# Publicity, punishment and protection: the role(s) of adverse publicity in consumer policy

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Word Total: 12,122 words

*This is the peer reviewed version of the following article: Peter Cartwright, 'Publicity, Punishment and Protection: the Role(s) of Adverse Publicity in Consumer Policy' (2012) 32 Legal Studies 179, which has been published in final form at Wiley Online Library via the following DOI: 10.1111/j.1748-121X.2011.00212.x. This article may be used for non-commercial purposes in accordance with Wiley Terms and Conditions for Self-Archiving.*

# Publicity, punishment and protection: the role(s) of adverse publicity in consumer policy

***Abstract**: This article argues that adverse publicity can fulfil two crucial roles in consumer protection law and policy. First, it can operate as an effective regulatory sanction in its own right; secondly it can play a vital role in helping consumers to exert market discipline by making informed choices about suppliers. However, there are significant risks to using adverse publicity to achieve these ends and that it is imperative that any regulatory regime addresses these. Studying this topic now is particularly important for three main reasons. First, there has been widespread recognition that the regulatory offence, typically backed up with fines, is not the most effective form of sanction. More flexible, targeted and responsive options are required. Secondly, there is now ample evidence that regulated information, for example in the form of mandatory disclosure, frequently fails to help consumers to make fully informed choices. Finally, there are some highly significant very recent examples of enforcers using publicity in ways that can be viewed both as a sanction and as an information tool. The need to sanction responsively and to bolster consumer sovereignty demonstrates the potential for adverse publicity as a tool of consumer protection policy.*

## INTRODUCTION

The control of information has been a central theme in consumer protection law and policy for decades.[1] In the panacea of the perfect market, consumers search for

* This research was undertaken under the Arts and Humanities Research Council's Research Fellowship Scheme and I am very grateful to the AHRC for its support. Thanks also to Geraint Howells and Richard Hyde for comments on an earlier draft. The usual disclaimer applies.

information (which traders are under incentives to provide) and act in accordance with their preferences. In so doing, they send signals to traders which provide them with incentives to satisfy those preferences. Where they fail to satisfy consumers, traders lose custom and are forced either to improve or to exit the market. This is seen as desirable both in terms of efficiency and ideology.[2] While perfect markets may be conspicuous by their absence in practice, and while much economic thinking has moved from its focus on the paradigm rational consumer to a more realistic vision, the role and the control of information remain central to consumer protection law and policy.

As well as facing discipline by consumers where they fail to meet their expectations, traders also face formal sanctions where they breach consumer protection laws. In the UK, strict liability criminal offences tempered by due diligence defences have typically been used.[3] The limitations of such regimes have been examined in detail and efforts are underway to create a more effective sanctioning regime.[4] One element in the move to better regulation has been an emphasis on transparency, both towards the activities of firms and of regulators.[5] Another has been recognition of the need for responsive and flexible enforcement tools which reflect how powers are used in practice.[6]

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[1] Seminal articles include: H Beales, R Craswell and S Salop 'The efficient regulation of consumer information' (1981) 24 J Law and Econ 491; WC Whitford 'The Functions of Disclosure Regulation in Consumer Transactions' (1973) Wisc L Rev 400; G Hadfield, R Howse and MJ Trebilcock 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 Journal of Consumer Policy 131. London Economics, *Consumer Detriment Under Conditions of Imperfect Information* (OFT Research Paper 11, August 1997).

[2] See C Fried *Contract as Promise*: *A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981) and PS Atiyah "The Liberal Theory of Contract" in PS Atiyah *Essays on Contract* (Oxford: Clarendon Press, 1986) p 121.

[3] See generally P Cartwright *Consumer Protection and the Criminal Law* (Cambridge: Cambridge University Press, 2001).

[4] Note in particular the Regulatory Enforcement and Sanctions Act 2008 and the Civil Sanctions Pilot (LBRO/OFT Civil Sanctions Pilot (OFT 1296, December 2010).

[5] Weil *et al* use the term "regulatory transparency" to mean "the mandatory disclosure of structured factual information by private or public institutions in order to achieve a clear regulatory goal" (D Weil, A Fung, M Graham and E Fagotto "The Effectiveness of Regulatory Disclosure Policies" (2006) 25(1) Journal of Policy Analysis and Management 155 at 155. In the UK, much emphasis has been placed on the need for enforcement authorities to be transparent in their dealings with business. See e.g. P Hampton *Reducing Administrative Burdens* (London: HM Treasury, March 2005).

[6] See in particular R Macrory *Regulatory Justice: Making Sanctions Effective* (Nov 2006).

One approach available to those regulatory authorities charged with protecting consumers (described here as enforcers) is to harness publicity, particularly that which might be described as negative or adverse, and to use it both as sanction and as a tool to inform consumers. This is referred to here as "regulated adverse publicity" (or simply 'adverse publicity' for short). This article examines the use of such adverse publicity to achieve both objectives and makes a case for how adverse publicity might best be used in future. Studying this now is particularly topical for three main reasons. First, there has been widespread recognition that the regulatory offence, typically backed up with fines, is not the most effective form of sanction in areas such as consumer protection. More flexible, targeted and responsive sanctions are essential.[7] Secondly, it has become increasingly clear that regulated information, for example in the form of mandatory disclosure requirements, typically fails to help consumers to make fully informed choices.[8] Finally, there are some highly significant very recent examples of authorities beginning to use publicity is ways that can be viewed both as a sanction and as a way of informing consumers.[9] It is vital that lessons are learned if adverse publicity is to avoid the dangers and fulfill its potential as a tool of consumer policy.

The article begins by looking at adverse publicity in relation to the aims of sanctioning traders, and follows this with an examination of its role in helping consumers to make informed decisions. After drawing preliminary conclusions, the article demonstrates how adverse publicity may be harnessed to play a vital role as part of a consumer protection regime in the context of some highly significant recent initiatives. Finally, conclusions are drawn.

## PART ONE: ADVERSE PUBLICITY AND SANCTIONING

### Introduction

[7] Ibid.
[8] See eg *Warning! Too Much Information can Harm* (London: Better Regulation Executive/National Consumer Council, 2007).
[9] Note in particular the publication of financial complaints data and the introduction of the National Food Hygiene Rating Scheme discussed below.

Adverse publicity may first be viewed as a sanction. Such publicity may be used as a formal sanction, for example in the form of public censure, or less formally, such as through press releases.[10] While this article focuses on (consumer protection) enforcers, it should be noted that courts may also use adverse publicity as a sanction, for example by imposing a publicity order, and that such publicity may play a role in achieving other regulatory objectives, such as environmental protection.[11] As will become apparent, negative publicity may also emerge from general media coverage, independently of any regulatory action. To assess adverse publicity as a sanction, it is helpful to identify the principal aims of, and justifications for, such sanctioning.

**Deterrence and compliance**

The most obvious aim of sanctioning is to prevent future harm through deterrence. First, sanctioning a trader may deter him or her from further wrongdoing (individual deterrence). Secondly, that sanction may deter others from similar wrongdoing (general deterrence). Where consumer protection offences are concerned, deterrence is, perhaps, the most obvious rationale for sanctioning. Wells argues that: '[m]ost corporate crime theory has been deterrent-based, in the sense that the purpose of instituting sanctions has been to discourage violations and encourage good practice.'[12] However, deterrence does not always operate effectively in the context of consumer protection offences. To appreciate this, it is important to think about how a system of optimal deterrence would work.

**Deterrence and financial factors**

[10] Although the distinction is an imperfect one. See K Yeung "Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?" (paper presented to the Australian Institute of Criminology Conference, Current Issues in Regulation: Enforcement and Compliance, Melbourne, 3 September 2002)). The problems with informal publicity are also examined by B Fisse and J Braithwaite *The Impact of Publicity on Corporate Offenders* (Albany: State University of New York, 1983) chap 20.

[11] See eg C Abbot "The Regulatory Enforcement of Pollution Control Laws: the Australian Experience" (2005) 17(2) Journal of Environmental Law 161.

