



Department
for Business
Innovation & Skills

**CONSUMER RIGHTS BILL:
PROPOSALS ON ENHANCED
CONSUMER MEASURES**

IMPACT ASSESSMENT: FINAL

JANUARY 2014

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Title: Consumer Rights Bill: Proposals on Enhanced Consumer Measures IA No: BIS0398 Lead department or agency: Department for Business, Innovation and Skills Other departments or agencies:	Impact Assessment (IA)			
	Date: 19/12/2013			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
Contact for enquiries: consumerbill@bis.gsi.gov.uk				

Summary: Intervention and Options	RPC Opinion: GREEN
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£81.04m	£0m	£0m	No	NA

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

When addressing breaches of consumer law by businesses, enforcers can take criminal or civil law action. Criminal prosecution can result in a fine, imprisonment and/or a compensation order but civil courts may only impose injunctions and enforce voluntary undertakings and enforcers cannot secure redress for consumers who have suffered detriment through the civil courts. Consumers can take private action against a business, but there is a gap in the remedies that enforcers are able to secure on their behalf. Government will rebalance enforcement of consumer law towards addressing these issues.

What are the policy objectives and the intended effects?

The policy objective is to provide improved remedies for enforcers of consumer law aimed at achieving one or more of the following outcomes, increased business compliance with the law, improved redress for consumers affected by the breach of consumer law and more confident consumers who are more empowered to exercise greater consumer choice. Together these outcomes will increase consumer welfare and favour well-run, reputable businesses which will in turn contribute to positive economic growth. A further benefit will be a reduction in criminal prosecutions for relatively minor offences.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Four policy options were considered Option 0, do nothing was ruled out as while it would cause no disruption, it would have no impact on meeting our objective. Option A, introduce civil enforcement remedies available only following direction by a court or through agreement between traders and either enforcers or the court, is the preferred option. The Government believes Option A offers the best balance between effectiveness and fairness. Option B, to encourage an informal approach to a wide range of remedies and guidance was ruled out as it would not be effective without additional regulatory incentive. Option C implement the administrative sanctions in the Regulatory Enforcement and Sanctions Act 2008 was ruled out as it would not guarantee businesses a judicial hearing before sanctions are imposed.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 01/2019					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: n/a		Non-traded: n/a

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister: _____ Jo Swinson _____ Date: 19 December 2013

Summary: Analysis & Evidence

Policy Option 1

Description:

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
		10	Low: 54.04	High: 108.04	Best Estimate: 81.04

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	0.2	1.6
High	0	0.3	2.9
Best Estimate	0	0.3	2.2

Description and scale of key monetised costs by 'main affected groups'

Enforcers will incur familiarisation and training of £0.13 million and ongoing costs of using more complex remedies of £0.1million.

The movement of cases from criminal to civil courts will lead to a decrease in the revenue from criminal fines of £0.14 million.

Other key non-monetised costs by 'main affected groups'

There are no non monetised costs.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	6.6	56.9
High	0	12.7	109.6
Best Estimate	0	9.7	83.3

Description and scale of key monetised benefits by 'main affected groups'

Enforcers will benefit from an increase in civil procedures of £0.04 million.

Consumers will benefit from increased redress payments from non-compliant business of £9 million.

Government will benefit from reduced costs on the judiciary of £0.63 million

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

There will be a benefit to compliant businesses as the new powers bed in and become more widely used, consumers may be more likely to use compliant businesses.

Over time enforcers will experience savings from spending less time and resource preparing for civil cases.

Consumer will face a reduced risk of consumer detriment.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

There is a risk that enforcers may prove reluctant to use civil instead of criminal procedures.

There is a risk that businesses will not improve compliance.

There is a risk that compliant business will have unmeritorious cases brought against them and that enforcers will have to pay compensation to these businesses.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m: 0			In scope of OIOO?	Measure qualifies as
Costs: 0	Benefits: 0	Net: 0	No	N/A

Evidence Base (for summary sheets)

Problem under consideration

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, such issues are not in question; the concern arises when things go wrong. If goods or services are not up to standard, or if the trader has otherwise broken the law, the consumer will expect some sort of remedial action, be that a replacement, refund, or some other form of remedy. The Government has recently consulted on measures to simplify and clarify the law to make it easier for businesses and consumers to understand when consumers have a right to redress

2. The best traders will be keen to help consumers in this situation. They will ensure that the consumer's own position is not adversely affected by the problem, and that obligations under consumer law are fully met thereby safeguarding their own reputation as lawful traders. This will encourage the individual consumer, and others, to continue to trade with them rather than switching to a competitor. The ability of consumers to freely choose providers based on a range of factors including experience and reputation is a crucial factor in ensuring a functioning competitive marketplace, but markets also work best when they are open to new market entrants and this implies consumers who are willing to experiment with new suppliers and try new products or services.

3. Adventurous consumers do best in a climate of strong consumer confidence where there is a robust framework of law allowing consumers to defend their own rights where possible and providing support and protection where not. This encourages enterprise, innovation and efficiency, and helps reduce prices and improve quality, ultimately creating conditions that support economic growth.

4. Within this context certain minimum standards for traders, the goods and services they provide, and the way in which they are provided are necessary. For example, there are regulations aimed at ensuring the safety and standard of goods, or their presentation to ensure consumers can make this choice without being intentionally or inadvertently misled. These need to be enforced effectively, but consumers also need to feel that the enforcement regime serves them directly.

5. Research completed by the Lincoln Law School (2008)¹ has shown that consumers generally benefit from public enforcement through prevention of the spread of malpractice, but consumers seldom obtain compensation. The report highlights that consumers wanting to obtain redress are obliged to pursue separate action through the civil courts but they often do not do so, due to the perceived complexity, risk or cost of the process.

