Evidence

BIS Civil Sanctions Pilot

A consultation on the pilot operation of civil sanction powers for consumer law enforcement

Response from Citizens Advice and Citizens Advice Scotland

May 2010

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Introduction

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone, about their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims:

- to provide the advice people need for the problems they face; and
- to improve the policies and practices that affect people's lives.

The Citizens Advice service is a network of over 400 independent advice centres that provide free, impartial advice from more than 3,000 locations in England and Wales, including GPs' surgeries, hospitals, community centres, county courts and magistrates courts, and mobile services both in rural areas and to serve particular dispersed groups. Citizens Advice Bureaux in England and Wales assisted two million clients with over seven million problems in 2009/10, including over 139,000 relating to consumer goods and services.

Citizens Advice Scotland (CAS) is the umbrella organisation for Scotland's network of 83 Citizens Advice Bureau (CAB) offices, the largest advice network in Scotland. These bureaux deliver frontline advice services through more than 200 service points across the country, from the city centres of Glasgow and Edinburgh to the Highlands, Islands and rural Borders communities. Bureaux in Scotland dealt with a total of 976,989 issues in 2008/9, nearly 25,000 of which related to consumer goods and services.

We are pleased to have the opportunity to comment on the proposals for the civil sanctions powers for consumer law enforcement pilot and are pleased to be included in the monitoring group. We are keen to encourage the use of Regulatory, Enforcement and Sanctions (RES) Act powers and to see improved access to redress for consumers who suffer loss as a result of breaches of consumer protection legislation by businesses

Summary

Preferred option

We agree that option D is preferable.

The consultation offers four options: the status quo; collective actions for consumer compensation; a national roll-out of civil sanctions; or the pilot programme preferred by government and which may include the proposed Consumer Advocate's powers for collective redress. Citizens Advice and Citizens Advice Scotland agree that more needs to be done to ensure that consumers are compensated when they suffer a breach of consumer protection legislation, especially where there are no rights of redress and no provision of ADR. We believe all UK consumers should benefit from civil sanctions. In terms of the Consumer Advocate, we feel that the success of civil sanctions will greatly reduce the need for an Advocate. We agree therefore that the pilot should go ahead, although it is a great shame that a further two years will go by before all consumers can benefit from the protections included in the pilot.

The joint roles of enforcement and redress

We believe that enforcement and access to redress together provide the best levels of consumer protection. The range of RES Act enforcement options detailed in the consultation provide a real opportunity both to stop bad practice and to ensure that affected consumers are compensated.

We agree that business needs to know where it stands with the enforcement regime and that opportunities should be available to put things right when a breach of the law is identified. This should not, however, be at the expense of those consumers who suffer as a direct result of business failures to deliver on consumer protection law obligations. The proposals in the consultation go a long way to providing effective enforcement along with effective redress. However, the objectives relating to proportionate enforcement will mean that there will sometimes be breaches of consumer law that are not pursued by the enforcement community. We therefore remain convinced that a private right of redress is still needed under the Consumer Protection from Unfair Trading Regulations (CPRs).

Time lines

The pilot is planned as a two year project. We see that this time frame is necessary, not least because there are many opportunities for appeals contained within the proposals. Clearly business needs to see that the regime is fair, but it is important that enforcers are empowered to tackle the poor practices of all businesses. In addition, we hope that these powers will soon be available to all Trading Standards Services. A long time line for bringing in the powers for accessing redress contained within the pilot may seriously damage consumer confidence in the consumer protection it offers.

Scope

The proposal is for the pilot to enforce breaches of the Consumer Protection from Unfair Trading Regulations (CPRs) and the General Product Safety Regulations. We agree that both these sets of regulation are good choices for inclusion, not least because redress is often not available for consumers when these rules have been breached. However, we believe that the inclusion of two further pieces of legislation, the Consumer Credit Act 1974 and the Unfair Terms in Consumer Contract Regulations would allow the pilot to test the new powers in relation to the most significant areas of consumer detriment.

Choice of pilot areas

In terms of the selection of authorities to participate in the pilot, we urge BIS to ensure that there is a good geographical mix, including: Scotland, Wales, Northern Ireland and England; both large and small local authority areas; both urban and rural settings and centres where the RES Act's Principal Authorities function as well as those where no such relationships exist. This should allow the pilot to test potential problems across the board.

