunity does not arise to comment elsewhere in URN 09/876) to raise the disclosure requirement contained within sub-Article 4(3) of the Directive. Sub-Article 4(3) requires that where the conclusion of a credit agreement is dependent upon an ancillary service – insurance, for example – any advertisement for that product must disclose that obligation. The Advertising Association accepts that, given it is an explicit requirement of the CCD, this sub-Article 4(3) requirement must be reflected in the implementing Regulations, even though such a disclosure would arguably be required under

the existing regulatory framework for advertising, underpinned as it is by the CPRs. The Advertising Association is keen to ensure that the implementing Regulations avoid prescription whilst still achieving the objective of sub-Article 4(3). To this end, the Advertising Association would recommend that the Regulation implementing sub-Article 4(3) be drafted along the following lines: “Where the conclusion of a credit agreement is dependent upon an ancillary service, a statement to that effect should be made in the advertisement concerned.” The comments the Advertising Association makes above in relation to clarity, concision and prominence are also applicable in respect of the provisions contained in sub-Article 4(3).

Q9. Do you have views on the proposals to amend Regulations 5 and 6 of the Advertisements Regulations, while retaining other requirements concerning matters not in scope, e.g. health (sic) warnings?

3.33. The Advertising Association considers that the interpretation by DBIS on the final sentence of Recital 18 of the CCD, which permits Member States to require additional information be incorporated in consumer credit advertisements, is fair¹⁷. The Advertising Association would, however, request that DBIS in making its calculations as to the costs and benefits of this opportunity take fuller account than hitherto in its considerations of the detrimental impact mandatory information requirements have on media owners, especially when no consumer benefit might realistically be anticipated. Furthermore, it appears likely that other Member States may elect not to introduce additional requirements, such as ‘wealth warnings’ in their own jurisdictions, under Recital 18, perhaps recognising the limited value of so doing.

Special provisions in relation to dealers’ publications

3.34. The Advertising Association shares the view of DBIS that the special provisions contained within Regulation 5 (“Credit advertisements in dealers’ publications covering a calendar or seasonal period”) and Regulation 6 (“Advertisements in dealers’ publications relating to credit under a debtor-credit-supplier agreement”) are incompatible with the CCD. Given that the CCD does not contain any special provisions for such advertisements, the Advertising Association agrees that when the CCARs are amended to take into account the Directive, Regulations 5 and 6 of the existing Statutory Instrument should be deleted.

Other requirements concerning matters not in scope: name of lender

3.35. Regulation 3(c) of the CCARs specifies that the name of the advertiser must be given in consumer credit advertisements. The CCD does not appear explicitly to require this, although DBIS has indicated its intention to retain this provision within the CCARs. The Advertising Association would observe that an explicit requirement that lenders provide their names in advertisements appears superfluous on the basis that firms in this market would almost certainly provide this information of their own volition, as the principal purpose of advertising is to draw attention to the brand. In the circumstances, the Advertising Association considers that little would be lost by deleting Regulation 3(c), when DBIS comes to amend the CCARs.

Other requirements concerning matters not in scope: postal address of lender

3.36. Regulation 4(1)(b) of the CCARs (as amended) specifies that a postal address be given in consumer credit advertisements, where triggered by the inclusion of certain information specified in Paragraphs 5 and 7 of Schedule 2 (“Information to be contained in a

¹⁷ Recital 18 (final sentence): “In addition, Member States should remain free to regulate information requirements in their national law regarding advertising which does not contain information on the cost of credit.”

credit advertisement”)¹⁸ of those Regulations. The Advertising Association considers that, if these information requirements are to be retained, DBIS should not seek to expand on them as a consequence of implementing the CCD, given that they are not a requirement of the Directive. Furthermore, the Advertising Association would argue that assuming DBIS does retain this requirement, the exceptions to providing a postal address in credit advertisements under sub-Regulations 4(1)(b)(i), (ii), (iii) and (iv) of the CCARs should be preserved.

Other requirements concerning matters not in scope: wealth warnings

3.37. Regulation 7 (“Security”) of the CCARs imposes a series of ‘wealth warnings’ that are triggered when secured loans are being advertised. The Advertising Association considers it notable that the CCD contains no such requirements, perhaps in recognition of their utility (or otherwise) from a consumer perspective and the burden they impose on media owners. The Advertising Association has appended to this submission, research evidence that bears out the supposition that wealth warnings and other mandated information requirements serve little purpose.

