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CIVIL SANCTIONS PILOT

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

MARCH 2010

Consultation on the pilot operation of civil sanction powers for consumer law enforcers

In July 2009, the Government published its Consumer White Paper "A Better Deal for Consumers: Delivering Real Help Now and Change for the Future"[1]. The White Paper presented a programme of initiatives to help consumers through the downturn, and to reshape consumer regulation to make sure our regime remains one of the best in the world.

One of the proposals in the White Paper was to undertake a pilot programme for civil sanctions for consumer law enforcers. These civil sanctions would provide alternatives to criminal prosecutions in certain cases, and a possible route for compensation to be awarded to consumers who had lost out as a result of consumer law infringements.

It is proposed that the Pilot Programme should run in around ten Local Authority Trading Standards areas, and we would also hope that the Office of Fair Trading would participate. The Pilot Programme will enable best practice to be established in the use of the new sanctions, and will permit monitoring of the impact of the civil sanctions on business behaviour and on consumer compensation.

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Respond by: 28 May 2010

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This consultation is relevant to: consumer representative bodies; businesses; business representative bodies; consumer law enforcers.

[1] http://www.berr.gov.uk/files/file52072.pdf

Pilot operation of powers for consumer law enforcers: a consultation

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Foreword by Kevin Brennan MP

An important contributor to our quality of life in our communities is the availability of dependable goods and services from our local traders. It makes a big difference to the provision of essentials for our homes and families. Consumers need to have confidence in the value of purchases, and in the integrity of traders.

Much of consumer law is concerned with goods and services being fit for purpose: safe to use and supplied by a competent person who is dealing fairly with the consumer. Trading Standards does an excellent job of hunting down the rogues and scammers, and they bring prosecutions wherever necessary. More difficult is the question of how consumers can have their positions restored when they have suffered as a result of a rip-off merchant.

In our Consumer White Paper, published in July this year, we made a number of commitments that should ensure a greater level of compensation for consumer when things go wrong. For example, we proposed to appoint a Consumer Advocate and give that person the power to take collective actions on behalf of a group of consumers to obtain compensation for them. We are already consulting on these proposals. Another proposal was to mount a pilot programme using new powers for consumer law enforcers to impose civil sanctions as an alternative to criminal prosecution. This would enable enforcers to have a broader toolkit of powers, including powers to tackle instances where consumers had suffered loss as a result of things going wrong. The pilot programme is the subject of this consultation.

As ever, the first priority is on compliance, with traders following their legal duties to consumers. Second, where things have gone wrong, we need to see traders volunteering to put things right for consumers. Third, we need to see enforcers exercising the new powers in the pilot programme to encourage or enforce compensation for consumers where warranted. Last, the option of criminal prosecution should be reserved for the real rogue traders, who set out to mislead and defraud consumers. Consumers must be treated fairly and when consumers suffer loss because of a breach of the law by a trader, the consumers should have their position restored.

Fairness should be the foundation of our approach to consumers, and to traders too. These are difficult times for consumers, and for businesses of all sizes. That is why we want to introduce these powers on a pilot basis, to enable the monitoring and evaluation of how the powers are deployed, and to assess the impact on consumers and business alike before we take any steps to roll out the powers more widely.

A fundamental tenet of awarding the new powers is that they will only be exercisable by those enforcers who carry out their regulatory activities in a way which is transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed. Only those who are able to demonstrate that they work in accordance with the criteria will be part of the pilot programme.

The pilot programme will be important to enforcers, to traders, and to consumers. It will give traders the benefit of targeted enforcement in accordance with Hampton principles, with flexibility and proportionality in the regulatory response. Consumers in the pilot areas will have access to additional remedies for improved restoration of their position where things have gone wrong. And the enforcers will have a wider array of remedies available to address the range of consumer problems.

This consultation focuses on how we propose to conduct the pilot programme: which areas of consumer law are to be covered, and those enforcers who will take part in the pilot.

In consulting on these issues I am keen to hear the views of those affected. I hope that you will respond constructively to these proposals and I look forward to your comments.

Kevin Brennan
Minister for Further Education, Skills, Apprenticeships and Consumer Affairs

1 Executive summary

1.1 Consumers often do not get any compensation when their purchases of goods or services go wrong. For many breaches of consumer law, the main formal sanction is criminal prosecution of the trader by the enforcing authority. That benefits consumers generally, because it prevents the spread of instances of illegal trading, but those who are direct victims of the breach are not automatically compensated and sometimes criminal prosecution may be disproportionate for minor and inadvertent consumer law infringements. Consumers do have the right to pursue claims for compensation through the civil courts, but this course of action is likely to prove a major hurdle for many consumers, and disproportionate in some cases in relation to the losses incurred.

1.2 The quickest path for consumers to obtain compensation when things go wrong is through direct representation to the business concerned. Should the business not satisfactorily redress the harm, and if any enforcement activity also fails to provide compensation, then consumers must typically pursue remedies individually either through an Alternative Dispute Resolution (ADR) scheme if available or, as a last resort, though a civil court case. Evidence suggests that while going to court may be a viable option, many consumers find this too onerous in terms of money, time, and anxiety.

1.3 In 2008, the Government commissioned research from the Lincoln Law School[2] which suggested that there is a gap between successful enforcement action and adequate consumer compensation, and that representative actions by an independent publicly-funded figure could be a way to meet this gap alongside attempts to deliver compensation through public enforcement. On 2 December 2009, the Government launched a consultation on the role and powers of the Consumer Advocate[3]. One of the proposed powers for this new national consumer champion is to be able to take collective actions on behalf of a group of consumers to obtain compensation for them. The consultation closes on 5 March 2010. It is proposed that the Consumer Advocate should take collective actions only as a last resort and where other routes to obtain compensation, including public enforcement, have been tried or are judged inappropriate.

1.4 In the Government's Consumer White Paper "A Better Deal for Consumers: Delivering Real Help Now and Change for the Future"[4] it was announced that Government proposes to work with the Local Better Regulation Office to test new powers as provided in the Regulatory Enforcement and Sanctions Act 2008 (the "RES Act"), and apply them to areas of consumer law enforcement.

[2] http://www.berr.gov.uk/files/file51559.pdf
[3] http://www/berr.gov.uk/consultations/page53813.html
[4] http://www.berr.gov.uk/files/file52072.pdf

1.5 One of the features of the RES Act is to provide a framework for regulators (enforcers) to be granted access to a range of civil sanctions by the Secretary of State as an alternative to criminal prosecution. The sanctions will be available under a range of legislation, and apply to breaches of the relevant law where criminal sanctions exist in relation to underlying criminal offences. They provide a wider, more flexible, and proportionate range of sanctions by enforcers for breaches of the law, enabling action to be taken which more closely matches the offence and the harm suffered by victims of the breach.

1.6 In this consultation, we are not seeking views on the merits or otherwise of the RES Act or civil sanctions. This consultation relates solely to the implementation of the provisions contained in the Act through a Pilot Programme, and how that programme should be conducted.

1.7 Under the Pilot Programme it is proposed to introduce the civil sanctions that mirror those set out in the RES Act into existing consumer protection legislation and to make them available to enforcers by way of amending regulations rather than by way of an Order under the RES Act. Such regulations will be subject to the affirmative resolution procedure. This Pilot Programme will deliver on the Consumer White Paper commitment.

1.8 This consultation invites views on a range of issues connected with the proposed Pilot Programme, including the elements of consumer law which should be covered in the pilot. It is proposed that the pilot should cover The Consumer Protection from Unfair Trading Regulations 2008 (2008 No.1277) and the General Product Safety Regulations 2005 (2005 No.1803). These regulations are made under the European Communities Act 1972. Regulations made under that Act are not within the scope of the RES Act itself, so the implementation of the Pilot Programme will take the form of amending regulations made under the European Communities Act which mirror the provisions in part 3 of the RES Act.

1.9 This approach will mean that in future, when the civil sanctions in the RES Act are rolled out to all of the relevant consumer legislation, there can be consistency across the application of sanctions. If, in the light of this consultation, different areas of consumer law enforcement are preferred for the Pilot Programme, and these preferred areas are covered by the RES Act, the authorisation will be under the provisions of the RES Act.

1.10 The civil sanctions in the RES Act comprise:

(a) **Fixed Monetary Penalty** notices, which enable a regulator to impose a monetary penalty of a fixed amount;

(b) **Discretionary requirements**: this provision enables a regulator to impose one or more of the following, by giving a notice to the trader:

(i) a **Variable Monetary Penalty** determined by the regulator;

(ii) a requirement to take specified steps within a stated period to secure that an offence does not continue or recur (**compliance notice**); and

(iii) a requirement to take specified steps within a stated period to secure that the position is restored, so far as is possible, to what it would have been if no offence had been committed (**restoration notice**);

(c) **Stop notices**, which will prevent a business from carrying on an activity described in the notice until it has taken steps to come back into compliance; and

(d) **Enforcement undertakings**, which will enable a business, which a regulator reasonably suspects of having committed an offence, to give an undertaking to a regulator to take one or more corrective actions set out in the undertaking.

1.11 The RES Act provides that the civil sanction powers should be granted only to those regulators who carry out their regulatory activities in a way which is transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed.

1.12 Although the civil sanction powers under the Pilot Programme will not be granted under the RES Act, it is intended to follow the requirements in that Act in relation to grant of the powers and their application. Accordingly, the Local Better Regulation Office (LBRO) will – as envisaged in the Guidance to the RES Act – provide advice to the Secretary of State on those enforcers who meet the criteria.

1.13 While the new powers will benefit consumers and businesses alike, by providing for compensation in appropriate cases and a range of more proportionate sanctions to deal with non-compliance, it is considered appropriate that the powers should be trialled in a pilot programme. Application of the new powers will require the exercise of discretion by enforcers, and – in order to be truly successful – a forward-looking business community which is ready to seize the opportunity to take a lead in dealing with consumer problems. Those who take part in the pilot programme will lead the way in establishing best practice, ensuring value for money, and provide valuable information on which to base a subsequent roll-out of the powers more widely.

1.14 It is estimated that 10 Trading Standards Services across the country and the Office of Fair Trading will be eligible to participate in the pilot programme. We propose that pilot enforcers will have the powers to employ the type of civil sanctions set out in the RES Act as an alternative to current criminal and other sanctions available in respect of offences under:

(a) The Consumer Protection from Unfair Trading Regulations 2008 (2008 No.1277) and

(b) The General Product Safety Regulations 2005 (2005 No.1803).