Funding arrangements

The consultation does not explain whether there is an intention to fund the pilot and, if there is such an intention, the sums involved. Whilst costs are recoverable for some of the sanctions, fines are paid to the Consolidation Fund (paragraph 14.6). We also believe that there are additional costs that would be incurred such as: resources for reporting to the proposed panel; setting up internal review mechanisms for challenged notices; and potentially assessing levels of consumer loss. We are concerned that local authority Trading Standards would need to ensure the pilot was cost neutral before they felt able to engage with it.

Response to specific questions

The Pilot Programme

Q1 Are you content with the proposals to trial the civil sanction powers in relation to the two pieces of legislation identified?

We agree that both the CPRs and the General Product Safety Regulations are good candidates for the pilot. Both have a wide application across markets and both are areas where the opportunity for restoration would fill gaps in the provision of redress for consumers. Please also note our response to question 2.

Q2 ***Are there any other areas of consumer legislation which should be covered in the Pilot Programme in addition to – or instead of – the two identified?***

We suggest the Consumer Credit Act 1974 as amended by the 2006 Act and the Unfair Terms in Consumer Contracts Regulations should also be included in the pilot programme. This would allow enforcement authorities in the pilot to tackle the root causes of many of the problems our clients experience. Credit is frequently part of consumer purchases and many poor customer service issues relate to the unfair terms imposed on consumers. Without these additions, we are concerned that the tools proposed in the pilot will not be able to tackle adequately the full range of problems experienced by consumers. For example:

> A CAB in Kent reported the misrepresentation of the financial benefits of undertaking home energy assessor training, for a 58 year old client who had used his redundancy pay and a loan for what he had thought would be an employment opportunity. He signed up to the course and paid a £1,000 deposit on a £7,735 loan which will amount to £11,936 with credit charges. The training providers claimed he would easily earn enough to pay the loan off, he would have enough training to earn the money in four months and that there was a shortage of qualified people in this sector. None of this has proved true. There are an estimated 12,000 qualified assessors and the required number is said to be 2,000.
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> A 76 year old client in Kent responded to an advert in a newspaper to win a bed and was contacted by a representative who came to her house and stayed for nearly 5 hours until she agreed to purchase a bed costing £3,749, which she was told would be specially made for her and delivered in three days. She paid a

deposit of £2,000 through her bank and installments were to be paid at £149.58 per month. She realised once the sales man had left that she could not afford it so she rang the company and stopped the delivery. The bureau commented on how worry and distress she was.

An east of Scotland CAB reported the case of a client who had been sold membership to an online shopping club over the telephone. He had accepted a four-week trial period at the cost of £1, and had been told that his annual subscription of £98 would be debited from his account a month later. However, the £98 was actually taken from the client's account a week earlier than he was expecting, which left him unable to pay his rent and in significant distress. He sought advice because when he contacted the shopping club to cancel his membership they refused. The CAB adviser noted that their terms and conditions were unclear and confusing, resulting in the club agreeing to refund his £98.

A west of Scotland CAB client claimed a refund when they found it took some three months for the suppliers to mend a sky dish. She was asked if she wanted the refund in cash or credited to her account, and she asked for the former. However, she was later told that she could only receive the refund in the form of an account credit. This is a clear example of the company imposing its own business terms at the expense of the client's sale of goods rights, as she should have been able to receive a cash refund. Because she had been expecting the promised refund, the company's failure to deliver the money had a direct negative impact on the client's financial situation, as she incurred a bank charge and struggled to pay other bills.

The proposed collective actions for financial services in the Finance Bill, detailed at paragraph 5.18 of this consultation, were not included in the Act. Therefore, the argument for excluding financial products altogether may no longer be relevant. Consumer credit is so frequently a feature of consumers' purchases that failing to include it would seem to restrict unnecessarily the pilot's scope. Because the OFT are to be in the pilot and they have specific expertise in consumer credit law and cannot enforce the General Product Safety Regulations, they could provide a lead role where CCA breaches are being tackled.

Unfair terms are often reported by CAB clients. Our consumer clients find that businesses which fail to deliver consumer protection rights rely on their own terms to argue against providing the redress to which consumers are entitled.

If the pilot includes unfair terms rules, consumer credit legislation, unfair commercial practices and product safety, the enforcers could tackle what we believe to be all the major causes of consumer detriment.

