



## BIS Consultation on extending the range of remedies available to public enforcers of consumer law

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### Consultation response from the ESRC Centre for Competition Policy

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## General comments.

According to the foreword to the consultation document:

The enforcement regime should look not just to deterrence, but also to providing restorative justice for consumers, especially vulnerable consumers, who are not easily able to launch their own civil actions in the small claims courts to secure their rights.

While the desire to ensure deterrence is uncontroversial since it ensures that the violation does not occur, the second aim of restorative justice is much less obvious. In particular, should this be regardless of the cost? If it is at a cost, who should bear that cost? How do we ensure that the cost is not merely added to future prices? Nor is securing restorative justice always straightforward. In the very last paragraph of the document, paragraph 3.28, BIS concedes that: “the best remedy may not always be clear. Alternatively, there may be a number of ways to achieve the same outcome and a lack of information on what would be successful.” While refreshingly honest, it also illustrates what may be the key weakness of much of the proposal. Ask this question: Who has the most money on the line? The answer is clearly not the individual consumer. The most money and the greatest expense and hence the greatest incentive to control the process rests surely with businesses who have or who are considering violating consumer law. Given their incentives, any degree of flexibility or any vague language will likely be exploited by such businesses. Unless the rules can be written in clear and simple language which can be enforced unambiguously and cheaply, there is always the risk of no effect or of unintended consequences from the proposed regime.

For a number of the questions, for example questions 9 and 10, it is difficult to provide a meaningful response without further detail of the proposals.

## Responses to selected specific questions

*QUESTION 1. Do you consider the Government’s proposed outcomes to be valid for remedies to address breaches of consumer law? Will these outcomes address consumer problems?*

Assuming the law is well thought-out, increased compliance will improve outcomes for consumers by definition. Improved redress, if this can be achieved at low cost [and as we suggest above, this is a very big if], can likewise improve outcomes for consumers. The third proposed outcome of a remedy: “more confident consumers who are empowered to exercise greater consumer choice” is very unclear. What does it mean to be “empowered to exercise greater consumer choice”? Why would a particular remedy make a consumer more confident? A remedy may have the possibility to “empower” consumers, depending on what is meant by that term, but at the same time the power of a remedy depends on how empowered consumers are. The third outcome appears more to be about who enforces the remedies rather than what results from the remedies. It is moreover very difficult to see how the third aim mentioned above could be achieved without the second aim, so they should be considered together.

*QUESTION 6. Do you think the burden of proof should be at the criminal or civil level?*

This is one area where the twin aims of deterrence and compensation muddy the waters. If deterrence is the objective, then punitive measures may well be appropriate and in that case so may a more exacting standard than the civil burden of proof. If the aim is compensation, then the measure is explicitly not punitive, in which case the standard should normally be at the civil level,

not the criminal level. However, it might be appropriate to raise the burden of proof above the civil level depending on a number of issues such as:

- The likelihood of spurious cases aimed at extracting a payoff for the litigant.
- The ability and cost of businesses to avoid infringing the law.

*QUESTION 8. Do you consider that micro-businesses should be exempt from the new proposals?*

No, they have to come up to the same standards as any other business. Arguably it would harm such businesses if it became clear to consumers that they had less incentive to comply with consumer law. Moreover if the reason for suggesting exemption is that the proposals are costly, these costs should be made more explicit as part of the debate.

*QUESTION 11. Do you agree that the Government's proposals will achieve the outcome of improved redress for consumers?*

No. This is unlikely, particularly from the examples provided. Take the examples in Box 1. If companies know who has purchased and how much, then why not just send a cheque in reimbursement? The proposal in the consultation is very time consuming and consumers may well decide that it is not worth writing back. In the early days of quality standards in newly privatised and regulated utilities, the take up rate by consumers was so low (only 2% in some water cases) that compulsory and automatic compensation was introduced<sup>1</sup>. The text in the box mentions that terms and conditions should not be too complex – who should decide on whether the conditions are too complex? Can the conditions be used to discriminate between different groups of consumers?

Would businesses be permitted to offer coupons instead of money? Consider the settlement between the Consumer Association and JJB Sports in a private action regarding a violation of competition law. In this case coupons were the agreed remedy. Existing literature points to severe problems with coupons.<sup>2</sup> For example the effect of the coupon could be countered by an appropriate temporary increase in the price. Moreover, it is far from clear that this is neutral in terms of effects on competition and hence ultimately price and quality.

The second example in the Box is hugely expensive and may make the rule punitive. It is difficult to specify where businesses should advertise. Will this reach the worst affected customers? Will the business be able to place the advert so it mainly reaches those consumers least likely to respond to the message?

