



Department  
for Business  
Innovation & Skills

**ENHANCED CONSUMER  
MEASURES**

**Guidance for Enforcers of  
Consumer Law**

**MONTH 2015**

DRAFT

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# 1. Introduction

1. This guidance is aimed principally at enforcers of consumer law to help them understand what the new enhanced consumer measures (ECMs) are, how they are intended to work and when it is appropriate for them to be used.
2. The guidance can also be used by business to help them understand what the measures are and what they can expect if they have breached the law and an enforcer is seeking to use them.
3. The guidance sets out when and how ECMs should be used and what might be appropriate measures. This includes the use of illustrative case studies. Ultimately however, only the courts can decide if the use of ECMs is appropriate in a particular case and whether or not they should be included in an enforcement order or undertaking.
4. The guidance has been written in consultation with business representatives public enforcers and consumer organisations. It is not a detailed breakdown of the rules and procedures in the civil courts.
5. ECMs give enforcers of consumer law greater flexibility to get better outcomes for consumers who have been the victims of a breach of the law.
6. The main formal sanction for dealing with the most serious breaches of consumer law will remain criminal prosecution. As an alternative to criminal prosecution, certain enforcers can seek a civil injunction under Part 8 of the Enterprise Act 2002 against infringements of consumer protection legislation.
7. ECMs widen the orders that the enforcer can seek in the civil courts, giving the flexibility to seek orders aimed at achieving one or more of:
  - redress for consumers who have suffered loss from breaches of consumer law;
  - remedies from traders who have breached consumer law to improve their compliance and reduce the likelihood of future breaches;
  - remedies to give consumers more information so they can exercise greater choice and help improve the functioning of the market for consumers and other businesses.
8. The measures should always be just, reasonable and proportionate<sup>1</sup>. Details of possible measures are not included in the legislation. This ensures that the enforcer or the court retain the flexibility to find the most appropriate measure or measures to deal with a business that has broken the law. It may also take away the flexibility for a person who is subject to enforcement orders or undertakings to put forward their own measures, which could be deemed suitable, to the court or enforcer.
9. In the vast majority of cases where use of the measures is appropriate they will be an alternative to criminal prosecution. However, there may be cases where not only is it appropriate to criminally prosecute a defendant, but a civil action may also be appropriate, for example to recover redress.

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<sup>1</sup> An explanation of these terms is contained below

10. Whilst criminal courts have the power to award compensation to victims of crime, the experience is that often criminal prosecutions do not lead to all consumers who have suffered loss receiving compensation.
11. The enforcer will take a number of factors into account before deciding on the most suitable way of dealing with a case including, what is in the public interest<sup>2</sup>.

### **Case Study 1 - How the measures give greater flexibility**

Trading standards receive a number of complaints from consumers who had made payments to a business offering online courses. The courses were never delivered.

Using the company's own records and details of complaints made to trading standards and citizens advice it is established that 130 consumers have suffered loss in the region of £550.

#### **Actions available before enhanced consumer measures**

##### Criminal Prosecution

- fine, imprisonment, disqualification etc.

##### Civil action

- to stop the offending behaviour and prevent it's re-occurrence.

#### **Actions after enhanced consumer measures**

##### Criminal Prosecution

- fine, imprisonment, disqualification etc.

##### Civil action

- to stop the offending behaviour
- to pay consumers redress;
- to increase business compliance;
- to provide more information to consumers about the breach.

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<sup>2</sup> The reference to the public interest reflects the requirements of section 21 of the Legislative and Regulatory Reform Act 2006 to act in a way that is transparent, accountable, proportionate, and consistent and target cases in which action is needed and the practice of many public enforcers of having regard to the principles of the Code for Crown Prosecutors in determining whether or not to bring a criminal prosecution.

[http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/codetest.html](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html).

**FAQ 1 - What are enhanced consumer measures?**

- Measures designed to give public enforcers greater flexibility to get the best outcomes for consumers. Measures must aim to achieve one or more of the following: redress for consumers, enabling consumer choice or a reduction in reoffending.

**FAQ 2 - What if a business does not comply with the measures?**

- If they don't comply with a court order or undertaking individual traders and directors or officers of a company, who have wilfully failed to ensure compliance by the company, can be committed for contempt of court. This is punishable by up to 2 years imprisonment.
- In addition, individual traders, directors or officers of companies and the company itself can have property sequestered or be given an unlimited fine.

**FAQ 3 - Are the measures an alternative to criminal prosecution?**

- An enforcer should aim to use the measures whenever they deem them to be appropriate.
- In most cases, they will be used as an alternative to criminal prosecution.
- However, there may be cases where the offences are serious enough to warrant them being used in conjunction with criminal prosecution.
- The enforcer will take a number of factors into account before deciding on the most suitable way of dealing with a case including, what is in the public interest.

