



**Consumer  
Focus**  
Campaigning for a fair deal

**Consumer Focus response to the Department  
for Business, Innovation and Skills  
consultation on the pilot operation of civil  
sanction powers for consumer law enforcers**

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## About Consumer Focus

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

# The problem

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To appreciate the potential of the Civil Sanctions Pilot Programme, it is important to revisit the mischief which the Regulatory Enforcement and Sanctions Act 2008 (the Act which enables the Pilot Programme) sought to address.

In 2005, the Hampton Review of Regulatory Inspections and Enforcement concluded that the current regime for achieving business compliance is ineffective and complex. In 2006 the Macrory Review, which looked at improving compliance among businesses, also found the current regulatory and enforcement landscape wanting. More importantly, the report highlighted that enforcement practices fail to achieve redress for consumers who suffer loss.

So although our enforcement regime can and does successfully prosecute offending businesses, money received as a result of non-compliance goes into the public purse, not to the consumers who have fallen victim to misconduct. And while we know that in many cases consumers can sue for non-compliance or a wrong doing; they often do not. Consumers say that they find the court process intimidating, confusing and costly.

Moreover, consumers do not always have a direct right of redress, ie the right to sue for direct compensation even where they have suffered loss. For example, the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) does not afford consumers with a direct right of redress. In England and Wales only enforcement agencies can prosecute for non-compliance with the CPRs. In Scotland, prosecutions can only be taken by the Crown Office and Procurator Fiscal Service. This means that consumers, who suffer loss as a result of a business's failure to comply with the Regulations, have no right to seek compensation under the CPRs. This is the case despite the fact that in 2009, Consumer Focus<sup>1</sup> uncovered consumer detriment of £3.3 billion in relation to unfair commercial practices.

The limitation of our enforcement regime in obtaining compensation for consumers is also compounded by data which shows that in considerable markets, consumers suffer substantial detriment, without access to an independent, open and or transparent redress mechanism. In 2008, *Lessons from Ombudsmania*<sup>2</sup> identified over 200,000 consumer complaints made annually in areas where there are no formal independent redress mechanism available by way of an Ombudsman scheme.

In 2009, data from Consumer Direct showed that for the fourth consecutive year, second hand cars purchased from independent dealers topped the list of complaints recorded by Consumer Direct at 50,790. This was followed by complaints about TVs at 22,184. Both markets lack adequate redress mechanisms. This means that in numerous instances consumers do not receive any redress for loss suffered. Indeed, research commissioned by the then Department for Business Enterprise and Regulatory Reform (BERR now BIS) from Lincoln University<sup>3</sup>, noted that high volumes of cases where consumers are unlikely to receive redress when things go wrong. The reported noted that consumers are unlikely to receive redress in the double glazing domestic market – a market worth over £1.8 billion. Often when things go wrong in such markets consumers have no choice but to put things right at their own expense.

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<sup>1</sup> Bello, L (2009) *Waiting to be heard*, Consumer Focus

<sup>2</sup> Brooker, S (2008) *Lessons from Ombudsmania*, National Consumer Council

<sup>3</sup> *Representative Actions and Restorative Justice: A Report for the Department for Business Enterprise and Regulatory Reform (BERR)*

Consequently, the Macrory Review considered an assortment of options that would add to the regulators' enforcement toolbox, broadening the flexibility available to both regulators and the judiciary. The key messages from the Macrory Review were that the criminal prosecutions available to enforcement agencies were too rigid to be used for all but the most serious offences. It proposed a more flexible approach that would allow the regulators to be more efficient and to take account of the financial benefit gained from the breach.

The Macrory Review advocated that the level of enforcement should fit the regulatory breach and there should be a greater range of penalties. It recommended that the Government introduce pilot schemes involving the use of restorative justice techniques to cases of regulatory non compliance.

Consumer Focus supported the better regulation agenda and recommendations laid down in the Macrory Review. We also supported the subsequent Regulatory Enforcement and Sanctions (RES) Act 2008, which purported to give effect to the Macrory Review. The provisions in part 3 of the RES Act lays the foundations for flexible powers, which among many things have the potential to restore consumers to the position they would have been in if an offence had not been committed. Of particular interest to Consumer Focus is the idea of applying the principle of restorative justice via Enforcement Undertakings.

