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**BEST PRACTICES FOR CONSUMER POLICY: REPORT ON THE EFFECTIVENESS OF
ENFORCEMENT REGIMES**

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REPORT ON THE EFFECTIVENESS OF ENFORCEMENT REGIMES

FOREWORD

This report was prepared by Anthony Ogus, Professor of Law, University of Manchester; Research Professor, University of Maastricht; Michael Faure, Professor of Law, University of Maastricht; and Niels Philipsen, Post-doctoral Researcher, University of Maastricht acting as consultants to the Department of Trade and Industry (DTI) in the United Kingdom.

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At its 72nd Session on 26-27 October 2006, the Committee on Consumer Policy agreed to declassify the report by written procedure, which was completed on 20 December 2006.

The report is published under the responsibility of the Secretary-General of the OECD.

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EXECUTIVE SUMMARY

Objectives and methods

1. The objective in this study has been to investigate which enforcement regimes are cost-effective in securing a high level of compliance with consumer protection legislation designed to prevent financial losses.
2. The study comprised four principal tasks:
 - i.* Obtaining information on existing systems of consumer protection enforcement across OECD jurisdictions, to classify these systems, and thereby identify the principal policy options.
 - ii.* Developing a theoretical framework for evaluating the cost-effectiveness of the identified policy options.
 - iii.* Undertaking case-studies in four jurisdictions, both to enrich understanding of existing systems and to assist evaluation of policy options by drawing on the experience of those engaged in enforcement processes.
 - iv.* Using the theoretical framework developed in *ii)* and the information obtained in *iii)*, to evaluate the principal policy options, leading to conclusions as to how selection from them might achieve a high degree of compliance at lowest cost, thus leading to conclusions also on best practices.
3. From the information gathered, there appeared to be five principal models of enforcement:
 - i.* Those relying on the criminal justice system for penalties.
 - ii.* Those in which the administrative agencies use primarily the civil justice system to obtain sanctions and remedies.
 - iii.* Those in which the administrative agencies have power themselves to impose financial penalties.
 - iv.* Those relying primarily on consumer complaints to an Ombudsman.
 - v.* Those relying primarily on self-regulatory arrangements and on the enforcement of private rights.
4. The countries selected for the case-studies were: the United Kingdom as an example of model *i)* Australia as an example of model *ii)*; Belgium as an example of model *iii)*; and the Netherlands as an example of model *v)*.
5. To assess the cost-effectiveness of different policy options, a theoretical framework of deterrence was adopted which assumes that, in general, traders comply with the law when the costs that they will incur by acting unlawfully, if detected, will exceed the benefits that will accrue to them from the unlawful act. The various enforcement policy options were then explored to assess how effective they were likely to

be in meeting this condition, and at what likely cost. The latter involved, principally, the administrative costs of using particular practices and procedures, but also considered costs arising from any errors to which those practices and procedures might give rise. Given the limits to the research in terms both of resources and time, it was not possible to engage in quantitative analysis; rather the work proceeded on the basis of an intuitive appraisal of the relative costs and benefits of different options, fortified by such data as could be made available. Interviews were used in the case studies to judge the plausibility of the intuitive appraisals and, more importantly, to seek the subjective opinions of officials working in the systems on the effectiveness of the options.

Case studies

6. The United Kingdom was selected as a jurisdiction which relied on the criminal justice system for the imposition of financial penalties. The following key points emerged from the study (*see* section II.D).

- Although enforcement procedures are considered in general to be effective, for serious cases there is perceived to be inadequate deterrence, because the penalties imposed by the criminal courts are too low and no adverse financial consequences are attached to enforcement orders obtained in civil proceedings.
- It is thought that the introduction of a suitable system of administrative financial penalties would enhance compliance.

7. Australia was selected as a jurisdiction in which enforcement agencies use primarily the civil justice system to obtain remedies. The following key points emerged from the study (*see* section II.A).

- Civil proceedings appear to be an effective way of stopping illegal conduct by recalcitrant traders and achieving timely redress for consumers.
- The civil regime does not allow the courts to impose financial penalties – these may only be pursued through criminal prosecution. Officials are currently considering the possible introduction of civil pecuniary (financial) penalties for contraventions of Australia’s consumer protection laws.
- “Probation orders” and adverse publicity are regarded as important devices for inducing compliance.
- Criminal sanctions are reserved for the most serious contraventions of the law, however because of the additional time and complexity associated with criminal prosecution they are not generally considered an effective mechanism for achieving timely consumer redress.

8. Belgium was selected as a jurisdiction in which the administrative agencies had themselves power to impose financial penalties. The following key points emerged from the study (*see* section II.B).

- The “transaction” (an administrative financial imposition) is considered to be an easy and low-cost means of dealing with consumer protection offences.
- The ability of the criminal process to operate effectively in relation to cases appropriate for the process was perceived to be hampered by inadequate resources in the prosecution service and by the fact that some of the cases referred to that service could more appropriately be resolved in the civil courts.

9. The Netherlands was selected as a jurisdiction relying primarily on self-regulatory arrangements and on the enforcement of private rights. The following key points emerged from the study (*see* section II.C).

- The system, which is dependent to a large extent on consumer activism, self-regulation and the informal resolution of disputes, works well where contraventions are easily detected and where traders are “benevolent”. Industry self-regulatory compliance schemes can play an important complementary and cost effective role to consumer policy enforcement regimes. Nevertheless, there is perceived to be inadequate deterrence for “*mala fide*” traders.
- The situation is likely to alter to some extent when current reform proposals, creating a new administrative agency with powers to impose financial penalties, are implemented.

Evaluation of key policy options

10. The impact of different policy options is to some extent dependent on conditions, notably differences in culture, both legal and non-legal, which vary across OECD jurisdictions. This has required caution in drawing applicable generalisations from the analysis, particularly in relation to some policy options where culturally-specific qualifications are important. Subject to that important caveat, the analysis of the likely cost-effectiveness of the key policy options leads to the following conclusions.

Monitoring (paras. 171-176)

11. A system of monitoring traders’ behaviour by public authorities, enhanced by a system of risk-assessment, is likely to be cost-effective where there is not within the jurisdiction a significant culture of pro-active complaints by consumers and consumer associations or where the contravention is unlikely to be easily detected by consumers themselves.

Post-detection discretion (paras. 177-180)

12. There are important reasons for discriminating between contraventions, for example when committed by first-time offenders or second or repeat offenders, and thus, unless there are justified fears that officials might abuse discretion, it is cost-effective for enforcement agencies to have the power to choose between dismissing a case (with or without a warning) and initiating enforcement procedures.

Administrative financial penalties (paras. 181-188)

13. Reliance on the criminal or civil justice processes for the imposition of penalties may result in insufficient deterrence for traders. This is a consequence of the fact that, the costs of these processes typically being high, not many cases reach this stage. Viewed *ex ante*, traders will therefore perceive the probability of a criminal or civil penalty to be low. To compensate, the courts might impose a relatively large penalty, but as the case-studies reveal, although courts generally have the power to do this, in practice they are very reluctant to do so for minor trading offences. A suitably designed system of administrative financial penalties may be one way to address this problem. However, consideration needs to be given to the potential costs of regulatory error, whether those costs outweigh the benefits of such systems, and whether such systems are suitable in every jurisdiction. To the extent that administrative financial penalties are pursued, it is suggested that:

- i. The language typically associated with the criminal process (for example “fine” or “penalty”) be avoided – instead something more neutral, for example “financial notice” or “charge” should be used.

- ii. Fixed penalties be used only for very minor offences, with the agency having discretion, up to a limit, to determine the amount in other cases.
- iii. The penalty system can be related to the civil or criminal processes, enabling the trader to avoid those processes on payment of the penalty, or it can operate independently of those processes, but with a right of appeal to a tribunal or court – the choice between the two approaches might depend on the level of administrative costs to which, respectively, they give rise.

Other administrative sanctions (para. 189)

14. If financial penalties are too low for deterrence purposes, they may usefully be complemented by orders to compensate consumer-victims and the reimbursement of (some of) the administrative costs of enforcement. The issuing of adverse publicity (“naming and shaming”), however, seems to be inappropriate in this context, unless it follows a definitive ruling by a court.

Civil v criminal financial penalties (paras. 190-196)

15. In jurisdictions where the cost of the criminal process significantly exceeds that of the civil process, the imposition of a civil financial penalty may be a more cost-effective means of enhancing compliance than a criminal financial penalty, except where increased deterrence resulting from the criminal process justifies the increased cost.

Injunctions, enforcement orders and “cease offence” orders (para. 194-195)

16. Injunctions, enforcement orders or “cease offence” orders are justified where continuing or further contraventions will lead to such a level of social harm that prevention of the continuing unlawful activity is regarded, in the individual case, as essential.

The role of the criminal justice system (paras. 197-203)

17. In general, criminal prosecutions should be reserved for repeat offenders who cannot be deterred by other instruments, as well as for those whose conduct is regarded as so repugnant morally as to justify such proceedings being taken. Other considerations that may justify the imposition of criminal sanctions include high and widespread levels of consumer detriment, and deliberate or reckless conduct.

18. This perspective of the function of the criminal law in relation to the enforcement of consumer protection legislation has important implications for the procedures and substance of the criminal justice process. Procedural safeguards, such as the existence of a specialist prosecution authority as well as high evidentiary thresholds for liability and conditions of knowledge and blameworthiness, may be considered necessary to reflect the moral values implicit in criminal justice and protect individual rights. As such, these should be preserved for consumer protection legislation even though they may not always be consistent with cost-effective deterrence.

Penalties in criminal and civil proceedings (paras. 205-214)

19. The imposition of a financial penalty, of an amount which is determined by reference to the nature of the contravention and the trader’s circumstances, is likely to be the most cost-effective penalty in criminal and civil proceedings for inducing compliance. However, in appropriate cases, particularly where that penalty is insufficiently large for deterrence purposes, the likelihood of compliance can be enhanced by compensation orders, orders for the recovery of administrative costs, the disgorgement of profits or a policy of “naming and shaming.” This is also the case with a “probation order,” as developed in Australia, if used selectively. In some extreme cases, imprisonment may be justified as an ultimate sanction, but the

suspension or revocation of a trading licence, if applicable, is likely to be much more cost-effective. The same may apply to a “cease trading” order where the scope of the order can be defined with sufficient precision.

Enforcement of private rights (paras. 215-221)

20. Many contraventions of consumer protection regulation constitute also an infringement of the consumer’s private rights. If the private right is enforced or traders perceive that such enforcement is plausible, this will enhance the inducement to compliance supplied by the public system. Therefore consideration should be given to cost-effective possibilities for using public law determinations that a trader has contravened consumer protection regulation to facilitate the enforcement of private rights.

Third party participation in public law enforcement (paras. 222-224)

21. A related, but separate, issue to the pursuit of remedies in private proceedings is the participation of consumer-victims, competitor traders and other third parties in public law enforcement. Such participation can increase the possibility of a penalty being imposed and thus enhance the likelihood of compliance. On the other hand, third party activism can defeat, or at least undermine, sensible enforcement policy, where this dictates that a given trader should not be the subject of formal enforcement procedures. Therefore it may be preferable for the right (if any) of third parties to initiate public proceedings for the imposition of sanctions to be subject to approval by a relevant public agency.

Concluding observations

22. Due to different legal traditions and cultures, it is highly unlikely that any single model of practices and procedures will provide the most cost-effective means of achieving a high degree of compliance with the law across the OECD countries.

23. The predictions set out in this report of what options are likely to be cost-effective are based not on actual cost data, but rather on what can be considered to be plausible cost comparisons between different procedures and conditions. Needless to say, the actual cost profiles of those procedures and conditions may vary significantly between the jurisdictions. If they do so, a different set of predictions on the cost-effectiveness of the policy options may emerge. To the extent that the stated predictions herein rest on assumptions which do not apply in particular jurisdictions, this study can be understood as providing an analytical framework for addressing the key policy options. In any event, it is hoped that the study can be used by policymakers to identify and understand the interaction of key variables which impact on the choice of enforcement practices and procedures.

DRAFT REPORT ON THE EFFECTIVENESS OF ENFORCEMENT REGIMES

I. Introduction: Background and method

OECD background

24. The OECD Committee on Consumer Policy has taken a number of initiatives in recent years to co-ordinate national policies (for example to deal with cross-border trader fraud) and to explore methods of dealing with new problems, such as those arising from e-commerce. It has also been examining best practice in consumer policy, initially with two phases of research led by the UK Department of Trade and Industry. The first phase concerned consumer awareness-raising against scams. The present project on enforcement constitutes the second phase.

DTI and UK background

25. The development of better regulation has been an important item on the UK government's agenda in recent years. In 2005 the Hampton Report on *Reducing Administrative Burdens*¹ was published and this recognised the important relationship between the level of government intrusion in business by monitoring activity and the level of penalties imposed following apprehension and conviction for a contravention:

“At present, regulatory penalties do not take the economic value of a breach into consideration and it is quite often in a business's interest to pay the fine rather than comply. This is especially true where a business feels able to shrug off the reputational risk of prosecution. If businesses face no effective deterrent for illegal activity, some will be tempted to break the law, and regulators will need to inspect more businesses.”²

26. Following this report, the UK government has set up several studies to investigate regulatory enforcement policy, headed by the Better Regulation Penalties Review, the object of which is to:

“consider options that could add to regulators' enforcement toolbox, broadening the flexibility available to both regulators and the judiciary to better meet regulatory objectives and improve compliance.”³

27. The present study, funded by the Department of Trade and Industry (DTI), is intended to meet this objective in the particular context of consumer protection regulation, thereby building evidence on best practice for the OECD Committee on Consumer Policy.

Objectives and scope of project

28. The objectives of this research project were stated by DTI to be:

- To assess which enforcement regimes are most effective in preventing breaches of consumer protection regulations.

- To draw best practice lessons to assist in the formulation of new regimes and the improvement of existing regimes.

29. It was not possible within the short time-period envisaged for the work to collect and analyse reliable data and thus to establish on a scientifically rigorous basis what regimes “are most effective”. Therefore, the first objective of the project is interpreted as an attempt to assess which regimes **are likely to be** the most effective in preventing breaches of consumer protection regulations in the light of:

- i. Theoretical work on the impact of enforcement measures.
- ii. The practice of enforcement regimes in different jurisdictions.
- iii. The perceptions derived from experience of enforcement regimes in the jurisdictions in the case-studies.

30. The same research basis and the conclusions to be drawn on the first objective then can lead to the second objective, of drawing best practice lessons to assist in the formulation of new regimes and the improvement of existing regimes.

31. The phrase “effective in preventing breaches” also requires some comment. There may be several enforcement policies which are “effective in preventing breaches” of consumer protection legislation but which are inappropriate because they require large resources to be spent on them. Clearly regard has to be had to the costs of different policy options relative to their likely impact – with higher costs of certain options (*e.g.* court procedures) being justified by potentially stronger deterrence and educational effects. Neither can it be a sensible aim to prevent **all** breaches, because even if this were possible, the cost of achieving it would inevitably outweigh the benefits. If the desired outcome is, therefore, to be construed as a **high** level of compliance, the approach becomes what is known as “cost-effectiveness”,⁴ to investigate what regimes are capable of producing the desired outcome, a high level of compliance, at lowest cost.

32. “Consumer protection legislation” covers a very broad area. As the OECD Committee on Consumer Policy is concerned primarily with protection against financial losses, the research has focussed on this area of the law. Indeed, to concretise this focus, in seeking information regarding existing enforcement arrangements, three examples of the types of regulatory contravention to be covered were put forward: failure to provide mandatory information in distance selling; odometer tampering; and misleading price labelling (see further para. 49).

Approach to, and methods of, study

33. The study comprised four principal tasks:

- i. To obtain information on existing systems of consumer protection enforcement across OECD jurisdictions, to classify these systems, and thereby identify the principal policy options.
- ii. Following a literature review, to develop a theoretical framework for evaluating the cost-effectiveness of the identified policy options.
- iii. To undertake case studies in four jurisdictions, both to enrich understanding of existing systems and to assist evaluation of policy options by drawing on the experience of those engaged in enforcement processes.

- iv. Using the theoretical framework developed in *ii)* and the information obtained in *iii)*, to evaluate the principal policy options, leading to conclusions as to how selection from them might achieve a high degree of compliance at lowest cost, thus leading to conclusions also on best practices.

Information on existing systems

34. The principal method of obtaining information on existing systems was to send a set of questions to members of the OECD Committee on Consumer Policy, through the DTI and the OECD Secretariat (see Appendix B). This was complemented by information obtained directly from printed and electronic sources.

35. Full responses to the survey questions were received from the following countries: Australia, Belgium, the Czech Republic, Hungary, Japan, the Netherlands, New Zealand, Norway, Poland, Slovakia, Sweden, Switzerland, and the United States, with partial responses from Canada, Denmark, Finland, Germany and the United Kingdom. Although the information thereby acquired on practices within the OECD jurisdictions was far from complete, it is important to appreciate that the aim was not to provide a comprehensive survey of the existing systems. Rather the aim was simply to obtain from them possibilities which could be fed into the policy options and also to establish contacts which could be the basis of further exploration in the case studies. The information received was certainly adequate for these purposes.

36. The summary of the information acquired in this exercise is contained in Section II of the report. A draft of this section was sent to all those who had responded to the survey, to give them an opportunity to correct any errors.

Theoretical framework

37. As indicated above, the task of this study was construed as being that of exploring the cost-effectiveness of achieving a high degree of compliance by different enforcement policy options. That required investigation of two different dimensions.

38. First a theoretical framework needed to be adopted for predicting when traders will comply with the law. That is a complex issue on which sociologists, psychologists and others have made contributions.⁵ In this study an economic perspective is adopted, predicated on the assumption that traders comply with the law when the costs that they will incur if their unlawful act is detected and pursued will exceed the benefits that will accrue from the unlawful act. In other words, the adverse consequences to which a particular enforcement policy option gives rise have to be compared with the traders' likely benefits from contraventions as well as the chance of escaping detection and enforcement procedures altogether (see further paras. 158-163).

39. The second dimension regards the costs generated by the policy option. Although the focus is on the primary administrative costs of using the particular enforcement device, the study also takes account of "secondary" costs which arise as a consequence of such use. These include, importantly, what might be called "error costs", the adverse consequences to particular individuals and to society more generally if the processes generate some inappropriate condemnations and sanctions. These are important because some processes, notably those involved in criminal justice systems, involve more elaborate procedures for reducing such errors than others, for example, administrative processes (see further paras. 164-170).

40. Ideally, data would have been obtained both to concretise the predictions on the relative effectiveness of different policy options and to test them. So, for example, the evidence might reveal that the administrative costs of one particular option are low compared with those of another. Then it may have been possible to find data on the levels of compliance as between systems using or not using a particular policy option, attempting to control for all other influences on the compliance rate. However, as has been

mentioned above, limits in terms both of resources and of time meant that such quantitative analysis was not possible. It was decided, therefore, to proceed on the basis of an intuitive appraisal of the relative costs and benefits of different options, fortified by such data as could be made available. In addition, it was felt that interviews in the case-studies could be used to judge the plausibility of the intuitive appraisals and, more importantly, to seek the subjective opinions of officials working in the systems on the effectiveness predictions. As is indicated in the relevant sections of the report, only a very limited amount of useful data was obtained, but the interviews were very valuable in channelling ideas on the relative effectiveness of the policy options.

The case studies

41. The function of the case studies is identified above (para. 33). Resource constraints limited the case studies to a maximum of four jurisdictions. Jurisdictions were selected for the case-studies on the basis of two criteria.

42. The first was practical and logistic *i.e.* that on the basis either of personal knowledge of the consultants or of the viability of contacts, established through the UK DTI and the OECD, that the jurisdiction in question would provide an appropriately fruitful source of information, and that it would be possible, without undue problems, to conduct interviews with relevant officials.

43. The second criterion related to the systems adopted in the jurisdictions. From the preliminary information gathered, there appeared to be five principal models of enforcement:

- i.* Those relying on the criminal justice system for penalties.
- ii.* Those in which the administrative agencies use primarily the civil justice system to obtain sanctions and remedies.
- iii.* Those in which the administrative agencies have power themselves to impose financial penalties.
- iv.* Those relying primarily on consumer complaints to an Ombudsman.
- v.* Those relying primarily on self-regulatory arrangements and on the enforcement of private rights.

44. In the light of the two criteria, it was decided to select the UK as an example of *i)*, Australia as an example of *ii)* and Belgium as an example of *iii)*. The common feature of *iv)* and *v)* was that they depended on a strong culture of consumer activism and this was applicable only to a small number of jurisdictions. It was therefore considered justified to select the fourth jurisdiction as reflecting either of these two approaches; and as a result the Netherlands, which has adopted *v)*, was chosen.