6. Legal fees are often seen as high, and legal advisors often cannot give clear advice that a consumer is likely to win a case, when losing would put them at a risk of being liable for the other party's costs. Behavioural thinking shows that many people actively try and minimise the risk of losses rather than seek gain, which encourages them not to act. Additionally, the low individual value of some losses (although in aggregate, consumer detriment can be great) deters court action.

¹ University of Lincoln, Lincoln Law School (2008): Representative Actions and Restorative Justice www.bis.gov.uk/files/file51559.pdf

7. Furthermore, in 2008 the University of East Anglia published a comparative analysis of the UK consumer regime as compared to a group of other leading countries.² On the whole the UK regime was found to be reasonably well-performing but one of the three relative weaknesses identified was that it is somewhat difficult for consumers to seek and obtain redress for breach of consumer law.

8. Where traders fail to comply with consumer law and fail to satisfactorily meet consumer expectations with regard to remedies, they may be subject to enforcement action. Enforcers (primarily Local Authority Trading Standards Services (LATSS) and the Office of Fair Trading (OFT)) will usually seek to work informally with the trader to secure remedial actions to amend its behaviour. Where this fails to satisfactorily address the issues, more formal action may be taken. Formal enforcement action can be via a criminal or civil prosecution.

- Criminal prosecution - the courts tend to issue a fine punishing past behaviour and/or a prison sentence. There is no scope to secure commitments from the business not to break the law again and compensation for consumers who have suffered detriment is rarely awarded.³
- Civil prosecution - Enforcement Orders and Undertakings under Part 8 of the Enterprise Act 2002 provide for injunctive relief against certain infringements of consumer protection legislation. They can be used to stop a business behaving in a particular way, but cannot generally be used to require a business to take positive action to provide redress to those consumers who have suffered detriment.

9. As stated above, research has shown that UK consumers consider it difficult to seek and obtain redress for breach of consumer law due to the costs associated with bringing private prosecutions and the risk of having costs awarded against them.

10. The Government therefore believes that there is a gap between the ability of enforcers to seek compensation for consumers in criminal prosecutions and the inability of enforcers and the courts to seek or order redress in civil law cases. The Government also believes that enforcers lack flexibility when dealing with breaches of consumer law and both they and business would benefit if a range of proportionate but appropriate, flexible actions they could take were introduced.

11. Following a consultation⁴, the Government has decided that it will amend Part 8 of the Enterprise Act 2002 to allow the courts to attach a range of civil remedies to Enforcement Orders and undertakings. Enforcers may make an application to the court for such enforcement orders. Enforcers will also be able to agree undertakings under Part 8 that include enhanced civil remedies. These additional powers will be available for enforcers of consumer law, including Trading Standards, OFT and sectoral regulators.

12. The remedies should be aimed at addressing the breach and be proportionate, appropriate and achievable. The Government believes that any remedies should be aimed at achieving the following outcomes:

- Ensuring business compliance with the law;

² University of East Anglia, ESRC Centre for Competition Policy (2008): Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries www.bis.gov.uk/files/file50027.pdf

³ For example, according to the OFT's Annual Report for 2011/12, LATSS made 1860 prosecutions under consumer law in 2011/12 which resulted in just under £1million fines and just under £100,000 compensation.

⁴ www.bis.gov.uk/Consultations/consultation-rationalising-modernising-consumer-law?cat=closedawaitingresponse Consultation on extending the range of remedies available to public enforcers of consumer law

- Improving redress for consumers affected by the breach; and
- Enabling more confident consumers who are empowered to exercise greater consumer choice.

13. Linked to these outcomes, it is important that any remedies deter other businesses from also breaking the law.

14. Equally, it is essential that honest businesses do not lose out through being undercut by illegal behaviour. However, as the civil law system is principally about reconciling individuals' interests, it would be important that deterrence is not the sole justification for any sanction. Ultimately, criminal sanctions would remain the best option for enforcers when dealing with out-and-out rogues who only respond to the threat of imprisonment.

Consumer Rights Bill

15. The proposals within this Impact Assessment form part of a proposed wider reform of Consumer Law in order to clarify and update the legislative framework across the piece. The reform will require primary legislation (the Consumer Rights Bill), amendment of the Consumer Protection from Unfair Trading Regulations as well as the implementation of the Consumer Rights Directive through regulations. The package of reform intends to:

- **Consolidate** the law to reduce fragmentation;
- **Clarify** the law to reduce the scope for costly disputes;
- **Update** the framework to ensure that consumer rights keep pace with technological advances;
- **Deregulate** to introduce key business-friendly provisions; and
- **Enhance** consumer rights where it is appropriate to do so.

Rationale for intervention

16. In 2011/12 there were 1972 prosecutions by LATSS for breaches of consumer law. Of these 1866 were prosecuted under criminal law and 106 under civil⁵. While prosecution under criminal law will always be appropriate in the most serious cases, the Government believes that there is scope to move more prosecutions to the civil process. A survey by BIS of LATSS⁶ asked how many criminal prosecutions in 2011/12 might have been suitable for civil action if the proposed new powers had been in place. In response LATSS estimated that as many as 476 cases might have been suitable for civil action rather than criminal prosecution. In the same survey, LATSS estimated that as much as £12m worth of redress could have been paid to consumers who had suffered detriment if enforcers had been able to seek redress under civil law.

17. In addition, the Government also believes that in some cases there might be the potential to take the courts out of the process altogether by enabling LATSS and other enforcers to agree undertakings under Part 8 of the Enterprise Act 2002 with businesses who have broken the law on providing redress to consumers who have suffered detriment. Criminal prosecutions can be expensive, time consuming and represent a real reputational risk for business for what can sometimes be minor breaches of consumer law. Moving more cases to the civil law process and giving

⁵ Notified to the OFT or recorded on the OFT's Consumer Regulations Website (CRW).

⁶ See Annex A

enforcers a range of proportionate and flexible remedies could reduce the number of cases that end up in front of the courts, saving both businesses and enforcers time and resources.