[12] C Wells *Corporations and Criminal Responsibility* (2nd ed) (New York: Oxford University Press, 2001) p 31. See also the symposium "Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions" (1979) 92 Harv L Rev 1227.

Classical economics assumes that rational traders, motivated only by profit, will break the law if the anticipated benefits of doing so exceed the anticipated costs. Such traders might be referred to as 'amoral calculators.'[13] The trader will comply where *pD>U*, where *p* is the perceived probability of apprehension and conviction, *D* is the perceived cost of apprehension and conviction, and *U* is the perceived benefit from contravention.[14] An enforcer seeking to deter wrongdoing might adopt a deterrence strategy, which involves 'detecting violation, determining who is responsible for the violation, and penalising violations to deter violations in the future.'[15] It has been suggested that unlike other wrongdoers, traders act on a calculation of potential costs and benefits. [16] Even those less calculating will be concerned to avoid financial loss from enforcement action.

The principal formal penalty for traders is the fine, the effectiveness of which might be doubted. Recent research for the OFT found a perception that formal enforcement action for consumer protection offences is unlikely and sanctions low.[17] Although traders may suffer economic loss from enforcement action (such as through remedying a defect, and having business interrupted) even without being formally penalised, there is ample evidence that current formal sanctions under deter.[18]

Does adverse publicity deter more effectively than fines? Recently, the Confederation of British Industry (CBI) stated that adverse publicity 'puts peer pressure on those firms that have issues to address and threatens adverse impact on their reputation.'[19] Recent research for the OFT supports this, both for large firms, which might be vulnerable to

[13] R Kagan and J Scholz "The "Criminology of the Corporation" and Regulatory Enforcement Strategies" in K Hawkins and J. Thomas (eds) *Enforcing Regulation* (Dordrecht: Kluwer Nijhoff, 1984).
[14] See G Becker "Crime and Punishment: An Economic Approach" (1968) 76 Jl Pol Econ 169 and A Ogus *Regulation : Legal Form and Economic Theory* (Oxford: Clarendon Press, 1994) p 91.
[15] AJ Reiss "Selecting Strategies of Social Control Over Organisational Life" in K Hawkins and J Thomas (eds) *Enforcing Regulation* (Boston: Kluwer Nijhoff, 1984) pp 23-24.
[16] "Developments in the Law: Corporate Crime" (1978-79) 92 Harvard LR 1227, 1231. See also J Braithwaite and G Geis "On Theory and Action for Corporate Crime Control" (1982) 28 *Crime and Delinquency* 292.
[17] This is in contrast to areas like health and safety law which are likely to be prioritised. See OFT *Factors affecting compliance with consumer law and the deterrent effect of consumer enforcement* Report by IFF Research OFT 1228 June 2010 table 3.5.
[18] Macrory above n 6, para E7.
[19] Ibid.

adverse publicity from the national media, and for smaller firms trading in localized markets where word of mouth could easily damage standing.[20] The research found that traders fear that existing and potential consumers might be alienated by non-compliance. Traders admitted that they sometimes changed behavior through fear of OFT investigation and prosecution.[21] Furthermore, as reputation is relevant to quality of products and service as well as to integrity, breaching civil as well as criminal standards might lead to loss of business. The research found the threat of adverse publicity to be crucial in motivating compliance, noting that that 89% of respondents agreed that: 'the threat of adverse publicity associated with breaching consumer law is as important as any financial penalty.'[22] Although there is some debate, a range of studies have demonstrated that adverse publicity typically impacts negatively upon the performance of firms.[23]

Fisse and Braithwaite identified less direct ways in which adverse publicity harms the financial position of a trader.[24] For example, where a trader has a poor public image, it may be difficult to attract high-quality employees who are able to add value to the organisation. Furthermore, a poor image may make it more difficult, and therefore more expensive, to raise funds from financial institutions. In addition, traders with a positive image may find it easier to have influence. For example, it may be that those traders who have a high image will find it easier to influence governments, for example to pass or to drop legislation that impacts upon their interests.[25] It has even been suggested that previous wrongdoing will be treated more leniently where there is a strong reputation. Finally, it has been argued that a trader's prestige has an impact upon its

[20] OFT *Drivers of compliance and non-compliance with consumer law* (A report by Ipsos MORI) OFT 1225a, May 2010 para 1.9.
[21] OFT above n 17, para 1.19.
[22] Ibid para 1.21
[23] See in particular C Alexander "On the Nature of the Reputational Penalty for Corporate Crime: Evidence" (1999) 42 J Law and Econ 489.
[24] Fisse and Braithwaite above n 10, p 248.
[25] A Cowan "Scarlet Letters for Corporations? Punishment by Publicity under the New Sentencing Guidelines" (1991-92) 65 S Cal LR 2387 at 2398

morale and self-esteem, including those of its employees, with the financial benefits that result.

We can therefore conclude that adverse publicity may operate more effectively as a deterrent than traditional formal sanctions. However, firms will also wish to avoid adverse publicity for other reasons.

**Deterrence, compliance and non-financial factors**

A distinction might be drawn between deterrence and compliance. "Deterrence" implies that in the absence of the threat of a sanction, traders will decide rationally to engage in wrongdoing where that is financially beneficial. But traders may want to comply with the law for a range of reasons. First, habit may lead to compliance, Ayres and Braithwaite noting that 'most corporate actors will comply with the law most of the time because it is the law'.[26] Secondly, there is the symbolism attached to breaches of the law, particularly criminal law, which leads firms to try to comply. Ball and Friedman found that the word very word crime 'has symbolic meaning for the public and the criminal law is stained so deeply with notions of morality and immorality, public censure and punishment, that labelling an act as criminal often has consequences that go far beyond mere administrative effectiveness'. They conclude that 'businessmen abhor the idea of being branded a criminal'.[27] The language of deterrence might be used here, but compliance results in part from a desire to be seen as acting within the law. A number of commentators view this as a search for prestige. Rourke suggests that the psychological desire to 'establish and maintain more subtle assets such as respectability and prestige in the eyes of the community' may be strong.[28] This respectability and prestige may be felt (and lost) by traders as individuals or as part of an organisation. According to

[26] I Ayres and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) p 19. See also C Sunstein *Free Markets and Social Justice* (New York: Oxford University Press, 1997) chap two.
[27] Harry Ball and Laurence Friedman "Use of Criminal Sanctions in the Enforcement of Economic Legislation: a Sociological View" (1965) 17 Stan L Rev 197 at 216-217.
[28] F Rourke "Law Enforcement Through Publicity" (1956-57) (24) U Chi L Rev 225 at 241.

Channon 'the climate of opinion, and therefore the projection of the company as a moral, useful and likeable member of society…[becomes] a direct objective of management…It exists in its own right as an operational goal of prime importance.'[29] Fisse and Braithwaite's survey of 17 firms that had experienced significant negative publicity emphasised both the value to firms of corporate prestige and repute, and the ability of adverse publicity to reduce these, something that was beyond the capacity of fines.[30] While concern about the loss of prestige may be based upon economic factors, it may run more deeply.[31] That traders are deeply concerned about their reputations is evidenced by the growth of reputational risk management professionals.[32] The use of brand image in advertising and the significant efforts of corporations to regain a positive image after a disaster further demonstrate the importance of status and image.[33]

Those traders who comply with the law even when it is economically inefficient are not 'amoral calculators' and may be categorised otherwise, for example as political citizens or organisationally incompetent.[34] In other contexts, commentators have sought to divide up firms into similar categories. For example, when looking at Health and Safety at Work, Baldwin divided up employers into the categories of: well intentioned and well informed; well intentioned and ill-informed; ill intentioned and ill-informed, and problematic.[35] The organisationally incompetent are of particular relevance where consumer protection is concerned. Many consumer protection offences result from organisational failures rather than calculated wrongdoing. Consumer protection legislation typically consists of strict liability offences tempered by due diligence defences. In practice, many contraventions concern traders who do not have the

[29] C Channon "Corporations and the Politics of Perception" (1980) 60 *Advertising Quarterly* 12, 13. Cited in Cowan above n 25, p 2399.
[30] Fisse and Braithwaite above n 10. Yeung correctly notes that the firms in questions endured media disasters and that any generalisation from the study should be undertaken with caution. Yeung above n 10 at 12.
[31] Rourke above n 28 at 241-242 .
[32] Yeung above n 10, at 12-14.
[33] Wells above n 12, p 37. Of course, this desire may also result from the fear of losing business.
[34] Kagan and Scholz, above n 13.
[35] R Baldwin "Why Rules Don't Work" (1990) 53 MLR 321 at 324.

competence to comply.[36] While the model of optimal deterrence may not work smoothly where non-intentional offences are concerned, it is still possible to think of how compliance and deterrence-based sanctioning regimes might operate. Traders need incentives not to deliberately break consumer laws, but also to minimize the likelihood that they will accidentally break them. Many unintended offences could be avoided if further effort and resources were put into organisation, supervision and planning. Adverse publicity may provide an incentive for firms to minimize the risk of such unintended wrongdoing.