45. The task within each case study was:

- i.* To enhance knowledge of the system derived from the survey questions.
- ii.* To obtain such data on the workings of the enforcement systems as was useful and easily accessible.
- iii.* To interview representatives of policy making and enforcement officials for their subjective judgements on the effectiveness of the systems, on the basis of a structured set of questions designed for that jurisdiction.

46. In fact it became necessary to adapt the selection of interviewees to the particular characteristics of the jurisdiction in question. Thus:

- In Australia, one interview was conducted with three officials from the Treasury, Competition and Consumer Policy Division, and one with three officials from the Australian Competition and Consumer Commission.
- In Belgium, one interview was conducted with the DG for Enforcement and Mediation (DGEM) of the Federal Public Service for Economic Affairs, involving representatives from a local branch office (Leuven) as well as of the management, and one with a public prosecutor specialising in prosecuting socio-economic crime.
- In the Netherlands; one interview was conducted with three officials⁶ from the Ministry of Economic Affairs Directorate for Consumer Affairs and one with two policy officials from the *Consumentenbond* (Consumer Association).
- In the United Kingdom, one interview was conducted with an enforcement officer from the Trading Standards Service (TSS), one with an official from the Local Authorities Coordinators of Regulatory Services (LACORS) that co-ordinates the enforcement policies of TSS offices, and one with three officials from the Office of Fair Trading (OFT).

47. Draft reports on the case studies were sent to interviewees. The final versions appear in sections II.A-D of this report, with text boxes containing a summary of the opinions of the officials interviewed.

Evaluation and conclusions

48. The final stage of the project was to evaluate the cost-effectiveness of the policy options in the light of what was derived from the case studies. This evaluation and conclusions are to be found in sections III and IV of the report.

II. Current approaches to sanctions and enforcement in OECD jurisdictions

Preliminary observations

49. This section contains a synthesis and summary of the information which was obtained primarily from responses to the questions sent to representative officials from the OECD countries. Given the diversity of the regulatory and legal cultures, it was not always easy to tabulate the information within the pre-defined categories and it has been necessary to simplify what are often complex procedures and arrangements. A particular problem arose from the fact that within the broad area of consumer protection legislation within any one jurisdiction there might be considerable differences between the approaches taken to a variety of regulatory controls. To mitigate these difficulties, respondents were asked to describe the processes for three “typical” contraventions giving rise only to financial loss:

- i.* A trader offering television sets on the Internet fails to provide the buyer with information on the right to cancel the purchase.
- ii.* A second hand car dealer interferes with the odometer of a vehicle so that it registers fewer kilometres/miles than the vehicle has travelled.
- iii.* A label attached to a food item in a store misleadingly indicates that the customer will only pay 50% of the “normal” price.

50. These examples themselves gave rise to differentiated responses because in some jurisdictions, for example, scenario *i*) has consequences only in private law, while scenario *ii*) frequently gives rise to criminal prosecutions as fraud is often involved. Nevertheless, although some of the generalisations which

are drawn from responses undoubtedly oversimplify the detailed arrangements which exist, they can be considered sufficient both to indicate the variety of processes and the specific characteristics of individual jurisdictions.

Classification of key characteristics

51. Jurisdictions which responded to the survey are first classified into groups which reflect some key characteristics, notably whether a public agency engages in pro-active monitoring of traders, and whether financial penalties are imposed as a consequence of primarily administrative, civil, or criminal procedures.⁷

52. Five main categories have been identified:

a) Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies and, for the purposes of punishment and deterrence, there is reliance on the possibility of penalties being imposed as a result of criminal justice proceedings.

b) Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies but efforts to secure compliance are focused on agencies taking proceedings against traders in the civil courts, although this does not preclude the possibility of criminal prosecutions.

c) Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies and they themselves have the power to impose (generally modest) financial penalties. This does not preclude the possibility of criminal prosecutions or civil proceedings.

d) Jurisdictions in which a public institution (such as an Ombudsman) exists to receive complaints from consumers and third parties and that agency may be instrumental in initiating proceedings in a civil court or referring the case for prosecution in the criminal courts.

e) Jurisdictions in which there is little or no monitoring of traders by an administrative agency and it is mainly left to the consumers, aided by voluntary or publicly-funded consumer associations, to enforce private rights against defaulting traders, or else to resort to self-regulatory dispute settlement processes. Administrative and/or criminal proceedings by a residual, public enforcement agency are taken only in exceptional cases.

Table 1. Classification of approaches to sanctions and enforcement⁸

	AUS*	BEL	CAN*	CHE*	CZE	DEU	DNK	FIN	GBR	HUN	JPN	NLD	NOR	NZL	POL	SVK	SWE	USA*
Model A				√					√		√							
Model B	√		√						√									√
Model C		√			√					√	√		√	√	√	√	√	√
Model D							√	√									√	
Model E				√		√						√						

* Based only on the federal/national enforcement law and practice; significant differences may apply to state/provincial/canton law and practice.

53. Table 1 provides the classification of jurisdictions responding to the survey, although at the risk of some over-simplification. To some extent the classifications reflect legal traditions and cultures, so that, for example, the Anglophone/common law jurisdictions tend to adopt mainly Models A and B, former members of the East-European bloc Model C, Scandinavian countries Model D, Germanic countries Model

E. Switzerland is a hybrid in that while much trade is self-regulated and there is no specialist administrative agency for consumer protection regulation, nevertheless for compliance purposes there is also significant reliance on the criminal law. Japan and the United Kingdom are also placed in two categories because in both jurisdictions there are different enforcement agencies, relying on different powers and sanctions, for legislation for which they have responsibility. The United States is placed in two categories because its main consumer protection enforcement authority, the Federal Trade Commission (FTC), relies both on the courts as well as its own enforcement authority to sanction law violators. Finally, Sweden is placed in Models C and D because it has both an Ombudsman's office, which represents consumers in disputes, a Consumer Agency, which has supervisory authority for consumer protection legislation.

Monitoring policy and practice

54. As noted above, there is a significantly different approach to monitoring between jurisdictions adopting Models A, B and C, and those adopting D and E. More detail on this dimension is given in Table 2. The first row gives an indication of jurisdictions where there is either no monitoring of traders by a public agency, or monitoring only in response to consumer or third party complaints. The second and third rows indicate whether pro-active monitoring takes place on a random basis or rather by reference to some risk-assessment model which aims to target resources on cases where contraventions are more likely.

Table 2. Approaches to monitoring

	AUS	BEL	CAN	CHE	CZE	DEU	DNK	GBR	FIN	HUN	JPN	NLD	NOR	NZL	POL	SVK	SWE	USA
Reactive monitoring (if any)			√	√		√	√					√	√					
Random pro-active monitoring			√					√	√	√	√			√	√	√	√	
Risk-adjusted pro-active monitoring	√	√			√			√					√	√		√		√

Pre-sanction procedures

55. In jurisdictions adopting Models D and E, complaints are taken forward, with or without the aid of some consumer association, to an ombudsman institution, to a self-regulatory organisation, or to a tribunal or court which has power to enforce private rights, in each case with some expectation that the dispute will be resolved by means of ADR procedures, that is without resort to formal legal enforcement processes.

56. In jurisdictions adopting Models A, B or C, the decision is taken by a specific enforcement agency on how to proceed. If, on the basis of a consumer (or third party) complaint or its own investigations, an enforcement agency believes that a contravention has taken place, it can – especially in more serious cases – move directly to the procedures for imposing a penalty (see below). However, there are some intermediate options which are more usually adopted as an alternative. These include notably:

- a) Discharging the trader with (or without) an informal warning.
- b) Negotiating an informal agreement with the trader to comply.
- c) Issuing a formal warning or order to comply.

Option (c) may indeed be mandatory before any further sanction can be imposed, indicating that in practice the relevant penalties are imposed only for second or repeated contraventions.

57. In most jurisdictions responding to the survey, agencies have a broad discretion whether to adopt any of the above options or else engage in a formal sanction procedure. However, in the Czech Republic and Slovakia, it seems that negotiations between trader and agency and formal or informal warnings are not allowed; and in Hungary and Poland, no informal warnings are permitted, but negotiations can lead to a formal warning or voluntary compliance agreement.

Procedures for administrative sanctions

58. Table 3 highlights some of the key differences emerging from the survey with respect to the procedures for the imposition of administrative sanctions.

Table 3⁹. Procedures for administrative sanctions

	AUS	BEL	CAN	CZE	GBR	HUN	JPN	NOR	NZL	POL	SVK	SWE	USA
alt.inst	√	X	√	X	√	X	X	X	√	X	X	X	(3)
oral	√	X	√	X	√	X	√	X	√	X	√(1)	X	√
fault etc	X	√	√	√	X	X	(2)	X	X	√	(2)	X	(2)
sett	√	X	√	X	√	√	X	√	√	√	X	√	√

(1) Generally.

(2) Varies according to offence and circumstances.

(3) Some sanctions may be issued directly; others must be referred.

59. “Alt. inst” signifies that the administrative agency cannot itself impose the sanction, but must refer the matter to another institution, for example a court or tribunal. As the table reveals, this is a characteristic of Anglophone/common law jurisdictions. Such referral normally has the consequence that the sanction will be imposed only after an oral hearing, but – as the second row reveals – that requirement may apply even where the administrative agency has power itself to impose the sanction.

60. Several procedural conditions may have to be satisfied before there can be a formal condemnation of the trader and the imposition of some sanction. Table 3 provides an indication of where some element of fault or knowledge on the part of the trader must be established. Although the absence of this requirement implies strict liability, there is a distinction to be drawn between regimes which allow some defence, for example “due diligence” or “reasonable mistake”, and those where no defence is available and which may therefore be called “absolute liability.” However, on the basis of the information obtained in the survey, it was not possible to identify which jurisdictions adopted which of these regimes.

61. The concept of “burden of proof” may not be very meaningful to non-lawyers and has different connotations in different legal cultures. The survey does not give a reliable picture of how the matter is addressed in different jurisdictions. Nevertheless, it is possible to distinguish between the following possibilities even though the classification may be unduly influenced by the legal culture of common law jurisdictions:

- a) The trader must show that it was more probable than not that the contravention did not take place.
- b) The agency must show that it was more probable than not that the contravention did take place.
- c) The agency must show beyond reasonable doubt that the contravention did take place.

62. It should be noted, finally, that in all the surveyed jurisdictions, except the Czech Republic, Japan and Slovakia, the administrative agencies are allowed to negotiate with traders, leading to agreements by

the latter to comply voluntarily with their obligations. The effect of such an agreement is, presumably, little different from a formal compliance order or injunction, leading to possible penalties in the event of further non-compliance.

Administrative sanctions

63. Table 4 lists the sanctions available to the enforcement agencies in the jurisdictions responding to the survey. Included are those that may be imposed by a court or tribunal on the application of the administrative agency, but not if it is part of the criminal justice process.

Table 4¹⁰. Categories of administrative sanctions

	AUS	BEL	CAN	CZE	DNK	GBR	FIN	HUN	JPN	NOR	NZL	POL	SVK	SWE	USA
fine	X	√	√	√	X	X	√	√	X	√	√	√	√	(1)	(4)
prohib	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
imprison	X	X	X	X	X	X	X	X	X	X	X	√	X	X	X
comp	√	X	X	X	X	X	X	X	X	X	√	√	√	√	√
conf	√ ¹¹	X	X	X	X	X	X	X	X	X	X	X	√	X	√
cease	X	X	X	√	X	X	X	X	√(4)	X	X	X	√	X	√
shame	√	√	√	X	X	√	X	X	√	X	√	√	√	√	√ ¹²
costs	√	X	√	X	X	√	X	√	X	X	X	√	√	√	√
other	√(2)											√(3)			√

1. Power to issue a “default fine” if prohibition not obeyed.

2. Probation order to establish a compliance programme, and education or training programme, or a direction to revise the internal operations of the business.

3. Payment for social purposes for support of national culture.

4. Only for certain contraventions.

64. “Fine” indicates some financial penalty, although the sum in question might be relatively small and there may be an attempt to avoid the language of criminal penalties, hence a “financial notice” or “financial charge”. “Prohib” covers a variety of enforceable undertakings for future compliance, such as “cease offence” orders, prohibition orders or injunctions. Imprisonment (“imprison”) is included even though it appears to be available as an administrative sanction in only one jurisdiction. “Comp” indicates a power to award compensation to the consumer-victim as an administrative measure rather than as a consequence of the enforcement of a private right (on which see below, para. 71). “Conf” indicates that there is some power to confiscate relevant goods of the offending trader or to disgorge profits acquired as a result of the contravention. “Cease” covers orders forbidding the individual or firm to continue to trade generally or in a particular market. A policy of “naming and shaming”, by providing or authorising some publicity of contraventions, is indicated by “shame”. Finally “costs” means that the agency can recover from the trader at least some part of the costs incurred in the administrative procedure.

65. The survey revealed two relatively unfamiliar sanctions. In Poland, the relevant agency may require the payment of “a certain amount of money for social purposes relating to support of the national culture or protection of the national heritage, if the act of unfair competition was caused by fault”. In Australia, the Federal Court can, on an application by the enforcement agency, impose a “probation order”. This is:

“a) an order directing the person to establish a compliance program for employees or other person involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct”. Or

“b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct”. Or

“c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct”.¹³

66. In the United States, the FTC's enforcement orders may contain provisions similar to those in Australia's probation orders. Some FTC orders require traders to *i)* establish a compliance program that is reviewed by an independent third party professional and *ii)* distribute copies of the order to employees, affiliates and others to make them aware of its existence and provisions. The FTC can also obtain “fencing in” provisions in its orders, which are designed to prevent consumers from being further harmed by a trader's practices. Fencing in provisions can include requiring affirmative disclosures by the trader.

Procedures for criminal sanctions

67. The procedural and other requirements for the imposition of criminal sanctions generally differ considerably from those used for administrative sanctions. Table 5 reflects some of these differences.

Table 5¹⁴ . Procedures for criminal sanctions

	AUS	BEL	CAN	CHE	CZE	GBR	FIN	JPN	NOR	NZL	POL	SVK	SWE	USA
pub.pros	√	√	√	√	√	√	√	√	√	X	√	√	√	√
fault etc	Xb)	√	c)	√	X	Xb)	√	c)	√	X	√	c)	√	√
sett	X	√a)	√	√	X	X	X	X	X	X	X	X	X	√

(a) Negotiate administrative fine.

(b) Subject to defences e.g. mistake/due diligence.

(c) Varies between offences.

68. The first row shows that in all countries, except New Zealand, prosecutions must be brought, and therefore decisions on whether to prosecute made, by a public agency distinct from that which investigates the contravention. Typically that agency is responsible for criminal prosecutions generally. The second row reveals that more may be required by way of proof of blameworthiness, relating to the intention, knowledge or fault of the trader; or defences of, for example, “due diligence” or “reasonable excuse” may be available. Third, in theory, negotiations between the prosecuting authorities and the defendant trader may not be allowed, although in practice some form of plea-bargaining may exist even if it is not formally authorised.

69. There are also special rules of criminal procedure, particularly relating to what evidence may be relied on by the prosecution; and there may be a heavier burden of proof on the prosecutor, for example, “beyond all reasonable doubt” as opposed to “on the balance of probabilities” which applies in administrative or civil cases.

Criminal sanctions

70. Table 6 contains an understanding of the sanctions available in the criminal process in the jurisdictions responding to the survey. The abbreviations are the same as those used in Table 4.

Table 6.¹⁵ Categories of criminal sanctions

	AUS	BEL	CAN	CHE	CZE	DNK	GBR	FIN	HUN	JPN	NOR	NZL	POL	SVK	SWE	USA
fine	√	√	√	√	√	√	√(4)	√	√	√	√	√	√	√	√(3)	√
prohib	√	X	√	√	√	X	√	X	√	X	X	X	√	√	X	√
imprison	√(1)	√(5)	√	√	√	√	√(1)	√	X	√	√	√(3)	√	√	X	√
comp	√	√(6)	?	√(6)	√	X	X	X	X	X	X	√	√	√	X	√
conf	X	√	√	√	X	X	X	√	X	√	√	√(3)	√	√	X	√
cease	X	√(5)	√	X	X	X	X	√	X	X	X	√(3)	X	X	√(3)	√
shame	√	X	√	√	X	X	√	X	X	X	X	√	√	X	X	√ ¹⁶
costs	√	X	X	√	X	X	√	X	√	X	√	√	√	X	X	√
other	√(2)															

1. Only if failure to pay fine or for contempt of court.

2. Probation order to establish a compliance programme, and education or training programme, or a direction to revise the internal operations of the business.

3. Odometer tampering cases only.

4. Only following contravention of order or of voluntary undertaking.

5. Some cases only.

6. Only if civil claim attached.

Enforcement by consumers

71. Many contraventions of consumer protection regulation constitute also an infringement of the consumer's private rights, especially those arising under contract law. Enforcement of those rights can obviously help with regulatory compliance. Quite apart from this, consumers (and third parties) may be allowed to contribute to the regulatory enforcement processes. It is important, therefore, to examine the possibilities in the different jurisdictions. Ideally, these would include the fostering and financing of consumer protection networks and the provision of institutions, such as small claims courts, for the cheap adjudication of disputes. These matters, however, lie outside the ambit of the project.

72. The primary focus is on the relationship between the private and public enforcement systems and there would appear to be four principal procedural methods of facilitating such a contribution:

- i.* Enabling the consumer to initiate administrative proceedings for the regulatory contravention.
- ii.* Enabling the consumer to initiate a criminal prosecution for the regulatory contraventions.
- iii.* Enabling the consumer to use the administrative or criminal determinations of the contravention as evidence for the purpose of a private law claim.
- iv.* Enabling a consumer to combine a private right claim with the administrative or criminal processes.

73. Table 7 provides an indication of the relevant procedural arrangements in those jurisdictions which supplied information on the points.

Table 7.¹⁷ Procedures for private enforcement by consumers

	AUS	BEL	CAN	CHE	CZE	GBR	JPN	NOR	NZL	POL	SVK	SWE	USA
i)	√	X	X	X	X	X	X	X	?	√	X	(5)	X ¹⁸
ii)	√	X	X	(2)	(2)	√	X	√(1)	?	?	√	(3)	X
iii)	√	√	√	√	√	√	√	√	√	?	√	√	√
iv)	X	(4)	X	√	X	X	X	√	X	√	X	(4)	X

1. In theory, but not in practice.

2. Only via the police.

3. Can be “associated with” public prosecution.

4. Only in the criminal process.

5. Participation as “intervener”.

A. Case study: Australia

Consumer protection regulation

74. Most federal consumer protection regulation in Australia is contained in the Trade Practices Act 1974 (TPA), Part V of which contains civil remedies and Part VC criminal liability provisions. Some of the relevant provisions are mirrored in financial services legislation.¹⁹ At the local level, each of the States and Territories has enacted legislation similar to the consumer protection provisions contained in the TPA. The three examples of contravention used in the project are dealt with as follows:

- i. Failure to provide information in distance sales transaction: distance selling is not specifically regulated by the TPA as the Act is technology neutral and applies broad norms of conduct to commercial transactions, irrespective of how they are made. In this respect, however, failing to provide information on the right of cancellation may be interpreted as making a misrepresentation regarding a right under sections 52 and 53(g) of the Act and is in any event governed by general contract law. It should be noted that state/territory door-to-door selling legislation imposes obligations beyond those under the TPA.
- ii. Interference with odometer: this is not regulated specifically in the TPA. However, it may be caught by the general prohibition on “misleading or deceptive conduct” (section 52) or “falsely representing that goods are of a particular standard or quality [...] or have had a particular history” (TPA section 53(a) in Part V or section 75AZC(a) of Part VC). Some States and Territories have specific legislation relating to odometer tampering under motor vehicle sales legislation.
- iii. Misleading price labelling: this is regulated by the TPA as a civil contravention in Part V and as a criminal offence under Part VC. Specifically it may be caught by the general prohibition on “misleading or deceptive conduct” (section 52 in Part V) or the prohibition on ‘false and misleading representations’ (section 53(e) in Part V and section 75AZC(g) in Part VC).

Enforcement authorities

75. There is an independent statutory authority that is responsible for enforcing the TPA: the Australian Competition and Consumer Commission (ACCC). The ACCC is active at the federal level and in that respect targets all conduct with a national or international focus as well as cases where enforcement action will have a broad national educative or deterrent effect. It has offices in each capital city across the country.

76. The Commonwealth Director of Public Prosecutions (DPP) has exclusive responsibility for prosecuting breaches of the criminal liability provisions of the TPA. Although the ACCC and the DPP co-

operate in relation to their respective roles in investigating and prosecuting, each agency has regard to its own enforcement priorities and resources in determining whether it is appropriate to pursue a matter in the criminal justice system.

77. At the local level, each of the States and Territories has its own fair trading regulator, which enforces state fair trading laws.

