



**Law  
Commission**  
Reforming the law

# Consumer Redress for Misleading and Aggressive Practices





# **The Law Commission and The Scottish Law Commission**

(LAW COM No 332)

(SCOT LAW COM No 226)

## **CONSUMER REDRESS FOR MISLEADING AND AGGRESSIVE PRACTICES**

*Presented to the Parliament of the United Kingdom by the Lord Chancellor  
and Secretary of State for Justice  
by Command of Her Majesty*

*Laid before the Scottish Parliament by the Scottish Ministers*

*March 2012*

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The text of this report is available on the Internet at:

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**THE LAW COMMISSION  
THE SCOTTISH LAW COMMISSION**

**CONSUMER REDRESS FOR MISLEADING AND  
AGGRESSIVE PRACTICES**

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**THE LAW COMMISSION**  
**AND**  
**THE SCOTTISH LAW COMMISSION**  
**CONSUMER REDRESS FOR MISLEADING AND**  
**AGGRESSIVE PRACTICES**

**SUMMARY**

- S.1 This Joint Report by the Law Commission and Scottish Law Commission considers the redress available to consumers who have been the victims of misleading or aggressive practices by traders.
- S.2 Sanctions against such practices are set out in the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations).<sup>1</sup> The Regulations concern public enforcement rather than private redress. They do not give consumers the right to start civil actions to obtain compensation or other remedies. Instead, consumers must rely on existing private law doctrines, such as the law of misrepresentation and duress. This is problematic: the law of misrepresentation is complex and uncertain; while the law of duress leaves gaps in protection.
- S.3 Misleading and aggressive trade practices are common and lead to a high level of consumer detriment.<sup>2</sup> They are a particular problem for vulnerable consumers. In the course of this project, we were given many examples of elderly consumers who had suffered unscrupulous hard-selling on the doorstep, where, for example, salesmen pretended to be from social services or refused to leave when asked.

**CALLS FOR REFORM (Part 1)**

- S.4 In 2009, Consumer Focus called for a private right of redress for all consumers who suffered loss through a breach of the Regulations. They pointed out that scams are all too common but relatively few prosecutions are brought. They thought that enforcement would be more effective if public authorities and consumers “worked in tandem”, using both private and public enforcement sanctions.<sup>3</sup>

<sup>1</sup> SI 2008/1277.

<sup>2</sup> Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2009) p 3.

<sup>3</sup> Above.

- S.5 These calls were echoed at European level. In 2009, the European Parliament asked member states “to consider the necessity of giving consumers a direct right of redress” to ensure that they are sufficiently protected against unfair commercial practices.<sup>4</sup>
- S.6 In 2010, the Department for Business, Innovation and Skills (BIS) asked the Law Commission and Scottish Law Commission to conduct this review.<sup>5</sup> Our aims are:
- (1) to simplify redress for misleading commercial practices;
  - (2) to simplify redress for aggressive commercial practices; and
  - (3) to fill gaps in protection, where a consumer is unable to gain redress for serious breaches of the Regulations.
- S.7 This Report does not include a draft Bill, but we understand that our recommendations will be considered as part of the Government’s proposed new Consumer Bill of Rights.

### **THE CURRENT LAW**

- S.8 At present, misleading and aggressive trade practices are covered by two sets of law. One is concerned with public enforcement and the other with private redress. The two systems are completely different: although they both address the same conduct, they use different terminology and concepts and lead to varied outcomes.

#### **Public law (Part 2)**

- S.9 The Regulations were introduced in 2008 to implement the Unfair Commercial Practices Directive 2005.<sup>6</sup> They replaced 23 previous enactments, including most of the Trade Descriptions Act 1968.
- S.10 Under the Regulations, traders may not engage in misleading or aggressive practices which would be likely to cause “the average consumer to take a transactional decision he would not have taken otherwise”.<sup>7</sup> The terms “the average consumer” and “a transactional decision” follow the wording of the Directive, and implement European law. These concepts seemed strange at first, but enforcement agencies are now becoming more familiar with them, and gradually finding them easier to use.

<sup>4</sup> European Parliament Resolution on the Transposition, Implementation and Enforcement of Directive 2005/29/EC and Directive 2006/114/EC OJ C 46 of 13 January 2009, para 12.

<sup>5</sup> For the full terms of reference please see paras 1.10 – 1.11 of this Report.

<sup>6</sup> Directive 2005/29/EC (OJ 2005 L 149).

<sup>7</sup> See for example Regs 5(2)(b) and 7(1)(b).

- S.11 The Regulations are enforced by Trading Standards Services (TSS) and the Office of Fair Trading (OFT) through criminal sanctions and enforcement orders.<sup>8</sup> Although courts may award compensation following a criminal conviction, this power is little used. The Regulations do not permit consumers to bring civil actions on their own behalf.

### **Private law (Part 3)**

#### ***Misleading practices***

- S.12 In private law, misleading actions fall within the law of “misrepresentation”, which is a large and varied set of rules. In theory the law provides redress for most misleading trade practices where consumers suffer detriment, but it is fragmented, complex and unclear. It is particularly difficult to apply in a consumer context, because the law primarily evolved to deal with business disputes. Furthermore, there are differences between the law of England and Wales and the law of Scotland, as is illustrated by the two diagrams on page 24 of the Report.
- S.13 In most cases of consumer misrepresentation, the consumer is induced to enter into contracts by misleading statements and seeks a remedy against the retailer or service provider. In these circumstances, their common law remedies for misrepresentation have been supplemented by statute. In England and Wales, the Misrepresentation Act 1967 applies. In Scotland, the issue is addressed by section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.
- S.14 The remedies available under these statutes are uncertain. The most useful remedy is the right to unwind the contract (referred to as “rescission” in England and Wales and “reduction” in Scotland). Unfortunately, it is unclear how quickly the right must be exercised, or how far the consumer must return goods or services. Where the right to unwind has been lost, it is unclear what other remedy the consumer might be entitled to.

#### ***Aggressive practices***

- S.15 The current civil law on aggressive practices lacks a coherent framework, and it provides only patchy and inadequate protection.
- S.16 The most important doctrines are “duress” in England and Wales and “force and fear” in Scotland. These doctrines developed through cases which were not brought by consumers, and the law is not readily accessible to non-lawyers. The doctrines are particularly difficult to apply where the trader does not make explicit threats to the consumer’s person or goods. It therefore fails to provide a usable remedy against high-pressure sales tactics, such as doorstep salespersons who refuse to go away.

<sup>8</sup> In Scotland, all criminal prosecutions are conducted by the Crown Office and the Procurator Fiscal Service on behalf of the Lord Advocate.

- S.17 Doctrines such as undue influence, facility and circumvention, unconscionable bargain and intimidation may apply. Their scope, however, is extremely uncertain. The Protection from Harassment Act 1997 is helpful in some circumstances, but it usually requires “a course of conduct”, rather than a single incident.

#### **THE CASE FOR REFORM (Part 4)**

- S.18 In April 2011 we published a Consultation Paper and received 71 responses. Consumer groups and TSS agreed strongly that the current law of misrepresentation was overly complex:

The availability of existing remedies is patchy at best. Furthermore, where protection does exist, the remedies are too complex for consumers to understand and as a consequence, are rarely used. [Which?]

The current position is confused and very challenging for lawyers, advisers and enforcers, and well-nigh impossible for consumers to understand. [Highland Council Trading Standards]

- S.19 Business groups also incur unnecessary costs in having to come to grips with the Regulations and with the different concepts used in private law. Several welcomed reform:

The BRC agrees that reform would be useful provided the outcome leads to something that is simpler to understand for all parties. [British Retail Consortium]

Sky ... supports a clearer system for consumer redress reflecting the principles set out in the Consumer Protection Regulations. [British Sky Broadcasting Group]

- S.20 As far as aggressive practices are concerned, many consultees argued that there was an urgent need to fill a gap in the law:

We believe that the extension of private redress to aggressive practices is essential. This is a gap in consumer protection that cancellation rights and information provisions cannot always fill. As the consultation explains, it is easy for rogue traders to evade these provisions and to rely on pressure selling and scare tactics to sell products or to secure payments consumers would not otherwise agree to make. [Citizens Advice]

We completely agree ... that the existing causes of action do not address the specific problems arising from high pressure selling practices and that ... the current law provides little redress for unscrupulous and often commission-based hard selling. [Age UK]

- S.21 We conclude that there is a pressing need to improve consumer redress against aggressive practices. We were told of many cases of consumer detriment, often involving vulnerable elderly consumers in their own homes. With the increase in people aged over 85 living alone this problem is likely to grow.

## TARGETED REFORM

- S.22 We recommend new legislation to provide redress to consumers who experience misleading and aggressive practices in their dealings with traders. Our aim is to clarify and simplify the current law on misleading practices, and to improve the law on aggressive practices by filling the gaps in the current law.
- S.23 We recommend targeted reform. We do not propose that consumers should have a right of redress simply because there has been a breach of the Regulations. Instead, we recommend a new right only where there is a clear problem in the marketplace.
- S.24 In particular, we recommend that
- (1) There must be a contract between the parties or a payment made by the consumer. Thus consumers would not, for example, be entitled to compensation if they visited a shop in response to a misleading advertisement but did not buy anything. Nor would consumers have a separate right to compensation for being misled about their rights.<sup>9</sup>
  - (2) The consumer would only have a right against the other party to the contract, usually the retailer or service provider. The legislation would not provide additional rights against others in the supply chain, such as producers or against individual directors.<sup>10</sup>
  - (3) The list of banned practices under the Regulations would not give rise to automatic redress; they would only be covered by the new right if they would affect an “average consumer”.<sup>11</sup>
  - (4) The general prohibition against commercial practices which are “contrary to the requirements of professional diligence” should not give rise to redress. It is too uncertain.<sup>12</sup>
  - (5) Land transactions and financial services should not be covered.<sup>13</sup> Instead the existing law should remain.
- S.25 Our terms of reference do not extend to reforming court procedures or access to advice. We are aware, however, that our proposed remedies will be enforced in a variety of settings: through compensation orders, ancillary to criminal proceedings; in negotiations between traders and consumers; and through court proceedings.
- S.26 This means that remedies need to be simple and standardised. When facing choices between simplicity on the one hand and flexibility on the other, we have opted for simplicity. The law should be suited to the forum in which it is enforced.

<sup>9</sup> Paras 6.23 to 6.60.

<sup>10</sup> Paras 6.61 to 6.93.

<sup>11</sup> Paras 4.40 to 4.63.

<sup>12</sup> Above.

<sup>13</sup> Paras 6.94 to 6.120.

## **THE ELEMENTS OF LIABILITY**

S.27 We recommend a new statutory right of redress for a consumer against a trader. The consumer would need to show that:

- (1) The trader carried out a misleading or aggressive practice;
- (2) this was likely to cause the average consumer to take a decision to enter into a contract or make a payment they would not have taken otherwise;<sup>14</sup> and
- (3) the misleading or aggressive practice was a significant factor in the consumer's own decision to enter into the contract or make the payment.<sup>15</sup>

S.28 Where the consumer has entered into a contract, the consumer's right would lie against the other party to the contract. Where the consumer had made a payment, their right would lie against the party to whom the payment was made.<sup>16</sup>

### **Defining a misleading practice<sup>17</sup>**

S.29 The new right would follow the substance of the definition of misleading practice in Regulation 5(2)(a) by stating that a commercial practice is misleading if it contains false information, or if it is likely to mislead the average consumer in its overall presentation.

S.30 This approach moves away from the distinctions drawn under current law based on whether the misrepresentation is "false" or "factual". It also moves away from the traditional language of acts or omissions, which is unhelpful, as much conduct does not fall clearly into either category.<sup>18</sup>

### **No liability for "pure omissions"<sup>19</sup>**

S.31 Under Regulation 6 it is a criminal offence for a trader to omit or hide material information. The most controversial issue was whether consumers should have a right of redress for a "pure" omission, where the overall presentation was not misleading but material information was omitted. Views were mixed. Many consumer groups argued that the new legislation should mirror the Regulations. The OFT also said that it "may confuse consumers as well as the courts" if Regulation 6 were not followed.

S.32 By contrast, business groups argued that it would be too uncertain to introduce a private right of redress specifically for all material omissions; the scope would be difficult to define; and it would represent a departure from the current approach of UK law.

<sup>14</sup> Paras 7.85 to 7.116.

<sup>15</sup> Paras 7.107 to 7.116.

<sup>16</sup> Paras 6.61 to 6.93.

<sup>17</sup> Paras 7.38 to 7.61.

<sup>18</sup> Paras 7.3 to 7.37.

<sup>19</sup> Paras 7.3 to 7.37.

- S.33 We have concluded that there should not be a private right of redress for “pure” omissions. We would, however, welcome a review by BIS of the effect of the Regulations in five years time. If the test has proved too narrow, this decision could be reconsidered.

#### **Defining an aggressive practice<sup>20</sup>**

- S.34 The definition of aggressive practices would follow the substance of Regulation 7. We think that some of the blacklisted aggressive practices would provide helpful examples illustrating the coverage of the new Act. Pressure selling and doorstep salespersons overstaying their welcome should be expressly included as examples of aggressive practices.

#### **Defining the “average consumer”<sup>21</sup>**

- S.35 The Regulations use the concept of the “average consumer”. This hypothetical person is “reasonably well informed, reasonably observant and circumspect”.<sup>22</sup> We recommend that the new right should mirror this test. Practices are only misleading or aggressive if they would be likely to cause this hypothetical consumer to take a decision they would not have taken otherwise.
- S.36 As with the Regulations, in some cases the test of the average consumer would be replaced with a test of the average vulnerable consumer. This would apply where:
- (1) the commercial practice is directed to a particular group of consumers; or
  - (2) a clearly identifiable group of consumers is particularly vulnerable to the practice because of “their mental or physical infirmity, age or credulity” in a way which the trader could reasonably be expected to foresee.<sup>23</sup>

#### **A REPLACEMENT STATUTE<sup>24</sup>**

- S.37 The recommended new right covers substantially the same ground as the Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (in Scotland). We think the new legislation should replace these provisions in so far as they cover business to consumer transactions within the ambit of the new Act.
- S.38 Other common law and contractual remedies would remain. In particular, consumers would continue to be able to make claims under the Sale of Goods Act 1979 where goods are of unsatisfactory quality, though consumers would not be entitled to double recovery.

<sup>20</sup> Paras 7.62 to 7.84.

<sup>21</sup> Paras 7.87 to 7.106.

<sup>22</sup> Reg 2(2).

<sup>23</sup> Reg 2(5).

<sup>24</sup> Paras 7.117 to 7.137.

## REMEDIES (Part 8)

- S.39 Stakeholders told us that there was a need for certain, standardised remedies, even if these were sometimes “rough and ready”. The most important remedy is the right to unwind the contract and obtain a refund. This fits with the primary aim of current private law, which is to restore the consumer to the position they were in before the misleading or aggressive practice took place.
- S.40 Under the new legislation consumers would have two tiers of remedies. Tier 1 remedies would be the standard remedies and would apply on a strict liability basis. The amount would be based on the price paid and would not require evidence of loss. This means they could be used in both the civil courts and alongside enforcement action, for example in criminal compensation orders. By contrast, Tier 2 remedies would apply only if the consumer proved additional loss; they would also be subject to the trader’s due diligence defence.

### Tier 1 remedies<sup>25</sup>

- S.41 The type of Tier 1 remedy would depend on how soon after the event the consumer complains and whether the consumer has fully consumed the product:
- (1) **The right to unwind.** If the consumer raises a complaint within three months, and is able to reject some element of the goods or service, then the standard remedy is to unwind the contract. This means that the consumer can get a refund.
  - (2) **Discount.** If the consumer waits more than 3 months to sue or if the goods or services are fully consumed, then the consumer can claim a discount on the price.

### Tier 2 remedies<sup>26</sup>

- S.42 Tier 2 remedies provide damages to compensate for indirect losses, including economic damage and distress and inconvenience. They are provided only if the consumer can prove that the unfair practice caused actual loss, meeting a “but for” test of causation. Furthermore, the trader can avoid this consequential liability if it can establish a due diligence defence.
- S.43 The basic structure of the consumer’s remedies would be as follows:

<sup>25</sup> Paras 8.27 to 8.143.

<sup>26</sup> Paras 8.144 to 8.175.

<b>CONSUMER REMEDIES</b>		
<b>When available</b>	<b>Standard (Tier 1)</b>	<b>Optional (Tier 2)</b>
Up to 3 months, provided some element of the product is either returned or rejected	Refund  Unwind - both parties are released from their obligations (if any)	Indirect economic losses  Damages for distress and inconvenience
After 3 months, or if product fully consumed	% discount on price	

### **UNFAIR PAYMENT COLLECTION (Part 9)**

- S.44 There is uncertainty about how far the Regulations cover misleading or aggressive demands for payment. They clearly include demands made following a sale but problems arise in other contexts. For example, consumers accused of copyright infringement or shoplifting, or those who have had their car towed, might be misled or pressured into paying significant sums of money.
- S.45 We recommend that the Regulations should be amended to clarify that all commercial demands for payment are included within the definition of commercial practices. There was strong support for this, to protect consumers and to ensure consistency and clarity.
- S.46 We also recommend that the new right to redress should include misleading or aggressive demands for payment. The many examples submitted by consumer groups illustrate that consumers would benefit from clearer and more certain rights to redress in these cases.
- S.47 Where there has been an unfair demand for money and the money was not owed, the consumer would be entitled to a refund. Where it was owed, the consumer would not be entitled to a refund but would be able to claim for proven consequential losses, together with limited damages for proven distress and inconvenience.

### **CREDITOR LIABILITY (Part 10)**

- S.48 In Part 10 we consider the creditor's liability when a consumer has entered into a credit agreement to buy goods and services which have been sold in a misleading or aggressive way.

- S.49 In the Consultation Paper we proposed that section 75 of the Consumer Credit Act 1974 should be amended. This section applies to credit card and other connected credit purchases worth more than £100 and not more than £30,000. It makes a creditor liable for the supplier's misrepresentation and breach of contract, but not for the supplier's aggressive practices. There was significant opposition to this proposal and we do not recommend it.
- S.50 We conclude that consumers already have adequate redress under section 56(2) and section 140A of the Consumer Credit Act 1974.

### **IMPACT ASSESSMENT (Part 11)**

- S.51 An impact assessment is published alongside this Report, and summarised in Part 11. We anticipate three benefits from the proposals:
- (1) Easier complaint handling. Legitimate traders would find it easier to deal with complaints of misleading practices. TSS and advice agencies would also benefit from simpler, easier ways of valuing consumer loss. This saving is estimated at around £5 million.
  - (2) Consumers who have suffered a misleading or aggressive practice would receive more compensation, estimated at between £2 million and £5 million.
  - (3) Combating aggressive practices more effectively would increase consumer confidence, and therefore lead to increased sales. On a conservative estimate, improved protection might boost the market for doorstep sales by around £5 million.
- S.52 We do not include costs that would fall on rogue traders. We do not consider any additional compensation paid by rogue traders to be a true cost, as it is compensating consumers for actions which are already criminal offences. Better enforcement will bring some rogue traders into compliance, while others may no longer be able to continue trading. Again, this cost to rogue traders would be a gain to legitimate traders.
- S.53 There would be one-off familiarisation costs as traders, TSS officers and consumer advisers need to become familiar with the new law. These are estimated at between £3.75 million and £7.5 million.
- S.54 There may also be a few more court cases each year, including some which are ill-founded. We estimate that an additional 550 to 1,100 new cases may result, of which up to 330 may be ill-founded, at a cost to traders of up to £330,000.

### **FURTHER INFORMATION**

- S.55 The full Report and impact assessment may be downloaded from our websites at [www.lawcom.gov.uk](http://www.lawcom.gov.uk) and [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk) (from the project page).

March 2012

## LIST OF ABBREVIATIONS USED IN THIS REPORT

The 1967 Act	Misrepresentation Act 1967
The 1985 Act	Law Reform (Miscellaneous Provisions) (Scotland) Act 1985
B2B	Business to business
B2C	Business to consumer
BBA	British Bankers' Association
BERR	Department for Business, Enterprise and Regulatory Reform (now replaced by BIS)
BIS	Department for Business, Innovation and Skills
BRC	British Retail Consortium
C2C	Consumer to consumer
CAB	Citizens Advice Bureau
CCA	Consumer Credit Act 1974
CCCS	Consumer Credit Counselling Service
The Directive	Unfair Commercial Practices Directive 2005/29/EC (OJ 2005 L 149)
DMA	Direct Marketing Association
ECJ	European Court of Justice
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
NETSA	North East Trading Standards Authority
OFT	Office of Fair Trading
PMA	Property Misdescriptions Act 1991
The Regulations/CPRs/CPUTRs	Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)
RLP	Retail Loss Prevention Ltd
TSS	Trading standards services

Note: all URLs specified in this document were accessible as of 1 March 2012.

# **THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION**

## **CONSUMER REDRESS FOR MISLEADING AND AGGRESSIVE PRACTICES**

*To the Right Honourable Kenneth Clarke QC, MP, Lord Chancellor and Secretary of State for Justice, and the Scottish Ministers*

### **PART 1 INTRODUCTION**

- 1.1 In this Report, the Law Commission and the Scottish Law Commission recommend new legislation to provide redress for consumers who enter into contracts or make payments as a result of traders' misleading or aggressive practices.
- 1.2 There are already sanctions against such practices under the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations).<sup>1</sup> The Regulations, however, do not give consumers a private right of redress. They concern public enforcement rather than private law. They are mainly enforced by the Office of Fair Trading (OFT) and trading standards services (TSS), through criminal proceedings and civil enforcement actions.
- 1.3 Consumers who have been victims of unfair commercial practices must rely on existing private law doctrines, such as the law of misrepresentation and duress, if they want redress. This is problematic: the law of misrepresentation is complex and difficult to enforce, while the law of duress leaves gaps in protection.
- 1.4 We are recommending limited reform targeting the most serious causes of consumer detriment.<sup>2</sup> Our aims are to simplify consumer remedies against misleading practices and to improve protection against aggressive practices. We do not recommend redress for every breach of the Regulations.

#### **THIS PROJECT**

- 1.5 In February 2010, the Department for Business, Innovation and Skills (BIS) asked the two Law Commissions to consider the reform of private law in this area. Here we set out the background to the project, our terms of reference and the various stages of our work.

<sup>1</sup> Consumer Protection from Unfair Trading Regulations SI 2008/1277.

<sup>2</sup> "Consumer detriment" is a term used in the consumer protection field. It concerns the harm caused to consumers, both financial and non-financial, by the actions of traders who fail to comply with the law.

1.6 In April 2011 we published a full Consultation Paper<sup>3</sup> and received 71 responses.

## **BACKGROUND**

- 1.7 The Regulations implement the Unfair Commercial Practices Directive 2005 (the Directive) and came into effect in May 2008.<sup>4</sup> In 2009, Consumer Focus called for a private right of redress for all consumers who suffered loss through a breach of the Regulations.<sup>5</sup> Consumer Focus pointed out that scams are all too common, but relatively few prosecutions are brought. Enforcement would be more effective if public authorities and consumers “worked in tandem”, using both private and public enforcement sanctions, against misleading and aggressive practices.<sup>6</sup>
- 1.8 These calls were echoed at European level. In January 2009, the European Parliament passed a resolution calling upon member states “to consider the necessity of giving consumers a direct right of redress in order to ensure that they are sufficiently protected against unfair commercial practices”.<sup>7</sup> In July 2010, the European Parliament’s Internal Market and Consumer Protection Committee identified a private right of redress as one of the options for improving the enforcement of the Directive.<sup>8</sup>

<sup>3</sup> Consumer Redress for Misleading and Aggressive Practices (2011) Law Commission Consultation Paper No 199; Scottish Law Commission Discussion Paper No 149. Available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>.

<sup>4</sup> Directive 2005/29/EC (OJ 2005 L 149).

<sup>5</sup> Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland. It was formed by the Consumers, Estate Agents and Redress Act 2007. It replaced the former National Consumer Council.

<sup>6</sup> Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2009) p 3, available at <http://www.consumerfocus.org.uk/files/2010/12/Waiting-to-be-heard.pdf>.

<sup>7</sup> European Parliament Resolution on the Transposition, Implementation and Enforcement of Directive 2005/29/EC and Directive 2006/114/EC (13 January 2009), para 12, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:046E:0026:0030:EN:PDF>.

<sup>8</sup> Internal Market and Consumer Protection Committee, *State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation* (July 2010) para 2.6.2.

1.9 In November 2008, the Law Commission published preliminary advice on the issue.<sup>9</sup> Noting that in Ireland the implementation of the Directive had included a private right to damages,<sup>10</sup> the advice suggested that a private right of redress could bring benefits to consumers. It would clarify the law, fill in gaps and deter unfair behaviour. However, introducing a new private right would have unpredictable costs, and raise difficult questions about what should happen to the current law. The best option was thought to be improving and simplifying the current law, particularly the law of misrepresentation and duress. The Law Commission noted:

If changes were made within existing structures, it seems less likely that unforeseen consequences would cause significant problems.<sup>11</sup>

#### **TERMS OF REFERENCE**

1.10 In February 2010, BIS asked the Law Commission and Scottish Law Commission:

- (1) to advise on a possible restatement and simplification of the law of misrepresentation, to make it more transparent and easier for businesses and consumers to understand and to remove unnecessary differences between the civil law and the Regulations;
- (2) to consider the law of duress in order to clarify whether aggressive commercial practices under the Regulations should automatically be classed as a form of illegitimate pressure; and
- (3) following full consultation with relevant stakeholders, to consider the justification for the introduction of a private right of redress where there is clear evidence that consumers have suffered loss as a result of an unfair commercial practice and no private right currently exists.

1.11 We consider the law as it applies to consumer transactions between businesses and individuals. We have not been asked to look at the law between businesses, or between two private individuals. Our terms of reference specifically limit our project to contracts between businesses and consumers.

<sup>9</sup> Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department for Business, Enterprise and Regulatory Reform on the issues raised* (November 2008) available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>.

<sup>10</sup> See the Irish Consumer Protection Act 2007, s 74.

<sup>11</sup> Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department for Business, Enterprise and Regulatory Reform on the issues raised* (November 2008), para 4.19.

## PRELIMINARY CONSULTATION

- 1.12 This project is evidence-based. We have been keen to involve stakeholders at each stage of the project. We started by asking for evidence of cases where consumers suffered loss due to unfair commercial practices but currently have no effective right of redress.<sup>12</sup> We also spoke to business groups about the likely costs of reform. In October 2010, we published a paper in which we summarised stakeholders' views.<sup>13</sup>

### Misleading practices

- 1.13 We received many examples of misleading practices. These case histories illustrate the range and variety of misleading statements. Some were relatively minor. Others go to the root of the contract.

#### **Example: mobile phone reception**

A consumer took out a two-year contract with a mobile phone company, after being told by the salesperson in the store that the network and phone had "excellent reception" in her area. However the reception turned out to be poor, and she was forced to buy another phone.

#### **Example: "no obligation"**

A will writing company salesperson visited an elderly consumer with poor eyesight at home, and asked him to sign a form to allow the salesperson to take away some of the consumer's papers, on a no obligation basis. The form was actually a contract agreeing to pay for a new will.<sup>14</sup>

<sup>12</sup> Law Commission, *Misrepresentation and Unfair Commercial Practices: Some Initial Questions* (February 2010), available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>.

<sup>13</sup> Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm> and <http://www.scotlawcom.gov.uk>.

<sup>14</sup> See Society of Trust and Estate Practitioners (STEP), *Cowboy Will Writing, Incompetence and Dishonesty in the UK Wills Market*, Policy Briefing (January 2011), available at [http://www.step.org/publications/reports/cowboy\\_will\\_writing\\_-\\_incompetet.aspx](http://www.step.org/publications/reports/cowboy_will_writing_-_incompetet.aspx). The STEP survey found that 75% of its members had encountered cases of "incompetence or dishonesty in the will-writing market in the last 12 months", p 3. In Scotland, will-writing is to be regulated under Part 3, Chapter 2 of the Legal Services (Scotland) Act 2010. For background, see The Scottish Government, *Regulating non-lawyer will writers: Consultation report*, (May 2010), <http://www.scotland.gov.uk/Publications/2010/05/will-writers>.

**Example: training will lead to a job**

When a 58 year old man was made redundant, he was promised that if he retrained as a “home energy assessor” he would easily get a job, given the shortage of qualified people. This was not true: at the time there were around 12,000 qualified people to satisfy an estimated demand of 2,000. He paid a £1,000 deposit, and took out a loan which, with credit charges, would amount to £11,936. The course was of poor quality and virtually useless to him.

- 1.14 Although the current law of misrepresentation should provide a remedy in these cases, it was felt to be too complicated for consumers to use. We were told that consumers needed a simpler scheme of private remedies.

**Aggressive practices**

- 1.15 The most serious problems, however, were aggressive practices, usually connected with commission-based selling. They were often targeted at vulnerable groups. The following are typical examples of the types of problems raised.