Q3 ***At two years, is the duration of the Pilot programme correct? Is there another period which should be used?***

If all the opportunities to appeal detailed in the consultation are taken forward, it is difficult to see how the pilot could last for less than the two years proposed and still be sure of including cases that have been completed. We therefore accept the proposal for the pilot to run for two years.

Q4 ***Is the membership of the Monitoring Group broadly right?***

We are pleased that representatives from the Citizens Advice Service are included in the proposed list for the pilot Monitoring Group. In order to ensure that the experiences of consumers and enforcers from across Great Britain are adequately represented, we seek confirmation from BIS that this will include representatives from both Citizens Advice and Citizens Advice Scotland'.

The views of all those in the list of stakeholders consulted, at Annex B, will need to be reflected by members of the monitoring group and the group members should ensure that they actively involve those organizations. In particular we believe that it would be essential to involve the Federation of Small Businesses and Which?, so that the pilot properly considers the full range of consumers and businesses affected by these sanctions.

Q5 ***Do you agree with the proposals set out in paragraphs 6.22 to 6.27 for how the use of civil sanctions should work alongside any power the Consumer Advocate is granted to take collective actions on behalf of consumers?***

We appreciate that the pilot will need to work well with any future powers for the Consumer Advocate. The details at paragraph 6.25 however are rather confusing, in that they appear to us to argue both for and against double jeopardy.

Then, at paragraph 6.26, the view appears to change. Where an undertaking is given, clearly there was a breach of legislation, yet a follow-on action by the Consumer Advocate is forbidden even where the enforcement authority fails to include steps to put things right for consumers within that undertaking. The paragraph says it is not expected that enforcers would fail to include consumer reparation but that is by no means a guarantee and seems to us to act as a block on restorative justice.

In our response to the consultation on the role and powers of the Consumer Advocate, we argued that undertakings should only be considered as outside the scope for a collective action if that undertaking specifically included redress for consumers who had already suffered detriment from the breach of law that triggered the undertaking.

Fixed monetary penalties

Q6 ***Following the issue of a "notice of intent" by the enforcer, we propose to allow the maximum 28 days for the submission of representations – including defences – and for making a discharge payment. Do you agree that 28 days is a reasonable period to allow?***

The 'notice of intent' is seen, at paragraph 8.1, as the start of a process available for minor cases. Enforcers are to seek compliance before this notice is used, including education, advice and warning the business. This implies that some time has already passed since the breach of the law was first brought to that business's attention. We are very concerned that the 28 and 56 day delays built into the enforcement exercise for minor breaches could just encourage delaying tactics. These timings for representations need to be balanced against the costs of the problem continuing to cause consumer detriment during this period.

Q7 ***We propose that the discharge payment should be set at two thirds of the Fixed Monetary Penalty. Do you agree that this is an appropriate discount for early payment?***

We agree there may be grounds for an early payment discount. There is a need to ensure that fairness is clearly built into the pilot. Also, encouraging early payment might well mean that local authorities might be saved the costs of preparing for a challenge if the business agrees to accept the claimed grounds for the penalty and pays at an early stage. We have no information, however, as to whether the savings made by early acceptance of the fine would mirror the reductions suggested.

Q8 ***We propose that representations (including defences) should be considered by a senior officer in the enforcement body. The senior officer should preferably be one who should have experience of working in the relevant area of regulation, but who has not had involvement in the initial decision to issue a notice of intent, and be senior to the officer who issued the notice. If that is difficult in practice, enforcers should consider having the case reviewed by a senior officer of another, equivalent, enforcement body that is participating in the pilot programme. Do you support that proposed provision?***

In terms of evidence on how this might work in practice, Citizens Advice and Citizens Advice Scotland are not in a position to comment. We think it is likely that the service of the notice would have been a proportionate response to the problem and the preliminary warnings to the business would have flushed out any likely defence. Assuming that to be the case, we agree that any defence needs to be considered and would expect that the officer who issues the notice would discuss it with a senior colleague, as well as with their legal department. It seems likely, however, that the availability of a senior officer with the right expertise but no involvement in the case will be dependant on the size of the Trading Standards Department concerned. Using another authority within the pilot for this review seems sensible, provided that finances for this mechanism are included within the pilot's funding structure. Without this, we suggest it might be difficult for the 'other' local authority service to justify conducting the review.