## 2. The Enterprise Act 2002

12. Part 8 of the Enterprise Act 2002 (EA 2002) allows certain enforcers to seek a civil injunction against a trader for infringement of consumer protection legislation. The key power is an enforcement order. Through an enforcement order, a civil court can order that the trader does not engage in the conduct in question. Enforcers can also seek an undertaking from business that they will not engage in that conduct.

### Enforcement Orders

13. EA 2002 enables enforcers to apply to the civil court for an order to stop a trader from breaching certain legislation, where the breach harms the collective interests of consumers. The enforcement procedure is set out at sections 214 to 223 of the EA 2002 with applications for an enforcement order set out under section 215.
14. Section 214 of the EA 2002 requires an enforcer to consult the person against whom the enforcement order would be made and not to apply for an order until 14 days (or 28 days where under the new extended consultation period applies, see below) after the request for consultation is received by the person concerned in respect of an enforcement order or 7 days in respect of an interim enforcement order. Prior consultation is not required if the CMA thinks that an application for an enforcement order or an interim enforcement order should be made without delay.
15. Enterprise Act 2002 (Part 8 Request for Consultation) Order 2003 lays down the rules in respect of the making and receipt of an enforcer's initial request for consultation to the person concerned.
16. If the consultation is not successful and the enforcer seeks an enforcement order, the application must name the person the enforcer thinks has engaged in or is likely to engage in conduct that infringes relevant consumer protection legislation.
17. Following consultation an application can be made to the court who can then consider the merits of issuing an order (under section 217).
18. Section 217 sets out the detail relating to the enforcement order, which must direct the business to comply with the prohibitions set out in the order. As an alternative to issuing an order, the court may accept an undertaking from the business under section 217(9).
19. Enforcement orders made under Part 8 will apply throughout the UK. It will therefore be capable of stopping a person who is the subject of an order in one jurisdiction of the UK from harming the collective interests of consumers in the other parts of the UK.

### Undertakings

20. As an alternative to an enforcement order the enforcer can seek an undertaking from the business that they will stop engaging in practices that infringe consumer protection legislation. The scope of such undertakings mirror the scope of the enforcement order, see sections 217(6) and section 219(4) EA 2002.

21. Where such undertakings are accepted, and the enforcer goes on to make an application for an enforcement order the court must have regard as to whether such an undertaking has been given and whether they have failed to comply with it (section 217(4)).

## What has changed?

22. The Consumer Rights Act 2014 amends EA 2002 Act to widen the scope of the measures that an enforcer can apply for in the civil courts. Rather than being constrained to seeking an order to stop certain practices, the ECMs allow a much wider range of measures and enable the enforcer to consider on a case by case basis the best way of dealing with a breach of the law.
23. For example, enforcers can now seek an order for a business to pay consumers redress, change their practices to stop a repeat of the breach and/or put measures in place to increase consumer choice.

### **FAQ 4 – What is an undertaking/enforcement order?**

- A business can agree with an enforcer to put measures in place to put right their breach of the law, known as an undertaking.
- If the enforcer and business cannot agree an appropriate response to a breach of the law, the enforcer can seek an enforcement order from the court that will require the business to put measures in place.

### 3. Overview

24. 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.
25. 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 breaches of the law.
26. The Government believes that there is a lack of flexibility in the ways that enforcers can achieve the best outcomes for consumers. Prosecutions in the criminal courts can lead to a fine or even imprisonment, while actions in the civil courts under EA 2002 can stop the infringing conduct. However, neither option tends to lead to positive outcomes for consumers, for example getting their money back, nor does the person who has broken the law have to take positive steps to put right the damage they have caused.
27. ECMs are designed to allow public enforcers to seek a wider range of innovative and positive measures in the civil courts. In the first instance the enforcer should seek to work with the trader that has breached the law to identify suitable measures to deal with the breach. If the trader refuses to co-operate or disagrees that the measures put forward by the enforcer are just, reasonable and proportionate, the enforcer will have to present their case to the court. It will be for the court to decide, after hearing from both parties, if the measures being proposed by the enforcer, but being rejected by the trader, are just, reasonable and proportionate.
28. The legislation does not contain a list of what might constitute suitable measures. This is to ensure that the enforcer has as much flexibility as possible to identify the most suitable approach to dealing with a breach or potential breach of the law. It also gives the business the opportunity to put forward their own suggested measures to address their behaviour.
29. The measures came into force on the 1st October 2015.