**Example: pressure doorstep-selling**

An elderly housebound man was sold a £3,000 bed. The salesman stayed for three hours, giving the impression that he would only leave if the consumer agreed to buy.

The trader offered a 14 day cancellation period, but the next day the salesman returned, unpacked the bed and took a cheque for the full amount.

**Example: pressure-selling a car**

A consumer was subjected to four hours of pressure-selling and felt unable to leave the dealer’s showroom. The salesperson added that if the consumer did not buy the car, the salesperson would be sacked. The consumer was worn down and agreed to buy the car.

**Example: pressure-selling a holiday club**

A couple agreed to attend a two hour presentation about a holiday club. In fact the presentation lasted six hours and, feeling under considerable pressure, the couple eventually agreed to become club members. The next day they returned to try to cancel the contract. The company threatened to call the police if they did not leave.

- 1.16 Research by Consumer Focus found that these problems were far from rare. In a survey of consumers, one-in-twenty had experience of a salesperson who ignored requests to leave; and one-in-twenty-five had experienced intimidation such as attending “presentations” where threatening doormen made it difficult to leave.<sup>15</sup>

## **THE CONSULTATION PROPOSALS**

- 1.17 We published the Consultation Paper on 12 April 2011 and sought responses by 12 July 2011. We proposed a new Act to give consumers redress against traders for misleading and aggressive practices. It would not replace the Regulations. These would continue to govern public enforcement.

### **A limited reform**

- 1.18 We explained that we were proposing a limited reform, aimed at the problems brought to our attention. We did not think that consumers should have a right of redress for all breaches of the Regulations. Some elements of the Regulations are too uncertain for such a right, such as the general prohibition against commercial practices which are “contrary to the requirements of professional diligence”.<sup>16</sup>
- 1.19 Other elements might give rise to trivial claims. We thought consumers should only have redress if they had entered into a contract or made a payment. Consumers would not have a right to redress if, for example, they had visited a shop as a result of a misleading advertisement. We were concerned that it would be difficult to assess the truth of a consumer’s claim that they made a transactional decision where there has been little interaction between the parties.<sup>17</sup>
- 1.20 We also proposed to exclude land transactions and financial services. These often involve large sums, and are unsuited to the standardised remedies which we propose. Moreover, ombudsman schemes already provide sufficient redress. The current law would continue to apply to these areas.

### **New remedies**

- 1.21 In the Consultation Paper we proposed a new scheme of remedies, which favoured clarity and simplicity over flexibility; the remedies would be in two tiers.
- 1.22 Standard (Tier 1) remedies would be provided in all cases where the consumer establishes a misleading or aggressive practice. We proposed two types:

<sup>15</sup> Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2009) p 8, available at <http://www.consumerfocus.org.uk/files/2010/12/Waiting-to-be-heard.pdf>.

<sup>16</sup> Reg 3(3).

<sup>17</sup> See the Consultation Paper, para 13.22.

- (1) *The right to unwind the contract:* The consumer would receive a refund of money paid and would not be required to meet any future obligations. Consumers would be entitled to unwind provided that they rejected some part of the goods or services, and acted sufficiently quickly. We tentatively suggested that consumers would need to complain to the trader within three months.
  - (2) *A discount on the price:* If unwinding is no longer possible, the consumer may nonetheless receive a discount on the purchase price. We proposed bands of discounts, from zero to 100%, depending on the seriousness of the misleading or aggressive practice.
- 1.23 Tier 2 remedies resembled traditional damages. They would apply only if a consumer could prove they had suffered actual additional loss. For Tier 2 remedies, the trader would have a defence of due diligence.

#### **Unfair payment collection**

- 1.24 Many of the problems brought to our attention concerned misleading and aggressive demands for payment. Sometimes these followed from a consumer sale; often they did not. For example, consumers accused of copyright infringement or shoplifting, or those who have had their car towed, might be misled or pressured into paying significant sums of money. Sometimes traders demand payment from someone who was never a customer.
- 1.25 There is an arguable case that the Regulations already cover these demands, but the issue is far from clear. We asked if the Regulations should be amended to clarify the issue. We also proposed that these practices should be covered by the new Act.

#### **Creditor liability**

- 1.26 Finally, where goods or services are bought on credit, we considered how far a creditor should be liable for any misleading or aggressive practice by the supplier. Section 75 of the Consumer Credit Act 1974 applies to credit card and other connected credit purchases worth more than £100 and not more than £30,000. The section makes a creditor liable for the supplier's misrepresentation, but not for the supplier's aggressive practices.
- 1.27 We provisionally proposed that the protection given to consumers under section 75 should be amended to include aggressive acts. We suggested that the connected lender's liability for the supplier's act should be capped at the amount of the loan plus interest.

#### **RESPONSES TO THE CONSULTATION PAPER**

- 1.28 We received 71 responses to our Consultation Paper. Of these,
- (1) 17 were from enforcement agencies, including TSS and the OFT;
  - (2) 15 were from consumer organisations;
  - (3) 11 were from individual businesses and trade bodies;

- (4) 10 were from academics;
- (5) 8 were from public bodies, including regulators and ombudsmen;
- (6) 4 were from lawyers or judges; and
- (7) 6 were from members of the public.

### **Support**

- 1.29 There was overwhelming support for the view that reform was needed. Which? summarised the views of many respondents:

There can be no doubt about the need for reform. The introduction of the CPRs was an important step towards improving consumer protection, but it was missing a vital aspect: a private right to redress. While the common law enables consumers to obtain redress for some breaches of the CPRs, the availability of existing remedies is patchy at best. Furthermore, where protection does exist, the remedies are too complex for consumers to understand and as a consequence, are rarely used.

- 1.30 All but three respondents thought there was a need to simplify redress for misleading practices. This included support from business groups. The British Retail Consortium (BRC) stated:

The BRC agrees that reform would be useful provided the outcome leads to something that is simpler to understand for all parties.

- 1.31 All but two agreed that there was a need to extend private redress for aggressive practices. As Age UK put it:

We completely agree ... that the existing causes of action do not address the specific problems arising from high pressure selling practices and that ... the current law provides little redress for unscrupulous and often commission-based hard selling.

- 1.32 Many consultees thought that the provisional proposal would fill a gap in existing provisions. Citizens Advice wrote:

We believe that the extension of private redress to aggressive practices is essential. This is a gap in consumer protection that cancellation rights and information provisions cannot always fill. As the consultation explains, it is easy for rogue traders to evade these provisions and to rely on pressure selling and scare tactics to sell products or to secure payments consumers would not otherwise agree to make.<sup>18</sup>

- 1.33 There was also strong support for our proposal that the new Act should provide redress for all unfair payment collection against private individuals. This was even described as “the best proposal within the new legislation”.

<sup>18</sup> The respondent’s full title is the Citizens Advice Bureau and Citizens Advice Scotland.

### **Contentious issues**

- 1.34 Other areas were more contentious. The Consultation Paper asked whether consultees agreed that the right of redress should not apply to all breaches of the Regulations. Over half of the respondents agreed that rights should be limited.
- 1.35 On the other hand, around one-third disagreed, including Which?, Consumer Focus and the OFT. They thought that the private law should track the Regulations. Consumer groups expressed particular concern about our proposals on misleading omissions. They felt that the idea of an implied representation was potentially confusing, and that the private law should provide redress for all misleading omissions, as set out in Regulation 6.
- 1.36 We discuss the arguments for and against tracking the Regulations in Part 4. We conclude that consumer rights should only be extended if there is clear evidence of consumer detriment. We are concerned that if traders were liable for all banned practices and misleading omissions they could be faced with many small claims for minor losses, which would impose undue costs.
- 1.37 We appreciate, however, the argument put by the OFT and consumer groups that a piecemeal approach increases the risk of confusion and uncertainty. We therefore recommend that BIS should review the issue five years after the new Act is brought into force.
- 1.38 The OFT and many TSS officers urged us to adopt the terminology of the Regulations. Judges and private lawyers, however, had misgivings about the long lists set out in the Regulations, which were thought to be overly detailed and possibly restrictive. In Part 7 we discuss how far the private law should track the language of the Regulations. Our recommendations align the private law with the main concepts of the Regulations. On the other hand, we do not recommend adopting the Regulations word-for-word where it would be confusing, or where detailed lists would add nothing to the general definition.
- 1.39 Our proposal to amend section 75 of the Consumer Credit Act 1974 proved particularly controversial. As we explain in Part 10, we are no longer proceeding with this idea.

### **WHERE NEXT?**

- 1.40 Unusually for a Law Commission Report, we do not include a draft Bill. This is because we hope that our recommendations will be included in the Consumer Bill of Rights.
- 1.41 On 19 September 2011 the then Consumer Minister, Edward Davey, announced a new Consumer Bill of Rights. He stated that:

Consumer law in the UK comes from a variety of Acts and regulation, making it complex and confusing. ... The Consumer Bill of Rights will consolidate, clarify and strengthen the consumer laws already in place, which will make it easier for everyone to understand and consumer rights in the UK will be stronger than ever.<sup>19</sup>

1.42 The Bill will bring together consumer law from 12 Acts and Regulations, and will also include the European Consumer Rights Directive (adopted in November 2011).<sup>20</sup> This project is also part of the Government's Red Tape Challenge.<sup>21</sup>

1.43 BIS plans to consult on the new Consumer Rights Bill during 2012.

### THE STRUCTURE OF THIS REPORT

1.44 We start with the **current law**. The Consultation Paper described the law in detail, considering the many varied rights of action and the ways they are enforced. Here we provide only a brief outline of the current law.

(1) Part 2 considers the Regulations.

(2) Part 3 summarises the private law.

1.45 Part 4 sets out **the case for reform**. We explain why there is a need for new legislation, but why it should not cover all breaches of the Regulations.

1.46 We then discuss our **recommendations**:

(1) Part 5 gives a brief overview of our recommendations.

(2) Part 6 looks at the scope of the new Act. It covers the definition of a consumer; the transactions which should give rise to redress; the person against whom redress should be available; and the products which should be covered.

(3) Part 7 sets out the elements of liability. It considers the definitions of misleading and aggressive practices; the causation test; and the impact on existing law.

(4) Part 8 considers remedies.

(5) Part 9 discusses our approach to unfair payment collection.

<sup>19</sup> Department for Business, Innovation and Skills Press Notice, *New bill will strengthen consumer rights* (19 September 2011): "Edward Davey has today announced a new Consumer Bill of Rights, which will streamline confusing and overlapping legislation and regulation, and provide stronger consumer protection.", <http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=421254&NewsAreaID=2>.

<sup>20</sup> Department for Business, Innovation and Skills, *Business Plan 2011-15* (November 2010) section 9, <http://www.bis.gov.uk/assets/biscore/corporate/docs/b/10-p58-bis-business-plan.pdf>. Directive 2011/83/EU (OJ 2011 L 304/64).

<sup>21</sup> <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>.

- (6) Part 10 describes the effect of our recommendations on associated credit agreements: how far would the creditor be liable for misleading or aggressive practices by the supplier?

For each issue, we describe the proposals in the Consultation Paper and summarise the responses we received before reaching a conclusion.

- 1.47 In Part 11 we assess the impact of the reform. Finally, Part 12 lists our recommendations.

### **THANKS**

- 1.48 The responses to our Consultation Paper, together with our pre-consultation discussions with stakeholders, have been crucial to this project. We thank all those who took the time and trouble to respond to our questions and to provide us with evidence. A list of respondents is given in the Appendix.

## **PART 2**

# **THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008**

- 2.1 Under the current law, misleading and aggressive trade practices give rise to two sets of remedies. One set is provided by public law, usually enforced by trading standards services (TSS) officers and the Office of Fair Trading (OFT) through criminal sanctions and enforcement orders under the Enterprise Act 2002.<sup>1</sup> The other set is provided by private law, usually enforced by aggrieved consumers through small claims procedures. These two systems are completely different: although they both address the same conduct, they use different concepts and terminology, and lead to varied outcomes.
- 2.2 In this Part we give a brief outline of the public law on misleading and aggressive trade practices, as set out in the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations).<sup>2</sup> More detail is provided in the Consultation Paper.<sup>3</sup>

### **IMPLEMENTING THE EUROPEAN DIRECTIVE**

- 2.3 The Regulations implement the Unfair Commercial Practices Directive 2005 (the Directive).<sup>4</sup> The Directive aims to harmonise consumer protection regulation by replacing detailed provisions with overarching principles. It is a full harmonisation measure, which means that member states may not add to the provisions except in limited areas (such as financial services and immoveable property). In the UK, the Regulations repealed 23 enactments, including most of the Trade Descriptions Act 1968 and provisions against misleading price indications.<sup>5</sup>
- 2.4 However, the Directive only provides for public enforcement.<sup>6</sup> Matters of contract law are excluded. Thus the private law of misrepresentation and duress remains unaffected.
- 2.5 The Regulations stay close to the wording of the Directive, and include several new European terms, such as “the average consumer” and “a transactional decision”. The Regulations came into effect in May 2008.

<sup>1</sup> In Scotland, all criminal prosecutions are conducted by the Crown Office and the Procurator Fiscal Service on behalf of the Lord Advocate.

<sup>2</sup> Consumer Protection from Unfair Trading Regulations SI 2008/1277. Any other Regulations mentioned in the text are distinguished appropriately.

<sup>3</sup> See the Consultation Paper, Parts 2 and 4.

<sup>4</sup> Directive 2005/29/EC (OJ 2005 L 149) of 11 May 2005. Any other directives mentioned in the text will be distinguished appropriately.

<sup>5</sup> These were formerly set out in the Consumer Protection Act 1987.

<sup>6</sup> Art 11.

- 2.6 It took TSS officers some time to become familiar with these concepts. The OFT publishes an annual report detailing the number of prosecutions obtained under consumer legislation. From April 2007 to March 2008 there were 283 prosecutions for offences similar to those under the Regulations.<sup>7</sup>
- 2.7 In the first year under the Regulations (from 26 May 2008 to 31 March 2009) only 23 prosecutions were proposed.<sup>8</sup> The following year, there were 173 prosecutions,<sup>9</sup> and from April 2010 to March 2011 there were 308.<sup>10</sup> We were told that enforcement agencies are now becoming much more familiar with the Regulations.<sup>11</sup> It was suggested that, as TSS officers have learnt to use the Regulations, it is now the concepts of private law which seem strange.

## SCOPE

- 2.8 The Regulations, like the Directive, apply to most “business-to-consumer” dealings (B2C). Importantly, the Regulations do not apply to dealings that are purely between businesses (B2B) or purely between consumers (C2C).<sup>12</sup>
- 2.9 The Regulations apply to “commercial practices”, defined as:

any act, omission, course of conduct, representation or commercial communication (including advertising or marketing) by a trader which is directly connected with the promotion, sale or supply of a product to or from consumers.<sup>13</sup>

<sup>7</sup> Office of Fair Trading Annual Report 2007 to 2008, Annex E, [http://www.offt.gov.uk/shared\\_offt/annual\\_report/2007/hc8336e.pdf](http://www.offt.gov.uk/shared_offt/annual_report/2007/hc8336e.pdf). This gives an indication of the possible figures. It is difficult, however, to have a complete read across and match the provisions which were replaced by the Regulations.

<sup>8</sup> Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2009), p 13, available at <http://www.consumerfocus.org.uk/files/2010/12/Waiting-to-be-heard.pdf>: “Court action proposed means that the enforcer had decided to proceed to court. It was also highlighted to Consumer Focus that sometimes the trader will offer undertakings at that late stage and that may cause deferment, so a number of the 23 cases noted above may indeed not proceed to court”.

<sup>9</sup> Office of Fair Trading Annual Report 2009-2010, Annex G, Table G-7, available at [http://www.offt.gov.uk/shared\\_offt/annual\\_report/2009/hc301-annual-report2009-10g.pdf](http://www.offt.gov.uk/shared_offt/annual_report/2009/hc301-annual-report2009-10g.pdf).

<sup>10</sup> Office of Fair Trading Annual Report 2010-2011, Annex G, Table 2.1, available at <http://www.offt.gov.uk/about-the-offt/annual-plan-and-report/annual-report/>.

<sup>11</sup> Jane Williams and Caroline Hare, “Early Experiences of the Enforcement of the Unfair Commercial Practices Directive in Scotland” (December 2010) *Journal of Consumer Policy* 33(4), 377-401.

<sup>12</sup> See Art 3 and Recital 6 of the Directive; and European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (December 2009) 1666, p 14, available at [http://ec.europa.eu/consumers/rights/docs/Guidance\\_UCP\\_Directive\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf).

<sup>13</sup> Reg 2(1).

- 2.10 This is a wide concept.<sup>14</sup> The definition of a product includes any goods or service: the Regulations therefore apply to the full gamut of consumer transactions, from buying a sandwich, holiday, pension or will-writing service to a contract for utilities. Furthermore, the Regulations apply to the whole supply chain. Thus an advertisement by a manufacturer is a commercial practice because it is “directly connected with the promotion” of the product, even if consumers only buy from retailers.
- 2.11 Under the Directive, the product must be supplied “to” the consumer. The Regulations extend the scope to the supply of products “to or from” consumers. This covers traders who buy from consumers, such as second hand dealers or “cash for gold” firms.

### **UNFAIR PRACTICES**

- 2.12 The Regulations identify five unfair practices:
- (1) misleading actions;<sup>15</sup>
  - (2) misleading omissions;<sup>16</sup>
  - (3) aggressive practices;<sup>17</sup>
  - (4) a blacklist of examples of 31 practices which are always unfair;<sup>18</sup> and
  - (5) practices which are contrary to the requirements of professional diligence.<sup>19</sup>
- 2.13 For the purposes of this Report, the most important categories are the first three. To fall into one of the first three categories, a commercial practice needs to meet two tests. First, it must be misleading or aggressive under the Regulations. Second, it must be likely to affect an average consumer’s transactional decision in respect of a product.
- 2.14 By contrast, the 31 blacklisted examples are automatically unfair. There is no need to prove that they would have affected the behaviour of an average consumer.

<sup>14</sup> Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV*; and *Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I – 2949, para 49, [2010] All ER (EC) 694.

<sup>15</sup> Reg 5.

<sup>16</sup> Reg 6.

<sup>17</sup> Reg 7.

<sup>18</sup> Sch 1.

<sup>19</sup> Reg 3(3).

- 2.15 Finally, the professional diligence test is a catch-all provision, designed to cover practices which are harmful but which do not fall into another more specific category. In the Consultation Paper we described it as so uncertain as to be intrinsically unsuited to form the basis of private law rights.<sup>20</sup> It is therefore of limited relevance to this Report, and we do not consider it further.

## **WHEN IS A PRACTICE MISLEADING OR AGGRESSIVE?**

### **Misleading actions**

- 2.16 An action by a trader is misleading under Regulation 5 if it contains false information, or the practice or its overall presentation in any way deceives, or is likely to deceive, the average consumer even if it is factually correct.
- 2.17 The misleading information must relate to one of the listed matters, set out in Regulation 5(4) to 5(6). The lists are long, and include the main characteristics of the product, the price, the trader's attributes and the sales process.
- 2.18 An action will also be "misleading" under the Regulations in two specific cases: copycat packaging and a failure to comply with a code of practice.<sup>21</sup>

### **Misleading omissions**

- 2.19 A commercial practice is a misleading omission, contrary to Regulation 6, if in its "factual context" it:
- (a) omits material information;
  - (b) hides material information;
  - (c) provides material information in a manner which is unclear, unintelligible, ambiguous or untimely; or
  - (d) fails to identify its commercial intent, unless this is already apparent from the context.
- 2.20 The Regulations take a functional approach to materiality: omitted information will be material if the average consumer would need it to make an informed decision.
- 2.21 Regulation 6(4) sets out specific requirements for "invitations to purchase" which describe the product and its price, and enable consumers to make purchases. It lists information which is material in this context, including:
- (1) the main characteristics of the product;
  - (2) the trader's identity and geographical address;
  - (3) the price and additional charges;
  - (4) unusual arrangements for payment or performance; and

<sup>20</sup> See the Consultation Paper, para 2.5.

<sup>21</sup> Reg 5(3).

- (5) rights of withdrawal or cancellation.<sup>22</sup>
- 2.22 The concept of material information, however, is not limited to the listed items. It is an open ended concept, which includes any information the average consumer needs to make an informed decision.
- 2.23 In November 2011 a new Consumer Rights Directive was adopted, which must be transposed into national law by 13 December 2013.<sup>23</sup> Article 5 states that, before the consumer is bound by a contract, the trader shall provide the consumer with listed information “in a clear and comprehensible manner, if that information is not already apparent from the context”.<sup>24</sup>
- 2.24 The list is very similar to the list in Regulation 6(4), summarised above. The main difference is that under the Regulations an omission is only misleading if it is likely to cause an average consumer to take a different transactional decision.<sup>25</sup> The Consumer Rights Directive does not include this test. Furthermore, member states may, if they wish, exempt “day-to-day transactions which are performed immediately” from the new information requirements.<sup>26</sup>
- 2.25 The Consumer Rights Directive does not prescribe penalties: under Article 24, it is up to member states to “take all measures necessary” to ensure that the provisions are implemented. Penalties must be “effective, proportionate and dissuasive”. At the time of writing, the UK Government has not reached a decision on what these penalties should be.

### **Aggressive practices**

- 2.26 The Regulations refer to three forms of aggressive practices:<sup>27</sup> (1) “coercion”, which includes “physical force”;<sup>28</sup> (2) “undue influence”, which involves “exploiting a position of power ... so as to apply pressure, even without using or threatening to use physical force”;<sup>29</sup> and (3) “harassment”, which is undefined.
- 2.27 Under the Regulations all the features and circumstances of a commercial practice are relevant to deciding whether it is aggressive.<sup>30</sup> The Regulations also set out specific factors to be taken into account. These include:
- (a) its timing, location, nature or persistence;
  - (b) the use of threatening or abusive language;

<sup>22</sup> Reg 6(4).

<sup>23</sup> Directive 2011/83/EU (OJ 2011 L 304/64).

<sup>24</sup> Art 5 applies to contracts other than distance and off-premises contracts. Art 6 imposes similar but slightly more onerous requirements on distance and off-premises contracts.

<sup>25</sup> Reg 6(1).

<sup>26</sup> Consumer Rights Directive 2011/83/EU (OJ 2011 L 304/64), Art 5(3).

<sup>27</sup> Reg 7(2).

<sup>28</sup> Reg 7(3)(a).

<sup>29</sup> Reg 7(3)(b).

<sup>30</sup> Reg 7(1).

- (c) the exploitation by the trader of any specific misfortune or circumstance of which the trader is aware;
- (d) any onerous or disproportionate non-contractual barrier, for example where a consumer wishes to terminate a contract or switch to another trader; and
- (e) a threat to take any action which cannot legally be taken.<sup>31</sup>

2.28 The list of banned practices, found at Schedule 1 of the Regulations, provides some helpful examples of the sort of high-pressure sales tactics which are considered aggressive. These include creating the impression that the consumer cannot leave the premises until a contract is formed;<sup>32</sup> persistent and unwanted solicitations;<sup>33</sup> or home selling, where the trader ignores the consumer's requests to leave.<sup>34</sup>

### **CAUSING THE AVERAGE CONSUMER'S TRANSACTIONAL DECISION**

2.29 To qualify as misleading or aggressive, the commercial practice must cause, or be likely to cause, "the average consumer to take a transactional decision he would not have taken otherwise".<sup>35</sup> This is a complex test which introduces three new concepts: "cause or likely to cause"; "the average consumer" and a "transactional decision". We look briefly at each.

#### **"Cause or likely to cause"**

2.30 It is not necessary to prove that the misleading or aggressive practice actually caused the consumer to make the transactional decision. It is enough if there was a real risk of an average consumer making a transactional decision.<sup>36</sup> It is necessary, however, to show that but for the misleading and aggressive practice, an average consumer would have made a different decision.<sup>37</sup>

<sup>31</sup> Reg 7(2).

<sup>32</sup> Banned practice 24.

<sup>33</sup> Banned practice 26.

<sup>34</sup> Banned practice 25.

<sup>35</sup> See the Consumer Protection from Unfair Trading Regulations 2008, Reg 5(2)(b). A similar test occurs in Reg 6(1) and 7(1)(b).

<sup>36</sup> European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (December 2009) 1666, p 24, available at [http://ec.europa.eu/consumers/rights/docs/Guidance\\_UCP\\_Directive\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf).

<sup>37</sup> *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106, [2011] WLR (D) 34, paras 69 to 71. In this case, the appeal and cross-appeal ([2011] EWCA Civ 920) were stayed by the Court of Appeal in July 2011 and a reference was made to the European Court of Justice (C-428/11).

### **“The average consumer”**

- 2.31 The concept of the average consumer is used widely across European Union law. The European Court of Justice (ECJ) has set a robust standard: one must judge the practice from the viewpoint of a hypothetical consumer who is “reasonably well informed, reasonably observant and circumspect”.<sup>38</sup> The ECJ has emphasised that national courts should exercise their own judgment: the test does not depend on statistical evidence of how consumers actually behave.<sup>39</sup>
- 2.32 The test posits a consumer who is critical and rational. This has been criticised as being unrealistic, given that consumers often make decisions based on emotional factors.<sup>40</sup>
- 2.33 On the other hand, the test is relaxed in two circumstances. Where:
- (1) the commercial practice was “directed to a particular group” of consumers;<sup>41</sup> or
  - (2) a “clearly identifiable group of consumers is particularly vulnerable ... because of their mental or physical infirmity, age or credulity” and that a trader could be reasonably expected to foresee this;<sup>42</sup>

then the average consumer refers to “the average member of that group”.<sup>43</sup>

- 2.34 If viewed analytically, the second test seems strange.<sup>44</sup> Many practices will have a disproportionate effect on credulous consumers, and it is not clear when one should look at “the average consumer” and when at “the average credulous consumer”.<sup>45</sup> Spam e-mails, for example, are often sent to many thousands of consumers but the fraud may be designed only to exploit the credulous. The test seems to work best if applied in a broad way, focusing on a fair outcome. If a practice is clearly fraudulent and exploitative, but an averagely critical consumer would not be taken in, then it may be right to look at the practice from the point of view of the average credulous consumer.

<sup>38</sup> See Reg 2(2), and Case C-210/96 *Gut Springenheide GmbH, Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung and Another* [1998] ECR I-4657.

<sup>39</sup> Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I-0117, para 29, [2000] All ER (EC) 122.

<sup>40</sup> R Incardona and C Poncibó, “The average consumer, the unfair commercial practices directive, and the cognitive revolution” (March 2007) 30(1) *Journal of Consumer Policy*, 21 and S Weatherill, “The role of the informed consumer in European community law and policy” (1994) 2 *Consumer Law Journal* 49.

<sup>41</sup> The Consumer Protection from Unfair Trading Regulations 2008, Reg 2(4).

<sup>42</sup> Above, Reg 2(5)(a).

<sup>43</sup> Above, Reg 2(5).

<sup>44</sup> For discussion, see J Stuyck, E Terryn and T Van Dyck, “Confidence through fairness? The new Directive on unfair business-to-consumer commercial practices in the internal market” (2006) 43 *Common Market Law Review* 107, 121-122; and C Cathcart and J Williams, “The highly detailed general principles of the Consumer Protection from Unfair Trading Regulations 2008” (2009) 77 *Scottish Law Gazette* 24, 28.

<sup>45</sup> The Oxford English Dictionary defines “credulous” as “ready or disposed to believe”.

### **“A transactional decision”**

- 2.35 A “transactional decision” is defined as: “any decision taken by a consumer, whether it is to act or to refrain from acting, concerning:
- (1) whether, how and on what terms to purchase, or make payment in whole or in part for, retain or dispose of a product; or
  - (2) whether, how and on what terms to exercise a contractual right in relation to a product”.<sup>46</sup>
- 2.36 A transactional decision is a broad concept. Both the decision to buy a product and the decision not to buy it can be “transactional decisions”. It also covers post-purchase decisions, such as whether to pay a bill or to cancel a contract. The European Commission’s Guidance suggests that many pre-purchase decisions would be included, such as the decision to enter a shop,<sup>47</sup> though the High Court has described this as “debatable”.<sup>48</sup>

### **THE “DUE DILIGENCE” DEFENCE**

- 2.37 Almost all breaches of the Regulations are criminal offences.<sup>49</sup> The maximum penalties are two years imprisonment or an unlimited fine.<sup>50</sup>
- 2.38 Traders may escape liability if they can show that the offence was due to a cause beyond their control,<sup>51</sup> and that they “took all reasonable precautions and exercised all due diligence” to avoid committing the offence.<sup>52</sup> The burden of proof lies on the trader. The standard is high and requires taking *all* reasonable precautions.<sup>53</sup>

<sup>46</sup> The Consumer Protection from Unfair Trading Regulations 2008, Reg 2(1).