**Retribution and just deserts**

Under retributive (sometimes called 'just deserts') theories, wrongdoers are sanctioned because they deserve to be, not simply because their penalty is likely to have particular consequences such as reducing future offending.[37] The trader is therefore sanctioned irrespective of whether it reforms his character, deters his conduct or sets an example to others.[38] Although retributive theories are sometimes associated with the political right, just deserts is founded on respect for the individual, ensuring that sanctions are fair, determinate, and proportionate.[39]

Adverse publicity might be justified on the basis of retributive theories. We may inform the public of wrongdoing in order to reflect traders' culpability – to 'name and shame' those who deserve such approbation. Indeed, it has been argued that to secure appropriate retribution, any punishment 'must be public and must attempt to shame the wrongdoer.'[40] But retributive theories demand proportionality, and because the 'sting' of adverse publicity is dependent upon the public's response to it (and may be affected by

[36] J Braithwaite *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002) p 32.
[37] A. Ashworth "Sentencing" in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology* (Oxford: OUP, 2nd ed, 1994) pp 1096-1097
[38] Dan D Dobbs "Ending Punishment in Punitive Damages: Deterrence Measured Remedies" (1989) ALA L Rev 831 at 844
[39] RA Duff and David Garland *A Reader on Punishment* (Oxford: Oxford University Press, 2005) p 12.
[40] M Galanter and D Luban "Poetic Justice: Punitive Damages and Legal Pluralism" (1993) 42 Am U L Rev 1400 at 1444.

how third parties such as the media present the enforcer's message) its impact is inherently unpredictable and potentially disproportionate. This point is developed later. As retribution is closely connected to labelling, it is particularly important that any adverse publicity accurately reflects the wrongdoing.

**Rehabilitation, restoration, restitution and reparation**

Rehabilitative punishment traditionally focuses upon the idea of 'reformation of the offender's lawbreaking tendencies'.[41] To the extent that rehabilitation involves what Duff and Garland call 'a kind of transformation of character in which offenders are turned into law-abiding citizens by the application of some generalizable penal technique' then their conclusion that rehabilitation "remains an impossible goal" may seem understandable.[42] However, this may be too pessimistic a conclusion. There are examples of organizations making significant internal reforms following the publicising of their wrongdoing, and there is some evidence that this may have been accompanied by a genuine re-evaluation of the organisation's culture.[43] This demonstrates the fuzzy line between rehabilitation and restoration, and it is to this that we now turn.

Much attention has been paid recently to the restorative role of sanctioning. Ashworth argues that restorative and reparative theories are not theories of sanctioning or punishment as such: '[r]ather, their argument is that sentences should move away from punishment of the offender towards restitution and reparation, aimed at restoring the harm done to the victim and to the community.'[44] However, much literature does view restoration as an aim of sanctioning.

Where consumer protection is concerned it is helpful to consider two elements of restorative theories. First there is restoration as restitution or reparation. Here, a

[41] Ashworth above n 37, p 1098.
[42] Duff and Garland above n 39 p 24.
[43] Fisse and Braithwaite above n 10 pp 233-236.
[44] Ashworth above n 37 p 1100.

sanction is imposed to correct the damage done. This may be attractive because of the belief that consumer protection law does not provide effective consumer redress.[45] If a sanction leads to consumers being compensated and profits from wrongdoing removed, it fulfils an important objective. Adverse publicity may inform consumers of the wrongdoing and available remedies, although its threat may also propel traders to offer redress. It is closely connected to adverse publicity as information, discussed below.

The second element is restoration as rehabilitation. To the extent that restorative theories are concerned with the restoration of offenders, they are 'based on a behavioural premise similar to rehabilitation.'[46] Where adverse publicity leads to a change of heart as well as practice, it may be characterised either as rehabilitative or restorative. Shame may play a role here. According to Curcio, a company guilty of wrongdoing 'may find that to redeem itself, it needs to acknowledge its wrongdoing, express remorse, and explain its intention to remedy the problem leading to the misconduct.'[47] She later suggests that adverse publicity 'may lead to a 'collective soul-searching' and examination of the reasons the conduct occurred…this re-evaluation furthers the rehabilitative goal of punishment.'[48] The harnessing of such feelings may be achieved, in part, through adverse publicity. However, even in the absence of such soul-searching, it is possible to see a role for rehabilitation in consumer protection. It was noted above that one aim of sanctioning traders is to ensure that they correct errors, such as inadequate controls or supervision, which have lead to the commission of an offence. This involves a form of rehabilitation, although one that focuses more on deeds than on remorse. Adverse publicity may provide an incentive for the firm to put measures in place to make such mistakes less likely to occur in future.

[45] See for example F Cafaggi and Hans-W Micklitz (eds) *New Frontiers of Consumer Protection* (Antwerp: Intersentia, 2009) and W van Boos and M Loos *Collective Enforcement of Consumer Law* (Groningen: Europa Law Publishing, 2007).
[46] Ashworth above n 37 p1100.
[47] AA Curcio "Painful Publicity – an Alternative Punitive Damage Sanction" (1995-6) 45 DePaul L Rev 341, 380.
[48] *Ibid*, 382. See also Cowan, above n 25 at 2401 citing Fisse and Braithwaite above n 10 pp108-109

**Incapacitation**

The final aim of sanctioning is incapacitation. Curcio argues that incapacitation may result from adverse publicity. She suggests that where wrongdoing continues after litigation 'public notification of the wrongdoing would allow market forces to dictate whether the conduct needs to change…consumers may not purchase the product or do business [with the wrongdoer].'[49] However, it is submitted that adverse publicity only truly incapacitates the trader in such cases where the withdrawal puts it out of business. This will occur only rarely.

When viewed as a sanction, adverse publicity may therefore be justified on a number of bases. Most obviously, it may operate as a deterrent, either replacing or supplementing other sanctions such as fines. However on appropriate facts it is also possible to justify the use of adverse publicity to achieve other goals. One question to consider is how adverse publicity enforcement authorities might choose to use adverse publicity (or the threat of such publicity) as part of different enforcement strategies in practice.

**Adverse publicity and enforcement strategies**

When enforcers are faced with wrongdoing they have a choice about how to proceed, but it is clear that that formal action will generally be viewed as a last resort. Legislation sometimes requires the first course of action to be informal. For example, regulation 10(5) of the General Product Safety Regulations 2005 states that in enforcing the Regulations, enforcers "shall encourage and promote voluntary action by producers and distributors", although this can be departed from when a product poses a serious risk. In addition the statutory Regulators Compliance Code is premised on the need for authorities to operate in ways which involve less formal enforcement, and more guidance and advice.[50] For example, the Code states that: 'when considering formal enforcement

[49] Curcio above n 47, at 383
[50] BERR *Regulators Compliance Code* (December 2007) para 1.2

action, regulators should, where appropriate, discuss the circumstances with those suspected of a breach and take these into account when deciding on the best approach.'[51] It has long been recognized that where consumer protection is concerned, enforcers typically adopt what have been named 'compliance strategies' which aim 'to secure conformity with law by means of ensuring compliance or by taking action to prevent potential law violation without the necessity to detect, process and penalise violations.'[52] While enforcers historically chose to adopt such strategies, the Regulators Compliance Code makes such strategies compulsory.