## 4. Scope

30. Use of ECMs is open to all public enforcers under Part 8 EA 2002<sup>3</sup>. This includes specialist enforcers who operate within a particular market, for example the CAA, whereas others like Trading Standards Services have a far broader remit.
31. A power is included in the Act that, subject to certain safeguards, can extend the use of the measures to private designated enforcers<sup>4</sup>.
32. ECMs can be used to address domestic and Community infringements of legislation set out at Annex A to this guidance.<sup>5</sup>..
33. The decision on whether or not use of the measures is appropriate to deal with a breach or suspected breach rests with the enforcer. The enforcer will need to evaluate the detriment caused and use this to decide on the best way of dealing with the business.

### When can they be used?

34. The measures must be used to address breaches or potential breaches of consumer law, for example the CPRs, UTCCRs etc. As stated, the decision whether or not to use the measures rests with the enforcer. However, there are conditions on when and how the redress part of the enhanced consumer measures can be used. In short, they can only be used when consumers have suffered loss<sup>6</sup>.
35. There may be cases where it is appropriate that ECMs are used alongside or following criminal prosecution. For example, where an individual has caused considerable detriment to a number of elderly consumers criminal prosecution would appear to be suitable. However, it may also be appropriate for the enforcer to use the measures to seek an order for the individual to pay those consumers, who had suffered loss, redress.

### How should the measures be used?

36. Before deciding whether or not to seek to use the measures the enforcer will need to take a number of factors into account, including whether or not it is in the public interest.

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<sup>3</sup> Competition and Markets Authority, Trading Standards Services in Great Britain, Department for Enterprise, Trade and Investment in Northern Ireland, Civil Aviation Authority, the Northern Ireland Authority for Utility Regulation, Ofcom, Ofwat, Ofgem, Phonepay Plus, The Information Commissioner, Office of Rail Regulation, the Financial Conduct Authority, community enforcers under the Injunctions Directive, Secretary of State for Health, Department of Health, Social Services and Public Safety in Northern Ireland.

<sup>4</sup> Only Which? are designated as a private enforcer.

<sup>5</sup> List up to date as at 1<sup>st</sup> October 2015

<sup>6</sup> See the section on redress measures below for further information.

37. In the first instance the enforcer should seek to agree appropriate measures with the trader. At this stage it should be made clear to the trader, and confirmed in writing, what measures the enforcer is seeking and what the trader will have to do to put them in place<sup>7</sup>. A public enforcer cannot impose the measures on a business, what they can do is seek an undertaking from the business that they will put the measures in place.
38. It is open to the trader to suggest alternative measures to the enforcer. If the enforcer considers them appropriate, they can accept an undertaking with measures suggested by the trader instead or together with measures suggested by the enforcer.
39. If the trader and enforcer cannot agree measures that are suitable to the breach of the law, the enforcer will have to present their case to the court and the court will decide if the measures are just, reasonable and proportionate.
40. An enforcer or the court will have to consider the likely benefit to consumers of the proposed measure. They will also have to consider the cost to the business of putting the measures in place and the cost to consumers of obtaining the benefit of the measures. As part of the measures the trader can also be required to provide information to show that they have carried out the agreed measures. The enforcer will need to play a key role in ensuring that the measures are being complied with and, if ordered, consumers are receiving redress.

## The extended consultation period

41. The Consumer Rights Act 2014 extends in certain circumstances from 14 to 28 days the consultation period before an enforcer can seek to use the enhanced consumer measures.
42. The extended period applies in those cases where the person that may be subjected to the enforcement order or undertaking using the measures is a member of, or represented by, a trade association or other business representative body that operates a consumer code of practice that has been approved by a public enforcer or a community interest company whose role includes the approval of consumer codes, such as the Trading Standards Institute.
43. The extended consultation period may be used, for example, by the person that may be subject to the enforcement order or undertaking to propose their own measures to address the detriment caused and be based on the requirements of the relevant consumer code. Depending on the circumstances of the case, this may be an indicator that the infringement will not be repeated. At the end of the 28 day period, the enforcer may take further action if they consider it appropriate. They can either commence court action to seek an enforcement order and/or seek to work with the person to agree undertakings.

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<sup>7</sup> See example document at Annex X below

## Case Study 2 – Using the measures alongside criminal prosecution.

A number of complaints are received by trading standards regarding a business specialising in selling mobility aids to vulnerable consumers. The complaints allege that the business is cold calling consumers and arranging to visit them at home.

Once at the address the salesmen are using high pressure sales techniques to get the consumer to sign up to purchase a mobility aid. In many cases the aid is unfit for the purpose it was being sold for and the price eventually being paid by consumers is much more than that originally quoted.

Following investigation, due to the serious nature of the offences a criminal prosecution against the company and its directors is commenced.