# Key features of a good Enforcement Undertaking scheme

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Consumer Focus believes that, if appropriately implemented, Enforcement Undertakings can be a valuable addition to traditional regulatory enforcement powers. However, we are firmly of the view that in order for Enforcement Undertakings to work effectively, and in the interest of both consumers and business, key features need to be embedded into the proposed Pilot Programme and any subsequent scheme. These features are currently missing from the proposed Pilot Programme. We have highlighted the gaps and hope that our concerns are addressed before the Pilot Programme is rolled out.

## The process for Enforcement Undertakings

Enforcement Undertakings have the ability to transform the way business responds to rectifying misconduct. It gives consumers a real opportunity to receive compensation for losses suffered. For the first time, instead of a criminal prosecution and sanction, business can, where appropriate, opt to make an offer of compensation to restore consumers to the position they would have been in had the misconduct not occurred.

As noted above, Consumer Focus welcomes Enforcement Undertaking. However, we are concerned that as drafted, the pilot scheme gives the upper hand to businesses to negotiate voluntary remedies that do not adequately deter or correct misconduct in the public interest.

Consumer Focus believes that a credible process of Enforcement Undertakings requires three important components. Firstly, where appropriate and possible it should involve the victims (or a representative) of the alleged misconduct, and other stakeholders implicated or affected by the conduct. These parties should not only be present but where appropriate the negotiations should be facilitated in a way that empowers their meaningful participation.

Consumers have legitimate interest in participating and negotiating the terms of Enforcement Undertakings where they require compensation for the way the misconduct has affected them. We are therefore concerned that a fundamental principle of restorative justice is currently omitted from the Pilot Programme. More importantly, evidence from other areas where restorative principles have been successful shows that where all parties participate in a restorative justice response to misconduct, the responsibility and the accountability of offenders' increases, and the victims are likely to be more satisfied with the outcome.

Secondly, as far as it is reasonably possible, Enforcement Undertakings should take place face to face. It is important that those responsible for an alleged breach have the opportunity to appreciate the effects of their behaviour on affected parties.

This form of negotiation makes it less likely for businesses to attempt to rationalise the moral aspects of their behaviour, including its consequence and the impact the misconduct had on consumers and or other parties. Moreover, face to face negotiations are likely to promote a culture of taking responsibility, needed for a much improved culture of compliance.

Thirdly, it is important that the negotiations are convened by an independent party e.g. a qualified mediator, particularly where there is an imbalance of power between the parties. In the research commissioned by BERR (now BIS)<sup>4</sup>, enforcement agencies noted that they were reluctant to become the prosecutor, judge and juror. Negotiations convened by an independent mediator or a person skilled in facilitating multi-party deliberation will address some of the real concerns that enforcers have raised. It will also ensure that all interests are adequately addressed. An independent mediator is particularly important where consumers have lost significant sums of money, especially if such enforcement undertaking will preclude the proposed Consumer Advocate from taking a collective redress case (as suggested in the consultation document).

Since 2008, the Trading Standards Service in Hampshire County Council has been running a successful Mediation Pilot Scheme designed to obtain compensation (for consumers) against businesses that have breached the CPRs<sup>5</sup>. This is good practice which ought to be built into the Enforcement Undertakings process. The additional cost that a mediation service would incur should be borne by the offending business.

Consumer Focus however appreciates that having an independent mediator or facilitator may not always be possible, in circumstances where this is the case, a senior member of the regulatory body should chair the negotiation meetings. However, this person should not have been involved in the investigatory stage, in order to maintain a degree of independence.

## The content of Enforcement Undertakings

Consumer Focus believes that as far as possible, Enforcement Undertakings should have little formal or legal constraint. We do not agree with listing the actions business can offer to undertake. A list of what can be offered will only serve to limit and restrict the creativity of Enforcement Undertakings.

So long as the process of negotiation adheres to the good practice principles outlined above, all terms should be permissible unless they are unlawful, a breach human rights or could be characterised as purely punitive. Terms such as corrective advertising and other appropriate and relevant compliant programs should be negotiable.