Although compliance strategies predominate, enforcers will sometimes be able to adopt more deterrence-based approaches. The Macrory 'Penalties Principles', which underpin the Regulatory Enforcement and Sanctions Act 2008, state that sanctions and penalties policies should 'be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction.'[53] Some regulators, such as the Financial Services Authority (FSA) have moved to a more aggressive deterrence-based approach to enforcement.[54] Responsiveness requires enforcers to impose, or press for, significant sanctions where the circumstances merit it. Braithwaite has described responsive regulation as involving 'a presumption in favour of trying restorative justice first, then deterrence when that fails, then incapacitation when that fails.'[55] Similarly, restorative justice emphasises informal techniques such as persuasion which characterise compliance strategies, but recognizes that there will be a need to shift from such strategies towards deterrence in some circumstances.

[51] *ibid* para 8.2. The Code states that the paragraph does not apply "where immediate action is required to prevent or respond to a serious breach or where to do so is likely to defeat the purpose of the proposed enforcement action."
[52] Reiss above n 15 pp 23-24.
[53] Macrory above n 6 executive summary. The Compliance Code requires enforcement authorities to ensure that their sanctions and penalties policies are consistent with the Principles.
[54] In championing its emphasis on "credible deterrence", The FSA's Chief Executive famously declared that firms should be "very frightened" of the FSA. See H Sants "Delivering Intensive Supervisions and Credible Deterrence" Speech to Reuters Newsmakers 12 March 2009.
[55] Braithwaite above n 36, p 42.

It has been noted that adverse publicity may follow from, or form part of, a formal sanction. But such publicity may play an important role in a compliance strategy. An enforcer might, for example, suggest that a trader acknowledges wrongdoing as part of an informal settlement with consumers. Sometimes, a trader will genuinely reflect on conduct, recognise wrongdoing, and publicly acknowledge the need for change. Neither requires formal sanctioning powers to be utilised. For example, the RES Act envisages that traders will be incentivised to bring contraventions to the attention of enforcers and suggest solutions through a procedure of enforceable undertakings. A public acknowledgement of wrongdoing may form part of the undertaking. [56] It is also possible for enforcers to threaten adverse publicity in the absence of formal enforcement action. While it could be argued that such a threat 'gives enforcers an ace to play' and that any unjust publicity is a 'relatively trivial problem', such a view should be treated with caution.[57] The need to provide procedural safeguards for traders counsels against the widespread use of informal publicity without compelling proof of wrongdoing. Nevertheless, at different stages of the enforcement process, there may be a role for adverse publicity. To understand how enforcement authorities use their powers in practice, it is helpful to look at some examples.

**Adverse publicity in practice: the Financial Services Authority and the Office of Fair Trading**

The Financial Services Authority (FSA) is the UK's leading regulator of the financial services industry, and has consumer protection as one of its statutory objectives.[58] The FSA will generally publicise enforcement action, such as final notices, and its success in obtaining civil remedies, such as injunctions and restitution orders. It will also consider making public announcements at key stages of criminal proceedings, while being mindful not to prejudice the fairness of any subsequent trial.

[56] Regulatory Enforcement and Sanctions Act 2008 Part 3.
[57] Fisse and Braithwaite above n 10 pp 261, 262.
[58] The FSA's consumer protection functions are to be carried out by a new financial conduct authority.

Publicity is generally achieved via the issuing of press releases, and the FSA has noted the different functions this performs: 'When we issue press releases about firms we have fined, and the reasons for taking disciplinary action, we are making a statement not only about that firm, but also about what we find unacceptable, what we are doing about it, and what consumers and firms should be alert to.'[59] This illustrates some key purposes of publicity. First, by making a statement about the firm, the FSA seeks to ensure individual deterrence, as well as to enable the consumer to take appropriate action. Secondly, by making clear what it finds unacceptable, and what it is doing, the Authority can aim to ensure general deterrence, while also making it clear both to firms and to consumers, the standards that it expects. This may also have the effect of raising the regulator's profile. Emphasising what consumers and firms should be alert to will also help to achieve these objectives. Some of these points are developed below.

As well as managing the publicity of enforcement action though press releases, the FSA can also use public censures as a formal disciplinary tool as an alternative to financial penalties.[60] The FSA's Guidance sets out the factors to be considered when deciding whether to impose public censure rather than a financial penalty. For example, the first factor is whether deterrence can be achieved effectively through a public censure. This is discussed further below. A second factor is whether the person has profited from, or avoided a loss from, the breach. A third factor is seriousness, with financial penalties (generally) being used in more serious cases. Fourth is that where the breach has been brought to the attention of the FSA by the person in question, it may make public censure more appropriate. Fifth, where the person admits the breach, fully co-operates with the FSA and takes steps to ensure that those who lose out receive compensation, again this may weigh in favour of merely public censure. Sixth, a poor disciplinary/compliance record is likely to point in favour of a financial penalty. The

[59] FSA *Transparency as a Regulatory Tool* (DP/03, May 2008) para 2.14.

[60] Public censure includes a statement published under section 205 and a statement of misconduct published under section 66 of FSMA.

rationale for this is stated to be deterrence. Seventh, the FSA will look to ensure consistency in its approach, by considering previous cases. Finally, the FSA will consider the impact upon the person concerned. The factors reveal that public censure alone will typically be used in less serious cases, which may appear surprising given the deterrent effect of adverse publicity. However, two points should be noted. First, the imposition of a financial penalty will not mean that the firm is immune from adverse publicity as this will be communicated via a press release. Secondly, the FSA is able (and has shown itself willing in appropriate cases) to impose far more significant financial penalties than most authorities.[61]

The Office of Fair Trading also uses adverse publicity as part of its enforcement toolkit. Like the FSA, the OFT sets out the rationale behind its use of publicity. It states that 'wherever possible and appropriate' the OFT publicises the outcomes of proceedings, undertakings, interim measures and orders, taking due account of the need to: 'Deter others from engaging in similar kinds of conduct; warn consumers about practices that are detrimental to their interests; increase consumers' awareness of their rights; facilitate complaints about further breaches; and educate other businesses in the market.'[62] Like the FSA, the OFT will sometimes consider it appropriate to publicise investigations at an early stage, particularly if there is evidence that a problem is manifesting across a market.[63]

The OFT has fewer sanctioning tools than the FSA and no formal power of public censure. One of its principal powers is to seek undertakings under a variety of consumer protection legislation, including the Enterprise Act 2002, and the Consumer Protection from Unfair Trading Regulations 2008. Publicising undertakings performs the dual roles of securing deterrence and communicating effectively with consumers. The latter is

[61] See http://www.fsa.gov.uk for details.
[62] OFT *Statement of Consumer Protection Enforcement Principles* (OFT 964) December 2008 para 2.23.
[63] *Ibid.*

particularly important given the nature of undertakings and the need for consumer input to help to monitor the conduct of the trader. The OFT will conduct regular reviews of trader behaviour in relation to undertakings and orders that have been obtained, but relies upon third parties to provide it with information about the extent to which a trader continues to comply with an undertaking. This information might come from consumers or from bodies such as Consumer Direct. As explained in more detail below, adverse publicity may be helpful in alerting consumers to the wrongdoing of particular traders and encouraging consumers to report any further breaches.

The OFT regime has come in for some criticism, being described by the OECD as 'not fully formed or agreed.'[64] The OFT's use of publicity is in a sense informal, although the existence of a policy reveals the blurring of lines between the formal and informal use of adverse publicity.

