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Enforcement Practices for Breaches of Consumer Protection Legislation

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FEATURE ARTICLES

Enforcement Practices for Breaches of Consumer Protection Legislation

By Michael Faure,* Anthony Ogus** & Niels Philipsen***

1. Introduction

The Organization for Economic Cooperation and Development (OECD) committee on consumer policy has taken a number of initiatives to coordinate national policies and to explore methods of dealing with new problems, such as those arising from e-commerce. In exploring best practices in consumer policy, it has recently addressed the effectiveness of penalties for breaches of consumer protection legislation.¹

The interest of the OECD committee has been paralleled by developments in the United Kingdom including, as part of the “better regulation” enterprise, the Hampton report on *Reducing administrative burdens*, published in 2005.² This recognized, in

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¹ See Anthony I. Ogus, Michael G. Faure, & Niels J. Philipsen, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, DSTI/CP(2006)21/FINAL, Paris, OECD, December, 20 2006. available at www.oecd.org/dataoecd/56/7/37863861.doc [hereinafter “OECD Report”].

² See Philip Hampton,, *Reducing Administrative Burdens: Effective Inspection Enforcement*, London, H.M. Treasury, 2005. available at <http://www.hm-treasury.gov.uk/media/7/F/bud05hamptonv1.pdf>.

relation to regulatory contraventions, the important relationship between the level of government intrusion in business by monitoring activities and the level of penalties imposed following apprehension and conviction. In response to the report, the British government developed several studies to investigate regulatory enforcement policy, headed by the better regulation penalties review, which considered options that could add to the regulators' enforcement tool box to better meet regulatory objectives and to improve compliance.³

In 2005-2006, the UK Department of Trade and Industry (DTI) funded a study undertaken by the authors of this paper to meet the objective of the better regulation project in the context of consumer protection and to acquire evidence on best practices for the OECD committee project on consumer policy.⁴ In this paper we draw on the study to provide an overview of different enforcement practices that are used and to draw some tentative conclusions regarding their likely effectiveness.

For the DTI project, we obtained information on consumer protection enforcement practices across OECD jurisdictions on the basis of a questionnaire sent to members of the OECD consumer policy committee. This was complemented by information obtained directly from printed and electronic sources. On the basis of this information, we classified the national systems into five models, reflecting key variables in enforcement policy. To enrich our understanding of these models and to assist in the evaluation of the policy options by drawing on the experience of those engaged in enforcement processes, we then undertook case-studies in jurisdictions which we considered to be representative of the models.

In section two, we provide the overview of current approaches to sanctions and enforcement in OECD jurisdictions and our classification of them into five models. Then follows our comparison of the key enforcement characteristics in the four case-studies. The paper concludes in the fourth section with some observations on these comparisons and the implications that they have for effective enforcement policy.

In some jurisdictions, reform of the enforcement systems was, at the time of our study, being discussed or in the process of implementation. This paper draws only on information available to us at the end of 2006, but with reference to some later developments

³ See Richard Macrory, *Regulatory Justice: Sanctioning in a post-Hampton World*, Consultation Document, London, Better Regulation Executive, 2006. available at <http://www.berr.gov.uk/files/file45183.pdf>.

⁴ OECD Report, *supra* note 1.

known to us. These include, most significantly, legislative proposals by the UK government which, if implemented, would radically change the approach to enforcement in that jurisdiction.⁵

2. Survey of approaches to sanctions and enforcement in OECD jurisdictions

Introduction

In this section, we provide a general picture of the enforcement regimes used for consumer protection regulation in OECD jurisdictions.⁶ The information was obtained primarily from written responses to questions sent to representative officials from those jurisdictions. Given that we did not receive responses from a number of jurisdictions, our survey is not comprehensive but nevertheless provides a good indication of arrangements in a wide variety of industrialized countries. Of course, the very diversity of the regulatory and legal cultures meant that it was not always easy to tabulate the information we received within pre-defined categories and it proved necessary to simplify what are often complex procedures and arrangements. Although the officials who provided the information were given the opportunity subsequently to verify our classifications, descriptions and summaries, we cannot be entirely confident that what follows provides a completely accurate picture of the law and practice in the relevant jurisdictions.

A particular problem arose from the fact that within the broad area of consumer protection legislation in any one jurisdiction there might be considerable differences between the approaches taken to a

⁵ At the time of writing, the Regulatory Enforcement and Sanctions Bill 2008 [hereinafter RES Bill] is being considered by the UK Parliament, *available at* <http://www.publications.parliament.uk/pa/ld200708/ldbills/046/08046.i-iv.html>.

⁶ For an excellent, but slightly outdated, overview of consumer protection laws in South American countries (including their enforcement and the role of consumer groups) see Robert G. Vaughn, *Consumer Protection Laws in South America* 17 HASTINGS INT'L & COMP. L. REV. 275, 275-322 (1994).; Robert G. Vaughn 22, *Chilean Consumer Protection Standards and the United Nations Guidelines on Consumer Protection: A Comparative Study Revealing Regional Conflicts*, N.C. J. INT'L & COM. REG.1, 1-17.(1996). The latter paper also considers United Nations Guidelines on consumer protection. The first attempt at a more comprehensive analysis of consumer protection legislation in the EU (more specifically, the then nine EC countries) can be found in Nibert N. Reich & Hans W. Micklitz, CONSUMER LEGISLATION IN THE EC COUNTRIES: A COMPARATIVE ANALYSIS: A STUDY PREPARED FOR THE EC COMMISSION (1980).

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:

1. A trader offering television sets on the Internet fails to provide the buyer with information on the right to cancel the purchase.⁷
2. A second hand car dealer interferes with the odometer of a vehicle so that it registers fewer kilometers/miles than the vehicle has travelled.
3. A label attached to a food item in a store misleadingly indicates that the customer will only pay 50% of the “normal” price.

These examples themselves gave rise to differentiated responses because in some jurisdictions, for example, scenario one has consequences only in private law, while the second scenario frequently gives rise to criminal prosecutions, as fraud is often involved. Nevertheless, although some of the generalizations which we drew from the responses undoubtedly oversimplified the detailed arrangements which exist, they can be considered sufficient both to indicate the variety of processes used in individual jurisdictions and to enable comparisons between them to be made. We should also stress that the tables below, which summarize the questionnaire responses, relate only to the three typical contraventions which we have identified above and not to other breaches of consumer protection legislation.

In relation to enforcement law and practice, there would seem to be seven principal areas which give rise to important policy options:

1. monitoring trader behavior
2. procedures following detection of contraventions, but preceding the imposition of sanctions
3. procedures for administrative and civil sanctions

⁷ See also Michael Cordera, *E-Consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet*. 27 RUTGERS COMPUTER & TECH. L. J. 231, 231-263 (2001) (analyzes consumer protection on the internet more generally, from a comparative (EU versus US) point of view).

4. categories of administrative and civil sanctions
5. procedures for criminal sanctions
6. categories of criminal sanctions
7. enforcement by consumers

Our survey is divided accordingly.

Monitoring of Trader Behavior

Major differences arise between jurisdictions regarding the monitoring of trader behavior in order to detect contraventions. As indicated in Table 1, the approach taken by the enforcement agencies in some countries is not to engage in pro-active monitoring, but instead to respond to complaints from consumers and third parties. This we refer to as reactive monitoring. Where pro-active monitoring is adopted, it may be undertaken 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. The second and third rows of Table 1 show that the agencies in some jurisdictions engage in both strategies.

It is important to appreciate that the generalizations in this table merely indicate the main monitoring strategy in the particular jurisdiction. A country categorized as engaging in 'random proactive monitoring' does not exclude the possibility of some reactive monitoring in cases of suspected contraventions.