18. In November 2012 the Government consulted on a number of options for reforming the civil law regime. All were aimed at ensuring business compliance with the law, improving redress for consumers affected by the breach; and enabling more confident consumers who are empowered to exercise greater consumer choice.

19. The Consultation closed on 31 December. Responses to the consultation were received from a number of business and business representatives, from LATSS and from consumer organisations. The consultation proposed that the approach to civil sanctions contained in the Regulatory Enforcement and Sanctions Act 2008 (RES Act) was not appropriate for consumer law⁷ and as an alternative planned to amend Part 8 of the Enterprise Act 2002 to offer the civil courts more flexibility when imposing sanctions in order to secure the Government's identified outcomes.

Responses to the consultation

Large Business and Business Representatives were on the whole sceptical that amending Part 8 of the Enterprise Act was the best and least burdensome option. A number of respondents believed that existing legislative remedies such as consumers taking their own action through the small claims court or enforcers seeking compensation orders through criminal prosecutions were more preferable than creating new legislation.

Local Government (LATSS) were supportive of the proposals but there were a number of concerns about them having adequate resources and training to ensure the proposals were fully effective.

Consumer Organisations agreed that the Government's proposed outcomes were valid and that the proposals would lead to more confident and empowered consumers. However, concerns were expressed about public enforcers having the necessary resources to use the new powers effectively and some thought that the new powers should not be limited to public enforcers.

Policy objective

20. The Government's policy objective is to provide improved remedies aimed at achieving one or more of the following outcomes:

- increased business compliance with the law: forward-looking measures to ensure the same or a similar breach does not reoccur;
- improved redress for consumers affected by the breach of consumer law: providing schemes aimed at securing redress for consumers; and
- more confident consumers who are empowered to exercise greater consumer choice: measures to improve the ability of new and existing customers to make a free and informed choice.

⁷<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121108/wmstext/121108m0001.htm>

21. Business compliance with the law is an important element of any enforcement regime as it helps to ensure that consumers do not continue to suffer from breach of the law. Part 8 of the Enterprise Act 2002 already allows enforcers to respond to this imperative, but in practice, enforcers have expressed concerns as to its effectiveness.

22. As highlighted above, redress for consumers affected by a breach of the law is currently difficult to obtain in both the criminal and civil courts processes. While this proposal would not replace the right of an individual consumers to seek compensation privately, it would go some way to improving the current position.

23. Finally, for many consumers, a key element of a purchasing decision is the past performance of a business.⁸ Promoting greater consumer choice by better informing them of breaches of consumer law and encouraging switching behaviour is therefore important.

24. Taken together, these outcomes would, if secured, increase deterrence whilst making markets work better and reducing consumer detriment.

25. A further side benefit of the proposal could be to meet the Government's aim of reducing reliance on criminal prosecution for relatively minor offences. Remedies would be attached to the civil rather than criminal regime. By attaching remedies to the existing civil enforcement process, the Government anticipates that the proposal would direct more enforcement down the civil route. The availability to enforcers of civil remedies should also increase the general incentive towards compliance by all traders, leading to a reduced need for any form of formal enforcement action.

Baseline – case numbers and costs

26. According to data from the OFT⁹ the number of civil and criminal cases taken by LATSS over the past five years was as follows:

Financial year	Criminal prosecutions	Enforcement Orders	Enforcement Undertakings
2011/12	1866	7	99
2010/11	1695	5	125
2009/10	2450	8	175
2008/09	1872	4	144
2007/08	1887	3	131

27. This equates to an average of 1954 criminal prosecutions, 5 Enforcement Orders and 135 undertakings each year. Information from LATSS indicates that the average cost to them of a civil enforcement case where an Enforcement Order is sought is approximately £3400. From the BIS survey of LATSS we have estimated that the average cost of a contested criminal prosecution is £4050. Additional data from Surrey Trading Standards indicated that 75% of defendants pleaded guilty to one or more offences at an average cost to each party of £1270 per guilty plea.

⁸ Office of Fair Trading (2008): Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services, Page 76
www.offt.gov.uk/shared_offt/reports/consumer_protection/oft992.pdf

⁹ Notified to the OFT or recorded on the OFT's Consumer Regulations Website (CRW).

28. Baseline costs for LATSS can therefore be cautiously estimated at around £3.8m¹⁰ spent on criminal prosecutions each year, as well as £17,000¹¹ on Enforcement Orders and just over £170,000¹² on undertakings.

29. The consultation specifically asked for estimates of the costs associated with agreeing undertakings between enforcers and business. However no responses were received that enabled us to make an accurate estimate of these costs. Data from Surrey Trading Standards indicated the average cost of a criminal enforcement case to be £1,270 for each party where a 'guilty' plea is made. We do not believe that the cost of action involving undertakings would exceed this and we think that it is accurate to use this as a baseline figure for undertakings.

Description of options considered

30. Four policy options were considered:

- Option 0, do nothing
- Option A, introduce civil enforcement remedies available only following direction by a court or through agreement between traders and either enforcers or the court. This is the preferred option.
- Option B, to encourage an informal approach to a wide range of remedies and guidance.
- Option C, implement the administrative sanctions in the Regulatory Enforcement and Sanctions Act 2008.

Option 0 - Do Nothing

31. Option 0 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. Enforcers would continue to rely primarily on the criminal regime with a lack of remedies attached.

32. For individual consumers who have suffered detriment as a result of a business breaching consumer law, compensation would usually need to be pursued through individual action in the civil courts, although options for Alternative Dispute Resolution also exist in some cases. For business, enforcement would, primarily, continue to mean prosecution, with the attendant time and costs burden for business and enforcers alike. The problem of lack of proportionate remedies would remain and therefore the Government does not consider that this option is suitable.

Option A, introduce enhanced civil enforcement remedies. This is the preferred option.