The vulnerable nature of the victims means it is unlikely that they will be able to take their own civil actions to try and recover money lost. Due to the complexity of the case the enforcer launches a civil action alongside the criminal prosecution seeking an enforcement order with ECMs in the redress category.

The enforcer contacts the affected consumers and establishes that 25 consumers have suffered detriment. Of these 20 want to return the aid and receive a full refund while 5 wish to keep the aid but only pay what they were originally quoted.

Using the redress measures in the ECMs the enforcer obtains a civil order that orders the Directors of the company to:

- Give a full refund to the 20 consumers who want to return the mobility aid and get their money back. The order states that the consumers must make the aid available for collection;
- Pay the difference between what the consumers were originally quoted and the money they eventually paid by the 5 consumers who wish to keep the aid.

## 5. The Measures – Redress, Compliance and Information

44. Enhanced consumer measures give enforcers greater flexibility to get better outcomes for consumers. Measures must be based around achieving one or more of:
- Redress – giving consumers who have suffered loss their money back
  - Compliance - reducing the likelihood of future breaches;
  - Information – enabling consumers to exercise greater choice in the market.
45. The legislation specifically leaves out a list of possible measures. This enables the enforcer to choose the most appropriate measure to deal with a breach. It also enables the business to have the flexibility to suggest their own measures to put right the detriment they have caused.
46. A list of potential measures was included in the consultation. These are included here as suggested measures. The decision on the most suitable way of dealing with a breach of the law remains with the enforcer. Possible remedies could include the business doing one or more of:
- Setting up a redress scheme and advertising/notifying it to customers;
  - Detailing their breach and what they are doing to put it right, for example on their website, in the press or in store.
  - Signing up to a Primary Authority scheme;
  - Appointing a compliance officer;
  - Providing better staff training/guidance to staff;
  - 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;
  - Signing up to an ADR scheme for future complaints and committing to be bound by decisions of an independent ADR provider.

### Case Study 3 – Using the three categories of measures

A large furniture shop advertises that it is '*never beaten on price*' and goes on to explain that it matches at the till all offers and discounts offered by its competitors on any given day ensuring their customers always pay the lowest price available. The adverts are displayed prominently in the press, on their website and in large advertisements outside their stores

The Local Trading Standards Service receives complaints from consumers that the advertising is misleading and on a particular weekend an online competitor was offering a discount that was not matched at the till. Following investigation, it is established that the store was not including online retailers in the deal, but had decided deliberately not to make this clear to consumers unless they asked.

What is just, reasonable and proportionate?

#### Redress measures?

- Yes, consumers could be offered the difference between the price paid and that charged by the online retailer.

#### Compliance measures to reduce re-offending?

- Yes. It would be appropriate to seek an order changing the internal practices of the company to ensure there was not a repeat, for example updating their training materials or advertising material to ensure all offers are properly explained to customers and designed to comply with the law.

#### Measures to give consumers more information?

- Yes. It would be appropriate to seek an order requiring the business to advertise their breach in the press, on their website and in store.
- It may also be appropriate for trading standards to name and shame the company by publicising details of the offence.

### FAQ 5 - Is there a list of appropriate measures?

- A list of possible appropriate measures is not included in the legislation as it is not possible to list each and every measure that might be appropriate in a particular circumstance.
- Business may also want to come up with their own innovative measure to put right a breach of the law.

**FAQ 6 - Can the measures contain financial penalties?**

- The measures should aim to achieve one or more of the following: redress for consumers, more information for consumers or increasing business compliance with the law. The measures do not allow for financial penalties.
- Whilst a business might be required to spend money in order to pay redress to consumers, or to increase compliance or provide information to consumers, a financial penalty payable to the Treasury cannot be imposed under the measures.

## The Redress measures

47. ECMs give the enforcer the opportunity to seek redress for consumers who have suffered loss as a result of the actions of a business. If using measures under all three categories would be disproportionate to the breach, then redress measures should take priority.
48. Use of the redress category is limited to those cases where consumers have suffered loss as a result of the breach of consumer law. There is no minimum or maximum of loss that must be suffered by consumers before the measures are used. The enforcer or the court must be satisfied that the cost to the business of putting a redress scheme in place is unlikely to be more than the losses suffered by consumers. However, this does not include the administrative cost of putting a redress scheme in place. Although the administrative cost must be included in the overall assessment of proportionality.
49. In the first instance the enforcer should work with the business to identify whether or not consumers have suffered loss, and if so, whether the business is prepared to be subject to an undertaking to pay them redress.
50. It is for the enforcer to decide if redress is appropriate in a case. If the business disagrees then the enforcer will have to prove the case in court and show what redress is appropriate.
51. The enforcer will have to consider the following when deciding if a redress scheme is appropriate:

| Consideration  | Explanation  |
|--|--|
| The likely benefit to consumers if the measures are used.                          | <ul style="list-style-type: none"> <li>• Have consumers suffered loss?</li> <li>• How much loss have they suffered?</li> <li>• Are they likely to receive any money back?</li> </ul>   |
| The cost likely to be incurred by the business of putting the measures in place.   | <ul style="list-style-type: none"> <li>• The reasonable administrative costs of putting the redress scheme in place i.e. if a large number of consumers have lost a small amount of money a full redress scheme may not be proportionate.</li> <li>• Will the cost of the redress scheme be more than the loss caused to consumers?</li> </ul> |
| The likely cost to consumers of obtaining the benefits of the measures being used. | <ul style="list-style-type: none"> <li>• Will it cost consumers more to collect redress. Is the business being clear about what they are offering as part of a redress scheme?</li> </ul>  |

## Making an offer of redress

52. It is recognised that each case will be different. The legislation does not say how much a consumer should lose before redress becomes appropriate. The enforcer should consider the following questions:
- Have consumers suffered loss?
  - How much loss have they suffered?
  - How will consumers who have suffered loss be identified, does the business have records?
  - How will consumers be contacted?
  - How will the redress be paid?
53. It will be up to the enforcer to calculate how much consumers have lost as a result of the actions of the business and whether it is appropriate for redress to be paid. The enforcer should agree with the business who has responsibility for contacting consumers with an offer of redress. In most cases it will be for the business to contact consumers to make the offer of redress. However, there will be cases, for example when the offence is particularly serious or when the consumers are vulnerable, when it is more appropriate for the enforcer to contact the consumer.
54. As part of a redress scheme the business can include a condition that if a consumer accepts it, they waive the right to take additional action to get their money back. However, the business cannot include a condition that the consumer agrees to waive their right to take any action in relation to other conduct against the business. For example a consumer could accept redress for money owed, but it would still be open to them to take their own civil action for compensation if they believed that

other actions of the business had caused them harm. They would though, not be able to seek additional damages in relation to conduct for which they had already received redress.

55. It is recognised that some consumers may not get back 100% of the loss they have suffered. For example, when a large number of consumers have suffered different amounts of loss it may be appropriate to work out an average of the loss suffered and for the enforcer or business to make consumers an offer of redress based on that. In these circumstances it will be up to individual consumers to decide whether or not to accept this offer of redress.
56. In these situations the enforcer should ensure that the offer of redress acknowledges that the redress being offered may not cover the total loss suffered by the consumer and the consumer is free to reject the offer of redress and take their own civil court action to recover the total amount they have lost. The business could also include a condition that if the offer of redress is accepted, the consumer waives their right to take additional action to recover the difference between the amount being offered and the actual loss suffered, but only in respect of the conduct that gave rise to the enforcement order or undertaking.

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### Case Study 3 – Using the redress measures

Trading standards receive a number of complaints regarding a business. Consumers are complaining that they have paid a deposit but the goods are subsequently not delivered. Consumers are struggling to get their deposits back.

Trading standards visit the business to investigate the complaints.

The enforcer establishes that the business has only recently been set up and the owner is struggling to keep up with the number of customers and orders. The enforcer confirms that the complaints are due to poor practices in the business, rather than them actively seeking to mislead and scam consumers.

The enforcer works with the business to establish the level of loss suffered. Using the business' own records, including details of payments made by credit and debit cards, and details of complaints, the enforcer is able to establish that 75 consumers have lost amounts in the region of £100.

Using ECMs the enforcer seeks an undertaking from the business that they will:

- Change their internal processes to give accurate delivery dates when orders are placed and reduce the chances of the business re-offending;
- Improve the training given to their staff on deposits, delivery dates and refunds; and
- Repay those consumers who do not want to wait any longer for delivery 100% of the money owed to them.

The business agrees to the first two measures and these are included in an undertaking. However, while accepting that consumers have suffered loss, the owner insists that the costs of processing the deposits should be deducted from the balance owed. The enforcer disagrees and brings a civil action for an enforcement order with ECMs in the redress category requiring the business to contact all the consumers who have suffered loss and repay them 100% of the money owed.

The enforcer sets out to the court:

- Details of the business' behaviour;
- Why the order is required;
- Details of the consumers who have suffered loss and how much each of them is owed;
- How long the enforcer believes the business should take to carry out each of the measures; and
- What information the business should lodge with the court to prove it has carried out these measures.

The court grants the order and the owner of the business is required to comply.