3.38. Despite the lack of evidence that wealth warnings serve a useful purpose, the Advertising Association anticipates that DBIS will nonetheless feel obliged to retain them. Under such circumstances, the Advertising Association would take this opportunity to make a number of recommendations, some of which are deregulatory, which should help off-set, albeit to a limited extent, the overall detrimental effect on media owners that might be expected to result from implementation of the CCD.

3.39. The first recommendation is that the media exceptions for radio, television and cinema advertising currently contained within sub-Regulations 7(8)(a) and (b) of the CCARs be carried forward into any revised Statutory Instrument and that the exception for, effectively, brand advertising contained within sub-Regulation 7(8)(c) also be retained.

3.40. The second recommendation is that those media not benefiting from the exceptions contained within sub-Regulation 7(8) be subject to a less prescriptive approach by providing lenders with greater flexibility as to the way in which wealth warnings may be communicated. There are two sub-strands to this second recommendation.

3.41. The first (and *de minimis*) strand is that the CCARs should no longer require the ‘wealth warnings’ to appear in capital letters only – this would serve to lighten slightly the regulatory burden on those media not benefiting from the exceptions contained in sub-Regulations 7(8)(a) and (b). Another benefit of this would be that the use of capital letters in the warnings may well serve to draw the attention of consumers away from the standard information required by Article 4(2) of the CCD, thereby rendering that latter data less noticeable. The Advertising Association also considers it notable in this context that the Financial Services Authority does not require the ‘wealth warnings’ it mandates appear in advertisements, as a consequence of its *Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB)*, to appear in capital letters.

3.42. The second strand is that the CCARs should no longer be so prescriptive in respect of the wording of the ‘wealth warnings’ contained in sub-Regulations 7(2)(a), 7(2)(b), 7(2)(c), 7(4) or 7(5) of the CCARs. Such an approach would have two benefits. Firstly, advertisers might be innovative enough to come up with a form of words that is shorter than the current warnings. As stated in Paragraph 3.28 of this submission: brevity is a virtue. Secondly, it would help address the problem that currently bedevils advertisements for those second charge mortgages that are subject both to the CCA and to FSMA, so that rather than potentially requiring the risk statements under both *MCOB* 3.6.13R and the CCARs,

¹⁸ Paragraph 5 relates to the frequency, number and amount of repayments of credit; Paragraph 7 relates to the total amount payable by the debtor.

advertisers could tailor their wealth warnings to meet both those requirements in a single statement. In order to achieve this, the Advertising Association would recommend that whereas, for example, Regulation 7(2)(a) currently requires a warning in the following form: “YOUR HOME MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON A MORTGAGE OR ANY OTHER DEBT SECURED ON IT”, it should be amended such that advertisers must make a statement to that effect. Thus, Regulation 7(2)(a) might be amended to read: “except where sub-paragraph (c) applies, the advertisement shall contain a statement to the effect that the home of the debtor may be repossessed if they do not keep up repayments on a mortgage or any other debt secured on it”. The Advertising Association considers that the same underlying approach should be adopted towards the wealth warnings currently contained in sub-Regulations 7(2)(b), 7(2)(c), 7(4) and 7(5).

3.43. This less prescriptive approach would allow advertisers in those media not benefiting from the exceptions contained in sub-Regulation 7(8) to communicate the wealth warning, which DBIS intends carrying forward, but in a more concise way. Such an approach would also reflect the preference expressed in the CCD for mandatory information required under the Directive to be communicated to the consumer in the most concise manner possible – recognition, perhaps, that brevity is also a virtue from a consumer perspective as well.

3.44. In conclusion on the subject of wealth warnings, the approach set out above would offset the detrimental impact of wealth warnings on media owners (over and above the anticipated additional information load on advertisements that the CCD will introduce), whilst allowing DBIS to point to a series of deregulatory measures, in keeping with the Government’s declared commitment to better regulation.