1.15 These Regulations will need to be amended to provide additional powers to employ civil sanctions to eligible enforcers.

1.16 We consider that this will provide the most useful means of gaining experience of the application of civil sanctions in relevant cases.

1.17 We propose to designate an appeals body, to hear appeals against the civil sanctions imposed by enforcers as provided for under the RES Act. The target is to start the pilot programme in autumn 2010 or spring 2011, subject to completion of the necessary arrangements in agreement with the Tribunals Service.

2 How to respond to this consultation

Responses to this consultation must be received by 28 May 2010**.**

You can respond by email to:

CivilSanctions@bis.gsi.gov.uk

Or by letter or fax to:

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Fax: 020 7215 2837

Please state if you are responding as an individual or representing the views of an organisation. If responding on behalf of a company or an organisation, please make it clear who the organisation represents and, where applicable, how the views of the members were assembled.

Additional copies

This consultation paper is available electronically at http://www.bis.gov.uk/consultations along with the accompanying Economic and Equality Impact Assessments.

You may make copies of this document without seeking permission. Printed copies of the consultation document can be ordered on request from:

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Where possible, we will make other versions of this document available on request in Braille, other languages, large fonts and other formats.

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Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of

Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries

Questions about policy issues raised in this document can be addressed to:

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A list of those organisations and individuals involved in the consultation process is provided in Annex B. We would welcome suggestions of others who should be consulted.

If you have concerns about the way in which this consultation is being managed or conducted, please refer to Annex C which details the Code of Practice for Consultations and provides contact details for complaints.

3 The Problem

3.1 Successful transactions for goods and services depend heavily on consumer confidence in the trader, and in the quality of goods and services provided. Usually, the quality of goods and services is not in question: the concern arises when things go wrong.

3.2 What happens next is important. If goods or services are not up to standard, the consumer will expect replacement, refund, or other remedial action. The best traders will be eager to help consumers in this situation: they will be keen to ensure that the consumer's own position is not adversely affected by the problem transaction, and that obligations under consumer law are fully met thereby safeguarding their own reputation as lawful traders.

3.3 The last point is important: consumer law requires standards for traders, the goods and services they provide, and the way in which they are provided. For example, there are regulations aimed at ensuring the safety and standard of goods, and at restricting the availability of some goods to avoid under-age sales.

3.4 At present, enforcement action taken by authorities for breaches of consumer law does not normally include any element of redress for individual consumers. Criminal courts rarely award compensation. For individuals who have suffered as a consequence of a breach of consumer law, the amount of the loss, and the cost, time and trouble required to pursue a civil case for recovery through the courts, may all militate against taking civil action for recovery or compensation.

3.5 Government has two over-arching objectives. First, to secure compliance with the consumer law. This is best for traders and consumers alike, with traders able to demonstrate a clear commitment to high standards of service, and consumers having the confidence to purchase goods and services from them.

3.6 Second, Government seeks to encourage traders voluntarily to restore the position of consumers when a transaction goes wrong. This is best practice for traders generally, and very many will already voluntarily ensure that consumers obtain a satisfactory outcome if they encounter a problem as it is in their interests to maintain the goodwill of consumers. It is a matter of embedding this best practice more deeply and widely in the market.

4 Enforcement

4.1 In many instances, consumer law provides for criminal sanctions for breaches of the law. This may mean criminal prosecution by enforcers, and a criminal record for traders who are found guilty. As we have already mentioned, these prosecutions do not commonly provide any compensation for the consumer who has suffered loss as a result of the breach. For certain deliberate or persistent breaches of the law, a criminal sanction may be expected to be appropriate. But the enforcement response should be proportionate to the circumstances: the range of sanctions available to enforcers should enable that

proportionate response. The Office of Fair Trading and Trading Standards Services already make use of civil enforcement under Part 8 of the Enterprise Act 2003

4.2 Taking into account the Government's objectives, the range of responses available to enforcers should encourage compliance and – in the event of a breach – encourage voluntary restitution by traders. Enforcers should have the fallback of using their powers to provide the response which is appropriate in the circumstances. Traders - in relevant cases – should have the benefit of voluntarily restoring the position of consumers adversely affected by a consumer law breach. If that does not happen, they should be subjected to more appropriate sanctions applied by enforcers.

4.3 The Regulatory Enforcement and Sanctions Act 2008 (the "RES Act") provides a framework for the award of powers to enforcers to impose civil sanctions in areas where criminal sanctions exist at present. Government plans to allocate similar powers to a number of enforcers in respect of certain areas of consumer law. These new powers would sit alongside the powers that exist to impose criminal sanctions.

4.4 Having at their disposal a wider range of responses to breaches of consumer law, enforcers will need to be able to take informed decisions about how best to pursue individual cases where a breach of the law has been identified. Not all cases will be appropriate for civil sanctions: criminal sanctions will still be needed - and will remain available as now - for appropriate cases.

5 Policy options

5.1 The following options were considered when deciding the right approach to provide consumers with better access to routes to obtain compensation when things go wrong.

Option A: maintain the current arrangements

5.2 Option A maintains the status quo – the "do nothing" option. This would cause no disruption, and would not cause any change to the way in which businesses operate in the market, or the way in which consumer law is enforced. Enforcement would continue to rely primarily on criminal sanctions.

5.3 For individual consumers who have suffered detriment as a result of a business breaching the consumer law, compensation would usually need to be pursued through individual action in the civil courts. For business, enforcement would continue to mean prosecution, with the attendant time and costs burden for business and enforcers alike. The problem of lack of proportionate sanction would remain.

5.4 Costs for both business and enforcers would, therefore, remain higher than need be. Consumer detriment would also remain higher than under other options.

Option B: facilitate collective actions for consumers to claim compensation

5.5. This option would make it easier for consumers to claim compensation or for others to do so on their behalf by lowering the cost to an individual of taking forward court action. It would have a deterrent effect making competition fairer, especially with respect to those cases where a large numbers of consumers suffer similar detriment.

5.6. It would however increase the chances of a business facing both a public prosecution and a civil compensation claim for the same offence. It would raise compliance costs for business and do nothing to make public enforcement procedures more flexible and efficient or public enforcement sanctions more proportionate. Using public enforcement as the primary route to secure appropriate offers of compensation should allow far more cases to be resolved informally, and where this is impossible, sanctions are able to take account of the consumer detriment suffered as well as the gravity of the offence itself.

5.7 So Government is proposing a targeted development of collective actions through the special powers being proposed for the new Consumer Advocate. But new powers are also being proposed for public enforcers to help them to ensure that compensation is given. The Advocate will only act if the public enforcement route fails to deliver for consumers.

Option C: national roll-out of civil sanctions

5.8 Extending civil sanctions to all consumer law enforcers across the country, and making the sanctions apply to all areas of consumer law, would have the attraction of wide availability of civil sanctions, and the prospect of the most widespread benefits to consumers, business, and enforcers. But it would represent a significant step change without the benefit of best practice having been established, and without practical experience of operation on a pilot basis.

5.9 There would be a substantial delay, too, as a result of the need to ensure that all of the enforcing bodies were compliant with Hampton principles. Concerns would be likely to arise on the part of businesses that the civil sanctions might not be applied in all cases in a way which was “transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed” – the Hampton principles.

Option D: pilot programme

5.10 To run a Pilot Programme into the operation of the civil sanctions in a limited manner would develop best practice for enforcers and provide business with some experience of responding to the sanctions, offering compensation to consumers and minimising or reducing penalties through early payment,

5.11 The civil sanctions would be applied to a limited range of consumer law, and the powers would be allocated to only those enforcers who have demonstrated their compliance with Hampton principles.

5.12 Included in the framework for the pilot programme is a monitoring group, comprising Government and key stakeholders. The purpose of the group – discussed further below – is to ensure that the development of the operation of civil sanctions during the pilot programme can be subjected to ongoing evaluation, with comparative experience shared across participants in the programme as a means of fostering best practice. Business representatives will be an important part of the monitoring group, because businesses also need to learn from the experience of civil sanctions.

5.13 A pilot programme would have the disadvantage of not applying to all consumer law in all areas, but the benefit of the pilot is that when the time is right to roll out civil sanctions more widely; best practice for enforcement will have been established.

Preferred Option

5.14 The Government's preferred approach to providing consumers with better access to routes to obtain compensation when things go wrong is to deliver this through a more flexible approach to enforcement and to do this, first, through the introduction of a Pilot Programme – option D.

5.15 Without a Pilot Programme, there would be no opportunity to trial the use of the powers in respect of consumer law enforcement. The opportunity would not exist to establish best practice, and to fine-tune polices and processes on imposing sanctions and on securing consumer compensation. This could lead to the powers being under-used, to the detriment of business and consumers alike.

5.16 Consumer law enforcers and businesses need to be confident in the way the civil sanctions operate. In addition to the regulations which would be laid to implement the civil sanctions, enforcers need to consult on and implement Sanctions Guidance and Enforcement Policy, which are discussed in section 16 below. The Pilot Programme will allow monitoring and evaluation of the total package. Without that pilot operation of the new sanctions and the associated guidance and enforcement policy, there would be greater uncertainty and potential loss of effectiveness going straight to a national roll-out.

5.17 However, as was recognised in the Consumer White Paper[5], there may be circumstances that will make it difficult for enforcers to order compensation through the new sanctions. For that reason, the Government will also facilitate – to some extent – collective actions for consumers (option B). The detail of what is proposed for the Consumer Advocate is the subject of a separate consultation.

5.18 Different considerations apply to consumer claims in the financial services sector. The law in this sector is not publicly enforced n the same way as mainstream consumer law and the level and scale of consumer detriment is different. The Government therefore intends to make it possible, through the Financial Services Bill, for a representative to apply to the court to take forward a collective action for financial services claims[6]. whereas for claims that do not

[5] http://www.berr.gov.uk/files/file52072.pdf
[6] http://www.hm-treasury.gov.uk/fin_bill_ondex.htm

relate to financial services, the Government has proposed to limit the ability to take forward collective action claims to a new public figure – the Consumer Advocate – who can act only as a last resort for consumers. The detail of what is proposed for the Consumer Advocate is the subject of a separate consultation.[7]

6 The Pilot Programme

Participants in the Pilot Programme

6.15 Only those enforcers who carry out their regulatory activities in a way which is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed will be entitled to take part in the pilot programme. It is hoped that around ten Trading Standards Services and the Office of Fair Trading will be able to participate. LBRO is currently working to establish a system for assessing local authorities' compliance with the criteria. The Better Regulation Executive and the Office of Fair Trading are working together to demonstrate how the requirements of section 66 of the RES Act have been met.