## Accountability through publicity

Enforcement Undertakings must be made publicly available. This allows interested parties to assess regulators performance in accepting Enforceable Undertakings. It also gives enforcers a chance to explain and justify their processes. Moreover, it has the added benefit of giving participants information about the types of undertakings negotiated previously, which may strengthen their bargaining power. Consumer Focus would like to see details of how Enforcement Undertakings will be publicised on the face on any enabling Statutory Order.

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<sup>4</sup> *ibid*

<sup>5</sup> In 2008, Hampshire obtained £30,000 in redress for consumers. This amount was quadrupled in 2009.

It is however important that any publicity recognises the co-operative nature of Enforceable Undertakings. Good practice should therefore dictate that enforcement agencies make business aware of the content of any information that will be published prior to its publication. Publicity should serve to inform the public and interested parties about constructive solutions to wrongdoings and should not be used to trumpet regulatory wins.

# Levels of penalty and early discharge discount

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Consumer Focus is concerned that the Pilot Programme does not appear to address some of the key concerns highlighted in the Hampton Review, namely that the fines imposed for misconduct are often low and slow to impose.

The penalties for civil sanctions need to be stronger, quicker to impose, and penalties for non-compliance need to match or exceed the early discharge discount currently proposed. Indeed the RES Act suggests that the level of penalty should be set at such a level as to ensure that a firm does not make a monetary gain from the wrong-doing and also that the fine is sufficient to compensate customers for the costs they have incurred.

One of the concerns we have with the proposals is the generous discounts given to business who pay their fine early, especially when such early discharge discount does not match or even come close to penalties imposed on businesses for late compliance or non-compliance. Our observation is compounded by the lack of transparency in how these figures were arrived at. Without some economic analysis and or wider social consideration it is difficult to understand the rationale for setting the early discount discharge for Fixed Monetary Penalties at a third. This lack of transparency will only reinforce the current criticism that fines are too low and often slow to be imposed.

We do not agree with early discharge discounts of up to one third of the original fine, and certainly do not think that such discounts should be enjoyed when paid within 28 days. This is not to say that we do not support early discount discharge, we do, so long as it is proportionate and comparable to the penalties levied for late payment and importantly the rationale for setting it at a specific level is clear.

It is important to note that businesses already benefit from not being prosecuted for a criminal offence. The least any flexible enforcement powers could do is to ensure that the penalties fit the misconduct. If a culture of deterrence and compliance is to be promoted. Fines must be tough but fair.

Finally early discount should be enjoyed if paid within 14 days and not 28 days as proposed.

# Jurisdictional Issues

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The consultation states that the pilot schemes are to be run ‘throughout the country.’ We very much hope that the intention behind this is to pilot such schemes across Great Britain. We believe there would be real benefit in using the opportunity of a pilot to test how the scheme operates in the devolved nations, allowing problems of operating the scheme within different justice systems to be identified.

We also believe operating the scheme throughout GB would enable the full benefits of the civil sanctions pilot to be explored. There are for example, likely to be different benefits of the scheme in Scotland, where criminal prosecutions can only be raised by the Crown Office and Procurator Fiscal Service rather than other enforcement agencies such as Trading Standards.

We would draw attention to a number of areas where we identify potential difficulties for the pilot scheme. Given the devolved nature of local authorities in Scotland and their different funding arrangements, it will be important to consider how such schemes might operate in Scotland. We would also point out that the Local Better Regulation Office (LBRO), which will provide advice to the Secretary of State on those enforcers who meet the criteria to be included in the pilot, has a limited presence in Scotland. We hope this would not disadvantage any Trading Standards service in Scotland that wished to participate in the pilot.

The proposal state the intention is for appeals to be made to the General Regulatory Chamber of the First-tier Tribunal. Following the reports of the Administrative Justice Steering Group,<sup>6</sup> published by Consumer Focus Scotland, the Scottish Government has announced it will take forward the recommendation in the first report for a new tribunal service for Scotland to be established. Their starting point will be that tribunals sitting in Scotland, serving the Scottish people should be part of a Scottish Tribunals Service.<sup>7</sup> We would welcome clarification of whether discussions have been held with the Scottish Government about how the appeals process would work in the context of a separate Scottish Tribunals Service.