<sup>47</sup> European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (December 2009) 1666, p 23, available at [http://ec.europa.eu/consumers/rights/docs/Guidance\\_UCP\\_Directive\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf).

<sup>48</sup> *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106, [2011] WLR (D) 34, by Briggs J at para 68. In this case, the appeal and cross-appeal ([2011] EWCA Civ 920) were stayed by the Court of Appeal in July 2011 and a reference was made to the European Court of Justice (C-428/11).

<sup>49</sup> The only exceptions are two of the banned practices, listed in sch 1. These are banned practice 11 (“advertorials”), and banned practice 28 (practices targeted at children).

<sup>50</sup> Reg 13.

<sup>51</sup> These causes are listed in the Consumer Protection from Unfair Trading Regulations 2008, Reg 17(1)(a).

<sup>52</sup> The Consumer Protection from Unfair Trading Regulations 2008, Reg 17(1)(b).

<sup>53</sup> See also C Twigg-Flesner, D Parry, G Howells, A Nordhausen, *An analysis of the application and scope of the unfair commercial practices directive: Report for the Department of Trade and Industry* (18 May 2005), para 2.10, available at <http://www.bis.gov.uk/files/file32095.pdf>.

## **ENFORCEMENT**

- 2.39 In England and Wales, the Regulations can only be enforced by the OFT and local authority TSS. In Scotland, this is also the case for most enforcement, but criminal prosecutions are conducted by the Crown Office and the Procurator Fiscal Service on behalf of the Lord Advocate.
- 2.40 The enforcement mechanisms are described in Part 4 of the Consultation Paper. The emphasis is on education, guidance and advice. The formal sanctions are used as a last resort. They include not only criminal prosecutions but also civil enforcement orders under Part 8 of the Enterprise Act 2002.

### **Compensation orders in criminal proceedings**

- 2.41 Although criminal prosecution is about public enforcement, rather than private redress, the courts have a power to make compensation orders following criminal convictions.
- 2.42 In England and Wales, where a person is convicted of an offence, the court may order compensation to be paid to the victim, to cover "personal injury, loss or damage".<sup>54</sup> Section 130(4) of Powers of Criminal Courts (Sentencing) Act 2000 states that the order:

shall be of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor.

- 2.43 Although the section is written in very general terms, the courts have interpreted it restrictively. In *R v Vivian* a defendant stole a car and drove it recklessly into another vehicle, causing damage.<sup>55</sup> At the original trial the owner of the damaged car provided an estimate for repair of £209. The court made a compensation order against the defendant for £100. This order was quashed on appeal, on the ground that there was neither agreement nor sufficient proof of the amount of the damage.<sup>56</sup> The subsequent case of *R v Horsham Justices, ex p Richards*<sup>57</sup> applied *R v Vivian*, confirming that a court may not make a compensation order simply on the basis of the representations made by the prosecution.

<sup>54</sup> Powers of Criminal Courts (Sentencing) Act 2000, s 130(1).

<sup>55</sup> [1979] 1 WLR 291.

<sup>56</sup> Above, by Talbot J at 293.

<sup>57</sup> [1985] 1 WLR 986.

- 2.44 These cases have been taken to mean that a court may only make a compensation order if it is presented with evidence of loss. Studies have highlighted the limited use made of compensation orders generally.<sup>58</sup>
- 2.45 Similarly, in Scotland, a compensation order can cover any personal injury, loss or damage caused directly or indirectly, or alarm or distress caused directly, to the victim.<sup>59</sup> Again, however, Scottish Courts have made relatively low use of compensation orders.<sup>60</sup>
- 2.46 The use of compensation orders is a particular issue in prosecutions brought under consumer protection legislation. The 308 prosecutions brought by TSS in April 2010 to March 2011 resulted in compensation orders of £68,362 (an average of £222 a case).<sup>61</sup> Given that prosecutions tend to be brought only in cases of serious consumer harm, this seems low.
- 2.47 Research by Professor John Peysner and Angus Nurse found that TSS officers regarded compensation claims as a burden.<sup>62</sup> The research cites an example in which the defendant disputed the value of a car. The TSS officers relied on the industry guide, Glass's Car Values, but the defendant contested this. As Glass's does not have statutory footing, prosecutors thought that an independent expert would be required, adding to prosecution costs.
- 2.48 Our remedies are intended to make it much simpler for the courts to award compensation to consumers. The court will hear evidence of what the consumer paid for the car, and will then be able to award a discount on the price in one of our bands. No further evidence would be needed.
- 2.49 In Part 8 we recommend a system of standardised remedies, based on a refund of the purchase price. Our aim is to make it easier for enforcement officers to seek redress alongside criminal prosecutions. The standard remedies could also be used should a decision be taken to allow compensation to be awarded alongside enforcement orders brought under Part 8 of the Enterprise Act 2002.

<sup>58</sup> See J Peysner and A Nurse, *Representative Actions and Restorative Justice: A Report for the Department for Business, Enterprise and Regulatory Reform (BERR)*, (December 2008), para 7.4, available at <http://www.bis.gov.uk/files/file51559.pdf>. This research indicated that the position had not changed since earlier studies, such as those conducted by C Flood-Page and A Mackie, *Sentencing practice, an examination of decisions in magistrates' courts and the Crown Court in the mid-1990's* (1998) Home Office, available at <http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs/hors180.pdf>.

<sup>59</sup> Criminal Procedure (Scotland) Act 1995, s 249.

<sup>60</sup> A compensation order as a main penalty was only used in 1,083 cases in 2010 to 11, 1,039 cases in 2009 to 10 and 1,153 cases in 2008 to 09. The average compensation order imposed, either as a main or secondary penalty, has increased slightly from £378 in 2008 to 09 to £394 in both 2009 to 10 and 2010 to 11: see Statistical Bulletin: Crime and Justice Series: Criminal Proceedings in Scotland, 2010 to 11, pp 18 and 34.

<sup>61</sup> Office of Fair Trading Annual Report 2009-2010, Annex G, Table G-7, available at [http://www.offt.gov.uk/shared\\_offt/annual\\_report/2009/hc301-annual-report2009-10g.pdf](http://www.offt.gov.uk/shared_offt/annual_report/2009/hc301-annual-report2009-10g.pdf).

<sup>62</sup> J Peysner and A Nurse, *Representative Actions and Restorative Justice: A Report for the Department for Business, Enterprise and Regulatory Reform (BERR)* (December 2008), para 7.4, available at <http://www.bis.gov.uk/files/file51559.pdf>.

## **CONCLUSION**

- 2.50 In May 2008, the Regulations introduced new concepts into UK law. They provide only for public enforcement and do not provide consumers with private rights. The courts may award compensation following a criminal conviction, but this power is little used, partly because it is often difficult to value loss.
- 2.51 Traders may not engage in misleading or aggressive practices which would be likely to cause the average consumer to take a different transactional decision. Although these concepts seemed strange at first, they are rapidly becoming a bedrock of consumer protection.

## **PART 3**

# **THE CURRENT LAW: PRIVATE REDRESS FOR MISLEADING AND AGGRESSIVE PRACTICES**

- 3.1 Here we provide a brief summary of the current private law. We look in turn at how private law deals with misleading actions, misleading omissions and aggressive practices. A much more detailed account is given in the Consultation Paper.<sup>1</sup>
- 3.2 As we see, the law provides consumer redress for misleading actions. By contrast, the general rule is that traders are not liable for omissions, though this is subject to several exceptions. For aggressive practices, the law provides only patchy and inadequate protection.

### **PRIVATE REDRESS FOR MISLEADING ACTIONS**

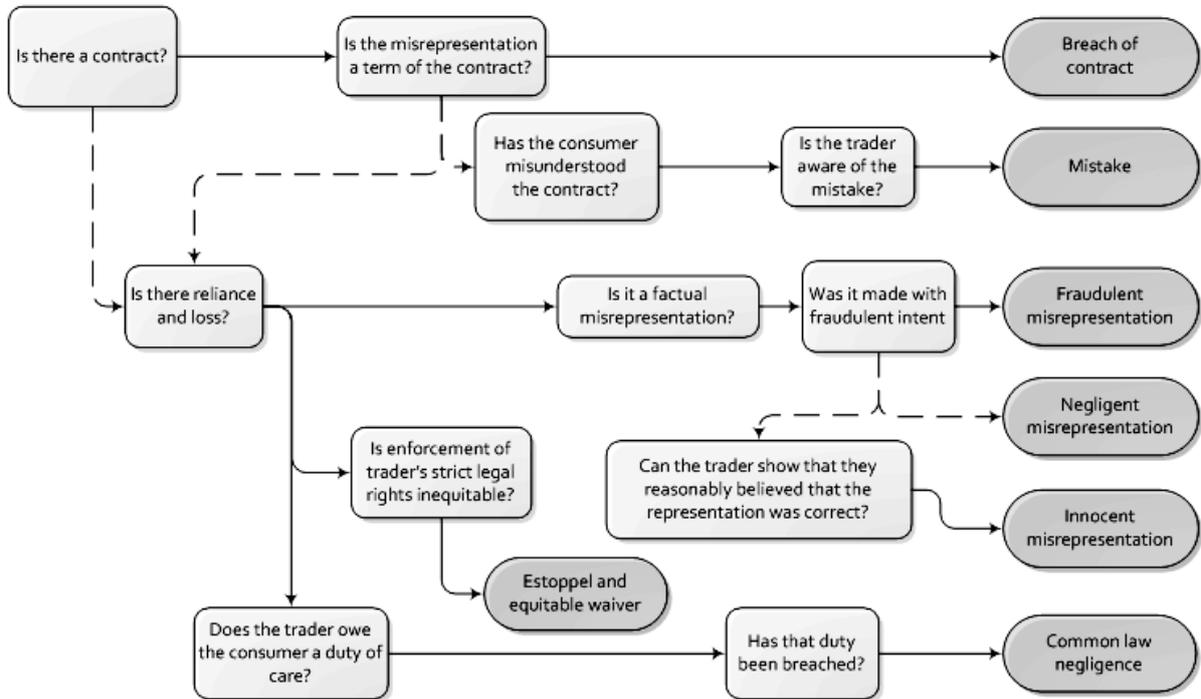
- 3.3 In private law, misleading actions fall within the law of “misrepresentation”, which is a large and varied family of rules. There are some differences between the law of England and Wales and the law of Scotland, as is illustrated in the two diagrams overleaf. The law in this area applies equally to business disputes. Indeed, almost all the leading cases involve disputes between businesses, which makes the law difficult to apply in a consumer context.
- 3.4 In the Consultation Paper we described seven possible causes of action, each with its own complexities.<sup>2</sup> Here we do not repeat our description of all seven. We do not, for example, describe the law of equitable estoppel, personal bar and waiver.<sup>3</sup> Instead we focus on the actions of most relevance to consumers. We start by outlining two key concepts: the nature of a misrepresentation and the significance of a contract.
- 3.5 Typically, consumers will have been induced to enter into contracts by false or misleading statements. They will seek a remedy against the other party to the contract, usually the retailer or service provider. In these circumstances, their common law remedies for fraudulent or innocent misrepresentation have been supplemented by statute. In England and Wales, the Misrepresentation Act 1967 (the 1967 Act) applies. In Scotland, the issue is addressed by section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (the 1985 Act). We therefore concentrate on these provisions. Although we think that the policies behind the Acts are broadly correct, the Acts appear overly complex and difficult for consumers to use.

<sup>1</sup> See the Consultation Paper, Parts 5 and 7.

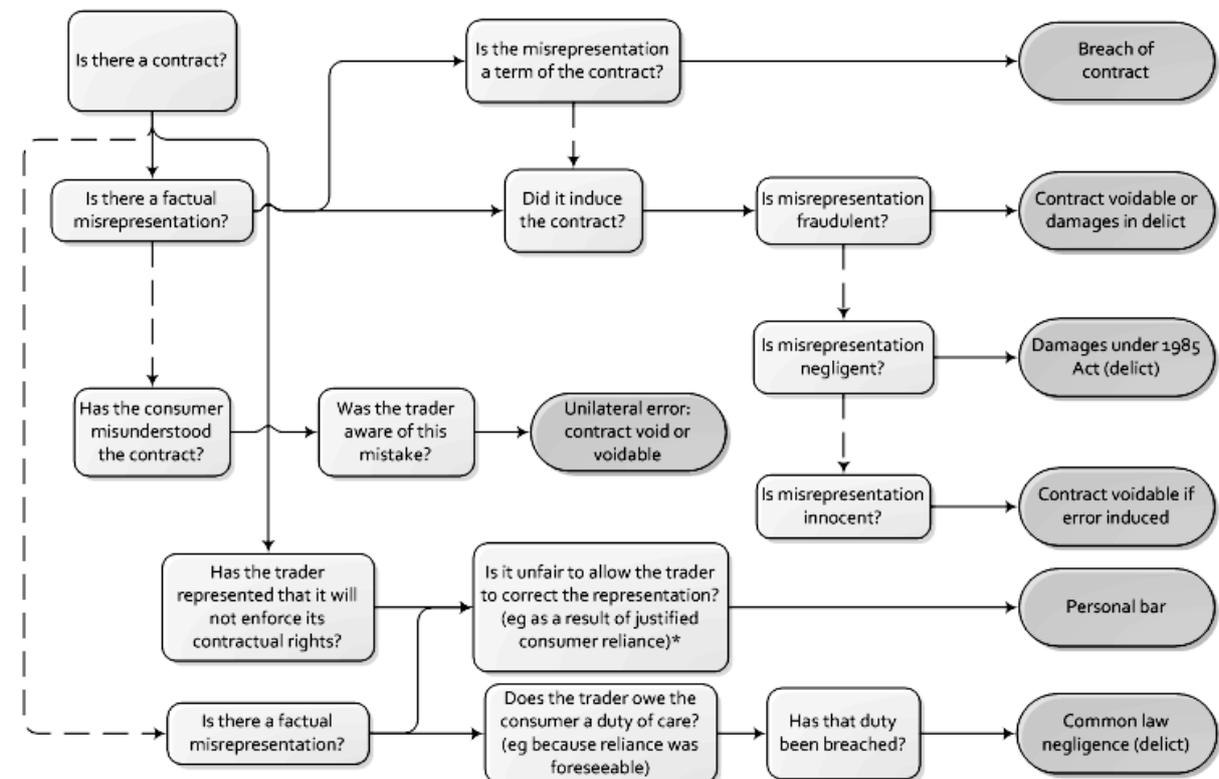
<sup>2</sup> For a full account see the Consultation Paper, Part 5.

<sup>3</sup> For detail of these doctrines, see the Consultation Paper, paras 5.72 to 5.79.

## KEY CONCEPTS IN THE LAW OF MISREPRESENTATION IN ENGLAND & WALES



## KEY CONCEPTS IN THE LAW OF MISREPRESENTATION IN SCOTLAND



Key:  
 Yes →  
 No - ->

\* See Reid & Blackie, *Personal Bar* (2006) para 2.11, which states that "Direct verbal representations are found relatively seldom as the basis of bar, perhaps because in many cases they are more readily analysed under the law of promise or misrepresentation."

### **What is a misrepresentation?**

- 3.6 The definition of a misrepresentation is similar in both England and Scotland. There are said to be three main requirements: it must be (1) false; (2) factual; and (3) not an omission.<sup>4</sup> Each of these requirements has several exceptions and has generated a large amount of relevant case law.
- 3.7 Although in theory an omission cannot count as a misrepresentation,<sup>5</sup> the line between acts and omissions is a fine one. There can be:
- (1) *Half truths*: where the trader has not actually lied, but the meaning of what they have said changes completely because of what they omitted.<sup>6</sup>
  - (2) *Representations implied by conduct*: although a trader may not expressly say something, their actions may convey a clear meaning.
  - (3) *Active concealment*: a distinction is made between concealment in the sense of silence, and active concealment (which is considered a positive misrepresentation).<sup>7</sup>
  - (4) *Representations falsified by later events*: a representation can continue. There is a duty to correct it if it subsequently becomes untrue.<sup>8</sup>
- 3.8 We think that the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) take a more satisfactory approach.<sup>9</sup> Under Regulation 5(2) the crucial issue is whether the practice or “its overall presentation in any way deceives or is likely to deceive the average consumer”. The Regulations accept that presentation may be deceptive even if it is factually correct. This concentrates on the effect of the practice, rather than setting a rule that the statement must be false, and then providing for exceptions to the rule. They also specifically cover omissions.

### **The significance of a contract**

- 3.9 The effect of a misrepresentation depends on whether the consumer has been induced to enter into a contract. In most cases, the consumer will have bought a good or service, and will seek a remedy against the retailer or service provider.
- 3.10 In some cases the misleading statement will be interpreted as a term of the contract, giving the consumer a right to claim for breach of contract. Even if the statement is not a contract term, the law still provides a remedy, as we discuss below. In theory, consumers are well-protected, though as we shall see, the law is overly complicated.

<sup>4</sup> See the Consultation Paper, paras 5.8 to 5.18.

<sup>5</sup> *Smith v Hughes* (1871) LR 6 QB 597; J Cartwright, *Misrepresentation, mistake and non-disclosure* (1<sup>st</sup> ed 2007) para 16.02.

<sup>6</sup> *Chitty on Contracts* (30<sup>th</sup> ed 2008) para 6-017.

<sup>7</sup> See *Gibson v National Cash Register Co Ltd* 1925 SC 500.

<sup>8</sup> *Slough Estates plc v Welwyn Hatfield DC* [1996] 2 PLR 50, and *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15; [2002] EMLR 27.

<sup>9</sup> SI 2008/1277.

- 3.11 Private law provides far fewer remedies in the absence of a contractual relationship between the parties. Take a case, for example, where a manufacturer makes a misleading statement which induces the consumer to buy the product from a retailer. In public law, the manufacturer may be guilty of an offence under the Regulations. In private law, however, the consumer would be expected to bring an action against the retailer, who may then in turn raise the issue with the manufacturer.
- 3.12 This is a central principle of consumer redress: problems and complaints should be raised with the retailer and then passed up the chain. In the Consultation Paper we identified five exceptions to this principle, but they are all specific.<sup>10</sup> These were:
- (1) Where the producer provides a specific guarantee.
  - (2) Where an advertisement makes an unambiguous promise. The courts may interpret it as giving rise to a collateral contract.<sup>11</sup> In Scotland, the promise would be enforceable as it stood.<sup>12</sup>
  - (3) In England and Wales, under the Contracts (Rights of Third Parties) Act 1999, a third party may enforce a contract term if the contract expressly states so or “the term purports to confer a benefit on him”.<sup>13</sup> Express rights for consumers in producer/retailer contracts are extremely rare. In Scotland, if the parties to a contract intended to confer rights upon a third party, the law will generally give effect to the intention of the parties so that the third party can claim under the contract.<sup>14</sup>
  - (4) Under the doctrine in *Hedley Byrne v Heller*,<sup>15</sup> traders can become liable if they owe the consumer a duty of care and make a negligent mis-statement, knowing that the consumer may rely on it and suffer economic loss.
  - (5) Where defective products caused personal injury or property damage.<sup>16</sup>
- 3.13 In most cases, however, the consumer’s claim is against the retailer.

<sup>10</sup> See the Consultation Paper, paras 13.36 to 13.41.

<sup>11</sup> The leading case is *Carlill v Carbolic Smokeball Co* [1893] 1 QB 256. As Scott and Black point out, however, “the courts do not regard most statements in advertisements as being intended to create legal relations”. See C Scott and J Black, *Cranston’s Consumers and the Law* (3<sup>rd</sup> ed 2000) p 174.

<sup>12</sup> See H L MacQueen & J M Thomson, *Contract Law in Scotland* (2<sup>nd</sup> ed 2007) para 2.13.

<sup>13</sup> See s 1(1)(a).

<sup>14</sup> H L MacQueen & J M Thomson, *Contract Law in Scotland* (2<sup>nd</sup> ed 2007) para 2.69. This branch of contract law is known as *ius quaesitum tertio* (right acquired by a third person).

<sup>15</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. This doctrine is discussed in more detail from para 5.27 of the Consultation Paper.

<sup>16</sup> Third parties may incur liability for negligence at common law - see *Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1, 1932 SC (HL) 31. They may also be liable for defective products under Part 1 of the Consumer Protection Act 1987.

- 3.14 Here we concentrate on consumers' rights where a misrepresentation has led them to enter into a contract. The position differs between England and Wales on the one hand, and Scotland on the other hand. We then look briefly at the much more limited right to claim damages for negligent misrepresentation in the absence of a contract.

### **England and Wales: the Misrepresentation Act 1967**

- 3.15 The 1967 Act applies "where a person has entered into a contract after a misrepresentation has been made to him".<sup>17</sup> It was designed to fill some of the gaps left by the common law. It is not primarily a consumer measure, but applies to all contracts.

### ***The common law remedies before 1967***

- 3.16 Before 1967, the common law set a sharp distinction between fraudulent misrepresentation and innocent misrepresentation.

- (1) Fraud was difficult to prove: the consumer would need to prove that the trader made the representation knowingly or recklessly.<sup>18</sup> Once proved, however, the victim of a fraudulent misrepresentation has the full array of remedies available, including damages. Damages tend to be generous: fraudsters are often held responsible for all consequences of their actions, not just the foreseeable ones.<sup>19</sup>
- (2) In the absence of fraud, the only remedy was "rescission": the contract was unwound and the parties returned to their original position. The right is easily lost, however, where for example, there is delay, or where services have been consumed or goods have deteriorated.<sup>20</sup> In some cases, the courts require the victim to make an allowance for services received or for the deterioration in the goods.<sup>21</sup>

### ***The intention behind the Act***

- 3.17 The 1967 Act was intended to make two changes. First, it was intended to provide a remedy in damages for negligent misrepresentation. Importantly, the claimant did not need to prove negligence. Instead, the onus was on the defendant to prove that "he had reasonable ground to believe and did believe" that the facts represented were true.<sup>22</sup>

<sup>17</sup> This phrase is used in ss 1, 2(1) and 2(2).

<sup>18</sup> *Derry v Peek* (1889) LR 14 App Cas 337 stated that the representation must have been made knowingly; or without belief in its truth; or recklessly, careless of whether it be true or false.

<sup>19</sup> See *McGregor on Damages* (18<sup>th</sup> ed 2009) para 41-006.

<sup>20</sup> See the Consultation Paper, paras 8.15 to 8.23.

<sup>21</sup> *Erlanger v New Sombrero Phosphate Co* (1878) LR 3 App Cas 1218; see also *Chitty on Contracts*, para 6-116.

<sup>22</sup> See s 2(1), Misrepresentation Act 1967.

- 3.18 Secondly, for non-fraudulent misrepresentation, the Act provided the court with a discretion to award damages in lieu of rescission. We think that, originally, one intention was to allow damages where rescission was no longer a practical option.<sup>23</sup>

### **Problems**

- 3.19 Unfortunately, the policy was frustrated by clumsy implementation:
- (1) Section 2(1) provides damages for negligent misrepresentation, stating that the defendant is liable as if “the misrepresentation had been made fraudulently”. This roundabout wording has been called “the fiction of fraud”. The leading case suggests a defendant who has not acted fraudulently should pay damages designed for fraud, even though this harsher measure is inappropriate.<sup>24</sup>
  - (2) Section 2(2) confers a discretion to provide damages in lieu of rescission. This only applies if the party “would be entitled, by reason of the misrepresentation, to rescind the contract”. These words are ambiguous, but it is likely that the right to damages under section 2(2) is lost if the original right to rescind is lost.<sup>25</sup>
- 3.20 This makes the Act much less useful than first appears. A contract cannot be rescinded once the goods have been fully consumed: for example, one cannot give back electricity or phone calls which have been used. Thus the right to rescind is lost, and it appears that damages under section 2(2) are also unavailable. We do not think that this was intended, and there is academic support for the abolition of this restriction.<sup>26</sup>
- 3.21 There is also uncertainty about the proper measure of damages under section 2(2). The judges in the leading case, *William Sindall plc v Cambridgeshire County Council*, did not come to a single view.<sup>27</sup> As noted by Mr Justice Jacob in a subsequent case:

The constant and justified academic criticism of the Act indicates a subject well worth the attention of the Law Commission.<sup>28</sup>

<sup>23</sup> The Solicitor General’s comments to the House of Commons suggest it was his view that damages would be available under section 2(2) when rescission was no longer possible. See *Hansard* (HC) (5<sup>th</sup> Series) 20 February 1967, vol 741, cols 1388 to 1389; and Hugh Beale, “Damages in lieu of rescission for misrepresentation” (January 1995) 111 *Law Quarterly Review* 60 to 65.

<sup>24</sup> *Roycott Trust v Rogerson* [1991] 2 QB 297. For discussion, see J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (2007).

<sup>25</sup> See P S Atiyah, G H Treitel, “Misrepresentation Act 1967” (1967) 30 *Modern Law Review* 369, 377 and *Atlantic Lines & Navigation Co Inc v Hallam Ltd* [1983] 1 Lloyd’s Rep 188.

<sup>26</sup> Hugh Beale, “Damages in lieu of rescission for misrepresentation” (January 1995) 111 *Law Quarterly Review* 60 to 65.

<sup>27</sup> [1994] 1 WLR 1016. For discussion, see *Chitty on Contracts* (30<sup>th</sup> ed 2008) para 6-101.

<sup>28</sup> *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 591.

- 3.22 Consumer advisers told us that the 1967 Act is seldom used. Although we support the policy behind the Act, we think a much clearer statement of remedies is required.

### **The law of misrepresentation in Scotland**

#### ***The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, section 10***

- 3.23 Section 10 provides damages for negligent misrepresentation: Section 10(1) reads as follows:

A party to a contract who has been induced to enter into it by negligent misrepresentation made by or on behalf of another party to the contract shall not be disentitled, by reason only that the misrepresentation is not fraudulent, from recovering damages from the other party in respect of any loss or damage he has suffered as a result of the misrepresentation; and any rule of law that such damages cannot be recovered unless fraud is proved shall cease to have effect.

- 3.24 Unlike the 1967 Act, section 10 of the 1985 Act does not create a new statutory liability. It simply abolished the previous common law rule in *Manners v Whitehead*,<sup>29</sup> which had denied the victim of a misrepresentation a remedy in delict against the perpetrator, unless the representation was fraudulent. Under section 10, the pursuer must still establish a case in negligence, which involves establishing that the defender has breached a pre-existing duty of care owed to the pursuer.<sup>30</sup> Where the pursuer and defender are parties to a contract following upon the misrepresentation, this should not be problematic. If the defender's misrepresentation was made negligently, and economic loss was sustained because of it, a claim in delict will succeed.
- 3.25 The section does not state the legal rights it creates in a direct manner. The fact that consumer actions remain subject to the establishment of a case in negligence provides additional uncertainty.

<sup>29</sup> (1898) 1 F 171.

<sup>30</sup> See J Thomson, "Misrepresentation", 2001 SLT (News) 279 at 281, where Professor Thomson criticises the view of the Lord Ordinary (Carloway) in *Hamilton v Allied Domecq plc* 2001 SC 829 that s 10 of the 1985 Act equated a negligent misrepresentation with a fraudulent misrepresentation as in the Misrepresentation Act 1967. This point was not addressed further when the case progressed to the Inner House 2006 SC 221 (IH 2 Div) and the House of Lords [2007] UKHL 33, 2007 SC (HL) 142. See further, J Thomson, *Delictual Liability* (4th ed 2009) para 4.14.

### ***The remedy of reduction***

- 3.26 Scots law gives an aggrieved party the right to withdraw from a contract for misrepresentation or induced error. This is known as “reduction” and is a remedy granted by a court.<sup>31</sup> It can only be obtained in the Court of Session, although it may also be sought in the sheriff court as a defence (*ope exceptionis*) to an action for implement of a contract. It is uncertain whether the victim of a misrepresentation may escape from a contract without seeking a court decree.<sup>32</sup>
- 3.27 A clear rule allowing the consumer to unwind the contract by giving notice to the other party could assist in making the law more accessible and transparent, and easier for the consumer to operate.<sup>33</sup>
- 3.28 The remedy requires the aggrieved party to be able to restore the other party to its original position; this is known as the principle of *restitutio in integrum*. This may produce harsh results in a consumer context. On a previous occasion, the Scottish Law Commission proposed that, should restitution be impossible, the court should have the power to value the obligation to restore in terms of money. This would not represent damages, but would be a surrogate for restitution.<sup>34</sup> The need for a more flexible approach is particularly apparent in the consumer context.
- 3.29 Furthermore, there is no equivalent in Scots law of section 2(2) of the 1967 Act, giving the courts discretion to award damages in lieu of reduction/rescission in cases of innocent misrepresentation.

<sup>31</sup> *The Laws of Scotland (Stair Memorial Encyclopaedia)* vol 13, para 25 and following.

<sup>32</sup> W W McBryde *The Law of Contract in Scotland* (3<sup>rd</sup> ed 2007) para 13-21, noting also that “Part of the problem may be that rescission as an English concept influenced Scots law on invalidity, but the consequences have never been clarified”. See, for example, *MacLeod v Kerr* 1965 SC 253, where the issue is not addressed satisfactorily.