The examples of the FSA and OFT demonstrate that adverse publicity should not be viewed solely in this punitive sense. It also has a role to play in informing consumers and facilitating the effective operation of markets. It is to this communicative role of adverse publicity that we now turn.

## PART TWO: ADVERSE PUBLICITY AS INFORMATION

### Adverse publicity as information: market discipline and consumer choice

Adverse publicity may be viewed as an important information tool, assisting consumers in making informed choices and so helping markets to function. In the perfect market of economic theory, all players have perfect information about the nature and value of goods traded. With that information, they can make informed choices in accordance with their preferences. While this is championed by supporters of classical economics on

[64] OECD *Report on the Effectiveness of Enforcement Regimes* (Paris: OECD) 43.

grounds of efficiency and autonomy, the value of the paradigm perfect market as a framework for analysis is much contested.[65] It has long-been recognised that perfect markets are conspicuous by their absence. Scholars sympathetic to the market in large part accept this, but concentrate their attention on (a) the positive role of the law in addressing market failure (for example by correcting information asymmetry) and (b) the negative role that other intervention might have in contributing to market failure.[66] By focusing on these issues, scholars could identify how regulation is best designed to improve the functioning of the market. Many regulators describe their approaches as 'market based' and some see market failure as the justification for regulation.[67] The need to correct the information asymmetry that exists between suppliers and consumers has been a major, and perhaps the dominant, narrative in consumer law and policy across the globe.[68]

There is now a wealth of evidence that consumers do not play the role traditionally ascribed to them by classical economic theory. Many recent studies in behavioural economics have challenged traditional assumptions about how consumers make decisions.[69] For example, it is suggested that: consumers' preferences vary over time (usually with a preference for the short term); they tend to be over-optimistic; they respond very differently depending upon how questions are presented, and they tend to use heuristics (rules of thumb) to assess factors such as risk.[70] These findings counsel caution about the extent to which we focus on simply correcting information asymmetry

[65] Below n 69.
[66] See e.g. David J Cayne and Michael J Trebilcock "Market Considerations in the Formulation of Consumer Protection Policy" (1973) 23 Univ of Tor LJ 396.
[67] The FSA, for example, has stated that "markets can fail and this provides *the* reason for regulation" FSA *Reasonable Expectations: Regulation in a non-zero failure world* (FSA, September, 2003) para 1.9 (emphasis added).
[68] See e.g. G Hadfield, R Howse and M Trebilcock 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 Journal of Consumer Policy 131.
[69] The literature is voluminous. See for example C Jolls, CR Sunstein and R Thaler "A Behavioural Approach to Law and Economics" (1998) Stan L Rev 1470; J Hansen and D Kysar "Taking Behaviouralism seriously: The Problem of Market Manipulation" (1999) 74 NYUL Rev 630. The literature is skilfully summarised and discussed in G Howells "The Potential and Limits of Consumer Empowerment by Information" (2005) 32(3) JLS 349.
[70] For an excellent summary of these issues see I Ramsay *Consumer Law and Policy* (Abingdon: Hart Publishing, 2nd ed, 2007) pp 71-84.

in the hope and expectation that this will lead to consumers' making informed choices in their own interests. Whether we believe that consumers are rational maximisers of their own utility, or view them instead as typically displaying cognitive biases, there is broad agreement that the information consumers would need to make a fully informed choice is likely to be absent from many markets. The reasons for this need not trouble us here, and have been examined at length in the literature.[71] Our focus is instead on the role that adverse publicity might play in improving consumer choice and decision-making.

Adverse publicity may be viewed as a tool to ensure that consumers are informed about matters that might affect their decisions. Research suggests that to make informed choices, consumers need information about price, quality and terms of trade and that an unregulated market may not always provide this.[72] Adverse publicity may help to inform consumers about the quality of the provider, for example by informing them about wrongdoing. Consumer sovereignty is respected, as a consumer for whom the integrity or competence of a supplier is important can be informed about that. This helps the consumer to exert market discipline. The issuing of press releases about enforcement action is traditionally seen as principally part of the sanctioning process, but as the examples of the FSA and OFT above demonstrate, they may equally be seen as helping consumers to make informed choices.

**Adverse publicity as information: beyond breaches of the law?**

The discussion above assumes that the trader has breached the law and that the adverse publicity will reflect that. Where a firm breaches the criminal law, it is relatively easy to convey this in a press release or similar communication. Similarly, where a trader has been is in breach of other clear minimum standards, conveying this will be comparatively straight forward. However, if we view adverse publicity through the lens of consumer information, we may need to go further. Brooker suggests that 'consumers

[71] See London Economics above n 1.
[72] Ibid.

have a right to know when businesses act illegally *or perform poorly*' [my italics].[73] At another point he suggests we might argue that 'as a matter of principle, consumers have a right to know when the behaviour of a business casts serious doubts on its integrity or competence.'[74] Where illegality and integrity are in issue, it should be relatively straight forward to use adverse publicity. How far adverse publicity has a role in informing consumers about competence and poor performance in the absence of a breach of mandatory standards is more difficult to determine, but demands consideration.

It has been suggested that consumers have expectations of what businesses should deliver in a range of areas, such as product design, customer service, financial probity, legal compliance and ethical practices.[75] Particular difficulties are raised by what might be called social or ethical factors. Communicating negative information about such factors is likely to generate, or constitute, adverse publicity. A review of ethical consumerism literature and matters deemed by the press to be of concern to consumers by one leading study revealed sixteen such social and ethical issues.[76] If we accept that consumers need information about some such matters to make informed choices, we have to identify which to publicise. A second difficulty is that even if we can identify the matters of most concern to consumers, using adverse publicity to inform them of which firms or products perform poorly on such matters will be problematic. As there is no single accepted standard which a firm can be said to have breached, firms may rightly object to 'poor performance' being conveyed as reprehensible. In particular, adverse publicity may not communicate effectively the tradeoffs involved with some apparently unethical conduct. For example, some products may involve a substantial carbon

[73] S Brooker *Regulation and Reputation* (London: NCC, 2006) p 7.
[74] Ibid, p 1.
[75] Ibid, p 3.
[76] These were: (1) animal rights in product testing; (2) the use of animal by-products; (3) product biodegradability; (4) products made from recyclables; (5) the provision of product safety information; (6) human rights; (7) packaging recyclability; (8) product disposability; (9) the payment of minimum wages; (10) whether unions are allowed; (11) whether minimum living conditions are met; (12) sexual orientation rights; (13) the guarantee of safe working conditions; (14) the use of child labour in production; (15) genetically modified material usage; and (16) gender religious and racial rights. (T Devinney, P Auger and G Eckhardt *The Myth of the Ethical Consumer* (Cambridge: CUP, 2010) pp 140-141.

footprint, but bring important business to impoverished producers. It is not possible comprehensively to label many products simply in terms of social or ethical criteria. Recent research by the Better Regulation Executive and National Consumer Council suggests that authorities should be cautious in their use of regulated information, and that the disclosure of complex information is particularly unappealing for consumers.[77] It found general agreement that 'information provision that made choices more complicated was unlikely to be successful.'[78]

A third difficulty is that even where consumers say that matters concern them and are provided with information about them, it is not clear how far they act upon them. Devinney Auger and Eckhardt found that while consumers typically claim significant interest in such issues, they generally do not act accordingly, and that 'providing people with information about the social issues did not seem to influence their choice.'[79] If this is correct, publicizing such matters may be neither effective as a sanction, nor useful in improving market discipline.

A final and significant difficulty in relying on adverse publicity to deliver social and ethical information is that to the extent that consumers care about ethical and related issues, they want to know those players in the market who perform well in addition to those who perform poorly. By definition, adverse publicity focuses on the latter. There is an argument for any regime that emphasises information and consumer choice to be more comprehensive. As will be seen below, there is a welcome movement in regulation towards the provision of such information.