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<sup>6</sup> Scottish Consumer Council (2008) *Options for the Future Administration and Supervision of Tribunals in Scotland: A report by the Administrative Justice Steering Group*; Consumer Focus Scotland (2009) *Administrative Justice in Scotland – The Way Forward: The final report of the Administrative Justice Steering Group*

<sup>7</sup> New Direction to Tribunals System in Scotland, Consumer Focus Scotland press release, dated 25 June 2009, available at <http://www.consumerfocus.org.uk/scotland/news/new-direction-to-tribunals-system-in-scotland-2>

# Answers to consultation questions

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## **Q1 Are you content with the proposal to trial the civil sanction powers in relation to the two pieces of legislations identified?**

No. Consumer Focus is not content with the proposal to limit the trial of civil sanctions to two pieces of legislation. Indeed, the rationale for doing so is unclear.

We believe that the scope of the Pilot Programme should be focused, and agree that enforcement agencies should be guided by a defined list of consumer protection legislation. It is important that any list is based on preliminary analysis of the areas where consumers are failing to get recompense for losses suffered. We are not convinced that the pieces of legislation mentioned are the only ones that fit the criteria described.

It is also important that post the Pilot Programme, the civil sanctions provisions should apply to all consumer protection legislations.

## **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?**

Yes, in addition to the legislation identified, the pilot scheme could cover:

- a) Sale of Goods Act 1979
- b) Supply of Goods and Services Act 1982
- c) Supply of Goods (Implied Terms) Act 1973
- d) Consumer Protection (Distance Selling) Regulations 2008
- e) Estate Agents Act 1979
- f) Fair Trading Act 1973
- g) The General Product Safety Regulation 2005

These pieces of legislation were identified in the Consultation on the Role and Powers of the Consumer Advocate as areas where collective redress could apply and so are potentially a good starting place.

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

Yes. We believe two years will allow for sufficient numbers of suitable cases to emerge. This will allow all elements of the Pilot Programme to be fully tested, including the appeals process. Two years also allows sufficient time for the Monitoring Group to evaluate the Pilot programme and importantly, examine how it operates in the devolved administration.

#### **Q4 Is the membership of the Monitoring Group Right?**

It is important that the Monitoring Group reflects the real diversity in how enforcement agencies are structured and operate across the UK. Should pilots be conducted in Scotland and/or Wales, it would be important to ensure that there is appropriate input from the various stakeholders in these jurisdictions.

Examples of appropriate organisations to consider including within the monitoring group, or seeking input from, are the Scottish Branch of the Trading Standards Institute, SCOTTS (Society of Chief Officers of Trading Standards in Scotland), Citizens Advice Scotland, CBI Scotland and the Scottish Retail Consortium.

#### **Q5 Do you agree with the proposals set out in paragraph 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**

In our consultation response to the role and powers of the Consumer Advocate, we set out arguments against the prescription that the Consumer Advocate should only be empowered to act 'following on' from a regulatory or enforcement action. We noted that this provision was unduly restrictive and would only serve to delay, limit and deny consumers of an effective outcome.

In principle, we do not disagree with the notion that Enforcement Undertakings could preclude the Consumer Advocate from taking a collective action case. But only if such undertakings follow the good practice and principles set out above. We are not convinced that the Enforcement Undertakings have been designed in a way that puts consumers at the heart of its consideration or in a way that will ensure that consumers who have suffered loss are fairly compensated. Therefore, at this point we cannot agree with the assertion that Enforcement Undertakings should preclude the Consumer Advocate from taking a collective action case.

#### **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?**

Consumer Focus agrees that 28 days is a reasonable period to allow for representation and or defences. However, we consider 28 days to be overly generous for making an early discharge payment. This does not promote early compliance, especially, when we consider that the fines involved are small sums of money. Businesses should benefit from an early discharge payment if made within 14 days, but no longer than 14 days.

Although Consumer Focus supports the use of Fixed Monetary Penalties (FMP) for relatively minor cases. It is important to set out, with examples the types of cases FMP will be applicable to. As it stands, it is difficult to comment on the appropriateness of some of the processes set out in the consultation paper.

Nevertheless, Consumer Focus believes that FMP should only be used for clear-cut offences or defined aspects of offences, which we would expect to be outlined in the sanctions guidance. The guidance should also note that FMP is not appropriate for cases of serious or repeat non-compliance.