Consumer legislation to be covered by the Pilot Programme

6.16 There is a wide range of consumer legislation which is enforced by Trading Standards Services and the Office of Fair Trading. For the Pilot Programme, we seek to extend powers to grant civil sanctions to supplement the criminal sanction penalty in specific legislation, rather than have the sanction applied to all relevant consumer legislation. The intention is to allow enforcers to become accustomed to the use of the powers, in line with the strategy for the Pilot Programme.

6.17 The consumer legislation which we propose to trial in the Pilot is:

(a) The Consumer Protection from Unfair Trading Regulations 2008[8]; and

(b) The General Product Safety Regulations 2005[9]

The Office of Fair Trading does not enforce the General Product Safety Regulations.

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?

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?

[7] http://www.berr.gov.uk/consultations/page53813.html
[8] SI 2008 No. 1277
[9] SI 2005 No. 1803

Duration of the Pilot Programme, and monitoring progress

6.18 It is planned that the Pilot Programme should last for two years, during which the progress of the Pilot will be overseen by a Monitoring Group comprising representatives of:

the Department for Business, Innovation and Skills (BIS);

the Department for Communities and Local Government (CLG);

The Office of Fair Trading

the Local Better Regulation Office (LBRO);

the Confederation of British Industry (CBI);

the British Retail Consortium (BRC);

the Local Authority Coordinators of Regulatory Services (LACORS)

the Trading Standards Institute (TSI)

Consumer Focus

Citizens Advice Bureaux

and, once appointed, the Consumer Advocate.

6.19 The objectives of the Monitoring Group will be to:

(i) monitor the impact of civil sanctions on the areas of consumer law included in the Pilot;

(ii) assess the operation of the civil sanctions against the guidance produced (see section 16, where guidance is explained);

(iii) draw the attention of enforcers participating in the Pilot to any emerging best practice;

(iv) make enforcers aware of any difficulties encountered with the application of the civil sanctions, including diverging or inconsistent practices which might cause concern to traders and/or consumers;

(v) develop a report and recommendations on the Pilot at the end of the Pilot Programme, for consideration by Ministers.

Relationship of the Pilot Programme to the work of the Consumer Advocate

6.20 As has already been explained the Pilot Programme was not the only initiative announced in the Consumer White Paper to deliver more compensation

to consumers when things go wrong. Another key proposal is the appointment of a new Consumer Advocate with the power to take collective actions through the courts to obtain compensation for groups of consumers when a business has broken consumer protection law. A parallel consultation on the role and powers of the Consumer Advocate was launched in December and closes on 5 March[10].

6.21 The Consumer Advocate is expected to be appointed in 2010. Before any new powers are granted the Advocate's role in respect of consumer compensation is expected to be informal with the Advocate promoting voluntary compensation offers from business when things go wrong. In addition the Advocate (as explained above) will be a member of the Monitoring Group for the Pilot Programme. This will provide the Advocate with experience and insight into another form of restorative justice, which will be useful to the Advocate when he/she considers using any future power that he/she is granted. It is worth noting that primary legislation would be needed to give the Advocate the new power proposed.

6.22 In order to provide clarity for business it is important to set out how the power proposed to be granted to the Consumer Advocate would work alongside the Civil Sanctions that will be used in the Pilot Programme, although this will all be subject to the outcome of the consultation on the Advocate's powers which is running in parallel to this consultation.

6.23 It should be explained at the outset that the proposals for the Consumer Advocate would not create any new rights for consumers. It would, rather, introduce a mechanism through which existing rights could be exercised. In addition, unlike the civil sanctions which could only be used where there has been a criminal offence, the power proposed for the Consumer Advocate could be used more widely. However, it has been proposed to limit when the Consumer Advocate could use any power he/she is granted to take a collective action on behalf of consumers. This is explained more in the separate consultation but essentially there is a significant limit on scope (i.e. there has to have been a civil or criminal breach of consumer protection law following public enforcement) and on the specific circumstances that surround a case (e.g. taking forward a case has to be in the public interest). Just as the proposals for the Consumer Advocate would not create any new rights for consumers, so any decisions not to allow the Consumer Advocate to bring a collective action on the basis of the application of certain civil sanctions would not prevent consumers from bringing their own actions for compensation.

6.24 The separate consultation also considered, in broad terms, when the Consumer Advocate should be able to take forward a collective action in the case where enforcers chose to make use of the civil sanctions provided in the RES Act, rather than seeking a criminal prosecution. It was proposed that the Consumer Advocate should be able to take a "follow-on" action to secure compensation for consumers in circumstances where civil sanctions have been applied but only to the extent that these have not already secured compensation for consumers.

[10] http://www.berr.gov.uk/consultations/page53813.html

6.25 Subject to the outcome of the parallel consultation, this is the broad approach proposed for the use of civil sanctions under the Pilot, i.e. where civil sanctions do not secure compensation for consumers then the Consumer Advocate would be able to use any future power he/she is granted to take forward a collective action case to seek to obtain compensation for consumers. This would be the case even in circumstances where a business has been made to pay a "compensatory" element of a Variable Monetary Penalty (see below for further details). Although it could be argued that under these circumstances a business may end up paying twice for the same offence we believe that this is the right approach, as the business will have been given plenty of opportunities to voluntarily offer compensation. In addition, if the case meets the other conditions to enable the Consumer Advocate to take it forward as a collective action then there is no reason to artificially restrict the Advocate when there would be no similar restriction on the right of an individual consumer to launch a civil case to obtain compensation where a business has been successfully prosecuted and suffered a criminal penalty.

6.26 However, we do propose that the acceptance of Enforcement Undertakings should not, in itself, be sufficient to enable a "follow-on" action by the Consumer Advocate even if these do not include the provision of compensation for consumers. This is because it would be wrong to discourage businesses from offering undertakings, particularly in circumstances where the business itself brings the offence to the attention of the enforcer. It is also not expected that enforcers would accept undertakings in cases where consumers had lost out unless the undertakings included reasonable steps to put things right for consumers. (Note: this exemption does not apply to third party undertakings offered as part of a discretionary requirement.)

6.27 It is worth noting that the parallel consultation proposes that before the Consumer Advocate could use any future power he/she is granted to take a collective action that he/she should consult relevant enforcers/regulators. This requirement should ensure the Advocate understands the full background to a case, including the decisions behind any civil sanctions that have been imposed.

The Pilot Programme

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

Q4 Is the membership of the Monitoring Group broadly right?

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?

7 The Civil Sanctions

7.1 The following sections discuss each of the civil sanctions in more detail, and invite comments and suggestions on points which need to be addressed.

8 Fixed Monetary Penalties

8.1 Fixed Monetary Penalties are financial penalties for relatively low, fixed, amounts. They are expected to be used for minor cases of non-compliance with regulatory requirements, but should not be used in those cases where education, advice or a warning would currently be given. Enforcers should still seek first to ensure compliance. In appropriate cases, however, these penalties will enable enforcers to enforce less serious offences without resorting to prosecution.

8.2 To avoid confusion, we should make it clear that the legislation will include provisions that no criminal proceedings can be brought against a person for a particular offence where:

- the person has been served with a notice of intent in relation to that particular offence and the time limit for making representations/discharging liability has not yet expired;

- the person has discharged their liability by paying the discharge payment in relation to the offence; or

- a Fixed Monetary Penalty has been imposed in relation to that offence.

However, if the offence caused a loss to consumers then the payment of a discharge payment or the payment of a Fixed Monetary Penalty would not prevent future action by the Consumer Advocate to use any power he/she is granted to take collective actions on behalf of consumers to obtain for them compensation for breaches of consumer protection law.

The process for imposing Fixed Monetary Penalties

Notice of intent served by the enforcer

8.3 Before imposing a fixed monetary penalty, the enforcer must first serve the business with a 'notice of intent' giving notification that it proposes to impose the penalty.

8.4 The notice of intent must include certain information including:

- the grounds for proposing to impose the penalty;
- the effect of a paying a 'discharge payment' (see below);
- the right to make the representations and objections against the proposed penalty;

- the circumstances in which the enforcer is not allowed to impose the fixed monetary penalty (for example where a business has a defence);
- the period of time a business has to make representations and objections, which may not exceed 28 days; and
- the period of time which liability for the fixed monetary penalty may be discharged, which may not exceed 28 days.

Rights of the business to make representations

8.5 The business will then have the right to:

(a) make written representations and objections to the enforcer about the proposal to impose the penalty;

(b) pay a discharge payment; or

(c) raise any defences to the proposed sanction.

8.6 The discharge payment, which may be made at this "notice of intent" stage of the process, is intended to encourage early compliance. It should reward a business for complying immediately with a sanction and reflect the procedural savings from an early admission of liability. **We propose that the discharge payment should be set at the level of two thirds of the Fixed Monetary Penalty.**

8.7 The RES Act sets a maximum of 28 days (starting from the date the notice was received) for making representations or paying an early discharge payment. While it possible to set a shorter time limit, **we propose that the full 28 days should be allowed for making representations or paying an early discharge payment.**

8.8 It is proposed that enforcers must have a system in place to ensure that representations made by businesses are considered fully and fairly. **We propose that the representations (including defences) made by businesses should be considered by a senior officer in the regulatory body, and preferably one who has not had involvement in the initial decision to issue a notice of intent. Where this proves difficult in practice, enforcers should consider referring the case to another, equivalent, enforcement body taking part in the Pilot Programme.**

Final notice by the enforcer

8.9 It is proposed that after the end of the period for making representations and objections, the enforcer must decide whether to impose the penalty (with or without modification). The enforcer must be satisfied beyond reasonable doubt (i.e. the criminal standard of proof) that an offence has been committed.

8.10 If the enforcer decides to impose a Fixed Monetary Penalty, the enforcer must serve a further notice, a 'final notice', which contains certain information as to the following:

- the grounds for imposing the Fixed Monetary Penalty;
- how payment may be made;
- the period within which it must be made and, where they exist, any early payment discounts or late payment penalties;
- rights of appeal; and
- the consequences of failing to pay the penalty.