Restrictions on certain expressions in credit advertisements

3.45. Regulation 9 (“Restrictions on certain expressions in credit advertisements”) of the CCARs restricts the use of certain expressions in an exhaustive list, permitting them only under certain defined circumstances to ensure that where terms are used, consumers are not misled. Whilst the Advertising Association would agree that ensuring such expressions are not misused by advertisers is laudable, consumers would arguably be protected from this (and more flexibly) by reliance on the CPRs. The Advertising Association would therefore argue that DBIS should give consideration to revoking Regulation 9, when it comes to amend the CCARs in the course of implementing the CCD and relying on the CPRs to achieve the objective desired.

Q10. Do stakeholders envisage any particular problems in this sector (TV/radio/internet)? If so, how should these be addressed within the confines of the CCD?

3.46. As outlined elsewhere in this submission, and as expressed in its discussions with DBIS officials, the Advertising Association does envisage detrimental impacts on the advertising sector, not least on linear media, most notably commercial radio, given the extra airtime that advertisers will need to purchase in order to deliver the additional information required by the CCD. This risks rendering what is otherwise a very attractive and competitive medium relatively less so from the perspective of potential advertisers of consumer credit, than at present.

3.47. The Advertising Association accepts regretfully, however, that the CCD does not provide for the nature of different media to be taken into account in respect of the delivery of mandated information and that the necessary improvements to its operation are unlikely to be possible before the Directive is next scheduled for review by the European Commission in 2013. The Advertising Association understands from DBIS that during the negotiations at a European level, officials made the case for a media-proportionate approach to be pursued,

similar to that contained within Article 7(3) of the Unfair Commercial Practices Directive¹⁹, but that such a policy line was ultimately rejected. The Advertising Association considers that the UCPD approach, although not possible to apply to those advertisements for products falling within the scope of the CCD could be applied to those falling outside its scope, but currently covered by the CCA/CCARs. The Advertising Association discusses that option in more detail in Paragraph 3.13 of this response above.

3.48. The Advertising Association shares the view of DBIS that in respect of internet advertisements, whether on the homepage of a website, or in a banner or pop-up, “clicking” between items does not conflict with the requirements set out in Article 4 of the CCD. As set out in Paragraph 3.31 above, the CCD does not require, nor provides Member States with discretion to mandate, that the standard information appears in a particular order or together on the same page or the same part of the page. (Clarity, concision and the relative conspicuousness of that mandated information when presenting such data to consumers must, however, be taken into account.) The Advertising Association agrees that it would not be appropriate to treat internet advertisements any differently from advertisements in other media in the implementing Regulations in respect of the presentation of the standard information and that this is best left to guidance agreed between the advertising industry, DBIS and other interested parties.

3.49. Whilst the Advertising Association would recommend, as with the CCD as a whole, that DBIS adopt the most flexible approach possible towards implementation, the organisation would accept that advertisements delivered via comparison websites would fall within the scope of the Directive. The Advertising Association considers that where the advertisement is simply advertising the price comparison website brand and drawing the attention of consumers to its existence, this would not trigger the standard information requirements set out in the CCD. URN 09/876 presently is somewhat equivocal on that point. The Advertising Association therefore looks forward to that point being clarified following publication by DBIS of the Government response to the Department’s consultative exercise.

Comments on Impact Assessment around implementation of Article 4 of the CCD

3.50. The IA conducted by DBIS compares the existing standard information requirements contained within Article 4 of the CCD and the equivalent provisions within the existing CCARs and concludes that the one-off costs across the lending industry of implementing this Article will be up to £1.3m per company and involve recurring costs of £70,000. The Advertising Association accepts that the requirements of the CCD may be less onerous than those of the existing CCARs from the perspective of lenders, because they are arguably less prescriptive. Equally, the transitional costs may be limited, given that firms offering loans would be likely already to budget for regular refreshments of their advertising over time in any case. The impact on advertising media and the potential for distortion of expenditure between media is significant, however, and is not apparently considered in the IA. The Advertising Association is also concerned by the conclusion arrived at by DBIS in the IA, based on the FSA report *Financial Capability in the UK: Establishing a Baseline*, which was published in March 2006²⁰. DBIS has extrapolated the finding that 42% of customers rely on product information and/or advice from friends, relatives and sales staff to draw the conclusion that great importance is placed on the technical information contained within advertising material. The FSA in its report makes no such leap, perhaps because the Authority shares the view of the Advertising Association that the principal purpose of advertising is to raise brand awareness and is not the place to communicate detailed technical information about the product. In support of the conclusions in its IA, DBIS also cites another FSA report - *Mortgage effectiveness review: Stage 1 Report*²¹ - which was

¹⁹ See Paragraph 3.13 of this submission for wording of sub-Article 7(3) of the UCPD.