We do not agree that FMP should not be used in cases where education, advice or a warning would currently be given. Civil sanctions are designed to be a complementary and flexible addition to existing powers enjoyed by enforcement agencies.

There may therefore be occasions when an enforcement agency wishes to impose a small fine, in addition to guidance, as opposed to just guidance. Indeed it may be that advice and guidance has already been given and has not been complied with and the enforcer considers that the extra sting of a fine may be appropriate. We do not support the restriction of this necessary tool in such circumstances.

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

No. Consumer Focus does not consider a one third discount to be balanced or in the interest of compliance. Particularly, when as noted above, it is unclear how this figure was arrived at.

**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.**

Consumer Focus agrees with the 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?**

Consumer Focus does not consider it appropriate to give business any discount after a final notice has been served. It should be borne in mind that businesses would have had an opportunity to put forward a defence or make a representation. This process is likely to take some few weeks; an early payment discount can no longer be justified at this stage.

If civil sanctions are to be effective and respected as a viable alternative to criminal sanctions, then the scheme must be seen to be tough but fair. More importantly, it must withstand criticism of bias or a soft touch approach. As it stands, the provision in the Pilot Programme are open to criticism that civil sanctions are merely privileged treatments given to business deviance.

Not only do we disagree with a discount once a final notice has been made, we disagree that it should be applicable within 28 days. As noted above, we consider a 28 day time limit for early discount discharge to be excessive. As noted above, we believe any early discount should be given if payment is made within 14 days.

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

Consumer Focus does not consider the maximum limit of £3,000 to be reasonable, particularly as the consultation document fails to explain how the figure was arrived at. We suggest that the maximum for a Fixed Monetary Penalty should be set at £5,000 as this is the general maximum imposed in relation to summary offences i.e. offences that are not too serious and so triable in the magistrates or Sheriff courts.<sup>8</sup>

**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
- 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?**

No. Consumer Focus does not consider these arrangements to be reasonable.

Consumer Focus considers it excessively light touch to allow a time limit of approximately two months to pay a fine upon a business receiving final notice of payment, for a misconduct they have appealed against and lost; twice, if it goes all the way to a Tribunal.

We are unclear why the proposals allow for a longer period of time to pay the fine after an appeal, than is permitted if no such appeal is raised. This may create an incentive for businesses to exhaust all the appeal process, even where they know they have little chance of success. In order to discharge businesses from pursuing inappropriate appeals, we believe there may be justification in shortening the time limit for paying a fine once it has gone through all the appeals process.

We do not consider an early discount to be appropriate following an appeal. Likewise, we do not think a 28 day time limit for paying such a discount is balanced against the misconduct businesses are being held account for. As suggested above any early discount should only be offered within 14 days but not post appeal.

Again this time period is not comparable to anything we are aware of. Moreover, the different time limits of 28 and 56 days will only serve to complicate and confuse the operation of the scheme.

Finally, Consumer Focus thinks that the penalty charge of 10 per cent for late payment is unusual low and is out of step with comparable scheme and with the early discount proposed. Again we refer to the Environmental Civil Sanctions Order and Regulations 2010, which imposes a 50 per cent late penalty charge for non-compliance.

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<sup>8</sup> In Scotland, when considering the level of fixed penalty that would be appropriate in each case, we would expect an enforcer to have regard, as far as is possible, to whether a prosecution would likely have been raised by the Procurator Fiscal in the Justice of the Peace court or the sheriff court, as the maximum fine available in these courts is different.

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

Yes. Consumer Focus agrees with this approach.

**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?**

Yes. Consumer Focus considers this to be a reasonable period

**Q14 We propose that businesses subject to 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 this is an appropriate period to allow?**

Yes. Consumer Focus considers that this is the appropriate period to allow.

**Q15 We consider 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?**

Yes. Consumer Focus supports the proposal above.

**Q16 We propose that there should be an early 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 per cent should be made for payments which are not made within 56 days of the receipt of the final notice.**

**Do you agree that these are reasonable periods to allow, and that the one third discount is appropriate?**

Consumer Focus agrees that businesses should be able to put forward a defence or representation within 28 days of receiving a final notice. However, we disagree with the discount of one third (if paid within 28 days) and we think that the penalty charge of 10 per cent for late payment is too low. Instead we suggest that early discounts are given within 14 days of payment and that a late penalty charge of 50 per cent becomes applicable if payment is not received within 28 days of the receipt of the final notice.