Table 1:⁸ 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	√	√			√			√					√	√		√		√

⁸ The jurisdictions are, from left to right, Australia, Belgium, Canada, the Czech Republic, Germany, Denmark, the United Kingdom, Finland, Hungary, Japan, the Netherlands, Norway, New Zealand, Poland, Slovakia, Sweden, and the United States of America.

Procedures Following Detection of Contraventions, but Preceding The Imposition of Sanctions

In those jurisdictions, such as Denmark, Germany, and the Netherlands, where the public agency adopts a reactive rather than pro-active policy to monitoring, complaints are in general taken forward, with or without the aid of some consumer association, to an ombudsman institution, to a self-regulatory organization, 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.

In other jurisdictions, the decision is taken by the enforcement agency on how to proceed.⁹ If, on the basis of a consumer (or third party) complaint or its own investigations, it 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.

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 (presumably because of a fear that officials will abuse their discretion); and in Hungary and Poland, no informal warnings are permitted, but

⁹ An example for this approach would be the DG for Enforcement and Mediation of the Federal Public Service for Economic Affairs (in Dutch: Algemene Directie Controle en Bemiddeling van de Federale Overheidsdienst Economie) under Belgian law, situated in Brussels.

negotiations can lead to a formal warning or voluntary compliance agreement.

Procedures for Administrative and Civil Sanctions

Table 2 highlights some of the key differences emerging from the survey with respect to the procedures for the imposition of administrative and civil sanctions.

Table 2:¹⁰ Procedures for Administrative and Civil 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 offense and circumstances.

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

“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, for a formal decision on the trader’s responsibility and the appropriateness of the sanction. 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.

Several procedural conditions may have to be satisfied before there can be a formal condemnation of the trader and the imposition of some sanction. The third row of Table 2 provides an indication of whether 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 defense, for example “due diligence” or “reasonable mistake”, and those where no defense is available and which may therefore be called “absolute liability.” However, on the

¹⁰ 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 paper; *see infra* Section 5.

basis of the information obtained in the survey, it was not possible to identify the jurisdictions which do, and do not, allow the defenses.

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 voluntarily to comply 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

Table 3 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. We distinguish here between administrative and civil sanctions mainly on the basis of the institution which imposes the particular sanction. Administrative sanctions are thus sanctions imposed by an administrative agency. Civil sanctions have the aim of providing redress to the consumer who suffered a loss.¹¹ These sanctions will mainly be imposed by civil judges, although (as the table indicates) some jurisdictions also allow civil sanctions (like compensation) to be imposed through an administrative agency.

Table 3:¹² **Categories of Administrative and Civil Sanctions**

	AUS	BEL	CAN	CZE	DNK	GBR	FIN	HUN	JPN	NOR	NZL	POL	SVK	SWE	USA
Fine	X	√	√	√	X	X	√	√	X	√	√	√	√	(1)	(2)
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	√	X	X	X	X	X	X	X	X	X	X	X	√	X	√
Cease	X	X	X	√	X	X	X	X	(2)	X	X	X	√	X	√
shame	√	√	√	X	X	√	X	X	√	X	√	√	√	√	√

¹¹ See generally, Andrew S. Burrows, *English Private Law*, (Oxford Univ. Press 2007) for an introduction to English private law.

¹² *Supra* note 10.

Costs	√	X	√	X	X	√	X	√	X	X	X	√	√	√	√
Other	√											√			√

- (1) Power to issue a “default fine” if prohibition not obeyed.
- (2) Only for certain contraventions.

“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 offense” orders, prohibition orders or injunctions. Imprisonment (“imprison”) is included even though it appears to be available as an administrative sanction in only one jurisdiction. The question (which we cannot address within the scope of this paper) of course arises, to what extent the imposition of a prison sanction through an administrative agency can be reconciled with the requirements of the European Convention on Human Rights.¹³ “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). “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 from continuing to trade generally or in a particular market. A policy of “naming and shaming”, by providing or authorizing 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.

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” to establish a compliance program, an education and training program, or a direction to revise the internal operations of the business.¹⁴

¹³ One would in particular think of the requirements expressed in Art. 6 that have to be met. The European Convention on Human Rights (ECHR) is available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-C9014916D7A/0/EnglishAnglais.pdf>.

¹⁴ The United States Federal Trade Commission has similar powers.

Procedures for Criminal Sanctions

The procedural and other requirements for the imposition of criminal sanctions generally differ considerably from those used for administrative sanctions. Table 4 reflects some of these differences.

Table 4:¹⁵ **Procedures for Criminal Sanctions**

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

(a) Negotiate administrative fine.

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

(c) Varies between offenses.

(d) The enforcement agency prosecutes criminal offenses in the magistrates courts.

The first row shows that in all countries, except New Zealand and the United Kingdom (in part), prosecutions must be brought, and therefore decisions on whether to prosecute made, by a public agency distinct from that which investigates the contravention. Typically the latter 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 defenses of, for example, “due diligence” or “reasonable excuse” may be available. As the third row suggests, negotiations (“sett”) between the prosecuting authorities and the defendant trader may not be allowed, but in practice some form of plea-bargaining may exist even if it is not formally authorized.

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, in common law jurisdictions, the prosecution must substantiate the allegation “beyond all reasonable doubt” as opposed to “on the balance of probabilities”, which applies in administrative or civil cases.

¹⁵ *Supra* note 10.

Criminal Sanctions

Table 5 contains our 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 3.

Table 5:¹⁶ **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	√ ¹⁷
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 program, an education and training program, 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

Many contraventions of consumer protection regulation also constitute infringements of consumers’ private rights, especially those arising under contract law, and enforcement of these rights can help with regulatory compliance. Quite apart from this, consumers (and third parties) may be allowed to contribute to the regulatory enforcement processes.¹⁸ It was important, therefore, to examine the

¹⁶ *Id.*

¹⁷ 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.

¹⁸ For an overview as to possibilities of private enforcement and their weaknesses see Kati J. Cseres, ‘Enforcement of collective consumer interests: a competition law perspective’ in Van Boom, Willem & Loos, Marco ‘Collective Enforcement of Consumer Law’, 125 – 172 (2007).

possibilities in the different jurisdictions, although such matters as the fostering and financing of consumer protection networks and the provision of institutions for the cheap adjudication of disputes lie outside the ambit of this paper.¹⁹

There would appear to be four principal procedural methods of enabling consumer activism to complement and enhance the public enforcement of regulatory contraventions:

- i) enabling the consumer to initiate administrative proceedings for a regulatory contravention;
- ii) enabling the consumer to initiate a criminal prosecution for a regulatory contravention – a long-standing tradition in common law jurisdictions enabling the consumer to use the administrative or criminal determinations of a contravention as evidence for the purpose of a private law claim;
- iii) enabling a consumer to combine a private right claim with the administrative or criminal processes – a long-standing tradition (*partie civile*) within some civil law jurisdictions.²⁰

Table 6 provides an indication of the relevant procedural arrangements in those jurisdictions which supplied us with information on these possibilities.

¹⁹ Jules Stuyck, Evelyne Terryn, Veerle Colaert, Tom Van Dyck, Neil Peretz, Nele Hoekx, & Piotr Tereszkiwicz, *An Analysis and Evaluation of Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings*, A study for the European Commission (Leuven: Study Centre for Consumer Law – Centre for European Economic Law) (2007) available at http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf. This study provides a comprehensive overview of “alternative means of consumer redress other than redress through ordinary judicial proceedings” in the field of consumer protection in the EU, Australia, Canada and the United States. It focuses on consumer redress only. Cafaggi, Fabrizio & Micklitz, Hans-W., *Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community* EUI LAW Working Paper No. 2007/22 available at SSRN: <http://ssrn.com/abstract=1024103>.

²⁰ Mario Chiavario, *Private Parties: the Rights of the Defendant and the Victim*, in *EUROPEAN CRIMINAL PROCEDURES*, 541 (Mireille Delmas-Marty & J.R. Spencer ed., 2005).