Q9 ***Following the issue of a final notice, we propose that the level of the early payment discount should be one third of the Fixed Monetary Penalty, paid within 28 days of receipt of the final notice. Do you consider this to be an appropriate discount and timescale for early payment?***

Please see our responses to the questions above in this section of the consultation.

In general, we support time to pay because the business might need to arrange for funds to be available, but remain concerned about the consumer detriment continuing.

We are unsure as to how the pilot might be planning to work within the environment of RES Act Principal Authorities, when that authority may have provided the advice to the business and may need to be consulted before any enforcement action is taken by another authority.

Q10 ***We propose to place a maximum limit on Fixed Monetary Penalties of £3,000. Do you consider this to be a reasonable maximum penalty?***

The consultation at paragraphs 8.16 to 8.18 explains that the usual maximum for the offences attracting the Fixed Monetary Penalty is £5,000 and that the enforcer will consider the nature, duration and severity of the infringement and the business' response. We cannot see how the consultation then reaches the conclusion that the top limit for this penalty should be only £3,000. We suggest the limit is set at £5,000 and that the Hampton ready enforcers are trusted to use their judgement.

The position in Scotland is somewhat complicated by the fact that summary offences are triable in both Justice of the Peace courts and sheriff courts, with the maximum fine available in each court being different. When setting the level of the penalty, we would therefore expect Scottish enforcers to have regard to the court in which it is most likely a prosecution would have been raised. Although in Scotland prosecutions would actually be raised by the Procurator Fiscal, we would expect enforcers to be able to use their knowledge and experience in determining the seriousness of the offence and therefore the likely court in which a prosecution would have been raised.

Q11 ***We propose that the time allowed for the payment of a Fixed Monetary Penalty should be 56 days from either:***
(a) the date of receipt of the Final Notice of penalty; or
(b) in cases where the business has decided to appeal to the tribunal against the Final Notice, the date of the decision by the tribunal.
In either case, the one third discount for early payment would apply for payment made within 28 days of either event.
Do you consider these arrangements to be reasonable?

We are concerned that delaying tactics might be used to avoid action for non payment for as long as possible. That might be followed with a decision to cease to trade, having gained from continuing the offence during this time. Consequently, the fine is not paid and consumers will not get redress. The ten per cent late payment charge would not be paid either.

And if the business appeals the Final Notice to a tribunal, more time passes before a decision. This might mean that some six months will have passed since the offence was spotted. So a 56 day payment period post the tribunal decision, with a one third discount if paid in the first 28 days, does seem very generous, compared to the considerably less generous timings and discounts consumers experience if they transgress public parking rules, for example.

Discretionary Requirements

Citizens Advice and Citizens Advice Scotland strongly support automatic redress for consumers where enforcers take action against a business for breaches of consumer protection law. We are also pleased that enforcers would be trusted with setting sensible levels of monetary penalty, time limits and restoration requirements. However, the discretionary powers proposed may have a fatal flaw. If the business refuses to compensate consumers and, as suggested at paragraph 9.4, enforcers cannot use these powers against a firm on more than one occasion for the same offence, then what sanction can the enforcer use? Enforcers, unlike regulators, have no backstop powers to withdraw a permission or licence to trade. This is particularly worrying in the consumer protection

field where, other than in those cases which fall within the jurisdiction of the Financial Ombudsman Service, there is unlikely to be an ombudsman to provide a financial incentive for good complaints process and redress provision.

We are also concerned about the lack of detail as to how enforcers would decide on the restorative measures and be 'sufficiently precise' to meet the aim at paragraph 9.20 to achieve restitution. We have noted the intention for guidance at paragraph 9.21 but it seems the enforcers in the pilot would be agreeing this, rather than receiving guidance from LBRO and OFT.

There is a well established model for obtaining restoration in the Financial Services and Markets Act (FSMA). Section 384 allows the FSA to require firms to organise and make restitution to affected consumers. The onus is on the business rather than the enforcer to sift through business records and to pay out to consumers. The FSA requirement could include the appointment of a relevant professional to do this, such as an accountant. We suggest the same model is used here.