8.11 Following service of the final notice, if the business chooses to pay straight away, it could benefit from an early payment discount. **We propose that the level of early payment discount should be one third of the Fixed Monetary Penalty within 28 days of the final notice.**

8.12 The RES Act provides for time limits to be established for payment of penalties, and for charges to be made or interest applied for late payment. **We propose that there should be:**

(a) a period of 56 days allowed for the payment of a Fixed Monetary Penalty from the date of receipt of the final notice (a one third discount applying for payment within 28 days);

(b) in the event that payment is not made within 56 days, a late penalty charge of 10% of the Fixed Monetary Penalty should be applied.

Right of appeal against the Final Notice

8.13 It is proposed that the business will have a right of appeal to a tribunal against the final notice. Provided the business notifies the enforcer of the decision to mount an appeal within 28 days of receipt of the final notice, the period of 56 days allowed for payment should run from the date of the decision by the tribunal, and should apply to the amount (if any) specified by the tribunal in its decision. If a monetary penalty is decided by the tribunal, the opportunity for a one third discount should still apply if payment is made within 28 days of the tribunal decision.

8.14 It follows that the business would have 28 days from the date of receipt of the Final Notice to pay the penalty with the benefit of a one third discount, or to make an appeal against the Final Notice. If neither option is exercised within 28 days, the business would have a further 28 days to pay the full amount of the penalty.

8.15 It is proposed that any enforcement of the penalty will be suspended until an appeal has been resolved.

The maximum level of the Fixed Monetary Penalties to be imposed

8.16 The RES Act provides for the levels of penalties to be prescribed, although it sets a maximum level for penalties imposed in relation to summary only and either-way offences[11]. For such offences, the penalty cannot exceed the maximum fine that would have been available if the case had been tried summarily (i.e. in the magistrates' courts): this is usually £5,000, but sometimes higher.

8.17 There is no cap for fines payable for indictable only offences, but it is unlikely that any such offence would ever be appropriate to be dealt with by means of a Fixed Monetary Penalty.

8.18 It is proposed that the amount of the penalty to be imposed will be a matter for the enforcer, taking into account the nature, duration, and severity of the infringement and any representations made by the business. **We propose to place a maximum limit on the Fixed Monetary Penalty, on the basis that the maximum will rarely be used, and that the maximum penalty should be set at £3000.**

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?

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?

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

[11] Summary offences are triable in a Magistrates court. Either-way offences may be tried either in the Magistrates court (summary trial) or in the Crown Court (trial on indictment). Magistrates may decide whether an either-way offence is too serious or too complex to hear in the Magistrates court. Indictable only offences may only be tried in the Crown Court. There are limits on sentences and fines that may be imposed in a Magistrates court but under an exceptional summary maximum a Magistrates court can issue a penalty of up to £50,000. The position in Scotland is different. Summary offences are triable in a justice of the peace court or the Sheriff court. Either-way offences and indictable only offences are triable in the Sheriff court or the High Court of Justiciary. In a justice of the peace court, the maximum penalty is £2,500. In the Sheriff court the maximum penalty is £10,000. The High Court of Justiciary can impose a fine of any amount.

senior officer of another, equivalent, enforcement body that is participating in the pilot programme. Do you support that proposed provision?

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?

Q10 We propose to place a maximum limit on Fixed Monetary Penalties of £3000. Do you consider this to be a reasonable maximum penalty?

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?

9 Discretionary requirements

9.1 Discretionary requirements are a range of sanctions that may be imposed either on their own or in combination with each other. They are expected to be used as a response to mid to high level examples of regulatory non-compliance. In appropriate cases, these penalties will enable enforcers to enforce mid to high level offences without resorting to prosecution.

9.2 The RES Act provides that regulators may be given powers to impose one or more of the following discretionary requirements:

- to pay a **variable monetary penalty** of an amount determined by the regulator;
- to take steps specified by the regulator, within a stated period, designed to secure that the offence does not continue or recur (a '**compliance requirement**'); and
- to take steps specified by the regulator, within a stated period, designed to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed (a '**restoration requirement**').

9.3 **It is proposed that the enforcers in the Pilot Programme should have powers to impose all three kinds of discretionary requirements.** This would

mean that a range of appropriate measures could be taken by the enforcers as an alternative to criminal prosecution.

9.4 If an enforcer is authorised to impose more than one of the requirements it will be for the enforcer to decide which sanction or combination of sanctions to use in a particular case. If different discretionary requirements are to be combined for the same offence, then they must be imposed simultaneously. Enforcers will be prohibited from imposing discretionary requirements on more than one occasion for the same act or offence;

The process for imposing discretionary requirements

Notice of intent served by the enforcer

9.5 It is proposed that before imposing a discretionary requirement, the enforcer must first serve the business with a "notice of intent" telling it what is proposed. The notice must include certain information including:

- the grounds for proposing to impose the requirement;
- the right to make the representations and objections and the period within which they may be made – the period must be at least 28 days beginning with the day the notice is received; and
- the circumstances in which the enforcer is not allowed to impose the requirement (for example where a business has a defence).

Rights of the business to make representations

9.6 It is proposed that the business should have the right to make written representations and objections to the enforcer about the proposal to impose the requirement. The business may also raise any defences to the proposed sanction.

9.7 After the end of the period for making representations and objections, the enforcer must decide whether to impose the requirement (with or without modification) or, where it has the power, to impose a different discretionary requirement. The enforcer must be satisfied beyond reasonable doubt (i.e. the criminal standard of proof) that an offence has been committed.

9.8 **We propose that the period allowed for making representations or raising a defence should be 28 days.**

9.9 It is proposed that the enforcer should have arrangements in place to review or monitor individual decisions. This will ensure that there is confidence in the regulatory system from the regulated community and the wider public. Such arrangements could, for example, provide that a senior officer within the enforcement authority reviews whether the case should progress to a final notice taking into account the representations and objections made by the business. To provide a degree of independence, that officer should not have been involved in the original decision to issue the notice of intent but should work or have

worked in the relevant area of regulation, and where possible, be more senior and experienced than the person imposing the notice.

9.10 We propose to make provision in the amending Regulations that the enforcer should have such arrangements in place.

Rights of the business to offer third party undertakings

9.11 The RES Act allows a business subject to a notice of intent to be able to offer action to benefit a third party affected by the offence, and for the regulator to take this into account when imposing the discretionary requirement. For example a business that has committed an offence could offer to pay compensation to the victims of the offence. The regulator could then reduce the level of a Variable Monetary Penalty to reflect this.

9.12 As with enforcement undertakings (see below), these third party undertakings are offered voluntarily by the business. It is for the regulator to decide whether to accept them. Amending Regulations will require the enforcers to take into account any third party undertakings when they are deciding the level of a Variable Monetary Penalty. But unlike enforcement undertakings, the third party undertakings are intended to mitigate, rather than replace, the sanction.

9.13 Voluntary undertakings represent an opportunity for businesses to make amends for infringements, to the benefit of consumers as well as their own interests. Consumers could benefit directly, receiving reparation for losses. Businesses could have any Variable Monetary Penalty mitigated.

9.14 **We propose that businesses which are subject to a notice of intent should have the opportunity to offer third party undertakings within 28 days of the receipt of the notice.**

Final notice by the enforcer

9.15 If the enforcer decides to impose a discretionary requirement, it must serve a further notice, a 'final notice', which contains the following information:

- the grounds for imposing the requirement;
- if a variable monetary penalty is imposed, how payment may be made, the period within which it must be made and, where they exist, any early payment discounts or late payment penalties;
- rights of appeal; and
- the consequences of failing to comply with the requirement.

In common with the Fixed Monetary Penalties, the enforcer must be satisfied beyond reasonable doubt (i.e. the criminal standard of proof) that an offence has been committed.

9.16 **We consider that there should be a discount for early payment of a Variable Monetary Penalty. We propose that the discount should be one third for payment within 28 days of receipt of the Final Notice. A late**

payment charge of 10% of the amount of the Variable Monetary Penalty should be made for non-payment within 56 days.

9.17 **Within 28 days of receipt of the Final Notice, the business may also choose whether to make an appeal against the final notice**.

The maximum level of the Variable Monetary Penalties to be imposed

9.18 The level of penalty will depend on the underlying offence. The RES Act sets a maximum level for variable monetary penalties only in respect of the more minor 'summary only' cases. The cap is the level of the maximum fine for the offence (which is usually £5,000 but sometimes higher).

9.19 For the more serious 'either way' and 'indictable only' cases, Variable Monetary Penalties are not subject to a cap in the RES Act.

9.20 We envisage that the most serious offences should still be the subject of criminal prosecution, but discretionary requirements can be used by enforcers to ensure that businesses compensate consumers who have suffered loss as a result of a breach of relevant consumer law. The aim is not so much to punish but rather to ensure that restitution occurs. An enforcer could, in this situation impose a Restoration Requirement if it has the necessary information to make such an order sufficiently precise. Failing that, a variable monetary penalty could be imposed to ensure that a business does not profit from breaking the law and refusing to offer compensation.

9.21 At the same time, any undertakings to compensate consumers – if accepted by the enforcer – would mitigate the level of any Variable Monetary Penalty. We propose therefore that the "punitive" element of any variable monetary penalty should be capped at a modest level (£10,000), but that the amount of the fine could be increased substantially in cases where the business had caused consumer loss by breaking the law and yet had refused to commit to an adequate scheme to offer compensation to such consumers. Enforcers would have to consider the practicality of such restitution, and of reasonable alternatives, and make reasonable estimates of the level of consumer loss suffered. Guidance will be established by those participating in the Pilot on how such discretion must be exercised.

9.22 On balance, **we propose that when including "compensatory elements", there should be a cap on Variable Monetary Penalties in respect of all offences which fall within the scope of the Pilot Programme, and that the cap should be set at:**

(a) £10,000 in respect of the punitive element of the penalty, and in addition

(b) 1% of the UK turnover of the business where the business has caused a loss to consumers, but has refused to commit to restitution

but where the compensatory element of the variable monetary penalty exceeds £500,000, the Office of Fair Trading must be consulted and approve any final amount.