Box 1. Relationship between the different enforcement authorities

States and Territories in Australia dedicate significant resources to consumer policy. There is a close relationship between the federal regulator (ACCC) and the local authorities. Whether a given case will be dealt with at State or Federal level depends on the circumstances of the case.

Consumer complaints at the federal level are transferred to other agencies when they are not nationally significant, of sufficient priority, where there is significant public detriment, or when the matter appears to fall within the responsibility of other agencies (e.g. local offices of fair trading or ASIC).

The division of power between the ACCC and the DPP is well understood by the agencies and is not problematic. There is a strong working relationship between the two agencies.

Monitoring traders

78. The ACCC is the national consumer protection agency in Australia and as such is involved in the monitoring of traders' activities and detection of contraventions which involve significant consumer detriment.²⁰ However, it does not usually monitor the behaviour of traders of its own initiative; rather it operates on the basis of complaints received from the ACCC Infocentre. This is a call centre for consumer and business complaints regarding possible contraventions of the TPA, which is accessible through a national hotline, the Internet and e-mail.²¹ The information received enables the ACCC to ascertain if there are trends or escalations of particular problems. Other monitoring mechanisms available to the ACCC include industry and community liaison groups and consultative committees. The ACCC can also undertake a market study or an evaluation of a specific area and may target education and compliance campaigns at specific industry sectors where it appears there may be a systemic market failure or general compliance issues.

79. Section 155 of the TPA confers on the ACCC the power to require a person to provide information, documents and/or give evidence under oath or by way of affirmation, and limited powers to enter premises and inspect and/or copy documents. A section 155 notice may be issued when the ACCC "has reason to believe, on reasonable grounds, that a person is capable of providing information about a possible contravention of the TPA".²² In relation to criminal matters, these powers are more limited. Also, where a notice is served on a person regarding a criminal offence, any evidence thereby obtained is inadmissible against that person in criminal proceedings or against a body corporate regarding criminal proceedings other than those taken under the TPA.

80. Private businesses and individuals may themselves commence civil actions for breaches of the consumer protection laws. For example, a business may take a private action against a competitor where the latter makes false or misleading claims about its products or services. Furthermore, the principle that allows any person to initiate a *criminal* prosecution is of long standing in Australian law and is based on the view that a court, in the administration of justice, is keen to seize any opportunity to deal with crime. At all times, however, it is within the statutory power of the DPP to take over the private party prosecution and, if it is considered appropriate, to discontinue it.

Box 2. Information gathering

Notwithstanding major efforts at publicity concerning rights to complain to the ACCC, there is a recognition that certain contraventions will not be reported by consumers. The fact that evidence gathered from persons under compulsion, including from entry to premises, is inadmissible in criminal penalty proceedings against an individual, but admissible in civil proceedings (in which penalties are not available), has the consequence that civil proceedings may be a more effective way of stopping infringements of consumer law quickly and achieving adequate redress.

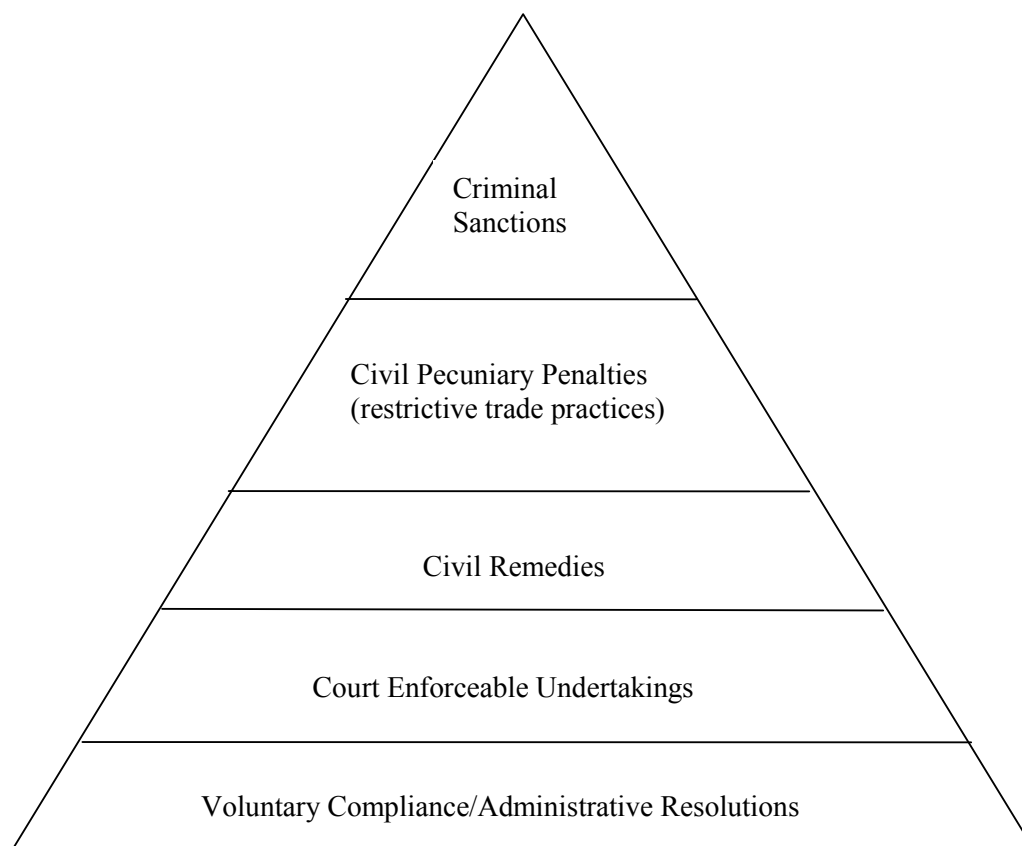
The Australian Parliament recently passed legislation increasing the information gathering powers of the ACCC. The current provisions in the TPA provide the ACCC with the power to enter premises and inspect documents without a warrant. The new laws will, once they come into effect, provide the ACCC with the ability to search premises and seize evidence, when backed by a warrant.

Dealing with suspected contraventions

81. If a complaint received by the ACCC is likely to give rise to a contravention of the TPA, it is transferred to investigators who are usually based in one of the ACCC's regional offices. Important questions in this investigation stage are, for instance: Who is the trader? How big is the problem and how can it be fixed? Is it a priority? And does it have national significance? After this investigation, the complaint is sent to the Enforcement Committee, which operates on a national basis. This committee decides on the necessary steps to take upon recommendation of the regional office, *e.g.* is it simply a question of writing a letter or is further action required?

82. In principle, the ACCC will first contact the business concerned to seek further information and give it an opportunity to respond to the allegation. However, if the conduct is blatant or significant or has national implications, the ACCC is likely to seek a more public resolution. Once it has reached a view that a *prima facie* case has been made out, there are a number of available options, depending on factors such as the severity of the alleged conduct, the availability and extent of evidence, and the level of co-operation from the business alleged to have breached the TPA. The diagram below gives a general overview.²³

Figure 1. Options for dealing with alleged contraventions



83. *Voluntary compliance or administrative resolutions* will generally be appropriate in situations where the contravention has been inadvertent, has not resulted in irreparable consumer detriment, and where the company has detected the contravention and moved quickly to compensate affected consumers. The ACCC does not have the power to issue formal warnings. *Undertakings* relate to the voluntary conferral of undertakings to the ACCC in connection with the consumer protection provisions (or a matter in relation to which the ACCC has a power or function). It may be appropriate for the ACCC to accept such a (written) court-enforceable undertaking²⁴ where the trader does not deny the contravention, moves quickly to stop the conduct, provides redress to affected consumers and acknowledges that the ACCC may publicise the matter. If a trader breaches the terms of a court-enforceable undertaking the ACCC may seek an order from the court to enforce the terms of the undertaking or any other order the court considers appropriate, as provided by section 87B(4). The ACCC can pursue contempt proceedings where the Court had previously made orders against the trader to comply in relation to the undertakings and the trader has not complied with those orders. The ACCC does not have the power to issue formal warnings.

Civil enforcement orders

84. *Civil remedies* for breaches of consumer protection provisions (Part V TPA) include declarations that the TPA has been contravened, injunctions, community service orders and probation orders (see para. 87), compensation and corrective advertising.²⁵ Adverse publicity orders are also available but can only be made if a criminal penalty has already been imposed. Cease-trading orders and the suspension of a business licence are not available to the ACCC. For most traders, the harm suffered to their public reputation from the publicity consequent on an adverse court judgement is considered to be a sufficient deterrence against future breaches of the law.

85. Only the courts have power to make orders concerning remedies in relation to contraventions or offences pursuant to the TPA. The ACCC itself cannot make findings of consumer protection (or any other) contraventions and cannot impose sanctions. The ACCC may apply to the Federal Court to seek orders to grant damages,²⁶ make declarations, secure enforceable undertakings and impose injunctions. In these cases, independent lawyers have to be employed to represent the ACCC in court. However, because the ACCC has a reasonable level of funding, the costs of litigation are generally not considered as a decisive factor. The priority of a complaint is more important.²⁷ The ACCC is required to comply with the Attorney General's Legal Services Directions, which includes the Commonwealth Government Model Litigant Policy. The Directions set out, *inter alia*, the conduct of litigation by Commonwealth agencies. These Directions require that, before instituting proceedings, the ACCC must obtain external legal advice that there is a reasonable basis for taking the action.²⁸ They also allow the ACCC to be receptive to settlement offers from the defendant where it is considered appropriate and in the public interest to dispose of the matter in this way.

86. To give an impression of the relative likelihood of the different enforcement options being used in cases of alleged misleading pricing advertisements, ACCC supplied the following information regarding complaints and cases of alleged misleading pricing advertisements. Over the period July 2004 to June 2006, the ACCC recorded almost 4 200 complaints and enquiries relating to pricing. In 92% of these cases, no further action was taken by ACCC other than the provision of advice or information. From the remaining 8% (350 cases), 32 in-depth investigations were commenced. The others, revealing insufficient evidence of breach, were referred to other (usually State) agencies, were resolved administratively or were, for other reasons, discontinued. Of the 32 in-depth investigations, 9 traders agreed to cease the conduct and implement a compliance programme (1 of the traders provided 13 affected customers with AUD 500 in vouchers), 6 signed agreements of compliance, 6 were resolved administratively, and 2 warning letters were sent. The remainder are the subject of ongoing investigations. During this period, the ACCC continued one misleading pricing case in criminal proceedings,²⁹ and judgements were made in the civil jurisdiction in two misleading pricing legal proceedings.³⁰

87. Currently *finis* cannot be imposed in civil proceedings for breach of consumer protection legislation. Such "pecuniary penalties" are only available for breach of competition provisions (TPA Part IV). The criminal process, on the other hand, can lead to the court imposing monetary sanctions for breach of consumer protection legislation (under TPA Part VC). The maximum fine is AUD 220 000 for individuals and AUD 1.1 million for corporations. The (general) sentencing provisions set out in section 16A of the Commonwealth Crimes Act 1914 should be taken into account in setting the fine.³¹ It is unlikely, however, that one of the three specified contraventions would reach the criminal courts for reasons mentioned elsewhere in this section.

88. At the time of this study, a government working party is reviewing the civil remedies in relation to contraventions of Part V of the TPA and has released a discussion paper examining the desirability of civil pecuniary penalties and/or banning orders for directors.³² It should be mentioned also that in some of the States and Territories in Australia there is power to impose sanctions that are not available to the ACCC under the TPA. Some jurisdictions have, for example, "name and shame" powers, the power to issue infringement notices or "show cause" notices, or the power to seek "cease trading" injunctions. In addition the level of (criminal) fines available in each jurisdiction varies considerably – although they are invariably lower than the maximum available to the ACCC under the TPA.

89. Of particular interest is the "probation order", one of the civil remedies available to the ACCC but not apparently in other Australian jurisdictions. A probation order is an order to either *i*) establish a compliance programme, *ii*) establish an education and training programme, or *iii*) direct a person to revise the internal operations of his/her business.³³ Compliance programmes provide a preventative mechanism enabling companies to identify, remedy and reduce the risk of subsequent trade practices breaches.

Therefore, the ACCC is also concerned with compliance programme clauses when seeking court orders or settling a matter by a court-enforceable undertaking. Typically, a company is required to design, implement and maintain a compliance programme for three years following the conclusion of a case. The ACCC has a dedicated team that monitors compliance with court orders and compliance programmes. Breach of a probation order can, in theory at least, give rise to proceedings for contempt of court, leading to imprisonment or a very hefty fine. As noted above (para. 78), in certain circumstances the ACCC targets education and compliance campaigns at specific industry sectors.

Box 3. Civil remedies

Civil remedies available under Part V of the TPA include damages, injunctions, publicity orders, and probation orders. The possibility of introducing civil pecuniary penalties is currently under consideration. Adverse publicity orders – and using the media in general - are generally regarded as quite effective, although these are used only following the institution of proceedings or when a matter has been resolved. Likewise, probation orders, which have recently been frequently used, are considered as a fairly cost-effective way of avoiding further (inadvertent) breaches of the law.

While the TPA does not specifically provide for disgorgement of profits, it is possible to obtain orders to freeze assets and distribute refunds to affected consumers pursuant to sections 80(1), 80(2), and 87A(1A) of the TPA. Remedies to preserve assets are also available in interlocutory proceedings to any litigant under the Federal Court Rules (Order 25, rule 2), the equitable remedy of the Mareva Injunction, as well as in other jurisdictions through case law.

DPP and criminal prosecutions

90. Breaches of the criminal consumer protection provisions under Part VC of the TPA are investigated by the ACCC but prosecuted by the DPP. In determining whether a given matter is suitable for criminal prosecution, the DPP has regard to its own enforcement priorities and in particular the Commonwealth Prosecution Policy.³⁴ Factors which are taken into account include the prospects of a conviction (which depend on the availability of admissible evidence and defences open to the accused) and the public interest (seriousness of the offence, need for deterrence, etc.).³⁵

91. Where the ACCC considers that criminal prosecution is warranted, it will compile a brief of evidence for the DPP, outlining the basis for this view, the contravention itself and the nature of the evidence available. The DPP will then give a preliminary view on whether the available evidence is capable of supporting a criminal conviction and whether a criminal prosecution is warranted, having regard to the factors mentioned above. In a criminal prosecution, the offence must be proved “beyond reasonable doubt.”

Box 4. Criminal sanctions

Imprisonment is currently not available as a sanction for contraventions of Part VC. However, it may be imposed for a failure to pay a fine imposed under this legislation. The additional consequences of a criminal conviction for a company include reputational damage and the possibility of significant financial penalties. For an individual, the additional consequences are particularly serious – in addition to the imposition of a fine, the recording of a criminal conviction may prevent them from traveling to certain jurisdictions, or holding certain offices.

There is a clear division of power and responsibilities between the ACCC and the Director of Public Prosecutions (DPP). The DPP has developed extensive expertise in prosecuting criminal offences and the current system appears to be working well.

Compared to civil cases, criminal investigations are time-consuming and are generally not seen as effective for rapidly stopping illegal conduct or providing timely consumer redress. The ACCC considers a variety of factors in deciding whether to pursue a matter in civil or criminal legal proceedings, such as the seriousness of the alleged conduct and the individual's blameworthiness. However, the ultimate decision as to whether to pursue criminal prosecution is left to the DPP.

Enforcement powers of consumers

92. Private parties can themselves bring civil actions for breaches of Part V of the TPA.³⁶ Furthermore, the Crimes Act 1914 provides that any person has the right at common law to institute a prosecution for a breach of the criminal law. In practice, however, all but a very small number of Commonwealth prosecutions are instituted by Commonwealth officers. Findings of fact made against a respondent in earlier proceedings for a Part V or VC offence will be *prima facie* evidence of those facts for the purpose of later civil proceedings by affected persons for damages or compensation.³⁷

93. It should be noted, finally, that there are procedural limitations on the ability of the ACCC to recover compensation in cases involving multiple consumers. That is, the ACCC cannot take actions on behalf of multiple consumers without the active written consent of the consumers. This means that parties have to be named in the civil action or should have given prior written consent for a claim to be made on their behalf.³⁸

Box 5. Enforcement of private rights

Evidence from criminal prosecutions may be used for the enforcement of private legal rights, which facilitates the obtaining of compensation for consumers. However, whether it also has an effect on compliance by traders is unclear.

Summary

94. The key points emerging from this case-study may be summarised as follows:

- Civil proceedings appear to be an effective way of stopping illegal conduct by recalcitrant traders and achieving timely redress for consumers.
- The civil regime does not allow the courts to impose financial penalties – these may only be pursued through criminal prosecution. Officials are currently considering the possible introduction of civil pecuniary (financial) penalties for contraventions of Australia’s consumer protection laws.
- “Probation orders” and adverse publicity are regarded as important devices for inducing compliance.
- Criminal sanctions are reserved for the most serious contraventions of the law, however because of the additional time and complexity associated with criminal prosecution they are not generally considered an effective mechanism for achieving timely consumer redress.

B. Case Study: Belgium

Consumer protection regulation

95. Most consumer protection regulation in Belgium is contained in the Fair Trade Practices Act,³⁹ but this is complemented by specific legislation governing particular trading activities. The three examples of contravention used in the project are generally dealt with in the statute as follows:

- i.* Failure to provide information in distance sales transaction: this is governed by article 78 of the Fair Trade Practices Act, with the penalty being a fine of (currently) EUR 1 375 to EUR 55 000. In addition, the court can order publication of the judgment.
- ii.* Interference with odometer: this is the subject of specific provision in an Act of 11 June 2004.⁴⁰ Violations are punishable with imprisonment of one month to one year and/or a fine of EUR 55 to

EUR 16 500 (as corrected for inflation). More stringent provisions for fraudulent conduct exist in the Penal Code.⁴¹

- iii. Misleading price labelling: this could constitute a violation of article 43 of the Fair Trade Practices Act, article 102, punishable with a fine of (currently) EUR 1 375 to EUR 55 000.

Enforcement authorities

96. The institution responsible for monitoring traders' activities and detecting contravention is the DG for Enforcement and Mediation (DGEM) of the Federal Public Service for Economic Affairs. The DGEM is organised at the federal level in Belgium and has generally the duty to control and monitor compliance with economic regulations in Belgium, governing both consumer protection and competition. It has one central office and seven regional offices.

Box 6. Relationship between the central and regional enforcement offices

The division of labour between the federal DGEM and the regional agencies is considered to be working well. There appears to be sufficient room for initiatives and monitoring activities by the regional agencies themselves while not detracting from the beneficial harmonising effect of the directives issued at the federal level. This has the advantage that there are not too many regional differences and that if, for example, a certain category of traders were to be targeted for monitoring, this would be the case for the entire territory of Belgium.

Enforcement policy generally

97. A charter drafted by DGEM provides an indication of general enforcement policy. The principal task is to protect the rights of both consumers (against illegal practices that may endanger their interests) and traders, by means of information, prevention, negotiation and coercion, on the basis of correct decisions and transparency and, within limited resources, efficiency. As regards the latter, there are specific target time-periods for responding to telephone calls, written requests for information and complaints about trading behaviour.

98. As will be discussed below, there are a number of enforcement options, ranging from administrative action (informal and formal warnings) to civil proceedings (obtaining an injunction from the commerce court) to referring the case to the Public Prosecutor for criminal prosecution. However, the most important enforcement instrument today is probably the so-called "transaction", a monetary penalty which can be "proposed" to the perpetrator.

99. Although DGEM can also formally bring a civil complaint for an injunction before the commerce court, this remedy is not often used in practice. One reason is that the proceedings can only be instituted after formal approval of the competent Minister. Another reason is that an attorney at law must be employed, and this is costly. Nor is the criminal justice system used very often, because the enforcement of consumer law does not have a high priority for public prosecutors, whose resources are, in any event limited.⁴²

Box 7. Role of the public prosecutor

There is a certain sense of frustration at the lack of time and resources within the public prosecutors office to guarantee effective enforcement of consumer legislation. For this reason the administrative “transaction” is viewed as an important enforcement tool. Indeed, it was suggested that in the (rare) cases where the administrative agency (DGEM) has referred the case to the public prosecutor the result was not always satisfactory. Given the fact that in some districts there is limited capacity, whereas in others a prosecutor may have more possibilities to prosecute the cases, there is *de facto* no uniform enforcement policy across the jurisdiction.

Monitoring traders

100. Basically, there are three ways in which an offence can be detected by DGEM or its regional offices:

- i. A complaint can be filed by a consumer, a competitor (or any third party) or by the public prosecutor services.
- ii. There is a yearly programme under which a certain number of general enquiries are formulated by the central DGEM office, leading to targeted monitoring of traders in specific sectors by the regional offices.
- iii. Individual and random monitoring by officials.

101. On average, approximately 40 000 investigations are carried out per annum, though these do not necessarily lead to the establishment of infringements or violations of consumer protection legislation. Approximately 25% of the detected contraventions are the result of complaints, the remainder the consequence of monitoring traders.

