

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

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1 ABOUT THE OFT

- 1.1 The Office of Fair Trading (OFT) is the UK's competition and consumer authority. Our mission is to make markets work well for consumers. Our goal is for competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation.
- 1.2 We adopt a market-informed approach, with a focus on outcomes that support productivity growth and consumer and business welfare. We believe this approach is in the best interests of both businesses and consumers as well as to the benefit of the UK economy.

2 THE PILOT PROGRAMME

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

2.1 Yes, although the OFT's role is only with regard to CPRs.

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?

2.2 No.

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

2.3 The OFT believes that the suggested two-year time period may be too short to conclusively test out the powers. However, it is also recognised that extending the period of the Pilot will have a consequential delay in the roll out of the RES powers to the OFT and other enforcers.

2.4 Whichever period is chosen it is important to ensure that the closure of the Pilot does not influence or impact on any ongoing enforcement actions started during the test period. It is, therefore, essential that enforcement actions commenced during the Pilot continue to their natural conclusion. The OFT suggests that BIS also considers how new cases under the RES Act will be progressed after the conclusion of the Pilot.

2.5 It may be useful to provide a mechanism for extending the Pilot if this is felt to be appropriate at the time, subject to the approval of the Monitoring Group.

Q4 Is the membership of the Monitoring Group broadly right?

2.6 Yes. But the OFT notes that it is quite a large group. To facilitate agility and effectiveness we suggest day to day activities are concentrated on a

core membership to assist the Monitoring Group in its functions – a Pilot member sub group - which periodically reports to and assists the Monitoring Group to meet its objectives.

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

2.7 Yes. The OFT recognises that the proposals are dependent on the outcome of the consultation on the Consumer Advocate. Where concurrent working is being proposed it will be important to ensure that there are clear guiding principles for all involved.

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?

2.8 Yes, although the OFT notes that there may be scope for a shorter period. The equivalent function under the Consumer Credit Act 1974, for example, to refuse or revoke a consumer credit licence, has a maximum of 21 days.

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

2.9 The OFT takes the view that the discharge payment set at two-thirds of the Fixed Monetary Penalty may be generous to the trader bearing in mind the proposals to set the maximum penalty at £3000. Care needs to be taken to ensure that the cumulative effect of the discount, the low ceiling of the FMP, and the expectation that the maximum penalty will be the exception rather than the rule, does not remove the deterrent effect.

2.10 The OFT also suggests that for the avoidance of doubt it should be made clear that the business concerned will be precluded from lodging an appeal once the discharge payment has been made.

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?

2.11 The OFT sees some merit in the senior officer model for representations, but much depends on the nature of the enforcer and of the case. On the basis of experience of different regimes, the OFT would support a less prescriptive approach that enabled enforcers to tailor the appropriate and proportionate level of safeguard to the nature of the case, thus opening the doors to other models. These might include in some cases a less distinct separation of the decision making officer but in conjunction with greater access to file and transparency of decision making where this would be more expedient. This may be appropriate considering there is an external judicial appeal body. Conversely, a more inquisitorial model may be appropriate in certain circumstances. It would be desirable not to close down options at this early stage. Further, maintaining flexibility is particularly important in a cost constrained environment. The OFT favours some flexibility to test through the Pilot what works best in practice for those involved.

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?

2.12 Yes, but see response to Question 6.

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

2.13 Please see the response to Question 7. The OFT notes that one of the key characteristics of the policy for the Pilot is to incentivise voluntary redress through the ultimate sanction of fines. Fines therefore need to be sufficient to provide such an incentive. The maximum proposed may not always provide the deterrence required depending on the size and nature of the business or the problem.

Q11 We propose that the time allowed for the payment of a Fixed Monetary Penalty should be 56 days from either:

(a) the date of receipt of the Final Notice of penalty, or

(b) in cases where the business has decided to appeal to the tribunal against the Final Notice, the date of the decision by the tribunal.

In either case, the one third discount for early payment would apply for payment made within 28 days of either event.

Do you consider these arrangements to be reasonable?

2.14 The arrangements are broadly reasonable. The OFT takes the view, however, that discounts should only be available to businesses that do not lodge an appeal, thus incentivising against unnecessarily drawing out the process.

3 DISCRETIONARY REQUIREMENTS

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

3.1 Yes.

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?

