



## OFT and LBRO consultation on the operation of the BIS Civil Sanctions Pilot

## Response from Citizens Advice and Citizens Advice Scotland

February 2011

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## Introduction

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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 the largest independent network of free advice centres in Europe, providing advice from over 3,000 outlets, including GPs' surgeries, hospitals, community centres, county courts and magistrates' courts, throughout Wales, England and Northern Ireland. In addition, over 80 bureaux provide advice through over 200 service points in Scotland.

Citizens Advice Scotland (CAS) is the umbrella organisation for Scotland's network of over 80 Citizens Advice Bureau (CAB) offices. 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.

Citizens Advice Bureaux in England and Wales assisted two million clients with over seven million problems in 2009/10. The Citizens Advice service in Scotland dealt with over 500,000 new issues in 2009/10, representing around 1,500 for every day of the year and a nine per cent increase from the year before.

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## General comments

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Citizens Advice and Citizens Advice Scotland are pleased to be involved in the monitoring group for the Civil Sanctions Pilot. In particular we share the enthusiasm of the participants for the opportunities the pilot represents for restorative justice. We believe that businesses who breach consumer protection law should compensate those consumers who suffer detriment as a result of that breach. This is particularly important in the case of the Consumer Protection from Unfair Trading Regulations (CPRs) where there is currently no private right to redress for breaches such as pressure selling.

We agree with the OFT that this document on the practical operation of the pilot should be capable of incorporating changes learned during the progress of the pilot. By the end of the pilot's term it should then represent robust guidance that will fit the needs of enforcers using the Regulatory Enforcement and Sanctions (RES) Act powers in the future.

Citizens Advice is also involved with BIS in looking at the powers needed by trading standards after the OFT has been abolished. We believe that the civil sanctions pilot will be valuable in informing that work, since the pilot tests what we hope will be future powers for all Trading Standards services.

The draft guidance on the enforcement approach is, in our view, very good. It appears to highlight areas where participating enforcers will need to be reassured that they are

maintaining their usual high levels of proportionality and transparency. The document would, however, benefit from the addition of some practical case examples, that those participating in the pilot could work through, as well as some further points of clarification. Our comments below suggest how this might be achieved and where matters are unclear.

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## Response to specific matters raised in the consultation

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We understand that the start of the Civil Sanctions pilot may be delayed. We are very concerned that this could result in businesses, enforcers and consumers losing confidence in the ability of the proposals for enforcement and restitution to tackle bad practice. Consumers could lose this important early opportunity to gain restoration when businesses trade illegally. There is, however, an issue that must first be resolved. How will the pivotal role envisaged in the pilot for OFT work alongside the delivery of a consumer landscape where the OFT ceases to exist and Trading Standards services take on the OFT enforcement role?

Our response to the consultation is made as if the OFT role remains and that Trading Standards Services who propose penalties in excess of £100,000 must first consult OFT.

We appreciate that the consultation allows comments only on the proposed enforcement approach and not on the specifics of the regulation enabling the pilot to proceed.

### How the sanctions will be enforced during the pilot

In our response to the BIS consultation about the civil sanction powers we suggested that the model for obtaining restoration in the Financial Services and Markets Act (FSMA) should be used, where onus is on the business to compensate all relevant customers and the enforcer can readily check this has happened. We are concerned that without such powers enforcers may find the job of ensuring restitution happens an unnecessarily onerous task. In the section on restitution, at paragraph 2.5, enforcers will expect traders to take: 'reasonable steps to correct the harm caused'. As the OFT does not currently have similar powers to the FSA under FSMA, we suggest that examples of how enforcers might check whether the agreed restitution has been delivered would be useful in the guidance, as this may be a new area for the enforcement community. For example, we think that any agreed undertaking given by the trader to carry out restoration could include consent to publish the agreed actions and who is responsible for this. OFT commonly require that they can publish the undertakings they agree and issue a press release in order to alert consumers. Examples in this guidance of how enforcers in this pilot have ensured restitution reaches all relevant consumers could be included as updates in the guidance.

We agree that it is useful to set out the scope of the pilot and to confirm, in the guidance, that the additional sanctions do not replace existing informal discussions and warnings and that the backstop power to prosecute remains.