²⁰ http://www.fsa.gov.uk/pubs/other/fincap_baseline.pdf

²¹ http://www.fsa.gov.uk/pubs/other/mortgage_review.pdf

published in September 2006. That FSA report found that whilst 77% of consumers obtained product information from more than one firm and 44% may have studied the leaflets and brochures published by firms. However, the FSA's *Consumer Purchasing Outcomes Survey*, published in September 2006 and cited in the Appendix to this submission, found that whilst 74% of people obtained information and advice from another person in connection with a mortgage purchase - only 3% relied on advertisements. The Advertising Association therefore considers that the decision of DBIS to cite these two FSA reports in the way that the Department has in the context of Article 4 is somewhat misleading. If DBIS does refer to them in the final version of its IA, the Advertising Association trusts it will be done in a manner which provides a somewhat fuller picture.

Q26: Do you agree with this approach, in particular the proposal to revise the missing payments warning?

3.51. The Advertising Association notes the intention of DBIS to revise the warning contained in Schedule 2 of The Consumer Credit (Agreements) Regulations 1983 (as amended) concerning the consequences of missing payments by making clearer the risks to the property of a debtor if a Charging Order is imposed by a court due to non-repayment of an outstanding debt. The Advertising Association also notes that Article 10 ("Information to be included in credit agreements") of the CCD mandates that a warning regarding the consequences of missing payments is required²².

3.52. In discussing sub-Article 10(2)(m), DBIS proposes that anyone selling an unsecured loan should ensure that the warning proposed for inclusion in the agreement should also feature in advertisements for products that could lead to the forced sale of the assets of a debtor. Such a proposal would appear to gold-plate upon what the CCD actually requires, given that sub-Article 10(2)(m) relates to agreements and not advertisements. Furthermore, no assessment of this new proposal appears to have been provided in the IA that accompanies URN 09/876.

3.53. For reasons that are clear from other comments made in this submission, the Advertising Association is opposed in principle to the proposal described in Paragraph 3.52 immediately above and would discourage DBIS from pursuing it, given the absence of quantifiable consumer benefit twinned with a detrimental media impact. Clearly, DBIS is free to make the proposal, but given it is not required by the Directive and is not required under the existing CCARs regime. If DBIS is to pursue this proposal the right place to do so would be in the forthcoming Consumer White Paper and not in one sentence within URN 09/876 unsupported by any apparent consideration within the IA.

Q33. Do you agree with the approach in respect of the giving of notice by newspaper advertisement and branch notice?

3.54. The Advertising Association notes how DBIS intends implementing Article 11 ("Information concerning the borrowing rate") of the CCD and the giving of notice by newspaper advertisement when rates change – an area where The Consumer Credit (Notice of Variation of Agreements) Regulations 1977²³ has some effect. In its discussion of this proposal, DBIS does not identify the creation of any new regulatory burden and the Advertising Association trusts that this analysis is correct.

²² Sub-Article 10(2)(m) contains the specific requirement.

²³ Statutory Instrument No.1977/328

Q54. Do you agree with our proposed positions on the APR assumptions (b), (d) and (e) in Annex I? If not, please explain why.

3.55. The Advertising Association is not in a position to provide technical comments on the equation and additional assumptions contained at Annex 1 Part II of the CCD for calculating the APR. The organisation notes that the CCARs, in Paragraph 4 of Schedule 1, refer to credit being paid in twelve equal instalments and is thus consistent with the CCD.

3.56. To support its contention that credit, which is not defined in the CCD, be taken to include 'interest or other charges', DBIS cites the view of the OFT, as set out in the response of the Office to Question 6.16 of its own publication *Consumer Credit (Advertisements) Regulations 2004: Frequently Asked Questions (OFT746)*²⁴. It is important to note in this context that OFT746 is only the Office's interpretation of the CCARs, and as important as that may be, actually has no legal status. It may not therefore necessarily be appropriate to transpose that OFT interpretation of 'credit' into a new legal definition of the term.