9.23 In all cases, the penalties would be:

(a) capable of mitigation if third party undertakings were offered to compensate consumers;

(b) subject to a discount of one third in respect of the punitive element if paid within 28 days of receipt of the Final Notice; and

(c) proportionate and appropriate in all the circumstances, taking into account the seriousness of the offence.

Appeals against the Final Notice

9.24 It is proposed that if an appeal to the tribunal is made within 28 days of receipt of the Final Notice, any enforcement of the sanction will be suspended until the appeal has been resolved.

9.25 In the event of a Variable Monetary Penalty being payable following the appeal, the business should have the same right of a one third discount on the amount decided by the appeal tribunal if the penalty is paid within 28 days of the tribunal decision. Otherwise, the business will have up to 56 days from the date of the tribunal decision to pay the full amount of the penalty, and a 10% late payment charge will apply after that time.

Discretionary Requirements

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?

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?

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?

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?

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?

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?

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?

10 Stop notices

10.1 Stop notices under sections 46-49 of the RES Act require a business to cease an activity that is causing harm, or which presents a significant risk of causing serious harm until it has taken the steps set out in the notice. Where the business served with a notice is already carrying on the activity, the notice will prohibit the activity being carried on until the business has taken the steps specified in the notice.

10.2 Stop notices may also be used for preventative purposes. A stop notice may be imposed where an activity, which is likely to be carried on in the near future and will cause, or is likely to cause, a significant risk of serious harm.

10.3 A stop notice may only be served if the business is carrying on or is likely to carry on the activity and the regulator has the reasonable belief:

- that in carrying it on the business presents, or would be likely to present, a significant risk of serious harm to:
    - human health;
    - the environment (including the health of animals and plants); or
    - the financial interests of consumers; and

- that in carrying on the activity the business is, or is likely to be, committing an offence.

10.4 Stop notices can be combined with other sanctions (except for fixed monetary penalties) or indeed criminal prosecution for the original offence. For example, an enforcer could impose a stop notice to prevent any further harm from happening, but then pursue a criminal prosecution for the original offence that caused the harm.

The process for imposing stop notices

10.5 It is proposed that enforcers will be empowered to serve a stop notice on a business prohibiting it from carrying on a specified activity until steps are taken to either remove the risk of harm or fully return to compliance with the law.

10.6 Stop notices have the power to require a business to cease carrying out certain processes or even stop the business trading altogether. As such, the test of significant risk of serious harm is deliberately stringent to ensure that only the most serious cases are captured.

10.7 Given the high threshold for stop notices and the sorts of harm they are intended to address, there is no requirement to serve a business with a notice of intent before a stop notice can be imposed.

10.8 If the enforcer is satisfied, after the notice has been served, that the business has taken the steps set out in the notice, the enforcer must issue a certificate (a 'completion certificate').

10.9 The business may also apply for a completion certificate at any time. If a business makes such an application, the enforcer must make a decision as to whether to issue one within 14 days of the request. In practice, the enforcer should make this decision as soon as possible.

<u>Right of appeal against the stop notice</u>

10.10 It is proposed that a business will have a right of appeal against both the decision to impose a stop notice and a decision by the enforcer to refuse to issue a certificate of completion on request by the business.

10.11 Stop notices are designed to address serious harm, and there is a high threshold for the enforcer to meet in order to impose such a notice. **The stop notice would not be suspended on appeal unless the First-tier Tribunal directed otherwise**.

<u>Grounds for appeal</u>

10.12 Section 47 of the RES Act sets out some grounds for appeal against a decision to serve a stop notice as follows:

(a) that the decision was made on an error of fact;

(b) that the decision was wrong in law;

(c) that the decision was unreasonable;

(d) that any step specified in the notice is unreasonable;

(e) that the person has not committed the relevant offence and would not have committed it had the stop notice not been served;

(f) that the person would not, by reason of any defence, have been liable to be convicted of the relevant offence had the stop notice not been served.

10.13 Section 48 of the RES Act sets out some grounds for appeal against a decision of the regulator not to issue a completion certificate as follows:

(a) that the decision was based on an error of fact;

(b) that the decision was based on an error of law;

(c) that the decision was unfair or unreasonable.

10.14 **We propose that these grounds should be taken as the grounds for appeal in the relevant circumstances.**

Compensation

10.15 Under the RES Act enforcers who are empowered to serve Stop Notices must have in place a scheme to compensate businesses who suffer losses as a result of the service of the notice in certain prescribed cases and for prescribed descriptions of loss.

10.16 We propose that the cases where such compensation should be paid by the enforcer and the descriptions of associated loss should be as follows:

(a) where the service of the stop notice in its entirety has been overturned on appeal, other than those cases where the appeal has relied on a purely technical issue which does not bear directly on the purpose for which the stop notice was served. Compensation should be paid in respect of the losses directly and demonstrably attributable to the activities ceased as a result of the service of the notice for the period from the service of the notice to the date on which the stop notice became void;

(b) where one or more steps specified in the stop notice is overturned on appeal, other than those cases where the appeal has relied on a purely technical issue which does not bear directly on the purpose for which the stop notice was served. Compensation should be paid in respect of the losses directly and demonstrably attributable to the activities ceased as a result of compliance with the relevant step in the notice for the period from

the service of the notice to the date on which the relevant step in the stop notice became void;

(c) where the enforcer's refusal to issue a completion certificate has been overturned on appeal. Compensation should be paid in respect of the losses directly and demonstrably attributable to the activities ceased as a result of compliance with the relevant stop notice for the period from 14 days after the enforcer's receipt of a request to issue a completion certificate to the date on which the relevant stop notice became void;

Appeals on compensation

10.17 It is proposed that businesses will have a right of appeal against a decision by the enforcer not to award compensation, or the level of compensation awarded.

10.18 The grounds for appeal should be:

(a) that the criteria for compensation were met, but compensation was not paid;

(b) that the compensation paid did not meet the losses – as specified in the criteria – and for which the enforcer had been provided with evidence.

Enforcement

10.19 The RES Act provides in section 49 that a person served with a stop notice, and who does not comply with it, is guilty of an offence, and liable:

(a) on summary conviction, to a fine not exceeding £5,000 or imprisonment for a term not exceeding three months; or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both.

Stop Notices

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?

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?

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?

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?

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

11 Enforcement Undertakings

11.1 Under the RES Act enforcement undertakings are agreements proposed by a business and accepted by the enforcer for the business to undertake specific actions within a specified timeframe. They differ from the third party undertakings (which can be offered as part of a discretionary requirement) in that they take the place of a sanction, rather than mitigating the level of the sanction.

11.2 Enforcement undertakings will be proposed by the business but it is for the enforcer to decide whether to accept the undertaking. They are for use where the enforcer suspects that the business has committed a relevant offence, although in practice it may well be the business that brings this to the enforcer's attention.

The process for enforcement undertakings

11.3 It is proposed that an enforcer should be able to accept an undertaking from a business in any case where it has reasonable grounds to suspect that the business has committed an offence.

11.4 The action that a business can offer to undertake must be:

- action to secure that the offence does not continue or recur;
- action to secure that the position is restored, so far as possible, to what it would have been if the offence had not been committed;
- action, including paying money, to benefit any person affected by the offence; or
- any other actions specified in amending Regulations.

11.5 It is for the business to offer such action, perhaps after brief discussions with the enforcer. It is not anticipated that the business and the enforcer would enter protracted negotiations.

11.6 Once an undertaking has been accepted and the business complies with it, the business may not be convicted at any time for the original offence or have another administrative sanction imposed on it. In addition the Consumer Advocate would not, on the basis of such an undertaking, be able to use any power that he or she is granted to take forward a collective action case to obtain compensation for consumers in relation to the original offence. On completion of the undertaking, the enforcer should issue a completion certificate to the business to provide the business with assurance.

11.7 **We propose to set out further specific measures in amending Regulations regarding Enforcement Undertakings including the following:**

(a) *Variation of an undertaking*

An agreed undertaking should be capable of being amended by agreement between the enforcer and the business, at the request of either, without the need to enter into a new undertaking.

(b) *Monitoring of compliance*

An enforcer should monitor compliance with an undertaking, and provide such guidance or advice to a business as may be necessary to ensure compliance.

(c) *Compliance with an undertaking*

Where a business has provided inaccurate, misleading or incomplete information to an enforcer in making the undertaking or for the purposes of monitoring compliance with the undertaking, the business will be regarded as having failed to comply with the undertaking.

(d) In the event of non-compliance with an undertaking, the enforcer will be able to consider the imposition of criminal or civil sanctions.

(e) Where the business has only partly complied with an undertaking, the enforcer must take into account that part compliance in the imposition of any criminal or civil sanction.

(f) Where the business has failed to comply with an undertaking, the time limit for prosecution of any breach should be extended by the period equal to the period from the date of agreement of the undertaking to the date on which the enforcer notified the business of non-compliance.

<u>Appeals</u>

11.8 It is proposed that the business will have a right of appeal against a refusal by an enforcer to issue a completion certificate. The grounds for appeal should be that the enforcer has been unreasonable in refusing to provide a completion certificate, on the basis that the objective of the undertakings has been achieved.

11.9 Other than an appeal over an enforcer's refusal to issue a certificate, there is no right of appeal against Enforcement Undertakings as they will be volunteered by the business, rather than imposed by the enforcer.

Enforcement undertakings

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?

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?

12 Combination of sanctions

12.1 The RES Act provides that sanctions may be combined in some cases, and prohibits combination of sanctions in other cases:

Fixed Monetary Penalties cannot be combined with discretionary requirements or stop notices. This is because Fixed Monetary Penalties are intended to be used for lower level, more minor instances of non-compliance.

Discretionary requirements can be combined with each other for the same offence, although they must be imposed simultaneously,

Discretionary requirements can be combined with a stop notice.

Stop notices can be combined with a prosecution for the original offence.

12.2 The Act does not require that a regulator should be precluded from serving a business with a notice of intent to impose a Fixed Monetary Penalty at the same time as a notice of intent to impose a Discretionary Requirement, or while such a notice is outstanding and the Discretionary Requirement has not yet been imposed. However **we propose that enforcers should be prohibited from serving different notices of intent for the same offence.** Enforcers would still be able to combine some sanctions in the specific circumstances outlined above.

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?

13 Enforcement

13.1 It is proposed that the enforcement process will differ from sanction to sanction. The proposals are summarised below.