Q12 ***We propose that the enforcers in the Pilot Programme should have access to all three of the "discretionary requirements", in order to provide flexible and appropriate response to regulatory breaches. Do you consider that this is the best approach to providing for proportionate regulation?***

Yes, we agree that all three discretionary requirements need to be available for the delivery of both enforcement and redress. Since the consultation envisages a similar series of reviews, representation, offers of third party undertakings and appeals to those for fixed monetary penalties, there are ample opportunities for business to resolve matters.

Q13 ***We propose that the period allowed for a business to make representations or raise a defence should be 28 days following the receipt of a "Notice of Intent" from the enforcer. Do you consider this to be a reasonable period?***

Please see our response to question 6 above.

Q14 ***We propose that businesses subject to a Notice of Intent should have 28 days from the date of receipt of the notice to have the opportunity to offer voluntary third party undertakings to make reparation. Do you agree that that is an appropriate period to allow?***

Yes, at this stage enforcers will have made the business aware of the consumer detriment and we assume that a third party undertaking would not need to include specific consumers by name, but rather what actions the firm will take to restore the losses experienced by all those consumers adversely affected. It is important, however, that the 28 days provision for making representations and the 28 days for third party undertakings run concurrently, to avoid undue delays in halting illegal practices.

Q15 ***We propose that representations (including defences) should be considered by a senior officer in the regulatory body. The senior officer should preferably be one who should have experience of working in the relevant area of regulation, but who has not had involvement in the initial decision to issue a notice of intent, and be senior to the officer who issued the notice. If that is difficult in practice, enforcers***

should consider having the case reviewed by a senior officer of another, equivalent, enforcement body that is participating in the Pilot Programme. Do you support that proposed advice to enforcers?

Please see our response to question 8.

Q16 ***We propose that there should be an early payment discount of one third for Variable Monetary Penalties paid within 28 days of receipt of the Final Notice. The same period of 28 days should be permitted for a business to make an appeal against the Final Notice. A late payment charge of 10% should be made for payments of Variable Monetary Penalties which are not made within 56 days of receipt of the final notice.***
Do you agree that these are reasonable periods to allow, and that the one third discount is appropriate?

Please see our responses to questions 7 and 11 above where the same question was asked about fixed monetary penalties.

Q17 ***We propose that there should be a cap of £10,000 on the punitive element of any Variable Monetary Penalty, and an additional penalty of up to 1% of UK turnover where consumers have suffered losses, but no proposals have been agreed for restoration.. Do you agree that these are the right levels for the maximum penalties to be imposed?***

No, we do not agree with these levels of maximum penalty. Penalties are not restricted to variable monetary penalties and need to include compliance and restoration.

It is important that business can see that civil sanctions are a preferable option to court action. Further, it is vitally important for the objective of restoration to be achieved both to supply consumer redress and to act as a deterrent to poor customer practices. We do not believe that this proposal achieves either of these aims. There seems to be a choice here for business between paying a fine of one percent of turnover, possibly plus the £10,000, or providing restoration to consumers and possibly having to pay a fine up to £10,000. If the detriment to consumers is worth more that one percent of UK turnover, we believe that the business is likely to pay the one per cent and make no offer to consumers. This leaves consumers without the restoration promised under the pilot.

The consultation expects the proposed Consumer Advocate's powers to fit with the pilot. However, the expectation in the Consumer Advocate consultation was that only one case a year would be taken to court. Whilst some others might be resolved, it seems very unlikely that the Advocate could tackle many of the businesses who refuse to engage with restoration.

To resolve this, we suggest that the percentage of turnover in the fine is increased substantially. For fuel companies, for example, the limit is currently 10 per cent where licence conditions are breached. In addition, money needs to be available for restoration of consumer losses, rather than being pooled with the fines. We have already suggested earlier in this response that this could be achieved using the FSMA model..

Q18 ***Do you agree that the Office of Fair Trading should be consulted on Variable Monetary Penalties where the compensatory element exceeds £500,000, and should approve the final amount?***

This may be a helpful measure, in order to reassure participating Trading Standards Services who are tackling businesses with a £50,000,000 UK turnover. Including this measure would create the obligation for the OFT to assess the case. We wondered whether there might also be a role for LBRO here and, in addition, LBRO could provide or help provide the guidance envisaged at paragraph 9.21 in relation to restoration assessment.