## Measures in the collective interest of consumers

57. The redress category of ECMs allows enforcers to seek measures that are in the 'collective interest of consumers'. This means that in circumstances where a business has caused consumer loss, but it is impossible to identify some or all of the consumers who have been affected, the enforcer can, for example, seek a measure requiring the business to pay the equivalent of the loss suffered to a consumer charity.
58. In the first instance the enforcer should seek to identify a suitable charity with the business. If the business refuses to co-operate it will be for the enforcer to identify a suitable consumer charity for the redress to be paid to. In instances where there is unclaimed redress the enforcer could also seek an order for the business to pay this to a consumer charity. However, in circumstances when the consumer has declined the offer of redress in anticipation of bringing their own civil action, the enforcer should not seek to include that money in a payment to a consumer charity.
59. The measures must serve the collective interests of "consumers", so it must benefit people in their capacity as consumers. This might include consumer charities like the Citizens Advice Service, but not charities solely aimed at, for example, medical research or protecting animals. The charity could be one that supplied vulnerable or elderly consumers with help choosing the best energy supplier or broadband provider or one that gave educational talks to young people explaining their consumer rights.

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### **Case Study 5 - Using the redress measures to pay money to a consumer charity**

A trading standards officer makes a routine visit to a petrol station. They find that three of the twelve pumps are wrongly calibrated and are dispensing a quarter of a litre less than the amount shown on the pump when the consumer comes to pay.

The petrol station has records of the pumps being checked and being correct two weeks before.

Initially the owner is keen to put right the detriment they have caused. Using records of the fuel dispensed from the pumps the enforcer and the business are able to establish that the three pumps had been used around five thousand times in the last two weeks with each customer being overcharged by an average of £3.

Following investigations the enforcer establishes that it would not be just, reasonable and proportionate to seek an order for the business to pay back individual consumers as it is not possible to identify individual consumers who used the defective pumps. A number of consumers paid by cash and the records from the cash register do not show which credit card payments relate to the defective pumps.

Once it is established that it is impossible to identify the consumers who have suffered loss, the owner becomes less co-operative.

Using the redress part of the ECMs the enforcer brings a civil action and obtains an order for the business to pay £15,000 to a local consumer charity.

### **FAQ 7 - How will consumers get their money back?**

- Each case will be different. In some cases the business will have customers credit card details so they may be able to pay redress that way. In others they will have address and telephone numbers. In others they may have no details so the business and the enforcer will have to agree on the best way of paying redress. In these circumstances it may be that a payment to a consumer charity is more appropriate.

### **FAQ 8 - What if some consumers accept redress but others don't?**

- Consumers do not have to accept the offer of redress. They are free to take their own action against the company if they think the offer of redress is not appropriate for the losses they have suffered.

**FAQ 9 - What if there are hundreds or thousands of consumers who have suffered loss and it is impossible to work out exactly how much each individual consumer has lost?**

- Each case will be different but in cases that involve a large number of consumers who have all lost a small amount of money and where they are not easily identifiable, then it might not be appropriate or proportionate to offer them individual redress.
- Enforcers should bear in mind that in cases where consumers have lost a small amount of money they might be more unlikely to bring their own civil actions to recover money lost
- In these circumstances the business could agree with the enforcer that a payment to a consumer charity is most appropriate.

**FAQ 10 - Should all consumers get 100% of their money back?**

- Ideally, all consumers who have suffered loss should get back 100% of the loss. However, we recognise that this will not be possible in all cases and the enforcer will have to make a decision on whether use of the measures is appropriate.

**FAQ 11 - What if some consumers have lost more than others?**

- In some cases it will be possible for the enforcer to calculate what each consumer has lost and ensure that they get their money back.
- In other cases it will not be possible to work out exactly how much each consumer has lost so the enforcer will have to work out how much each consumer should be offered.
- This might be less than a particular consumer has lost so it will be up to the individual consumer whether or not they accept the offer of redress.

**FAQ 12 - How much loss must consumers suffer before they get any redress?**

- Each case will be different. It will be up to the enforcer to decide whether a redress scheme is appropriate.

**FAQ 13 - Can a business offer consumers more/less than the detriment caused?**

- A business will have to agree with the enforcer on what an appropriate level of redress should be. If they want to offer additional redress on top of that then that is up to them.

**FAQ 14 – Can a business use their own redress scheme?**

- There is nothing to stop a public enforcer agreeing in an undertaking that a business can use their existing redress scheme to give consumers redress.

**FAQ 15 – Can a business declare themselves bankrupt to avoid paying redress?**

- If the redress order was against the company director then the order to pay redress remains in place, regardless of whether the company is in liquidation.
- If the order is obtained against a sole trader who declares bankruptcy, the redress order becomes a debt in the bankruptcy.
- If the order is against company and it goes into liquidation, the redress order becomes a debt in the liquidation

**FAQ 16 – Who will decide what is an appropriate consumer charity?**

- The enforcer will decide what is an appropriate consumer charity. However, there is nothing to stop the business suggesting a local charity that they have supported in the past.