3.57. If, however, the custom and practice of lenders (perhaps partly based on OFT746) is such that credit is taken to include both interest and other charges then, the case for defining 'credit' in the way DBIS proposes would be considerably strengthened.

3.58. Clearly whatever definition is finally chosen, it is essential that all lenders are working to the same definition, given the importance consumers attach to the APR as a means of comparison. In this context, the Advertising Association notes the finding reported in the IA published alongside the final version of the CCARs in 2004 that 84% of people then considered the APR an important factor for them in choosing which credit product to take, and from which lender²⁵.

Q55. Does the removal of the existing UK APR tolerances raise any issues?

3.59. The Advertising Association notes that Paragraph 2 ("Permissible tolerances in disclosure of an APR") contained in Schedule 1 ("Provisions relating to calculation and disclosure of the total charge for credit and any APR") of the CCARs currently provides for a threshold around stated APRs, where lenders inadvertently fail exactly to achieve them. The CCD is, however, silent on the subject of tolerances around the advertised APR. The Advertising Association would strongly endorse, if permissible under the CCD, the case for retaining these tolerances in statute, so that slight errors made in good faith are not deemed to be in breach of any amended version of the CCARs that take into account the requirements of the Directive. If this is not possible then the Advertising Association would still strongly recommend that tolerances be retained in respect of those advertisements for products falling outside the scope of the CCD, but where an APR is provided.

Q58. Do you think it would be helpful if we defined the term "independent" in legislation or would an explanation of the term be better left to guidance? Do you have any comments on a possible definition? Do you think there is a better way to ensure that the requirement is applied consistently than to define the term?

Q59. Do you have any comments on our proposals for implementing the requirements in Article 21? If you do not agree with our proposals, please explain why and where possible suggest an alternative proposal.

²⁴ The most recent version of OFT746 was published in May 2009.

²⁵ The Consumer Credit (Advertisements) Regulations 2004 Regulatory Impact Assessment (page 2) <http://www.berr.gov.uk/files/file42396.pdf>

3.60. Article 21 (“Certain obligations of credit intermediaries vis-à-vis consumers”) – specifically sub-Article 21(a) of the CCD - explicitly requires credit intermediaries to disclose in advertising the extent of their powers, and in particular whether they work exclusively with one or more creditors or as a business independent of such ties. The Advertising Association notes that the term ‘credit intermediary’ is defined in Article 3(f) of the CCD, but not what constitutes ‘independent’. (The Advertising Association would also note that those businesses offering these types of services that might be caught under the CCA, would not necessarily be covered under the definition of ‘credit intermediary’ contained in the CCD, given how narrowly that term is framed in the Directive.²⁶) The Advertising Association is reassured that DBIS does not intend elaborating in its implementing legislation on the meaning of intermediaries’ powers or the manner in which information on that subject, where necessary, might be set out (including in respect of their independence or otherwise) in advertising and promotional material. This suggests DBIS intends adopting a copy-out approach in respect of Article 21(a). The Advertising Association would, however, recommend a different approach in any implementing Regulations, at least in respect of that part of sub-Article 21(a) relating to advertising and sets out its proposals in Paragraphs 3.61 to 3.66 below.

3.61. In respect of the meaning of the extent of intermediaries’ powers, the Advertising Association considers that the wording was almost certainly incorporated to cover off the issue of whether providers were authorised to offer loans on behalf of a creditor, rather than an interpretation that would require the advertiser to provide a list of the products offered, however concise. To cover off the former, the Advertising Association considers that a concise statement to the effect that the intermediary was authorised to offer loans should be sufficient to reflect sub-Article 21(a). DBIS implies that intermediaries that are empowered only to forward customers’ applications to creditors are rare, if not entirely absent, from the UK market. If any such providers do exist and engage in advertising, they should be permitted to make a concise statement to the effect that they are empowered only to forward prospective customer’s applications to lenders. See Paragraph 3.65 of this submission, for the comprehensive approach the Advertising Association proposes to meet the advertising-related requirements established by Article 21(a) of the CCD.