33. Part 8 of the Enterprise Act 2002 allows certain enforcers (primarily LATSS and the OFT) to seek civil injunctive relief in respect of certain infringements of

¹⁰ 1950 criminal prosecutions per year of which 75% (1462) are a guilty plea costing £1270 per case. 25% (488) are contested costing £4050 per case.

¹¹ 5 Enforcement Orders per year costing £3400 per case.

¹² 135 Undertakings per year costing £1270 per case.

certain consumer protection legislation. It can be used to stop a business behaving in a particular way. However, it cannot generally be used to require a business to take particular remedial action to address the broader issues. Under Option A, Part 8 of the Enterprise Act 2002 will be amended to allow a court to require remedies aimed at securing the outcomes of business compliance with the law and redress for consumers, which in turn would lead to more confident consumers who are empowered to exercise greater consumer choice.

34. This proposal would particularly apply to breaches of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the General Product Safety Regulations 2005 (GPSRs). It would apply also to other consumer law, but the CPRs and GPSRs would be expected to give rise to the greatest number of enforcement actions to which remedies could be attached.

Background to the current civil enforcement regime

35. The Enterprise Act 2002 allows enforcers to apply to the civil court for an Enforcement Order. An enforcer may not usually apply for an Enforcement Order without first consulting the person or business against whom the Enforcement Order would be made. At this stage the enforcer may opt to accept undertakings from the business that it will not continue or repeat the infringing action. If, however, the business will not give undertakings, or it is a matter of urgency, the enforcer can apply to the court for an Enforcement Order.

36. In an Enforcement Order a court will require the business to stop the infringing action. It can also order that the business publish the order as well as a corrective statement. Alternatively the court can accept undertakings from the business. As part of the undertaking to the court the business may be required to publish the terms of the undertaking and a corrective statement. Finally, the court may pass the case back to the enforcer to attempt further action to seek an undertaking.

37. Both Enforcement Orders and undertakings require the business in question not to engage in conduct that involves an infringement; and court undertakings can require steps to be taken to do this. Beyond this, there is very little or no scope for a civil court to make an award or direction that requires a business to take positive measures, for example, to provide redress to affected consumers.

Proposal

38. Under Option A, Part 8 of the Enterprise Act 2002 will be amended to allow an Enforcement Order or undertakings to require a wider range of remedies. These remedies will be aimed at securing the outcomes of increased business compliance with the law and redress for consumers, as well as leading to more confident consumers who are more empowered to exercise greater consumer choice.

Remedies

39. As part of the consultation the Government listed a number of possible remedies to secure greater business compliance with the law that could form part of an undertaking or Enforcement Order, including:

- signing up to a Primary Authority scheme;¹³

¹³ Primary Authority schemes enable businesses operating across the boundaries of two or more local authorities to form a statutory partnership with a single local authority, which then provides robust and reliable advice for other councils to take into account when carrying out inspections or dealing with non-compliance.

- appointing a compliance officer;
- providing training/preparing guidance;
- undertaking internal spot checks (and maintaining records of these);
- improving record-keeping;
- collecting (and acting on) customer feedback;
- introducing a robust customer complaints-handling scheme; or
- signing up to an ADR scheme for future complaints and committing to be bound by decisions of an independent ADR provider.

40. The Government has considered the responses to the consultation and has confirmed that while the above list might be helpful, exact remedies to achieve greater business compliance will be decided on a case-by-case basis and where possible should be agreed between the enforcer and the business. A detailed list is unlikely to be able to contain all the potential remedies that might be appropriate for a certain case. The Government will though make clear in the legislation that remedies should be aimed at addressing the breach and be proportionate, appropriate and achievable. The legislation will also confirm that the cost of a remedy to business should never exceed the detriment caused to consumers.

41. Where an enforcer accepts an undertaking from a business, the remedies to be attached would be agreed between the parties. Where there is a dispute over remedies, the case would proceed to court. Where an enforcer applies to the court for an Enforcement Order, they would propose remedies but the ultimate decision as to what remedies are required would lie with the court.

Securing Redress

42. The consultation contained examples of possible remedies to secure consumer redress including for example:

- If an energy company was found to have miss-sold a particular payment plan, all customers signing up to that plan in the affected timeframe could be contacted and if they reply within a given timeframe provided a set sum of money in recognition of their loss.
- If an electrical store was found to have miss-sold a product, the store could issue a public notice notifying consumers that could prove they purchased the product within a certain timeframe that they were entitled to a set sum of money in recognition of the miss-selling, or
- If a trader had miss-sold a product but did not have a list of consumers who had suffered detriment they could take out adverts in national, regional or specialist press. Advertising would be proportionate, targeted and effective. The advert would operate in a similar way as product recall where if people showed they were affected by the issue they would receive a sum of money.

43. Following the consultation, the Government has decided that it will not publish a detailed list on what remedies should be used by enforcers to secure redress for consumers who have suffered detriment. As with securing greater business compliance, the Government believes that the best way of securing redress will be decided on a case-by-case basis.

44. The remedies themselves would be based around mechanistic schemes to deliver particular outcomes rather than the outcomes themselves. For example, if the court was required to make judgement on outcomes or effectiveness based on harm suffered, there would potentially be a huge evidence burden. A court could, for example, give a view on the reasonableness of an offer of redress to be made under a scheme but would not mandate a particular redress amount for each individual that

had suffered loss. Performance would therefore be based on the technical requirements of the individual schemes.

45. Government will also include in the legislation that for redress schemes the court or enforcer must be satisfied that the cost to the person subject to the enforcement order or undertaking of complying with the measures is unlikely to exceed the loss suffered by consumers. However, the administrative costs (i.e. the cost of setting up and running the scheme) should not be included in this calculation though they must be proportionate to the detriment caused

Option B, to encourage an informal approach to a wide range of remedies and guidance.