Table 6: 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 ²¹
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”.

Classification of Approaches

On the basis of the information obtained in our survey, it became possible to classify the responding jurisdictions into groupings which reflect the key characteristics of our investigations, 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.²² Five broad approaches are evident:

- 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.

²¹ 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.

²² For a similar exercise in classification, see Department of Trade and Industry, *Comparative Report on Consumer Policy Regimes* (2003) (UK), available at <http://www.berr.gov.uk/files/file34673.pdf>.

- c) Jurisdictions in which there is a significant degree of monitoring and investigation by administrative agencies and the latter 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 7:²³ Classification of Approaches to Sanctions and Enforcement

	AUS*	BEL	CAN*	CHE*	CZE	DEU	DNK	FIN	GBR	HUN	JPN	NLD	NOR	NZL	POL	SVK	SWE	USA*
a)				√					√		√							
b)	√		√						√									√
c)		√			√					√	√		√	√	√	√	√	√
d)							√	√									√	
e)				√		√						√						

In Table 7, we attempt to identify the responding jurisdictions with these models, although at the risk of 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-

²³ This is based only upon the federal/national enforcement law and practice; significant differences may apply to state/provincial/canton law and practice.

European bloc model c), Scandinavian countries model d), and Germanic countries Model e).²⁴

Switzerland is a hybrid in that, while much trade is self-regulated and there is no specialist administrative agency for consumer protection regulation, there is significant reliance on the criminal law for compliance purposes nevertheless. 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.²⁵ 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.²⁶ Finally, Sweden is placed in models c) and d) because it has both an Ombudsman's office, which represents consumers in disputes, and a Consumer Agency, which has supervisory authority for consumer protection legislation.²⁷

3. Case-Studies and Comparative Overview

As was mentioned in the introduction, we undertook case-studies in four jurisdictions to explore in greater depth the key characteristics of the different models of enforcement policy. The

²⁴ With respect to models d and e, see also Cafaggi & Micklitz, *supra* note 19 at 6-7.

²⁵ In the United Kingdom, for instance, the enforcement of these areas of consumer protection regulation is primarily undertaken by the Trading Standards Service (TSS). 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.”

²⁶ Dean Alderman, however, notes that in the United States there is a trend towards (pre-dispute) mandatory arbitration in consumer contracts, replacing consumer law. He argues that because of this consumer protection is decreasing. Richmard M. Alderman, *The Future of Consumer Law in the United States—Hello Arbitration, Bye-bye Courts, So-long Consumer Protection*, U of Houston Law Center No. 2008-A-09 (2007), available at SSRN: <http://ssrn.com/abstract=1015517>.

²⁷ For a more detailed comment on the approach of the Nordic countries see Klaus Viitanen: ‘Enforcement of consumers’ collective interests by regulatory agencies in the Nordic countries’, in Van Boom, Willem & Loos, Marco ‘Collective Enforcement of Consumer Law’, p. 83 – 103 (2007).

resources made available enabled us to select only four jurisdictions for closer scrutiny. The United Kingdom was selected as an example of model a), primarily relying on the criminal justice system for financial penalties, Australia as an example of model b) where administrative agencies use primarily the civil justice system to impose sanctions, and Belgium as an example of model c) in which administrative agencies have power themselves to impose financial penalties. The common feature of models d) and e), those primarily relying on consumer complaints to an ombudsman and those primarily relying on self-regulatory arrangements and the enforcement of private rights, is that they depend on a strong culture of consumer activism. For the fourth jurisdiction, reflecting this dominant characteristic of both models d) and e), we selected the Netherlands.

Within the scope of this paper it is of course not possible to discuss the details of the four legal systems.²⁸ Rather we will focus on some key characteristics of the particular jurisdiction: the monitoring systems; whether administrative financial penalties exist; the roles of the criminal and civil law; and the types of penalties imposed.

Key Characteristics

In Australia, at the federal level, most consumer protection regulation is contained in the Trade Practices Act 1974 (TPA).²⁹ The object of the TPA is to “enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”³⁰ With regard to consumer protection, the civil remedy provisions are set out in Part V, with equivalent criminal liability provisions in Part VC.³¹

Australia places great emphasis on recourse to civil sanctions (relative to criminal sanctions) in the enforcement of consumer

²⁸ For more detailed information to the OECD report, see OECD Report, *supra* note 1.

²⁹ Trade Practices Act, 1974, (Austl.) available at http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149.

³⁰ *Id.* at Part 1, § 2.

³¹ This is enforced by the Australian Securities and Investments Commission and principally concerns the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001.

protection legislation.³² Civil proceedings are perceived to be an effective way of dealing with many recalcitrant traders but the sanctions available are considered to be limited and officials would favour the introduction of civil pecuniary penalties as a further option to deter some offenders. One particularly interesting civil remedy available to the Australian enforcement authority is the “probation order” to be discussed below; this is regarded as an important device for inducing compliance.³³ The criminal process is seen as a last resort, the process being too slow for most cases, but a worthwhile option for some cases where the conduct is very serious and urgent action is not required.³⁴

Most consumer protection regulation in Belgium is contained in the Fair Trade Practices Act³⁵, but this is complemented by specific legislation governing particular trading activities. Art. 116 of the Fair Trade Practices Act³⁶ provides that the agents appointed by the minister can, after the issuing of a *pro justitia*, the formal notice of contravention, propose³⁷ the payment of a sum by the perpetrator which will extinguish the criminal prosecution. This “transaction”, although not formally viewed as an administrative fine, is a financial imposition which is considered to be an easy and low-cost means of dealing with consumer protection offenses.³⁸ In Belgium the criminal law can theoretically be applied to the type of offenses we examined. However, the ability of the criminal process to operate effectively in relation to cases appropriate for the process was perceived to be

³² Interview with officials from the Australian Treasury, Competition and Consumer Policy Division (April 5, 2006) [hereinafter ATC Interview]; Interview with officials from the Australian Competition and Consumer Commission (May 3, 2006) [hereinafter ACCC Interview].

³³ See *supra* note 29 at sec. 86(C)(2)(b) (non-punitive orders).

³⁴ ACCC Interview, *supra* note 32.

³⁵ Fair Trade Practices Act of 14 July 1991 *translated at* http://mineco.fgov.be/protection_consumer/trade_practices/trade_law/law_on_protection_en_001.htm (in Dutch: Wet betreffende de handelspraktijken en de voorlichting en bescherming van de consument).

³⁶ *Id.* at Art. 11.

³⁷ The literal word used in the Dutch text is “voorstellen”; in the French text “proposer”.

³⁸ Interview with the Director General for Enforcement and Mediation of the Federal Public Service for Economic Affairs (April 18, 2006) [hereinafter DGEM Interview]; Interview with public prosecutor specializing in prosecuting socio-economic crime (March 30, 2006) [hereinafter Prosecutor Interview].

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.

The amount of Dutch legislation in the area of consumer protection has traditionally been rather limited and there is much reliance on self-regulation and private enforcement initiative, through either individual consumer complaints or consumer organizations.³⁹ Some important institutional and legal changes have recently taken place. As a consequence of EC Regulation 2006/2004 on Consumer Protection Cooperation, a new authority was established in early 2007, the Netherlands Consumer Authority (*Consumentenautoriteit*, hereafter CA), which operates under the Ministry of Economic Affairs⁴⁰. The CA concentrates on dealing with collective consumer matters. Individual complaints from consumers can now be forwarded to the existing *Stichting Geschillencommissies voor Consumentenzaken* (Foundation of ADR Committees for Consumer Affairs) among others.⁴¹

Government interviewees in the Netherlands considered that 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”; but there is perceived to be inadequate deterrence of “mala fide” traders.⁴² As a consequence of the recent reforms, the CA is now able to initiate administrative proceedings for contraventions of specific statutes⁴³ and particular provisions in the Civil Code⁴⁴,

³⁹ See *infra* note 40.

