



# Ofcom response to BIS consultation on civil enforcement remedies

Publication date:

7 January 2013

## **Introduction**

Ofcom welcomes the opportunity to respond to the Business, Innovation and Skills ('BIS') consultation on proposals to extend the range of remedies available to public enforcers of consumer law. We have a particular interest in the issues raised in the consultation as the independent regulator and competition authority for the UK communications industries and as one of the bodies responsible, through Part 8 of the Enterprise Act 2002, for enforcing consumer law.

Our principal duty under Section 3(1) of the Communications Act 2003 is to further the interests of citizens in relations to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In performing this duty, we seek to ensure that communications markets work well both for consumers and for businesses that operate fairly and responsibly towards consumers.

It is important that the enforcement bodies can efficiently and effectively protect the interests of consumers at the collective level and that there are remedies available to individual consumers. It is also important to ensure that businesses have appropriate incentives to comply with their responsibilities under consumer law and that fair dealing businesses do not lose out to businesses that engage in illegal conduct.

### **Question 1: Do you consider the Government's proposed outcomes to be valid for remedies to address breaches of consumer law?**

Subject to the points made in this response, we support the proposed outcomes set out in the consultation to:

- Increase business compliance with the law.
- Improve redress for individuals consumers affected by the breach.
- Create more confident consumers who are empowered to exercise greater consumer choice.

Ofcom agrees that achieving these outcomes goes to addressing a gap in current consumer protection law for the sorts of reasons set out in the consultation document.

### **Question 2: What are your views on the suitability of the RES Act to achieve the proposed outcomes?**

Ofcom agrees that the RES Act is ultimately concerned with penalties. Such penalties are unlikely in many cases of significant consumer harm to exceed the profits derived from a breach. For that reason, it appears to us, the RES Act may not be the most suitable instrument to achieve the proposed outcomes. We also consider that the RES Act may not provide the most appropriate procedural safeguards in terms of enforcers having the onus of challenging a business's practices and of a business's right to respond.

**Questions 3 and 4: Do you think that amending Part 8 of the Enterprise Act 2002 to extend Enforcement Orders and undertakings would be an appropriate way to mandate one or more actions by businesses to address breaches of consumer law? Do you agree with the Government's proposed enforcement mechanisms?**

Yes, we agree that the expanded Enforcement Orders and undertakings should apply to designated public enforcers under the Enterprise Act 2002, including Ofcom as a designated sectoral regulator, and that enforcers should be Hampton-compliant.

In Ofcom's view, this approach would generally be consistent with the (civil law) provisions of the 2002 Act, which are aimed at securing compliance with consumer law: stopping and deterring breaches and fairly reconciling and protecting the rights of consumers and business. These aims would be complemented by the restorative effect of the proposed remedies, such as redress schemes for affected consumers, where breaches have occurred. – Otherwise, gains made from unlawful conduct may exceed the penalties for which a wrongdoing business is liable, which may discourage compliance with the law and undermine consumer protection.

**Question 5: Do you agree that Hampton-compliant enforcers should have access to these remedies?**

Yes. Ofcom's regulatory framework is consistent with the principles of good regulation which were set out in the Hampton Review. Section 3(3) of the Communications Act 2003 requires Ofcom, when performing its duties, to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and any other principles appearing to Ofcom to represent best regulatory practice.<sup>1</sup>

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

We agree with the analysis in the consultation document and consider that the burden of proof should be set at the civil level.

The consultation paper notes that arguments have been put forward by some business stakeholders suggesting that if a wider range of remedies is available then a higher level of proof should be required than in ordinary civil cases as it could lead to costs on businesses. We would note that businesses should already be complying with their responsibilities under consumer law and fair dealing businesses should not incur additional costs as a result of there being a wider range of remedies available to enforcers to tackle illegal behaviour. It is important that enforcers are able to take efficient and effective action against non-compliant businesses so that these businesses do not prosper at the expense of fair dealing businesses. In that aspect, fair dealing businesses would benefit, rather than being additionally burdened by the proposals. Further, it is important that individual consumers who have suffered harm as a result of illegal conduct have access to remedies from that business.

Each of the foregoing points is consistent with the Government's proposed outcomes, and with those of increasing compliance with the law and improving consumer redress in particular. We also agree that, were the burden of proof higher where enforcers take action on behalf of consumers collectively than where individual consumers take action, this would be perverse and would undermine the achievement of the proposed outcomes.

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<sup>1</sup> Ofcom's regulatory principles can be found at <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>.

**Question 7: Do you agree that the evidence requirements should be at the civil level and that an enforcer's report should be admissible in lieu of formal witness statements?**

Yes, we agree that the evidence requirements should be at the civil level and enforcer's reports should be admissible.

Again, we agree it would undermine the proposals and the achievement of the proposed outcomes if evidential requirements were set at a higher level. Moreover, in compiling such reports, enforcers will seek to take account of all available evidence (including, for example, from consumer complaints and consumer research and from businesses responses to formal information requests and business records). Nonetheless, in some of our enforcement work, we think it is important to take formal witness statements. We would still consider whether this would be appropriate evidence to collect and present in future consumer law cases. There will continue, on these bases, to be sufficient safeguards for businesses.