102. Even though the monitoring under the yearly programme (para. 100 *ii*) does not take place on the basis of a formal risk assessment, several relevant criteria are taken into account to determine which potential contraventions or sectors will more particularly be targeted. These include:

- i. An increased amount of consumer complaints relating to a particular sector.
- ii. The introduction of new regulatory controls.
- iii. Feedback from regional offices.
- iv. Guidelines issuing from competent Ministers.
- v. Suggestions from the Board of Attorneys-General (an organ competent to issue general guidelines on enforcement policy).

103. On the basis of these considerations, points are attributed to, and aggregated for, each sector or contravention, thus giving rise to a targeting strategy.

Box 8. Pro-active and responsive monitoring

Inspectors are generally considered to possess sufficient capacities and formal competence in relation to monitoring. *De facto*, inspectors spend most of their time on the targeted monitoring and relatively less on inspections as a result of consumer complaints. However, it appears that there is still sufficient time to deal with individual consumer complaints. As such, the balance between pro-active and responsive monitoring policy is perceived to be appropriate.

Dealing with suspected contraventions

104. Following monitoring or a consumer complaint, once DGEM has established to its satisfaction that a contravention has taken place, it has several options:

- i.* Issue an **informal warning**: This has no formal basis in the legislation. It is, however, typically used where a trader negligently violates the law, but where no damage to third parties has occurred and where the trader immediately agrees to rectify the problem.
- ii.* Issue a **formal warning**: The formal warning, governed by art 101 of the Fair Trade Practices Act, is issued to the perpetrator within three weeks after the facts have been authenticated by registered mail. It indicates the time period within which the trader has to comply and the actions that will be taken on non-compliance. The procedure is usually used for a first offence, where there is no harm to a victim and when the co-operation of the trader can be expected.
- iii.* Draft a **pro justitia**: This is a report in which an officer instituted with investigating powers formally asserts that the trader has committed a violation. The document, that can later be used as evidence in the criminal court, has to be addressed in principle to the public prosecutor.

The administration can then:

- iv.* Propose an **administrative “transaction”** (see below paras. 106-110). Or
- v.* Initiate proceedings before the **commercial court** (paras. 111-112). Or
- vi.* Refer the case to the **public prosecutor** for criminal prosecution (see below paras. 113-116).

105. Recent data presented to the Belgian parliament,⁴³ relating to the 2 938 formal warnings issued by the DGEM in 2004, gives an indication of the effectiveness of formal warnings. In 882 of these cases, there was subsequent compliance; in 874 cases a further warning was deemed necessary to prevent a second offence.⁴⁴ and in 19 cases a *pro justitia* was drafted after a second offence.

Box 9. Warning procedure and compliance

The warning procedure is generally considered to be quite effective. The compliance rate appears to be relatively high, principally because, warnings tend to be given only in cases where the inspector suspects that the trader will comply. Another stated reason is that inspectors tend to make clear at their inspection visit and when formulating the warning that non-compliance will result in a *pro justitia*, and subsequently in criminal prosecution.

Financial transactions proposed administratively

106. Article 116 of the Fair Trade Practices Act⁴⁵ provides that the agents appointed by the minister can, after the issuing of a *pro justitia*, propose⁴⁶ the payment of a sum by the perpetrator which will extinguish the criminal prosecution. It must be stressed that this procedure is perceived not as an administrative fine, but rather as an instrument for avoiding criminal prosecution. The device is at the discretion of the administrative agency: usually it will be the regional officers that propose a “transaction”, but the formal decision to make the offer is made at the central level of DGEM. Several considerations are relevant to the discretion, including the seriousness of the offence, whether there is significant damage and whether it is a second (or repeated) offence. If, in these situations, it is considered inappropriate to offer the transaction, the case might then be referred directly to the public prosecutor.

107. There is no formal hearing or interrogation before a transaction is offered. In practice, the proposal of the payment of a transaction is made three months after the perpetrator receives the *pro justitia*.

This means that traders can use the period of three months to formulate their comments on the allegations in the *pro justitia* and communicate them to the administrative agency. Such comments are taken into account in determining whether or not to offer the transaction and this decision is taken without the prior approval or consent of the public prosecutor. This contrasts with the normal rule relating to administrative fines.⁴⁷

108. As regards the amount of the payment, there is a Royal Decree, issued under the Fair Trade Practices Act, which stipulates the margin within which the administration can offer a transaction. The maximum amount is EUR 500 000. However as appears from Table 8, the average amount imposed has been less than EUR 500.

Table 8. Numbers and amounts of “transactions” 2002-2004

Year	Number of transactions	Number of transactions paid	Total amount paid (EUR)	Average amount paid (EUR)
2002	1 509	834	404 950	485.55
2003	1 345	1 081	522 045	482.93
2004	1 220	766 ⁴⁸	303 470	396.17

109. There is no formal appeal against the proposal of a transaction. This is justified on the basis that the transaction is not a formal administrative fine, but rather an opportunity offered to the offender to avoid the criminal justice process. An aggrieved trader can simply choose not to pay and the case will be referred to the public prosecutor. From this characterisation it follows, too, that it is not possible for the administrative agency itself to initiate proceedings to claim the money proposed.

110. As was made clear in legislative discussions, an important reason for the introduction of the transaction was the problem (see para. 99) of resources available for the criminal prosecution of consumer protection offences: There are large savings in costs since, as is revealed in Table 8, compliance with the transaction is also relatively high, involving some 60-70% of transactions proposed.

Box 10. Assessment of the “transaction”

The DGEM regards the transaction as an easy and low cost possibility to react in an effective manner to offences. This is partly because, to allow for appropriate differentiation, the amount to be paid can reflect elements such as the seriousness of the offence and the profit made by the trade. The amounts are not significantly smaller than the fines which would be imposed by the criminal courts. As such they are regarded as effective deterrents, at substantially lower cost, given that 60 – 70% of the transactions result in payments. Moreover, since the transactions are offered at the central level by the DGEM a uniform policy can be applied.

It is not considered a disadvantage that there is no oral hearing: the circumstances and arguments of the offender could be taken into account because of the period of 3 months following the *pro justitia*. DGEM does not favour changing the current model to a system of a formal administrative fine. That would mean not only that costs might increase, e.g. if appeals were introduced, but also that DGEM itself would have to collect the fine, requiring the employment of attorneys and perhaps court proceedings.

A rather different picture is presented by the public prosecutor. In his view, administrative agencies have a tendency to propose too readily the transactions without carefully checking whether an offence has actually been committed; and insufficient account is taken of the individual facts of the case. Moreover, the administrative agency almost always applies strict liability, this contrasting with the far more nuanced and balanced approach of the criminal courts and their concern with blameworthiness. Especially since there is no appeal possible against the proposal of a transaction, the public prosecutor believes that the agency should be more cautious with the proposals.

Civil enforcement orders

111. Non-compliance with a warning can lead to civil proceedings at the commercial court for an order for cessation of the offence,⁴⁹ with the threat of penalty payments for each day, week or month of continued violation of the order. Action for the cessation order can be brought by:

- i. A party with standing (a consumer or another trader who is e.g. a competitor harmed by the violation).
- ii. An association for consumer protection that meets a number of special conditions (however, these actions are, rare in practice).
- iii. The Minister for the Economy.

112. It follows that if the DGEM wishes to seek an enforcement order, it can currently do so only through the Minister and that helps to explain why this option is seldom used. There may be political reasons why the Minister does not wish to take action. In addition it is costly, requiring an attorney at law to be employed. However, as a result of the implementation of EC Regulation 2006/2004 on Consumer Protection Co-operation, the director-general of the DGEM will in the near future acquire the right to bring an action, independently of the Minister.

Box 11. Interplay between civil and criminal procedures

The public prosecutor expressed frustration that the criminal procedure is too often used by parties to obtain certainty about the interpretation of the statute when these cases could more appropriately be dealt with in the commercial court.

There are also diverging views on the participation of consumer-victims in criminal proceedings. One view is that the participation of a consumer victim is a valid reason for the DGEM to refer the case to the prosecutor since this allows the victim to claim compensation as *partie civile* before the criminal court. The other view is that the intervention of a victim often is a reason not to prosecute precisely because that person could take proceedings in the commercial

court.

Criminal prosecutions

113. A case can reach the public prosecutor because a consumer or trader has filed a complaint with the police. This accounts for less than 10% of prosecutions. The majority are referred by the administrative agencies in the following two situations:

- i.* The administration considers the case unsuitable for proposing a transaction, perhaps because it is a second offence, perhaps because of its complexity.
- ii.* Non-payment of the transaction by the trader.

114. On receipt of the file, the public prosecutor has the following options:

- i.* To send a police officer (in uniform) to the trader asking why the proposal of a transaction was not accepted – apparently this leads to payment in a large number of cases.
- ii.* To propose a new transaction (offered by the public prosecutor, not the administrator) and of an amount which can be higher or lower than in the first offer.
- iii.* To dismiss the case.
- iv.* To proceed to prosecute in court.

115. The public prosecutor can decide to dismiss a case or offer a transaction in cases where the administration have expressed a clear preference for prosecution. This might result from the prosecutor giving greater weight to the particular facts of the case, elements like guilt and blameworthiness and the personal characteristics of the offender.

Box 12. Perceived usefulness of prosecution

The public prosecutor stressed that the prosecutions service takes a different view on the usefulness of the prosecution, compared with that of the administrative agency: blameworthiness and guilt and personal characteristics are important.

116. The standard sanction is the fine. The Fair Trade Practices Act provides for imprisonment only in exceptional cases, and not in the three exemplary cases used in this project. In theory, it is possible to expropriate illegal gains, but this almost never occurs in practice because of information difficulties. The public prosecutor sometimes also asks for publication of the judgement.

Box 13. Severity and effectiveness of criminal sanctions

The sanctions imposed currently by the criminal courts are considered to be relatively severe, even though they will undoubtedly be considered as low by some of the offenders.

Publication of the judgement is not considered to be very effective: some traders appear to welcome the publicity.

Enforcement powers of consumers

117. The consumer-victim has the following options:

- i.* To make a complaint to the DGEM.
- ii.* To make a complaint to the police (rarely used).
- iii.* To pursue a claim in the commercial court for a cessation order, if the wrong is continuing.
- iv.* To pursue a claim in the civil court for damages, if loss has been sustained: alternatively to add that claim to a criminal prosecution as *partie civile*.

Box. 14. Partie civile procedure

The public prosecutor considered that individual consumer-victims should in principle use the commercial court. Public enforcement should, in his opinion, be reserved for cases where there are no individual victims; rather large numbers or the public more generally are at risk. In his view, the system of *partie civile* is used too often to solve essentially commercial law disputes.

Summary

118. The key points emerging from this case study may be summarised as follows.

- The “transaction” (an administrative financial imposition) is considered to be an easy and low-cost means of dealing with consumer protection offences.
- The ability of the criminal process to operate effectively in relation to cases appropriate for the process was perceived to be hampered by inadequate resources in the prosecution service and by the fact that some of the cases referred to that service could more appropriately be resolved in the civil courts.

C. Case Study: the Netherlands*Consumer protection regulation*

119. The amount of Dutch legislation in the area of consumer protection is rather limited and there is much reliance on self-regulation and private enforcement initiatives, either through individual consumer complaints or through consumer organisations. There is no specific regulation dealing with the three examples of contraventions (failure to provide information on distance selling rights; interference with odometer; misleading price label). There is the *Colportagewet* (Canvassing Act) and the *Prijzenwet* (Prices Act), both monitored by the FIOD-ECD (Tax Control and Investigation Service – Economic Surveillance Unit), but it is not clear that the provisions cover the examples. An activity that involves “*bedrog*” (fraud) or “*oplichting*” (deception) might be caught by general provisions of the Dutch Criminal Code,⁵⁰ enforceable by the Dutch Public Prosecutor (*Openbaar Ministerie*) but use of the criminal process is dependent on its prosecution policy and relatively minor contraventions might not be of sufficiently high priority.

120. Some important institutional and legal changes are due to be made in the near future. As a consequence of EC Regulation 2006/2004 on Consumer Protection Co-operation, a new authority will be established in early 2007, the Netherlands Consumer Authority (*Consumentenautoriteit*, hereafter CA), which will operate under the Ministry of Economic Affairs.⁵¹ The CA will concentrate on dealing with collective consumer matters. Individual complaints from consumers will be forwarded to the existing

Stichting Geschillencommissies voor Consumentenzaken (Foundation of ADR Committees for Consumer Affairs – see para. 119) among others.⁵² The CA itself will only be able to act administratively in case of breaches of the *Colportagewet* or the *Prijzenwet* but an administrative fine will be available and the CA will have power to apply for an injunction against a trader.

Box 14. Self-regulation and private enforcement

According to the government interviewees, it is mainly for the market parties to react against consumer protection contraventions. As a result of self-regulation, a large number of dispute settlement arrangements exist which function satisfactorily in a large number of cases, because consumers are very active in complaining. While the introduction of the CA would lead to a more active enforcement policy and to the possibility of imposing administrative fines, the basic model of consumer activism would remain, with consumers filing claims with consumer organisations or using the available alternative dispute settlement arrangements.

This general picture is also confirmed by interviewees from the Consumers' Association (*Consumentenbond*), although they have lobbied in favour of a more public law oriented enforcement approach. In their view, the current system does not work well in cases where a large number of consumers are affected (and hence alternative dispute settlement does not work); nor does it sufficiently deter *mala fide* traders.

Enforcement authorities and other agencies

121. The general approach taken to the enforcement of consumer protection legislation in the Netherlands has the consequence that there are several different agencies whose activities are relevant.

- i. FIOD-ECD (Tax Control and Investigation Service – Economic Surveillance Unit) a government agency which has responsibility, among many others, for monitoring the *Colportagewet* and *Prijzenwet* but, as indicated in paras 119-120, this involves only a part of the consumer protection legislation.
- ii. *Consumentenbond* (Consumers' Association) and *Stichting De Ombudsman* (Ombudsman). These are independent agencies⁵³ the first of which lobbies on behalf of consumers, negotiates with traders, and assists consumers with ADR procedures and civil proceedings, although in relation to the latter mainly by way of collective action.
- iii. *Stichting Geschillencommissies voor Consumentenzaken* (Foundation of ADR Committees for Consumer Affairs, hereafter SGC). This is an independent organisation, but it receives some financial support from the Ministry of Economic Affairs and the Ministry of Justice.⁵⁴ It has 32 arbitration boards, each consisting of three members: one independent chairperson appointed by the SGC, one appointed by the *Consumentenbond* and one appointed by the trader's branch organisation. In some committees, an expert is brought in to deal with technical aspects of a case.
- iv. *Consumentenautoriteit* (CA): as indicated above, in early 2007 this new government agency will assume some major enforcement responsibilities (para. 120).

Monitoring traders

122. Contraventions are detected mainly through complaints by consumers and other parties such as consumer organisations and companies. Although the FIOD-ECD has the authority to enforce the *Colportagewet* and the *Prijzenwet*, it does not actively monitor the market. The FIOD-ECD only reacts in cases of repeated consumer complaints and when public health is endangered.

123. Given that the Netherlands is so dependent on consumer activism for the enforcement of consumer protection law, efforts have been made to study the extent of such activism. Research conducted

in 2004 by the independent management consultancy company Twynstra Gudde has shown that 22% of consumers do not take their complaint back to the supplier. Furthermore, about 43% of consumers who return to the supplier with a complaint are dissatisfied with the way it is handled. In the same study it is mentioned that very few consumers take their disputes to a court of law. Indeed, Twynstra Gudde found that only 4.5% of consumers who were dissatisfied by the way their complaint was handled by the supplier took further steps – and 35% of those consumers were satisfied with the way in which the dispute was settled in the procedure phase.⁵⁵ According to a 2004 study by market research company NIPO, suppliers indicated that 69% of the complaints are settled with the consumer. And some 37% of suppliers claim to have changed their way of doing business after having received a consumer complaint.⁵⁶

124. After the introduction of the CA, it is not anticipated that the approach will change much. It is possible that the CA will engage in some monitoring activities, but criteria for such monitoring have not been worked out yet, although it is planned to set *ex ante* priorities on the basis of a risk analysis. As regards entry and inspection, the CA will have some special powers.⁵⁷

Box 15. Role of monitoring by public authorities

Dutch consumers do not seem to be familiar with the monitoring tasks of the FIOD-ECD with respect to violations of the *Prijzenwet* and *Colportagewet* and the possibility of criminal sanctions. They are, however, generally much more aware of the existence of the *Consumentenbond* and have a tendency to report problems regarding consumer protection regulation there, if at all. The Consumentenbond itself has noted a trend towards a “drop in demand” in recent years, i.e. consumers increasingly give up their right for compensation already at an early stage.

There is clearly a different perception between the government and consumer organisations concerning the need for active monitoring. The *Consumentenbond* perceives the current system to be focused too much on individual actions taken by consumers with insufficient monitoring by public authorities. It argues that there is a need for a more active role for government on the basis that there is today underdeterrence and that as a purely private organisation, it cannot always meet the high expectations placed on it. The government interviewees, on the other hand, argue for relying largely on consumer organisations on the basis that the general policy in the Netherlands since the 1980s has been one of withdrawing government and deregulation.

The forthcoming legislative change will address many of these issues. The current system may work well in the majority of cases, but there is a problem where consumers do not know their rights and thus cannot claim or where it is simply too expensive for consumers to enforce those rights. Pro-active monitoring by competent administrative agencies can play an important complementary role in cases where the private law system fails.

Dealing with suspected contraventions

125. If the consumer detects or suspects a contravention there are three main possibilities:

- The case can be taken to one of the many ADR committees. This is the easiest and least costly option. However, a condition is that the trader is associated with the relevant branch organisation.
- A complaint can be made to one of the consumer organisations, for example, the *Stichting Ombudsman* or the *Consumentenbond*, leading to possible negotiations with, or civil proceedings against, the trader.
- (If the conditions for public enforcement action are established) a complaint can be filed with the FIOD-ECD or directly with the Public Prosecutor.

Alternative Dispute Resolution (ADR)

126. ADR committees,⁵⁸ which function as arbitration boards, are organised by the SGC. If a trader who is suspected of a contravention is affiliated with one such committee, the case can be brought before it. Affiliation with an ADR committee is usually done on a voluntary basis, but it provides a way for traders to indicate their reliability and some consumers, in their purchasing policy, may distinguish between affiliated and non-affiliated traders.

127. A small fee (often between EUR 30 and EUR 50) is typically charged to consumers using the process, and cases are expedited relatively speedily.⁵⁹ On the other hand, not every sector is covered by a committee and decisions are not binding.

Box 16. ADR Committees

The *Geschillencommissies* are considered as a low-threshold type of self-regulation which functions well, leading to a relatively high level of compliance by affiliated traders. However, quite apart from the obvious limitations, that some sectors are not covered and decisions are not binding, the interviewees recognised that the process did not deal adequately with three main types of case, where:

- The trader's activities generate widespread losses, rather than damage to particular individuals.
- Urgent action is needed e.g. to stop continuation of a certain harm.
- Damage is caused by a non-affiliated trader.

Civil proceedings

128. A consumer who refers a complaint to the *Consumentenbond* can receive some limited legal advice for EUR 10 (free for members). Prior to 2000, the *Consumentenbond* used to take on civil cases for individual members through their legal service. However this proved to be too expensive and it now intervenes usually only in cases of collective action, involving many claims.⁶⁰ Individual actions are paid for by the consumers themselves.

129. A collective action case is dealt with as follows. The *Consumentenbond* normally tries to negotiate with the trader to stop the contravening activities. If this does not work and a settlement is not possible a case may eventually go to court. Then there are two principal possibilities:

- A formal collective action whereby the *Consumentenbond* acting as an NGO in the public interest seeks an injunction. The judge can order the latter, with the threat of a penalty payment being imposed in the event of non-compliance.
- A class action on behalf of many consumers. This is not a formal collective action, but a group action where several individual consumers with a similar interest combine their claim, assisted by the *Consumentenbond*. In this case, the *Consumentenbond* will normally ask the court to establish the trader's liability. However a second procedure is still needed to establish the amount of the damages for each individual consumer and the costs of this second action must be borne by the consumers themselves.

In addition, a very important instrument used by the *Consumentenbond* is (negative) publicity, via the public media.

Box 16. Effectiveness of current system

There appears to be consensus between the Ministry of Economic Affairs and the *Consumentenbond* that the current system is effective only in relation to “benevolent” traders, as opposed to *mala fide* traders. The Ministry nevertheless stressed that disputes can often be solved in an informal way and possible reputational damage works as a deterrent factor for many companies, in particular the big chains and local shops.