⁴⁰ The Enforcement of Consumer Protection Act (*Wet Handhaving Consumentenbescherming*) was entered into force on December 29, 2006: *Staatsblad*, 2006, 591 and 592. See also Michael A. Heldeweg, *Supervisory Governance: The case of the Dutch Consumer Authority*, 2 *UTRECHT L. REV.*, 67, 67-90, available at <http://www.utrechtlawreview.org/publish/articles/000018/article.pdf>; see also Sjoerd Ammerlaan & Dirk Janssen: ‘The Dutch Consumer Authority: an introduction’, in Van Boom, Willem & Loos, Marco ‘Collective Enforcement of Consumer Law’, 107 – 121 (2007).

⁴¹ *Stichting Geschillencommissies voor Consumentenzaken, Jaarverslag 2005* p. 7 (2006).

⁴² Interview with three officials from the Ministry of Economic Affairs Directorate for Consumer Affairs, The Hague (April 19, 2006) [hereinafter MEA Interview].

⁴³ *Prijzenwet* (Prices Act) and *Colportagewet* (Canvassing Act) available (in Dutch) at http://www.consumentenautoriteit.nl/Wet_en_regelgeving.

⁴⁴ Notably provisions on *koop of afstand* (distance selling) [Art. 46 BW7],

although it appears that this typically occurs only if the self-regulatory features of the market have not resolved the case.⁴⁵ The principal sanction has become a fine and/or a financial penalty for each day of continual infringement.⁴⁶

In the United Kingdom⁴⁷, consumer protection regulation is contained both in primary and secondary legislation. Having evolved from nineteenth century weights and measures and anti-adulteration controls, administered by local authority officials and magistrates courts, it has always relied heavily on the criminal justice system for enforcement.⁴⁸ At present,⁴⁹ administrative fines cannot be imposed for breaches of consumer legislation. Agency officials interviewed considered the enforcement procedures to be generally effective, but 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.

Monitoring

In Australia, there is an independent statutory authority that is responsible for enforcing the TPA: the Australian Competition and Consumer Commission (ACCC). The ACCC is the national consumer protection agency in Australia and as such is involved in

misleidende reclame (misleading advertising) [Arts. 194-196 BW6] and *oneerlijke bedingen in consumentenovereenkomsten* (unfair conditions in consumer agreements) [Arts. 231-247 BW6].

⁴⁵ For details see Consumentenautoriteit, "Consultatiedocument", September 2006, pp. 16 and 19. For more information see <http://www.consumentenautoriteit.nl/ca/content.jsp?objectid=5335>.

⁴⁶ MEA Interview, *supra* note 42; Interview with two policy officials from Consumer Association (April 21, 2006) [hereinafter NCA Interview].

⁴⁷ Scotland and Northern Ireland have their own legal systems and, particularly in Scotland, some of the institutions and procedures used there differ from those in England and Wales. To facilitate exposition, in this paper we refer, unless otherwise indicated, to institutions and procedures operating in England and Wales. For Scottish law see W.C.H. ERVINE, CONSUMER LAW IN SCOTLAND (2004).

⁴⁸ Interview with an enforcement officer from Trading Standards Service (March 9, 2006) [hereinafter TSS Interview]; Interview with an official from the Local Authorities Coordinators of Regulatory Services (March 1, 2006) [hereinafter LACORS Interview]; Interview with three officials from OFT (March 9, 2006) [hereinafter OFT Interview].

⁴⁹ If the RES Bill, *supra* note 5, is passed the government will be able to confer power on regulators to impose administrative fines.

the monitoring of traders' activities and detection of contraventions which involve significant consumer detriment.⁵⁰ It 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.⁵¹ However, it does not usually monitor the behavior of traders of its own initiative; rather it operates on the basis of complaints received from the ACCC Infocentre.⁵² The information received enables the ACCC to ascertain if there are trends or escalations of particular problems.⁵³ Also, it can undertake a market study or an evaluation of a specific area and may target education and compliance campaigns at specific industry sectors.⁵⁴

In Belgium, 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.⁵⁵ The DGEM is organized 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.⁵⁶ It has one central office and seven regional offices.⁵⁷

Essentially, there are three ways in which an offense can be detected by DGEM or its regional offices.⁵⁸ First, a complaint can be filed by a consumer, a competitor (or any third party) or by the public prosecutor services.⁵⁹ Second, a yearly programme formulates a certain number of general inquiries by the central DGEM office,

⁵⁰ ACCC Interview, *supra* note 32; see <http://www.accc.gov.au> for an overview of the activities of the agency.

⁵¹ ACCC Interview, *supra* note 32.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *supra* note 10.

⁵⁶ The legal basis can be found in the so-called Fair Trade Practices Act of 14 July 1991, published in the *Moniteur Belge* 29 August 1991 (in Dutch: Wet betreffende de handelspraktijken en de voorlichting en bescherming van de consument).

⁵⁷ DGEM Interview, *supra* note 38.

⁵⁸ *Id.*

⁵⁹ *Id.*

leading to targeted monitoring of traders in specific sectors by the regional offices.⁶⁰ And third, there is individual and random monitoring by officials.⁶¹

Even though the monitoring 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.⁶² On the basis of these considerations, points are attributed to, and aggregated for, each sector or contravention, thus giving rise to a targeting strategy.⁶³ *De facto*, inspectors spend most of their time on the targeted monitoring and relatively less on inspections as a result of consumer complaints.⁶⁴

Contraventions in the Netherlands are detected mainly through complaints by consumers and other parties such as consumer organizations and companies.⁶⁵ Until 2007 the FIOD-ECD (Tax Control and Investigation Service – Economic Surveillance Unit) had sole authority to enforce the *Prijzenwet* and the *Colportagewet*⁶⁶, but it did not actively monitor the market. The FIOD-ECD only reacted in cases of repeated consumer complaints and when public health is endangered. The CA is now responsible for the enforcement of this legislation and the situation will probably change only slightly, with the CA perhaps being able to react sooner to consumer complaints.⁶⁷ But this is a matter of conjecture, considering the very recent

⁶⁰ In the yearly reports, which are published by DGEM, priorities are set which are followed in a structured monitoring.

⁶¹ For example, the yearly report of 2003 of DGEM mentions that 4,897 traders were subjected to control and that in 4.06% of cases a contravention was found.

⁶² Interviewees described that on the basis of a variety of elements (e.g. whether consumer safety is at stake, the importance of the number of complaints etc.) a ‘hitparade of contraventions’ is formulated whereby every sector or contravention receives a number of points. On that basis the decision is made to target on specific areas.

⁶³ *Id.*

⁶⁴ DGEM Interview, *supra* note 38.

⁶⁵ *Id.*

⁶⁶ Enforcement of Consumer Protection Act *supra*, note 40.

⁶⁷ The official document establishing the Consumer Authority is the Consumer Protection Enforcement Act of 20 November 2006, Implementation Regulation 2004/2006 (‘Wet van 20 november 2006, houdende regels omtrent instanties die verantwoordelijk zijn voor handhaving van de wetgeving inzake consumentenbescherming (Wet handhaving consumentenbescherming)’).

introduction of this institution. 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.

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.⁶⁸ Furthermore, about 43% of consumers who return to the supplier with a complaint are dissatisfied with the way it is handled.⁶⁹

There has been a difference in the perceptions of government and consumer organizations concerning the need for active monitoring.⁷⁰ The government interviewees argued for relying largely on consumer organizations and stressed that in the Netherlands since the 1980s the general policy has been one of withdrawing government and deregulation.⁷¹ However, the Consumentenbond itself suggests that these high expectations cannot be met for it is purely a private organizations and therefore not always the appropriate agency.⁷² It stressed that there should be a much more active role for government since, in its perception, there is today insufficient deterrence.