**Adverse publicity as information: rights redress and feedback**

As well as helping consumers to make informed purchasing choices, adverse publicity may also provide useful *post* contractual information. For example, by publicising details

[77] BRE/NCC above, n 8.
[78] Ibid, p 11.
[79] Devinney, Auger and Eckhart above n76, p 116.

of wrongdoing, enforcers may help consumers to identify that they have been victims and to seek compensation. As Yeung observes, where private enforcement is possible 'publicity campaigns directed at regulatory violations may encourage aggrieved individuals to mount private enforcement actions, thereby directly contributing to the vigour of regulatory enforcement.'[80] Publicity may also operate as an enforcement feedback mechanism, as consumers are alerted to a trader's activities and may help enforcement authorities to monitor the success of their actions. This will help inform whether further regulatory action is desirable.

The RES Act contains a number of provisions which may involve the use of publicity to ensure consumers receive redress. Traders are able to offer enforcement undertakings to enforcers which involve, in Macrory's words 'the potential of imposing fit for purpose sanctions which are more satisfying for both offender and victims of non-compliance.'[81] The action that the business can undertake must be: to ensure the offence does not continue or recur; to secure that the position is restored (so far as possible) to where it would have been without the offence; to pay money to benefit anyone affected by the offence; or other actions specified by the minister in the order.[82] Where a trader is offering to restore a position or pay compensation, it is likely that s/he will also have to publicise this in order to bring it to the attention of those affected. The other RES Act power of particular relevance is the restoration requirement (an example of what the Act calls Discretionary Requirements). Under this provision, an enforcer may give a trader a notice which sets out the steps the trader must take to restore the position (so far as possible) to where it would have been had the offence not been committed.[83] In many cases, this will involve publicising the original wrongdoing and the redress or similar

[80] Yeung above n 10, at 18.
[81] Macrory above n 6, para 4.18. Macrory referred to the powers as enforceable undertakings in his report.
[82] BERR *Regulatory Enforcement and Sanctions Act 2008 Guidance to the Act* (July 2008) para 60. See RES Act s.50.
[83] RES Act s.42(3)(c).

corrective action available. A two year Pilot will test the utility of applying RES Act powers in consumer protection.[84]

**Adverse publicity as information: standard setting and education**

Adverse publicity might be justified as a method of communicating to firms and consumers what is expected of the former. Because they frequently lack understanding of consumer law, traders sometimes apply a 'spirit of the law' or 'common sense' test rather than one based on legal requirements.[85] There is nothing to stop enforcers informing firms directly of the standards they expect, and it is clear that this is done outside any formal use of adverse publicity. But adverse publicity may help to bring home that message forcefully and clearly. As noted above, the OFT has stated that when it publicises details of its actions, such as litigation and undertakings, it takes account of the need to increase consumers' awareness of their rights, educate other businesses, and facilitate complaints about further breaches. This educational role of adverse publicity is important. Publicity may focus on a particular trader (for example following successful enforcement action) but may also be used to draw the attention of the public to more systemic problems within a sector, perhaps as part of a wider campaign. The FSA has explained that when it issues press releases, it is making a statement about *inter alia* what it finds unacceptable and what 'consumers and firms should be alert to.' It might be argued that if traders are to have a better picture of what is and what is not acceptable, it would be appropriate to publish details even when a trader is found to be in compliance. The Advertising Standards Authority publishes details of all its adjudications for this reason.[86]

**Adverse publicity as information: raising the standing of the enforcer**

Adverse publicity may raise the profile and standing of the enforcer. Rourke observes that agencies use publicity 'as an avenue through which the public may be acquainted –

[84] LBRO/OFT Civil Sanctions Pilot (OFT 1296) December 2010.
[85] OFT above n 20, para 1.22.
[86] See Brooker above n 73, p 16

or more than acquainted – with the objectives and achievements of executive agencies.'[87] If the enforcer's aim were merely to persuade consumers to think highly of it then this would be a cause for concern. However, if adverse publicity helps consumers to understand the context of enforcement, that would appear desirable. When examining food hygiene disclosure, Van Erp identifies an aim of such regimes as accountability, arguing that informing the public about the activities of an enforcement authority improves the image of the authority and, and as result, aids compliance.[88] Similarly, the Chairman of the Australian Competition and Consumer Commission accepts that an aim of adverse publicity is to enhance the transparency and accountability of his organisation's work.[89] As noted above, adverse publicity might help to educate consumers, not just about the firm in question, but about common problems within a sector.[90]

## PART THREE: RE-CONCEIVING ADVERSE PUBLICITY

### The risks and rewards of adverse publicity

The discussion above has outlined the role of adverse publicity as sanction and information tool, while recognising that the distinction between these is imperfect. It is important now to draw the themes from the discussion above, and to consider how the concerns may be addressed.

The article has identified deterrence and compliance as the principal aims of adverse publicity when examined through the lens of sanctioning. Adverse publicity should deter traders from deciding to engage in wrongdoing (broadly interpreted) and incentivise them to take precautions to avoid unintentionally producing the harm that would lead to such publicity. There is some evidence that regulatory offences are not always taken

[87] Rourke above n 28 at 231.
[88] J van Erp "Effects of Disclosure on Business Compliance: a Framework for the Analysis of Disclosure Regimes" (2007) 5 European Food and Feed Law Review 255.
[89] A Fels "Australia's Competition Regulator and the Media" cited in Yeung,above n 10, at 3.
[90] Brooker above n 73 p 10.

seriously, either by the perpetrators or by the public.[91] While this is probably because of the very low formal sanctions that are typically imposed, it may also be because relatively little stigma attaches to their commission. There is also evidence that consumers do not always take what might be described as social and ethical matters into account when making purchasing decisions. While these are of concern, they may be overstated. There seems little doubt that firms take negative publicity very seriously, and there is evidence that some forms of adverse publicity are likely to have a significant impact upon consumer decision-making.[92]

Of more concern is the argument that adverse publicity may operate disproportionately as a penalty, particularly because it is so difficult to control. Coffee describes it as 'something of a loose cannon', arguing that 'its exact impact cannot be reliably estimated nor is it controllable so that only the guilty are affected.' He concludes that 'it seems easier to rely on even cash fines in preference to the wholly unpredictable impact of a legal stigma.'[93] Whitman also notes the potential for adverse publicity to be disproportionate, suggesting that 'once the state stirs up public opprobrium against an offender it cannot really control the way the public treats that offender.' He thereby concludes that this risks conferring 'too much enforcement power on a fickle and uncontrolled general populace'.[94] More recently, the Better Regulation Task Force raised concerns about the potential for adverse publicity to operate unfairly.[95]

There are difficulties balancing the deterrent value of adverse publicity with the need for sanctioning to be proportionate. Yeung suggests that publicity is likely to aid deterrence,

[91] Borrie argued that fines are sometimes viewed by traders as "tiresome pinpricks, minor inconveniences that are shrugged off and the fines put down as a business expense." Gordon Borrie *The Development of Consumer Law and Policy – Bold Spirits and Timorous Souls* (London: Stevens and Stevens, 1984) p 56.
[92] See below.
[93] John C Coffee Jr "No Soul to damn no Body to kick" An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Mich L Rev 386, at 427-428.
[94] Whitman cited in Yeung, above n 10, at 40.
[95] Better Regulation Task Force *Avoiding Regulatory Creep* (Cabinet Office, 2004).

but that this may come at the expense of proportionality.[96] Van Erp also emphasises fairness and proportionality, but she notes practical, as well as ideological, objections to any excess stigma that arises from adverse publicity. Where any form of sanctioning is excessive there is a danger that it will produce defiance.[97] The sense of grievance is likely to be particularly great where the media sensationalises the story, or its significance is otherwise misconstrued or exaggerated by the public. Any such defiance will make the regulator's task of securing compliance particularly difficult.[98]