46. Option B would be very similar to Option 0 in that it would maintain the legislative status quo. As previously highlighted, enforcers already in the first instance, seek to work informally to address a breach of the law. Option B would seek to encourage business and enforcers to take informal steps not only to secure compliance but also to provide consumer redress and improve consumer choice. However it is not clear that enforcer exhortation to business to do more would have any effect in the absence of any ability on the part of the enforcer to follow through with potential sanctions.

47. Government could also encourage greater use of the Consumer Codes Approval Scheme¹⁴ but this is dependent on trade associations and their members agreeing to be bound voluntarily to offer redress in cases of breach (amongst other commitments). The proposals in Option A are aimed at the businesses that refuse to do this.

48. It is unlikely that this option would fully achieve the outcomes relating to redress or confident consumers exercising greater consumer choice. Traders may be unwilling to give up the value of monies already received or submit to a process aimed at directly favouring competitors, weighing up instead the risk and cost of potential prosecution and individual claims by consumers.

49. This option is not preferred because it is not clear that there would be significant additional take-up. As noted, enforcers already, in most cases, seek informal solutions to cases rather than proceeding straight to prosecution. For some years now compliance-oriented approaches to enforcement have been heavily promoted within LATSS and by the Local Better Regulation Office (LBRO) (now called the Better Regulation Delivery Office) and have been practiced by the OFT. These build on the principles proposed by Sir Philip Hampton's 2005 review.¹⁵

¹⁴ <http://www.tradingstandards.gov.uk/advice/oftapproved.cfm>

¹⁵ Hampton (2005): Reducing administrative burdens: effective inspection and enforcement www.bis.gov.uk/files/file22988.pdf

Option C – Implement the Administrative Sanctions in the Regulatory Enforcement and Sanctions Act 2008 (RES Act)

50. The previous Government introduced civil administrative powers through the Regulatory Enforcement and Sanctions Act 2008 (the 'RES Act') and proposed pilot projects, involving the OFT and a small number of selected LATSS, to test the use of these. As stated above, the Government does not believe that the approach to civil sanctions contained in the Regulatory Enforcement and Sanctions Act 2008 (RES Act) is appropriate for consumer law and decided not to proceed with the pilots. Much of the focus of the RES Act is on the use of penalties as an ultimate sanction, which, while potentially effective in some cases as levers to secure voluntary agreement on positive action, do not in themselves secure remedies for individual consumers.

51. The RES Act provides 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 would 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.

52. Concerns have been raised that these sanctions may create a perverse incentive for a business to offer undertakings due to the threat of a penalty imposed by an enforcer rather than by a court following a fair hearing. According to this view, such an approach may lead to businesses that have been falsely accused being forced to enter agreements or face fines rather than prove their innocence. Some fear that small businesses, in particular, would be exposed to pressure in this way, because of the relatively high cost and uncertainty for them of launching an appeal against any penalty.

53. The consultation asked whether the RES Act would be suitable to achieve the proposed outcomes of increased business compliance with the law, improved redress for consumers and more confident consumers. A number of businesses and business representatives strongly opposed the use of RES Act sanctions in the field of consumer protection, though some consumer organisations took the view that the RES Act might be the best way of achieving more redress for consumers. Business were particularly concerned that the use of fixed and variable monetary penalties potentially has the danger of becoming parking ticket style fines with smaller businesses suffering the most detriment as they would not have the resources to challenge enforcers' decisions.

54. Given the punitive nature of RES Act sanctions, which are not ideally suited to resolving consumer detriment, the Government reached the view that a more bespoke regime for consumer law would be preferable. While the RES Act will remain in legislation, since the close of the consultation the Government, in a Written Ministerial Statement¹⁶, confirmed that if ever used, the RES Act should be limited to those large companies with more than 250 employees.

¹⁶ <http://news.bis.gov.uk/Press-Releases/Use-of-Civil-Sanctions-Powers-Contained-in-the-Regulatory-Enforcement-and-Sanctions-Act-2008-682e6.aspx>

Risks of Preferred Option

Enforcers may prove reluctant to adopt a civil approach over a criminal one.

55. There are concerns over the difficulty in enforcing civil sanctions, and in the Lincoln Law School study, enforcers and regulators indicated that the payment of civil penalties and compliance with civil court judgements is relatively low and that little attention is paid to ensuring that businesses convicted at court and required to provide redress actually do so.

56. However, under this proposal enforcers, rather than only individual claimants, would be able to push for contempt of court orders against traders if they were flouting previous judgements against them and this was in the public interest. This ought to lead to higher levels of compliance.

Identifying the most effective remedy may require additional investigation of a very different type from simply establishing a breach of regulations

57. The enforcer may have to assess the likely impact of the remedy, including levels of loss, harm and damage caused to consumers. This could involve the use of additional experts to evaluate the remedy and to prepare evidence of this for subsequent court proceedings. Courts may not accept unsubstantiated evidence and the increased costs of providing sufficient evidence to convince a court could be a barrier in some circumstances.

58. This risk can be mitigated by provision of central guidance on the type of evidence and assessment required for this type of case. Additionally, a number of the changes to Trading Standards powers already proposed will further encourage the use of civil cases across the board.

Businesses may fail to take advantage of the opportunities to informally settle or mitigate financial costs or penalties by offering undertakings in appropriate cases.

59. Businesses will need to be made aware of the opportunities for mitigation. As the new powers bed in and their use becomes more common, we think that non-compliant businesses will become more aware of the opportunities to informally settle.

Costs of unmeritorious cases

60. There is a risk that some unmeritorious cases may be taken under the proposed reforms. However any business which is subsequently found to have been incorrectly accused of non-compliance can apply to the courts for its costs.