It is not anticipated that the approach will change much after the introduction of the CA. However, some targeted monitoring now takes place by focusing on specific priorities, which include internet trade, the travelling branch, misleading lotteries, warranties/guarantees and "unfair general conditions."⁷³ Also there is an information desk, *Consuwijzer*, for non-business consumers, organized jointly by the CA, the Competition Authority NMA and

⁶⁸ 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.

⁶⁹ *Id.*

⁷⁰ MEA Interview, *supra* note 42; NCA Interview, *supra* note 46.

⁷¹ MEA Interview, *supra* note 42.

⁷² NCA Interview, *supra* note 46.

⁷³ Consumentenautoriteit, *supra* note 64, pp. 13-14.

OPTA (regulator post and electronic communications).⁷⁴ If Consuwijzer receives many similar complaints, investigations could in theory take place.⁷⁵

In the United Kingdom, the enforcement of these areas of consumer protection regulation is primarily undertaken by the Trading Standards Service (TSS).⁷⁶ 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.⁷⁷ However, there is an institution responsible for coordinating practice and policy (Local Authorities Coordinators of Regulatory Services – LACORS).⁷⁸ Powers of enforcement in this area are also conferred on the Office of Fair Trading (OFT), which is a national, semi-autonomous agency with general responsibilities for the development and enforcement of competition law and consumer protection; it is funded by central government.⁷⁹

Consumer complaints play a large role in relation to detection and the processes of enforcement, but much pro-active monitoring, particularly by the TSS, does take place.⁸⁰ Some random inspection of traders is undertaken, but monitoring proceeds usually on the basis of risk assessment, traders being typically categorized into groups of “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.⁸¹

This brief overview shows that Australia, Belgium and the United Kingdom rely largely on publicly financed institutions which adopt a pro-active approach to the monitoring of traders whereas the Netherlands have institutions which adopt a more reactive approach, relying largely on responding to the complaints of consumers and third parties.

⁷⁴ See Consuwijzer available at <http://www.consuwijzer.nl>.

⁷⁵ *Id.*

⁷⁶ For further information, visit <http://www.tradingstandards.gov.uk/>.

⁷⁷ TSA Interview, *supra* note 48; LACORS Interview, *supra* note 48; OFT Interview, *supra* note 48.

⁷⁸ Visit <http://www.lacors.gov.uk/lacors/home.aspx>.

⁷⁹ For more information visit <http://www.oft.gov.uk>.

⁸⁰ TSA Interview, *supra* note 48; LACORS Interview, *supra* note 48; OFT Interview, *supra* note 48.

⁸¹ *Id.*

Administrative Financial Penalties

Australia does not have a system of administrative fines. Only the courts have power to make orders concerning remedies in relation to contraventions or offenses pursuant to the TPA. The ACCC itself cannot make findings of consumer protection contraventions and cannot impose sanctions. It may apply to the Federal Court to seek orders to grant damages, make declarations, secure enforceable undertakings, and impose injunctions. Currently fines cannot be imposed in civil proceedings for breach of consumer protection legislation. Such “pecuniary penalties” are only available for breach of competition provisions. At the time of our study a government working party was reviewing the civil remedies available under Part V of the TPA and has released a discussion paper examining the desirability of civil pecuniary penalties and/or banning orders for directors.⁸²

In Belgium the administration can, when a contravention has been established, propose an administrative “transaction” to the perpetrator. 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 offense, whether there is significant damage and whether it is a second (or repeated) offense. If, in these situations, it is considered inappropriate to offer the transaction, the case might then be referred directly to the public prosecutor. 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.

As regards the amount of the payment, there is a Royal Decree, issued under the Fair Trade Practices Act, which stipulates

⁸² Ministerial Council of Consumer Affairs, *Civil penalties for Australia's consumer protection provisions*, Discussion Paper, September 2005; see also http://www.consumer.gov.au/html/civil_penalties/index.html, (last visited May.29, 2008 (includes many public submissions)).

the margin within which the administration can offer a transaction.⁸³ The maximum amount is currently €500,000.⁸⁴

There is no formal appeal against the proposal of a transaction.⁸⁵ 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.⁸⁶ An aggrieved trader can simply choose not to pay and the case will then be referred to the public prosecutor.⁸⁷ From this characterization it follows, too, that it is not possible for the administrative agency itself to initiate proceedings to claim the money proposed.⁸⁸

In the Netherlands, as noted above, the CA now has powers to impose a fine (with a maximum of currently € 67,000 per contravention).⁸⁹ Before such an imposition, the CA first has 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.⁹⁰ Moreover, any decision taken by the CA is 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.⁹¹

In the United Kingdom, the enforcement authorities have available a variety of enforcement options for dealing with the perpetrators of contraventions, including seeking to secure a voluntary agreement to comply or to initiating proceedings for an

⁸³ Royal Decree of 27 April 1993, *Moniteur Belge*, 22 May 1993.

⁸⁴ Royal Decree of 13 July 2001, *Moniteur Belge*, 11 August 2001.

⁸⁵ This is clear from Article 116 of the Fair Trade Practices Act. The Act provides that the agents appointed by the Minister can, after a violation has been established, propose the payment of a sum by the perpetrator which will extinguish the criminal prosecution. No mention is made of any possibility of appeal.

⁸⁶ DGEM Interview, *supra* note 38.

⁸⁷ Prosecutor Interview, *supra* note 38.

⁸⁸ This follows from the Fair Trade Practices Act where no possibility was foreseen for the administrative agency to initiate proceedings.

⁸⁹ See Article 2.9 in conjunction with Article 2.15 of Consumer Protection Enforcement Act of 20 November 2006 (‘Wet van 20 november 2006, houdende regels omtrent instanties die verantwoordelijk zijn voor handhaving van de wetgeving inzake consumentenbescherming (Wet handhaving consumentenbescherming)).

⁹⁰ See *id.* at Article 2.12.

⁹¹ *Id.*

injunction or enforcement order.⁹² However, they cannot impose a financial penalty; a fact that was perceived to inhibit deterrence.⁹³ Indeed, the LACORS, TSS and OFT representatives all considered that enforcement would be facilitated by conferring on TSS and OFT the possibility of imposing financial penalty notices, although such a reform (it was thought) should not lead to the removal of any power, in appropriate cases, to undertake a criminal prosecution.⁹⁴

Under the new British legislative proposals, the agencies may be granted power to impose either fixed monetary penalties or, for more serious offenses, variable monetary penalties.⁹⁵ In either case, offenders can seek a review of the decision or appeal against the imposition.⁹⁶ The penalties would operate to provide immunity to the offender from later criminal prosecution and if the penalty is not paid, proceedings to recover it and any further liable payments will have to be made to the civil courts.⁹⁷

Criminal Law

In Australia, breaches of the criminal consumer protection provisions under Part VC of the TPA are investigated by the ACCC but prosecuted by the Director of Public Prosecutions (DPP).⁹⁸ 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. Factors which are taken into account include the prospects of a conviction (which depends on the availability of admissible evidence and defenses open to the accused) and the public interest (including seriousness of the offense and the need for deterrence).⁹⁹ Compared to civil cases, criminal investigations are time-consuming and are generally not seen as effective for rapidly stopping illegal conduct or providing

⁹² TSA Interview, *supra* note 48; LACORS Interview, *supra* note 48; OFT Interview, *supra* note 48.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ RES Bill, *supra* note 5, Part III.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ ACCC Interview, *supra* note 32.

⁹⁹ *Id.*

timely consumer redress.¹⁰⁰ For companies, the additional consequences of a criminal conviction include reputational damage and the possibility of significant financial penalties. Imprisonment is currently not available as a sanction for contraventions of TPA Part VC. However, it may be imposed for a failure to pay a fine imposed under this regulation.