<sup>33</sup> This is the position in England and Wales, where no formality requirements attach to rescission. See *Chitty on Contracts* (30<sup>th</sup> ed 2008) para 22-030.

<sup>34</sup> Scottish Law Commission, *Defective Consent and Consequential Matters*, CM 42, 1978, paras 4.2 to 4.4.

### **Negligent misrepresentation in the absence of a contract**

- 3.30 In both jurisdictions, it is possible to bring an action for negligent misrepresentation in the absence of a contract, but only if the claimant succeeds in establishing that the defendant owed a “duty of care” to the claimant. The doctrine developed from the case of *Hedley Byrne v Heller*, which first recognised that a negligent misrepresentation could give rise to liability for economic loss, if the parties were in a “special relationship”.<sup>35</sup> The courts have been cautious not to take liability too far.<sup>36</sup> The doctrine relies on vague concepts like “assumption of responsibility”, “proximity”, and the ultimate catch-all phrase of what is “fair, just and reasonable”.<sup>37</sup>
- 3.31 Although these concepts are continuously evolving, we think it would be difficult for a consumer to establish liability against a manufacturer or other third party. The consumer would probably need to show that some special factor was present, leading to a duty of care. The consumer would then need to prove both negligence and loss. Damages are the usual remedy.<sup>38</sup>

### **Conclusion**

- 3.32 The law provides a consumer with redress against a trader who has led them to buy goods or services following a misrepresentation, but the remedies are not as clear as they should be. In particular:
- (1) The right to unwind the contract is uncertain and easily lost. It is unclear how far the consumer must be able to return goods or services, or how quickly the right must be exercised.
  - (2) Where the right to unwind has been lost, either because of delay or because the goods or services have been fully consumed, it is unclear what other remedy the consumer might be entitled to. The law on valuing economic loss is largely about business contracts.

<sup>35</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. For a discussion of Scots law in this area, see J Thomson, *Delict* (SULI) (4<sup>th</sup> ed 2009) para 5.16.

<sup>36</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605.

<sup>37</sup> *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181. See also *Fraser v The Professional Golfers' Association* [2008] CSIH 53, 2008 GWD 33-492, 2009 SCLR 324.

<sup>38</sup> *Clerk & Lindsell on Torts* (20<sup>th</sup> ed 2010) para 8-04; J Thomson, *Delictual Liability* (4<sup>th</sup> ed 2009) paras 16.9 to 16.10.

## **PRIVATE REDRESS FOR MISLEADING OMISSIONS**

- 3.33 The general common law rule is that a misrepresentation must be a positive act. There is no liability for omissions, unless a specific duty has been breached. The courts have recognised a few exceptions to this rule. There is, for example, a duty to disclose information in insurance contracts or in specific relationships of trust (such as between solicitor and client).<sup>39</sup> Traders, however, have no general common law duty to disclose information to the consumer. This contrasts with the position under the Regulations, which impose a duty on traders to disclose material information to consumers.<sup>40</sup>
- 3.34 Although the distinction between acts and omissions is an important conceptual divide, it is a difficult one to draw in practice. As we discussed in the Consultation Paper, many of the examples of omissions given to us by consumer groups would give rise to civil liability under the current law.<sup>41</sup> Consumers may have three types of claim: for a misrepresentation; for a breach of an implied contract term; or under unfair contract terms legislation. We look at each in turn.

### **Omissions shading into positive misrepresentations**

- 3.35 The line between acts and omissions is a fine one. The concept of misrepresentation includes half-truths, representations by conduct, cases of active concealment and representations which are falsified by later events.<sup>42</sup> In all these situations, the omission colours a related action of the trader, making the trader liable to provide redress.
- 3.36 Consider the example that was put to us in evidence: a plumber advertises that there is “no call-out charge” but then charges a “diagnosis fee”.<sup>43</sup> The original statement could be considered positively misleading and therefore a “misrepresentation” in law.<sup>44</sup>

### **Implied contract terms**

- 3.37 As we discussed in the Consultation Paper, terms may be implied into contracts by statute or by common law.<sup>45</sup> Below we describe three examples which may be particularly useful to a consumer who has not been given full information about a product.

<sup>39</sup> For discussion of these exceptions, see the Consultation Paper, paras 6.9 to 6.12.

<sup>40</sup> Reg 6.

<sup>41</sup> See the Consultation Paper, Part 6.

<sup>42</sup> See discussion in the Consultation Paper at paras 5.13 to 5.18.

<sup>43</sup> Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), para 3.21.

<sup>44</sup> See *Tapp v Lee* (1803) 127 ER 200. For Scots law, see *Patterson v Lansberg* (1905) 7 F 675.

<sup>45</sup> See the Consultation Paper, paras 6.13 to 6.23.

### **Statutory implied terms in the sale of goods**

- 3.38 The Sale of Goods Act 1979 requires that when goods are sold, they must be of satisfactory quality and fit for the buyer's purpose.<sup>46</sup> The Act provides a remedy if the goods are sub-standard, unless the defect was "specifically drawn to the buyer's attention before the contract" was made.<sup>47</sup> This means that if a retailer fails to mention a defect in the goods, the consumer has a remedy for breach of contract against the retailer.
- 3.39 That said, information may be "material", within the meaning of the Regulations, without necessarily affecting quality. Professor Hugh Collins gives an example of a lawn mower that uses an unusual, hard-to-find fuel.<sup>48</sup> It is arguably a material consideration for a consumer making a transactional decision about whether or not to purchase that particular lawn mower. Yet this fact cannot properly be regarded as a defect in quality.

### **Implied terms in service contracts**

- 3.40 In England and Wales, the Supply of Goods and Services Act 1982 requires a trader to carry out services with reasonable care and skill.<sup>49</sup> This may include a duty to inform the consumer of any problems with the service beforehand. Professor Hugh Collins uses the example of a dentist treating a patient: the duty of reasonable care and skill may include a duty to disclose the side-effects of a treatment.<sup>50</sup>
- 3.41 In Scots law, liability for services is based upon terms implied at common law.<sup>51</sup> There is an implied duty to exercise the ordinary standard of care and workmanship of the trade in question.<sup>52</sup> Indeed, there is authority to the effect that, if the workman does not have the requisite skill for the job in hand,<sup>53</sup> or has a lesser ability than would normally be expected in that particular trade,<sup>54</sup> there is a duty to let the customer know.<sup>55</sup>

<sup>46</sup> Sale of Goods Act 1979, s 14.

<sup>47</sup> Above, s14(2C)(a).

<sup>48</sup> H Collins, *A private right of redress for unfair commercial practices: A report for Consumer Focus* (April 2009), p 23.

<sup>49</sup> Supply of Goods and Services Act 1982, s 13. Part II of this Act does not apply to Scotland. See W C H Ervine, *Consumer Law in Scotland* (4th ed 2008) para 6-04.

<sup>50</sup> H Collins, *A private right of redress for unfair commercial practices*, A report for Consumer Focus (April 2009), p 22.

<sup>51</sup> See W C H Ervine, *Consumer Law in Scotland* (4th ed 2008) paras 6-13 to 6-26.

<sup>52</sup> *Dickson v Hygienic Institute* 1910 SC 352 and *Owen v Fotheringham* 1997 SLT (Sh Ct) 28.

<sup>53</sup> *Brett v Williamson* 1980 SLT (Sh Ct) 56.

<sup>54</sup> *Dickson v Hygienic Institute* 1910 SC 352.

<sup>55</sup> *Macintosh v Nelson* 1984 SLT (Sh Ct) 82.

### **Other implied terms**

- 3.42 In both English and Scots law, terms can also be implied on the basis of the facts of the particular case, or by custom.<sup>56</sup>
- 3.43 In its preliminary advice on the Regulations, the Law Commission considered the example of a theatre ticket sold at full price, but which turned out to have a restricted view of the stage.<sup>57</sup> The consumer could argue that, as a matter of normal commercial practice, there is an implied term that the stage is reasonably visible from all seats unless the consumer is told otherwise.

### **Unfair terms**

- 3.44 Finally, the law provides consumers with protection against “hidden” contract terms, that is to say, terms with which the consumer had no real opportunity of becoming acquainted before conclusion of the contract. Such terms may be assessed for fairness under the Unfair Terms in Consumer Contracts Regulations 1999 (the 1999 Regulations).<sup>58</sup>
- 3.45 One potential problem is that the 1999 Regulations do not cover “the definition of the main subject matter of the contract” or “the adequacy of the price”, provided these terms are “in plain intelligible language”.<sup>59</sup> In *Office of Fair Trading v Abbey National plc*, the Supreme Court found that this exemption included contingent charges which would only be applied in specific circumstances and which the consumer did not see as part of the essential bargain.<sup>60</sup> Thus the court may not review charges for unauthorised overdrafts, provided they were set out in clear language, even if most consumers taking out a current account were more focused on other aspects of the bargain.
- 3.46 This reduces the usefulness of the 1999 Regulations in combating hidden charges. The Law Commissions have recommended statutory reform.<sup>61</sup>

<sup>56</sup> For further discussion, see Consultation Paper paras 6.19 to 6.23. For Scots law, see W W McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed 2007) ch 9.

<sup>57</sup> Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department for Business, Enterprise and Regulatory Reform on the issues raised* (November 2008), para 2.51, available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>.

<sup>58</sup> SI 1999/2083.

<sup>59</sup> Reg 6(2).

<sup>60</sup> [2009] UKSC 6, [2010] 1 AC 696, [2009] 3 WLR 1215.

<sup>61</sup> Unfair Terms in Contracts (2005) Law Com No 292; Scot Law Com No 199. Clause 4 of our draft Bill would clarify that a price term is only exempt from review if it is transparent and payable in circumstances which are substantially the same as those the consumer reasonably expected.

## **Conclusion**

- 3.47 In the UK, the private law approach to omissions is narrower than under the Regulations. There is no liability for pure omissions. On the other hand, consumers do have some remedies for what is not said. A consumer who is not told of a defect in goods has a remedy under section 14 of the Sale of Goods Act 1979. A consumer who is not told of a problem with a service may show that the trader has breached their duty to use reasonable care and skill.<sup>62</sup> Hidden contract terms meanwhile may be assessed for fairness.<sup>63</sup>
- 3.48 Many apparent omissions are in effect misrepresentations by default, where an average consumer would assume something that was not actually said. We think it would be helpful to clarify that a statement may be misleading, if in its overall presentation, it would be likely to mislead the average consumer, even if it is not actually false.<sup>64</sup> We return to this issue in Part 7.

## **PRIVATE REDRESS FOR AGGRESSIVE PRACTICES**

- 3.49 As we saw in Part 2, the Regulations define aggressive practices widely. They cover illegitimate high-pressure sales tactics, such as creating the impression that the consumer cannot leave the premises until a contract is formed,<sup>65</sup> persistent and unwanted solicitations;<sup>66</sup> or home selling, where the trader ignores the consumer's requests to leave.<sup>67</sup>
- 3.50 During the course of our project we received many examples where consumers were exploited by practices of this sort – from the doorstep salesman who stayed for four hours to persuade an elderly consumer to buy an orthopaedic bed, to the six hour “holiday club” presentation, where burly doorkeepers dissuaded consumers from leaving. There is a right to cancel in off-premises sales, but the time is often too short for vulnerable consumers to take action.
- 3.51 As we explain below, the present private law provides only patchy and inadequate safeguards against aggressive practices. The doctrines of duress and undue influence are ill-fitted to deal with high-pressure sales techniques used to exploit consumers. Furthermore, the law of unconscionable bargains is too uncertain to deliver effective consumer protection. Finally, the Protection from Harassment Act 1997 can be useful protection against a course of conduct, but does not usually apply to one-off incidents.

<sup>62</sup> Supply of Goods and Services Act 1982, s 13.

<sup>63</sup> Under the Unfair Terms in Consumer Contracts Regulations SI 1999/2083.

<sup>64</sup> Under our recommendations, the consumer would also have to show they were actually misled in order to obtain relief.

<sup>65</sup> Sch 1, banned practice 24.

<sup>66</sup> Above, banned practice 26.

<sup>67</sup> Above, banned practice 25.

### **The right to cancel**

- 3.52 In off-premises sales, consumers' main protection is the right to cancel the contract within seven days,<sup>68</sup> (which will soon be extended to 14 days).<sup>69</sup> This applies to all off-premises sales, whether or not the selling has been misleading or aggressive.
- 3.53 We were told about tactics aimed specifically at reducing the likelihood of consumers exercising this right. In a 2009 edition of the BBC TV programme *Rogue Traders*, an undercover reporter attending training was told to encourage purchasers to delay informing their family of their purchase.<sup>70</sup> Another tactic was to deliver items quickly and help unpack them when they arrived.
- 3.54 Consumer advisers told us that, even without such tactics, 14 days is often not long enough for elderly house-bound consumers who lack regular social contact to take action. They are often unaware of their rights, embarrassed about what has happened and reluctant to make a fuss. By the time family and friends find out about the problem, the cancellation period has passed.

### **Duress**

- 3.55 Consumers' main protection against aggressive practices lies in the law of duress (which in Scotland is known as "force and fear"). This provides a remedy where there are threats of physical violence or damage to property, but when the pressure tactics do not include overt threats it is difficult to tell whether relief would be available.<sup>71</sup>
- 3.56 One problem is that victims of high pressure sales tactics rarely protest, either at the time or immediately thereafter. Yet the courts have held that the lack of protest may be a factor suggesting that there was no "economic duress".<sup>72</sup> Furthermore, in English law, the doctrine of duress usually demands that the victim takes action to rescind the contract as soon as the duress ceases (that is as soon as the salesperson leaves). If action is taken a month later, following advice from a relative, the right to rescind for duress will usually have been lost.<sup>73</sup>

<sup>68</sup> Cancellation of Contracts made in a Consumer's Home or Place of Work Regulations 2008 (SI 2008/1816), Reg 2(1) and Schedule 4, para 3.

<sup>69</sup> Consumer Rights Directive 2011/83/EU (OJ 2011 L 304/64), Art 9.

<sup>70</sup> See [http://www.bbc.co.uk/blogs/Rogue Traders/2009/11/rogue\\_traders\\_updates.html](http://www.bbc.co.uk/blogs/Rogue%20Traders/2009/11/rogue_traders_updates.html).

<sup>71</sup> For discussion, see the Consultation Paper, paras 7.11 to 7.29.

<sup>72</sup> See *Maskell v Horner* [1915] 3 KB 106; *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366; and *Chitty on Contracts* (30<sup>th</sup> ed 2008) para 7-034.

<sup>73</sup> See the Consultation Paper, paras 7.23 to 7.24.

3.57 Finally, it is not clear whether a consumer is entitled to damages for the consequences of duress. In England and Wales, there do not appear to be any cases in which damages have been awarded for duress. A leading textbook suggests that damages should be available in principle,<sup>74</sup> but in a House of Lords case, judges expressed differing views on the issue.<sup>75</sup> In Scotland, the question of whether the doctrine of force and fear can give rise to a delictual remedy is also contentious.<sup>76</sup>

### **Undue influence**

3.58 Undue influence is an equitable doctrine which applies where there is a special relationship of trust and confidence between the parties.<sup>77</sup> If this relationship is abused and the weaker party is exploited, the contract can be set aside.

3.59 Many cases of undue influence have involved husbands and wives,<sup>78</sup> spiritual advisers, and relationships of trust involving particularly vulnerable individuals who are either very old, or young and impressionable.<sup>79</sup> The relationship between trader and consumer, although imbalanced, is very different to the sort of ongoing dependency that is characteristic of undue influence cases. This makes the doctrine of undue influence an unlikely source of redress for consumers.

3.60 As with duress, undue influence does not provide a remedy in damages but only provides grounds for avoiding the contract.<sup>80</sup>

<sup>74</sup> *Chitty on Contracts* (30<sup>th</sup> ed 2008) para 7-055.

<sup>75</sup> In *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366, Lord Diplock said that duress was not a tort for which damages could be awarded (at p 385). However, Lord Scarman said that it was an actionable tort (at p 400).

<sup>76</sup> For discussion, see the Consultation Paper, paras 8.30 to 8.31.

<sup>77</sup> *Chitty on Contracts* (30<sup>th</sup> ed 2008) para 7-056. Scots law does not have any formal division between law and equity, but borrowed undue influence from English Equity in the mid nineteenth century as (also under English law influences) the definition of fraud became narrowed. See *Gray v Binny* (1879) 7 R 332.

<sup>78</sup> *Bank of Montreal v Stuart* [1911] AC 120 and *BCCI v Aboody* [1989] 2 WLR 759.

<sup>79</sup> As with *Morley v Loughnan* [1893] 1 Ch 736 and *Allcard v Skinner* (1887) LR 36 Ch D 145.

<sup>80</sup> This is subject to the possibility of "equitable compensation" discussed at para 8.32 of the Consultation Paper.

### **Facility and circumvention (in Scotland)**

- 3.61 Scots law offers some protection for the vulnerable consumer where there is no prior relationship with the other party, on the ground of facility and circumvention.<sup>81</sup> Three elements are required. First, it must be shown that the victim was “facile”, that is a person who was in a weak state of mind, owing to age, bodily infirmity, distress or mental health, and thus susceptible to intimidation or persuasion to act in a manner other than would be usual. Secondly, the contract must be shown to have been to the disadvantage of that individual. Thirdly, that individual must have been induced to enter into the contract as a result of “fraud and circumvention”.<sup>82</sup> The degree of facility depends on the degree of circumvention. The greater the one, the lower the standard required of the other.<sup>83</sup>
- 3.62 The doctrine is likely to provide practical protection only for vulnerable consumers such as the elderly or those in poor health, physical or mental. Consumers may however be reluctant to label themselves as “facile”, when the main problem is the wrongful conduct of the trader.

### **Unconscionable bargains (in England and Wales)**

- 3.63 In England and Wales, it is possible that some contracts may be set aside on the grounds that they were “unconscionable bargains”. However whether this constitutes a general, independent ground of relief remains unclear.<sup>84</sup>
- 3.64 In *Lloyds Bank Ltd v Bundy*,<sup>85</sup> an elderly farmer granted the bank security over his home to secure the debts of his son’s ailing business. Lord Denning emphasised the court’s general jurisdiction to provide relief where the transaction was “very unfair”. In such cases the victim’s bargaining power may be “grievously impaired” because of the victim’s ignorance or other disadvantage, coupled with pressure from the other side.<sup>86</sup> Since then, however, Lord Denning’s interpretation of a general principle of unequal bargaining power has been criticised.<sup>87</sup>

<sup>81</sup> See W W McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed 2007) Part 16.

<sup>82</sup> In this context, fraud has a different meaning from fraud in the conventional sense, and can be established using evidence short of that required to prove a charge of fraud. See W W McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed 2007) at para 16-16 and *Gibson’s Exr v Anderson* 1925 SC 774 at 788.

<sup>83</sup> W W McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed 2007) para 16-15.

<sup>84</sup> In England and Wales it has been recognised in several cases, such as *Fry v Lane* (1889) LR 40 Ch D 312 and more recent cases including *Shiloh Spinners v Harding* [1973] AC 691, and *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144. See also *Chitty on Contracts* para 7-126. In Scotland, see W W McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed 2007) para 17-12.

<sup>85</sup> [1975] QB 326.

<sup>86</sup> Above, 339.

<sup>87</sup> See for example *National Westminster Bank plc v Morgan* [1985] AC 686, 708 by Lord Scarman.

- 3.65 There appear to be three elements: an oppressive bargain, a victim suffering from a particular disadvantage and unconscionable conduct.<sup>88</sup> The claimant must show that there has been an unconscionable bargain.<sup>89</sup> However, even once this has been satisfied, the defendant has an opportunity to defend the claim by showing the transaction was in fact “fair, just and reasonable” and not oppressive.<sup>90</sup> Equity will not set aside a transaction just because it is harsh.
- 3.66 Overall, this is an extremely uncertain doctrine. It is difficult for consumers and their advisers to predict where the line will be drawn.

### **Lesion (in Scotland)**

- 3.67 Scots law also has an undeveloped doctrine to deal with extortionate contracts, known as “lesion”. Lesion means detriment, loss or injury. Like the English law of unconscionable bargains, it is extremely uncertain. Lesion may feature as one element in a case of defective consent, such as, for example, force and fear, undue influence or facility and circumvention. Doubt exists, however, as to whether lesion by itself would be sufficient in order to invalidate consent to a contract.<sup>91</sup>
- 3.68 The law on lesion as a ground of challenge is thus piecemeal at best. There is no set of general rules and principles, and almost nothing is to be gleaned from the infrequent and highly fact-dependent case law, which is, in any event, rather old.

### **The Protection from Harassment Act 1997**

- 3.69 The Protection from Harassment Act 1997 applies to the whole of Great Britain. It states that a person must not pursue “a course of conduct” which “amounts to harassment of another” and which “he knows or ought to know amounts to harassment”.<sup>92</sup> Section 3 provides a possible civil remedy, including damages for (among other things) anxiety and financial loss.<sup>93</sup>
- 3.70 Although the Act is usually used against “stalkers”, it may be useful in consumer cases. For example, it has been applied where British Gas sent a consumer a series of threatening letters over an eight month period, even though she did not owe them money.<sup>94</sup> Her various complaints and appeals had no effect.

<sup>88</sup> *Chitty on Contracts* (30<sup>th</sup> ed 2008) paras 7-129 to 7-133. See also *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87.

<sup>89</sup> Above.

<sup>90</sup> *Earl of Aylesford v Morris* (1872 to 1873) LR 8 Ch App 484, 490-491 by Lord Selborne, LC.

<sup>91</sup> W W McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> ed 2007) para 17-12.

<sup>92</sup> Protection from Harassment Act 1997, s 1 (England and Wales) and s 8 (Scotland).

<sup>93</sup> For the equivalent Scottish provision, see Protection from Harassment Act 1997, s 8(5) and (6).

<sup>94</sup> *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46, [2010] 1 WLR 785. See also “Debt Collection and Recent Legal Issues” (April 2009) *Consumer Law Today* 9.

- 3.71 In the Consultation Paper we noted that the Act was a potentially good tool for consumers.<sup>95</sup> The drawback is the requirement for a “course of conduct”: usually a single, highly invasive incident will not be enough. Yet some of the worst abuses may involve a single incident. It is interesting to note that in Scots law, the Domestic Abuse (Scotland) Act 2011 has removed the requirement to show a “course of conduct” before a Non Harassment Order will be granted. Under the Act, evidence of only one incident of harassment is sufficient.

### **CONCLUSION**

- 3.72 The current civil law on aggressive practices lacks a coherent framework. Many examples of high-pressure selling would slip through the gaps, such as salespeople who refuse to go away. The evidence presented to us shows that this is a real problem in practice. Vulnerable consumers in off-premises sales who fail to take action within the cooling-off period find it difficult to assert their rights.
- 3.73 Reforming the law of aggressive practices in light of the Regulations could help set a more uniform and transparent benchmark of what would count as “illegitimate” or “unfair” pressure in private law.

<sup>95</sup> See the Consultation Paper, paras 7.66 to 7.70, 8.64 to 8.65 and 10.62.

## **PART 4**

### **THE CASE FOR REFORM**

- 4.1 In this Part we summarise the problems with the current law and set out the case for reform.
- 4.2 The problems are different for misleading practices and for aggressive practices. At first sight the law appears to give consumers adequate redress for misleading statements, but consumers can become lost in a bewildering array of remedies, all with their own complexities and uncertainties.
- 4.3 For aggressive practices, there are serious gaps in the law. Although aggressive practices are a major problem, often affecting particularly vulnerable consumers, the existing causes of action (duress, undue influence and harassment) provide inadequate protection.
- 4.4 Consumer groups and the Office of Fair Trading (OFT) urged us to provide a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations).<sup>1</sup> Below we discuss the arguments and explain why we have not taken this route.

#### **PROBLEMS WITH THE LAW ON MISLEADING PRACTICES**

- 4.5 The law of misrepresentation has not been developed with consumers in mind. In the Consultation Paper we identified seven possible routes to a remedy, each with its own uncertainties and complexities.<sup>2</sup> As we explain in Part 3, the most useful would appear to be the statutory remedies: the Misrepresentation Act 1967 in England and Wales (the 1967 Act), and section 10 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 in Scotland (the 1985 Act).
- 4.6 At first sight, the 1967 Act appears particularly useful, as it does not require the consumer to prove that the trader was at fault: instead the trader must show that it was *not* negligent. However, the 1967 Act is not well known or well-used.<sup>3</sup> It uses obscure and tortuous language and has been subject to academic criticism.<sup>4</sup> Furthermore, there is considerable uncertainty over the three remedies it provides: rescission, damages and damages in lieu of rescission.

<sup>1</sup> SI 2008/1277.

<sup>2</sup> See the Consultation Paper, para 5.4.

<sup>3</sup> See Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), paras 2.6 and 2.8, available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>.

<sup>4</sup> See for example P S Atiyah, G H Treitel, "Misrepresentation Act 1967" (1967) 30 *Modern Law Review* 369.

4.7 Meanwhile, section 10 of the 1985 Act requires the consumer to prove negligence. It also lacks transparency. The section simply abolished the rule laid out in previous case law<sup>5</sup> which barred delictual remedies unless the misrepresentation was fraudulent. We think that it would be more effective for the law to be expressed in a positive right-conferring form.

4.8 The remedies for misrepresentation are particularly problematic:

- (1) The right to rescind (or unwind) the contract is uncertain and easily lost. It is unclear how far the consumer must be able to return goods or services, or how quickly the right must be exercised.
- (2) Where the right has been lost, it is unclear what other remedy the consumer might be entitled to. The law on valuing economic loss is largely about business contracts.

#### **What consultees said**

4.9 The consultation responses showed strong support for statutory reform to simplify and clarify private redress for misleading practices. As Highland Council Trading Standards put it:

We think that the current position is confused and very challenging for lawyers, advisers and enforcers, and well-nigh impossible for consumers to understand. Simplification and clarification of the law of redress for misleading practices would be an important and necessary contribution to consumer empowerment and fair trading generally.

4.10 Cowan Ervine of Dundee University agreed:

The Consultation Paper makes a powerful case for statutory reform to simplify and clarify private redress for misleading practices. The complexity of the law and its lack of complete coverage of typical consumer problems make this area difficult enough for professional lawyers but next to impossible for consumer advisers and individual consumers. There is then the range of remedies to cope with which only adds to the problems.

4.11 There was also support from business groups. The British Retail Consortium (BRC) stated:

The BRC agrees that reform would be useful provided the outcome leads to something that is simpler to understand for all parties.

4.12 British Sky Broadcasting Group plc also welcomed reform:

Sky welcomes the Law Commissions' consultation and supports a clearer system for consumer redress reflecting the principles set out in the Consumer Protection Regulations.

<sup>5</sup> *Manners v Whitehead* (1898) 1 F 171, discussed at para 5.39 of the Consultation Paper.

- 4.13 Only three respondents did not think there was a need for reform in this area. The Federation of Small Businesses wrote:

The FSB acknowledges the reasoning behind the consultation. However, we are concerned that these proposals will simply push the pendulum in favour of the consumer.

- 4.14 Similarly, BT disagreed:

Whilst the CPRs do not currently provide a private right of redress, consumers already have several causes of action through private law doctrines.

### **Conclusion**

- 4.15 The current law of misrepresentation is not as effective as it should be. Consumers find it too difficult to value losses and obtain redress. Businesses also incur unnecessary costs in having to come to grips with the Regulations and with the different concepts used in the 1967 Act and 1985 Act.
- 4.16 **Recommendation 1: There should be new legislation to simplify and clarify consumer redress for misleading practices.**

### **PROBLEMS WITH THE LAW ON AGGRESSIVE PRACTICES**

- 4.17 The private law on aggressive practices leaves major gaps. None of the main causes of action (duress, undue influence or harassment) covers the sort of aggressive problems consumers typically encounter. Consumers have little chance of redress against many of the practices used in unscrupulous hard selling.
- 4.18 The Regulations highlight problems such as “creating the impression that the consumer cannot leave the premises until a contract is formed”,<sup>6</sup> or “conducting personal visits to the consumer’s home ignoring the consumer’s requests to leave or not to return”.<sup>7</sup> The law does not provide a clear right of action in these circumstances.
- 4.19 These high-pressure techniques are common, and an increasing problem for elderly consumers, especially when the selling took place in their homes. With an ageing population this problem is likely to grow. Government statistics suggest that in England and Scotland there are currently 630,000 people aged 85 or over who live alone.<sup>8</sup> This is set to rise to 1.4 million by 2033.

<sup>6</sup> Sch 1, banned practice 24.

<sup>7</sup> Above, banned practice 25.

<sup>8</sup> These figures combine data from the Office of National Statistics with the household figures produced by the Department for Communities and Local Government and the General Register Office for Scotland. Unfortunately, the figures for Northern Ireland and Wales do not include a breakdown by age group, so are not included.