Enforcement of monetary penalties

13.2 Where a monetary penalty is imposed and the person fails to pay it, that person cannot be prosecuted for the original offence. This is for reasons of double jeopardy. The exact nature of the procedure will differ depending on whether the business has appealed to the tribunal against the sanction.

Procedure following an appeal

13.3 If the tribunal finds in the enforcer's favour, then unpaid sums will be recoverable as if they were payable under an order of a county court or the High Court in England and Wales[12] or the Sheriff Court in Scotland. (Similar provisions apply in Northern Ireland.) In practice, this means that the enforcer will skip the initial stages of registering a claim for the unpaid sum in the courts and will be able to proceed direct to enforcement.

Procedure where there is no appeal

13.4 The procedure will be slightly different where the business chooses not to appeal against the sanction and does not pay the penalty. The RES Act provides that the unpaid amount may be pursued either in the ordinary way through the civil courts, or for unpaid sums to be recoverable as if 'on the order of' a county court or the High Court. **We propose to provide that unpaid sums should be recoverable as if on the order of a Court**.

Enforcement of discretionary requirements

13.5 The way in which the Discretionary Requirements would be enforceable depends on whether the discretionary requirement (and any accompanying undertaking) includes a monetary penalty. There are three possible scenarios.

Only a Variable Monetary Penalty is imposed

13.6 In this instance, any unpaid Variable Monetary Penalty would be enforced through the Civil Courts.

A Variable Monetary Penalty plus a non-monetary discretionary requirement is imposed

13.7 Any unpaid Variable Monetary Penalty should be enforced through the civil courts. **We propose to make provision to allow the enforcer to impose a non-compliance penalty for any failure to comply with the non-monetary**

[12] See section 27 of the Tribunals, Courts and Enforcement Act 2007 and section 15 Employment Tribunals Act 1996

element of the discretionary requirement. We also propose to make any non-compliance penalty capable of being the subject of an appeal to the tribunal.

A non-monetary Discretionary Requirement is imposed without a Variable Monetary Penalty

13.8 The RES Act provides options for how to deal with non-compliance with a non-monetary Discretionary Requirement:

(a) the person could be prosecuted for the original offence, and the time limits for prosecution of the original offence could be extended;

(b) a non-compliance penalty could be imposed by the regulator.

13.9 **We propose that the enforcer should first impose a non-compliance penalty. If the penalty remains unpaid after 56 days from the date of receipt by the person of the notice of non-compliance penalty, we propose the introduction of an option to prosecute for the original offence or to impose a further non-compliance penalty. We propose that the time limits for prosecution for the original offence should be extended by the period equal to the time allowed for compliance with the initial discretionary requirement plus three months. Action to enforce the non-compliance penalty should be suspended in the event that the imposition of the penalty is the subject of an appeal to the tribunal. The extension of time limits proposed here are subject to obtaining the necessary consents.**

Calculation of non-compliance penalty

13.10 The calculation of the amount of the non-compliance penalty should be at the discretion of the enforcer, subject to the criteria proposed as follows:

(a) the maximum amount of the non-compliance penalty should normally be set at £2000;

(b) in a case where a Restoration Requirement has been imposed, the amount of the non-compliance penalty should be calculated with reference to the estimated cost for the business of complying with the Restoration Requirement. The penalty must ensure that the business does not profit from its non-compliance and include a premium of 5%;

(c) any non-compliance penalty paid with 28 days of receipt of the notice should normally attract a 50% discount; in the case of a Restoration Requirement the discount should be equal to the level of the premium;

(d) any non-compliance penalty which remains unpaid after 56 days may render the person liable to prosecution for the original offence, or for a further and additional non-compliance penalty – calculated as above – to be imposed;

(e) in the event of an appeal to the tribunal against the imposition of a non-compliance penalty, that appeal should be made within 28 days of receipt of the notice of non-compliance penalty. The time allowed for payment of a non-compliance penalty (if required) after the appeal (including the opportunity to benefit from early payment discounts within 28 days) should run from the date of the tribunal decision.

13.11 Ultimately, non-compliance penalties should be recoverable through the civil courts.

Enforcement of Stop Notices

13.12 As discussed at paragraph 9.11 above, given the serious nature of stop notices and the harm or potential harm they are intended to address, non-compliance will in its own right be a criminal offence, which we propose should be triable either way. Where tried summarily (i.e. in the magistrates' courts) the maximum fine would be £5,000 or the person could be liable to up to 3 months imprisonment. Conviction on indictment could lead to imprisonment for a term not exceeding two years, or an unlimited fine, or both.

Enforcement of Enforcement Undertakings

13.13 As discussed at paragraph 10.6 above, should a person fail to comply with the terms of an undertaking the enforcer should have the choice of whether to impose a different civil sanction or to pursue a criminal prosecution.

13.14 We propose to make a provision that if the business provides misleading or inaccurate information as part of the process of agreeing the undertaking, then the business could be deemed to have not complied with the undertaking and the enforcer would then be free to impose a sanction or pursue a criminal prosecution.

Enforcement

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?

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?

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?

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?

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?

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?

14 Cost recovery

14.1 The RES Act allows regulators to be given a power to recover certain costs when imposing a sanction. The power is limited to cases where a regulator is imposing a discretionary requirement or a stop notice. The costs that can be recovered will include investigation costs, administration costs and the cost of obtaining legal and other expert advice.

14.2 Enforcers will not be able to recover such costs in the case of fixed monetary penalties or enforcement undertakings. This is because the costs associated with such sanctions are expected to be much lower.

14.3 The Act requires the regulator to provide the person with a notice specifying the amount of costs required to be paid. This notice should be served at the same time as the sanction is imposed, unless there are practical reasons that prevent this. **We propose to adopt this power and procedure and to require that the costs notice should set out a detailed breakdown of the costs.**

14.4 The person should have the opportunity to challenge the costs, and will have a right of appeal to the tribunal against both the decision to impose the costs notice and the level of costs claimed.

14.5 **We propose that payment of costs should be regarded as late where the payment is not made within 56 days of receipt of the notice of costs.** It is not considered appropriate to provide for an early payment discount because the costs should reflect the actual costs incurred. **We consider that late payment should attract a charge, and that the charge should be set at 5% of the amount claimed by the enforcer.**

14.6 As with unpaid monetary penalties, unpaid cost notices should be enforced through the civil courts. Costs are designed to be recovered by the enforcer unlike penalties, where the payments are made to the Consolidated Fund.

Cost recovery

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

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

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

15 Appeals

15.1 We intend that all appeals should be made to the General Regulatory Chamber of the First-tier Tribunal established under the Tribunals, Courts and Enforcement Act 2007. The General Regulatory Chamber Rules can be found at http://www.opsi.gov.uk/si/si2009/uksi_20091976_en_1

15.2 The grounds for appeal vary by sanction, and are set out above under each relevant section.

15.3 In the event of an appeal, we propose that the enforcer will be required to satisfy the tribunal that:

(a) a sanction has been correctly applied, and is appropriate to the breach committed;

(b) a refusal to grant a completion certificate was properly taken, having regard to the evidence produced;

(c) that a non-compliance penalty was warranted, and of an amount justified in all the circumstances of the case;

(d) that a claim for costs was justified by the costs of preparing and implementing the sanction.

Powers of the tribunal

15.4 The tribunal should be empowered to deal with a range of issues which might form the substance of appeals, and to ensure that cases are dealt with in the interest of justice and minimising parties' costs.

15.5 In order to provide that appropriate response, we propose that the tribunal should be empowered to:

(a) withdraw the notice, requirement, penalty or decision imposed by the enforcer;

(b) confirm the notice, requirement, penalty or decision;

(c) vary the notice, requirement, penalty or decision by substituting the decision of the tribunal for that of the enforcer. In this case, the tribunal would have access to the same range of sanctions as the enforcer;

(d) remit the decision to the enforcer for further consideration;

(e) award costs.

Onward appeal from the tribunal

15.6 Any party to a case has a right of appeal to the Upper Tribunal on any point of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal.

Fees for appeals

15.7 The Tribunals, Courts and Enforcement Act 2007 provides powers to charge fees for appeals. We propose to make provision for fees to be payable by an unsuccessful appellant. When making proposals to charge fees, the Lord Chancellor is required to consult the Senior President of Tribunals and the Administrative Justice and Tribunals Council. The proposal would then be subject to secondary legislation, debated and agreed by both Houses of Parliament.

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?

16 Publication of enforcement action

16.1 Enforcers will be required to publish the details of any enforcement action taken where a civil sanction is imposed or, for discretionary requirements, where an undertaking is accepted. This will help to ensure transparency in the sanctioning process.

16.2 The requirement will exclude:

(a) cases where the sanctions have been overturned on appeal; and

(b) cases where publication of details of an individual would be prejudicial to public order or the personal safety of the individual.

17 Guidance

Sanctions Guidance

17.1 Enforcers will be required to publish guidance about the new sanctions ('Sanctions Guidance') and how they will enforce offences (an 'Enforcement Policy').

17.2 The Sanctions Guidance will contain information on the new civil sanctions and how they should be used. This will include information about the circumstances in which a civil sanction may be imposed or undertakings accepted. It should also detail:

- where a sanction may not be imposed (i.e. where a defence may be accepted);
- how a penalty should be calculated including the matters that may be factored into the calculation (e.g. discounts for voluntary reporting of non-compliance); and
- a business's opportunity to make representations or objections against the action and their rights of appeal to the tribunal.

17.3 Prior to issuing or revising guidance, an enforcer must consult with those people or bodies specified in the order, such as business and consumer representatives. The enforcer must revise the guidance where appropriate.

17.4 The enforcer must have regard to the guidance or revised guidance in exercising its functions.

Enforcement Policy

17.5 Enforcers will also be required to publish details of their Enforcement Policy, following consultation on a draft of the policy.

17.6 An Enforcement Policy is a broader outline of an enforcer's powers of enforcement and an indication of how it will exercise such powers. For each offence, the Enforcement Policy must set out the relevant sanctions to which a person may be liable. The Enforcement Policy must also set out the action which the enforcer may take to enforce the offence

17.7 Separate consultations will be undertaken on Sanctions Guidance and Enforcement Policy later this year.

18 Next Steps

18.1 In addition to the consultations by participants in the Pilot Programme later this year on Sanctions Guidance and Enforcement Policy, the Government will

produce a response to this consultation before autumn 2010. Secondary legislation to implement any new arrangements arising from this consultation will be taken forward when Parliamentary time permits.