In Belgium, 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. There are here two possibilities: the administration considers the case unsuitable for proposing a transaction, perhaps because it is a second offense, perhaps because of its complexity; or the trader has not paid the transaction.¹⁰¹ The public prosecutor then has the following options: 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; 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; to dismiss the case; or to proceed to prosecute in court.¹⁰²

The public prosecutor can decide to dismiss a case or offer a transaction in cases where the administration has expressed a clear preference for prosecution.¹⁰³ 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. In interview, the public prosecutor stressed that the prosecution service takes a different view on the usefulness of the prosecution than that of the administrative agency: blameworthiness and guilt and personal characteristics are important.¹⁰⁴

In the Netherlands, until 2007, where there was a violation of the *Prijzenwet* or the *Colportagewet* the FIOD-ECD could refer the case to the Public Prosecutor who might bring proceedings before the criminal court.¹⁰⁵ In Dutch criminal law “intent” (*opzet*) needs to be proved, but not malicious intent (*boos opzet*); so-called “colourless

¹⁰⁰ *Id.*

¹⁰¹ DGEM Interview, *supra* note 38.

¹⁰² Prosecutor Interview, *supra* note 38.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ MEA Interview, *supra* note 46

intent” (*kleurloos opzet*) is sufficient. After the implementation of the 2007 reforms, the *Prijzenwet* and *Colportagewet* are only enforced administratively.¹⁰⁶ Nevertheless, the general provisions in the Dutch Criminal Code regarding deception and fraud remain in force.¹⁰⁷ When both the public prosecutor and the CA have legislative authority to deal with a case, the CA is only allowed to act if the public prosecutor decides not to prosecute or fails to take any action. Interviewees from the *Consumentenbond* and the Ministry of Economic Affairs confirmed that enforcement of consumer protection provisions did not seem to be a major concern of the FIOD-ECD and the public prosecutor.¹⁰⁸

In the United Kingdom, 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, the case is tried summarily and there is a maximum fine which may be imposed.¹⁰⁹ For prosecutions in the Crown Court, the case must be referred to the Crown Prosecution Service (CPS) and the CPS forms its own judgment on whether it is appropriate for the prosecution to proceed. 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.¹¹⁰

To secure a conviction the prosecutor must satisfy the criminal law burden of proof of “beyond all reasonable doubt.”¹¹¹ However, there is invariably available the defense of “due diligence”, enabling the defendant to prove that commission of the offense 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 that all reasonable precautions were taken and all due diligence exercised to avoid the commission.¹¹²

¹⁰⁶ See *infra* pp. 124-25.

¹⁰⁷ *Wetboek van Strafrecht*, Articles 326 and 329.

¹⁰⁸ MEA Interview, *supra* note 46; NCA Interview, *supra* note 46.

¹⁰⁹ TSA Interview, *supra* note 48; LACORS Interview, *supra* note 48; OFT Interview, *supra* note 48.

¹¹⁰ Trade Descriptions Act 1968, s.18.

¹¹¹ See Michael Jefferson, *CRIMINAL LAW* (8th ed. 2007).

¹¹² Trade Descriptions Act 1968, s.24.

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.¹¹³ Data was not made available to us on the number of complaints and investigations from which the figure was derived but, in 2004-2005, 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.¹¹⁴

In sum, in all four of the countries there is a recognition that the criminal law should continue to play a role in relation to the enforcement of consumer protection legislation, notably where alternative systems are likely to provide inadequate deterrence. At the same time it is acknowledged, 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.”

Civil Procedures

We should note, first, the distinction between the use of the civil law by administrative authorities to enforce consumer protection regulation (which is not common to all legal systems examined) and its use by consumers enforcing private rights against the trader (which is far more common).

In Australia, *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, compensation and corrective advertising¹¹⁵. Adverse publicity orders are also available but can only be made if a

¹¹³ Taken from Chartered Institute of Public Finance compiled data 2005, made available to authors by the DTI.

¹¹⁴ *Id.*

¹¹⁵ See Trade Practices Act, *supra* note 29, sections 80, 82, 86(C), 86(D) and 87.

criminal penalty has already been imposed.¹¹⁶ Cease trading orders or the suspension of a business license are not available to the ACCC.¹¹⁷ For most traders, the harm suffered to their market reputation from the publicity consequent on an adverse court judgment is a sufficient deterrent against future breaches of the law.¹¹⁸

One particularly interesting civil remedy available to the ACCC is the “probation order”.¹¹⁹ This is an order to (a) establish a compliance program, (b) establish an education and training program, or (c) direct a person to revise the internal operations of his/her business.¹²⁰ Compliance programs 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 program clauses when seeking court orders or settling a matter by a court-enforceable undertaking.¹²¹ Typically, a company is required to design, implement and maintain a compliance program for three years following the conclusion of a case.¹²² The ACCC has a dedicated team that monitors compliance with court orders and compliance program.¹²³ Breach of a probation order can eventually be treated as a contempt of court, leading to imprisonment or a very hefty fine.¹²⁴ Probation orders have recently been frequently used and are considered as a cost-effective way of avoiding further (inadvertent) breaches of the law.¹²⁵ In certain circumstances the ACCC targets education and compliance campaigns at specific industry sectors where it appears that there may be a systematic market failure or general compliance issues.¹²⁶

¹¹⁶ *Id.* at section 89(D).

¹¹⁷ ATC Interview, *supra* note 32; ACCC Interview, *supra* note 32.

¹¹⁸ *Id.*

¹¹⁹ Trade Practices Act, *supra* note 29, section 86(C)(II)(b).

¹²⁰ *Id.* at section 86(C).

¹²¹ ATC Interview, *supra* note 32; ACCC Interview, *supra* note 32.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ ATC Interview, *supra* note 32; ACCC Interview, *supra* note 32.

Private parties can themselves bring civil actions for breaches of Part V of the TPA.¹²⁷ Findings of fact made against a respondent in earlier proceedings for an offense (against Part VC of the TPA) will be prima facie evidence of those facts in later proceedings by affected persons for damages or compensation.¹²⁸ Although this facilitates the obtaining of compensation for consumers, it is unclear whether it also has an effect on compliance by traders.

In Belgium, non-compliance with a warning can lead to civil proceedings at the commercial court for an order for cessation of the offense¹²⁹, with the threat of penalty payments for each day, week or month of continued violation of the order. A cessation order can be sought by: a party with standing e.g. a competitor harmed by the violation; an association for consumer protection that meets a number of special conditions (these actions are, however, rare in practice); or the Minister for the Economy.¹³⁰

It follows that if DGEM wishes to seek an enforcement order, they can currently do so only through the Minister and that helps to explain why this option is seldom used.¹³¹ 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 European regulation 2006/2004 on Consumer Protection Co-operation, the director-general of DGEM now also has acquired the right to bring an action, independently of the Minister.¹³²

The consumer-victim has the following options: to make a complaint to the DGEM; to make a complaint to the police (rarely used); to pursue a claim in the commercial court for a cessation order, if the wrong is continuing; to pursue a claim in the civil court for damages, if loss has been sustained: or alternatively to add that claim

¹²⁷ According to the Trade Practices Act Section 87(C)(a), the ACCC may intervene in such private proceedings.

¹²⁸ Trade Practices Act, *supra* note 29, section 83.

¹²⁹ Fair Trade Practices Act, Art.101. Article 101 of the Fair Trade Practices Act provides that when a warning has not been complied with, the Minister can launch an action in cessation of the wrongful behaviour. A request in that respect has to be made to the Commercial Court.

¹³⁰ This follows from Article 101 of the Fair Trade Practices Act.

¹³¹ DGEM Interview, *supra* note 46.