Direct costs and benefits to business calculations (following OIOO methodology)

Estimating the number of civil actions under proposed reforms:

61. The BIS survey of LATSS asked how many criminal prosecutions in 2011/12 might have been suitable for civil action if the proposed new powers had been in place. LATSS estimated that approximately 476 cases could have been suitable to switch from the criminal to the civil route if the new powers had been available.

62. We think that this is a high estimate as we do not think that all of these 476 cases would be suitable for the new powers as in some of those instances the cost of putting positive actions in place will be disproportionate to the detriment caused. In addition, not all the companies will be in a financial position to put remedies in place.

63. We have also subsequently discussed the 476 figure with trading standards who have confirmed that this is a high estimate and the actual number of cases transferring from the criminal to civil process is likely to be lower. The consultation estimated that 250 cases would transfer from criminal to the civil process and asked respondents for their own estimates of how many cases might transfer. Responses did not lead us to think that this figure was either over or under estimated.

64. The new remedies will encourage cases to be completed outside the court process by way of undertakings. Should trading standards apply for new rights of audience in the civil courts, this will also encourage cases to transfer from the criminal process. We have estimated that the actual number of cases moving from the criminal to the civil process will be in the region of 275 cases per year. We have included a lower estimate of 250 and a higher estimate of 300 in our costs estimates to ensure we are reflecting the range of possible outcomes.

Table A: Summary of costs and benefits of preferred options

Type of Cost/Benefit	Impact	High (£ million)	Low (£ million)	Best Estimate (£ million)
Transition costs	Familiarisation costs to enforcers	0.18	0.09	0.13
Ongoing Costs	Increased costs for assessing appropriate remedies	0.16	0.04	0.10
Costs to Government	Decrease in criminal court fines	0.16	0.13	0.14
Total Costs (PV)		2.2	1.6	1.9
Ongoing Benefits to Enforcers	Savings on court cases	0.05	0.04	0.04
Ongoing Benefits to Government	Reduced costs for judicial system from moving to civil process	0.69	0.57	0.63
Ongoing benefits to consumers	Increased redress	12.00	6.00	9.00
Total Benefit (PV)		56.9	109.6	83.3
Equivalent Annual Net Cost to Business		N/A	N/A	N/A

Costs

Costs to business

Familiarisation costs

65. This measure does not increase the regulatory obligations on business, and as firms will already be familiar with the basic concepts behind consumer protection legislation, there will be limited need for firms to become familiar with the new powers. Businesses that are confident that they comply with current consumer protection legislation would not need to be concerned. The main change is the increased options for enforcers to seek redress for consumers. Thus only those firms that think they may be at risk of infringing current regulations would need to become familiar with these remedies. Therefore we believe only non-compliant businesses will incur familiarisation costs.

Costs to enforcers

Familiarisation/training costs

66. Trading Standards costs relate to the transition to the new regime of remedies. There will be a cost in training trading standards officers. We think that the training will be incorporated within current training programmes and delivered in conjunction with other changes to consumer rights related to LATSS. Through consultation with a sample of LATSS, we estimate that training for this proposal will take 30-60 mins, for 10-20 staff members per LATSS at a cost of £22.05 per hour¹⁷. Based on the above, we have estimated familiarisation costs for enforcement agencies at between £89,975 and £179,950, with a best estimate of £134,962.

Ongoing Costs

To Enforcers

Costs associated with assessing appropriate remedies

67. There may be an increase in the costs to enforcers of assessing and proposing the most appropriate remedy. Our best estimate that 275 cases¹⁸ will transfer from the criminal courts to the civil process as a result of the new powers. Depending on the complexity of the case, we estimate that each case could take an additional 1 to 3 days to prepare. This includes identifying the most appropriate remedy for a case and working with the business to establish levels of consumer redress. We have calculated the cost to trading standards of using the new powers in a single case as follows:

1 day (8 hours) at £22.05 per hour = £176.40
2 days (16 hours) at £22.05 per hour = £352.80
3 days (24 hours) at £22.05 per hour = £529.20

¹⁷ These figure is based on the hourly wage rate £19.26 for senior officials in local government with non-wage labour cost at 14.5%. Hourly rate taken from ASHE 2011, table 14.5 SOC 2000.

¹⁸ See paragraphs 61 to 64 for estimated number of cases moving from criminal to civil process

68. As the figure of 275 is an estimate we have based our calculations for these costs on a range of number of cases and days taken to establish remedy; 250 new cases are brought through the civil process taking 1 day to prepare costs £44,105, whereas 300 cases taking 3 days preparation each would cost £158,779. Our best estimate is that trading standards will incur additional costs of assessing appropriate remedies of £101,442 per annum. This is the mid-point between our low and high estimate.

69. However, as the new powers bed in and trading standards become more experienced in identifying the most suitable remedy for a case we think that this figure will decrease significantly.

To Government

70. Unlike the magistrates court, the civil court cannot impose fines on non-compliant businesses. As a result of cases moving from the criminal to the civil process there will be a reduction in revenue in terms of the fines imposed on non-compliant business. We have also considered whether there may be a reduction in proceeds of crime orders but trading standards have confirmed that in cases where proceeds of crime orders are necessary the case is unlikely to be suitable for a civil action.

71. Information from the OFT register of convictions shows that the average fine in the magistrates courts for breaches of consumer law is £515¹⁹. If 250 cases transfer from the criminal to the civil process the loss in revenue from reduced fines will equate to approximately £128,000, if 300 cases transfer £155,000. Our best estimate, if 275 cases transfer, is a loss of revenue of £141,625.

Benefits

To Enforcers

Savings on court cases

72. We believe there will be a saving to enforcement agencies from moving redress cases from the criminal to civil courts. Moving to civil cases will result in two sources of savings:

- Fewer cases ending up in court
- Reduced court cases costs

Fewer cases ended up in court

73. Once the civil process is available to enforcers, we envisage that they will be an overall reduction in the number of cases proceeding to court. This is due in part to it being easier under the new powers for businesses to accept civil liability than to plead guilty to a criminal offence. Therefore, because of the flexibility built into the legislation, we anticipate more cases of enforcement undertakings,²⁰ where the business agrees to work with the enforcers to remedy their compliance and provide redress to consumers, without proceeding to the courts. At present, 75% of criminal

¹⁹ 1866 convictions with total fines of £960,990.