More worrying for your own starting point regarding who is particularly deserving of protection, the examples in the box are unlikely to benefit vulnerable consumers. As we have seen in the energy market, consumers have been slow to increase their switching behaviour in response to encouragement from government and regulator, despite substantial savings being identified<sup>3</sup>.

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<sup>1</sup> Service Quality in Regulated Monopolies, by Catherine Waddams Price, Bitten Brigham and Lin Fitzgerald, *Annals of Public and Cooperative Economics*, 79(2), pp 197-225, 2008

<sup>2</sup> See for example S. Borenstein, "Settling for Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits," *Journal of Law and Economics*, October 1996, 34(2), pp. 379-404.

<sup>3</sup> See for example CCP's response to the most recent Ofgem consultation at <http://competitionpolicy.ac.uk/documents/107435/107585/Response+to+Ofgem%E2%80%99s+Retail+Market+Review+%E2%80%93+Updated+domestic+proposals.pdf/c1be21c0-93fe-4fa2-bb3f-44c41a3b1f2e>

*QUESTION 12. Where individual consumers cannot be identified, how do you think the schemes could operate?*

Surely this is where an appropriate fine which ensures compliance/deterrence is the answer – that is why we have them. Redress cannot be provided unless those harmed can be correctly identified. This is an example where the aim of compensation, while possibly laudable, is not practical.

*QUESTION 13. Should businesses be able to offer undertakings to enforcers agreeing to implement consumer redress schemes or should the agreements be ‘rubber-stamped’ by a court before coming into force?*

The undertakings offered by the businesses should be considered by an appropriate third-party such as a suitably specialist court to ensure that the “agreement” actually benefits those it is intended to benefit. The example of the JJB sports case mentioned in the response to question 11 above is instructive. Offering coupons as a remedy may actually confer a benefit to the violator because the consumers have to visit the store to redeem the coupon. To the extent that getting consumers through the door help sales staff sell more goods, the remedy has potentially got the same effect as a promotional campaign and hence may neither benefit the consumer nor impose an additional cost on the business.

*QUESTION 14. Should the court have a power to impose a requirement that a business set up a scheme aimed at providing compensation or restitution?*

Yes if they have or can draw on appropriate expertise. Otherwise, too much power may be left in the hands of the business to design a scheme in such a way that they get closer to the result they want, which may not be aligned with customer interests.

*QUESTION 15. Do you agree that the Government’s proposals would be workable and appropriate?*

No – the means to achieving consumer empowerment and the resulting effects need further thought, in particular as regards the way in which information is communicated to consumers.

Consider Box 2. If the internet and simple search engines are really that effective, why is the regulator contemplating extensive interventions in the retail energy market, and the government proposing even more extreme measures? Why should consumers who are inactive in the energy market be likely to be activated by this initiative? All the evidence from the energy market shows that the main incentive to activity is provided by the potential price gains, and yet substantial numbers of people do not switch, even when such gains are presented to them clearly and authoritatively. For example in The Big Switch, held in the Spring of 2012, only a third of consumers who were told that they could gain more than £50 a year switched supplier, even after having provided a considerable amount of information to Which?, and so already showing substantial commitment to the process, and despite an easy further process to make the switch. Insights from behavioural economics show that removing barriers to activity does not necessarily stimulate the activity itself. CCP’s own analysis of switching shows that while gains are important, other factors also influence people’s responses<sup>4</sup>. Nonetheless, gains are sufficiently important that lower levels deters consumers from engaging in the market<sup>5</sup>, and policy makers need to guard against interventions which reduce such potential gains from consumer activity.

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<sup>4</sup> Effective empowerment: empirical estimates of consumer switching behaviour by Catherine Waddams Price and Catherine Webster, mimeo 2012

<sup>5</sup> Non-discrimination clauses in the retail energy sector by Morten Hviid and Catherine Waddams Price, The Economic Journal, 122 (August), F236-F252, 2012

*QUESTION 17. Do you think legislation should list specific actions to be chosen from or simply set out the outcomes while leaving discretion to the parties and ultimately the court as to the best action to address the breach?*

Given the text in 3.27 and 3.28 preceding this question, most of which we would agree with, the concern is surely that in either case unprincipled businesses would be able to subvert the initiatives and would have much greater incentives to do so than those who stand to lose or those who wish to represent this group. While the courts might have the expertise to counteract the action of unprincipled businesses, someone has to take the case there, and it is far from clear who would have the incentive or the financial resources to do so. We would urge BIS to spend more time on refining the details of this proposal and in particular learning the lessons from other areas where increasing consumer empowerment has proved challenging. This may also be the appropriate point at which to consider the role and powers of a consumer ombudsman.