¹³² The Act of 11 May 2007 changed Article 98 of the Fair Trade Practices Act so that also the Director of DGEM can now file the claim.

to a criminal prosecution as “partie civile”.¹³³ As a result of a recent legislative change (Act of 5 June 2007) which implemented European directive 2005/29 of 11 May 2005 in Belgian law the consumer also has the possibility to ask for reimbursement of the purchase price when a product or service has been delivered in violation of statutory provisions.¹³⁴ The judge moreover has the possibility of ordering reimbursement without the consumer being required to return the delivered product or service.¹³⁵

In the Netherlands, a consumer detecting or suspecting a contravention can, among other possibilities, take the case to one of the many ADR committees (this is the easiest and least costly option, but is available only if the trader is associated with the relevant branch organization), or make a complaint 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.¹³⁶

ADR committees¹³⁷ function effectively as arbitration boards. If a trader who is suspected of a contravention is affiliated to one such committee, the case can be brought before it. Affiliation to 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

¹³³ According to Article 4 of the title preceding the Belgian Code of Criminal Procedure of 27 November 1808 the victim can bring his civil claim before the same court as the criminal prosecution.

¹³⁴ Act of 5 June 2007, *Moniteur Belge*, 21st June 2007 which modified the Fair Trade Practices Act of 14 July 1991 (in Dutch: *Wet betreffende de handelspraktijken en de voorlichting en bescherming van de consument*).

¹³⁵ For comments see H. de Bauw, ‘De impact van de richtlijn oneerlijke handelspraktijken op de regeling van de verkooppromoties onder de WHPC’, *Droit de la consommation*, nr. 72, 2006, 3-30 and X ‘Omzetting van de richtlijn oneerlijke handelspraktijken’, *Droit de la consommation*, nr. 74, 2007, 107-112 as well as B. Ponet, ‘Wet oneerlijke handelspraktijken tegen consument: door de letter?’, *Balans*, 31 augustus 2007, 569.

¹³⁶ NCA Interview, *supra* note 55.

¹³⁷ For our 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 €4,066 and the *Geschillencommissie Thuiswinkel* (home shopping ADR committee), which dealt with 120 cases in 2005, leading to an average compensation of €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.

their purchasing policy, may distinguish between affiliated and non-affiliated traders.¹³⁸

A small fee (for example between €30 and €50) is typically charged to consumers using the process, and cases are expedited relatively speedily.¹³⁹ On the other hand, not every sector is covered by a committee and decisions are not binding. The ADR committees are considered as a low-threshold type of self-regulation which functions well, leading to a relatively high level of compliance by affiliated traders.¹⁴⁰ However, quite apart from the obvious limitations, that some sectors are not covered and decisions are not binding, the interviewees recognized that the process did not deal adequately with cases 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; or damage is caused by a non-affiliated trader.¹⁴¹

A consumer who refers a complaint to the *Consumentenbond* can receive some limited legal advice for €10 (free for members).¹⁴² Prior to 2000, the *Consumentenbond* used to take on civil cases for individual members through their legal service.¹⁴³ However, this proved to be too expensive and it now intervenes usually only in cases of collective action, involving many claims.¹⁴⁴ Individual actions are paid for by the consumers themselves.¹⁴⁵

A collective action case is dealt with as follows. The *Consumentenbond* normally tries to negotiate with the trader to cease the contravening activities.¹⁴⁶ If this does not lead to a settlement, a case may eventually go to court.¹⁴⁷ Then there are two principal

¹³⁸ MEA Interview, *supra* note 46; NCA Interview, *supra* note 46.

¹³⁹ 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.

¹⁴⁰ MEA Interview, *supra* note 46; NCA Interview, *supra* note 46.

¹⁴¹ *Id.*

¹⁴² NCA Interview, *supra* note 46.

¹⁴³ *Id.*

¹⁴⁴ These cases are usually "large-scaled" and attract quite a lot of media attention. Examples are *West-Friese Flora*, *Dexia* and *Keukengilde*.

¹⁴⁵ NCA Interview, *supra* note 46.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

possibilities. First, a formal collective action whereby the *Consumentenbond* acting as an NGO in the public interest seeks an injunction.¹⁴⁸ The judge can order the latter, with the threat of a penalty payment being imposed in the event of non-compliance.¹⁴⁹ Second, a class action on behalf of many consumers is possible. 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.¹⁵⁰

In the United Kingdom, 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).¹⁵¹ An application for an enforcement order is normally made only where the attempt to achieve a resolution through a voluntary undertaking by the trader has failed, the exception being where urgent action is needed to safeguard consumers' interests.¹⁵² To obtain the order, the enforcement authority need only satisfy the civil burden of proof that a contravention has taken place, even though the contravention also gives rise to criminal liability.¹⁵³

Breach of an enforcement order may lead to proceedings for contempt of court, with a fine or imprisonment then being available for non-compliance, but no penalty attaches to the order itself.¹⁵⁴ In the opinion of officials interviewed, this situation undermines its capacity to deter.¹⁵⁵ There are no powers to award compensation to consumer victims, but defendants subject to an order can be made to

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ TSA Interview, *supra* note 48; LACORS Interview, *supra* note 48; OFT Interview, *supra* note 48.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

pay costs.¹⁵⁶ Although the OFT has powers to publicize the details of undertakings and enforcement orders, it does so only rarely.¹⁵⁷

The victims of consumer protection contraventions normally have private rights in civil law but these must be enforced 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.

Summarizing, there are some clear differences with respect to the right of administrative agencies to enforce consumer legislation in a civil justice court. This system plays a most prominent role in Australia and is (although technically possible) rarely used in Belgium. In some cases the legal qualification of the remedy can differ. For example, the enforcement order imposed by the OFT in the United Kingdom is an administrative sanction rather than a civil remedy, and penalties imposed by the new consumer authority in the Netherlands (CA) will be subject to an appeal to the Civil Court of Rotterdam. This shows that, in some cases, there are thin lines between the different approaches. Typically the goal of the civil proceedings is different from that of the criminal process: while the criminal process aims at particularly rogue traders who cannot be deterred through alternative means, the civil proceedings are mostly used to prevent the continuance of the unlawful activity in the individual case.

As far as the enforcement of private rights is concerned, all systems have some possibility for individual consumers to seek relief and obtain compensation for the financial losses suffered. Differences are strongly related to the particular institutional features of the legal system concerned. For example, in Belgium, victims can either claim for a cessation order (in the event of a continuing wrong) from the commercial court or (in the few cases) where criminal proceedings are brought victims can constitute themselves “partie civil” in the criminal court. The most elaborate system of consumer complaints, aiming both at prevention of further harm and at compensation, can of course be found in the Netherlands. The ADR-system provided through the “Geschillencommissies” seems to offer a low threshold and cost-effective system for many consumer complaints.

¹⁵⁶ *Id.*

¹⁵⁷ 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.

Penalties

Penalties may be imposed by means of the administrative, civil or criminal law, but the powers and practice vary significantly between jurisdictions.

In Australia, as we have seen, civil remedies include injunctions, community service orders or the probation order. This obliges trading firms to adapt their management structures to regulatory requirements by means of compliance and trading programs and is considered to be an attractive option by interviewees in other jurisdictions. Fines can only be imposed in the criminal process, not in civil proceedings, although this is currently the subject of review.¹⁵⁸ Adverse publicity orders are also possible (after criminal conviction) and some jurisdictions have “name and shame” procedures and the power to seek “cease trading” injunctions.

In Belgium, in civil proceedings, the commercial court can order the cessation of the offense with the threat of penalty payments, but it is rarely sought by consumers. In the criminal law fines are possible.¹⁵⁹ For the three consumer protection cases which are the focus of our study, imprisonment is not possible; the Fair Trade Practices Act provides that this penalty is available only in exceptional cases.¹⁶⁰

The standard reaction to violations of consumer protection law are the “transactions” proposed administratively.¹⁶¹ As it appears from the table below, the average amount imposed has been less than 500 Euro.¹⁶²

¹⁵⁸ 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 available at http://www.consumer.gov.au/html/civil_penalties/index.html.