3.62. The Advertising Association notes, however, that DBIS is considering the relative merits of defining “independent” in either the legislation or accompanying guidance. Given that credit intermediaries are under a positive requirement to disclose whether they are independent or tied, the Advertising Association considers that a more flexible and all-encompassing regulatory approach would be to rely instead on the CPRs to ensure that advertisers do not mislead as to their independence or otherwise in advertisements. The Advertising Association agrees with the view of DBIS that where a broker is affiliated to a lender, failure to disclose this to consumers would potentially amount to a misleading omission under the CPRs – nevertheless the organisation recognises that the CCD contains an explicit requirement on this subject. One might anticipate that independent credit intermediaries would already chose to disclose that fact in advertising. Meanwhile, the effect of the CPRs, the OFT *Guidelines on Non-Status Lending* (which states that advertisements should indicate if the business is tied to a particular lender) and best practice in the industry is such that many “tied” intermediaries will already be disclosing this status in their advertising. DBIS itself points to anecdotal evidence in URN 09/876 that Article 21 will simply reflect and perhaps render more consistent the best practice standards that many credit intermediaries already engage in and meet by disclosing, when they are not independent, that fact in advertisements.

²⁶ It is notable that credit brokers are caught by the CCARs currently in as much as they must include the APR (where triggered) in any advertisements they place.

3.63. The Advertising Association would certainly welcome an approach that minimised the degree of prescription and that provided advertisers with the maximum degree of flexibility to be innovative about how they deliver the level of consumer protection foreseen by the CCD. For example, if they are “independent” it should be sufficient to state that, rather than going on as DBIS proposes that such a disclosure might also require them to state that the provider “offers a wide range of credit from a number of different creditors” – this is sufficiently implicit in any statement as to their independence. Similarly, for those credit intermediaries that are linked with particular lenders, it should be sufficient to communicate the fact that they are not independent. The above approach ensures that the key information the consumer needs to know about the independence or otherwise of the credit intermediary has been communicated without bombarding them with information at the advertising stage that they are unlikely to take in.

3.64. In this context, the Advertising Association is concerned at the proposal of DBIS that where a credit intermediary is not independent, it should list in advertising the creditors to which they are tied. Sub-Article 21(a) contains no such requirement and the Advertising Association would be opposed to this DBIS proposal for the reasons set out elsewhere in this submission, given the absence of any quantifiable consumer utility twinned with the detrimental effect on media. (By contrast, the Advertising Association considers that such information would have considerably greater value were it set out in other pre-contractual documentation produced by the credit intermediary concerned, but notes that, as with advertising, the CCD does not mandate this.)

3.65. In order to generate the maximum degree of flexibility and minimise the detrimental impact on media, the Advertising Association would recommend an approach, when transposing sub-Article 21(a) into the implementing Regulations, similar to that recommended by the organisation in respect of wealth warnings. In order to achieve this, it would be necessary to separate out the advertising requirements in sub-Article 21(a) from those on contractual and other pre-contractual information. On that basis, the Advertising Association would recommend that the following wording be adopted in respect of advertising: “Credit intermediaries should provide in their advertisements a concise statement reflecting whether they are authorised to offer loans or only to forward prospective customers’ applications to creditors, as well as whether the intermediary is entirely independent of creditors, or works exclusively with one or more of such natural or legal persons.”

3.66. As in its comments on Article 4 of the CCD, the Advertising Association would express its disappointment here that when negotiated in Europe, the disclosure requirement contained within sub-Article 21(a) of the Directive did not provide for the possibility of the required information being treated as per sub-Article 7(3) of the UCPD. However, because, as set out above, the Advertising Association considers that the status of the credit intermediary concerned could be delivered extremely concisely in an advertisement, it is anticipated that the detrimental effect on media will be less than that imposed by the requirements contained within Article 4 of the CCD.

Comments on Impact Assessment in respect of Article 21 of the CCD

3.67. The Advertising Association notes that DBIS in its IA anticipates that the costs to individual businesses of the requirements contained within Article 21 as being likely to relate primarily to having to change advertising and documentation intended for consumers so as to incorporate the new disclosures, but that other costs are likely to be insignificant. The Advertising Association notes that this conclusion is premised on DBIS pursuing a non-prescriptive approach to implementing the requirements so as to provide maximum flexibility for credit intermediaries, with the objective of minimising the costs associated with the measure. The Advertising Association commends the approach set out in Paragraphs 3.61 to 3.66 above as a means of minimising the detrimental impact of the disclosure

requirements that impact on owners of advertising media. Consumers should also benefit by not being overloaded with information in advertising, but for them to be provided with more detailed information in documentation at a later (but still pre-contractual) stage.