Annex A: List of Consultation 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?

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?

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

Q4 Is the membership of the Monitoring Group broadly right?

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?

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?

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?

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?

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?

Q10 We propose to place a maximum limit on Fixed Monetary Penalties of £3000. Do you consider this to be a reasonable maximum penalty?

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?

Discretionary Requirements

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?

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?

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?

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?

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?

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?

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?

Stop Notices

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?

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?

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?

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?

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

Enforcement undertakings

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?

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?

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?

Enforcement

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?

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?

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?

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?

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?

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?

Cost recovery

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

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

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

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?

Consultation stage impact assessment

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

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

Annex B: List of Stakeholders Consulted

Age Concern
Association of Chief Trading Standards Officers
British Chamber of Commerce
British Retail Consortium (BRC)
Confederation of British Industry (CBI)
Citizens Advice
Citizens Advice Scotland
Consumer Focus
Consumer Focus Wales
Consumer Focus Scotland
Convention of Scottish Local Authorities (COSLA)
Equality and Human Rights Commission
Federation of Small Business
Financial Ombudsman Service
Financial Services Authority
Forum for Private Business
Help the Aged
Institute of Directors
Local Authorities Coordinators of Regulatory Services (LACORS)
Law Society
Law Society of Scotland
Northern Ireland Consumer Council
Office of Fair Trading (OFT)
Royal Association for Disability Rights
Society of Chief Officers of Trading Standards in Scotland (SCOTSS)
Trading Standards Institute (TSI)
Which?

Annex C: Consultation Code of Practice

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Tunde Idowu,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Tunde on 020 7215 0412
or e-mail to: Babatunde.Idowu@bis.gsi.gov.uk

Annex D: Consultation stage impact assessment

This annex comprises the consultation stage impact assessment.

Consultation stage impact assessment

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

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

Summary: Intervention & Options

Department /Agency: BIS	Title: Impact Assessment of the pilot operation of civil sanction powers for consumer law enforcers	
Stage: Consultation	**Version:** 1	**Date:** 21 September 2009
Related Publications: http://www.berr.gov.uk/files/file52072.pdf and http://www.berr.gov.uk/files/file52074.pdf		

Available to view or download at:
http://www.berr.gsi.gov.uk/files/file54671.pdf

Contact for enquiries: Ed Blades **Telephone:** 0207 215 2121

What is the problem under consideration? Why is government intervention necessary?

Enforcement regimes can be ineffective, and over-reliant on criminal prosecution. They lack flexibility, and can result in disproportionate response. These findings by Professor Richard Macrory in his report *Regulatory Justice: Making Sanctions Effective* were accepted by Government and reflected in the Regulatory Enforcement and Sanctions Act 2008 ("RES Act").

A market failure exists whereby the current private benefit of prosecutions is less then the public benefit. Introducing compensation can align the private and public benefit

What are the policy objectives and the intended effects?

The programme of introduction of the civil sanctions powers from the RES Act for certain consumer regulations and on a pilot basis provides a means of implementing the wider range of sanctions for specific breaches of consumer law, while providing a means of enforcers and business to learn from the process. It will provide evidence to evaluate whether civil sanctions represent proportionate and effective responses to breaches of consumer law. This also takes forward a Consumer White Paper initiative.

What policy options have been considered? Please justify any preferred option.

- Option A – Maintain current arrangements
- Option B – Facilitate collective actions for consumers to claim compensation
- Option C – National roll-out of civil sanctions
- Option D – Pilot programme of civil sanctions

Option D is the government's preferred option as it is best for consumers and business, but elements of Option B are also being pursued through the Government's proposed powers for the new Consumer Advocate.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Operation of the two year pilot programme will be monitored by a Government and stakeholder group throughout the period, and will be reviewed by the group at the end of the programme, before decisions are taken on any wider application of the civil sanctions.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Date: 21/09/2009

Summary: Analysis & Evidence

Policy Option: 2	Description: **Introducing new UK regulations and amending the existing UK regulatory regime.**

COSTS

ANNUAL COSTS	Description and scale of **key monetised costs** by 'main affected groups'
One-off Yr	One-off training costs given to 10 Trading Standard agencies at £25,000 each. This amounts to £250k in training costs.
£395k	Also a one-off start up cost of £145k for setting up an appeal tribunal.
Average Annual Cost (excluding one-off)	
£0	**Total Cost** (PV) **£ 395k**

Other **key non-monetised costs** by 'main affected groups' There will be costs associated with providing a right of appeal.

BENEFITS

ANNUAL BENEFITS	Description and scale of **key monetised benefits** by 'main affected groups'
One-off Yr	Annual benefits are due to the cost reduction from lower cost of imposing administrative fines compared with criminal prosecutions.
£ 0	
Average Annual Benefit	
£73k to £117k	**Total Benefit** (PV) **£ 142.7k to £229k**

Other **key non-monetised benefits** by 'main affected groups'

Note benefits taken only over 2 years of pilot study. Enforcers and business should benefit from the savings in time and – in the case of business – avoiding criminal prosecution in appropriate cases. Regulatory compliance should be improved, and consumers should benefit from that higher level of compliance.

Key Assumptions/Sensitivities/Risks The key risk is that enforcers will not feel able to use the civil sanctions at the level anticipated, and that the benefits will be reduced as a result. Also, appeal costs are assumed to be similar to at present.

Price Base	Time Period	**Net Benefit Range (NPV) £-166k to £-252k**	**NET BENEFIT** (NPV Best estimate) £-209k

What is the geographic coverage of the policy/option?	Pilot areas
On what date will the policy be implemented?	2010/2011
Which organisation(s) will enforce the policy?	Consumer law
What is the total annual cost of enforcement for these	£ 0.00
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	N/A
What is the value of the proposed offsetting measure per year?	£ 0
What is the value of changes in greenhouse gas emissions?	£ 0
Will the proposal have a significant impact on competition?	No

Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase	£ 0	Decrease	£ 0	**Net** **£** 0

Key:	**Annual costs and benefits: Constant Prices**		**(Net) Present Value**

Evidence Base (for summary sheets)

A. Strategic overview

1 The proposed programme comprises pilots of civil sanctions for a number of enforcers of consumer law. It is hoped that around ten Trading Standards Services and the Office of Fair Trading will be able to participate in the pilots. The pilots will focus on delivering consumer compensation through voluntary compensation offers by business when breaches of consumer law are discovered.

2 The civil sanctions will relate to breaches of consumer regulations, and will stand alongside the existing criminal sanctions which are provided for such breaches. The pilot programme is planned to run for a period of two years. During that period, a Government and stakeholder group will monitor progress on the application of civil sanctions, and the experience of both enforcers and business.

3 At the end of the period, the group will complete a report, which will inform decisions on next steps, including the possible extension of the powers in scope and breadth of application in consumer law, and the possible allocation of the powers more widely in the consumer law enforcement community.

B. The issue

1 Research from the Office of Fair Trading produced estimates of 26.5 million problems with goods or services purchased in the year to April 2008. The associated financial detriment to consumers was estimated at £6.6 billion.

2 Research commissioned by the Department from the Lincoln Law School[13] has shown that consumers generally benefit from public enforcement through prevention of the spread of malpractice, but consumers seldom obtain compensation. Criminal courts rarely award compensation, and victims are obliged to pursue separate actions through the civil courts. Often, they do not do so, perhaps because of the perceived complexity or cost of the process.

C. Objectives

1 The programme will provide an increased range of sanctions to underpin the Government's policy objective that enforcement of consumer regulation should focus first on compliance, then compensation for consumers, and only resort to prosecution in the more serious cases.

2 The civil sanctions included in the programme will – alongside the existing criminal sanctions – permit a proportionate response by enforcers to the circumstances of individual breaches of the law.

[13] http://www.berr.gov.uk/files/file51559.pdf

3 The operation of pilots will enable enforcers and businesses alike to develop best practice and an understanding of the processes best adopted for success.

D. Options identification

1 The options are:

Option A: maintain the current arrangements;

Option B: facilitate collective actions for consumers to claim compensation

Option C: national roll-out of civil sanctions from the RES Act for all consumer law enforcers and for all consumer law and regulations.

Option D: implement a pilot programme of operation for the civil sanctions, run by enforcers who have demonstrated that they are compliant with the RES Act requirement that their regulatory activities are carried out in a way which is transparent, accountable, proportionate and consistent, and which are targeted only at cases in which action is needed.

E. Options analysis

Option A: maintain the current arrangements

1 Option A maintains the status quo – the "do nothing" option. This would cause no disruption, and would not cause any change to the way in which businesses operate in the market, or the way in which consumer law is enforced. Enforcement would continue to rely primarily on criminal sanctions.

2 For individual consumers who have suffered detriment as a result of a business breaching the consumer law, compensation would usually need to be pursued through individual action in the civil courts. For business, enforcement would continue to mean prosecution, with the attendant time and costs burden for business and enforcers alike. The problem of lack of proportionate sanction would remain.

3 Costs for both business and enforcers would, therefore, remain higher than need be. Consumer detriment would also remain higher than under other options.

Option B: facilitate collective actions for consumers to claim compensation

4 This option would make it easier for consumers to claim compensation or for others to do so on their behalf by lowering the cost to an individual of taking forward court action. It would have a deterrent effect making competition fairer, especially with respect to those cases where a large numbers of consumers suffer similar detriment.

5 It would however increase the chances of a business facing both a public prosecution and a civil compensation claim for the same offence. It would raise

compliance costs for business and do nothing to make public enforcement procedures more flexible and efficient or public enforcement sanctions more proportionate. Using public enforcement as the primary route to secure appropriate offers of compensation should allow far more cases to be resolved informally, and where this is impossible, sanctions are able to take account of the consumer detriment suffered as well as the gravity of the offence itself.

6 So Government is proposing a targeted development of collective actions through the special powers being proposed for the new Consumer Advocate. But new powers are also being proposed for public enforcers to help them to ensure that compensation is given. The Advocate will only act if the public enforcement route fails to deliver for consumers.

Option C: national roll-out of civil sanctions

7 Extending civil sanctions to all consumer law enforcers across the country, and making the sanctions apply to all areas of consumer law, would have the attraction of wide availability of civil sanctions, and the prospect of the most widespread benefits to consumers, business, and enforcers. But it would represent a significant step change without the benefit of best practice having been established, and without practical experience of operation on a pilot basis.