¹⁵⁹ The sanctions (fines) are provided for in Articles 102-104 of the Fair Trade Practices Act.

¹⁶⁰ Article 105 of the Fair Trade Practices Act only allows for imprisonment where a seller wrongly suggest a humanitarian cause of action which would promote generosity of consumers.

¹⁶¹ Article 116 Fair Trade Practices Act, *supra* note 54.

¹⁶² These numbers follow from the yearly reports published by DGEM and have been incorporated into one table here.

Table 8: Numbers and amounts of “Transactions” 2002-2004

Year	Number of transactions	Number of transactions paid	Total amount paid (€)	Average amount paid (€)
2002	1,509	834	404,950	485.55
2003	1,345	1,081	522,045	482.93
2004	1,220	766 ¹⁶³	303,470	396.17

In the Netherlands, public penalties are rarely imposed, given the focus on ADR.¹⁶⁴ Through civil proceedings an injunction can be sought with a penalty payment in case of non compliance as well as compensation for the damage suffered by the consumer.¹⁶⁵ Under the new arrangements the principal sanction is an administrative fine with a maximum of € 67,000, as stated above. However, considering the very recent introduction of this sanction, it is too early to tell how often such a fine will be imposed. Criminal sanctions will continue to apply in exceptional cases only.

The UK system, pending the envisaged radical reform, still relies strongly on criminal prosecutions. The principal penalty imposed by the courts on conviction is a fine. In 2004-2005, there were 275 convictions of offenses under section 1 of the Trade Descriptions Act (false description of goods), for which an aggregate of £185,561 was paid in fines¹⁶⁶, thus an average amount of about £675 for each offense. Officials who were interviewed considered that such amounts were inadequate for deterrence purposes.¹⁶⁷

Several other sanctions are available. The courts have power to award compensation to victims of the offense and following the reported 275 convictions in 2004-2005, an aggregate of £53,088 was awarded for this purpose.¹⁶⁸ Seven of the defendants convicted received sentences of imprisonment.¹⁶⁹ The courts routinely order convicted defendants to pay part of the prosecution costs and the

¹⁶³ 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.

¹⁶⁴ MEA Interview, *supra* note 46; NCA Interview, *supra* note 46.

¹⁶⁵ *Id.*

¹⁶⁶ Office of Fair Trading Annual Report 2004-05, Annexe D.

¹⁶⁷ TSA Interview, *supra* note 48; LACORS Interview, *supra* note 48; OFT Interview, *supra* note 48.

¹⁶⁸ Taken from Chartered Institute of Public Finance compiled data 2005, made available by the DTI.

¹⁶⁹ *Id.*

amount in question can sometimes exceed the fine imposed.¹⁷⁰ In addition, many TSS departments publicize on their website or elsewhere the names and details of offenders and the conviction.¹⁷¹

An idea of how these sanctions are combined in typical cases may be derived from Table 9 which gives details of individual cases of convictions of traders under the Trade Descriptions Act for interference with odometers, taken randomly from the websites of TSS departments.¹⁷²

Table 9. Criminal Fines for Interference with Odometers

	Fine	Costs	Compensation	Publicity
Birmingham	£4500	£1500	-	√
Brent	£4500 (4)	£12000	-	√
Coventry	£600	£200	£660	√
Derbyshire	£600 (3)	£740	-	√
N.Yorkshire	£1500	£1000	-	√
Worcestershire	£1400	£942	£100	√

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

This brief overview shows that the principal sanction is the fine (or a related financial penalty). Imprisonment plays a (slightly) more important role in the United Kingdom than in systems which rely more on civil (Australia, the Netherlands) or administrative (Belgium) remedies. Naming and shaming is considered to be more effective in some jurisdictions (notably Australia) than in others (notably Belgium), thus suggesting that cultural factors may impinge significantly on this policy option. In addition some penalties also aim at preventing further harm such as injunctions, cessation orders, or orders to cease the infringement. The Australian probation order is in that respect an attractive remedy aiming at effective compliance by the violating trader.

4. Policy Conclusions

In this paper we have provided a survey of approaches to sanctions and enforcement in OECD countries and a more detailed investigation of the systems in a few countries. Of course, care should be exercised before drawing any strong policy conclusions on

¹⁷⁰ TSA Interview, *supra* note 48; LACORS Interview, *supra* note 48; OFT Interview, *supra* note 48.

¹⁷¹ *Id.*

¹⁷² Information available at <http://www.tradingstandards.gov.uk/>.

the basis of such a limited study. Nevertheless, on the basis of the comparative study of four countries, we are able to reach some tentative conclusions on some of the aspects of enforcement practice which we examined.

First, there is the question whether there should be a proactive approach to the monitoring of traders (as in Australia, Belgium and the United Kingdom) or whether institutions should adopt a more reactive approach (as in the Netherlands). A reactive approach is plausible only in countries where there is a strong culture of consumer activism. This is likely to be the case where consumer associations and the like, whether voluntary or publicly funded, and ADR committees, 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 publicizing potential problems and seeking out defaulting traders. In the Netherlands that seems effectively to be the case. However, the Dutch reactive approach may not work where consumers do not know their rights or where violations can simply not be discovered by consumers. In those cases proactive monitoring by competent administrative agencies is necessary to remedy the failure of the private law. For the purpose of monitoring, the experience in the United Kingdom in adopting risk assessment models reveals the advantage of targeted enforcement efforts. However, the Australian and Belgian practice showed that sensible targeting can also exist without the use of a formal model of risk-assessment. Nevertheless it is important that such targeting should be based on objective criteria (for example, the number of complaints relating to particular categories of traders), 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, allowing the enforcement agencies to treat suspected offenders differently, is important in all the systems and is justified by the fact that imposing penalties for first and particularly minor contraventions can lead to disproportionate costs. Indeed dismissing such a case (with or without a warning) might have the benefit of educating traders and thus indirectly improving future compliance by first-time offenders.

There seems to be a tendency towards an increasing use of administrative financial penalties. In Belgium this is the standard reaction; the Netherlands have recently introduced the possibility; and in the United Kingdom a similar model is supported by recent policy reviews and is likely to result from the impending legislative reforms. Looking at the experience in Belgium, an important reason

for the introduction of the transaction was the problem of resources available for the criminal prosecution of consumer protection offenses. 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.

Interviewees at DGEM considered that the transaction provided them with an easy and low-cost possibility of reacting in an effective manner to offenses. This was partly because, to allow for appropriate differentiation, the amount to be paid could reflect elements such as the seriousness of the offense and the profit made by the trade. The amounts were not significantly smaller than the fines which would have been imposed by the criminal courts: as such they were effective deterrents, at substantially lower cost.

These arguments seem rather convincing. The criminal law can then 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.

As far as the sanctions are concerned, the imposition of a financial penalty (either through criminal or through civil proceedings) 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, more particularly in cases where for deterrence purposes the financial penalty is insufficiently large, we notice that most legal systems possess additional sanctions like compensation orders and "naming and shaming". Also the Australian "probation order" can in particular cases be an effective instrument to induce compliance.

There is today still a wide variety of different approaches to the enforcement of consumer protection legislation. In some jurisdictions there is almost no administrative intervention but reliance predominantly on consumer initiative and alternative dispute resolution (the Netherlands); some confer penalty-imposing powers on administrative agencies (Belgium); and others largely depend upon either civil justice (Australia) or criminal justice proceedings for the infliction of significant sanctions (United Kingdom). 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. Civil remedies and ADR may for example work well in a country like the Netherlands with a long tradition of consumer activism, but may be less effective in other legal systems. Also the effectiveness of "naming and shaming" as a penalty may be culturally limited. 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.