The time period of 56 days for making payment once the business receives a final notice is too long. Please see our comments to question 11.

**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 per cent 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?**

Consumer Focus does not support a cap for Variable Monetary Penalty. Offences which merit a Variable Monetary Penalty are medium to serious offences and enforcers are obliged to take into account any voluntary restoration undertaking the business in question has offered. Therefore, the essence of this penalty relies on the flexibility of the enforcers to weight the offence against any restorative or restitution offer made by the business in question. It is difficult to understand how a cap would promote such flexibility. More importantly, the consultation document does not clarify how the figure of £10,000 was arrived at, so that while a £10,000 fine may be appropriate for misconduct rated as medium level it may be completely inappropriate for a serious offence.

To complicate matters, the consultation document goes on to state that the fine could be increased substantially in cases where the business had caused consumer loss by breaking the law and refused to offer compensation for consumers. If the cap can be increased then there is a strong argument for suggesting that it is redundant and is not really a cap in the true meaning of the word.

We believe that a cap will only serve to restrict regulators from going above the £10,000 limit. We also believe that prescribing a cap, with the flexibility of exceeding it, could inadvertently lead to businesses appealing against fines over £10,000, on the ground that it is disproportionate to what is stipulated.

We do not agree that a blanket penalty of up to 1 per cent of UK turnover will always be appropriate where consumers have suffered loss. This penalty has to be linked to the consumer detriment that was suffered. It is important that enforcers have the flexibility to determine the appropriate level of compensation to accept. Where the fine includes a restorative element, this must always be in relation to the loss suffered by consumers.

We note that the figure of 10 per cent of UK turnover is used in the infringement of the Competition Act 1998 and we fail to understand why compensation for consumer losses should be set at a lower level than punishment for cartel or abuse of dominance.

**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?**

Consumer Focus accepts that there is merit in consulting the OFT where compensatory elements exceed a certain amount. However, the final decision on the amount should rest with the enforcers, once advice has been sought from the OFT.

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

Yes we agree.

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

Yes. We agree with the grounds of appeal against a decision to serve a stop notice.

**Q21 Do you agree with the grounds for appeal against a decision of the enforcer not to issue a completion certificate (paragraph 10.17 to 10.18)? Are there any additional grounds for appeal that should be considered?**

Yes. We agree with the grounds of appeal against the decision of the enforcer not to issue a completion certificate.

**Q22 Paragraphs 10.15 to 10.16 set out the proposed circumstances in which compensation should be covered 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?**

Yes. We agree with the proposals for compensation set out in the consultation document.

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

Yes. We agree with the proposal set out in para 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?**

Please see our comments above under 'Features of a good Enforcement Undertaking'.

**Q25 In addition to the list at paragraph 11.4, are there any 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?**

Please see our comments above under 'Features of a good Enforcement Undertaking'.

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

No. Enforcement agencies should have the flexibility to impose a combination of appropriate notices when they deem it necessary.

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

Yes. We agree that unpaid sums should be recoverable as if on the order of a county court or the high court. In addition, the non compliant business should bear the cost of enforcement activities.

It is however important to note that evidence suggests that court orders are difficult to enforce. In Scotland, an evaluation of the Debtors (Scotland) Act 1987 found that only 17 per cent of individual creditors received full payment following a charge (a formal demand for payment) being served by a sheriff officer<sup>9</sup>. Similar problems have been reported in England and Wales, where a 2003 study of enforcement in relation to default judgements, found that 50 per cent of county court claimants and 62 per cent of High Court claimants failed to recover any repayment from the defender, regardless of whether they had taken enforcement action or not<sup>10</sup>. We therefore believe the evaluation of the pilot scheme should examine the impact the different enforcement arrangements in each jurisdiction has on the operation of the scheme, particularly whether this creates any cross-border complications

**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 receipts 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?**

Consumer Focus believes that enforcement agencies<sup>11</sup> should have complete flexibility in deciding whether to prosecute for the original offence or impose a non-compliance penalty, where a business fails to comply with an initial penalty.

Enforcement agencies are in the best position to judge whether the only way forward is to prosecute or impose another sanction.