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## The Compliance Measures

60. Business compliance with the law is an important element of any enforcement regime. It helps to ensure that consumers do not continue to suffer from breaches.
61. Measures under the compliance category must be designed to prevent or reduce the risk of further breaches of the law. This includes a repeat of the conduct that led to the original complaint.
62. As with the use of the other categories of ECMs the enforcer will have to decide if seeking a measure to ensure business compliance with the law is just, reasonable and proportionate. This consideration is particularly important when considering the compliance measure. For example, the enforcer will have to take into account the size of the business and the possible impact on them that the measures might have. It would not be proportionate for the enforcer to seek to use ECMs to make a small business employ a full-time compliance officer.
63. Again a list of possible measures is not included in the legislation, but measures could include a business having to sign up to the Primary Authority Scheme, appointing a compliance officer or updating internal processes to ensure there is no repeat of the breach. It may also be appropriate to seek a measure that improves the training the business gives to its staff to ensure that there is no repeat of the breach.

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## Case Study 6 - Using the compliance measures to reduce the risk of re-offending

Trading standards receive a number of complaints regarding an online retailer. Some consumers have paid an additional fee for next day delivery but the goods are being delivered late. They are also complaining that their complaints are not being taken seriously enough by the firm.

The enforcer visits the firm and establishes that while some orders are being delivered late, they are being delivered. The delivery delays are due to short term staff shortages and poor staff training.

The business has already refunded the additional fee charged for next day delivery to those consumers whose goods were delivered late. They have also advertised for temporary staff to cover the staff shortages.

However, the enforcer is concerned that the internal problems relating to staff training and not taking customer complaints seriously remain. The business refuses to accept that there is a risk of a repeat of the delivery delays issue.

To ensure there is no repeat of the breach the enforcer seeks a civil order for the business to:

- Change and improve staff training; and
- Designate a member of staff to act as a customer complaints manager.

The enforcer explains to the court that if the original consumer complaints had been dealt with promptly, the issue of late deliveries would not have snowballed as it did.

The court accepts that the compliance measures are just, reasonable and proportionate and will ensure that there is not a repeat of the breach.

## Consumer information measures

64. A key element of a purchasing decision by consumers is the past performance of a business. Enabling consumers to see whether a business has broken the law and what action they have taken to put right any detriment caused will enable consumers to make better informed purchasing decisions.
65. If consumers are not aware of a business' past performance, there is no incentive for that business to change their practices and put consumers first. Informing consumers about businesses that have broken the law will encourage switching behaviour. This benefits not only consumers but also legitimate businesses who can find it hard to compete against businesses who flout the law.

66. The choice category gives the enforcer the flexibility to seek orders for the business to give consumers more information on the businesses past performance on complying with consumers law. This could include a business having to advertise their breach of the law and what they are doing to put the situation right on a business's own website, in the press or on social media. It could also include the enforcer advertising the breach of the law and details of the business on their own website.

### **Case Study 7 - Using the consumer information measures.**

Trading standards receive a number of complaints regarding a business that advertised prominently in the press that they were closing down and offering price reductions of 25% for 'this weekend only'.

When customers visited the business there was no sale and the business was not closing down. Goods were being sold at their usual price.

Trading standards establish that the business had purposely set out to mislead consumers that it was closing down.

Due to the actions of the business the enforcer seeks an order using the consumer information measures.

The court orders that the business displays a notice both in store, on their website, on social media and in the local press notifying consumers of their actions.

### **FAQ 17 – Can the measures be used to name and shame a business?**

- As long as the measure is just, reasonable and proportionate to the behaviour of the trader and the impact on consumers, there will be nothing to stop an enforcer using the measures to 'name and shame' a business.
- This could be the enforcer putting the business, the details of their behaviour and the actions they are taking to put right any detriment caused on an external website. Consumers could use this information to decide whether or not they wish to buy from that particular business

## 6. Roles and responsibilities

### The enforcer

67. ECMs are flexible and to some extent this extends to the roles and responsibilities of those involved. Whilst we expect in most cases that the enforcer will propose the measures to be put in place, each case will be different and if possible the enforcer should seek to work with the business to put in place measures that put right any detriment they have caused.
68. In the first instance the enforcer will seek to establish the best way of dealing with a breach or potential breach of the law, whether this should involve criminal prosecution, action under Part 8 EA 2002 and/or use of ECMs. The enforcer will be best placed to decide on the most appropriate way to proceed. The enforcer will have to decide whether it is proportionate for the measures to be used.
69. If the enforcer decides to use the measures their role will be to set out clearly what they expect the business to do to comply with them. They will also be expected to monitor compliance and bring the case back to the civil court if the business is not complying with the undertaking or enforcement order.