Q62. Do you agree with our proposal not to require APRs to be shown in Advertisements relating to Overdrafts and if not, why not?

3.68. Yes. The Advertising Association agrees with the proposal of DBIS to make use of the discretionary derogation permitted by Article 4(2)(c) of the CCD, a flexibility the UK Government successfully negotiated during the drawing up of the Directive, not to require the APR to be shown in advertisements relating to credit agreements that take the form of an overdraft. The Advertising Association notes that advertisements for authorised overdrafts would still be subject to sub-Articles 4(1), 4(2)(a), 4(2)(b), 4(2)(c) and 4(4), as appropriate, of the CCD following implementation of the Directive. The Advertising Association notes that, given the decision of DBIS to exercise this derogation, the Department will be required to inform the European Commission of its decision to make this regulatory choice, as required under Article 26 (“Information to be supplied to the Commission”) of the CCD.

Q67. Do you think there are provisions in the Directive with which lenders should be able to comply before June 2010? If so, which provisions?

3.69. Whilst the Advertising Association anticipates that all interested parties would welcome early publication of the domestic legislation implementing the CCD into UK law in order that they might have the opportunity to become conversant with it, the organisation would counsel against some provisions entering into force on an earlier date than 11 June 2010. The legislation governing consumer credit is already complex enough without a series of various dates existing for different provisions of the CCD to enter into force. The Advertising Association would certainly oppose early introduction of the advertising provisions, not least given that they will impose new burdens on media owners at what is an extremely trying time economically for them.

3.70. That said, the Advertising Association is concerned that an advertisement compliant with the CCARs on 10 June 2010, should not be considered in breach of the law the following day. In order to address this, the Advertising Association would strongly recommend that DBIS incorporate transitional provisions into the implementing Regulations similar to those contained within Regulation 12 (“Transitional provisions”) of the CCARs.

3.71. Regulation 12 provided transitional arrangements in respect of long shelf-life publications, following the introduction of the CCARs in 2004. For similar reasons, the Advertising Association would recommend DBIS put in place a three-month transitional provision for non-broadcast advertisements more generally and a six-month transitional provision for broadcast advertisements. (The Advertising Association considers that a transitional period of six months is necessary for broadcast advertisements given the longer lead times involved in their production.)

Q68. Do you agree with the assumptions, figures and impact assessments made in the Impact Assessment at Annex B? This is based on initial consideration of the key issues for the UK of the original CCD draft. Do you have any comments on the costs and benefits for the options for implementation discussed in the Impact Assessment and in the consultation document? Please provide as much supporting evidence as possible.

3.72. The Advertising Association has commented on the IA produced by DBIS that accompanied URN 09/876 as and when it appeared relevant to the consultation Question at

hand. In terms of a specific amendment that the Advertising Association would request to the final version of the IA, the organisation would direct DBIS to the comments made in Paragraph 3.50 above in respect of the FSA reports that are cited by the Department in its Assessment.

3.73. More generally, the key central concern that the Advertising Association has had in respect of the approach of DBIS towards analysing the impact of implementing the CCD and monetising costs on the main affected groups is that the effect on advertising media has received little attention to date.

3.74. Please find below a table detailing advertising expenditure in the personal loans category over the most recent four years for which full-year data is available.

Table: Advertising expenditure on personal loans 2005-2008²⁷

Year	2005	2006	2007	2008
Expenditure	£99,119,000	£82,737,000	£49,076,000	£52,294,119

4. Other Advertising Association comments on issues raised by CCD implementation

Penalties

4.1. There is little discussion by DBIS in URN 09/876 about the implementation of Article 23 (“Penalties”) of the CCD beyond the Department simply stating that no changes to the existing regime are planned and that any new provisions will be rendered consistent with penalties for similar offences. The Advertising Association assumes that DBIS in its further consideration of implementing the CCD will take fully into account the findings of the Macrory Review of Regulatory Penalties and the provisions contained within the Regulatory Enforcement and Sanctions Act 2008 in respect of civil sanctions for regulatory offences.