Administrative and criminal proceedings

130. As a consequence of the reforms described earlier (para. 120), the CA will be able to initiate administrative proceedings for contraventions of the *Prijzenwet* and the *Colportagewet*, although it is envisaged that this will occur only if the self-regulatory features of the market have not resolved the case. The principal sanction will be a fine and/or a financial penalty for each day of continual infringement. Before imposing a fine, the CA will first have to make a report on the “accusation” and send it to the trader, who will then have the opportunity to make representations, either in writing or at an oral hearing. Moreover, any decision taken by the CA will be subject to an administrative appeal within the CA itself, and subsequently to the Civil Court of Rotterdam and to the Trade and Industry Appeals Tribunal. Confiscation of goods or disgorgement of profits, imprisonment, and reparation of harm caused will not be available as administrative sanctions to the CA. However, it will be able to issue informal warnings and/or secure an undertaking that the infringing trader will cease the infringement.

131. Where there is a violation of the *Prijzenwet* or the *Colportagewet*, the FIOD-ECD can refer the case to the Public Prosecutor who might bring proceedings before the criminal court. In Dutch criminal law “intent” (*opzet*) needs to be proved, but not malicious intent (*boos opzet*); so-called “colourless intent” (*kleurloos opzet*) is sufficient. In theory, a consumer-victim can link a damages claim to the criminal process; however, in practice the possibilities are relatively limited.

132. When the current reform proposals are implemented, the *Prijzenwet* and *Colportagewet* will only be enforced administratively (as described in para 130). Nevertheless, the general provisions in the Dutch Criminal Code regarding deception and fraud will remain in force. When both the public prosecutor and the CA have legislative authority to deal with a case, the CA will only be allowed to act if the public prosecutor decides not to prosecute or fails to take any action.

Box 17. Enforcement authority priorities

Enforcement of consumer protection provisions does not currently seem to be a major concern of the FIOD-ECD and the public prosecutor.

Summary

133. The key points emerging from this case-study may be summarised as follows:

- The system relying to a large extent on consumer activism, self-regulation and the informal resolution of disputes works well where contraventions are easily detected and where traders are “benevolent”. Industry self-regulatory compliance schemes can play an important complementary and cost effective role in consumer policy enforcement regimes. Nevertheless, there is perceived to be inadequate deterrence for *mala fide* traders.
- The situation is likely to alter somewhat when current reform proposals, creating a new administrative agency with powers to impose financial penalties, are implemented.

D. Case Study: United Kingdom

Consumer protection regulation

134. In the United Kingdom,⁶¹ consumer protection regulation is contained in a variety of statutes (primary legislation) and statutory instruments (secondary legislation). The three examples of contraventions used in the project, are dealt with as follows:

- i.* Failure to provide information in distance sales transaction: the obligation to provide buyers information on their right to cancel is contained in the Consumer Protection (Distance Selling) Regulations 2000.⁶² The enforcement authorities (see further below) have a duty to consider any complaints regarding a breach of this obligation, but the only formal sanctions available are an injunction or enforcement order, obtainable under civil proceedings.⁶³
- ii.* Interference with odometer: interference with the odometer in a motor vehicle constitutes the criminal offence of applying “a false description of goods” or supplying or offering to supply “any goods to which a false trade description is applied”, under the Trade Descriptions Act 1968.⁶⁴ The principal penalties prescribed by this legislation are: a fine not exceeding GBP 5 000 or (on conviction on indictment by the Crown Court) a term of imprisonment not exceeding two years.⁶⁵
- iii.* Misleading price labelling: providing a misleading price indication⁶⁶ constitutes a criminal offence under the Consumer Protection Act 1987,⁶⁷ for which the principal penalty is a fine (on summary conviction by a magistrates court to a maximum of GBP 5 000 and on conviction on indictment by the Crown Court of an unlimited amount).

In relation to all three contraventions, the authorities may also take civil proceedings for an enforcement order. This requires the trader to cease the illegal act, with the threat of a penalty for contempt of court, should the order be contravened.⁶⁸

Enforcement authorities

135. The enforcement of these areas of consumer protection regulation is primarily undertaken by the Trading Standards Service (TSS). There are 202 TSS offices, operating under the aegis of local government, and the local authorities take responsibility for funding and setting priorities for the Service. However, there is an institution responsible for co-ordinating practice and policy (Local Authorities Coordinators of Regulatory Services – LACORS). The Enterprise Act 2002 also confers powers of enforcement in this area on the Office of Fair Trading (OFT), where a breach of the law “harms the collective interests of consumers”. The OFT is a national, semi-autonomous agency with general responsibilities for the development and enforcement of competition and consumer protection laws; it is funded by central government.

136. Consumer complaints may be made to either agency, although the large majority are made to the TSS. The TSS, but not OFT, can initiate criminal prosecutions. Both agencies may take civil proceedings for injunctions or enforcement orders, although in relation to the latter the TSS has first to notify the OFT. The “Home Authority Principle”⁶⁹ means that the TSS office of the area in which a trader is based has primary responsibility for dealings with that trader, but formal enforcement action can only be taken for contraventions committed within its geographical boundaries. Where a number of TSS offices are seeking an Enterprise Act enforcement order against a trader who has been active in different localities, the OFT may direct which is to proceed, or itself may do so. It also deals with what are perceived to be “high impact” cases, those relevant for clarifying the law, setting a precedent, or having a major deterrent effect. All enforcement authorities are in principle subject to the guidelines issued by central government and contained in an Enforcement Concordat,⁷⁰ although this document has no legal force.⁷¹

Box 18. Relationship between different enforcement agencies

The overlapping of responsibility between the enforcement agencies is not considered to be problematic. Nevertheless the “home authority principle” does not appear to be always effective as sometimes an authority taking enforcement measures fails to take sufficient account of advice given by the home authority. Knowledge of local businesses and of the conditions applying to them is considered to be of great importance.

Enforcement policy generally

137. The main characteristics of the UK approach to enforcement may be summarised as follows:

- The enforcement authorities adopt a pro-active policy to the monitoring and detecting of contraventions.
- There is a range of instruments available for enforcement purposes, from administrative action (informal and formal warnings) to civil proceedings (injunctions and enforcement orders) and (in the case of TSS) criminal prosecutions.
- To deal with serious and repeated contraventions, resort may be had to criminal penalties and/or enforcement orders (with the possibility of contempt proceedings).

138. The Enforcement Concordat published in 1998, together with the Crown Prosecution Service Code⁷² to which it refers, provides an important guide to enforcement practice and policy generally. Its key contents relevant to this project may be summarised as follows.

- *Information and advice:* an important strategy of enforcement agencies to increase compliance is “to provide information and advice ... on the rules that we apply and ... disseminate this as widely as possible”. And that strategy is particularly important in relation to small and medium-sized businesses (SMEs).
- *Openness:* enforcement agencies are encouraged to be open and transparent about their enforcement activities. That means, for example, that individual TSS offices outline their enforcement policy on their individual websites.
- *Proportionality:* enforcement action should be proportionate to the seriousness of the infringement and of the risk involved. Thus, prosecution should be “reserved for the most serious offenders” and the “minimum action should be taken necessary to secure compliance.”

Monitoring traders

139. Consumer complaints play a large role in relation to the detection and processes of enforcement for the contraventions under consideration. Nevertheless pro-active monitoring, particularly by the TSS, does take place. Some random inspection of traders may be undertaken, but monitoring proceeds usually on the basis of risk assessment. A risk assessment model typically categorises groups of traders into “high”, “medium” or “low” risk by reference to scores reflecting key variables, including for example the probability of the risk occurring, the complexity of the activity, the number of consumers potentially affected, and local history management. The fact that, as in the three designated contraventions, only financial loss may be suffered does not preclude an activity or trader from being categorised as “high risk”, since financial losses can be on a large scale.

140. To assist monitoring and responding to consumer complaints, the TSS have powers of entry and inspection; and these are not dependent on the existence of a reasonable suspicion that a contravention has been committed. However the powers are linked to a possible criminal prosecution.

Box 19. Pro-active and responsive monitoring

In general, the current system is perceived as achieving the right balance between pro-active and responsive monitoring policy. The use of risk assessment is considered to be important for the purpose of managing enforcement resources and minimising interference with traders' business. However, the fact that currently a number of risk assessment models were available is considered to generate confusion.

Dealing with suspected contraventions

141. When, as a consequence either of monitoring or of a consumer complaint, the TSS have evidence to suspect that a contravention has taken place, there are normally eight options, as follows:

- i.* Do nothing.
- ii.* Issue an advice letter or informal warning.
- iii.* Issue a formal warning.
- iv.* Seek to secure a voluntary agreement to comply.
- v.* Refer the matter to the trader's Home Authority.
- vi.* Seize (relevant) goods.
- vii.* Initiate proceedings for an injunction or enforcement order.
- viii.* Initiate a criminal prosecution.

These options, except (vi) and (vii), are also available to the OFT.

142. The legal position is that there is a discretion as to choice of option, although that discretion is subject to general administrative law principles; and for this purpose the guidance in the Enforcement Concordat may be relevant to what is "reasonable".

143. In the light of the Concordat, option *ii*) is often adopted for suspected first contraventions. However, the individual circumstances of the case might indicate the appropriateness of more formal action. Important considerations here include:

- The amount of consumer loss.
- The number of consumers potentially affected.
- Characteristics of the trader such as are associated with a "rogue trader", because, for example, the conduct involves a blatant disregard of the law or consumer harassment.

144. In the event of second and subsequent contraventions, procedures and sanctions of increasing severity are invoked until compliance is achieved. So if a formal warning is unheeded or a voluntary compliance agreement broken, an injunction may be sought, with the threat of the court exercising its powers to impose a penalty for contempt, should the trader fail to comply. Alternatively, in the case of TSS, a criminal prosecution can be brought or, in the case of OFT, an application may be made for an Enterprise Act enforcement order.

Box 20. Policy for dealing with suspected contraventions

There appears to be broad satisfaction with the current policy which adopts the “step by step” approach upwards through the enforcement pyramid for most cases, and for serious cases a more swift move towards prosecution or a Part 8 enforcement order by the TSS and the OFT respectively. However, the fact that the latter does not carry with it a financial sanction was regarded by the OFT as a disadvantage from a deterrence perspective.

Indeed, the LACORS, TSS and OFT representatives all consider that enforcement would be facilitated by conferring on TSS and OFT the possibility of imposing financial penalty notices, although they would not favour such a reform leading to the removal of any power, in appropriate cases, to undertake a criminal prosecution. It is noted that analogous powers have been given to the TSS to issue penalty notices (up to GBP 200) under the Housing Act 2004, for breach of obligations to provide a “home information pack”. In general, there is no support for a “fixed” penalty which might be too small to deter larger businesses. Rather some discretion is considered appropriate and, as with competition cases, could take account of the firm’s turnover; and perhaps also of the amount of consumer detriment. Given the risk of divergent approaches as between offices, it is recognised that some degree of control would be necessary.

As regards the administrative structure, one view is that the power to impose penalty notices might more appropriately be placed with an authority other than the TSS, since its existence might inhibit the advisory function of the service. In any event, it is widely considered that a right of appeal would be necessary, perhaps to a specialised tribunal.

TSS and criminal prosecutions

145. Criminal prosecutions, initiated by the TSS, are either to the magistrates court, for less serious cases, or to the Crown Court, for more serious cases. If the former, the prosecution is undertaken by the TSS itself,⁷³ the case is tried summarily and there is a maximum fine which may be imposed. For prosecutions in the Crown Court, the case must be referred to the Crown Prosecution Service (CPS) and the CPS forms its own judgement on whether it is appropriate for the prosecution to proceed.⁷⁴ In the Crown Court the trial is by indictment and if there is a maximum amount which may be imposed by way of fine, it is significantly higher than that in the magistrates court; imprisonment is also available as a penalty.

146. To secure a conviction the prosecutor must satisfy the criminal law burden of proof of “beyond all reasonable doubt”. Most of the offences relevant to this project involve strict liability. However, there is invariably available to the defendant the defence of “due diligence”. To succeed with this defence, the burden is on the defendant to prove:

- i. That commission of the offence was due to a mistake, reliance on information supplied, the act or default of another, an accident, or some other cause beyond the defendant’s control *and*,
- ii. “That he took all reasonable precautions and exercised all due diligence to avoid the commission”.⁷⁵

147. Although prosecutions are considered to be processes of “last resort”, the number undertaken is by no means trivial. For the period of five years to 2004, there were 3 929 prosecutions brought under the Trade Descriptions Act by the TSS.⁷⁶ Data was not made available on the number of complaints and investigations from which the figure was derived but, in 2004-05, having regard to all the enforcement responsibilities of TSS, there were in Britain 597 995 “enforcement activities”, 36 387 “letters of informal caution and advice”, 2 385 “formal cautions” and 4 609 prosecutions commenced.⁷⁷

148. It was not possible to obtain any information on the proportion of prosecutions leading to a conviction. The principal penalty imposed by the courts on conviction is a fine. To give an indication of typical fines, regard can be had to the data supplied by the TSS to the OFT and published in the latter’s annual report⁷⁸. In 2004-5, there were 275 convictions of offences under section 1 of the Trade

Descriptions Act (false description of goods), for which an aggregate of GBP 185 561 was paid in fines, thus an average amount of about GBP 675 for each offence.

149. Several other sanctions are available. The courts have power to award compensation to victims of the offence and following the reported 275 convictions in 2004-05, an aggregate of GBP 53 088 was awarded for this purpose. Seven of the defendants convicted received sentences of imprisonment. The courts routinely order convicted defendants to pay part of the prosecution costs and the amount in question can sometimes exceed the fine imposed. In addition, many TSS departments publicise on their website or elsewhere the names and details of offenders and the conviction.

150. To give an idea of how these sanctions are combined in typical cases, Table 9 sets out details of individual cases of convictions of traders under the Trade Descriptions Act for interference with odometers,⁷⁹ taken randomly from the websites of TSS departments.

Table 9. Criminal fines for interference with odometers

	fine	costs	compensation	publicity
Birmingham	GBP 4 500	GBP 1 500	-	√
Brent	GBP 4 500 (4)	GBP 12 000	-	√
Coventry	GBP 600	GBP 200	GBP 660	√
Derbyshire	GBP 600 (3)	GBP 740	-	√
N.Yorkshire	GBP 1 500	GBP 1 000	-	√
Worcestershire	GBP 1 400	GBP 942	GBP 1 000	√

Note: The figure in brackets after the fine indicates multiple offences.

Box 21. Assessment of criminal justice process

Based on experiences in Scotland, it appears that problems can arise from the fact that TSS prosecutions often contain much technical matter and that therefore the Scottish prosecuting authority (Procurator Fiscal) might benefit from some TSS input into the prosecution process. This is also considered to provide support for establishing specialist courts or tribunals to deal with consumer cases.

Strict liability, with the defence of due diligence, is widely favoured as the basis of liability. The requirement of "knowledge" or "recklessness" required for making false statements under Trade Descriptions Act s.14 is regarded as a "major hindrance" to the enforcement process. There are different opinions on the question whether, at least for relatively minor consumer protection contraventions, the burden of proof and other procedural principles of civil law might be more appropriate.

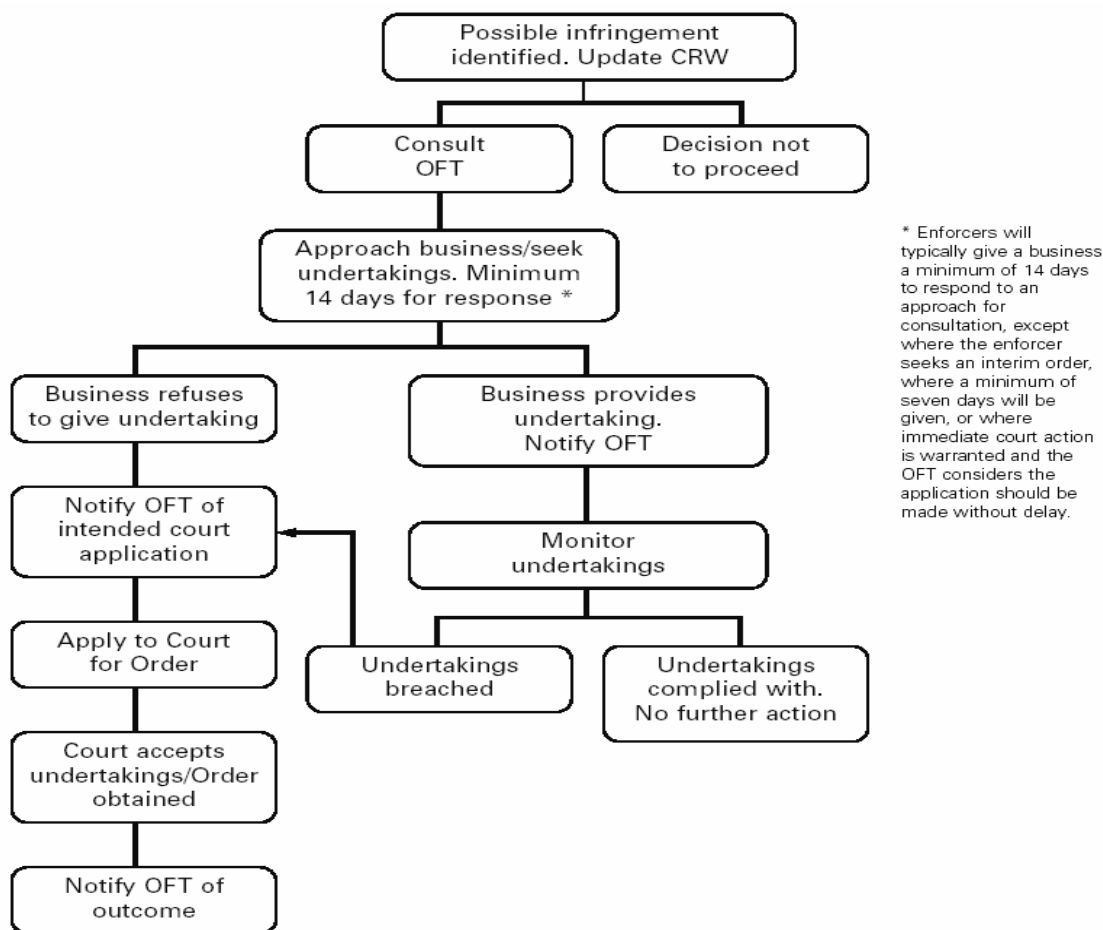
For the purpose of deterrence, the current level of fines, both as prescribed by the legislation and as determined by the courts, is considered to be insufficiently high. Where financial sanctions do not deter traders, some would favour the introduction of additional sanctions, such as the power to ban them from trading (what is referred to elsewhere as "negative licensing") as an alternative to imprisonment. Some traders who have in the past been the subject of enforcement action also held a consumer credit licence. Therefore, in determining a proportionate response, licensing action might be an alternative way to address the detriment. The impact on a trader of losing a licence would depend on the amount of its credit-related business but potentially could be an important incentive in ensuring compliance.

The OFT policy on "naming and shaming" is not fully formed or agreed. As regards TSS, it is considered to be appropriate in many cases, although there is some doubt as to its role in relation to small traders who can easily change their name or business location. Moreover, there are legal difficulties in publicising contraventions unless there had been a formal conviction by a court. Interviewees thought that the "probation order" currently available in Australia could usefully be introduced to the United Kingdom, although there was some concern as to the administrative costs which might be involved in following up and monitoring orders.

OFT and Enforcement Orders

151. The "last resort" option of the OFT is an enforcement order, made under Part 8 of the Enterprise Act 2002 (this process is also available to the TSS). The normal sequence of events in relation to the order is given in the following diagram.⁸⁰

Figure 2. Procedure for Part 8 action by an enforcer



152. It should be noted that an application for an Enforcement Order can normally be made only where the attempt to achieve a resolution through an undertaking has failed, the exception being where urgent action is needed to safeguard consumers' interests.

153. Enforcement orders can be sought in relation to a wide range of consumer protection measures, including cases such as the failure to provide information on the right to cancel a distance selling agreement, where no criminal liability arises. Moreover, where the application for the order is made on the basis of contravention for which there is criminal liability, the enforcement authority seeking the order need only satisfy the civil burden of proof that a contravention has taken place.

154. No penalty as such attaches to an enforcement order, though breach of it may lead to proceedings for contempt of court with a fine or imprisonment then being available for non-compliance. There are no powers to award compensation to consumer victims, but defendants subject to an order can be made to pay costs. Although the OFT has powers to publicise the details of undertakings and enforcement orders, it does so only rarely.⁸¹

Box 22. Enforcement order regime

Although the enforcement order regime is considered to be reasonably effective, it is felt that the deterrence impact could be sharpened by additional powers. There is enthusiasm for enabling the civil court to impose financial penalties, to complement the enforcement order. It is thought also that introduction of the Australian “probation order” could add an attractive and effective option. Negative licensing is seen, by some, to be problematic because it would be difficult to define the market to which the “cease trading” order would apply.