²⁰ See paragraph 8 in 'Problem Under Consideration' for an explanation of the criminal and civil processes for breaches of consumer law.

prosecutions result in a guilty plea, therefore we estimate a corresponding proportion of Enforcement Undertakings rather than Enforcement Orders.

74. Data from Surrey Trading Standards indicated the average cost of a criminal enforcement case to be £1,270 for each party where a 'guilty' plea is made. We do not believe that the cost of action involving undertakings would exceed this and we think that it is accurate to use this as a baseline figure for undertakings.

75. Based on the figures provided by LATSS there will be between 250 and 300 of cases suitable for the civil process, of which only 25% will result in a full civil court case, resulting in 63-75 additional civil Enforcement Orders.

Reduced cost of court cases

76. Of those cases which proceed to court, we estimate that the cost to enforcers will be significantly reduced from criminal court costs. This is because civil prosecutions are generally cheaper than criminal prosecutions. Based on consultation with the LATSS we have estimated that the average cost of a criminal prosecution is £4050 while the average cost of a contested civil action is around £3400.

77. Based on the above, we estimate the following savings to trading standards from cases moving from the criminal to the civil process:

Table B: Reduced Costs for Enforcers of moving from criminal to civil process

Cost to trading standards of <u>criminal</u> prosecutions			Cost to trading standards of <u>civil</u> actions		
Number of cases (that do not plead guilty)	Cost of criminal case (£)	Overall cost (£) (A)	Cost of Civil Case (£)	Overall Costs (£) (B)	Net Benefit (£) (A-B)
63	4050	253,125	3400	212,500	40,625
69	4050	278,438	3400	233,750	44,688
75	4050	303,750	3400	255,000	48,750

78. Therefore we estimate that trading standards will save approximately £45,000 per annum from cases moving from the criminal to the civil process.

To Government

Savings to judicial system from moving to civil cases

79. The Ministry of Justice Annual Report and Accounts²¹ reports that the average cost of a Magistrates Court trial is £110 per day in judicial costs and £1094 per day in staff costs. On average it takes 1.9 days for a Magistrates court case to be completed. In addition judicial costs in the civil courts are £765 per day and staff costs £853 per day. There is no estimate made on the average length of a civil court case.

80. The civil courts recover their fees through costs so there is unlikely to be savings in these courts. There will be some savings in the magistrate's courts from fewer cases being heard there. The average cost of a case for the magistrates court is £2,287²². We have estimated the range of costs depending on the number of court

²¹ <http://www.justice.gov.uk/downloads/publications/corporate-reports/hmcts/2012/hmcts-annual-report-2011-12.pdf>

²² This is based on 1.9 days average at £1,204 cost per day (£110+£1,094)

cases for 250 cases the cost is £570,000, for 300 cases the cost is £680,000, with a best estimate of £628,925²³.

To Consumers

Increased redress

81. Under the proposals it will be easier for consumers to obtain redress in those civil actions being brought by enforcers. There will be no change to the existing rights of consumers to seek redress themselves through a private prosecution of business that have caused them detriment.

82. The BIS survey of LATSS asked 'if the new powers had been in force how much additional consumer redress might have been recovered from non-compliant businesses. LATSS estimated that an additional £12m per annum could have been recovered from non-compliant businesses in terms of consumer redress. However, we think that this is a very high estimate as:

- LATSS were not aware that the legislation will state that, excluding administrative costs, redress schemes should never exceed the level of detriment caused.
- Not all the businesses would be in a position to pay redress.
- Not all the consumers who suffered redress could be identified.

83. Therefore we estimate that the potential additional redress for consumers will be between £12m and £6m per annum, with a best estimate of £9m.

Non-monetised costs and benefits

Costs to business

Impacts on non-compliant firms – increased redress and savings from cheaper court cases

84. The main costs would fall on non-compliant businesses which would be subject to increased remedies. Such remedies would be determined on a case-by-case basis and so costs would vary accordingly, but the legislation will state that the costs of the remedy should be proportionate to the detriment caused. We have not included these costs in this IA as we are not increasing the regulatory burden on compliant business and where businesses are in compliance with the existing legislation, they would not incur these costs.

Benefit to business

Compliant business – increased market where consumer switch to them from non-compliant businesses

²³ Figures are based on $250 \times £2287 = £570,000$; $275 \times £2287 = £628,925$ and $300 \times £2287 = £680,000$

85. As consumers become more knowledgeable about businesses that breach the law, there may be a benefit to compliant businesses as consumers switch to those firms that operate within the law. This benefit is though difficult to quantify.

86. In addition some responses to the consultation from large businesses commented that they would welcome a level playing field for all businesses and consumers. Some also commented that they would welcome an increase in consumer trust. We are not able to provide quantification or monetisation of these potential impacts.

To Enforcers

Savings from time and resource spent achieving criminal cases standard evidence

87. We envisage that over time enforcers will experience savings from spending less time and resource preparing for civil cases. This is due to two factors:

1. the burden of proof for civil court cases is less than for criminal and will require less time and resource;
2. as enforcers and businesses become more familiar with the use of the civil process, they may become more experienced at resolving compliance and redress issues before it escalates to a court case.