Parliamentary procedure

4.2. Although the Advertising Association accepts that DBIS may choose the Parliamentary procedure through which the Regulations implementing the CCD will reach the statute books, the organisation considers that serious consideration should be given to using the affirmative procedure. (The Advertising Association understands that the current intention of DBIS is to take the implementing Regulations for the CCD through under the negative procedure.)

4.3. The affirmative procedure may in fact be preferable, given that it provides the opportunity for clarifications that may be difficult to make on the face of the implementing Regulations, to be made instead via Ministerial statement and recorded in Hansard. It is notable that such Ministerial statements have a legal status that any Guidance, official or otherwise, published alongside the implementing Regulations will not enjoy.

17 June 2009

²⁷ Data include press, television, radio, outdoor, cinema, internet (display only) and direct mail. Data are net of discounts and exclude production costs and agency commission. The source for this data is Nielsen Media Research.

Review of evidence regarding the utility or otherwise of mandatory information requirements in advertising (referred to in Paragraph 3.37)

The public's perception of advertising in today's society – report on the findings from a research study

Conducted by: The Thinking Shop

Commissioned by: The Advertising Standards Authority

Published: February 2002

Relevant finding: Consumers tend to regard the inclusion of mandatory statements in advertisements as there to protect the advertiser rather than being of benefit to themselves.

Download from:

http://www.asa.org.uk/NR/rdonlyres/A351FFA3-22D2-4A03-942E-F653A700B6EC/0/ASA_Public_Perception_of_Advertising_Feb_2002.pdf

Radio Commercials and Wealth Warnings

Conducted by: Navigator

Commissioned by: Radio Advertising Bureau

Published: February 2004

Relevant finding: Consumers use advertising to make them aware of the different products available rather than as a useful way to find out detailed information about them. Supplier literature is regarded as the most appropriate means for delivering such information. There is cynicism amongst consumers about the role and usefulness of warnings in advertising and recognition that radio would be most detrimentally affected by their inclusion.

Download from:

n/a – supplied to Department of Trade & Industry by commercial radio industry during the Government consultation leading up to the making of the Consumer Credit (Advertisements) Regulations 2004

Effects of advertising in respect of compensation claims for personal injury

Conducted by: Millward Brown

Commissioned by: Department for Constitutional Affairs

Published: March 2006

Relevant finding: Relying strongly on either text onscreen or a voiceover to convey a message can prove ineffective (unless the voiceover or text is clearly reinforcing the visuals appearing on screen at the time).

Download from:

<http://www.cap.org.uk/NR/rdonlyres/DC59B829-D6DC-4585-81C7-8A6D7BC5494F/0/ClaimsadvertisingreportFINAL080506.pdf>

Consumer Purchasing Outcomes Survey

Conducted by: BMRB and The Henley Centre

Commissioned by: Financial Services Authority

Published: September 2006

Relevant finding: Advertisements were not deemed to be a useful source of detailed information for house-buyers in their decision-making processes for purchasing mortgage products, despite the data they are required by the regulator to incorporate. (Information provided by financial advisers was considered to be the most useful source of data upon which decisions were made, followed by leaflets and brochures supplied by the financial services companies offering the products.) This finding would appear to underline the fact that advertising by its very nature is aimed at raising awareness of products, rather than acting as a source of detailed information that consumers utilise when making purchasing decisions.

Download from: http://www.fsa.gov.uk/pubs/other/mortgage_review_outcomes.pdf

Licensing Conditions and Codes of Practice Focus Group Research

Conducted by: Corr Willbourn Research & Development, November 2006

Commissioned by: Gambling Commission

Published: November 2006

Relevant finding: Consumers tend to regard the inclusion of mandatory statements in advertisements as there to protect the advertiser rather than being of benefit to themselves.

Download from:

<http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Focus%20group%20results.pdf>

Although not advertising-specific, the following report may also be of interest:

Warning: Too much information can harm

Conducted and commissioned by: Department for Business, Enterprise & Regulatory Reform and National Consumer Council

Published: November 2007

Relevant finding: Many pieces of information were simply not having the impact on consumer behaviour they set out to achieve, whilst placing an undue administrative burden on businesses to ensure compliance.

Download from:

http://www.ncc.org.uk/nccpdf/poldocs/BRE-NCC_warning_too_much_information.pdf