### Pilot powers

This section might benefit from some case examples to illustrate the following:

- an enforcement undertaking that includes the specific actions listed in paragraph 3.6 that make use of the new powers;
- when a fixed monetary penalty might be used in such a way as to avoid this new sanction being used where existing tools such as advice would have been used prior to the Pilot, as envisaged at paragraph 3.7;
- how the various discretionary requirements might be used together; and
- situations where penalty fines are being calculated for a Variable Monetary Penalty. It is not clear in the guidance how the calculation of UK turnover will be made and what matters will be considered to decide whether the top end penalty sums are proportionate.

The 'use of sanctions' table is useful and could, perhaps, be added to if the pilot raises further issues.

### Restoration

On restoration requirements at paragraph 3.14 the examples of non- financial restorations includes finishing unfinished work or providing a replacement. The operation of the pilot needs to be clear about whether and, if so, what restoration choices should be offered to the affected consumers in what circumstances. For example, a consumer who has experienced aggressive sales practices may not be willing to have that trader revisit their home to complete work. It is also important that restoration is explained to consumers by the business as delivering an alternative to using civil law rights and sanctions and is not used by traders as a cheap alternative to delivering consumers' contractual rights. For example, where the consumer would have the choice of repair or replacement of faulty goods, the wording of an agreement for restoration needs to state that option clearly, so that if consumers want to pursue a claim themselves under sale of goods and/or services law, it is clear that this remains an option for them.

### Double jeopardy

At paragraph 3.20 the guidance seeks to avoid the double jeopardy of a trader being prosecuted for the same offence where that trader has paid or complied with the new sanctions. It is not clear whether repeating the same practice on another occasion would open the trader to prosecution. This may be particularly important where a fine and restoration notice have been agreed for an offence committed between certain dates and evidence subsequently comes to light about the same offence at different times. Consequently the additional consumer detriment experienced will not have been taken into account in the restoration. We believe it would be wrong for only some of those consumers affected to benefit from the restoration.

In addition, paragraph 3.19 at the last bullet says that Stop Notices can be combined with prosecution for the original offence, but provides no guidance on how a decision to prosecute might take account of complying or failing to comply with that Stop Notice. Further, paragraph 3.28 confirms that non-compliance with a Stop Notice is a criminal offence but does not confirm whether the same Stop Notice can be relied on for any future repetition of that offence once the original Stop Notice has been complied with. We are concerned that the trader could obtain a compliance certificate and then restart the old practice. We believe that clarification is needed as to whether a new Stop Order can be

issued later for the same offence. We are not certain whether paragraph 3.33 on repeat or multiple breaches makes this clear.

## Representations and appeals

In the Final Notice, at paragraph 4.6, a further bullet point is need for restoration where this is not captured in how and how much is to be paid, for example where the restitution is non-monetary, such as letters of apology.

## Fines

We have often seen bad practices that have been copied by other traders in that or another market. This appears to be recognised at paragraph 5.7 in the bullet on how widespread the practice is. We suggest this bullet should include an element of how readily this illegal practice might be taken up by other traders. It would obviously be unfair to fine one trader for practices that another type of trader might copy. We believe, however, that recognising the potential wider detriment and reflecting this in the fine is acceptable because it then acts as a deterrent.

## Consulting OFT

Paragraph 5.10 refers to the requirement to consult OFT on certain levels of fine but does not indicate how OFT will look at these cases. Further detail would help participating Trading Standards services to prepare for that discussion. As mentioned above, we also think that more detail is needed on the calculation of turnover in this paragraph.

## Consolidation Fund

Paragraph 5.15 says that monies collected using the pilot go into the Consolidation Fund. They cannot be retained or spent by the enforcer. It is not clear whether this money can be used to pay consumers, where a Variable Monetary Penalty includes a sum calculated as the necessary measure of restoration. We believe that payments by business under a Variable Monetary Penalty should be used to satisfy restoration payments, in preference to fines that will be paid into the Consolidation Fund, as consumers have no direct right to pursue these restoration payments.

If you have any queries in relation to this response please contact Susan Marks on 0207 833 7132 or at [susan.marks@citizensadvice.org.uk](mailto:susan.marks@citizensadvice.org.uk)

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