By contrast, Fisse and Braithwaite argue that to assume that the impact of a sanction must be finite and proportionate to the relevant offence is false: 'the most that is required to satisfy the principle of proportionality is formal proportionate quantification of sentence in advance, irrespective of the degree of impact upon an offender.'[99] This seems a weak defence. If the effect of an enforcer's conduct is disproportionate to any wrongdoing, then it should consider forbearance. However, adverse publicity may result from a trader being sanctioned without that publicity being sought by the enforcer. Some publicity is inevitable, and this may not accurately reflect the degree of culpability on behalf of the trader. The advantage of having the enforcer control adverse publicity is that it helps to manage the way that publicity results and thus guards against disproportionality. The use of the internet to shape reputations raises particular concern. Rumour and conjecture may do significant damage to traders, and this may not be easily undone. At its most serious, traders may be subjected to a form of 'brand assassination.'[100] Fairness may lead us to a regime which carefully considers and controls how information is communicated. As Brooker comments '[o]fficial comment

[96] Yeung above n 10 at 41-42.
[97] Van Erp, above n 88 at 6. The author illustrates this with the example of the several hundred employees and proprietors of Chinese restaurants in Rotterdam who protested against what they saw as disproportionate action by the Food Safety Authority.
[98] See e.g. AA Painter "Why Prosecute?" (1974) British Food Journal 38.
[99] Fisse and Braithwaite above n 10 p 310.
[100] The Economist "The blog in the corporate machine" 9 February 2006. Cited in Brooker above n 73 p 19. Note also the concern about websites such as Trip Advisor.

from regulators is surely preferable to the rumour mill.'[101] The question is not whether negative publicity should be generated. Instead, the focus should be on (a) how it might be generated; and (b) how it can best be managed.

Another concern is whether adverse publicity is helpful when so much enforcement activity is informal and based upon compliance strategies. The emphasis on compliance is striking in consumer protection law, and there will be a limited role for adverse publicity as part of a compliance regime. However, while that role may be limited, it will nevertheless be important. Compliance strategies take place against the background of the threat of sanctioning. Given the potential for adverse publicity to operate as a deterrent it has a role in a regime that emphasises compliance. However, there is concern that compliance strategies depend upon the existence of trust and co-operation between regulator and regulated. Where traders fear that regulators will be too ready to generate adverse publicity, they may be reticent to disclose evidence of wrongdoing. The powers being tested by the Civil Sanctions Pilot will be influential here. It seems likely that the existence of sanctioning tools will be sufficient to persuade many traders to do as the enforcer's request, and this is likely to involve either the enforcer, or the trader, publicising the latter's actions.

When examining adverse publicity as information, a number of concerns are evident. First, many consumers will not use the information disclosed, even where it appears objectively useful. In addition, it is difficult to decide what to disclose. Disclosing that a trader has breached consumer protection law is relatively straightforward, but rather narrow. Brooker favours disclosure 'when a regulator, or other organisation in the regulatory framework, has imposed a formal sanction (as stipulated by Macrory) or has failed to meet acceptable performance standards.'[102] This approach is justified on a number of bases. First, in these circumstances, the facts will all have been considered

[101] Brooker above n 73, p 10.
[102] Ibid, p 15.

and a decision will have been made that the firm is not in compliance. Secondly, a clear process will have been followed to reach this point. Thirdly, the organisation making the decision is part of the regulatory system and so is accountable for that decision.[103] By disclosing in such circumstances, stakeholders should be confident that appropriate procedures have been followed. There are attractions to this approach, particularly where a formal sanction has been imposed. Disclosing where traders have failed to meet 'acceptable performance standards' is more problematic, as the term is potentially very broad. Some regulators are specifically empowered to disclose such information. For example, the Utilities Act 2000 placed a duty on Energywatch to provide consumers with information about overall performance while the Water Act 2003 required the Consumer Council for Water to publish statistical information about complaints.[104] Other organisations, such as the Financial Services Authority and the Food Standards Agency, are subject to a public interest test. However, there is evidence that some enforcement authorities felt prohibited from disclosing information by part nine of the Enterprise Act. While there was some reason to show caution, research has concluded that regulatory practice was rather more cautious that was required by the legislation.[105] It should be noted that under the RES Act, enforcers will be required to publish details of any enforcement action, such as where a civil sanction is imposed or an undertaking accepted. The Guidance to the Act suggests that enforcers might append a list of cases taken in an annual report or maintain a database of sanctioning decisions taken. [106] While this does not restrict other publicity options available such as the issuing of press releases, it may signal a move towards more systematic reporting of enforcement action.

**Adverse publicity and positive publicity: towards an optimal balance**

It is vital that where consumers are invited to act upon adverse publicity, whether it is presented as a sanction or merely as information, they are able to see that information

[103] Ibid.
[104] Ibid, p 19 for discussion.
[105] Ibid pp 14-15.
[106] BERR *Regulatory Enforcement and Sanctions Act 2008 Guidance to the Act* (July 2008) para 71.

in context. This is particularly important where the trader may not have been found in breach of the law. It might involve providing additional textual information, or presenting more comprehensive information about all traders, and not just those who fall foul of the law or who display poor performance. Just as consumers want to be able draw appropriate adverse conclusions about traders, so they want to be able to draw appropriate positive conclusions about them. One model is to provide objective information about all firms within a given category, thus allowing consumers to draw appropriate inferences. This might be achieved by tables of all firms within a sector which show objective data and enable consumers to make comparisons. Such tables provide compelling incentives for firms to score highly on the relevant criteria. Two very recent developments are particularly interesting here.

## PUBLISHING DETAILS OF COMPLAINTS AGAINST FINANCIAL SERVICES FIRMS

In January 2010 the FSA announced that it would require firms that receive 500 or more complaints over a 6 month period to publish twice yearly: how many complaints they have opened and closed, the percentage closed within eight weeks and the percentage of complaints upheld.[107] These firms generate approximately 95 per cent of the complaints reported to the FSA. Firms present this information under five areas: banking, home finance, general insurance and pure protection, life and pensions, and investments. The FSA publishes both aggregate and firm-level data on its website.[108] The FSA's director of conduct policy argues that this greater transparency helps consumers to make better-informed decisions by presenting a picture of how firms handle complaints while also giving firms clear incentives to improve. [109]

[107] The FSA defines a complaint as: "any oral or written expression of dissatisfaction, whether justified or not, about the firm's provision of (or failure to provide) a financial service which alleges that the customer has suffered (or may suffer) financial loss, material distress or material inconvenience." Firms are not obliged to report complaints that are resolved to the customer's satisfaction by the close of the business day after the complaint was made.

[108] See http://www.fsa.gov.uk/Pages/Library/Other_publications/commentary/index.shtml accessed 8-10-10.
[109] For the background to the FSA's thinking on transparency see FSA above n 59.

Principle six of the FSA's 'Principles for Businesses' requires each firm to 'pay due regard to the interests of its customers and treat them fairly.' A report for the FSA identified certain principles which reflected the consumer perspective on fairness. Among those were 'do your best to resolve mistakes as quickly as possible' and 'do not take advantage of the customer'. The report also found a view that 'providers are quick to charge customers for their mistakes but less ready to pay out in recognition of their own errors.'[110] Other studies have suggested how fairness in the firm-consumer relationship might be conceived, with redress again looming large.[111] Against this background, the publication of complaints data may be used as a proxy indicator of fairness.