Enforcement powers of consumers

155. Consumer victims of contraventions will normally have private rights in civil law which they must enforce on their own initiative. Although these rights may be pursued at relatively low cost through the small claims procedures, the numbers enforcing their rights are likely to be small.⁸² The pursuit of private rights can be aided if there is prior public law enforcement by the TSS or OFT, notably where the evidence of the contravention is used in the civil proceedings. This is, however, subject to Part 9 of the Enterprise Act 2002 which, although it does not affect information which is on the court record and therefore in the public domain, prohibits the disclosure, without the trader’s permission, of other information obtained during the prosecution process.

156. Consumers also have the right to initiate prosecutions under the Trade Descriptions Act but, unless a compensation order is made in their favour, they may have little motivation to do so.

Box 23. Consumer redress and trade compliance

It is generally considered that creating easier forms of consumer redress would facilitate trade compliance. One possibility would be to combine the enforcement of private rights with administrative enforcement. Where there were a number of consumer victims of a particular contravention, consideration might also be given to collective or representative actions.

Summary

157. The key points emerging from this case study may be summarised as follows:

- Although enforcement procedures are considered in general to be effective, for serious cases there is perceived to be inadequate deterrence, because the penalties imposed by the criminal courts are too low and no adverse financial consequences are attached to enforcement orders obtained in civil proceedings.
- It is thought that the introduction of a suitable system of administrative financial penalties would enhance compliance.

III. Analysis and evaluation of policy options

Deterrence and compliance

158. The introduction to this report (paras. 37-40) explains the general nature of the theoretical framework and why it was chosen for this study. A simple model of deterrence is adopted whereby traders will be induced to comply with the law if the costs of contravening it exceed the benefits (say *U*) to them of the contravention.⁸³ The costs which traders will face as a result of contraventions are principally those arising from the enforcement regime (say *D*), but since not all contraventions will be detected, nor all

detected contraventions punished, D must be discounted by the probability (p) of these costs being imposed. The condition of compliance is, then, $U < pD$.

159. It is, however, important to appreciate that the costs for traders arising from contraventions are significantly broader than the sanctions imposed by the law. They include also the “hassle” and personal inconvenience arising from encounters with aggrieved consumers and public officials, legal and other defence expenditures, as well as any loss of market reputation resulting from the contravention being detected. It follows that some of the costs to the trader will be incurred even if there is no formal condemnation by a tribunal or other authorised institution. Because not all cases reach the ultimate stage of condemnation, involving the imposition of the formal sanction, it is helpful to rewrite the *ex ante* additional cost arising from the contravention as $qE + pD$ where qE represents the probability and the associated costs of the relevant act being detected, and pD the probability of a formal condemnation and its associated costs, including notably the prescribed sanction.⁸⁴ The condition of compliance thus becomes $U < qE + pD$.

160. Although the precise value of U will rarely be known, to induce compliance, policy measures can be aimed at influencing the variables in $qE + pD$ such that the costs to the trader of contravention exceed the *likely* value of U . The assumption of rational behaviour is regarded as applicable generally to “white-collar crime”, but some traders will of course not approach the decision on compliance in this way. Others will lack information on the likelihood of detection and conviction and on the sanctions which will be imposed. Nevertheless, it appears to make sense for policy makers to design enforcement systems having regard to the generality of behaviour to be expected. Moreover, as is argued below (see especially paras. 177-180), it is important that the design incorporates sufficient flexibility and discretion so that agencies can respond to individual patterns of behaviour which do not accord with general assumptions.

Enforcement variables

161. It is important next to specify the different ways in which policy measures can influence variables in $qE + pD$. Take, first, q - the probability of the contravention being discovered. This will be a function of (principally) the following:

- The amount of monitoring by enforcement agencies.
- The quality of such monitoring (*i.e.* how well targeted it is on likely offenders).
- The facility of consumers detecting contraventions and engaging in complaint procedures or enforcing private rights, and their readiness to do so.
- The involvement of third parties (such as consumer associations, “watchdogs” or competitors).

162. Then, looking to p - the probability of a formal condemnation – this will be lowered by notably:

- Any requirements for oral hearings.
- Proof of contravention, including burden of proof, and powers to obtain required evidence.
- Proof of fault or knowledge (if required for condemnation).

163. D is mainly the formal sanction, but may be increased by policy measures which generate adverse publicity for the trader (of course this might itself be a formal sanction)⁸⁵ or which recover from

the trader some of the costs of enforcement. *E* includes the cost to the trader of being subjected to investigation by the enforcement agency and expenditures incurred in any subsequent procedures.

Analytical framework for evaluation of policy options

164. The aim of the project is to assess the effectiveness of enforcement regimes in achieving a high degree of compliance with consumer protection regulation. It is therefore necessary to ascertain the beneficial impact (*B*), in terms of achieving increased levels of compliance, of different enforcement policy options. While different levels of compliance will generate different levels of social benefit according to the seriousness of the harm caused by the contravention, this study considers areas of consumer protection dealing only with financial losses. These may vary, but do not include the high levels of social cost which can arise from sickness and injury.

165. It is clear, both from the case studies and from other sources, that enforcement activity of certain kinds can help to educate and inform those whose behaviour is regulated.⁸⁶ Although this may be a valuable social benefit in its own right, it is treated here as mainly improving future levels of compliance, since better informed traders are more likely to comply with the law. The analysis which follows nevertheless draws attention to policies which generate benefits of this kind.

166. To be compared with the benefits (*B*) are the costs of the different policy options (*C*). This analysis concentrates on what can be considered to be the two most important categories of cost. The first (*C_a*) are the administrative costs associated with the different procedures; most of these fall ultimately on taxpayers. The second arises from the fact that procedures and institutions are not perfect and some decisions will erroneously impose sanctions or other losses on those who have not contravened the law. Given that some institutions and procedures (for example those in the criminal law process) may be designed specifically to reduce such errors, it is important to take account of the propensity of the various policy options to generate these losses, what are called here “error costs” (*C_e*).⁸⁷

167. The extent to which, in comparing costs with benefits, account should also be taken of the costs imposed by the penalties and procedures on traders who have contravened the law is debatable.⁸⁸ The costs are a consequence of an illegal activity and the deterrence system depends on them facing such costs. These are largely ignored except where the same level of compliance can be achieved by instruments imposing a significantly lower set of costs on traders.

168. From the information acquired on the regimes in different jurisdictions a number of policy options emerge, that is, alternative sanctions and institutional arrangements. Applying the theoretical framework to these makes it possible to hypothesise on how decisions on these options are likely to impact on *B* and *C_a* + *C_e*. To do this, the administrative and error costs incurred in exercising the option must be compared against the benefits, principally increased compliance. This is not a quantitative study and it has been difficult, in any event, to obtain reliable data even on administrative costs. As appears in the following box, the United Kingdom case study provides some indication of the relative costs of different processes within one jurisdiction.

Box 24. Costs of enforcement

The UK authorities have found it difficult to generalise on costs because of the heterogeneous character of consumer protection offences. It is nevertheless suggested that in relation to the enforcement of a typical case for a typical offence, the UK Trading Standards Service might “spend” something in the order of 1 officer day for investigating a contravention, 2 days for informal cautions, 4 days for formal cautions and 10 days for criminal prosecutions. And, for the last of these, there would in addition be 5 days of senior management time, as well as legal costs.

169. Subject to this, the question whether for a particular policy option **B** is likely to outweigh $C_a + C_e$ has been largely a matter of speculation. Nevertheless it has been possible to reach some intuitive predictions on this and therefore on the cost-effectiveness of the policy option. To explore further the plausibility of the predictions, the opinions of those working within enforcements systems in the four jurisdictions covered by the case studies have been sought.

170. A final preliminary but important observation. The impact of different policy options is to some extent dependent on conditions, notably differences in culture, both legal and non-legal, which vary across OECD jurisdictions. This requires caution in drawing applicable generalisations from the analysis and in relation to some policy options, necessitates culturally-specific qualifications to the conclusions.

Monitoring

171. The first set of key policy option draws on the distinction between those jurisdictions, for example, Australia, Belgium and the United Kingdom, in which publicly financed institutions adopt a pro-active approach to the monitoring of traders and those where the institutions adopt a reactive approach, relying largely on responding to the complaints of consumers and third parties, for example the Netherlands.

172. Generalisations on this distinction are difficult because the relative merits of the two approaches are likely to depend much on circumstances arising in particular jurisdictions, including their institutional arrangements and their consumer protection culture. Clearly, the pro-active approach requires significant resources to be available to the public agencies, but the marginal cost of those resources will be smaller, and therefore the argument for this approach more powerful, if an agency network already exists for other purposes. To similar effect, the reactive approach is plausible only in countries (such as the Netherlands) where there is a culture of consumer activism. This is likely to be the case where consumer associations and the like, whether voluntary or publicly-funded, have a major profile in the sense both that consumers will be sufficiently aware of their existence in order to refer cases to them, and that the institutions themselves take the initiative in publicising potential problems and seeking out defaulting traders.

173. The relative effectiveness of the two approaches may also depend on the nature of the consumer protection measure in question. In relation to those which most consumers will themselves be unlikely to detect (for example, the requirement of distant sellers to provide information to buyers on their right to cancel), pro-active monitoring should add significantly to p and q , and thereby also to deterrence. In addition, this should serve to educate a proportion of the relevant traders as to what is needed to comply with the law and that this should enhance future compliance. Contrast that with a contravention which relates more directly to the consumer's expectations and which is sufficiently transparent for the consumer easily to detect it. Then, at least in jurisdictions with a culture of consumer activism, pro-active monitoring by the agency is unlikely to increase p and q to a sufficient degree to justify the cost involved.

174. The conclusions drawn from this analysis are that a system of monitoring traders' behaviour by public authorities is likely to be cost-effective where there is not within the jurisdiction a significant culture of pro-active complaints by consumers and consumer associations, or where the contravention is unlikely to be easily detected by consumers themselves.

175. It follows that there is likely to be a significant enforcement deficit in those jurisdictions adopting a reactive approach in relation to consumer protection contraventions which are not easily detectable, a weakness acknowledged by officials in the Dutch case-study. For these jurisdictions, questions also arise as to how well the complaints and dispute-resolution procedures serve in inducing compliance. Since this study focuses on public procedures, it does not attempt to address these questions.

176. The cost-effectiveness of pro-active monitoring should be enhanced by the adoption of risk-assessment models as in the United Kingdom, since targeted enforcement should generate a higher rate of detection (q) for each unit of input. As the Australian and Belgian practice shows, sensible targeting can exist without the use of a formal model of risk-assessment. Nevertheless it is important that such targeting be based on objective (for example, the number of complaints relating to particular categories of trader), rather than subjective criteria, since the latter may too easily permit the intrusion of political and other undesirable considerations into the appraisal.

Post-detection discretion

177. As indicated earlier (paras. 55-57), when an agency believes that a contravention has taken place, it typically has a wide range of enforcement options, from taking no action other than an informal warning, to issuing a formal warning, to initiating administrative, civil or criminal procedures. It appears that the only plausible argument for denying enforcement agencies the discretion as to whether or not to initiate an enforcement action, and in what form, is derived from concerns with problems concerning the transparency and accountability of officials, in short where discretion can be abused.

178. There are two strong cost-effectiveness arguments for the discretion. First, although the automatic pursuit of enforcement measures obviously raises the value of p , and therefore, under the deterrence model, should increase compliance, the social benefit of such increased compliance in relation to trivial contraventions is relatively small. Proceeding with trivial cases in this way may add disproportionately to the costs (C_a), because traders will sustain significant “indignation costs” which may motivate them to initiate appeals against decisions.⁸⁹ Secondly, dismissing the case – with or without a warning – might not, in relation to *first-time offenders*, directly increase compliance, but it should generate significant benefits in terms of educating these traders, and this should indirectly improve future compliance. Furthermore, if the exercise of these options is followed by an increased monitoring of the traders concerned, it should lead to a major impact in deterring *second-time* offenders, because for these offenders, the chance of getting caught (q) will have a much higher value.⁹⁰

179. The cost-effectiveness of these options then may turn crucially on the relative importance of inducing compliance by first-time and second-time offenders, respectively. If, as is typically the case with consumer protection regulation dealing exclusively with financial losses, relatively small amounts of harm result from individual contraventions, and the problem is mainly with those traders who are regular offenders, then the discretion not to engage in an enforcement regime, if wisely exercised, is of great importance. A trader responsible for a single, and perhaps accidental, contravention offender will lose little, and may gain, through being better informed; the repeat offender is more likely to be caught and the subject of a formal condemnation.

180. It may therefore be concluded, that, unless there are justified fears that officials might abuse discretion, it is cost-effective for agencies to have the power to choose between dismissing a case (with or without a warning) and initiating enforcement procedures.

Administrative financial penalties

181. Perhaps the most important, and also the most contentious, issue arising in this report is whether the administrative agency should itself have power to impose some form of financial penalty on traders and, if so, how the system should operate.⁹¹ The analytical framework based on deterrence theory would tend to support conferring such power on agencies. For the condition of compliance ($U < qE + pD$) to be met in typical cases the variable pD (the formal sanction discounted by the probability of it being imposed) must be reasonably high if it is to exceed the profit accruing from the contravention (U), because qE (the costs to the trader of being detected discounted by the probability of this occurrence) is generally rather

low. If financial penalties are only available in the criminal or civil judicial processes, then given the significant administrative costs of these processes (particularly the criminal processes if there is a high threshold of evidence necessary to secure a conviction there), the probability of the penalty being imposed (p) will be relatively low.⁹² To compensate for the low (p), the courts might impose a relatively large penalty. But, as the case-studies reveal, although courts generally have the power to do this, in practice they are very reluctant to do so for minor trading offences. In consequence, in such systems, there is likely to be a problem of insufficient deterrence.

182. One means of addressing these issues may be the use of administrative financial penalties. If, as is assumed here, these are readily imposed in cases (notably involving second and repeat offenders) where deterrence is considered to be important, then in such cases p will be high, thus requiring only a relatively modest penalty (D) for the compliance condition to be met. Moreover this is done with a considerable saving in administrative costs (C_a). By way of qualification to this, it must be recognised that administrative financial penalties are likely to give rise to higher error costs (C_e), because without the higher evidentiary thresholds required for liability in the criminal and civil justice systems, some administrative penalties will be wrongly imposed. The risk of ‘regulatory error’ is a significant one, which will vary in relation to the level of discretion given to the regulator. The consequences of regulatory error can be serious, since an overly ‘heavy handed’ approach by the regulator may have a chilling effect on innovation and competition. As set out below (see paras. 186-188), there are devices available, for example an appeal against an imposition, which may ameliorate the consequences of such errors.

183. The desirability of administrative penalties will vary from one jurisdiction to the next. The economic, legal, and social justice issues require careful consideration in the context of each jurisdiction's administrative and judicial framework. Of those jurisdictions that have adopted some form of administrative sanctioning regime, the financial “proposal” used in Belgium appears to be most effective. In the Netherlands, when the current reforms come into effect, the new administrative agency will have power to impose financial penalties; and in the United Kingdom⁹³ officials expressed a preference for a suitably designed such system.

184. In relation to the design and operation of the system, the first question, that of terminology, might be considered to be relatively trivial, but it is not unimportant. Given issues of accountability, the stigma associated with certain forms of condemnation, and therefore also error costs, it appears preferable that the language typically associated with the criminal process (for example “fine” or “penalty”) should be avoided. Hence, perhaps, language such as a “financial notice” or “charge” is preferable.

185. The second question is whether the financial penalty should be fixed or variable, at the discretion of the agency (though to a specified limit)? From a deterrence perspective, there are clear advantages to the latter since the amount imposed can be made to reflect the trader's wealth and more particularly the profit likely to be derived from the contravention (U).⁹⁴ On the other hand, fixed penalties can be processed at lower administrative cost. In addition, the exercise of discretion regarding the amount might encourage more appeals and/or create problems of divergence of approach between different offices. On balance it is considered that fixed penalties should be used only for very minor offences. For others, the agency should have a discretion, up to a limit, and to maintain some uniformity of approach decisions regarding the amount might be made at a central, rather than a local, level (as in Belgium).

186. As regards the procedure governing the financial penalty, there would appear to be two main models.⁹⁵

- i. As in Belgium, a formal allegation of commission of a criminal offence is made. The trader is nevertheless given (by the administrative agency) the option of accepting a “proposal” for payment of a specified sum. If the proposal is not accepted or payment is not made within a prescribed

period, the trader will normally be prosecuted in a criminal court. Conversely, on payment, the criminal charge lapses. (Note that this model could be used in relation to civil, rather than criminal, proceedings).

- ii.* As will apply in the Netherlands, the imposition of the administrative financial penalty is independent of any criminal (or civil) process, but the trader has the right to bring an appeal against the imposition to a tribunal or court.

187. The choice between the two models may depend on the related phenomena of administrative costs (C_a) and error costs (C_e), and the incidence of these costs may vary from jurisdiction to jurisdiction, according to differences in legal culture. Take first, model *i*). Of course, if traders consider the decision to be wrong, they can refuse the proposal, thus relying on adjudication in the criminal (or civil) court. But, as the Belgian case study revealed, there are other, cheaper ways of constraining errors. For example, the administration can be required to provide a significant amount of detail in the allegation and the trader may be given the possibility of disputing the content of the allegation before the formal imposition is made. Then, as regards model *ii*), in addition to the right of appeal, the trader may be given the opportunity to respond (in writing) to a formal allegation or to attend an oral hearing in which the allegation is contested. Allowing the regulator to impose administrative penalties on a business tends to shift the burden of proof onto the business to prove its innocence. Adequate evidentiary standards and procedures at the administrative stage may, however, reduce this risk, as well as avoiding the increased costs associated with an appeal.

188. Clearly, the more elaborate the procedures, the higher the administrative costs, but also the lower the error costs. It is not easy to generalise on the optimal trade-off between these two sets of costs, particularly because the different styles of legal procedures generate different levels of costs in different jurisdictions. However, the following predictions are proffered. In jurisdictions, such as those in the common law world, associated with more complex criminal law procedures and higher evidentiary thresholds for criminal liability, model *ii*), with a right of appeal to an administrative tribunal, is likely to be less costly. Conversely, in jurisdictions where these conditions do not apply, as revealed in the Belgian case study, model *i*) is likely to be more cost-effective.

Other administrative sanctions

189. It appears from Table 4 (para. 63) that other sanctions are available to administrative agencies in some jurisdictions, including the power to order that victims be compensated and the reimbursement of (some of) the administrative costs of enforcement. These do not call for detailed comment. The amounts involved may, for deterrent purposes, usefully complement financial penalties, should these be set at too low a level. The issuing of adverse publicity (“naming and shaming”), however, seems to be inappropriate in this context, unless it follows a definitive ruling by a court (for example, following an appeal). The reason is that error costs can escalate if the agency has reached an incorrect decision, and reversing it on appeal will not significantly reduce the harm arising from adverse publicity.

Civil proceedings

190. The term “civil proceedings” refers here to those proceedings taken in a civil justice court against the trader by an administrative agency – the enforcement of private rights by consumer-victims is addressed below (paras. 215-221).

191. The first issue is whether a civil court should have power to impose financial penalties on traders guilty of contravening consumer protection regulation and when in practice it should be exercised. There appears to be no strong argument for denying this power to the civil court, although it may not always be

compatible with particular legal cultures. The question of when it should be exercised is more delicate and assumes particular importance if, in a given jurisdiction, for one policy reason or another, administrative agencies are not allowed themselves to impose financial penalties. It is assumed here (see further on this, paras. 195-196) that financial and other penalties will in any event be available in criminal proceedings. What are the relative advantages and disadvantages of civil and criminal financial penalties respectively?

192. In many jurisdictions there will be significant differences in the evidentiary threshold required as between civil and criminal liability. It may also be the case that some degree of knowledge, intention or blameworthiness must be proved in the criminal context, while these conditions are not so stringent in the civil justice context. These differences normally make the preparation and adjudication of the criminal prosecution significantly more expensive than the civil claim (see Text Box 24). For most cases, that should make the civil process more cost-effective than the criminal process, a conclusion supported by the Australian case study. On the other hand, the increased cost of criminal proceedings must be weighed against the possibility that the imposition of the penalty there will have a greater deterrent effect. That may be both because a criminal conviction carries a “stigma” which may exist to a lesser degree in civil condemnations and because the criminal court may have additional sanctions to secure compliance which are not available in civil proceedings (for example imprisonment).

193. For jurisdictions where the cost of the criminal process significantly exceeds that of the civil process, the following conclusion is reached. Where the administrative processes (which may or may not include a financial penalty) fail to deter contraventions, the imposition of a civil financial penalty may be a more cost-effective means of enhancing compliance than a criminal financial penalty, except where increased deterrence resulting from the criminal process (see paras. 197-203) justifies the increased cost .