88. It has not been possible to quantify and monetise these impacts as they are based on changes in behaviour by both businesses and enforcers which are not possible to predict at this point. However, cases using the new powers will initially be more complicated for enforcers and are likely to entail more work (see paragraphs 67 to 69 above). Estimation of these impacts will be considered as part of the Post-Implementation Review process in (referred to later in the IA)

To Consumers

Reduced risk of consumer detriment

89. Linked to the above impacts, we would expect overtime to see a reduction in the risk of consumer detriment. Consumer detriment exists in the form of the financial cost of problems with goods as well as the lost personal time and emotional distress suffered by consumers. We believe that as enforcers become more comfortable using civil sanctions, we may see a reduction in non-compliance with a resulting reduction in risk of consumer detriment. We have not been able to quantify and monetise this impact but again will consider it an important aspect to consider in the Post-Implementation Review (as above).

OIOO methodology

90. The new remedies will only affect non compliant businesses. There will be no new regulation on business and no change in the law. As the policy does not have an impact on compliant business the measure is out of scope of OIOO.

Specific Impact Tests

Competition Assessment

91. A wider range of remedies should enhance competition by increasing 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. Encouraging switching away from companies who have broken the law should improve opportunities for compliant businesses to compete.

Small Firms Impact Test

Costs to small firms

92. LATSS were asked how many prosecutions in the last twelve months they would have considered the civil process, if the new powers had been available. LATSS were also asked how many employees each of those businesses employed.

93. 85% of cases that LATSS estimated might be suitable for the new powers were small firms, employing fewer than 10 people. However, they were responsible for causing far less detriment than the large firms, around £3.6m compared to over £8m caused by the large firms, around 30% of the total. BIS estimates that the amount of additional redress for consumers payable under the new powers will be between £12m and £6m per annum, with a best estimate of £9m. We can therefore estimate that small firms will be responsible for approximately 30% of the additional redress, between £2m and £3.6m with a best estimate of £3m.

Benefits to Small Firms

94. 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 enter undertakings because this can bolster or redeem business reputation.

95. The consultation asked whether small firms should be exempt from these proposals. All respondents, including those from small firms, thought they should be included in these proposals as there was a risk that consumers would shun small firms if they did not think that they would have the same protections as buying goods from a large company.

Justice System

96. A Justice Impact Assessment has been completed. Details of the impacts on the courts service are contained in the benefits section above.

Annex A - Responses to Trading Standards Mini-Survey²⁴

Response from	Estimated Population*
Trading Standards Authority 1	278,000
Trading Standards Authority 2	1,119,800
Trading Standards Authority 3	728,200
Trading Standards Authority 4	635,500
Trading Standards Authority 5	601,200
Trading Standards Authority 6	848,489
Trading Standards Authority 7	859,400
Trading Standards Authority 8	160,400
Total	5,239,989

*Based on 2011 census

Annex B - Selected Responses to Individual Questions

Q1 - How many cases your office has handled over the last 12 months in each of the following categories						
	Informal agreement / no formal action necessary	Successful Prosecution	Unsuccessful Prosecution	Enforcement Order	Enforcement Undertaking	Undertaking suggested but case not proceeding
Trading Standards Authority 1	1	0	0	0	0	0
Trading Standards Authority 2	N/K	15	0	0	2	1
Trading Standards Authority 3	28	11	2	0	2	0
Trading Standards Authority 4	52	14	1	0	0	0
Trading Standards Authority 5	1	12	0	0	1	0
Trading Standards Authority 6	0	21	0	0	0	0
Trading Standards Authority 7	12	14	1	0	0	0
Trading Standards Authority 8	16	0	0	0	0	1
Total	110	87	4	0	5	2
National Figure²⁵	1309	1035	48	0	56	24

²⁴ All responses to be treated confidentially

²⁵ UK Population of 62m divided by the survey population of 5.2m all figures multiplied by 11.9

	Trading Standards Authority 1	Trading Standards Authority 2	Trading Standards Authority 3	Trading Standards Authority 4	Trading Standards Authority 5	Trading Standards Authority 6	Trading Standards Authority 7	Trading Standards Authority 8	National Total
Out of all the prosecutions, in how many of the cases would you have considered the civil process, if the new civil remedies on which BIS is consulting had been in place?	1	15	3	0	0	21	0	-	476
Detail on specific examples where the new civil sanctions might have been									
Size of business (number of employees)					0-10	10-50	50-250	250+	
					17	0	1	2	
Estimate of total amount of consumer detriment caused by category					£315,000	0	£500,000	£20,000	
National Figure					£3.749m	0	£5.950m	£2.38m	
Number of cases where meaningful redress for individual consumers could have been secured.					13	0	1	0	
Where estimated - Average cost incurred by the Authority in bringing the case – by category					£3958	0	£8000	£300	

Annex C: Post Implementation Review (PIR) Plan

Basis of the review:

This Impact Assessment includes a commitment to review the proposed changes 3-5 years after implementation.

Review objective:

To assess:

- the level of take-up of new remedies
- whether remedies are being applied proportionally and the balance between Enforcement Orders and undertakings
- whether remedies are meeting policy objectives
- improvements in consumer redress
- whether policy objectives are in practice feeding through to increased consumer welfare.

Review approach and rationale:

The review would evaluate the effectiveness of the changes within this Impact Assessment. The review will incorporate stakeholders' views that will include consumer groups, business groups, LATSS, the Consumer and Markets Authority (CMA) and the Citizens Advice services.

Baseline:

Total detriment suffered by consumers has been estimated in the Consumer Focus Consumer Detriment 2012 Report at £3.08 billion per year. This results from a wide variety of consumer problems including faulty goods or damaged goods and poor quality service.

Success criteria:

Increased consumer empowerment, reduction in consumer detriment and an increase in business compliance.

Monitoring information arrangements:

Feedback from businesses, consumers groups, TSS, the CMA and Citizens Advice will be achieved through regular engagement. The transition costs will be recorded during the implementation stage and Government will monitor the ongoing costs via annual reports and management information.

More general information about the impacts on business from the proposed changes will be collected from business groups and through surveys.

Reasons for not planning a review:

N/A

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