Stop Notices

The Stop Notice seems to us to provide the very prompt, no nonsense enforcement tool that we had originally hoped would be provided when the EU Injunctions Directive came into force as Stop Now Orders in the UK. It is designed to ensure an immediate halt to serious detriment across the vital areas of human health, the environment and consumers' financial interests. We see that only the financial interests of consumers would have been necessary in respect of the CPRs and the General Product Safety Regulations.

In general we think that the proposals for Stop Notices and for rights of appeal seem fair, but we are concerned about proposals for compensation. Whilst we agree generally with the proposals on the portion of time and breach that would attract potential compensation, we are concerned as to whether local authorities whose Trading Standards Service takes part in the pilot can afford these. We believe a large business could dissuade enforcers from using Stop Notices because a successful compensation claim could seriously harm that local authority's ability to deliver services to the local community. This could deter any Trading Standards Service from tackling major issues of harm where a national or international company would be the subject of the notice. It lacks an acceptable level of risk for the local community that pays for the enforcement, bearing in mind that the interests of consumers at the wider national or international level will be served but at no shared risk in terms of cost. We suggest that there needs to be a level of insurance for potential compensation claims and that this should be provided to all TSS in the pilot and be included as a cost in the impact assessment.

Q19 ***We do not propose that a Stop Notice should be suspended as a result of an appeal, but that the appeal should be heard as a priority. Do you agree that this is most practical approach, given the serious nature of the issues addressed by Stop Notices and the high threshold to be met by the enforcer before serving such a notice?***

Yes. We would be happy for the enforcers in the pilot to use our anonymised client evidence of any practice that might be serious enough to be considered relevant for use of a Stop Notice. We often see trends in business behaviour that snowball into a huge problem because they escaped enforcement action at an early stage.

> A CAB client in East Sussex was charged nearly £500 for 20 minutes parking in a space where there was no signage about clamping. When he returned to his car the clamping firm were loading it onto an unmarked tow truck. They demanded £140 for the clamp to be released, £160 for the tow truck and a further sum for what

was called ‘call out fees’. He was given two weeks to produce the money or his car would be destroyed. He did not have the money with him and had to get home without transport.

A single parent CAB client from Lancashire, with a monthly income of less that £600 plus tax credits sought advice when a high street building society would not stop calling her at work about two debts that she was only able to repay at a very low rate. She had explained that she was receiving debt advice from the CAB and that she needed her mobile phone to be available for contacts from her employer. But they continued to call her five or six times a day, contrary to the OFT debt collection guidelines and commiting a potentially aggressive unfair commercial practice.

A north of Scotland CAB client had entered into an agreement with a distance book selling retailer and ordered one or two books a month. He had received £400 of books which he had not ordered. When he contacted the retailer, they said this was a mistake and they would arrange collection of the books. A year later, the retailer had not collected the books and had passed the matter on to a debt collection agency which had started sending client demands for payment with threats of legal action.

Q20 ***Do you agree with the grounds for appeal against a decision to serve a Stop Notice (paragraph 10.12)? Are there any additional grounds for appeal that should be considered?***

In general we agree that the grounds detailed seem fair to all parties. We do, however, have a concern about the potential interpretations that could be applied to the word ‘unreasonable’ at (c) and (d). It will be important that this is not judged on the basis of cost to the business because these notices are for areas of serious detriment. We suggest the proposed regulations facilitating this pilot are drafted to ensure that, where a criminal practice will be costly to remedy, the financial argument is not sufficient on its own to make a successful appeal.

Q21 ***Do you agree with the grounds for appeal against a decision of the enforcer not to issue a completion certificate (paragraph 10.13)? Are there any additional grounds for appeal that should be considered?***

Yes, but please see our comments about the word ‘unreasonable’ above. We suggest that 10.13 (c) is amended to read: ‘that the decision is unfair and unreasonable’, rather than ‘unfair or unreasonable’.

Q22 ***Paragraphs 10.15 to 10.16 set out the proposed circumstances in which compensation should be paid by the enforcer to the business, and the losses which should be covered by the compensation scheme. Do you agree with the proposals? Are there any other circumstances or losses which should be covered in a compensation scheme?***

This is a difficult question to answer without the benefit of any details about what a compensation scheme might look like. As detailed in our introductory comments in this section, we do have concerns about local authorities’ Trading Standards Services being able to afford compensation, the effects on their local expenditure thereafter, and whether

this provision could dissuade enforcers from enforcing the law. We suggest, therefore, that the compensation scheme should be underwritten across the pilot.