194. In many jurisdictions, civil proceedings are taken against a trader formally to prohibit any continuing or further contraventions – this may be known as an injunction, an enforcement order or a “cease offence” order. In terms of deterrence, it is not clear that this device is likely to be significantly more effective than a formal warning issued by the administrative agency,⁹⁶ except to the extent that the court setting has a psychological impact on the trader’s propensity to comply or that the court injunction or order carries additional penalties not initially available. The greater publicity attached to court orders may also serve to deter other traders. Nevertheless, obtaining a civil justice order is much more costly than issuing a formal warning.⁹⁷ The argument for the civil justice order is therefore based primarily on a perceived need to **prevent** continuing unlawful activity in the individual case, rather than to **deter** more generally. The power of the court to uphold the order by means of further sanctions, such as imprisonment for contempt (common law jurisdictions) or accumulating financial penalties (civil law jurisdictions) is available for this purpose. The order may thus be effective to prevent serious amounts of harm which may arise from continuing or further contraventions. Even a harsh criminal justice regime may “bite” too late to avoid these consequences.

195. It is therefore concluded that a civil injunction or enforcement order is justified where continuing or further contraventions will lead to such a level of social harm that prevention of the continuing unlawful activity is regarded, in the individual case, as essential.

196. For other sanctions available in civil proceedings, see below, paras. 205-214.

The role of the criminal justice system

197. In all four of the case-studies, there was recognition that criminal law should continue to play a role in relation to the enforcement of consumer protection legislation and, moreover, that it is important, for general deterrence purposes, for the criminal process to be seen to be used on occasions. Putting the same point another way, if traders generally perceive the value of **p** (the probability of a conviction) to be

significantly higher than in reality is the case, there is no reason to disturb this impression, if it can contribute to a higher level of compliance.⁹⁸ Subject to that consideration, it is possible to identify some characteristics of a case which are likely to render a criminal prosecution cost-effective.

198. The criminal justice system is necessary to induce compliance where alternative systems provide, or are likely to provide, inadequate deterrence. A simple, if also crude, indicator of inadequate deterrence is the existence of a second, or subsequent contravention. A plausible enforcement policy might then be to engage in the high cost of a criminal prosecution only if a trader is known already to have committed the same or an equivalent contravention. Such a policy might involve a presumption that, in the large majority of cases, $qE + pD$ from *non-criminal processes* would exceed U and thus be adequate to induce compliance. In some individual cases, a second or subsequent contravention might reveal that the presumption was not justified, perhaps because of the size of U , perhaps because the trader was insufficiently aware of the law and its consequences. The use of the criminal justice system thus can involve a switch from general deterrence to individual deterrence.

199. In accordance with the analysis above (para. 179), this argument presupposes that the costs to society arising from first-time contraventions are not so high as to render deterrence of them a priority. It may be the case that some consumer protection measures do not fall into this category: if so, there is a strong argument for invoking the criminal justice process at an earlier stage.

200. The character of the criminal justice system is assumed to be concerned not only with deterring and repressing unlawful conduct, but also with reflecting moral values within a given society regarding what is “wrongful”. As such, as already noted, the evidentiary threshold and other conditions for criminal liability (including possibly requirements of blameworthiness) tend to be more exacting than those in other processes. They also typically generate significantly higher administrative costs. The justification for the special features of the criminal process are clear: the penalties that a criminal court can impose, including imprisonment, can be most severe and in addition a “stigma” often attaches to those with criminal convictions.⁹⁹ Both of these phenomena add substantially to error costs in the event of wrongful convictions, and the special features alluded to reduce the risk of such errors being made.

201. This report considers the principal enforcement function of the criminal justice system in relation to consumer protection legislation to be to deploy an ultimate set of sanctions appropriate for those traders who have not been, or will not be, deterred by other instruments (perhaps conveniently to be referred to as “rogue traders”). Other factors that will be relevant in determining whether criminal sanctions should be pursued including, for example, the level of individual consumer detriment associated with the conduct; whether the conduct and/or resultant detriment was widespread; whether the conduct was deliberate or particularly negligent; and the level of co-operation by the defendant with the investigation. The need to retain the criminal law for this purpose, whatever other instruments may be used or introduced, was stressed by all those participating in the case studies, particularly in the United Kingdom. At the same time, it was recognised, particularly in Australia and Belgium, that the criminal law may not always be an appropriate mechanism to respond to breaches of consumer protection law. This might be because resources within the criminal prosecution service become too stretched, with consumer protection being accorded insufficient priority. Or it might be because officers within the criminal prosecution service tend to adopt a perspective on the goals of consumer protection enforcement different from those of the enforcement agency, and this is considered inappropriate except for the minority who constitute “rogue traders”.

202. It is not easy to define exactly what are the characteristics of a “rogue trader”. In terms of the analytical framework used in this study, they should certainly include repeat offenders who cannot be deterred by other means. But this should not exclude other characteristics which would reflect the moral values of the criminal law. It might therefore be inappropriate to attempt a more specific definition, other

than that the conduct is regarded as so repugnant as to justify a criminal prosecution even where this is not justified by reference to deterrence arguments. And, of course, what satisfies this test is likely to vary across the OECD countries because in different jurisdictions different views will be held on what kinds of conduct should be the subject of criminal processes.

203. It is therefore concluded that in general criminal prosecutions should be reserved for repeat offenders who cannot be deterred by other instruments, as well as for those whose conduct is regarded as so repugnant morally as to justify such proceedings being taken, irrespective of deterrence considerations.

Criminal procedure

204. The above perspective of the function of the criminal law in relation to the enforcement of consumer protection legislation has important implications for the procedures and substance of the criminal justice process. If the requirements of a prosecution authority, a high evidentiary threshold for liability and conditions of knowledge and blameworthiness are considered necessary to reflect the moral values implicit in criminal justice, then these should be preserved for consumer protection legislation even though, for reasons given above, they may not always be consistent with cost-effective deterrence.

Sanctions in criminal and civil proceedings

205. The paragraphs below examine the sanctions available in both criminal and civil proceedings, since analytically it is considered that their impact will not differ significantly according to which of the two processes leads to the imposition, although as the Australian case study reveals the stigma attaching to a criminal conviction may assume particular importance.

206. The financial penalty is the most frequently encountered sanction and, for the purposes of deterrence, appropriately so. The principal advantage of this instrument is that the amount can be determined by reference to the deterrence goal, so that when discounted by the probability of the sanction being imposed (p) and when added to qE , it exceeds the trader's profits (U) and is thus likely to induce compliance. In fixing the amount for this purpose, courts can then take account not only of the likely level of profit to have been secured by the trader from the contravention but also of the likelihood of the contravention being detected and successfully prosecuted. In many cases this will imply a relatively severe penalty, although the amount in question must relate to the trader's disposable wealth; otherwise, another penalty will have to be imposed.¹⁰⁰ Subject to this constraint, imposition of an appropriate financial penalty is likely to be cost-effective in inducing compliance, because, relative to other sanctions, it is generally not expensive to administer.

207. Compensation of the consumer-victim is normally obtained by means of a private law remedy and as such will be discussed further below. However, it is also available in some jurisdictions in administrative, civil and criminal proceedings initiated by a public agency (see *e.g.* Tables 3 and 4). Of course, use of this instrument can be justified on grounds of "fairness", but the focus here is rather on how it might contribute to inducing the trader's compliance. For this purpose, adding a compensation order to a financial penalty or other sanction may serve to enhance compliance, since it can give an adequate value to D , if the other sanction alone cannot achieve this; and at relatively low additional administrative cost, that of ensuring that the consumer is paid the compensation. However, in the majority of cases a compensation order by itself is unlikely to generate compliance. This is because the amount of compensation, when discounted by the probability of a compensation order being made, is unlikely to exceed the trader's profit (U) although the loss to the trader may be enhanced by publicity consequent to the compensation order.

208. The recovery of the administrative costs of enforcement, or some part of them, gives rise to similar considerations. As with compensation, it can be a useful “add on” to a financial penalty which is insufficient, by itself, to induce compliance.

209. Imprisonment is available in most jurisdictions, at least in relation to criminal proceedings. It use may in extreme cases be rationalised by reference to the moral outrage generated by the trader’s conduct, or by the need to protect the public against further wrongdoing generating large amounts of damage. It is very difficult to justify its use as a cost-effective deterrent because of the huge cost it imposes both on the taxpayer and on the convicted traders themselves. Although imprisonment is sometimes resorted to when defendants do not have the means or the willingness to pay a financial penalty, there are other sanctions which are likely to be more cost-effective in ensuring compliance.

210. Disgorgement of profits obtained by means of, or confiscation of goods connected in some way with, the contravention may be impracticable in relation to most consumer protection contraventions. But, where it is feasible, it may help to solve the problem, identified in the last paragraph, when a trader has insufficient wealth or available assets, for an appropriate financial penalty to be effective.

211. Commercial reputation plays a key role in certain markets, particularly if traders have an interest in maintaining an ongoing relationship with customers and thereby acquiring and retaining their goodwill. In consequence, the costs which publicity imposes may, in some contexts at least, be higher than those resulting from other sanctions.¹⁰¹ Compared to financial penalties, it also has the advantage that payments do not have to be collected, and problems do not arise from the trader’s limited wealth or its availability. Publicity may therefore be highly effective in inducing compliance even when the costs are discounted to take account of a relatively low p and even in the absence of another penalty. Moreover, publicity does not normally give rise to significant additional administrative expenditure. This option therefore would seem to be particularly cost-effective. Of course, as noted above (para. 189), error costs following a wrong condemnation can be particularly high, but the risk of this is reduced if the sanction is available only after a court condemnation, particularly one involving criminal liability. From the case studies it appears that “naming and shaming” is more effective in some jurisdictions (notably Australia) than others (notably Belgium), thus suggesting that cultural factors may impinge significantly on this policy option.

212. The Australian “probation order”, requiring trading firms to adapt their management structures to regulatory requirements by means of compliance and trading programmes (see para. 89), is particularly interesting.¹⁰² As a policy option, this scheme was found attractive by those interviewed in other jurisdictions, and understandably so. Its deterrent effect is not to be underestimated, given that the programmes and business restructuring which must be carried out must impose significant costs on traders. At the same time, its main purposes would seem to be information and education. Presumably it is appropriate only for firms above a certain size; also it must be expensive in terms of administrative costs, given the need to negotiate the programme/restructuring and to monitor its implementation. Nevertheless, if used selectively, the benefits of a “probation order” should outweigh its costs.

213. If, within the relevant jurisdiction, there is a system of trade licensing operating in relation to the activity which gives rise to the contravention, then it may be possible for a court to suspend or revoke the licence. This is a severe penalty, as potentially it deprives traders of their chosen livelihood and for deterrence purposes, it is likely to be much more effective as an ultimate penalty than imprisonment. Although post-imposition monitoring is necessary to ensure that the trader does not continue the trading activity, it is certainly a less costly option than imprisonment. Moreover to traders it may appear to be a more realistic possibility than imprisonment since the reluctance of courts to imprison traders for relatively minor offences is well known. Of course, like imprisonment, a wrong decision can give rise to very large error costs; therefore a court decision justifying the suspension or revocation is essential.

214. In the absence of a licensing system, the equivalent outcome can be secured by what is sometimes called “negative licensing”,¹⁰³ a judicial order depriving the defendant of the right lawfully to practise a specific trade or profession. Although such a “cease trading” order potentially may be as powerful a sanction as the suspension or revocation of an actual licence, as was suggested in the UK case study, there may be problems in defining the scope of the prohibition for it to be legally effective. It is thus concluded that, as an ultimate sanction, the suspension or revocation of a trading licence is likely to be much more cost-effective than imprisonment. The same may apply to a “cease trading” order where the scope of the order can be defined with sufficient precision. Finally, it is noted that the imposition of a criminal sanction may have similar consequences for individuals as in a number of jurisdictions there will be associated restrictions on, for example, the ability to undertake international travel, or to be a director of a publicly listed company.

Enforcement of private rights

215. Although the role of consumer-victims, competitor traders and other third parties in the inducement of compliance with consumer protection legislation may be an ancillary question, it is not unimportant and deserves some attention. This section considers first the enforcement of private rights and then the role of third parties in the enforcement of public law.

216. Many contraventions of consumer protection regulation (public law) constitute also an infringement of the consumer’s private rights, especially those arising under contract law. If the private right is enforced or traders perceive that such enforcement is plausible, this will enhance the inducement to compliance supplied by the public system, in that it will add significantly to $qE + pD$. Notice, too, that there are advantages to private enforcement. In particular, the aggrieved individual consumer stands personally to benefit from a successful claim, and thus has a motivation for an efficient investment in enforcement which does not apply to a public official.¹⁰⁴ It is not, therefore, difficult to justify the existence of the private right regime as complementing the public law regime, particularly if, as in the Netherlands, there are effective self-regulatory arrangements in place.

217. However the private right might not in practice be enforced for a variety of familiar reasons: the consumer might not know of the facts which constitute the infringement, or that a private legal remedy is available; and/or the costs of obtaining adequate evidence of the infringement and of instituting remedial proceedings may be too high, especially relative to any compensation to which the infringement may give rise. A key question in the context of considering policy options for enhancing regulatory compliance is, then, whether these problems can be reduced in a cost-effective way.

218. Of course, there are many general ways of enhancing consumer awareness of rights and facilitating grievance procedures and legal proceedings. These include, for example:

- i.* The fostering and financing of consumer protection associations and networks.
- ii.* The provision of institutions, such as small claims courts, for the cheap adjudication of disputes.
- iii.* The public subsidy of legal costs incurred in consumer private law claims.
- iv.* The facilitating of “class” or “group” legal actions.
- v.* The granting of “punitive” or “triple” damages as compensation for the infringement of certain private rights.

219. These matters, however, lie outside the ambit of this project, the primary focus of which is on the relationship between the private and public enforcement systems and whether the arrangements can make a meaningful and cost-effective contribution to trader compliance.

220. To this end, there would seem to be three major legal devices linking private rights to public law enforcement which can be used to facilitate private law claims, at the same time enhancing compliance with the regulatory regime.

- i.* Contravention of consumer protection regulatory regimes, leading to losses sustained by the consumer, might itself give rise to a right under private law for compensation, in other words tortious or delictual liability, obviating the need for the consumer to fulfil the normal conditions of liability (for example, the existence of a “duty of care” or the commission of a fault).
- ii.* The private claim might formally be joined to the public law enforcement, as for example, with the “*partie civile*” familiar in some European legal systems,¹⁰⁵ thus enabling the consumer to rely on the evidence furnished for the public law action.
- iii.* If (*ii*) is not feasible, procedural law may enable the consumer to use an administrative or civil determination or a criminal conviction as evidence for the purpose of an independent private law action.

221. Consideration of these policy options is not taken further here because they are highly dependent on the procedural arrangements for public law and private law actions, which vary enormously across OECD jurisdictions. The conclusion is, therefore, restricted to the observation that in different jurisdictions consideration ought to be given to cost-effective possibilities for using public law determinations that a trader has contravened consumer protection regulation to facilitate the enforcement of private rights.

Third party participation in public law enforcement

222. The extent to which consumer-victims, competitor traders and other third parties may contribute to public law enforcement by, for example, initiating an administrative, civil or criminal action against the trader, varies greatly across OECD jurisdictions. It too is highly dependent on legal culture which may, indeed, be determinative of the policy options. Nevertheless; whether participation of this kind is likely to be a cost-effective way of enhancing compliance with consumer protection regulation, should be considered here, in the light of the theoretical framework.

223. At first glance, there would appear to be a strong cost-effective deterrence argument for allowing such participation: it should raise the values of q and p , at no extra cost to taxpayers. It can also – and this may not be a trivial consideration - provide a (minor) constraint on corruption.

224. On the negative side, however, third party activism can defeat, or at least undermine, sensible enforcement policy, where this dictates that a given trader should not be the subject of formal enforcement procedures. As already seen (paras. 178-180), in some circumstances – notably in relation to first offenders committing minor contraventions - taking administrative, civil or criminal proceedings may not be cost-effective. The motivation of the third party is likely to differ from that of deterrence. In the case of a consumer it may be to exact vengeance, or at least to secure some compensation. In the case of another trader, it may simply be to impose costs on a competitor. These motivations are not always inappropriate and, particularly as regards consumer compensation, they may be judged to override considerations purely of deterrence. Nevertheless on balance it appears preferable for the right (if any) of third parties to initiate public proceedings for the imposition of sanctions to be subject to approval by a relevant public agency.

IV. Conclusions

225. The task of this study has been to investigate what enforcement regimes are cost-effective in securing a high level of compliance with consumer protection legislation designed to prevent financial losses. To do this, the existing systems in those OECD jurisdictions responding to the survey questions have been examined and, from them, some key policy options identified. Adopting a theoretical model of deterrence, it has been attempted to assess the cost-effectiveness of those options. The four case-studies have been used both to explore the options in greater depth and to seek opinions of officials working in systems, with very different approaches to enforcement on the effectiveness of the options.

226. The analysis has led to some generalisable conclusions, of which the most important are the following:

1. The monitoring of traders' behaviour by public authorities, enhanced by a system of risk-assessment, is likely to be cost-effective where there is not within the jurisdiction a significant culture of pro-active complaints by consumers and consumer associations or where the contravention is unlikely to be easily detected by consumers themselves (para. 174).
2. Enforcement agencies dealing with alleged contraventions should have the power to choose between dismissing a case (with or without a warning) and initiating procedures for penalties (para. 180).
3. There are powerful cost-effectiveness arguments for allowing administrative agencies themselves to impose some form of financial penalty. However there are also significant risks associated with such a regime, particularly the risk of regulatory error. Detailed analysis of any administrative penalties regime would need to be undertaken with respect to each jurisdiction bearing in mind its judicial and administrative framework. If administrative penalties are introduced, it seems preferable that the language typically associated with the criminal process (for example "fine" or "penalty") should be avoided. It is also considered that fixed penalties should be used only for very minor offences. For others, the agency should have a discretion, up to a limit (paras. 183-185).
4. A civil injunction or enforcement order is justified where continuing or further contraventions will lead to such a level of social harm that prevention of the continuing unlawful activity is regarded, in the individual case, as essential (para. 195).

5. In general criminal prosecutions should be reserved for repeat offenders who cannot be deterred by other instruments, as well as for those whose conduct is regarded as so repugnant morally as to justify such proceedings being taken, irrespective of deterrence considerations (para. 203).
6. As regards sanctions available as a consequence of criminal or civil proceedings, it is considered that the imposition of a financial penalty, determined by reference to the nature of the contravention and the trader's circumstances, is likely to be cost-effective in inducing compliance in many cases. However, in appropriate cases, particularly where that penalty is insufficiently large for deterrence purposes, the likelihood of compliance can be enhanced by compensation orders, orders for the recovery of administrative costs, the disgorgement of profits and a policy of "naming and shaming"; also a "probation order" as developed in Australia, if used selectively. In some extreme cases, imprisonment may be justified as an ultimate sanction, but the suspension or revocation of a trading licence, if applicable, is likely to be much more cost-effective. The same may apply to a "cease trading" order where the scope of the order can be defined with sufficient precision (paras. 206-214).
7. Consideration ought to be given to cost-effective possibilities for using public law determinations that a trader has contravened consumer protection regulation to facilitate the enforcement of private rights (para. 222).
8. It is preferable for the right (if any) of third parties to initiate public enforcement proceedings for the imposition of sanctions to be subject to approval by a relevant public agency (para. 222-224).

227. These conclusions must be considered in the light of the fact that, as section II of this report reveals, there is currently in the OECD countries a wide diversity of approaches to the enforcement of consumer protection legislation. Some jurisdictions involve almost no administrative intervention, but rely predominantly on consumer initiative and alternative dispute resolution (ADR); some confer penalty-imposing powers on administrative agencies; and some are largely dependent on civil justice or criminal justice proceedings for the infliction of significant sanctions. It would be rash to assume that these differences have arisen haphazardly. They must, to some extent at least, reflect varying circumstances and, in particular, different legal traditions and cultures. If that is the case, it is highly unlikely that any single model of practices and procedures will provide the most cost-effective means of achieving a high degree of compliance with the law across the OECD countries.

228. The importance of the observations in the preceding paragraph derives additional weight from the methods adopted in this study to address the key policy options. Predictions of what options are likely to be cost-effective are based not on actual cost data, but rather on what are considered to be plausible cost comparisons between different procedures and conditions; and, of course, the actual cost profiles of those procedures and conditions may vary significantly between the jurisdictions. If they do, a different set of predictions on the cost-effectiveness of the policy options may emerge. To the extent that these predictions rest on assumptions which do not apply in particular jurisdictions, this study can nevertheless be understood as providing an analytical framework for addressing the key policy options. In any event, it is hoped that the study can be beneficially used by policy makers to identify and understand the interaction of key variables which impact on the choice of enforcement practices and procedures.