### **The mobility aids market**

- 4.20 In September 2011, the OFT completed a market study of mobility aids, which documented the aggressive practices sometimes used to sell mobility aids to elderly consumers.<sup>9</sup>
- 4.21 The OFT estimated that the mobility aids market was worth between £430 million and £510 million.<sup>10</sup> It includes mobility scooters, wheelchairs, adjustable beds, recliner chairs, stair lifts and bath hoists. More than 4,000 complaints about mobility aid sales were made to Consumer Direct in each of the last three years.<sup>11</sup> Purchasers are often vulnerable by reason of physical and cognitive difficulties or lack of access to the internet.
- 4.22 The OFT found that a small minority of firms engaged in unfair practices, especially when selling door-to-door. Examples included high pressure sales pitches lasting several hours, traders refusing to terminate the sales visit when asked to do so, and time-limited discounts requiring an immediate purchase. The following example illustrates the problem:

Mrs B, who is disabled, elderly and lives alone, received a phone call from a trader who already knew her personal details and the fact that she was on a mobility scheme. The trader arranged an appointment to visit. Two sales people then visited Mrs B's home and used high pressure sales practices to try to convince Mrs B to purchase a mobility aid for £2,000. For example, when Mrs B told the sales people that the purchase was too expensive and that she simply did not have the money to pay for the mobility aid, they continued to put pressure on Mrs B to buy, and told her she could afford it if she used her savings or released money that was tied up in her will.

The sales people left Mrs B's home after they had received a cash deposit of £40 for the purchase of a memory-foam mattress costing £240.<sup>12</sup>

- 4.23 Traders may make misleading claims over the nature of the sales visit, giving the impression that they are working on behalf of social services or the health service or have a link to a charity. They may also mislead consumers about the product by, for example, falsely claiming that the item is bespoke or that a second-hand item is new.

<sup>9</sup> The Office of Fair Trading, *Mobility Aids: an OFT Market study* (September 2011), OFT1374, available at <http://www.oft.gov.uk/OFTwork/markets-work/mobility-aids/>.

<sup>10</sup> Above, p 21.

<sup>11</sup> Above, p 40.

<sup>12</sup> Above, p 36.

- 4.24 The OFT found that consumers who reported high pressure selling paid £500 to £1,000 more on average for a mobility aid, an overpayment of around 50 to 100%.<sup>13</sup> They may be left with an unsuitable or unusable product, and often suffer emotional distress. The OFT commented that the impact on health and well being can be significant.<sup>14</sup>

### **Will-writing**

- 4.25 In July 2011 a report by the Legal Services Consumer Panel showed that aggressive practices may also be a problem in the will-writing market.<sup>15</sup> Again, the problem is most acute for older people in door-to-door sales. The report gives examples where high pressure techniques led to high prices. For example, a couple who were originally told that wills would cost £35 each were pressured to pay £3,000 when visited at home.<sup>16</sup>
- 4.26 Under Regulation 7(2)(c), one factor indicating that a practice is aggressive is where the trader exploits a specific misfortune. The study found that some will-writers played on the prospect that the consumer would be forced to sell their home to pay for long-term care. The report commented that “the emotive nature of the topic, when coupled with the pressure of the salesperson” makes it difficult for the consumer to say no.<sup>17</sup>

### **What consultees said**

- 4.27 In the Consultation Paper we asked if the new Act should provide redress for aggressive practices. The overwhelming majority of consultees agreed that there is a need to extend private redress for aggressive practices. Only two disagreed.<sup>18</sup>
- 4.28 Age UK supported extending protection, and wrote:

We completely agree ... that the existing causes of action do not address the specific problems arising from high pressure selling practices and that ... the current law provides little redress for unscrupulous and often commission-based hard selling.

- 4.29 Many consultees thought that the provisional proposal would fill a gap in existing provisions. For example, Citizens Advice wrote:

<sup>13</sup> Above, p 47.

<sup>14</sup> Above, p 56.

<sup>15</sup> Legal Services Consumer Panel, *Regulating will-writing*, July 2011, available at [http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/ConsumerPanel\\_WillwritingReport\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf).

<sup>16</sup> Above, p 37.

<sup>17</sup> Above, para 5.34.

<sup>18</sup> BT and Richard B Mawrey QC disagreed.

We believe that the extension of private redress to aggressive practices is essential. This is a gap in consumer protection that cancellation rights and information provisions cannot always fill. As the consultation explains, it is easy for rogue traders to evade these provisions and to rely on pressure selling and scare tactics to sell products or to secure payments consumers would not otherwise agree to make.

4.30 As Consumer Focus stated:

Consumers who experience aggressive trading practices also currently face a bewildering array of legal doctrine with remedy being available under the common law of duress and undue influence but where the scope of liability is difficult to determine. It is also narrower and less certain.

4.31 Similarly, Central England Trading Standards Authorities thought that the proposal had “the potential to fill a large hole in the existing legislative provisions”.

**Conclusion**

4.32 There is a clear need to provide redress to consumers who have suffered from aggressive practices. There are many cases of consumer detriment, often involving vulnerable elderly consumers in their own homes. With the increase in people aged over 85 living alone, this problem is likely to grow.

4.33 **Recommendation 2: Consumers who suffer aggressive practices should have a right of redress under the terms of the new legislation.**

**UNFAIR PAYMENT COLLECTION**

4.34 The Consultation Paper noted the large number of complaints made about unfair payment collection. In some circumstances, the debt collection followed a consumer contract. In other cases it did not. Examples included wheel-clamping charges,<sup>19</sup> demands in respect of parking charges, requests for compensation for alleged copyright infringements and “civil recovery” against alleged shoplifters. Consumer groups drew our attention to the large number of complaints in these areas. We were told that where people are intimidated into paying money not owed the existing law of unjust (or, in Scots law, unjustified) enrichment is overly complex and does not provide a clear remedy.

4.35 Where debt collection follows a consumer contract, the Regulations clearly apply. In other circumstances, the position is less certain. As we note in Part 9, there is an arguable case that the Unfair Commercial Practices Directive 2005 (the Directive) covers all misleading and aggressive commercial demands for payment, but the issue is not beyond doubt.<sup>20</sup>

<sup>19</sup> For wheel-clamping in Scots law, see discussion at para 3.13 of the Consultation Paper.

<sup>20</sup> Directive 2005/29/EC (OJ 2005 L 149).

- 4.36 In our Consultation Paper, we asked whether the Regulations ought to be amended to state that all commercial demands for payment are included within the definition of commercial practices. A large majority of respondents were in favour of amending the Regulations in this way.
- 4.37 There was strong support for our proposal that the new Act should provide redress for all unfair payment collection used against private individuals. This was even described as “the best proposal within the new legislation”. In Part 9 we recommend that the Act should apply in these circumstances.
- 4.38 We acknowledge that in the context of debt collection, the line between legitimate and illegitimate threats may be a fine one. It is an important one, however – which is already drawn by the OFT’s Debt Collection Guidance, issued in respect of consumer credit debt collection.<sup>21</sup> We recommend that the OFT’s Guidance should also apply in this context.
- 4.39 **Recommendation 3: The new legislation should apply to aggressive and misleading payment collection against private individuals.**

#### **A TARGETED REFORM**

- 4.40 In the Consultation Paper we proposed a limited reform targeted at the problems brought to our attention. Our aim was to clarify and simplify the law on misleading practices, and to extend protection against aggressive practices.
- 4.41 We did not propose that consumers should have a right of redress simply because there had been a breach of the Regulations. We did not think that it was justified to provide new causes of action unless there was a clear problem in the marketplace.
- 4.42 In 2008, the Law Commission pointed out that a private right of redress for all breaches of the Regulations would impose unpredictable costs on traders:

The Directive and subsequent regulations were deliberately drafted in an open-ended way, so as to cover potential and unknown practices that might arise in the future. It is therefore impossible to provide an account of how they might be used, or the costs they would impose on traders. Introducing a private right of redress would involve a leap of faith, which could never be fully costed.<sup>22</sup>

- 4.43 In our early discussions, the Confederation of British Industry echoed these concerns. Businesses commented that the Regulations were uncertain, and might encourage consumers to bring small and unfounded actions. This would impose litigation costs on traders, which would ultimately be passed back to all consumers.

<sup>21</sup> The Office of Fair Trading, *‘Debt Collection’: OFT guidance for all businesses engaged in the recovery of consumer credit debts*, OFT 664Rev (July 2003, updated October 2011), available at <http://www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/debt-collection>.

<sup>22</sup> Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department for Business, Enterprise and Regulatory Reform on the issues raised* (November 2008), para 4.9, available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>.

- 4.44 Public and private enforcement have different goals. Some banned practices may be undesirable in the marketplace generally, while imposing negligible financial loss on individual consumers. For example, it is often difficult to determine the financial effect of false “closing down sales”<sup>23</sup> or “bait and switch tactics”<sup>24</sup> on any individual consumer. Thus, automatic liability for banned practices could result in small claims which are disproportionately expensive to defend. The BRC pointed out that even frivolous claims need to be defended and that there are costs associated with this.
- 4.45 Businesses were particularly worried about being made liable for omissions. The criterion for material omissions is still rather vague and leads to uncertainty.<sup>25</sup> Businesses told us that whilst they could easily agree to provide more information if requested to do so by trading standards services or the OFT as part of public enforcement of the Regulations, it would be more difficult to react to a multitude of individual consumer claims.

### **Differences between the Regulations and our proposals**

- 4.46 The Consultation Paper explained that the proposed new Act would be more limited than the Regulations in six ways:
- (1) It would provide redress only to those who have entered into a contract or made a payment. It would not, for example, provide redress to those induced by a misleading advertisement to visit a shop if they failed to make a purchase.
  - (2) It would provide redress only against the other party to the contract (or the trader to whom a payment was made). It would not provide redress against third parties, such as producers.
  - (3) It would not cover land transactions or financial services other than credit.<sup>26</sup> Land transactions and financial services often involve large sums, and are unsuited to the “rough and ready” standardised remedies we proposed. Moreover, these areas are already covered by tailored alternative dispute resolution systems. The current law would continue to apply.
  - (4) It would not make traders liable for omissions generally. The new Act would apply only where the trader had made an actual or implied representation.

<sup>23</sup> The Consumer Protection from Unfair Trading Regulations 2008, sch 1, banned practice 15: “claiming that the trader is about to cease trading or move premises when he is not”.

<sup>24</sup> “Bait and switch” is where the trader advertises a product, but does not reasonably believe it will be able to supply it on the terms promised to consumers. See the Consumer Protection from Unfair Trading Regulations 2008, sch 1, banned practice 6: “making an invitation to purchase products at a specified price then- (a) refusing to show the advertised item to consumers, (b) refusing to take orders for it or deliver it within a reasonable time, or (c) demonstrating a defective sample of it, with the intention of promoting a different product” (bait and switch).

<sup>25</sup> H Collins, “Harmonisation by Example: European Laws against Unfair Commercial Practices” (2010) 73(1) *Modern Law Review* 89, 104 to 106.

- (5) It would not provide automatic redress for the 31 banned practices set out in the Regulations. Redress would only be available if the practice would be likely to cause the average consumer to enter into a contract or make a payment, which they would not otherwise have done.
- (6) It would not provide redress for breach of the general prohibition against practices which are “contrary to the requirements of professional diligence”.<sup>27</sup> We thought this was too uncertain to form the basis of private law rights.

### **What consultees thought**

- 4.47 In our Consultation Paper, we asked whether consultees agreed that there should not be a private right of redress for all breaches of the Regulations. Over half of the respondents agreed that there should only be a right of redress for some breaches of the Regulations. Approximately one-third disagreed.

### ***Arguments in favour of a limited right***

- 4.48 The majority of consultees acknowledged that there was a case for not including certain provisions within the scope of the new Act, such as the general prohibition at Regulation 3(3), and material omissions. For example, Highland Council Trading Standards expressed support for our proposal:

We agree with the rationale of the proposals that the “general prohibition” and misleading omissions are not sustainable for inclusion in the new law, for the reasons presented in the Consultation Paper. Indeed, we think that any attempt to include these could undermine the credibility of the whole project and place it under threat of serious opposition from various parties.

- 4.49 Craig Cathcart and Jane Williams of Queen Margaret University added:

There is sufficient generality in the proposed legislation to cover most breaches of the Regulations.

<sup>26</sup> This Report considers the issues of land transactions and financial services at paras 6.93 to 6.118.

<sup>27</sup> The Unfair Commercial Practices 2005 Directive Art 5, implemented by the Consumer Protection from Unfair Trading Regulations 2008, Reg 3(3).

4.50 Similarly Cowan Ervine agreed:

There is a case for excluding from the private right of redress breach of the general clause. The vagueness of this could cause problems and, in any event, it is difficult to think of examples of situations which would be breaches solely of this part of the regulations. Similarly, there is a case for excluding the 31 scheduled practices many of which will be caught by other provisions or are more appropriately dealt with by other enforcement methods. The case for excluding omissions from the private remedy is less convincing but here again in many cases the most egregious examples will be caught by other provisions. As examples in the consultation paper show, it is often possible to analyse a situation as both an omission and an implied representation.

4.51 The Bar Council agreed, on balance, that a limited approach was preferable:

There is much that is unclear about the [Regulations], and the principal areas of doubt have been recognised and developed in the Consultation Paper.<sup>28</sup>

4.52 Trading Standards South East Ltd thought that a general right could be unfair to traders:

As stated in the [Consultation Paper] if we open up the redress to all breaches of this legislation such as misleading omissions we could be putting an unfair burden on businesses.

***Arguments against a limited right***

4.53 Many of those who disagreed were concerned that the new statute would be inconsistent with the Regulations. The OFT felt that a partial right of redress would cause confusion:

The OFT believes that there needs to be a private right for all breaches of the CPRs. A piecemeal approach not only increases the risk of confusion and uncertainty but also implicitly creates a hierarchy of breaches of the CPRs.

4.54 Consumer Focus thought that the new right should apply to all breaches of the Regulations:

The proposals ... need to go much further so that civil remedy is available for all misleading and aggressive practices across the piece.

4.55 Similarly, Which? said:

A new right to redress could seek to gap-fill or aim to be a new comprehensive right that tracks all breaches of the CPRs. We strongly support the latter.

<sup>28</sup> The respondent's full title is the Law Reform Committee of the Bar Council of England and Wales.

- 4.56 Dr Gillian Black and Keiran Wilson of Edinburgh University argued that if traders did not wish to be sued they should not act unfairly:

We note that ... [the Consultation Paper] states “Automatic liability for banned practices could result in small, frivolous claims”. However, it is well within traders’ ability to ensure that they do not engage in any of the 31 banned practices.

### **Conclusion**

- 4.57 There is a distinction between preventing undesirable behaviour through public enforcement and providing compensation for loss suffered. Many of the concepts within the Regulations are new, uncertain and potentially wide. They work because they are tempered through the discretion of trading standards officers, who are able to discuss minor infringements with businesses and secure improvements, without necessarily imposing sanctions.
- 4.58 Private rights operate differently. We are concerned that if traders were liable for all banned practices and misleading omissions they could be faced with a myriad of claims for minor losses, which would impose undue costs. These costs would ultimately be paid by consumers by way of more expensive goods and services.
- 4.59 We are mindful that legal rights should only be extended if there is a clear need. We are persuaded that there is a need to simplify rights for misleading practices, which would reduce costs for traders and consumers alike. The many case histories that we have been sent demonstrate that there is also a need to extend rights against aggressive practices. Aggressive practices often result in serious detriment for the victim, and they reduce the market for honest traders. But we have not extended rights unless a clear case can be made.
- 4.60 We think that our recommended new Act will cover most breaches of the Regulations, and all the serious ones. On the other hand, we appreciate the argument put by the OFT and consumer groups that a piecemeal approach increases the risk of confusion and uncertainty. As the use of the Regulations develops, it may be that the distinctions between the Regulations and new Act would need to be reconsidered.
- 4.61 We therefore recommend that the Department for Business, Innovation and Skills (BIS) should review the operation of the new Act five years after it is brought into force. If further case law on the Regulations creates more certainty regarding their scope there may be a case for bringing the two regimes together. BIS should consider whether there should be a right of redress for misleading omissions and other breaches of the Regulations.
- 4.62 **Recommendation 4: There should not be a right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008.**
- 4.63 **Recommendation 5: The Department for Business, Innovation and Skills should review whether to extend a right of redress to other breaches of the Regulations five years after the new Act is brought into force.**

## **PART 5**

# **RECOMMENDATIONS: AN OVERVIEW**

- 5.1 In this Part, we provide a brief outline of our recommendations. These are discussed in detail in the next five parts.

### **A NEW ACT**

- 5.2 We recommend a new Act to provide redress to consumers who experience misleading and aggressive practices in their dealings with traders. Our aim is to clarify and simplify the current law on misleading practices, and to improve the law on aggressive practices by filling the gaps in the current law.
- 5.3 The new Act would not replace the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations).<sup>1</sup> The Regulations will continue to govern public enforcement in relation to aggressive and misleading practices. The new Act, however, would cover the private law consequences when traders are found to act in ways that are aggressive or misleading.
- 5.4 It would only apply to dealings between businesses and consumers, so-called “B2C” transactions. It would not affect transactions that are solely between businesses, or between parties where neither is acting in the course of a business.

### **A TARGETED REFORM**

- 5.5 Under our recommendations not all breaches of the Regulations would lead to civil redress. In particular we recommend that:
- (1) Land transactions and financial services should not be covered.<sup>2</sup> The existing law would continue to apply.
  - (2) There must be a contract between the parties or a payment made by the consumer. Thus consumers would not, for example, be entitled to compensation if they visited a shop in response to a misleading advertisement but did not make a payment to the trader or the trader's agent.
  - (3) There should be no liability for pure omissions or for the general prohibition on unfair trading under the Regulations.
  - (4) The list of banned practices under the Regulations should not give rise to automatic redress; they would only be covered if they would affect an “average consumer” (described below).

### **THE ELEMENTS OF LIABILITY**

- 5.6 The proposed new Act would provide a right of redress for a consumer against a trader. The consumer would need to show that:

<sup>1</sup> SI 2008/1277.

<sup>2</sup> This is dealt with in more detail from para 6.93 of this Report.

- (1) the trader carried out a misleading or aggressive practice;
- (2) this was likely to cause the average consumer to take a decision to enter into a contract or make a payment they would not have taken otherwise; and
- (3) the misleading or aggressive practice was a significant factor in the consumer's own decision to enter into the contract or make the payment.

5.7 Once liability had been established, the consumer would be entitled to unwind the contract or receive a discount on the price. A consumer who could show further actual loss may also be awarded damages. These remedies are outlined below, and discussed in detail in Part 8.

5.8 Where the consumer has entered into a contract, the consumer's right would lie against the other party to the contract. Where the consumer has made a payment, their rights would lie against the party to whom the payment was made.

#### **Defining a misleading practice**

5.9 The new Act would follow the substance of the definition of misleading practice in Regulation 5(2) by stating that a commercial practice is misleading if it contains false information, or if it is likely to mislead the average consumer in its overall presentation.

5.10 This approach moves away from the distinctions drawn under current law based on whether the misrepresentation is "false" or "factual". It also moves away from the traditional language of acts or omissions, which is unhelpful, as many different types of conduct do not fall clearly in one category.

5.11 We think the definition of a misleading practice should be kept short and general. Although examples may be useful to explain new concepts, the idea of a misleading practice is well established. Therefore, there is no need to replicate the lists of matters about which misleading representations may be made or include illustrations drawn from the banned practices.

#### **Defining an aggressive practice**

5.12 The definition of aggressive practices under the new Act would mirror the Regulations. The new Act would refer to "coercion" and "harassment". "Undue influence" has a specific meaning under current law, so we have avoided adopting that terminology and refer instead to "abuse of position".

5.13 We think that some of the blacklisted aggressive practices provide helpful examples illustrating the coverage of the new Act. We recommend that pressure selling and doorstep salespersons overstaying their welcome should, for example, be expressly covered as examples of aggressive practices.

### **Defining the “average consumer”**

- 5.14 The Regulations use the concept of the “average consumer” who is “reasonably well informed, reasonably observant and circumspect”.<sup>3</sup> We recommend that the new Act should mirror this test. Practices are only misleading or aggressive if they would be likely to cause this hypothetical consumer to take a decision they would not have taken otherwise. The issue is judged by an objective (and fairly demanding) standard.
- 5.15 As with the Regulations, in some cases the test of an average consumer would be replaced with a test of the average vulnerable consumer. This would apply where:
- (1) the commercial practice is directed to a particular group of consumers; or
  - (2) a clearly identifiable group of consumers is particularly vulnerable to the practice because of “their mental or physical infirmity, age or credulity” in a way which the trader could reasonably be expected to foresee.<sup>4</sup>

### **A REPLACEMENT STATUTE**

- 5.16 The recommended new Act would cover substantially the same ground as the Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (in Scotland). We think that the new legislation should replace these provisions in so far as they cover B2C transactions within the ambit of the new Act.<sup>5</sup>
- 5.17 Claims in unjust (or, in Scots law, unjustified) enrichment and contractual remedies would remain. In particular, consumers would continue to have rights under the Sale of Goods Act 1979 that goods are not of satisfactory quality and do not meet their description. Although there may be some overlap between such claims and the rights under the new Act, consumers would not be entitled to double recovery. Nor do we intend to repeal common law doctrines, such as the tortious/delictual liability for negligent mis-statements following *Hedley Byrne v Heller*.<sup>6</sup> This would provide a potential remedy against third parties, which is outside the scope of the proposed Act.

### **REMEDIES**

- 5.18 We were told that there was a need for certain, standardised remedies, even if these were sometimes “rough and ready”. The most important remedy is the right to unwind the contract and obtain a refund. This fits with the primary aim of current private law, which is to restore the consumer to the position they were in before the misleading or aggressive practice took place.

<sup>3</sup> Reg 2(2).

<sup>4</sup> Reg 2(5).

<sup>5</sup> This is dealt with in more detail from para 7.117 of this Report.

<sup>6</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

5.19 Under the new Act consumers would have two tiers of remedies. Tier 1 remedies would be the standard ones, and would apply on a strict liability basis. The amount would be based on the price paid and would not depend on evidence of loss. This means they could be used in both the civil courts and alongside public enforcement action, for example in criminal compensation orders. By contrast, Tier 2 remedies would only apply if the consumer proved loss; they would also be subject to the trader’s due diligence defence.

5.20 The type of Tier 1 remedy would depend on how soon after the event the consumer complains and whether the consumer has fully consumed the product:

- (1) If the consumer raises a complaint within three months, and is able to reject some element of the product, then the standard remedy is to unwind the contract. This means that both parties are released from their outstanding obligations under their contract, and the consumer is entitled to a refund.
- (2) If the consumer waits more than 3 months to complain, or if the goods or services are fully consumed, then the consumer can claim a discount on the price. The level of the discount would be in pre-set bands, depending on the impact of the practice, the trader’s behaviour and any delay by the consumer. Where the delay was significant and the impact of the practice was slight the court could award a 0% discount.

5.21 The Tier 2 remedies provide damages to compensate for indirect losses, including economic damage and distress and inconvenience. They are provided only if the consumer can prove that the practice caused actual loss, meeting a “but for” test of causation. Furthermore, the trader can avoid this consequential liability with a due diligence defence.

5.22 The basic structure of the consumer’s private right of redress under the proposed statute would be as follows:

<b>CONSUMER REMEDIES</b>		
<b>When available</b>	<b>Standard (Tier 1)</b>	<b>Optional (Tier 2)</b>
Up to 3 months, provided some element of the product is either returned or rejected	Refund  Unwind - both parties are released from their obligations (if any)	Indirect economic losses          Damages for distress and inconvenience
After 3 months, or if product fully consumed	% discount on price	

- 5.23 In Part 8 we describe how the recommended remedies would operate following an unfair demand for money. Where the money is not owed, the consumer would be entitled to a refund. Where it was owed, the consumer would not be entitled to a refund, but would be able to claim for proven consequential losses, together with limited damages for proven distress and inconvenience. A trader would have a due diligence defence against these secondary remedies.

### **CREDITOR LIABILITY**

- 5.24 In Part 10 we consider the creditor's liability when a consumer has entered into a credit agreement to buy goods and services which have been sold in a misleading or aggressive way.
- 5.25 Section 75 of the Consumer Credit Act 1974 applies to credit card and other connected credit purchases worth more than £100 but not more than £30,000. It makes a creditor liable for the supplier's misrepresentation and breach of contract, but not for the supplier's aggressive practices. In the Consultation Paper we provisionally proposed to extend section 75 to include aggressive practices, but suggested that the connected lender's liability for the supplier's act should be capped at the amount of the loan, plus interest.
- 5.26 This proposal was particularly controversial and we are not proceeding with it. Section 75 liability is highly contentious and lenders did not wish to see it changed.
- 5.27 On reflection, we consider that consumers are adequately protected by other provisions of the Consumer Credit Act 1974. Section 56(2) makes creditors liable for the supplier's antecedent negotiations. This means that the consumer would be entitled to rescind the credit contract if it was induced by an aggressive practice.
- 5.28 Further remedies are available under section 140A. This gives courts power to declare a consumer credit relationship to be unfair. In particular, the relationship may be unfair because of anything "done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement)".<sup>7</sup> As the supplier is deemed to be the creditor's agent, acts by the supplier are done on behalf of the creditor. Where an agreement is unfair, the courts have considerable discretion to offer a remedy, including reducing or discharging any sum payable under the agreement or requiring the creditor to repay any sum paid by the debtor, in whole or in part.<sup>8</sup>

<sup>7</sup> Consumer Credit Act 1974, s 140A (inserted by the Consumer Credit Act 2006, s 19).

<sup>8</sup> Above s 140B.

## PART 6

### RECOMMENDATIONS I: SCOPE

- 6.1 As we explained in Part 5, we recommend a new Act to give consumers redress against traders who sell products or obtain payment in a misleading or aggressive way. This is a targeted reform, which aims to simplify the law of misrepresentation as it affects consumers, and to improve protection against aggressive trade practices.
- 6.2 In this Part we focus on the scope of the new Act, looking at four issues:
- (1) the definition of a consumer;
  - (2) the transactional decisions which should give rise to redress;
  - (3) the person against whom the redress should be available;
  - (4) the products that should be covered.

#### WHAT IS A CONSUMER?

- 6.3 The Unfair Commercial Practices Directive 2005 (the Directive) only protects consumers in their dealings with traders.<sup>1</sup> Similarly, our terms of reference ask us to look only at the law as it applies between consumers and traders. Therefore we recommend a new Act to give consumers redress against traders. It would not protect small businesses or consumers dealing with other consumers.
- 6.4 The laws of the UK use two different definitions of a “consumer”. The English approach, used in the Unfair Contract Terms Act 1977, refers to a person who “deals as consumer”.<sup>2</sup> This has been interpreted widely to include businesses that enter into a one-off transaction outside their normal activities, such as a brokerage company which buys a car.<sup>3</sup> The Scottish provision, in the same statute, refers to a “consumer contract” which is defined as “a contract ... in which one party to the contract deals, and the other party to the contract (“the consumer”) does not deal or hold himself out as dealing, in the course of a business”.<sup>4</sup> Consumers, in terms of this provision, can clearly include non-natural persons.<sup>5</sup>
- 6.5 The definition used in European directives is more restricted. It only covers individuals who are acting for purposes outside their business. This means that a business engaged in a one-off transaction, such as buying a photocopier, would be excluded. The Directive defines a consumer as:

<sup>1</sup> Directive 2005/29/EC (OJ 2005 L 149).

<sup>2</sup> Unfair Contract Terms Act 1977, s 3. The term is defined in s 12.

<sup>3</sup> In *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321 the transaction was not integral to the business of the company, but merely incidental.

<sup>4</sup> Unfair Contract Terms Act 1977, s 25.

<sup>5</sup> The logic of *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321 thus applies in Scotland; another example of a non-natural person in Scots law which can accordingly be a consumer is a partnership.

any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.<sup>6</sup>

- 6.6 The Consumer Protection from Unfair Trading Regulations 2008 (the Regulations)<sup>7</sup> transpose this in the following terms:

Any individual who in relation to a commercial practice is acting for purposes which are outside his business.<sup>8</sup>

- 6.7 The European definition is now to be preferred. In our joint Report on Unfair Terms in Contracts, we considered that, under our recommended scheme, only natural persons should constitute consumers.<sup>9</sup> Furthermore, the academic study commissioned by the Department for Business, Innovation and Skills (BIS) to simplify consumer contract law as a whole recommended using the European definition of a consumer.<sup>10</sup> This is because consumer law must be fully compatible with European directives.<sup>11</sup> It also seems absurd, or at least counter-intuitive, that a company can be a consumer.