### Redress Measures

70. The enforcer will be responsible for establishing whether or not a redress scheme is appropriate. They will need to take into account the amount of loss suffered by consumers and whether a redress scheme would be proportionate.
71. This should be done by using the available information including details of complaints from consumers, the companies own records or other information supplied by the business.
72. If the business refuses to cooperate then the enforcer will have to decide whether or not to seek an order from the court for the disclosure of documents.

### The business

73. The business will have to decide if they believe that the enforcer is seeking to use ECMs in a just, reasonable and proportionate way. If they do not believe that they are or they do not think that they have done anything wrong, then they can reject the use of the measures and the enforcer will have to seek an enforcement order in the civil court. The business will have an opportunity to put their side of the case and the enforcer will have to present whatever evidence they have. The court will then be responsible for deciding whether the enforcer is using the measures in a just, reasonable and proportionate way.

**FAQ 18 – How does the trader show they have carried out the measures?**

- A trader will discuss in advance with the enforcer or the court what they will do to put the measures in place. It should be made as clear as possible to the trader what they have to do and the outcomes that the measures should achieve.
- What the business has to do to comply with an undertaking or enforcement order should be set out in writing.

**FAQ 19 - Can a court order the trader to prove they have carried out the measures?**

- Yes, a court can require the trader to show that they have carried out the agreed measures.
- The enforcer would also be expected to take a role in ensuring the measures were carried out as agreed or ordered.

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## 7. Definitions

### What is a just, reasonable and proportionate?

74. Whatever measures the enforcer is seeking to put in place to deal with a breach, they must be just, reasonable and proportionate to the behaviour of the trader and the detriment caused to consumers.
75. Enforcers such as trading standards officers are already guided by the Regulators Code<sup>8</sup> when deciding on appropriate enforcement action. The measures should be used in conjunction with the Code and the same considerations should be used when deciding whether or not using the measures is appropriate.
76. The Code puts a duty on the enforcer to act transparently and proportionately. Enforcers should have the necessary knowledge and skills to support those they regulate, including having an understanding of those they regulate that enables them to choose proportionate and effective approaches.
77. Enforcers also need to act proportionately, clearly explain what the non-compliant activity is, the advice being given, actions required or decisions taken, and the reasons for these. Enforcers should also provide an opportunity for dialogue in relation to the advice, requirements or decisions, with a view to ensuring that they are acting in a way that is proportionate and consistent.

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<sup>8</sup> <https://www.gov.uk/government/publications/regulators-code>

### **Case Study 8 – Measures that are not just, reasonable and proportionate.**

Consumers complain that a small white goods retailer is mispricing its products. Goods such as fridges and freezers are advertised in store at a lower price than consumers are eventually charged when they purchase the product. Some consumers may not have realised they were charged extra but the majority did not suffer loss as once they complained they were either charged the correct price or returned the product.

Following investigation the enforcer establishes that the goods are not being purposely mispriced and the fault lies with a new computer system the retailer has recently had installed. The enforcer also establishes that around 20 consumers had lost on average £6. The retailer has managed to contact 15 customers and repaid them the money lost.

The enforcer seeks to use ECMs to put in place the following measures:

- A redress scheme requiring the retailer to go through all their records and contact all consumers who purchased any product since the computer system was installed to check how much they paid and whether they are due any redress.
- Employ a compliance officer to ensure that there is no repeat of the breach.
- Put up a notice in the store and advertise in the local press detailing what the store did and what they are doing to put right the detriment caused.

The measures the enforcer is seeking to put in place are not just, reasonable and proportionate. The detriment was caused by an honest mistake and it would cost the retailer more to put the redress scheme in place than the loss suffered by consumers. In the circumstances described above the court should rule that the measures are not just, reasonable and proportionate and refuse to make an enforcement order that includes them. It would be more proportionate for the enforcer to work with and advise the business to ensure that there was not a repeat of the breach.

### **FAQ 20 - What does an enforcer have to consider when deciding if a measure is just, reasonable and proportionate?**

- An enforcer or the court will have to consider all the facts of the case including the likely benefit to consumers of the proposed measure. They will also have to consider the cost to the business of putting the measures in place and the cost to consumers of obtaining the benefit of the measures.

## 8. Templates

BIS would welcome comments from the guidance advisory group on what templates they might find useful

### Annex A - List of legislation

The below is a list of the legislation that ECMs can be used to address breaches of<sup>9</sup>.

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<sup>9</sup> As at 1<sup>st</sup> October 2015

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