We are pleased to note that compensation will not be payable where the appeal relies on a technical issue. If this were to be allowed, we would expect that businesses would find fault with the minutiae of the paperwork whilst ignoring the huge detriment that caused the enforcer to issue the Stop Notice. It could also seriously undermine consumer trust in and engagement with the pilot, and allowed for in the impact assessment costs.

Q23 ***Do you agree with the proposed grounds for appeals against the non- award or level of compensation (paragraphs 10.17 to 10.18)?***

It seems fair that a compensation scheme delivers on its own rules as to when compensation should be paid and at what level. As this is a pilot, there may need to be a maximum level of compensation written into the scheme to make the scheme insurable.

Please also note our comments about local authority funding in the rest of the responses to this section.

Enforcement Undertakings

This tool is attractive because it:

- can be put in place quickly and without the many appeals available through the other tools included in the pilot proposals;
- allows the business to put things right;
- offers the enforcer a degree of certainty, because the undertaking is formally agreed and monitored; and
- provides an opportunity for restoration and redress.

The less attractive features are that:

- whilst the actions the business can offer includes restoration, this is not a requirement. The enforcer may not be aware of the detriment consumers have suffered and thus may not insist on including a redress element or sufficient redress; and
- whilst the requirement for enforcers to publish details at paragraph 16.1 is very welcome indeed, there is no detail about this publicity. Consumers who suffered detriment will need to know that they should expect redress and learn that the practice the undertaking stops is illegal and should be challenged if they experience it in the future. We suggest that some element for business to notify relevant past customers be included.

Q24 ***In addition to the list at paragraph 11.4, are there any other actions which we should seek to make available in Enforcement Undertakings?***

We agree that the list needs to include stopping the offence, restoration and redress. The addition of ‘any other actions specified’ in the proposed regulations would cover any additional issues. There would need to be a firm time element for delivery of the actions in

the undertaking and some publicity of that undertaking so that consumers did not decide to start their own action in the courts when the redress was already part of the undertaking.

Q25 ***In addition to the list at paragraph 11.7, are there any other specific measures which we should seek to include in the amending Regulations regarding Enforcement Undertakings? Do you have any comments on the list provided above?***

We agree that the capacity for varying an undertaking is vital but do have concerns about what might happen if the business refused to vary something to include an element that was not foreseen when the undertaking was first given. Paragraph 11.6 specifies that the business cannot be convicted of the original offence at any time, nor can the enforcer use another administrative sanction, so there is no remaining challenge available. This eventuality may not be caught by the provision at (c) where the enforcer can act if the business provided inaccurate, misleading or incomplete information if the detriment had not come to light at that time. We suggest that the regulations are drafted so that the right of appeal against a refusal by the enforcer to provide a completion certificate, when the objective of the undertaking has been achieved, should be tightened so that the letter and the intention of the undertaking has to have been achieved.

Combination of sanctions

Q26 ***Do you agree that we should make specific provision to prohibit enforcers from serving different notices of intent for the same offence?***

We cannot think of a situation where different notices of intent would need to be served for the same offence and agree that prohibiting this fits with Macrory principles. On the general issue of using elements of sanction together, we strongly support the provision allowing for Stop Notices to be combined with other sanctions at paragraph 10.4 and see this as a vital element for achieving restorative justice and redress.

Enforcement

Citizens Advice and Citizens Advice Scotland support the objective indicated in the consultation of providing strong tools to require compliance by business and are pleased that some thought has been given to the restorative elements of the sanctions being delivered.

Q27 ***For monetary penalties, we propose to provide that unpaid sums should be recoverable as if on the order of a county court or the High Court. Do you agree that this is the most appropriate solution?***

Yes, in the case of England and Wales but in Scotland this would need to be via the sheriff courts.

Q28 ***For non-monetary Discretionary Requirements, we propose that the enforcer should first impose a non-compliance penalty. If the non-compliance penalty remains unpaid after 56 days from the date of receipt by the person of the notice of non-compliance penalty, the enforcer should have the option to prosecute for the***

original offence or to apply to a Civil Court for enforcement of the non-compliance penalty. Do you agree with that process?