8 There would be a substantial delay, too, as a result of the need to ensure that all of the enforcing bodies were compliant with Hampton principles. Concerns would be likely to arise on the part of businesses that the civil sanctions might not be applied in all cases in a way which was “transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed” – the Hampton principles.

Option D: pilot programme

9 To run a Pilot Programme into the operation of the civil sanctions in a limited manner would develop best practice for enforcers and provide business with some experience of responding to the sanctions, offering compensation to consumers and minimising or reducing penalties through early payment,

10 The civil sanctions would be applied to a limited range of consumer law, and the powers would be allocated to only those enforcers who have demonstrated their compliance with Hampton principles.

11 Included in the framework for the pilot programme is a monitoring group, comprising Government and key stakeholders. The purpose of the group – discussed further below – is to ensure that the development of the operation of civil sanctions during the pilot programme can be subjected to ongoing evaluation, with comparative experience shared across participants in the programme as a means of fostering best practice. Business representatives will be an important part of the monitoring group, because businesses also need to learn from the experience of civil sanctions.

12 A pilot programme would have the disadvantage of not applying to all consumer law in all areas, but the benefit of the pilot is that when the time is right to roll out civil sanctions more widely; best practice for enforcement will have been established.

Preferred Option

13 The Government's preferred approach to providing consumers with better access to routes to obtain compensation when things go wrong is to deliver this through a more flexible approach to enforcement and to do this, first, through the introduction of a Pilot Programme – option D.

14 Without a Pilot Programme, there would be no opportunity to trial the use of the powers in respect of consumer law enforcement. The opportunity would not exist to establish best practice, and to fine-tune polices and processes on imposing sanctions and on securing consumer compensation. This could lead to the powers being under-used, to the detriment of business and consumers alike.

15 Consumer law enforcers and businesses need to be confident in the way the civil sanctions operate. In addition to the regulations which would be laid to implement the civil sanctions, enforcers need to consult on and implement Sanctions Guidance and Enforcement Policy, which are discussed in section 16 below. The Pilot Programme will allow monitoring and evaluation of the total package. Without that pilot operation of the new sanctions and the associated guidance and enforcement policy, there would be greater uncertainty and potential loss of effectiveness going straight to a national roll-out.

16 However, as was recognised in the Consumer White Paper[14], there may be circumstances that will make it difficult for enforcers to order compensation through the new sanctions. For that reason, the Government will also facilitate – to some extent – collective actions for consumers (option B). The detail of what is proposed for the Consumer Advocate is the subject of a separate consultation.

17 Different considerations apply to consumer claims in the financial services sector. The law in this sector is not publicly enforced n the same way as mainstream consumer law and the level and scale of consumer detriment is different. The Government therefore intends to make it possible, through the Financial Services Bill, for a representative to apply to the court to take forward a collective action for financial services claims[15]. whereas for claims that do not relate to financial services, the Government has proposed to limit the ability to take forward collective action claims to a new public figure – the Consumer Advocate – who can act only as a last resort for consumers. The detail of what is proposed for the Consumer Advocate is the subject of a separate consultation.[16]

[14] http://www.berr.gov.uk/files/file52072.pdf
[15] http://www.hm-treasury.gov.uk/fin_bill_ondex.htm
[16] http://www.berr.gov.uk/consultations/page53813.html

Costs and Benefits of the Pilot.

The benefit from introducing compensation and civil sanction instead of criminal penalties was taken as the resource cost saving that arises because civil cases are much less resource intensive to pursue. We used information on costs awarded to plaintiffs who were successful in criminal prosecutions to estimate the costs of running such cases. Costs awarded are often partial rather than full so this should be an underestimate of the benefit.

- The defendant costs awarded (which translates into the benefits of the Civil Sanctions as this will be the costs saved) was obtained from the Surrey County Council Trading Standards. These costs were from 2003 to date. Using the figures from Surrey Trading Standards, the weighted average of cost per defendant was calculated (£860) and a range of cost per defendant was taken as this figure plus and minus £200. This is a good representation of the mid range as examining the defendant costs in order of costs reveals the mid-range of costs is similar to 660-1060. The mid-range figures were doubled to reflect costs from both sides to a litigation dispute, which is a truer figure for cost per case.

- We then obtained the total number of prosecutions commenced in 2008 in England, Scotland and Wales from the Trading Standards Statistics 2008. This was around 4000 cases. As the pilot will cover 10 Trading Standards areas out of a total of 220 we estimated the number of cases in the pilot areas to be 5% of the 4000 cases.

- We then made an assumption about the number of cases which came forward under the Consumer Protection Regulations and the General Product Safety Regulations as 50% of the pilot area cases as these are the cases that the compensation pilot would substitute for.

- Around half of these cases would be egregious cases that would still be prosecuted under criminal law. We allowed for 50% of the pilot population as serious cases to which civil sanctions will not apply.

We used the figure calculated from the steps above as an estimate of the number of estimated cases that civil sanctions will apply to in order to calculate the total benefit (costs saved) per year and then over the pilot period. A discounted rate of 3.5% was used over time to calculate the 2 year benefit of the Civil Sanctions.

The assumptions made in this analysis were firstly that Surrey County Council Trading Standards' information about costs awarded in court is reasonably representative of Britain. The second assumption was that 50% of these pilot cases will come forward under the Consumer Protection Regulations and the General Product Safety Regulations, for which the compensation pilot would be substituted The third assumption was that 50% of the pilot cases are likely to be residual cases whereby Civil Sanctions will not apply. A further assumption was made with regards to the appeal costs, in that it is assumed the appeal costs in

the criminal courts and civil courts are equal and so there is no net savings or cost for this source.

The cost of the Civil Sanctions scheme includes a one-off training cost of £25,000. This is used to train Trading Standards. With 10 Trading Associations taking part in the pilot, the total cost of the pilot scheme is £250,000. There is also a one-off start up cost of appeals, which is taken as £145,000. This start up cost of appeals is not expected to increase proportionately when the Civil Sanctions are rolled out nationally.

The figures depict that over the two year pilot scheme, the pilot would have a net cost of around £166k to £252k. However, this result is driven by the restriction of the duration of benefits to the 2-year life of the pilot. No ongoing additional costs are envisaged for enforcers.

If the compensation pilot is rolled out nationally, we envisage that the costs will be considerably less. First, because the training cost per Trading Standard agency will be lower as more cost effective training would have been developed and in place. Second, we envisage that the economies of scale are likely in the provision of an appeal procedure in a national roll out.

There may also be benefits to the civil sanctions scheme which cannot be quantified. There should in time be cost savings in public enforcement as fewer cases will need to be brought to Court at all. With some infringements the cost of criminal sanctions may be greater than the benefit from the sanctions and hence may be left unchallenged. However as civil sanctions are less costly, cases with lower benefit levels are also likely to be dealt with appropriately. This in turn may promote compliance with consumer law and is likely to strengthen conditions of competition in the economy.

Last, under the preferred option consumers who have suffered from a breach of competition law would obtain compensation for the detriment they have incurred.

F. Risks

1 The key risks are:

- Enforcers prove reluctant to adopt civil sanctions, because it requires additional consideration and judgment to be applied in each case. This risk will be mitigated by those who participate in the pilot programme being already fully Hampton compliant, and therefore experienced in the application of proportionate enforcement;
- Businesses will fail to take advantage of the opportunities to informally settle or mitigate financial penalties by offering compensation to consumers in appropriate cases. Businesses will need to be made aware of the opportunities for mitigation, and this will be part of both the consultation on enforcement policy and on sanctions guidance, and a key part of the development of best practice aided by the monitoring group;

- Enforcers impose a large number of fixed and variable penalties, and the civil sanctions fall into disrepute. In practice, the enforcers will have to produce and consult on Sanctions Guidance and Enforcement Policy. The circumstances in which any sanction will be imposed will be made clear in advance, and departure from the published guidance and policy will provide a ready avenue for appeal. Enforcers should, therefore, be keen to adopt practices in line with published guidance and policy.

G. Recommendation

The pilot programme should be undertaken for a period of two years, with ongoing monitoring and support and post-pilot evaluation.

H. Implementation

The pilot programme will go live in October 2010 or April 2011, subject to completion of the arrangements for an appeals body. Secondary legislation to enable the pilot programme to go ahead will be presented to Parliament in the second quarter of 2010.

I. Monitoring and evaluation

Ongoing monitoring and assessment will be undertaken by the stakeholder group to promote understanding of the impact of the pilots, and to establish best practice. Monitoring is intended to be interactive in order to facilitate the exchange of experiences between those enforcers involved in the pilot.

The monitoring work will form the basis of the post-pilot evaluation, where the focus will be on:

- the difference made to consumer compensation by businesses under the pilot programme;
- the experience of businesses in relevant cases being able to avoid the cost and reputational damage of criminal convictions;
- the extent to which the enforcers benefit from having a range of proportionate responses to infringements of consumer law.

It will be for the monitoring group to refine the range of criteria and methodology, but the Government will want the main thrust to focus on the benefits to consumer, business, and enforcers.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	***Results in Evidence Base?***	***Results annexed?***
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Annexes

Competition Assessment

The pilot programme of civil sanctions should enhance competition by enhancing consumer confidence in the market. The availability of proportionate remedies and the facilitation of compensation to consumers should make for fairer competition between businesses, and a better overall consumer experience.

Small Firms Impact Test

The pilot programme will be neutral with regard to the size of business. Overall, it is likely that smaller businesses that operate locally will benefit most from the more flexible procedures, including opportunities to avoid criminal infractions by agreeing to compensate consumers because this can bolster or redeem business reputation.

Equalities impact tests

After initial screening as to the potential impact of this policy on race, disability and gender equality, it has been decided that there will not be a major impact on minority groups in terms of numbers affected or the seriousness of the likely impact, or both. Further information on the impact of the civil sanctions enforcement programme on equalities can be found in the Consumer White Paper Equalities Impact Assessment at http://www.berr.gov.uk/files/file52073.pdf.

Other specific impact tests

Other specific impact tests have been considered, including Legal Aid, Sustainable Development, Carbon Assessment, Other Environment, Health Impact Assessment, Human Rights and Rural Proofing.

After an initial screening, it has been concluded that no significant impact is anticipated in any specific cases above.

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