3.2 Yes, but see response to Question 6 regarding potential for reducing the period.

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

3.3 There may be scope for reducing the time limit for businesses to offer the undertakings as outlined under Question 6. Offering of third party undertakings as an appropriate remedy would be considered in the context of the business making representations.

3.4 The OFT considers that safeguards need to be in place, however, to ensure that third party undertakings are agreed within the specified time so this is not used as a mechanism to deliberately drag out the length of the process.

Q15 We propose that representations (including defences) should be considered by a senior officer in the regulatory body. The senior

officer should preferably be one who should have experience of working in the relevant area of regulation, but who has not had involvement in the initial decision to issue a notice of intent, and be senior to the officer who issued the notice. If that is difficult in practice, enforcers should consider having the case reviewed by a senior officer of another, equivalent, enforcement body that is participating in the Pilot Programme. Do you support that proposed advice to enforcers.

3.5 The need for safeguards is recognised but there is a danger that this is too prescriptive for a Pilot which requires flexibility. Please see our response to Question 8.

Q16 We propose that there should be an early payment discount of one third for Variable Monetary Penalties paid within 28 days of receipt of the Final Notice. The same period of 28 days should be permitted for a business to make an appeal against the Final Notice. A late payment charge of 10 per cent should be made for payments of Variable Monetary Penalties which are not made within 56 days of receipt of the final notice.

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

3.6 See our response to Question 6 about reasonable time periods.

3.7 With respect to the late payment charge, the OFT thinks it would be more equitable if the magnitude of the penalty increased incrementally in line with the delay in making the payment. This would incentivise the business concerned to settle the penalty as quickly as possible after the 56 day limit.

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 one 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?

- 3.8 As commented above, the penalties have to be set at a level to provide an incentive to reach voluntary agreement. In order to provide a deterrent against breaches they must also be sufficient to eradicate any profit made by the trader as a result of the breach. This amount will vary depending on the size of the trader so there needs to be sufficient flexibility to motivate the traders to comply and provide redress. Given there is a route of judicial appeal as a safeguard BIS might consider how necessary it is to set caps. Nevertheless, the Pilot will test the disincentive effect of the caps BIS set.
- 3.9 The turnover based element, if retained, should be triggered where the trader fails to actually award (instead of merely agreeing to award) an appropriate amount of restoration within a reasonable time. Otherwise there is a risk that traders may agree to restoration but not provide it.
- 3.10 Additionally, it would be helpful to ensure there is clarity on some aspects of the Discretionary Requirements sanction, for example, whether the fine is per breach and providing clear definitions on what is meant by 'punitive' and 'compensatory' elements.

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?

- 3.11 No. The OFT does not consider at present it is best placed for the purposes of the Pilot to undertake any such approval role in relation to fine levels, especially in relation to enforcement of the General Product Safety Regulations of which the OFT has no experience. The OFT is unclear why such a role is necessary given the clear position of the

appeal body in the process. After the conclusion of the Pilot this question could be revisited in the light of experience.

4 STOP NOTICES

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

4.1 Yes.

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

4.2 Yes, the OFT agrees with the grounds for appeal set out in paragraph 10.12 of the consultation document.

4.3 No, there are no additional grounds for appeal that should be considered.

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

4.4 Yes. The OFT considers that the grounds for appeal should be consistent with those under Section 48 of the RESA.

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

4.5 The compensation provisions appear to be more generous to businesses that may be harmed as a result of the Pilot than to consumers who have been harmed by the unfair behaviour of a trader. If compensation is paid to business in proportion to losses, then the same provisions should exist for consumers harmed by unfair practices.

The compensation scheme for traders should be restricted to direct losses that can be proved.

Q23 Do you agree with the proposed grounds for appeals against the non-award or level of compensation (paragraphs 10.13 to 10.18)?

4.6 Please see responses to Questions 21 and 22 on the basis of which the OFT suggests that consideration is given to amending paragraph 10.18(b) to read 'that the compensation paid did not meet the "direct" losses – as specified....'

5 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?

5.1 The OFT takes the view that there should be flexibility for any other proposal which becomes necessary in light of the circumstances of the particular case, and which may not be expressly catered for in the amending legislation.

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

5.2 The OFT notes that the proposal at paragraph 11.7 (b) obliges an enforcer in the context of monitoring compliance to 'provide such guidance or advice to a business as may be necessary to ensure compliance.'