- 6.8 We provisionally proposed that generally the definition of a consumer should follow the European approach. Out of the 24 respondents who addressed the question, 23 agreed. As Citizens Advice said, “it would be confusing to use more than one definition for consumer in a single piece of legislation”. Age UK agreed that consistency was necessary “for simplicity”.

- 6.9 On the other hand, we raised two issues where further clarification of the European definition may be required: mixed use contracts and training contracts. We consider these in more detail below.

#### **Mixed use contracts – goods used “mainly” for consumer purposes**

- 6.10 The European definition of a consumer requires that an individual is acting for purposes which are outside his “trade, business, craft or profession”.<sup>12</sup> This raises questions where an individual buys a product which is to be used partly for leisure and partly for work. An example would be a person who buys a laptop mainly for playing games, but who also intends to use it for sending some work e-mails. Another would be buying a family car with the intention of making some business trips in it.

<sup>6</sup> The Directive, Art 2(a).

<sup>7</sup> SI 2008/1277.

<sup>8</sup> Reg 2(1).

<sup>9</sup> Unfair Terms in Contracts (2005), Law Com No 292; Scot Law Com No 199, para 3.24.

<sup>10</sup> G Howells and C Twigg-Flesner, *Consolidation and Simplification of UK Consumer Law*, Report for the Department for Business, Innovation and Skills (November 2010), available at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1255-consolidation-simplification-uk-consumer-law>.

<sup>11</sup> Above para 6.38.

<sup>12</sup> The Directive, Art 2(a).

6.11 The European Court of Justice has held that an individual does not act as a consumer if the element of business use was non-negligible.<sup>13</sup> We think that this is too narrow. Many employees make some use of mobile phones or home computers for work purposes, even if they are mainly used for leisure. In our Report on consumer insurance law, we concluded that it was important to include contracts which were mainly for consumer use even if they include some element of business use.<sup>14</sup> The Consumer Insurance (Disclosure and Representations) Bill currently before Parliament therefore defines a consumer as:

an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession.<sup>15</sup>

6.12 The key words are "wholly or mainly". Thus a consumer who insured a car mainly for family use would be protected, even if there was an element of work use.

6.13 We think it would be helpful if any new Acts on consumer law specified that an individual who used a product *wholly or mainly* for non-business use was protected. This may extend European consumer protection in a minor way, but would be permitted, as it is within the competence of member states to apply consumer protection to businesses if they wish. Extending protection to consumers who use products occasionally for work falls well within this competence.

#### **Training contracts – is a special definition of “consumer” necessary?**

6.14 During our initial consultations, Citizens Advice highlighted problems where unemployed individuals were sold training courses of doubtful value.<sup>16</sup> Those desperate for a job are often particularly vulnerable to being mis-sold a training course which promises a future job. We wish to include these practices within the scope of the scheme.

6.15 In the Consultation Paper we thought that the general definition of a consumer was sufficiently wide to cover such cases, but welcomed views on the point. We asked whether there are cases calling for special definition of who should count as a “consumer”, such as unemployed persons who might be sold training courses on the promise of a future job.

6.16 We received 23 responses. Views were split: 12 agreed that the general definition was wide enough, and 11 disagreed.

<sup>13</sup> *Johann Gruber v Bay Wa AG* [2005] Case C-464/01.

<sup>14</sup> Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (2009), Law Com No 319; Scot Law Com No 219, para 5.17, available at <http://lawcommission.justice.gov.uk/publications/consumer0-insurance-law-precontract-disclosure-and-misrepresentation.htm>.

<sup>15</sup> Clause 1(a).

<sup>16</sup> See Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), para 3.12, available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>.

6.17 Citizens Advice and Age UK agreed that no new definition was necessary, as individuals who bought courses on the promise of future work were clearly consumers. As Citizens Advice put it:

Our view is that an individual who pays for training themselves is a consumer, even if the training is intended to help them get work. If the employer buys the training for an employee, the purchase is made for a business purpose and is a business to business transaction.

6.18 The Bar Council advised against carving out special cases:

The danger of carving out special cases is that it is always difficult to be sure that all such cases have been considered. In the example given, our view is that such a person would properly fall within the definition of a consumer, since they would not be acting for purposes connected with their business at the point of application for the course.

6.19 East of England Trading Standards Association pointed out that the issue was wider than just training courses. It also included “registration with employment agencies and anyone paying an advanced fee for employment”. They noted that:

This is an area of consumer detriment which appears to be on the increase and failure to provide protection would disadvantage this group of consumers.

6.20 It remains our view that the general definition of a consumer is sufficiently wide to cover these training contract cases. We agree with the Bar Council’s view that it is preferable to rely on the broad definition of consumer rather than carving out special cases.

### **Conclusion**

6.21 **Recommendation 6: We recommend that:**

- (1) the new legislation should apply to consumers in their dealings with traders;**
- (2) the definition of consumer should be consistent with other consumer legislation; and**
- (3) in defining consumers generally, the new legislation should specify that an individual acts as a consumer if they act for purposes which are wholly or mainly outside their business, trade or profession.**

6.22 **Recommendation 7: It is not necessary to include a specific provision to protect unemployed individuals who are mis-sold training courses.**

## **WHICH TRANSACTIONAL DECISIONS SHOULD GIVE RISE TO REDRESS?**

### **Should the new Act cover all transactional decisions – or only some?**

- 6.23 Under the Regulations, an unfair commercial practice must cause or be likely to cause an average consumer “to take a transactional decision he would not have taken otherwise”.<sup>17</sup>
- 6.24 The concept of a transactional decision is wide. The most obvious transactional decision is whether to buy a product or service, but it is not limited to this. As the European Commission has stressed, it may cover a wide range of decisions, from the decision to travel to the shop to the decision whether to sue for an inadequate service.<sup>18</sup>
- 6.25 We considered whether the new Act should provide consumers with redress for all transactional decisions – or only some. For example, if a misleading advertisement falsely states that top-range televisions are available at an out-of-town shopping centre at a bargain price, and a consumer travels many miles to the shop only to find that no such televisions are available, should the consumer receive compensation for the cost of the wasted journey?
- 6.26 We thought that the new Act should not provide redress for transactional decisions such as this, and asked whether consultees agreed.

### ***What consultees said about redress for all transactional decisions***

- 6.27 More than half of those who responded to this question agreed that not all transactional decisions should be provided for. This included some consumer groups. For example, the National Consumer Federation wrote:

A limitation could be placed on situations where the consumer has e.g. made a wasted trip but has not otherwise entered into a transaction. We agree that such “transactional decisions” should be excluded.

- 6.28 The North East Trading Standards Association concurred:

The law needs to be clear but also restricted in scope (to ensure easy use). Businesses (and the Courts) need to focus on the real consumer detriment associated with the misleading practice and not associated matters. While such arguments have been theoretically interesting in discussions of the criminal aspects of misleading practices, useful lines of enquiry following from them have generally not been of direct use in taking offences forward. This would be a complainants’ charter for spurious and time wasting issues if taken forward.

- 6.29 The British Retail Consortium (BRC) thought that the new Act should not provide compensation for visiting a shop:

<sup>17</sup> Regs 5(2)(b), 6(1) and 7(1)(b).

<sup>18</sup> European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (December 2009) 1666, p 22, available at [http://ec.europa.eu/consumers/rights/docs/Guidance\\_UCP\\_Directive\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf).

The transactional decision occurs upstream before the contract is forged. If it were to be included it would seem to open the way for claims about what could have happened rather than redress for actual losses incurred – which would be a more reasonable limitation.

- 6.30 The Faculty of Advocates agreed that the Act should specify which transactional decisions were covered:

For the sake of clarity, it is preferable to specify those particular transactional decisions in respect of which redress is to be afforded ... and expressly to exclude all others, rather than to rely on phrases such as “substantial” or “minor” for the purposes of distinguishing between actionable and non-actionable transactional decisions.

- 6.31 Cowan Ervine pointed out that for some decisions (such as the decision to visit a shop), public enforcement might be more appropriate.

- 6.32 Among the minority that disagreed, Which? argued that all transactional decisions should be covered, to match the Regulations:

The CPRs cover a wide range of transactional decisions. Clearly the decision to purchase a good or a service or the decision to make a payment to a third party are the most significant. It is beyond doubt that the right to redress should cover these. However, we don't think the right should stop there, and disagree with the Law Commission's conclusion.

- 6.33 Birmingham City Council Trading Standards pointed out that consumers can still suffer significant loss even where they do not make a purchase. Similarly, Central England Trading Standards Authorities noted:

For example, people are tending to travel further afield to buy larger items like cars.

- 6.34 The Property Ombudsman argued that the new Act should take a broad view:

Even if no contract or payment is made a trader can still bring a consumer into a “relationship” by his actions and can still inconvenience or disadvantage an individual.

### **Conclusion**

- 6.35 It remains our view that the new Act should not provide redress for all transactional decisions, such as the decision to visit a shop. We think that allowing a right of redress for visiting a shop may lead to an unlimited number of claims, some of which may be difficult to disprove and involve only minor losses.

- 6.36 In initial consultations, consumer groups accepted that consumers often experience inconvenience and annoyance without expecting legal redress. From the trader's point of view, providing a right to redress for all potential transactional decisions opens the prospect that they will receive claims from people with whom they have had little direct contact. It might be difficult to assess the truth of the consumer's assertions in those circumstances.

6.37 The cases brought to our attention as requiring redress mostly concerned consumers who had bought products and services, or who had made payments. There were also cases in which consumers had been discouraged from exercising a legal right. First, we consider entering into a contract for goods or services, and making a payment. We then look at discouraging a consumer from exercising a legal right.

6.38 **Recommendation 8: The new Act should not provide redress for all “transactional decisions”, such as the decision to visit a shop.**

**Entering into a contract for goods or services, and making a payment**

6.39 In the Consultation Paper we asked consultees whether they agreed that the proposed Act should apply where the consumer has:

- (1) entered into a contract with the trader; or
- (2) made a payment to the trader.

6.40 The most common transactional decision is where a consumer enters into a contract with a trader, to buy or sell a product. We thought that the new Act should apply in these circumstances. This mirrors the current statutory law of misrepresentation. As discussed in Part 3, the relevant provisions of both the Misrepresentation Act 1967 and the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 only apply where the claimant has entered into a contract.

6.41 Our initial discussions also revealed many cases in which consumers made payments as a result of unfair debt collection. Sometimes the debt was owed under a contract, for example where the consumer ordered goods but had not paid for them. In the most serious cases, however, there was no clear contractual relationship between the parties – where, for example, wheel-clampers demanded large payments, or where utility companies demanded payment from people who were not their customers.

***What consultees said about entering into a contract***

6.42 There was a strong consensus that the recommended Act should provide redress where the consumer has entered into a contract with the trader. All but two agreed. As we discuss in Part 9, there was also support for our proposal that the new Act should provide redress, where the consumer had made a payment to the trader or the trader’s agent following a misleading or aggressive practice.

6.43 The BRC agreed that redress should follow a contract:

It would seem sensible to have a contract as a pre-requisite to damages. The payment of money usually secures a binding contract, even if there is a promise of future delivery of the contract.

6.44 BT partially agreed:

We disagree in principle, however if the law is to be reformed in this way, this approach would help address one of our key concerns which is that the proposals might encourage consumers to make ill-founded or worse still, malicious claims, particularly where there is a lack of evidence to enable a trader to form a robust defence.

By placing two clear evidential hurdles in the way of such claims and limiting the right of redress to those who (a) enter into a contract; or (b) make a payment to a trader, this risk is mitigated slightly and puts the onus on the claimant to prove that the contractual relationship existed in the first place, and/or how much money was paid (for the purpose of any offsetting should this approach to remedies be adopted).

### **Conclusion**

6.45 There is strong support for our provisional proposals that the new Act should apply where consumers had entered into a contract or made a payment following a misleading or aggressive practice. As shown by the case studies and examples submitted during this project, these are clearly the most common and significant transactional decisions that consumers make.

6.46 **Recommendation 9: The new Act should provide redress where the consumer has:**

(1) **entered into a contract with the trader; or**

(2) **made a payment to the trader or its agent.**

### **Misleading or obstructing the consumer exercising a legal right**

6.47 Under the Regulations, a transactional decision includes any decision taken by a consumer concerning “whether, how and on what terms to exercise a contractual right in relation to a product”.<sup>19</sup>

6.48 In initial discussions, consultees gave us several case histories where consumers attempted to exercise a legal right but were misled or obstructed. These included cases where a consumer asked for a refund for faulty goods but the retailer told them they were not entitled to it. Another example was where a consumer made a purchase using a credit card, but the credit card company denied responsibility, thereby misleading the consumer about its liability under section 75 of the Consumer Credit Act 1974.

6.49 The law does not currently provide a secondary cause of action against a trader’s misleading statements or obstructive behaviour in such cases. Usually, it is enough for the courts to grant the legal remedy which the consumer was seeking in the first place (but which the trader denied or obstructed).

<sup>19</sup> Reg 2(1).

- 6.50 We understand that there may be a need for public enforcement against traders who regularly mislead consumers about their legal rights, but providing private redress would be a major extension of the law. It would be difficult to distinguish between misleading actions and reasonable denials of liability. Furthermore, we thought that in many cases it would be difficult to quantify the loss or provide an appropriate remedy. The consumer would not necessarily wish to unwind the transaction: for example, where the consumer seeks repair or replacement of the goods.
- 6.51 In the Consultation Paper, we provisionally proposed that the new statute should not attempt to provide redress against traders who mislead or obstruct consumers attempting to exercise legal rights. We welcomed views on this, however, because we recognised that it might leave a gap in consumer rights. We also asked for views on how the loss should be quantified.

#### ***What consultees said***

- 6.52 There was no consensus among consultees on this question. A very slight majority of those who responded disagreed with our provisional proposal, and thought that consumers should have redress in these cases. The response rate was low, however, with only about one-third of consultees responding.
- 6.53 Many of those who argued in favour of such a right gave examples of cases where consumers had been misled, and argued that such behaviour should be discouraged. On the other hand, it was less clear how much loss consumers had suffered over and above the denial of the original right, or how such loss should be quantified. Respondents made various suggestions about quantifying loss, such as a fixed penalty or a set scale of damages. It appeared, however, that in most cases the pursuit of the original cause of action would provide the most appropriate remedy.
- 6.54 Those who agreed with our provisional proposal thought that providing an additional right to damages (alongside the original claim) would encourage consumers to make claims in the absence of real loss. The Bar Council wrote:

If there were to be such a right, we can foresee that there would be considerable difficulties of proof and potentially many unmeritorious claims.

- 6.55 The Bar Council explained that some consumers make allegations against traders based on misinformation, and added:

a direct right of action relating to this would increase the risk that such allegations would result in unnecessary litigation.

#### ***Conclusion***

- 6.56 On balance, we think that the new Act should not provide a cause of action against traders who mislead or obstruct consumers attempting to exercise their legal rights. Whilst this type of behaviour is serious and undesirable, we think that traders who habitually or intentionally seek to deprive consumers of their legal rights are best dealt with by public enforcement. We do not think that it would be appropriate to use civil proceedings to impose fixed penalties on traders.

- 6.57 Most of the problems brought to our attention involve face-to-face discussions between traders and consumers, where the consumer makes a complaint to the trader and the trader fails to deal with it to the consumer's satisfaction. In some cases, the facts (and law) are unclear or disputed; both parties think they are right. The consumer may feel that the trader is being difficult, whilst the trader may feel that it is justified in denying liability or in requiring further proof.
- 6.58 In other cases, the problem could be relatively minor, such as lack of training of an individual member of staff, which could be overcome by the consumer pursuing the trader's complaints procedure. For example, if a consumer attempts to return faulty goods to a high street shop and is wrongly told by the sales assistant that they are not entitled to do so, complaining to the shop manager or head office will often be sufficient to resolve the problem, rather than it being necessary to provide the consumer with additional legal rights for redress.
- 6.59 In private law, where a consumer has a legal right (such as the right to return faulty goods), the pursuit of that cause of action should be sufficient to obtain a suitable remedy (that is, a refund, repair or replacement). The consumer does not need a secondary cause of action.
- 6.60 **Recommendation 10: The new Act should not provide redress for consumers against traders who mislead them as to their legal rights or make their exercise more difficult than necessary.**

#### **AGAINST WHOM SHOULD REDRESS BE AVAILABLE?**

- 6.61 The next issue is against whom should the claim be made? Should a consumer only be entitled to bring a claim against a trader who is the other party to the contract or who has received the payment? Or should consumers have rights against anyone by whom they have been misled?
- 6.62 A typical example would be where a consumer has been misled into buying goods by false advertising placed by the producer. Should the consumer only have rights against the other party to the contract (the retailer) or should they also be entitled to claim directly against others in the supply chain, such as the producer?
- 6.63 As discussed in Part 3, in private contract law, remedies are traditionally confined to the contracting parties, so that the consumer's primary remedy is against the seller, not the producer. In the Consultation Paper we outlined five limited exceptions to this rule.<sup>20</sup>
- 6.64 By contrast, most provisions in the Regulations make no distinction between retailers and others in the supply-chain who promote products.<sup>21</sup> Under the Regulations action may be taken against perpetrators, whether they are retailers, wholesalers, producers or agents.

<sup>20</sup> See the Consultation Paper, para 13.37.

<sup>21</sup> The main exception is Reg 6(1) which imposes obligations on invitations to purchase, but not on other less direct forms of commercial communications. The Regulations are dealt with in more detail at Part 2 of this Report and Part 2 of the Consultation Paper.

### **Our provisional proposal for claims under the new Act**

6.65 In our Consultation Paper we proposed that, for the purposes of the new Act, the consumer's first point of redress should be against the other party to the transactional decision. Thus, where a consumer had entered into a contract, the redress should be against the other party to that contract. Where a consumer had made a payment, the redress should be against the trader receiving the payment. We gave three reasons:

- (1) It is in line with the general law of faulty goods and inadequate services. When goods are mislabelled, we anticipate that consumers' main remedy will continue to be a breach of contract claim against the retailer. The new measure is intended to build on existing rights, rather than change the underlying principles. It is not intended to encourage consumers to sue producers directly in most cases.
- (2) As we discuss in Part 8 of this Report, the primary remedy under the new Act will be to unwind the contract. This remedy is only possible against the other party to the contract.
- (3) In most cases, complaining to the retailer will remain the simplest and most certain solution. Retailers are usually easy to identify, and consumers would be prevented from bringing overlapping claims against multiple parties.<sup>22</sup>

6.66 We asked whether consultees agreed with this proposal.

#### ***What consultees said***

6.67 The response rate for these questions was low, with around one-third of consultees responding. Views were mixed, with just over half agreeing with our provisional proposal.

6.68 Many thought that it was right to preserve the current principle that consumers' main redress should lie against the retailer. Cowan Ervine thought limiting liability was right "in the interests of simplicity".

6.69 The Faculty of Advocates argued that the case for extending liability had not been made out:

There is no suggestion that a comparable protection is necessary against producers. Moreover, the overseas location of many producers whose products are traded in the UK may make such an attempted remedy unenforceable.

6.70 On the other hand, Highland Council Trading Standards thought that consumers should be able to claim against a wider range of businesses. They pointed to a scenario where a large national brand produced misleading advertising, leading a consumer to buy from a small local retailer:

<sup>22</sup> But see also connected lender liability discussed below in Part 10.

It would seem reasonable in such a situation for the consumer to have a claim against the national company. We recognise that extending the possibility of claims beyond the other party to the contract may threaten the simplicity and clarity that these proposals seek. However, on balance ... we would prefer to see the possibility for claims against a wider range of relevant businesses.

- 6.71 The OFT also argued that the consumer should be able to claim against the perpetrator:

We can see that for the sake of clarity it may be simpler to limit rights to contractual (or payment) situations. However, we believe that this needs careful thought as there will be many situations where the mischief has actually been carried out by a third party or a trader further up the supply chain (for example a car with a tampered odometer) and in those situations we would not want the consumer to be unable to seek or gain redress.

- 6.72 The BRC thought that where the retailer was not at fault, the consumer should have a secondary right against the producer:

A secondary right to redress is attractive because it enables a business to direct consumers further up the chain where the error is not the fault of the business. For example, if a motorcar manufacturer published a misleading advertisement about a new car, without this provision redress would be due from the dealer from whom the consumer purchased the car rather than the manufacturer – which would be unfair.

### ***Conclusion***

- 6.73 Although we understand these concerns, we have concluded that the consumer's rights should lie only against the other party to the contract, or against the party to whom the payment was made. This approach is consistent with consumer law on faulty goods and inadequate services. Furthermore, the primary remedy that we are recommending in this Report is the right to unwind the contract, which is only possible against the other party to the contract.
- 6.74 In most cases, claiming against the retailer will be the simplest course of action, as consumers may not know the identity of the producer, or whether it is the retailer or producer who is at fault. It would be undesirable for the consumer to become embroiled in a dispute about whether the retailer or producer should be held responsible. It would be too easy for the consumer to "fall between two stools". In most cases, the retailer would be in a better position than the consumer to recover from the producer if the producer is at fault. Public enforcement may also be available as a sanction.
- 6.75 **Recommendation 11: The consumer's rights should lie only against the other party to the contract, or against the party to whom the payment was made.**

### **A right against directors and other officers?**

6.76 In Ireland, where a consumer contracts with a limited company, section 74 of the Consumer Protection Act 2007 not only provides the consumer with a right against the company but also against:

any director, manager, secretary or other officer of the trader, or a person who purported to act in any such capacity, who authorised or consented to the doing of the act or the engaging of the practice.<sup>23</sup>

6.77 We did not propose such a wide right, because we were concerned that a provision of this sort might encourage consumers to bring nuisance actions against company directors personally, when they should be proceeding against the company.

6.78 On the other hand, rogue traders often hide behind limited liability. A right against a company is of little use if the company is in liquidation. In some of the worst scams, such as pyramid schemes, the company proceeds towards inevitable insolvency. In these circumstances consumers may not be protected. They could have an action against individual directors and officers for deceit or fraud, but not for other breaches of the Regulations.

6.79 In the Consultation Paper we thought that there may be a case for permitting a limited right against directors or officers in serious cases where the company is in liquidation and the directors or officers are at fault.<sup>24</sup> The same argument would apply to limited liability partnerships. We asked for views.

### ***What consultees said***

6.80 Only 23 out of 71 respondents answered this question. Of these, just over half thought there should be a limited right of action against directors and other officers. Approximately a quarter disagreed.

6.81 Many consultees supported the right of action on the ground that it would give consumers some protection against “phoenix companies”, which rogue traders use to escape liability and continue trading as before.<sup>25</sup> For example, Citizens Advice submitted:

We believe that there is currently an imbalance between consumers and business whereby businesses who trade unfairly can escape liability by hiding behind limited liability or ceasing to trade and then restarting with a new name. In this situation, consumers can find they are dealing with what is, effectively, the same business with no liability for past trading practices. Company law disadvantages the consumers who are providing the financial lifeblood of the business when that business goes into liquidation, generally placing them at the bottom of the creditors’ list.

<sup>23</sup> Consumer Protection Act 2007 (Ireland), s 74(2)(b).

<sup>24</sup> See the Consultation Paper, paras 13.47 to 13.50.

<sup>25</sup> A phoenix company is a company which has emerged from the liquidation of another. The new company is set up to undertake the same or similar trading activities as the former.

They thought that a new right against directors “would discourage bad practice because it would be more difficult for individuals to divorce themselves from the liabilities of their businesses”.

- 6.82 East of England Trading Standards Association were also concerned about phoenix companies:

The Companies Act 2006 now allows a person to form a limited company with themselves as sole director. By simply winding up such a company the individual can shed their liabilities to consumers and, as sometimes happens, merely start again. This is a problem which consumers face regularly.

- 6.83 Mike Hembry of Slough Borough Council Trading Standards concurred: “this remedy may deter the Phoenix effect”.

- 6.84 British Sky Broadcasting Group plc thought that there might be a case for such a right in exceptional circumstances:

Sky agrees that consumers should have redress against directors in limited circumstances where rogue traders use limited liability to avoid being held accountable but we believe that those circumstances should be exceptional and very clearly and narrowly defined in the draft Bill.

- 6.85 On the other hand, strong arguments were put forward against such a right. The Bar Council were concerned that the proposal would be a major departure from the principles of company and insolvency law, and could lead to a “race to judgment” as businesses and consumers competed for available assets:

The approach of English insolvency law is to recognise the collective nature of the insolvency process and to provide rules for the orderly collection and distribution of assets of the insolvent company for the benefit of the creditors so entitled.

We are not convinced that there is a need to give this level of protection to consumers when, for example, it is not available to other unsecured creditors of the insolvent company, which may include small businesses or employees who might be thought to be similarly deserving. Further, offering a direct route to claim to consumers may simply lead to a “race to judgment” between claims brought by insolvency practitioners on behalf of insolvent companies against former officers and claims that are brought by consumers. Where the only available assets are held by the former officer, the associated costs may significantly erode what might otherwise be available for distribution amongst all creditors of the company (including, for this purpose, consumers).

- 6.86 Cowan Ervine was also concerned about disturbing the existing balance of insolvency law:

In the interests of simplicity it would be more appropriate to limit the remedy to one against the legal entity responsible for the wrong. It should be remembered that there are other means of recovering assets from directors (and sometimes others) responsible for deception leading to the insolvency of a company or [limited liability partnership]. The wrongful and fraudulent trading provisions of the Insolvency Act 1986 allow recovery for the benefit of creditors as a whole where the directors have allowed the company to trade when insolvent.

6.87 Which? was not in favour of the introduction of the right of action:

Except in the case of fraud, we do not think it is appropriate for the Act to provide a claim against the directors or other officers of the company.

6.88 Brighton and Hove City Council Trading Standards also disagreed, and added that: “the Insolvency Act is a more suitable vehicle to deal with this type of problem.”

### ***Conclusion***

6.89 It is clearly a problem that rogue traders who use misleading and aggressive practices can set up phoenix companies to evade liability. At first glance, it appears attractive to allow consumers to pursue directors and officers directly. On balance, however, we have decided not to include such a provision in the new Act.

6.90 The arguments submitted by the Bar Council are persuasive. Providing for personal liability against directors would represent a major departure from company and insolvency law. It would disturb the balance of protection offered to the company’s other creditors. We think that if the problem of phoenix companies is to be tackled it would require a specific review, beyond the scope of this project. Such a review would need to consider how phoenix companies are dealt with by public regulation, and the level of resource available to tackle the problem, at a time when funding for consumer protection becomes ever more limited.

6.91 This type of action would also present practical problems for consumers. We think it would be too harsh to make directors and officers strictly liable for unfair practices, as even good companies may have one rogue salesperson. It would be necessary to provide that a director or officer should only be liable if they were at fault in some way (for example where they were aware of the problem but did not remedy it, or were fraudulent themselves). This would be difficult for consumers to prove, as they do not normally have that type of evidence at their disposal. We think that the issue is better addressed by public enforcement.

6.92 **Recommendation 12: The new Act should not give consumers a right of action against the directors and officers of a limited liability company or against the partners in a limited liability partnership.**

## **WHICH PRODUCTS SHOULD BE COVERED?**

- 6.93 The Regulations apply to all products. In the Consultation Paper, we considered whether the proposed new Act should follow this approach, or whether some potentially high value, complex items such as land and financial services require different treatment.<sup>26</sup>
- 6.94 We noted that the Directive accepted that land transactions and financial services might need to be treated differently. In these sectors, the Directive is a minimum harmonisation measure, which permits member states to provide increased protection. Recital 9 explains:

Financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders. For this reason, in the field of financial services and immovable property, this Directive is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers.<sup>27</sup>

- 6.95 In the Consultation Paper, we proposed that the new Act should not apply to land transactions or to financial services. Instead, they should continue to be governed by the present law.

### **Should the new Act apply to land transactions?**

- 6.96 There are three reasons for not including land transactions in the scope of the new Act:
- (1) We were told that the existing law covering land transactions, together with the ombudsman schemes,<sup>28</sup> are generally sufficient to provide consumers with redress. When we asked consumer groups about problems with the current law, none of them raised any problems concerning misleading or aggressive practices in the sale of land.<sup>29</sup>
  - (2) The remedies provided under the proposed new Act are relatively broad-brush, and may not be suited to the high-value losses that can arise on sales of land.

<sup>26</sup> The Regulations cover all products, defined as meaning any goods or service, which “includes immoveable property, rights and obligations”, Reg 2(1).

<sup>27</sup> The Directive Recital 9.

<sup>28</sup> For a summary of these schemes, see the Consultation Paper, paras 9.36 to 9.41.

<sup>29</sup> See Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010) paras 2.24 to 2.30, available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>.