Yes. At this stage there may be concerns about how long the illegal practice has continued. It would also be important to make provision here for any discretionary requirements in relation to restoration and redress. If the enforcer decides to take the route of prosecuting, these elements will not be gained. We are concerned that a business might decide not to comply with the notice because the restoration and redress elements cost more than the criminal fine is likely to be and to risk any element of possible imprisonment. Whilst it may be envisaged that the Consumer Advocate could then take up the case, as noted elsewhere in our response, it has only been envisaged that one such case would be taken to court per year. It seems likely that it would be necessary for the Advocate to go to court in the case of a business that was refusing to comply.

Q29 ***Do you agree that the maximum amount of the non-compliance penalty should be set at £2000, except in respect of Restoration Requirements and that a 50% discount should apply to payments made within 28 days?***

No. Firstly, £2,000 is unlikely to represent much of a penalty for a large company, such as a supermarket or a bank. Secondly, we see no reason why a discount should be available at this stage when the business has both refused to comply and failed to bother to appeal.

Q30 ***Do you agree that the non-compliance penalty for failure to respect a restoration requirement should be equal to the estimated cost to the business of complying with the restoration requirement, plus a 5% premium, but that the premium would not be payable in the event of payment within 28 days?***

Yes, but in practice gauging the sum may be difficult, time consuming and resource intensive without the facility to require the business to look at their own back book and/or provide relevant information, such as their customer records. As we have said above, the enforcer has no backstop of removing permission to trade, as is the case for the FSA.

Q31 ***In the event of non-compliance with enforcement undertakings, do you agree that the enforcer should have the choice of prosecution for the original offence, or imposition of a different civil sanction?***

Yes, otherwise it may be tempting for business to offer an enforcement undertaking with the intention of side stepping their legal obligations. Further, the enforcer will have committed resources to agreeing and monitoring that undertaking and, without the facility to take alternative action, would not be empowered to tackle the infringement.

Q32 ***For enforcement undertakings, should a person who provides misleading or inaccurate information to the enforcer be deemed to have not complied with the undertaking?***

Yes, but we think that it will be necessary to provide guidance on the level of what constitutes misleading or inaccurate. The cost of producing guidance needs to be included in the impact assessment.

Cost Recovery

Q33 ***Do you agree that an enforcer should be required to set out a breakdown of costs in a notice claiming costs?***

Yes, but as these details must be served when the sanction is imposed, we are unsure how costs that occur after the sanction is imposed will be met. We suggest that there may need to be a provision for secondary costs.

Q34 ***Do you agree that the payment of costs should be regarded as late after 56 days?***

Yes, especially in an environment where local authorities are likely to be short on funding and do not appear to be receiving separate funding to undertake the pilot.

Q35 ***Do you agree that a 5% late payment charge should be applied after 56 days?***

We see no reason why this should not be the case where a business is prevaricating.

Appeals

Q36 ***Do you consider that the General Regulatory Chamber Rules will suit the handling of appeals against civil sanctions imposed for offences by enforcers?***
Yes. Neither Citizens Advice nor Citizens Advice Scotland have any direct experience of using these new rules as yet but they appear to include the relevant elements to deal fairly and quickly with the appeals that may arise from the civil sanctions project. They include the necessary range of adjustments that might be granted to adjust or halt the notices and decisions of enforcers or to support those decisions.

Consultation stage impact assessment

Q37 ***Do you have comments or any additional material to contribute to the impact assessment at this stage?***

We believe that there will be a range of additional costs:

- Beyond the £25,000 per authority envisaged for training, new practices will need to be put in place in order to run the pilot alongside existing enforcement. This will create additional costs for enforcers. For example, the consultation requires the setting of guidance by the participating authorities and it seems likely there will be a need for one authority to review cases from another authority, in order to meet the required level of pre action checking.
- In addition, here are no costs detailed for the distribution of restorative monies that participating authorities might need to do. The Consumer Advocate consultation acknowledged that this might be expensive in any case taken by the Advocate and we would expect the same cost to be applicable to the pilot.
- A sum needs to be added to cover the costs for insurance for the pilot against the possibility of compensation claims, so as not to put the local authorities' budgets at risk.

- A sum also needs to be included for the costs of producing guidance materials across the pilot.

Q38 ***Do you have comments or any additional material to contribute to the Equalities Impact Assessment at this stage?***

No.

Should you have any queries regarding this response please contact Susan Marks susan.marks@citizensadvice.org.uk