It is clear that the FSA intends consumers to use this information in choosing firms. It should be viewed alongside the publication by the Financial Ombudsman Service of complaints with which it deals, as the FOS receives complaints only after consumers have not been able to obtain satisfaction from a firm. The combined information provides a helpful indication of how firms deal with complaints. Given that this is something which matters to consumers, it will assist them in making informed choices as well as providing compelling incentives on firms to improve. There is some evidence of the media picking up the data and, in some cases, displaying it prominently.[112]

## THE NATIONAL FOOD HYGIENE RATINGS SCHEME

A variation on the initiative above is to use some form of certification as an indicator of quality. The Food Hygiene Ratings Scheme ('the Scheme') is an initiative of the Food Standards Agency and local authorities which aims to 'help consumers choose where to

[110] FSA *Treating Customers Fairly: The Consumers' View* (FSA Consumer Research 38, June 2005) p 37.
[111] See e.g. P Cartwright "Conceptualising and Understanding Fairness: Lessons for and from Financial Services" in M. Kenny, J.Devenney and L. Fox O'Mahony (eds) *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (Cambridge: Cambridge University Press, 2010) 205 at pp 222-225.The FSA's Consumer Protection Strategy also seeks to ensure that consumers receive prompt and effective redress.
[112] See e.g. Daily Mirror "Food hygiene inspectors shut down own canteen over bugs and 'bad practices': http://www.mirror.co.uk/news/weird-world/2010/09/02/food-hygiene-inspectors-shut-down-own-canteen-115875-22530686/#ixzz1FMaupNnG (last visited 29-2-11).

eat out or shop for food" by giving them information about the hygiene standards in food outlets.'[113]

Food hygiene ratings are based upon an assessment by a local authority food safety officer of: how hygienically food is handled; the condition and structure of the buildings; and how the business manages and records its food safety activities. Handling covers matters such as the preparation, cooking, and storing of food. When examining the buildings, the officer will look at issues such as cleanliness and ventilation. The business then receives an overall rating on a scale from 0 to 5. When the Scheme was first developed, it was referred to as a 'Scores on the Doors Scheme.' While memorable, this could be criticised, particularly because there is no power to require firms to display the results on their doors, or, indeed, anywhere else. Businesses are merely encouraged to display stickers or certificates containing details of the where consumers can see them.

The Hampton Report had emphasised the role of positive incentives in securing compliance, and urged the Better Regulation Executive to encourage regulators to adopt positive incentives schemes.[114] The Scheme provides a compelling incentive for firms to improve their hygiene ratings so that they can advertise this. It is clear that consumers take food hygiene very seriously, with a snap shot survey carried our recently for the FSA indicating that 8 per cent of consumers regard hygiene standards to be extremely important when eating out. Those interviewed used proxy indicators of hygiene such as appearance (both of staff and the establishment) to make decisions. In the words of the FSA's Chairman 'we wanted to give people the ability to judge for themselves whether they considered the hygiene standards of a food outlet to be good enough.'[115]

The Scheme offers a glimpse of how reputation may be used as a tool of consumer protection policy. It has certain clear attractions. First, it provides information on quality

[113] http://www.food.gov.uk/news/newsarchive/2010/aug/fhrs
[114] Hampton above n 4, recommendation 11.
[115] FSA "National Food Hygiene Scheme Launched" (30th November 2010).

which a large proportion of consumers state is relevant to their decision-making. Secondly, rather than focusing solely on information that impacts negatively upon a trader, it also provides positive information that will reassure consumers. In so doing, it provides a very clear incentive upon traders to make food hygiene as a matter of priority. While the media are likely to pick up on poor scores, consumers are able to search for traders with higher ratings. The Scheme is likely, therefore, to operate both as a sanction and as an informational tool.

An obvious limitation of the Scheme is that as there is no compulsion on traders to disclose ratings, only those who score highly will publicise these ratings.[116] The ratings of all firms will be available, but only online. It is likely that tables of food outlets will be compiled, and so information will become more readily available. However, in this respect it compares unfavourably with schemes such as the Restaurant Hygiene Quality Cards system which was established in Los Angeles County in 1997. The Los Angeles scheme required restaurants to publicise in their front windows the grade that reflected inspection findings. It has been stated that in the Scheme: 'a restaurant's grade is available when users need it, at the time when they make a decision about entering the establishment; where they need it, at the location where purchase of a meal will take place; and in a format that makes complex information quickly comprehensible.'[117] There is evidence that those restaurants with high grades received increases in revenue, while those with low grades suffered. In addition, research found a reduction in hospitalisations as a result of food-related illnesses as a result of increases in the quality of hygiene. [118] According to Weil *et al*: 'more informed choices by consumers appear to

[116] Requiring businesses to disclose their ratings on the premises would require legislation.
[117] Weil, Fung, Graham and Fagotto above n 5 at 169. See also JE Fielding, A Aquirre, MA Spear and LE Frias "Making the grade: Changing the incentives in retail food establishment inspection" (1999)(17) American Journal of Preventative Medicine 243.
[118] See GZ Jin and P Leslie "The effect of information on product quality: Evidence from restaurant hygiene grade cards" (2003) 118 Quarterly Journal of Economics 409 and PA Simon P. Leslie G Run GZ Jin R Reporter A Aguirre and JE Fielding "Impact of restaurant hygiene grade cards on foodborne disease hospitalizations in Los Angeles County" (2005) 67(7) Journal of Environmental Health 32.

have improved hygiene practices, rewarded restaurants with good grades, and generated economic incentives that stimulated competition among restaurants.'[119]

In the UK Scheme, traders can ask for an additional inspection where they can demonstrate that they have taken steps to improve the matters that led to the initial rating. Commentators have long championed that where firms improve their performance, this should be celebrated. Fisse and Braithwaite see some role for what they describe as 'ceremonial reintegration.' Just as a failure to react appropriately to transgression would justify adverse publicity, so would an appropriate response deserve praise: 'if they [traders] come up with an exemplary performance, their virtue should be announced by the court as a reward.'[120] This is discussed in the context of court-based publicity sanctions, and it is not clear that such an approach would be appropriate under the National Food Hygiene Rating Scheme. Nevertheless, there has been an emphasis on traders being able to demonstrate publically that they have addressed the non-compliance that led to the earlier rating. This also guards against the potential for the Scheme to operate disproportionately.

It is too early to tell how successful the consumer complaints and Food Hygiene Rating schemes will be. Their rationale has been warmly greeted in some quarters. For example, it has been suggested that 'by providing consumers with independent information about quality indicators – such as compliance rates or upheld complaints – our regulatory institutions can help to square the virtuous circle and promote consumer power.'[121] The Food Hygiene Ratings Scheme in particular is to be welcomed as an information tool, given the way in which it provides information which is of considerable interest to consumers in a clear and readily understandable manner. It also provides significant incentives to traders to take steps to improve their hygiene. The publication of

[119] Weil, Fung, Graham and Fagotto above n 5 at169.
[120] Fisse and Braithwaite above n 10, p 308.
[121] Brooker above n 73 p 13.

complaints data is less compelling as an information tool. The information is more difficult for consumers to understand, and firms can legitimately claim that it might in some cases provide a misleading picture of the firm's treatment of consumers. Nevertheless, as a way of incentivising firms to improve their complaints handling, there is no doubt that it plays a role.

## CONCLUSIONS

It is inevitable that traders will sometimes act in a way that generates adverse publicity. Where their conduct receives the attention of enforcers, those authorities have to consider how they will use such publicity to achieve regulatory objectives. In the context of consumer protection, adverse publicity may be used in two principal ways. First, it may be used as or alongside a sanction, as part of the enforcement process. It has potential to operate as a compelling deterrent, and while there are concerns that it may potentially operate in a disproportionate manner, if it is carefully managed, it should incentivise traders to meet the requirements of the regimes under which they operate. Secondly, adverse publicity may be used to attempt to correct the information asymmetry that exists between traders and consumers. Publicising sanctions imposed on traders helps to inform consumers about definable and potentially significant matters, such as the trader's wrongdoing, the standards the enforcer expects and, where appropriate, the action that a consumer should take to obtain redress. Publicising social and ethical matters and performance standards is more problematic, particularly where that conduct does not fall foul of the law. There is a danger that consumers will not see the information is context and that the publicity will either be unfair to traders, or unhelpful to consumers.

The recent initiatives by the Financial Services Authority and the Food Standards Agency reveal how it is possible to develop regimes which inform consumers and raise standards. While neither is perfect, they demonstrate how adverse publicity may be generated alongside more favourable information in a manner that consumers can use.

At a time when there is a determination to provide more responsive and flexible forms of regulation, and to respect and bolster consumer sovereignty, the case for using adverse publicity is compelling.