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

In Ofcom's view, unless there is some countervailing reason, it is important that enforcers are able to take effective action against businesses that engage in illegal conduct, irrespective of their size. Likewise, that enforcers should have the option to secure that remedial action be taken by such businesses with respect to those consumers that suffered harm.

Against that backdrop, it is not clear that there is a strong case for exempting micro-businesses from the new proposals. One of the overall aims of the proposal is to create more confident consumers who are empowered to exercise informed choice. Applying a single framework to all types of businesses should make the law easier to understand and help give consumers confidence in their rights irrespective of the business they are transacting with. We also agree micro businesses may suffer if consumers avoided dealing with them on the basis they have fewer rights when doing so.

**Question 9: Do you agree with the Government's proposed remedies to increase business compliance with the law? Do you have any additional remedies to be considered?**

In general terms, we agree. It is important that there is a wide range of remedies available so that there is some flexibility for businesses and enforcers to consider what remedy might be most effective taking account of the nature of the infringement and the associated consumer harm.

We also agree there may be some benefit, in terms of clarity, from express stipulation in legislation of specific remedies that could be secured. However, some or all of the proposed remedies may well already be capable of being secured under the current law. Express legislative stipulation of certain remedies may, therefore, be unnecessary and potentially unhelpful (what would be the position in relation to remedies not stipulated?). We think it would be helpful and necessary, therefore, to clarify in any legislation that any list of specific remedies set out is non-exhaustive and other remedies might be appropriate depending on the specifics of the case.

Other remedies that might be relevant include reporting requirements or requirements to identify the root cause of any infringement and to take remedial action to address this. A more general way to secure that other remedies could be achieved would be to include in legislation a provision to the effect that undertakings and court orders may include such remedies as are appropriate and proportionate to secure compliance with the law in all the circumstances of the case.

**Question 10: Do you agree with the Government's proposed mechanism for enforcement via undertakings and Enforcement Orders?**

Yes, the proposal for businesses and enforcers to try to come to an agreement on remedial action, with the option of court action where they are unable to reach an agreement, seems appropriate.

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

Yes, subject to the following point, Ofcom agrees the proposals seek to address a shortcoming in the existing consumer enforcement regime and should lead to better outcomes for consumers.

One additional point we think needs consideration relates to the securing of and/or imposing of redress remedies against individuals. An issue Ofcom has encountered is the dissolution of corporate bodies liable for breaching the law. The practical effect is often that they evade the liability. The individuals involved then continue to operate via, or under the cover of, new corporate bodies. The effect of consumer redress remedies would be undermined if a similar position could be obtained as far as those remedies are concerned.

We suggest, therefore, that consideration is given to including for provision for redress remedies to be secured against and/or imposed on relevant individuals. One possibility may be to mirror the provisions already in sections 219 and 222 of the Enterprise Act 2002, which provide for the securing of undertakings and orders against individual accessories to corporate bodies' breaches of the law.

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

Where individual consumers can be identified, businesses should provide 'automatic' refunds to consumers affected where possible rather than the affected consumers having to take action to claim what they are entitled to. Where this is not possible (e.g. as the consumer has switched provider and the business no longer holds account information on the consumer), the process for obtaining a refund should be made as simple and as quick as possible.

Where individual consumers cannot be identified, consideration should be given to how affected consumers might be best made aware of the possibility of obtaining a refund. We agree this may occur by means such as through the media and via website alerts. There is also the possibility of enforcers' and consumer advocacy bodies' websites publicising redress schemes. Where funds have not been claimed, it may be helpful to consider how the unclaimed funds could be best put to use to benefit consumers more generally.

**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?**

Where businesses and enforcers are able to come to an agreement on consumer redress schemes, it is not clear what would be the benefits of having this rubber-stamped by the courts before coming into force. Enforcers have the expertise to assess the appropriateness of proposed redress schemes. Businesses are unlikely to propose or agree to excessive schemes. Enforcers are unlikely to accept inadequate schemes. There should be the option of going to court where businesses and enforcers have been unable to reach such an agreement.

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

Yes, this would appear to be an important backstop provision for cases where businesses and enforcers have been unable to reach an agreement. It would provide an appropriate incentive for businesses to agree appropriate schemes with enforcers, by way of undertakings, to avoid the extra time, expense and possible adverse publicity of court proceedings. In this way, such provision would facilitate the effective achievement of the Government's proposed outcomes.

**Question 15: Do you agree that the Government's proposals would be workable and appropriate in a remedies regime?**

We agree in principle with the analysis in the consultation document. In particular, that consumers should be aware of a business's breaches of the law and redress/remedies schemes. That is an aspect of consumer choice that should be a feature of the consumer enforcement regime. However, some of the proposals put forward appear more marginal. For example, it is difficult to see relevant businesses agreeing to make consumers aware of others' products, and we note the consultation document's acknowledgment that a court may be unlikely to impose such a remedy.

**Question 16: Are there any other measures you think could achieve the objective?**

We have not identified any other measures at this time, save that we re-iterate in this connection the point made in relation to question 11 above about the securing of remedies against relevant individuals.

**Question 17: Do you think the 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?**

We agree that it is important that some flexibility is built into the regime so that the remedies can be tailored to tackle the specific issues related to the infringement and the associated consumer harm. As set out in relation to question 9 above, where lists of possible specific remedies are provided, it should be made clear that these are non-exhaustive and other remedies may be appropriate depending on the specifics of the case.