- (3) The proposed Act would be limited to transactions between consumers and traders. It would not affect sales by private individuals. This might introduce an unnecessary distinction between private sales and sales or purchases by property developers and other businesses.<sup>30</sup>
- 6.97 In preliminary discussions, consultees pointed out that consumers who buy houses are usually professionally advised; the conveyancing system is well established; and the law is reasonably clear. There is not a duty to disclose material information.<sup>31</sup> Instead, through their legal advisers, buyers are expected to ask questions and sellers should provide honest and correct answers. If the seller's answers are false, the buyer will usually have a claim for misrepresentation.
- 6.98 Where estate agents make misleading statements, consumers are given additional protection. The Property Misdescriptions Act 1991 (PMA) requires estate agents to take all reasonable steps to ensure that the information they provide is accurate and not misleading.<sup>32</sup> This does not give rise to civil liability, but estate agents involved in residential sales must be members of an approved redress scheme.<sup>33</sup> The OFT has approved two schemes: the Property Ombudsman and Ombudsman Services: Property.<sup>34</sup> Both may make financial awards of up to £25,000, and will provide redress for breaches of the PMA.<sup>35</sup>

### ***Residential Lettings***

- 6.99 We thought residential lettings should be covered by the new Act. With residential lettings, the consumer generally has not engaged a legal adviser and therefore there is no pre-contractual enquiry process, while in addition there is no transfer of capital value between the parties.

<sup>30</sup> As most purchases of land by consumers are from other consumers, they would not be included within the scope of the new Act. However, the actions of estate agents (or other traders) involved in the process would potentially fall within the scope.

<sup>31</sup> Note, however, that in Scotland, Part 3 of the Housing (Scotland) Act 2006 provides that a person who is responsible for marketing a house must supply a Home Report to any prospective buyers. The Home Report includes a Single Survey, an Energy Report (including an Energy Performance Certificate) and a Property Questionnaire.

<sup>32</sup> This Act applies in Scotland too. However, as discussed below from para 6.104, the Department for Business, Innovation and Skills has consulted on whether to repeal this Act: see The Department for Business, Innovation and Skills, *Consultation on the repeal of the Property Misdescriptions Act 1991* (January 2011), available at <http://www.bis.gov.uk/Consultations/repeal-property-misdescriptions-act-1991>.

<sup>33</sup> See Consumers, Estate Agents and Redress Act 2007, sch 6, adding s 23A to the Estate Agents Act 1979. The requirement came into effect on 1 October 2008 (SI 2008/1712).

<sup>34</sup> See <http://www.of.gov.uk/OFTwork/estate-agents/EARS/>.

<sup>35</sup> The Property Ombudsman, *Terms of Reference for The Property Ombudsman* (effective from September 2011), para 10(b). The Ombudsman Services: Property, *Terms of Reference*, para 9.3(b), available at <http://www.tpos.co.uk/terms.htm>.

### **What consultees said about land transactions**

- 6.100 There was a lot of support for our proposal. More than two-thirds of consultees who responded to this question agreed that land transactions should not be covered by the new Act for the reasons given in the Consultation Paper. In particular, the OFT supported the proposal to exempt land transactions, so long as the exemption did not apply to lettings:

We think there are good arguments for exempting land sales. We think there needs to be clarity that this does not include lettings, where consumers may need CPRs protections.

- 6.101 The Bar Council also agreed:

The fact that most purchases of land by consumers are from other consumers and would therefore not be covered anyway seems to us to be largely determinative of the question.

- 6.102 The Property Ombudsman agreed, adding: "Current legislation (in particular the Property Misdescriptions Act) is more precise for this specific type of transaction."

- 6.103 Those that disagreed generally did so on the basis that the new Act should match the Regulations in scope. The Institute of Consumer Affairs added that it would be wrong to exempt estate agencies, "which frequently give rise to problems relating to sales and lettings".

### ***The Government's consultation on the Property Misdescriptions Act 1991***

- 6.104 In January 2011, BIS began a consultation on whether to repeal the PMA due to its perceived overlap with the Regulations.<sup>36</sup> The consultation closed in April 2011.

- 6.105 Many of those who agreed that land transactions should not be included in the new Act said that their view might be different if the PMA were repealed. As the National Consumer Federation put it:

We note that it is suggested that land sales should be excluded. We also note there is a closed consultation on repealing the Property Misdescriptions Act as it is subsumed into the Regulations. We therefore feel that it may be appropriate to include land sales in this civil legislation.

- 6.106 At the time of writing, it is unclear whether the PMA will be repealed. If it is, it is important that the two property ombudsman schemes continue to provide redress against estate agents who give misleading descriptions of property, as they do now. Although the PMA does not provide a private right of redress, the property ombudsmen have tended to treat it as though it did. If this were to change, we might need to reconsider our recommendations in this area.

<sup>36</sup> The Department for Business, Innovation and Skills, *Consultation on the repeal of the Property Misdescriptions Act 1991* (January 2011), available at <http://www.bis.gov.uk/Consultations/repeal-property-misdescriptions-act-1991>.

### **Should the new Act apply to financial services?**

6.107 Our preliminary view was that misleading or aggressive selling of financial services (by banks, investment advisers or insurers) should be excluded from the ambit of the proposed new Act. We gave three reasons:

- (1) There are already sophisticated mechanisms in place to protect consumers. The Financial Services Authority (FSA) issues rules and guidance, while consumers may complain to the Financial Ombudsman Service (FOS). Complaints over financial services are not decided according to the letter of the law. Instead, the FOS may come to a decision that is “fair and reasonable in all the circumstances”.<sup>37</sup>
- (2) Financial services complaints may merit a more generous measure of compensation than the simple, broad-brush approach we are proposing. For example, when the FSA issued detailed guidance about how firms should deal with complaints over mis-sold personal pensions, it did not simply require firms to unwind the transaction. Instead, firms who had wrongly advised consumers to opt-out of final salary pension schemes were required to compensate consumers for their loss. The measure of damages was higher than simple reliance losses. It was calculated as the difference between the results produced by the personal pension and the results which would have been produced by the final salary scheme.
- (3) Financial mis-selling may generate complex litigation. For example, in 2010 the British Bankers’ Association launched a judicial review of the FSA’s Payment Protection Insurance complaints-handling measures.<sup>38</sup>

### **What consultees said about financial services**

6.108 Once again, there was strong support for our proposal: around two-thirds of respondents to this question agreed.

6.109 Notably, Consumer Focus, Which? and the OFT all agreed that financial services should be excluded on the ground that it is a highly regulated area. As Which? put it:

Given the detailed regulatory regime in the financial services sector and the existence of the financial ombudsman service, we accept there is probably little need to include financial products and services within the scope of the right to redress.

6.110 On the other hand, some disagreed on the ground that the new Act should be comprehensive and consistent with the Regulations. For example, Brighton and Hove City Council Trading Standards responded:

To ensure consistency Financial Services should be covered by the proposed legislation.

<sup>37</sup> Financial Services and Markets Act 2000, s 228(2).

<sup>38</sup> *R (British Bankers’ Association) v The Financial Services Authority* [2011] EWHC 999 (Admin), [2011] Bus LR 1531.

- 6.111 Wolverhampton City Council Trading Standards Service said that they were “unclear why financial services are excluded as this issue impacts on consumers”. It would make the new Act “less than fully comprehensive.”
- 6.112 Several respondents argued that the Act should apply to consumer credit and debt collection. For example, Devon County Council Trading Standards wrote that the new Act:
- would be a useful remedy against the common practices of rogue debt collectors/debt management companies.
- 6.113 The British Bankers’ Association also queried how “financial services” would be defined in the new Act, in particular whether consumer credit and the collection of financial services debt would be covered.
- 6.114 In Part 9 we explain that although most banking, insurance and investment would be excluded from the new Act, debt collection would be covered. In Part 10 we discuss creditor liability where goods are sold on credit in a misleading or aggressive way.

### **Conclusion**

- 6.115 The new Act is intended as a simple solution to everyday problems, and in some cases our approach favours certainty over fairness. It is best suited to relatively straightforward transactions. The responses to our Consultation Paper indicate that there is considerable support for our proposals to exclude land transactions and financial services from the scope of the proposed new Act. It remains our view that the rationale is convincing and those sectors should be excluded.
- 6.116 The specialised sector of land transactions is currently governed by the well established and well understood law of conveyancing, and consumers have access to redress schemes. We think it would be wrong to legislate to provide redress against traders such as estate agents, but not to provide redress against individual sellers who mislead house buyers. This might encourage buyers to bring actions against agents even though the real fault lay with the seller. However, residential lettings should be covered by the new Act.
- 6.117 Similarly, in the financial services sector, there are already sophisticated mechanisms in place to protect consumers. We do not think that the new Act should extend to most financial services, such as pensions, investments, insurance or banking. These may involve considerable amounts of money, and be unsuited to the standard remedies we are recommending. We have, however, been persuaded that the new Act should cover consumer credit agreements and debt collection, which are often inextricably linked to the supply of goods and services, and cause many problems brought to the attention of advice agencies. We also think that the Act should apply to will-writing, which in this context appears to be a particularly problematic sector.
- 6.118 **Recommendation 13: The new Act should exclude land transactions (other than residential lettings) and financial services (other than credit and debt collection).**

# **PART 7**

## **RECOMMENDATIONS II: LIABILITY**

### **INTRODUCTION**

- 7.1 In Part 6, we set out the scope of our recommended Act. We explained that the new Act would apply where a consumer entered into a contract or made a payment to the trader. The consumer's right of action would lie against the other party to the transaction. We recommended that the Act should cover all products except land and financial services.
- 7.2 In this Part we set out the main elements of liability under the Act. We consider:
- (1) how far the new right should cover misleading omissions;
  - (2) how misleading practices should be defined;
  - (3) how aggressive practices should be defined;
  - (4) the causation test; and
  - (5) the impact on existing law.

### **MISLEADING OMISSIONS**

- 7.3 In our Consultation Paper, we provisionally proposed that the new Act should not cover omissions as such, but should cover a new concept of "implied representations". Implied representations are where the overall presentation means that a reasonable consumer would expect the product, contract or the trader to have certain characteristics, and the trader fails to tell the consumer that the expectation would not be met.
- 7.4 We explained that the advantage of this approach is that it avoids the difficult dichotomy between acts and omissions, which in practice often blend into a single course of conduct. It covers cases where the trader has behaved unacceptably in conveying an untrue meaning to the consumer. This could happen through an ambiguous (although factually true) statement; it could be through silence about something important; or it could be through expressing an opinion where the consumer reasonably believes that the trader has a basis for holding that opinion.
- 7.5 In our early discussions, traders were concerned that including omissions in the definition of misleading commercial practices would be too wide and uncertain in scope. Introducing general liability in respect of omissions – effectively a duty of disclosure – would be a major change from the current position. The scope of a general duty of disclosure is difficult to define. Traders thought that it would introduce uncertainty and encourage vexatious claims.

## **Private law**

- 7.6 In Part 3 we explained that at common law traders have no general duty to disclose information to consumers, but this is subject to exceptions. The main exceptions include: omissions which amount to positive misrepresentations; implied terms in the sale of goods; other statutory duties of disclosure; terms implied into contracts at common law; and unfair contract terms, where the law provides consumers with protection against “hidden” contract terms.
- 7.7 During the course of this project consultees submitted many examples of omissions. The vast majority of case histories provided would be covered by existing private law. For example, a plumber who advertised “no call-out charge” but imposed a “diagnosis charge”<sup>1</sup> would be considered to have made a misrepresentation, because the original statement was positively misleading.<sup>2</sup>

## **Consumer Protection from Unfair Trading Regulations 2008**

- 7.8 Regulation 6 of the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) prohibits commercial practices which omit or hide “material information”.<sup>3</sup> It defines material information as:

the information which the average consumer needs, according to the context, to take an informed transactional decision.<sup>4</sup>

- 7.9 Regulation 6 then lists information which an invitation to purchase should provide, such as: the main characteristics of the product; the identity and address of the trader; the price; and unusual arrangements for delivery. The duty to provide information is, however, not limited to this list. Nor is it confined to invitations to purchase. It has a general application.

## **Our provisional proposal for implied representations**

- 7.10 The division between acts and omissions is not clear cut. The law currently recognises many examples where traders are held liable for half-truths or deliberate ambiguities. If the consumer labours under a unilateral misapprehension and the other party knows this but does nothing to correct it, the current law may provide relief.<sup>5</sup> In most of the cases brought to our attention, the trader had allowed the consumer to make a reasonable inference from the circumstances, which they had made no attempt to contradict.

<sup>1</sup> Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), para 3.21, available at <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>.

<sup>2</sup> See *Tapp v Lee* (1803) 127 ER 200. For Scots law, see *Patterson v Lansberg* (1905) 7 F 675.

<sup>3</sup> SI 2008/1277.

<sup>4</sup> Reg 6(3)(a).

<sup>5</sup> See discussion at paras 5.60 to 5.64 (England) and 5.48 to 5.59 (Scotland) of the Consultation Paper.

- 7.11 We aimed to use a more transparent label for the mixed bag of existing cases giving rise to liability under the current law, such as half-truths and representations by conduct. This reflects the fact that whether something is misleading ultimately depends on its overall presentation.
- 7.12 We asked if consultees agreed that traders should not be liable for omissions as such, but instead should be liable for implied representations, where the overall presentation means the consumer would reasonably expect certain characteristics, and the trader fails to contradict that expectation.

### **What consultees said about misleading omissions**

- 7.13 Consultees' views were split, with around half of those who responded agreeing with our provisional proposal and the other half not. Those who disagreed with our provisional proposal were concerned about a lack of consistency with the Regulations.

### ***Views against our provisional proposal***

- 7.14 Consumer Focus summarised the view of the majority of those that disagreed as follows:

Trading Standards Officers report that, in practice, there is little evidence that the Regulations have created any real difficulties for traders ...

We think it would be simpler and clearer to adopt the approach taken in the Regulations and impose a duty on traders to disclose all material information to the consumer.

- 7.15 The Office of Fair Trading (OFT) objected to our provisional proposal on the ground that introducing a new test would be confusing:

Introducing this new test, which is based on the wording in Regulation 5 (misleading actions), may confuse consumers as well as the courts as to what was meant.

Liability should cover omissions as well as actions. The OFT strongly disagrees with the proposal to exclude omissions. Misleading actions and misleading omissions are strongly linked ... and it is not logical or effective to provide rights in relation to one and not the other, which would be an artificial and confusing distinction to make.

### ***Views in favour of our provisional proposal***

- 7.16 Conversely, BT wrote:

The CPRs [Consumer Protection Regulations] already impose a duty on traders to disclose material information to consumers. If liability for omissions was introduced it would be likely to have significant repercussions on the fundamental principles of contract law in England, Scotland and Wales in a situation where consumers already have several rights of redress i.e. implied terms in the sale of goods, fiduciary relationships or the duty to take reasonable care.

- 7.17 The British Retail Consortium thought the provisional proposal was “a sensible compromise.” They added:

The concept of the “implied representation” adequately covers omissions which constitute implicit representations.

- 7.18 The Bar Council wrote:

We agree that there should be no civil liability for omissions. It seems to us that there is too much uncertainty about what a customer may feel they “should” have been told by a trader.

- 7.19 The Faculty of Advocates thought that our proposal:

avoids the slippery (and possibly arbitrary) distinction between conduct which may constitute an “act” and an “omission”. As the consultation paper notes, the scope of such a general duty would be difficult to define and it may encourage the making of vexatious claims.

- 7.20 Cowan Ervine agreed that extending liability to cover all material omissions would be problematic and might not be necessary:

It does seem likely that to extend liability to omissions would raise problems of the kind outlined in the Consultation Paper. On the other hand in some cases what can be analysed as an omission can also be presented as an implied representation so the import of excluding liability for omissions may not be all that important.

### **Our response to consultees’ views**

#### ***A focus on the overall presentation***

- 7.21 Several consultees said that they found our suggested new term (“implied representation”) confusing. Consultees are already in the process of getting to grips with new terminology in the Regulations and other European initiatives. Introducing yet another new term was seen as unhelpful.

- 7.22 We agree that it would be undesirable to introduce a new term. In our provisional proposal we sought to focus on the overall presentation. This overall presentation test already exists in the Regulations. It is taken from Regulation 5(2)(a) which states that a commercial practice may be a misleading action:

... if its overall presentation in any way deceives or is likely to deceive the average consumer ... .

- 7.23 The word “deceive” is ambiguous. Although it is often used to refer to deliberate dishonesty, we do not think that is what is meant in this context. We think the phrase simply refers to an overall presentation which is likely to mislead the average consumer. The emphasis is on its effect on an average consumer, rather than the state of mind of the trader.

- 7.24 The key test is whether the overall presentation is likely to mislead the average consumer.

***Concern that our test would be too narrow***

- 7.25 Many of those consultees who disagreed with our provisional proposal thought that our test would be too narrow, and would prevent consumers from obtaining redress for some forms of unfair trading.
- 7.26 Our test is intended to cover a wide range of behaviour. It would not require a positive statement. In a report for Consumer Focus, Professor Hugh Collins gives two examples of material omissions.<sup>6</sup> We use these examples to illustrate how the concept of misleading overall presentation would apply in a broad way.

***Example 1:***

A consumer buys a lawnmower, which works satisfactorily, but the consumer is not aware that the mower requires an unusual and hard-to-obtain fuel.<sup>7</sup>

- 7.27 The type of fuel would obviously be an important matter to an average consumer, as without fuel the lawnmower will be useless. The average consumer would expect to be able to obtain appropriate fuel for a lawnmower they buy. If the trader fails to make the consumer aware that this will be very difficult, then we think that the overall presentation is misleading.

***Example 2:***

A travel agent sells a package holiday in an exotic foreign destination to a consumer, but the agent fails to tell the consumer that recently there has been an outbreak of cholera at the destination.<sup>8</sup>

- 7.28 The recent outbreak of cholera is an important matter, which would make the average consumer reconsider going on the holiday. The average consumer would reasonably expect a holiday to be a relaxing and enjoyable experience. This would be extremely unlikely in the event of a cholera outbreak. The overall presentation of the holiday is therefore misleading.

***Removing uncertainty***

- 7.29 Traders expressed concern about the potentially wide scope of a general duty to disclose everything that an average consumer may need to know to make an informed transactional decision. They queried whether shop staff would have to inform consumers that alternative products are available or that a new model is about to be introduced. They were concerned because in the electronics market an improved alternative is always about to be introduced. Further, would traders be required to tell consumers about the prices charged by competitors?

<sup>6</sup> H Collins, *A private right of redress for Unfair Commercial Practices: A report for Consumer Focus* (April 2009).

<sup>7</sup> Above, para 5.8.

<sup>8</sup> Above, para 5.12.

- 7.30 We think that these sort of omissions fall into the category of general knowledge, and should not give rise to a right of redress. The average consumer does not *need* to be told that a product may be available cheaper elsewhere if the consumer shops around, as it is a matter of common sense, which consumers can reasonably be presumed to know. It would only be misleading if the trader promises that its price is the cheapest, when it is not. It is also a matter of general knowledge that electronic equipment is constantly being updated.
- 7.31 It has been suggested that even if we were to mirror the wording of Regulation 6, these sorts of omissions would not be included, as the information would not be “material” to the average consumer. On the other hand, the Regulation appears broad and open. As we observed in the Consultation Paper, few consumer disputes are resolved by lawyers in court and it is therefore important that the concept can be readily understood by those without legal training.<sup>9</sup> Although enforcement officials may understand that Regulation 6 is limited, consumers may approach the issue in a more general way. There is a danger of unmeritorious claims.
- 7.32 On balance, we think it is better to start with a relatively narrow but principled approach to omissions, and to expand the concept if necessary – rather than to start with the general words of Regulation 6, and then find ways to limit the way consumers may approach them.

### **Conclusion**

- 7.33 We think that the key test in the new Act should be whether the overall presentation is likely to mislead the average consumer. The matters listed in the Regulations may provide a guide to this general principle.
- 7.34 The test we recommend is an objective standard that avoids complex questions of whether the trader’s fault is based upon a misleading statement or omission. As we discuss below, the consumer would be required to show that the presentation would have induced the average consumer to enter into the contract or pay money, and that they were also induced in this way.<sup>10</sup>
- 7.35 As we explain in Part 5, we recommend a targeted approach to reform. We accept the arguments put to us by business groups that it would be too uncertain to introduce a private right of redress specifically for all material omissions; the scope would be difficult to define and it would represent a departure from the current approach of UK law. We would, however, welcome a review by the Department for Business, Innovation and Skills of the effect of the Regulations in five years time. If the test has proved too narrow, this could be reviewed.
- 7.36 **Recommendation 14: Traders should not be liable for omissions as a specific category, but should be liable where the overall presentation of a product or service would be likely to mislead the average consumer.**

<sup>9</sup> See the Consultation Paper, para 9.54.

<sup>10</sup> See paras 7.85 to 7.116.

- 7.37 **Recommendation 15: Five years after the introduction of the new Act, the Department for Business, Innovation and Skills should review the test, “the overall presentation of a product or service was likely to mislead the average consumer”.**

#### **THE DEFINITION OF “MISLEADING”**

- 7.38 Under Regulation 5(2), a commercial practice is misleading if:
- (1) it contains false information; or
  - (2) its overall presentation in any way deceives or is likely to deceive the average consumer, even if the information is factually correct.<sup>11</sup>
- 7.39 Regulation 5(3) states that an action will also be “misleading” in two specific cases:
- (1) “Copycat packaging”, where the marketing of a product “creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor”,<sup>12</sup> or
  - (2) A failure to comply with a code of conduct with which the trader has undertaken to comply.<sup>13</sup>
- 7.40 The misleading information must relate to one of the listed matters, but the list is long. Regulation 5(4) lists 11 matters, including the nature and main characteristics of the product, the price, the trader’s attributes, the sales process, the consumer’s rights, or the need for a service, part or repair. Regulation 5(5) then provides a non-exhaustive list of 18 possible main characteristics of the product, while Regulation 5(6) lists 8 elements concerned with the “nature, attributes and rights” of the trader.

#### **Our provisional proposal on the definition of misleading**

- 7.41 In our Consultation Paper, we provisionally proposed to follow the definition in the Regulations, in substance. We were not sure, however, whether the lists in Regulation 5 would be helpful in a private law context in primary legislation. They seem too detailed and risk the possibility of excluding material issues.
- 7.42 We began by asking whether consultees agreed that the new Act should follow the substance of the definition of misleading practice in Regulation 5(2). All of those that responded to the question agreed.
- 7.43 We then asked whether the new Act should reproduce the lists of matters in Regulation 5(4) to (6), about which misleading representations may be made.
- 7.44 The majority of those that responded to this question thought that the new Act should reproduce the lists, to provide consistency with the Regulations. As the North East Trading Standards Association (NETSA) put it:

<sup>11</sup> Reg 5(2)(a).

<sup>12</sup> Reg 5(3)(a).

<sup>13</sup> Reg 5(3)(b).

Maintenance of current definitions will aid both civil and criminal actions in future once the new legislation is implemented. Differences, even minor ones, open both pieces of legislation up for unnecessary legal debate which could undermine consumer redress/future criminal action.

NETSA added that the lists would provide useful information to consumers.

- 7.45 On the other hand, several consultees were concerned that the lists in Regulation 5 may limit the practices for which redress is available. For this reason, Citizens Advice suggested that the lists should be produced as guidance rather than legislation:

We believe that the detailed list should be added to guidance about the new provisions rather than listing them in the new Act. This is because they could be viewed as a substantive list and so new and emerging practices would not be covered by the law.

- 7.46 Others thought that the lists should be simplified. The Council of Her Majesty's Circuit Judges said that the Regulation "appears overly detailed and that it would be desirable for the wording to be simplified if possible". Independent Park Home Advisory Services also thought that the lists "could be confusing or limiting".

#### **Banned misleading practices**

- 7.47 The Regulations list 31 practices which are considered unfair in all circumstances, whether or not they would cause the average consumer to take a different transactional decision. Of these 31 practices, 24 can be considered misleading, and the remaining 7 aggressive.
- 7.48 We do not wish to reproduce the concept of a banned practice. As discussed below, under the new Act a practice will only be actionable if it would be likely to cause the average consumer to make a decision they would not have made otherwise.<sup>14</sup> Some banned practices may lead to little direct loss, such as false "closing-down" sales.<sup>15</sup> Other banned practices are helpful examples of the sort of problem which the new Act is intended to cover, such as a trader claiming to be a signatory to a code of conduct when it is not.<sup>16</sup>
- 7.49 We asked whether consultees thought that it would be helpful for the new Act to include examples of practices that are misleading (unless the contrary is shown). Views were split on this question, but a slight majority thought that it would be helpful.
- 7.50 British Sky Broadcasting Group plc, the Faculty of Advocates, and Dr Gillian Black and Keiran Wilson thought it would assist consumers in determining whether they had been the subject of a misleading practice.

<sup>14</sup> See paras 7.85 to 7.106.

<sup>15</sup> The Consumer Protection from Unfair Trading Regulations 2008, sch 1, banned practice 15.

<sup>16</sup> Above, banned practice 1.

- 7.51 NETSA said that their preference would be to include the banned practices, but they added:

However there is no real need to include them – the definition of misleading representation etc. will cover such practices and it is not as relevant to identify current / past trade behaviour in civil legislation as it is in preventing criminal activity. Certain practices could be used in any guidance produced on the new legislation.

- 7.52 The OFT thought that the legislation should include the 31 banned practices as stand-alone breaches, rather than examples of misleading practices.

- 7.53 By contrast, several consultees objected to the banned practices being included in the new Act. Citizens Advice thought that the banned practices would be more useful as guidance, as primary legislation would be difficult to keep up-to-date:

We note that the CPRs banned practice list will be revisited five years after the Directive originally came into force in 2006.<sup>17</sup> This presents an opportunity for the annex list to be amended and updated to include new and emerging unfair practices. If the list is included in the new Act, there will need to be a provision to allow it to be updated. This may be costly in terms of parliamentary time.

- 7.54 The British Retail Consortium, Cowan Ervine and the Council of Her Majesty's Circuit Judges also favoured guidance. The Council of Her Majesty's Circuit Judges wrote:

We favour simplicity and are not attracted by either a non-exhaustive list of examples or examples of misleading practices creating a presumption and reverse burden of proof. A solution might be provided by issuing non statutory guidance to help explain terms such as that given by the Health and Safety Executive in relation to Health and Safety legislation.

- 7.55 Brighton and Hove City Council Trading Standards did not think that the banned practices should be included in the new Act, as "this could restrict thinking".

### **Conclusion**

- 7.56 On balance, we conclude that the definition of a misleading practice should be kept short and general. It is enough to say that a commercial practice is misleading if it contains false information, or if it is likely to mislead the average consumer in its overall presentation. There is no need to make separate provision for copycat packaging or codes of practice. Furthermore, we do not think that either the lists of matters about which misleading representations may be made or the banned practices should be included in the new Act.

<sup>17</sup> The Directive referred to here is the Unfair Commercial Practices Directive 2005/29/EC (OJ 2005 L 149).

- 7.57 As we discuss below, examples may be useful to explain new concepts, but the idea of a misleading practice is sufficiently understood and does not need further clarification.<sup>18</sup> The use of examples in this context could be restrictive. Even if the examples were said to be non-exhaustive they could be interpreted in a limiting way.
- 7.58 We find the arguments against the inclusion of the lists in the Act to be persuasive. In our view, the lists are unsuited to primary legislation. They are overly long and detailed; they may be confusing to consumers; and may not include new and emerging unfair practices. They will be difficult to keep up-to-date, leading to unhelpful differences between private and public law.
- 7.59 **Recommendation 16: The new Act should follow the substance of the definition of misleading practice in Regulation 5(2). That is, a commercial practice is misleading if it contains false information, or if it is likely to mislead the average consumer in its overall presentation.**
- 7.60 **Recommendation 17: The new Act should not reproduce Regulation 5(3) to (6).**
- 7.61 **Recommendation 18: The new Act should not include examples of practices that are misleading (unless the contrary is shown).**

#### **THE DEFINITION OF AGGRESSIVE COMMERCIAL PRACTICES**

- 7.62 As discussed in Part 4, there was overwhelming support for extending redress to consumers who have suffered loss from aggressive commercial practices. Most agreed that aggressive practices cause significant harm to consumers and that the existing law is inadequate. Here we discuss how aggressive practices should be defined.

#### **The Regulations**

- 7.63 As we discussed in Part 2, the Regulations define aggressive practices in terms of “harassment, coercion or undue influence” which significantly impairs the average consumer’s freedom of choice. Regulation 7(3) explains that:
- (1) coercion “includes the use of physical force”; and
  - (2) undue influence “means exploiting a position of power in relation to the consumer so as to apply pressure”.

Harassment is not defined.

- 7.64 Regulation 7(2) sets out factors which may be taken into account, such as “the use of threatening or abusive language or behaviour”; or “any threat to take any action which cannot legally be taken”.

<sup>18</sup> See para 7.83.