5.3 The OFT takes the view that it needs to be made clear that any 'guidance' and 'advice' should be no more than any enforcer will provide generally with regard to the legislation it enforces – that is it should provide what is reasonable in the circumstances. It is recognised, however, that where there is a Primary or Home Authority relationship between the business and the enforcer there may be instances where the advice may be more specific.

6 COMBINATION OF SANCTIONS

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

- 6.1 Yes, in order to prevent multiple actions by different authorities for the same breach.
- 6.2 But we see grounds for an enforcer issuing a Stop Notice with, or in addition to, another notice for example, a Discretionary Requirement. This would cater for instances where an enforcer has served a Stop Notice and further dialogue and consideration of the case indicates that a form of discretionary requirement might be suitable, in which case the latter can be served to coincide with or timed to start for example at the end of the Stop Notice period. We believe such a mechanism would make it is easier for an enforcer to issue a Completion Certificate safe in the knowledge that a Discretionary Requirement is in place or will be to deal with any residual issues or concerns. As there is no requirement for simultaneous imposition of the sanctions this could also enable Stop Notices to be lifted and Completion Certificates to be issued quickly and more readily.

7 ENFORCEMENT

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

7.1 Yes. It should be noted, however, that other than FMPs, recovery of other monetary penalties will have to be pursued through the civil recovery process.

Q28 For non-monetary Discretionary Requirements, we propose that the enforcer should first impose a non-compliance penalty. If the non-compliance penalty remains unpaid after 56 days from the date of receipt by the person of the notice of non-compliance penalty, the enforcer should have the option to prosecute for the original offence or to apply to a Civil Court for enforcement of the non-compliance penalty. Do you agree with that process?

7.2 The OFT considers that failure to comply with a Discretionary Requirement should not be substitutable for a financial penalty that may have less impact on the business than the original requirement or there will be incentives for non-compliance. This process appears to confuse the original non compliance with non payment of a fine for that non compliance – these are separate matters. Greater clarity on this provision is necessary to ensure business is appropriately incentivised to comply and ensure enforcers can follow through on the appropriate option for the original offence.

7.3 Conversely, the OFT would wish it to be clear that failure by the business to comply should not then lead to an obligation on the enforcer to impose a non-compliance penalty against the business or prosecute. This should be at the discretion of the enforcer (for example more pressing priorities may arise).

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

7.4 The OFT considers the non-compliance penalty should reflect the benefits gained by the business from non-compliance. Consequently there should be no maximum or minimum thresholds. Otherwise the incentives for compliance could be undermined.

7.5 The early payment discounts should also be set at a realistic level – the OFT suggests 10 per cent.

7.6 There appears more generally to be a lack of coherence across proposals for discounts for early payment, penalty maxima and uplifts for late payment. For example should the maximum non compliance penalty not match the maximum fixed monetary penalty?

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

7.7 Yes. Nevertheless, there is likely to be scope for simplifying levels of penalties, timescales and discounts across the piece to improve transparency.

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?

7.8 Yes.

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?

7.9 This would need to be considered on a case by case basis and at the discretion of the enforcer.

8 COST RECOVERY

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

- 8.1 The OFT appreciates the importance of being transparent about costs to traders engaged in the process, but notes, given the requirement for simultaneous service of enforcement and cost notices, the potential for the latter delaying the former. In some cases this could mean ongoing consumer detriment while costs are calculated. Further, such costs as could be given at the notice stage would be interim only, if for example the case were to go forward to appeal.
- 8.2 Actual costs would vary depending on the actions of the trader subsequent to the notice. An appeal or representations would increase enforcer's costs and these ought also to be recoverable. Therefore the initial notice should include an initial indication of costs, not a final number. Further reasonable costs should then be allowable where these are incurred because of the trader's subsequent course of action.
- 8.3 The OFT is happy to talk to BIS about how to make this process work best in practice at the next stage.

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

- 8.4 Yes. Incentives need to be in place to encourage timely payment, for example a late payment charge with accruing interest after the 56th day.

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

- 8.5 Yes. The OFT also believes that further incentives need to be in place to discourage prolonged non-payment, such as accrual of interest, as in our answer to Question 34 above.

9 APPEALS

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

9.1 Yes.