APPENDIX A: ABBREVIATIONS FOR OECD COUNTRIES

AUS	Australia
BEL	Belgium
CAN	Canada
CHE	Switzerland
CZE	Czech Republic
DEU	Germany
DNK	Denmark
GBR	United Kingdom
HUN	Hungary
JPN	Japan
NLD	Netherlands
NOR	Norway
NZL	New Zealand
POL	Poland
SVK	Slovakia
SWE	Sweden
USA	United States

NOTES

¹ P. Hampton, *Reducing Administrative Burdens: effective inspection and enforcement* (H.M.Treasury, 2005).

² *Ibid.*, p. 6.

³ R. Macrory, *Regulatory Justice: Sanctioning in a post-Hampton World*, Consultation Document (Better Regulation Executive, 2006), p. 5. (References are made to some of Macrory's key proposals later in this report, e.g. para 183).

⁴ A.M. Garber and C.E. Phelps, "Economic Foundations of Cost-Effectiveness Analysis" (1997) 16 *Journal of Health Economics* 1.

⁵ T.R. Tyler, *Why People Obey the Law* (Yale U.P., 1990); P. Webley *et al.*, "Studies on Minimal Rule Behaviour: Formal Rules in Public Places" (1998) 4 *Psychology, Crime & the Law* 309.

⁶ One of these is likely to become a member of the newly created Consumer Authority: see para. 120.

⁷ This classification can be compared with that used in DTI, *Comparative Report on Consumer Policy Regimes* (2003), p. 13, which divided the principal OECD jurisdictions into three categories: "mainly contract law"; "intermediate"; and "unified consumer law".

⁸ For country abbreviations, see Appendix A.

⁹ The Netherlands is not included in this table because administrative sanctions do not play a significant role in the enforcement of the areas of consumer protection legislation covered in this study. See para 119.

¹⁰ *Ibid.*

¹¹ For further discussion on the Trade Practices Act's remedies for freezing assets and distributing refunds see Box 3 on Civil Remedies.

¹² In the United States, "naming and shaming" is not a specific sanction, although the FTC issues press releases about its cases, which may have a similar effect.

¹³ Trade Practices Act 1974, section 86C.

¹⁴ The Netherlands is not included in this table because criminal sanctions do not play a significant role in the enforcement of the areas of consumer protection legislation covered in this study. See para. 119.

¹⁵ *Ibid.*

¹⁶ In the United States, "naming and shaming" is not a specific sanction, although press releases about cases, are issued which may have a similar effect.

¹⁷ The Netherlands is not included in this table because administrative and criminal sanctions do not play a significant role in the enforcement of the areas of consumer protection legislation covered in this study. See para. 119.

¹⁸ There is no private right of action under the FTC Act, but some federal statutes enforced by the FTC do allow individuals to bring claims. Individual state laws may also contain private rights of action.

19 This legislation, principally the Corporations Act 2001, and the Australian Securities and Investments Commission Act 2001, is enforced by the Australian Securities and Investments Commission (ASIC).

20 It should be noted again that this does not apply to financial services laws which are enforced and regulated by the ASIC: see N° 19.

21 In 2004 the Infocentre received more than 57 000 calls and 1 ,000 e-mails.

22 *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175.

23 Source: ACCC, based on I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992).

24 TPA, section 87B.

25 See in particular TPA, sections 82, 86C, 86D and 87.

26 TPA, section 83, provides that if in a proceeding it is proved that a person has contravened a provision of (*inter alia*) Part V or VC of the TPA, a finding of fact made by a court may be used as *prima facie* evidence in subsequent related proceedings by a person for compensation. However, there are significant procedural limitations on the ACCC's ability to obtain redress for consumers (see also para. 93).

27 At the time of writing, the budget is AUD 70 million a year for enforcement (lawyers, economists and court proceedings), and in addition there is a AUD 10 million contingency fund for when it loses a case and has to pay the other parties' legal costs.

28 The burden of proof in a civil case is the "balance of probabilities". However, the level of certainty to which the contravention must be proven will vary in accordance with the seriousness of the consequences of an adverse finding against the individual. Although the consumer protection provisions are based on strict liability, the TPA contains some common law defences, such as "reasonable mistake" and that the contravention arose as a result of an accident or that the cause was beyond the defendant's control.

29 *ACCC v Carrerabenz Diamond Industries and others*: it is alleged the conduct was a contravention of s.75AZC(1)(g) in that jewellery was not offered to the general public at the advertised "usual marked price"; the higher of two prices advertised. A director of the business is alleged to have been knowingly concerned within the meaning of s.79(1)(c).

30 *ACCC v Gary Peer & Associates Pty Ltd* [2005] FCA 404: court orders were made including declarations that the business had made misleading representations through advertising a price range for residential property (Price Guide \$600 000 Buyers Should Inspect") and that the agent did not believe that the property would sell for that price or substantially more than that price and the vendor had instructed not to sell below a price substantially more than that price, that the business had contravened ss.52 and 53A, and for costs. *ACCC v Telstra Corporation Ltd*: court ordered declarations that the telecommunications business had made misrepresentation relating to the use of '\$0' advertising (in relation to mobile phone and phone contract sales), injunctions that the business refrain from engaging in future conduct, and costs.

31 Moreover, TPA section 79B requires that, where a defendant lacks the financial resources to pay a fine as well as compensation, preference must be given to compensation for victims.

32 Ministerial Council of Consumer Affairs, *Civil penalties for Australia's consumer protection provisions*, Discussion Paper, September 2005. See also the accompanying website, which includes many public submissions: <http://www.consumer.gov.au/html/civil_penalties/index.html>.

33 TPA, section 86C. See para. 65.

34 The DPP is responsible for prosecuting the full range of criminal offences, *i.e.* not just those under the TPA.

35 For more information, see: <<http://www.cdpp.gov.au/prosecutions/policy>>.

36 According to section 87CA of the TPA, the ACCC may intervene in such private proceedings.

37 See section 83 of the TPA.

38 See section 87(1B) of the TPA.

39 *Wet Betreffende de Handelspraktijken en de Voorlichting en Bescherming van de Consument van 14 juli 1991, Moniteur Belge* 29 augustus 1991.

40 *Wet tot Beteugeling van Bedrog met de Kilometerstand van Voertuigen van 11 juni 2004, Moniteur Belge* (Belgisch Staatsblad) 5 juli 2004.

41 Articles 496 and 498.

42 According to the public prosecutor for Brussels there are only three prosecutors available for the entire domain of economic and social crime (including health, environmental crime, consumer legislation) for a district with approximately 1.5 million inhabitants.

43 Jaarverslag 2004 over de werking van de waarschuwingsprocedure, pp. 3-5.

44 But no second control could be undertaken to monitor compliance.

45 A similar provision can be found in article 11 of the Act concerning odometer fraud.

46 The literal word used in the Dutch text is “voorstellen”; in the French text “proposer.”

47 See the Belgian Act of 30 June 1971.

48 This relatively low amount is explained by the fact that a number of the payments would have been made in 2005, for which data was not yet available.

49 Fair Trade Practices Act, article 101.

50 *Wetboek van Strafrecht*, arts. 326 and 329, respectively. Recently one case attracted some media attention whereby a second hand car dealer who systematically tampered with odometers was successfully prosecuted (and thus convicted) before the criminal court.

51 At the time of writing this report, the Bill (*wetsvoorstel no 30 411; Wet handhaving consumentenrecht*) is before the Dutch Lower Chamber.

52 *Stichting Geschillencommissies voor Consumentenzaken, Jaarverslag 2005* (2006), p. 7.

53 Until 2004 the Ombudsman received subsidies from the government. Now it is dependent mainly on voluntary contributions. See <<http://www.deombudsman.nl>>.

54 *Geschillencommissies voor Consumentenzaken, Jaarverslag 2005* (2006), p. 5. Amounts are not mentioned.

- 55 Twynstra Gudde, *Onderzoek naar afhandeling van individuele consumentenklachten* (study on the handling of individual consumer complaints), April 2004. Quoted in Ministry of Economic Affairs, *Strategic Action Programme: Policy paper on consumer protection*, June 2004, pp. 8-9 and 24.
- 56 NIPO, *Klachtenafhandeling in de detailhandel en autobranche* (complaints handling in the retail trade and automobile sector), April 2004. *Strategic Action Programme: Policy paper on consumer protection*, above note 55.
- 57 See Wetsvoorstel 30 411 in conjunction with *Algemene wet bestuursrecht* (Awb), Arts. 5:15-5:19.
- 58 For the three example contraventions, these would include the *Geschillencommissie Voertuigen* (vehicles ADR committee) which dealt with 747 cases in 2005, leading to an average compensation of EUR 4 066 and the *Geschillencommissie Thuiswinkel* (home shopping ADR committee), which dealt with 120 cases in 2005, leading to an average compensation of EUR 608.80: *Stichting Geschillencommissies voor Consumentenzaken, Jaarverslag 2005* (2006), pp. 108-111 and 101-102, respectively. There is also the *Reclame Code Commissie* (Advertising Code Committee) which operates independently of the SGC.
- 59 The average time for expediting a case is 5 months, although the SGC has a target of 3 months: *Stichting Geschillencommissies voor Consumentenzaken, Jaarverslag 2005* (2006), p. 6.
- 60 These cases are usually “large-scale” and attract quite a lot of media attention. Examples are *West-Friese Flora*, *Dexia* and *Keukengilde*.
- 61 Scotland and Northern Ireland have their own legal system and, particularly in Scotland, some of the institutions and procedures used there differ from those in England and Wales. To facilitate exposition, unless otherwise indicated, this case study refers to institutions and procedures operating in England and Wales.
- 62 SI 2000/2334, Reg 7(1)(a).
- 63 *Ibid.*, Regs. 26-27.
- 64 S.1(1).
- 65 S.18.
- 66 On this, the Department of Trade and Industry has issued a Code of Practice for Traders on Price Indications.
- 67 S.20(1).
- 68 Enterprise Act 2002, Part 8.
- 69 This is currently under review: see N° 70.
- 70 DTI, *Enforcement Concordat: Good Practice Guide for England and Wales* (1998). A combined revised compliance code and home authority principle is likely to emerge from a review currently being undertaken by the Better Regulation Executive and the Local Better Regulation Office.
- 71 It may however exert some influence on a judicial decision as to whether a criminal prosecution is “oppressive”: *R v Adaway* [2004] EWCA Crim 2831.
- 72 Available at <http://www.cps.gov.uk/victims_witnesses/code.html>.

73 Though not in Scotland to the equivalent Sheriff's Court, the prosecution there being undertaken by the
Procurator-Fiscal.

74 Though in the light of guidance published in the Crown Prosecution Service Code: See N° 72.

75 Trade Descriptions Act 1968, s.24.

76 Taken from Chartered Institute of Public Finance compiled data 2005, made available by the DTI.

77 *Ibid.*

78 Annex D.

79 To place these amounts in their context, it should be noted that odometer fraud was estimated in 1997 to
generate GBP 100 million a year in illegal profits: OFT, *Selling Secondhand Cars* (1997), para. 24.

80 Taken from OFT, *Enforcement of Consumer Protection Legislation* (2003), p. 19.

81 An enforcement order may require the *trader* to publish the order (together with a correcting statement),
but this is mainly to deal with misleading statements and advertisements and is not intended as a "name
and shame" sanction.

82 A survey carried out in 2001 revealed that while 87% of consumer respondents had heard of the Citizens
Advice Bureaux as a means of making a complaint and 70% the Trading Standards Office, only 58% had
heard of the small claims courts: DTI, *Consumer Knowledge Performance Monitor*.

83 For the basic model see G.S. Becker, "Crime and Punishment: An Economic Approach" (1968) 76 *Journal*
of Political Economy 169. For overviews of the large literature to which the model has given rise see:
E. Eide, "Economics of Criminal Behavior", in G. De Geest and B. Bouckaert, *Encyclopedia of Law and*
Economics (Elgar, 2000), pp. 345-389; A.M. Polinsky and S. Shavell, "The Economic Theory of Public
Enforcement of Law" (2000) 38 *Journal of Economic Literature* 45.

84 A. Ogus, *Costs and Cautionary Tales: Economic Insights for the Law* (Hart, 2006), pp. 102-105.

85 J.M. Karpoff and J.R. Lott, "The Reputational Penalty Firms Bear from Committing Criminal Fraud"
(1993) 36 *Journal of Law and Economics* 757.

86 P. Grabosky and J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business*
Regulatory Agencies (OUP, 1986).

87 D.L. Rubinfeld and D.E.M. Sappington, "Efficient Awards and Standards of Proof in Judicial Proceedings"
(1987) 18 *Rand Journal of Economics* 308; N. Garoupa and F. Gomez-Pomar, "Punish Once or Punish
Twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties" (2004) 6 *American*
Law and Economics Review 410.

88 D. Friedman, *Law's Order* (Princeton UP, 2000), pp. 229-231.

89 E. Bardach and R.A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple,
1982).

90 P. Fenn and C. Veljanovski, "A Positive Economic Theory of Regulatory Enforcement" (1982) 98
Economic Journal 1055.

91 In his Consultation Paper, Macrory above note N° 3, devotes a whole chapter to this issue: Chapter 3.

92 Garoupa and Gomez-Pomar, See note N° 87.

93 So also in the Macrory consultation paper, see note N° 3.

94 Becker; and Polinsky and Shavell, above note 83. On the dangers of over-deterrence, see B. Kobayashi, "Antitrust, Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws against Corporations" (2001) 69 *George Washington Law Review* 715.

95 See also Macrory, see note N° 3.

96 This also reflects the views of DTI officials expressed in the UK case-study: see box N° 22 at para. 154.

97 See the text box in para. 168.

98 The empirical work of Keith Hawkins underscores the importance of this point. See e.g. K. Hawkins, *Law as a Last Resort* (OUP, 2005).

99 E. Rasmusen, "Stigma and Self-Fulfilling Expectations of Criminality" (1996) 39 *Journal of Law and Economics* 519; P. Funk, "On the Effective Use of Stigma as a Crime-Deterrent" (2004) 48 *European Economic Review* 715.

100 Becker; and Polinsky and Shavell, see note N° 83.

101 Karpoff and Lott, see note N° 85.

102 These comments and those which follow apply equally to the US practices described in para. 66.

103 A. Ogus, *Regulation: Legal Form and Economic Theory* (Hart, 2004), p. 222.

104 W.M. Landes and R.A. Posner, "The Private Enforcement of Law" (1975) 4 *Journal of Legal Studies* 1.

105 M. Chiavario, "Private parties: the rights of the defendant and the victim", in M. Delmas-Marty et al. eds., *European Criminal Procedures* (CUP, 2005), chapter 10.

APPENDIX B: QUESTIONS SENT TO OFFICIALS IN OECD JURISDICTIONS

Information on systems for enforcing consumer protection legislation

Thank you very much for agreeing to co-operate with our research. We would ask you to provide us with information on enforcement systems in your jurisdiction, by *i*) responding to the questions below and also *ii*) by providing us with *references to publications, particularly on the Internet, where we can obtain the relevant information.*

We wish to receive information on the enforcement sanctions and processes available in your jurisdiction for dealing with the following cases.

1. Distance selling: a trader offering television sets on the Internet fails to provide the buyer with information on the right to cancel the purchase.
2. Trade descriptions or specific trading regulation: a second hand car dealer interferes with the odometer of a vehicle so that it registers fewer kilometres/miles than the vehicle has travelled.
3. Trade descriptions: a label attached to a food item in a store misleadingly indicates that the customer will only pay 50% of the “normal” price.

We will assume that your answers are applicable to all three cases. If there are differences, please indicate in your answer to which case, 1), 2) or 3), the information applies.

Monitoring traders

1. Which institution is responsible for monitoring traders’ activities and detecting contraventions?
2. Are contraventions detected mainly through monitoring by the institution, by responding to complaints from consumers and other parties, or by other means? If by other means, please describe these briefly.
3. Are traders selected for monitoring on a random basis? If not, what characteristics (or risk assessment criteria) are used to identify potential offenders?
4. Does the monitoring institution have powers of entry and inspection, and to compel the production of documentation? In all cases? Or only where a contravention is suspected?

Contraventions

5. Once the institution suspects or establishes that a contravention has taken place, please indicate whether the following options are available:
 - (a) Informal warning?
 - (b) Formal warning?

(c) Initiate proceedings for administrative sanction?

(d) Initiate proceedings for criminal sanction?

Are there other alternatives?

What factors influence decisions as between the alternatives?

6. What institutions are responsible for:

(a) Issuing formal warnings/infringement notices?

(b) Initiating proceedings for administrative sanction?

(c) Initiating proceedings for criminal sanction?

7. Please indicate (in brief summary) the procedural steps which must be taken for:

(a) Issuing formal warnings/ infringement notices?

(b) Initiating proceedings for administrative sanction?

(c) Initiating proceedings for criminal sanction?

Available penalties

8. Please indicate whether the following penalties/sanctions are available *i)* in the administrative system and *ii)* in the criminal justice system:

(a) Fines/financial penalties.

(b) Enforceable undertaking for future compliance or “cease offence” order or prohibition order or injunction.

(c) Confiscation of goods or disgorgement of profits.

(d) Imprisonment.

(e) Reparation of harm/loss caused.

(f) Cease trading order or removal/suspension of trading licence.

(g) Publicity (“name and shame”).

(h) Recovery of cost of enforcement procedures.

9. Are there any other penalties/sanctions imposed in the administrative and criminal justice systems? If so, please describe them briefly.

10. In relation to fines/financial penalties as used in the administrative and criminal justice systems:

(a) Are the sums fixed in relation to particular contraventions/offences? If so, please give examples.

- (b) If the sums are at the discretion of the institution imposing the sanction subject to a maximum amount, please give examples.
 - (c) Which institution is responsible for collecting the fine/penalty?
 - (d) If the trader fails to pay the fine/penalty, what options are available?
11. In relation to enforceable undertakings for future compliance or “cease offence” orders or prohibition orders or injunctions:
- (a) Are traders subject to the undertaking/order routinely monitored?
 - (b) What action is taken if there is a breach of the undertaking/order?
12. Where a confiscation order is made, on what goods/property is the order made? To what (maximum) value? In the case of a disgorgement of profits order, to what (maximum) value?
13. What features of a case are likely to lead the prosecuting authority to ask for, or for the court to impose, a sentence of imprisonment?
14. What features of a case are likely to lead to a sanction of reparation of harm/loss? Is account taken of any right the consumer might have in civil law to recover compensation?
15. What features of a case are likely to lead to a sanction of publicity (“name and shame”)? What form does the publicity take?
16. Are orders for the recovery of the cost of enforcement procedures routinely made? If not when are such orders likely to be imposed? What costs are covered in the orders?
17. Are combinations of different types of penalties used? If so, please give examples of typical combinations?

Processes for the imposition of sanctions

18. Please indicate the institutions responsible in your jurisdiction for:
- (a) Formally taking administrative proceedings against a trader.
 - (b) Imposing an administrative penalty (if different from (a)).
 - (c) Formally prosecuting a trader in the criminal justice system.
 - (d) Imposing a criminal sanction (*i.e.* which court).
19. Please indicate the possibilities for third parties, particularly the consumer-victim:
- (a) Formally bringing, or being associated with, administrative proceedings.
 - (b) Formally bringing, or being associated with, criminal prosecutions.
 - (c) Using the evidence made available in the administrative or criminal proceedings for,
 - (d) The purposes of bringing a civil law claim for compensation or other form of redress.

- (e) Formally combining a civil law claim for compensation or other form of redress with administrative or criminal proceedings.
20. In relation to both administrative and criminal proceedings of the specified cases, please indicate:
- (a) Whether the process requires an oral hearing.
 - (b) The burden of proof required for condemnation/conviction.
 - (c) Whether proof is needed that the trader intended to commit the contravention/offence, was in some way at fault, or had knowledge of the nature of the unlawful act.
 - (d) Whether there are rules limiting the type of evidence which can be used to support a condemnation/conviction.
 - (e) Whether there are special rules of liability or procedure for corporate defendant traders.
21. In relation to both administrative and criminal proceedings of the specified cases, please indicate the institution or institutions to which an appeal or review against condemnation/conviction or against the nature or amount of the penalty may be taken. Does any such appeal/review involve a rehearing? What powers does the institution have to modify or substitute the penalty?
22. In relation to both administrative and criminal proceedings of the specified cases, please indicate whether any form of negotiation between the trader and the institution responsible for taking the proceedings takes place before or during the proceedings.
23. Where, in relation to a particular contravention, criminal and/or civil law (private right) proceedings are instituted in addition to administrative proceedings, are there any rules governing the relationship between the proceedings as regards, for example, the timing of the process, the evidence which may be provided or the penalties which may be imposed? If so, please give a brief description of the rules.