Our preference would be for the rules to prescribe that where a business has not complied with a non-monetary Discretionary Requirement then the business should be prosecuted for the original offence. We believe that enforcers are in a better position to gauge the likelihood of compliance, and the appropriate way to obtain compliance on a case by case basis.

We do not therefore think it beneficial to slavishly prescribe for an extra penalty for non-compliance (in all cases). This will only serve to restrict enforcement agencies and will not promote early compliance.

However, it is difficult to see how this aspect of the proposals will operate in Scotland without the co-operation of the Crown Office and the Procurator Fiscal Service, which is the only body with authority to raise criminal prosecutions. Consideration will therefore have to be given to how this aspect of the proposal operates in Scotland.

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<sup>9</sup> Evaluation of the Debtors Scotland Act 1987: Study of Individual Creditors, Debbie Headrick and Alison Platts, Scottish Office Central Research Unit, 1999

<sup>10</sup> Evaluating the Effectiveness of Enforcement Procedures in Undefended Claims in the Civil Courts, J. Baldwin, Lord Chancellor's Department Research Series 3/03, 2003.

<sup>11</sup> In England and Wales (where they the power to prosecute)

**Q29 Do you agree that the maximum amount of the non-compliance penalty should be set at £2,000, except in respect of Restoration requirements and that a 50 per cent discount should apply to payments made within 28 days?**

No. The maximum non-compliance penalty of £2,000 is too low. We do not agree that a discount should be given for non-compliance penalty. While we agree that discounts should be given for early discharge of an original penalty, businesses that have failed to comply should not benefit from a discount.

**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 per cent premium, but that the premium would not be payable in the event of payment within 28 days?**

Consumer Focus agrees 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. We also agree that a premium should be levied for non compliance. However, we think that the premium of five per cent is too low and instead suggest a premium of 30 per cent as adequate incentive for compliance. We strongly disagree with the proposal to waive the premium, in the event that a payment is made within 28 days. We note that the five per cent premium proposed serves as a penalty for non-compliance and do not consider it appropriate to waive it simply because a business who has to date failed to comply, decides to pay early.

**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?**

Consumer Focus agrees that in the event of non-compliance, the enforcer in England and Wales should have the choice of prosecution for the original offence or the imposition of a different civil sanction, as noted above, this provides the necessary flexibility needed by enforcement agencies to take appropriate action where necessary. As highlighted in our response to question 28, in Scotland, the decision about whether to raise a criminal prosecution can only be taken by the Crown Office and Procurator Fiscal Service.

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

Yes. Consumer Focus agrees that misleading or inaccurate information should be deemed as non-compliance.

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

Yes. We agree that an enforcer should be required to set out a breakdown of costs on a notice claiming cost. This is necessary in the interest of openness and transparency and is indeed good practice.

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

The payment of cost should be regarded as late after 28 days, we refer to our comments above.

**Q35 Do you agree that a five per cent late payment charge should be applied after 56 days?**

Consumer Focus agrees that a late payment charge should be applicable after 28 days, not 56 days. We also think the late payment charge should be in the region of 50 per cent.

**Q36 Do you consider that the General Regulatory Chamber Rules will suit the handling of appeals against civil sanctions imposed for offences by enforcers?**

As we highlighted above, the Scottish Government has announced it will take forward the recommendation in the first report of the Administrative Justice Steering Group for a new tribunal service for Scotland to be established. It is therefore unlikely that the General Regulatory Chamber will be suitable for all appeals against civil sanctions following the creation of any such Scottish Tribunals Service.

## **Consumer Focus response to the Department for Business Innovation and skills consultation on the pilot operation of civil sanction powers for consumer law enforcers**

If you have any questions or would like further information about our response please contact Lola Bello, Senior Policy Advocate, by telephone on 020 7799 7984 or via email: [lola.bello@consumerfocus.org.uk](mailto:lola.bello@consumerfocus.org.uk).

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From a textphone, call 18001 020 7799 7900

From a telephone, call 18002 020 7799 7900

### **Consumer Focus**

4th Floor  
Artillery House  
Artillery Row  
London  
SW1P 1RT

Tel: 020 7799 7900

Fax: 020 7799 7901

Media Team: 020 7799 8004 / 8005 / 8006