7.65 The banned practices provide further guidance about what counts as an aggressive practice. They illustrate the sort of problems that were envisaged by the Unfair Commercial Practices Directive 2005 (the Directive),<sup>19</sup> and include:

- (1) Creating the impression that the consumer cannot leave the premises until a contract is formed.<sup>20</sup>
- (2) Conducting personal visits to the consumer's home and ignoring the consumer's legitimate request to leave or not to return.<sup>21</sup>
- (3) Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media, except in circumstances and to the extent justified to enforce a contractual obligation.<sup>22</sup>

7.66 Thus, the definition of aggressive practice has multiple layers. Also some of the language used in Regulation 6 may be confusing. For example, in private law the term "undue influence" has a different meaning to that given in the Regulations. In private law, it implies the abuse of a special relationship of trust between the parties: cases typically involve husbands and wives or spiritual advisers. This is very different from the way that traders may exploit a position of power, so we think the term is best avoided in a private law statute.

#### **Our provisional proposal on the definition of an aggressive practice**

7.67 In our Consultation Paper we proposed that the new Act should track the Regulations with some modifications, to avoid confusion with existing domestic doctrines (such as undue influence). We thought that a commercial practice should be considered aggressive if there is coercion, an abuse of power or harassment. We suggested the following definitions:

- (1) "Coercion" means:
  - (a) the use of force; or
  - (b) the threat of the use of force.
- (2) "Abuse of power" means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the average consumer's ability to make an informed decision.
- (3) "Harassment" means unreasonable behaviour which is likely to cause alarm, distress or serious annoyance and inconvenience.

<sup>19</sup> Directive 2005/29/EC (OJ 2005 L 149).

<sup>20</sup> The Consumer Protection from Unfair Trading Regulations 2008, sch 1, banned practice 24.

<sup>21</sup> Above, banned practice 25.

<sup>22</sup> Above, banned practice 26.

7.68 Our proposals did not require “a course of conduct” with more than one instance of harassing behaviour. We thought that in some circumstances, a single instance may be sufficient if it results in the consumer entering into a contract or making a payment. In Part 3 we noted that although the Protection from Harassment Act 1997 required a “course of conduct”, this is controversial.<sup>23</sup> In Scotland the requirement has been removed in domestic abuse cases by the Domestic Abuse (Scotland) Act 2011.

7.69 Factors to be taken into account in determining whether a commercial practice is aggressive would include:

- (1) Its timing, location, nature and persistence;
- (2) The use of threatening or abusive language or behaviour;
- (3) The exploitation by the trader of any specific misfortune or circumstance of such gravity so as to impair the consumer’s judgment, of which the trader is aware, to influence the consumer’s decision with regard to the product; and
- (4) Any threat to take any action which cannot legally be taken.

7.70 Examples of aggressive commercial practices would include:

- (1) Creating the impression that the consumer cannot leave the premises until a contract is formed;
- (2) Conducting personal visits to the consumer’s home and ignoring the consumer’s legitimate request to leave or not to return; and
- (3) Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.

7.71 In our Consultation Paper we asked whether consultees thought that:

- (1) The definitions we proposed for coercion, abuse of power and harassment collectively cover the appropriate situations; and
- (2) It would be helpful to have a list of examples of aggressive practices, and if so, whether the examples we proposed were appropriate.

#### **What consultees thought about our proposed definitions**

7.72 A large majority of respondents agreed with the first question, that our proposed definitions of coercion, abuse of power and harassment together adequately cover the appropriate situations. Only four respondents disagreed.

7.73 The Bar Council was among the majority that agreed. It thought, in particular, that the definition of harassment would be useful:

<sup>23</sup> See above, paras 3.69 to 3.71.

We are broadly comfortable with the definitions. It is certainly an improvement on the CPUTRs, not least because there is some definition of harassment. We have experience of the difficulties that the absence of any such definition poses in the criminal context.

7.74 Citizens Advice also agreed and saw the benefit of the proposed definitions:

The common elements of aggressive practices often seen in CAB cases are: persistence ... ; threatening or abusive language; abusing vulnerability in terms of circumstances such as age, infirmity, health; causing fear and anxiety; and pursuing consumers in their homes where they can readily be targeted.

These are captured within the scope of the proposed definitions.

7.75 NETSA described the proposed definitions as “appropriate and comprehensive.”

7.76 On the other hand, the Council of Her Majesty’s Circuit Judges thought that “the definitions should follow the definitions under Regulation 7 to avoid confusion and complexity.”

7.77 Dr Gillian Black and Keiran Wilson argued that the terminology should be “abuse of position” rather than “abuse of power”, as this reflects more closely the actions we had cited in the Consultation Paper. On reflection, we agree that the definition we proposed in paragraph 7.67 above should refer to abuse of position rather than abuse of power.

#### **What consultees thought about the examples**

7.78 A large majority of respondents agreed that it would be helpful to have a list of examples of aggressive practices, and that the examples we set out were appropriate.

7.79 Several consultees, such as the Independent Park Home Advisory Service, and Dr Gillian Black and Keiran Wilson, said that an indicative list would be useful but that it would need to be made clear that the list is not exhaustive.

7.80 Citizens Advice thought it would be better for the banned practices to be produced as part of a guidance document. Cowan Ervine also made this point:

There is a danger that examples may limit the scope of this aspect of redress. While the intention is laudable it would be better to include the examples in the guidance material.

7.81 The Bar Council said it remained “to be convinced of the need for examples”. They thought that selecting a few examples from the blacklist “might confuse rather than inform”.

#### **Conclusion**

7.82 There is a strong consensus that the definitions we proposed for coercion, abuse of power and harassment are appropriate. We agree, however, with the suggestion from Dr Gillian Black and Keiran Wilson that our definition should refer to “abuse of position” rather than “abuse of power”.

7.83 On the definition of misleading practices, we concluded that lists of examples should not be included in the new Act. We think different arguments apply to aggressive practices. We are introducing a new concept, which extends private law and moves away from traditional concepts of duress and undue influence. We think it would be helpful to include examples of the sorts of practices intended to be covered, drawing on the banned practices in the Regulations.

7.84 **Recommendation 19: The new Act should:**

- (1) **provide redress for aggressive practices;**
- (2) **include our proposed definitions of coercion, abuse of position and harassment; and**
- (3) **include our proposed list of examples of aggressive practices.**

#### **THE CAUSATION TEST**

7.85 In our Consultation Paper we proposed a double test:

- (1) The aggressive or misleading practice would need to satisfy an objective test. We proposed to mirror the Regulations in stating that it must be likely to cause an average consumer to make a decision that consumer would not have made otherwise to enter into a contract or make a payment. In some circumstances, however, one could substitute the test of the vulnerable consumer.
- (2) As this concerns private redress, it would also be necessary for the consumer to show that the practice had some effect on them. We proposed that it should be enough if the consumer showed that the practice was a “significant factor” in their own decision.

7.86 We discuss each of these tests below. We look first at the average consumer test, then at the vulnerable consumer test, and finally at the effect on the individual consumer.

#### **Our provisional proposal: adopting the “average consumer” test**

7.87 In our Consultation Paper, we proposed that the new Act should require an objective level of seriousness: would the misleading or aggressive practice be likely to cause the average consumer to enter into the contract or make the payment?<sup>24</sup> This terminology tracks the wording of the Regulations, which define the average consumer as someone who is “reasonably well informed, reasonably observant and circumspect”.<sup>25</sup>

<sup>24</sup> See *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106 (Ch), [2011] WLR (D) 34 by Briggs J at paras 69 to 71 where the court held that a “but for” test of inducement applies to the average consumer under the Regulations. In this case, the appeal and cross-appeal were stayed by the Court of Appeal in July 2011 and a reference was made to the European Court of Justice (C-428/11).

<sup>25</sup> Reg 2(2).

- 7.88 The objectivity of the average consumer test is similar to the “materiality” test of the current law of misrepresentation. Conversely, case law on aggressive commercial practices has traditionally adopted a completely subjective approach.
- 7.89 We thought that it would be helpful to have an objective benchmark for assessing the significance of commercial practices for three reasons:
- (1) It ensures that the practice was genuinely misleading or aggressive, rather than a trivial issue to which the consumer over-reacted.
  - (2) It eliminates cases in which it is unlikely that the consumer suffered any real loss as a result.
  - (3) It would be helpful from the consumer’s point of view. Once consumers have proved that the aggressive or misleading commercial practice was likely to cause the average consumer to enter into a contract or make a payment they would not otherwise have made, they only need to show that it was a significant factor in their own decision. Consumers would not need to show that they would not have entered into the contract or made the payment if the practice had not occurred, which is a more difficult test.
- 7.90 We asked whether consultees agreed that a trader should only be liable for a misleading or aggressive practice if it would have affected an average consumer.

***What consultees thought about the average consumer test***

- 7.91 A large majority of respondents to this question agreed that the average consumer test should apply. Many, including Age UK, Wolverhampton City Council Trading Standards Service, NETSA, and Brighton and Hove City Council Trading Standards, agreed on the ground of consistency with the Regulations.
- 7.92 The Faculty of Advocates agreed that the average consumer test is important:
- Concepts such as "average consumer", the "reasonable man", and "reasonable doubt" are often used in both civil and criminal law fields. They are important in providing an objective reference point.
- 7.93 Which? agreed but requested further guidance:
- We recognise the need for there to be an objective test and believe the average consumer test is appropriate.
- However, we think that further guidance around the definition of “average consumer” would be appropriate to ensure consumers with genuine claims are not missing out.
- 7.94 By contrast, Mindy Chen-Wishart argued that the standard of a reasonably well informed, observant and circumspect consumer was unrealistic. It was set too high.

### ***The vulnerable consumer provision***

7.95 In some cases the Regulations substitute a test looking at how an average vulnerable consumer would react:

- (1) Where a commercial practice is directed to a particular group of consumers, a reference to the average consumer refers to the average member of that group;<sup>26</sup> or
- (2) Where a clearly identifiable group of consumers is particularly vulnerable to the practice because of “their mental or physical infirmity, age or credulity” in a way which the trader could reasonably be expected to foresee, a reference to the average consumer refers to the average member of that group.<sup>27</sup>

7.96 Our proposal to adopt the Regulations’ definition of “average consumer” includes the specific provisions for vulnerable consumers. This variation acknowledges that the “average” person in certain disadvantaged groups will be considerably weaker than an otherwise reasonably robust individual. Consumer groups told us that they see advantages in the way that the test incorporates the standpoint of vulnerable consumers, when a practice is targeted at them.

7.97 We asked whether consultees agreed that the definition of average consumer should include provision for vulnerable consumers mirroring the Regulations.

### ***What consultees thought about the vulnerable consumer provision***

7.98 Once again, there was a strong consensus in support of our proposal that a provision for vulnerable consumers ought to be included, with only one respondent disagreeing.

7.99 Several consultees, such as Age UK, East of England Trading Standards Association, Wolverhampton City Council Trading Standards Service and Cowan Ervine considered the vulnerable consumer provision to be essential. Similarly, Citizens Advice responded:

Yes, definitely. This is an important feature of the CPRs that needs to be reflected in the proposed provisions for redress. Without this provision, the “average consumer test” would be too high a benchmark for vulnerable consumers seeking redress.

7.100 British Standards Institute noted that “research undertaken prior to the consultation found that a disproportionately high number of those consumers who had fallen victim to a misleading or aggressive practice might be deemed ‘vulnerable’, including older and disabled people”.

7.101 By contrast, Richard B Mawrey QC disagreed:

All that would happen is that every consumer would make (or be encouraged by litigation farmers to make) claims of vulnerability.

<sup>26</sup> Reg 2(4).

<sup>27</sup> Reg 2(5).

- 7.102 The Council of Her Majesty's Circuit Judges also expressed concern that the definition was confused and would result in litigation: "in our view it is too vague a concept".

### **Conclusion**

- 7.103 There is strong support for our proposals that the new Act should include the average consumer test and the vulnerable consumer provision. Some consultees have pointed out shortcomings of those tests, and we acknowledge that they are not perfect. However, research by Jane Williams and Caroline Hare shows that the test is becoming better known and understood.<sup>28</sup> Trading standards officers are more comfortable in interpreting the test in accordance with "common sense" notions of justice.
- 7.104 We conclude that the average consumer test provides a necessary element of objectivity, whilst the vulnerable consumer provision provides additional protection for targeted vulnerable consumers. We think that courts will be able to prevent mis-use of the concept of the vulnerable consumer.
- 7.105 **Recommendation 20: A trader should only be liable for a misleading or aggressive practice if it would be likely to cause the average consumer to make a decision that they would not have made otherwise to enter into a contract or to make a payment to the trader or its agent.**
- 7.106 **Recommendation 21: The definition of "average consumer" should include provision for vulnerable consumers, mirroring the Regulations.**

### **Our provisional proposal: a significant factor in the consumer's decision**

- 7.107 Consumers should only be entitled to a remedy if the misleading or aggressive commercial practice had an actual impact on them. We identified two approaches to what the causation test might be. Should the test be that the aggressive or misleading commercial practice was:
- (1) a "significant factor" in the consumer's decision; or
  - (2) a "but for" cause? In other words, but for the unfair practice, would the consumer not have made the decision at all?
- 7.108 We thought that it would be unrealistic to expect consumers to prove that without the commercial practice they would not have entered into the contract at all. Often there will be no way of telling why a consumer acted in that particular way following an aggressive or misleading practice. As behavioural science suggests, there are many unpredictable factors affecting consumers' decisions.<sup>29</sup> On the other hand, putting no weight on causation would be inconsistent with the compensatory aim of private rights.

<sup>28</sup> J Williams & C Hare, "Early Experiences of the Enforcement of the Unfair Commercial Practices Directive in Scotland", (December 2010) 33(4) *Journal of Consumer Policy*, 377. See also discussion at paras 2.42 to 2.46 of the Consultation Paper, and paras 2.31 to 2.34 of this Report.

<sup>29</sup> R Incardona and C Poncibò, "The average consumer, the unfair commercial practices Directive, and the cognitive revolution" (2007) 30(1) *Journal of Consumer Policy*, 21.

- 7.109 We thought that requiring the aggressive or misleading practice to be a “significant factor” in the consumer’s choice would be a satisfactory compromise. This is in line with existing law, particularly in Scotland.<sup>30</sup>
- 7.110 We therefore asked whether traders should only be liable if the misleading or aggressive practice was a significant factor in this consumer’s decision to enter into the contract or make the payment.

***What consultees said on the “significant factor” test***

- 7.111 East of England Trading Standards Association favoured a more lenient test: “the word ‘significant’ has the potential to make the matter over complex. Merely ‘a factor’ would be sufficient.”
- 7.112 By contrast, the Bar Council thought that the test should be stronger:

Once a consumer is apprised of a misleading practice there is likely to be a natural temptation for that consumer to assume that he or she must have been influenced by it ... . If the requirement is only to show that the practice was a significant factor, rather than a “but for” cause, the difficulty for traders in countering such assertions will be greater.

- 7.113 On the other hand, the great majority of consultees agreed with our proposal. Once it is shown that a practice would have affected an average consumer, it should be enough for the consumer to show that the practice was a significant factor in their own decision.

**Conclusion**

- 7.114 We conclude that the significant factor test is the best compromise. It will ensure that there is a sufficient causal link to justify private redress.
- 7.115 In practice, this means that consumers will need to provide some evidence that they saw or heard the misleading statement, or experienced the aggressive practice before making the decision to buy or pay and that they were influenced by it. Thereafter, it will normally be enough if the misleading or aggressive practice is sufficiently serious to cause a reasonably well informed, observant and circumspect consumer to enter into the contract or make a payment.
- 7.116 **Recommendation 22: To obtain redress the consumer would need to show that the misleading or aggressive practice was a significant factor in their decision to enter into the contract or make the payment.**

**THE IMPACT ON EXISTING LAW**

- 7.117 We have considered how far the new statute should exist alongside the current law and how far it should replace existing legal rights.
- 7.118 The law covering consumers’ rights in respect of aggressive and misleading practices is vast. It spans common law and statute, with numerous and disparate causes of action potentially available.

<sup>30</sup> See our discussion at paras 8.7 to 8.8 of the Consultation Paper.

### **Common law doctrines**

- 7.119 We do not intend to repeal common law doctrines. The Consultation Paper discussed a wide variety of common law doctrines which may have some bearing on misleading or aggressive trade practices, including the law of deceit or fraud; the law of duress; liability for negligent mis-statements following *Hedley Byrne v Heller*,<sup>31</sup> and the Scots law of “facility and circumvention”.<sup>32</sup>
- 7.120 These doctrines are very rarely used in consumer cases but they have the potential to cover issues outside the scope of the recommended Act, or provide more generous remedies against particularly heinous conduct. For example, the doctrine in *Hedley Byrne v Heller* provides redress against mis-statements by a third party, such as a producer, who does not have a contractual relationship with the consumer. The law of deceit or fraud is extremely difficult for a consumer to use, but may provide compensation on a more generous basis for particularly serious wrongdoing.
- 7.121 The new statutory framework would operate without prejudice to the existing common law.

### **Contract remedies**

- 7.122 Under our provisional proposals, a trader’s contractual liability to the consumer would continue alongside the new Act. This can be a valuable alternative for consumers. There may be cases where the consumer would wish to obtain specific performance or implement of a representation which might be held to have promissory or contractual force. Remedies for unjust enrichment (or, in Scots law, unjustified enrichment) would also continue to be available.

### **Statutory provisions**

- 7.123 On the other hand, the new Act covers substantially the same ground as the Misrepresentation Act 1967 (in England and Wales) (the 1967 Act) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (in Scotland) (the 1985 Act).
- 7.124 The question is whether the new Act could be added alongside existing remedies; or whether it should partially replace these two provisions.
- 7.125 We noted that our provisional proposals will only affect business to consumer transactions. The two misrepresentation provisions will continue to exist, independently of our proposals, to cover business to business transactions, consumer to consumer transactions, and excluded products (such as sales of land and financial services). We also think that they may have a role in dealing with misrepresentations by consumers to traders.
- 7.126 We also thought there may be cases in which liability under the 1967 Act may offer consumers greater rights. The measure of liability for fraud is more extensive and it is possible that the “fiction of fraud” also provides consumers with this greater level of redress in respect of negligent acts.

<sup>31</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

<sup>32</sup> See Parts 5 and 7 of the Consultation Paper.

7.127 We proposed that the new Act should be added alongside existing law. We believed that in practice consumers would opt for the simpler solution of suing under the new Act, as it provided a more user-friendly alternative. We asked for views.

**Consultees' views on the impact on existing law**

7.128 Views were split on this issue. The majority of consultees who responded thought that the relevant legislation should continue to apply alongside the new Act.

7.129 Several consultees thought that the existing legislation might provide useful alternatives. For example, Mike Hembry of Slough Borough Council Trading Standards wrote:

It appears there are some enhanced values for consumers in the 1967 Act and this Act also applies to B2B [business to business] contracts. Given this and although little used by consumers there seems no real benefit in repeal or modification of the 1967 Act.

7.130 The OFT thought the legislation should continue to apply in the interim whilst the impact of the new Act is assessed.

7.131 On the other hand, Which? thought existing legislation should be repealed:

We would support the suggestion that the new regime would replace a consumer's rights under the Misrepresentation Act 1967 for B2C transactions, providing the proposed regime is sufficiently comprehensive. If it is, there would be little (if any) need for consumers to rely on the Misrepresentation Act. Furthermore, our experience shows there is precious little reliance on the existing law, particularly at a court level.

7.132 Brighton and Hove City Council Trading Standards also favoured repeal:

If the legislation is not working there seems to be no reason to keep them on the Statute Book.

7.133 The Council of Her Majesty's Circuit Judges, made a compelling argument in favour of repeal:

The stated objective is to provide a new and user-friendly *alternative* for consumers. Litigants and their lawyers are unlikely to opt for the simpler solution – they are much more likely to adopt a “belt and braces approach” and sue in the alternative. This will add to the complexity of proceedings and frustrate the objective. It would be preferable for the new remedies to replace existing law.

## Conclusion

- 7.134 Consultees made good arguments for and against retaining existing legislation that applies to consumers. However, we find the arguments in favour of disapplication to be convincing. Our recommendations for a new Act are intended to reduce complexity. The Council of Her Majesty's Circuit Judges correctly pointed out that a litigant would use both Acts, adding to the complexity of court proceedings. We therefore think that where the new Act applies it should replace the existing legislation on misrepresentation.
- 7.135 The two existing pieces of legislation for misrepresentation would continue to apply in business to business transactions, consumer to consumer transactions and excluded products (such as sales of land and financial services).
- 7.136 With the exception of the 1967 and 1985 Acts, the existing law would be unaffected by the new statutory framework.
- 7.137 For the purposes of section 75 of the Consumer Credit Act 1974, which provides that, in certain circumstances, a consumer under a credit agreement who has a claim for misrepresentation against a supplier has a like claim against the creditor, we think that the definition of misrepresentation should encompass the definition of misleading commercial practice in the new Act.<sup>33</sup>
- 7.138 **Recommendation 23: The Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (in Scotland) should be disapplied for consumers in transactions covered by the new Act.**
- 7.139 **Recommendation 24: For the purposes of section 75 of the Consumer Credit Act 1974, the definition of misrepresentation should encompass misleading commercial practices in the new Act.**
- 7.140 **Recommendation 25: The proposed new statutory framework would operate without prejudice to existing common law or contractual remedies, though consumers would not be entitled to recover twice for the same loss.**

<sup>33</sup> Creditor liability is discussed in more detail in Part 10.

## PART 8

### RECOMMENDATIONS III: REMEDIES

- 8.1 In Part 6 we described the scope of a new Act to provide consumers with private redress for misleading and aggressive practices. In Part 7 we discussed the main elements of liability, looking at how misleading and aggressive practices would be defined and at the causation test. Here we set out our recommendations on remedies in detail.
- 8.2 We begin by explaining why we are recommending a “reliance approach” to remedies. We then explain why we think that specific standardised remedies would be helpful, and consider whether the remedies we recommend strike an appropriate balance between certainty and flexibility. We finish by describing the two tiers of remedies that we recommend.

#### RELIANCE DAMAGES OR EXPECTATION DAMAGES?

- 8.3 What measure of damages should a consumer who has experienced a misleading or aggressive practice be entitled to? There is a fundamental policy choice between two measures of damages: “reliance damages” and “expectation damages”.
- 8.4 Reliance damages aim to restore the parties to the position they were in before the practice; that is to unwind the transaction. Expectation damages aim to put the parties into the position in which they would have been had the representation been true.
- 8.5 A simple example illustrates the difference:

#### Prize scams

Consumers are told that if they telephone a premium-rate telephone number they will “win” £1,000. A consumer phones the number, is charged £16, and does not win anything.

The reliance measure is £16. The expectation measure is £1,000.<sup>1</sup>

- 8.6 In our Consultation Paper, our provisional proposals for remedies were based upon the reliance measure, which follows the current law on misrepresentation. We focused on unwinding the transaction rather than trying to compensate consumers for their lost expectations. We thought that the reliance measure was the more appropriate measure for three main reasons:

<sup>1</sup> The consumer could claim £1,000 if the court found the promotion was a contractual offer, which the consumer accepted by phoning. *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 is a classic illustration of how an advertisement can be a contractual offer. In Scotland such advertisements may be promises binding without acceptance.

- (1) Consumers need clear, simple remedies. Trading standards services (TSS) officers told us that the amount of the remedy should, if possible, be related to the price paid.<sup>2</sup> It would often be difficult to quantify damages based on the expectation measure because it would require consumers to value their expectations. This is likely to be too complex and too uncertain to be workable.
- (2) Rogue traders often make claims that they have no practical means of fulfilling. When “miracle” products do not produce miracles, the law cannot put a value on what the miracle would have been worth had it happened. Even where a promise could in theory be met, the costs of doing so may be out of all proportion to the benefits involved.
- (3) For aggressive practices, there is no promise to enforce. There is no “missed benefit”. The reliance approach is the only option. We thought there were advantages in having a single remedy for both misleading and aggressive practices.

8.7 We acknowledged, however, that there might be some cases where expectation damages would provide a suitable remedy, for example where consumers use traders who falsely claim to be members of trade bodies. This means that consumers can not use the complaints or arbitration scheme, and may be left without a guarantee or certificate for the work done. Consumers may wish to be compensated for their loss in not being able to use the arbitration scheme or not receiving a certificate.

8.8 In these cases, consumers would have a choice. They could bring a claim for breach of contract on the basis that membership of the trade body was a term of the contract. This would enable them to claim for their loss, for example, in not receiving a certificate. Alternatively, they could use the new Act on the basis that the trader has made a misleading representation. This would provide the remedies we set out below.

8.9 Consumers would need to choose one or the other. They would not be entitled to *both* contractual remedies and redress under the new Act. This would avoid double recovery for the same loss.<sup>3</sup>

### **Consultees favoured the reliance measure of damages**

8.10 In the Consultation Paper, we asked whether consultees agreed that remedies under the new Act should aim to restore consumers to the position in which they were before the misleading or aggressive action took place (the reliance measure).

<sup>2</sup> We refer to comments arising from the Civil Sanctions Pilot Workshop that the Law Commission held in conjunction with the Office of Fair Trading, Local Better Regulation Office and certain trading standards services, on 28 October 2010.

<sup>3</sup> See the Consultation Paper, para 14.7, together with paras 13.117 to 13.120.

8.11 The overwhelming majority of respondents agreed that the reliance measure was the most appropriate measure of loss. Most agreed that the reliance measure was easier to calculate and more workable. As the Direct Marketing Association (UK) Ltd put it:

This is the best outcome for consumers as it is easier to identify and assess and therefore easier to achieve.

8.12 Devon County Council Trading Standards also thought that the approach was “in line with the current common law principles on calculation of damages and rescission.”

8.13 The response from Which? summarised the majority view:

In deciding this, the key question to ask is what remedy would the consumer expect? We believe the answer to this question in the vast majority of cases is:

- a full refund, where the consumer has made a payment to a trader (whether pursuant to a contract or otherwise) and release from any further obligations under the contract;
- a full refund from the trader where the consumer has incurred additional costs as a result of the breach by him (e.g. payment made to a surveyor);
- compensation for distress and inconvenience where this is the principal loss.

Of these, the first is the key remedy. Without this, consumers will not have faith in the remedies regime. We therefore strongly support the policy that remedies should seek to put consumers into the position they were in before the breach.

### **Conclusion**

8.14 For these reasons we continue to believe that the reliance measure is the appropriate approach.

8.15 **Recommendation 26: Remedies under the new Act should aim to restore consumers to the position in which they were before they entered into the contract or made the payment.**

## **AN APPROPRIATE BALANCE BETWEEN CERTAINTY AND FLEXIBILITY?**

- 8.16 It is common for legislation on unfair practices to provide the courts with a wide range of remedies, and leave their application to judicial discretion.<sup>4</sup>
- 8.17 We thought that this approach might be ill-suited to consumer claims. First, very few consumer cases reach the courts, so there would be a lack of authority on how the principles were to be applied in consumer disputes. Second, consumers are easily deterred by uncertainty. In disputes, they want to be clear about their rights. Third, TSS officers, who are at the forefront of enforcing the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations),<sup>5</sup> told us that they prefer certainty.<sup>6</sup>
- 8.18 We attempted, therefore, to give a greater steer about the appropriate remedies, although we were mindful that this might be at the expense of some flexibility. Misleading and aggressive practices vary greatly, and in some cases the remedy we specified may over-compensate or under-compensate consumers for their loss. That said, we thought that any measure of over or under-compensation would be small and could be justified in the circumstances. We also provided some discretion for second tier remedies, to prevent under-compensation in hard cases.
- 8.19 Overall, the remedies under the new Act approximate the outcomes under the current law, but in a simplified way. It is a scheme which values certainty over flexibility.
- 8.20 In the Consultation Paper, we asked whether consultees thought the remedies we proposed offered an appropriate balance between certainty and flexibility.
- 8.21 The vast majority of consultees agreed that, on the whole, our proposals struck an appropriate balance. Only three disagreed.
- 8.22 The Association of Chief Trading Standards Officers' response represented the views of the majority. They wrote:

We believe the proposed new scheme of consumer remedies is clear and specific and will assist both businesses and consumers in determining redress.

- 8.23 Also reflecting the majority view, Highland Council Trading Standards wrote:

<sup>4</sup> For example, the Competition and Consumer Act 2010 in Australia provides a list of possible remedies, including damages, enforcement orders and variation orders. See paras 11.10 and 11.24 of the Consultation Paper. In the Consultation Paper we refer to the Trade Practices Act 1974 which has been amended and renamed the Competition and Consumer Act 2010.

<sup>5</sup> SI 2008/1277.

<sup>6</sup> We refer to comments arising from the Civil Sanctions Pilot Workshop that the Law Commission held in conjunction with the Office of Fair Trading, Local Better Regulation Office and certain trading standards services, on 28 October 2010.

As stated above, we view this balance between certainty and flexibility – with the preponderant consideration being certainty – as central to the success of the proposed Act. The proposals for remedies have been very carefully considered by the Commissions ... . We are impressed with the final proposals and agree with them in full.

## **TWO TIERS OF REMEDIES**

8.24 We proposed two tiers of remedies:

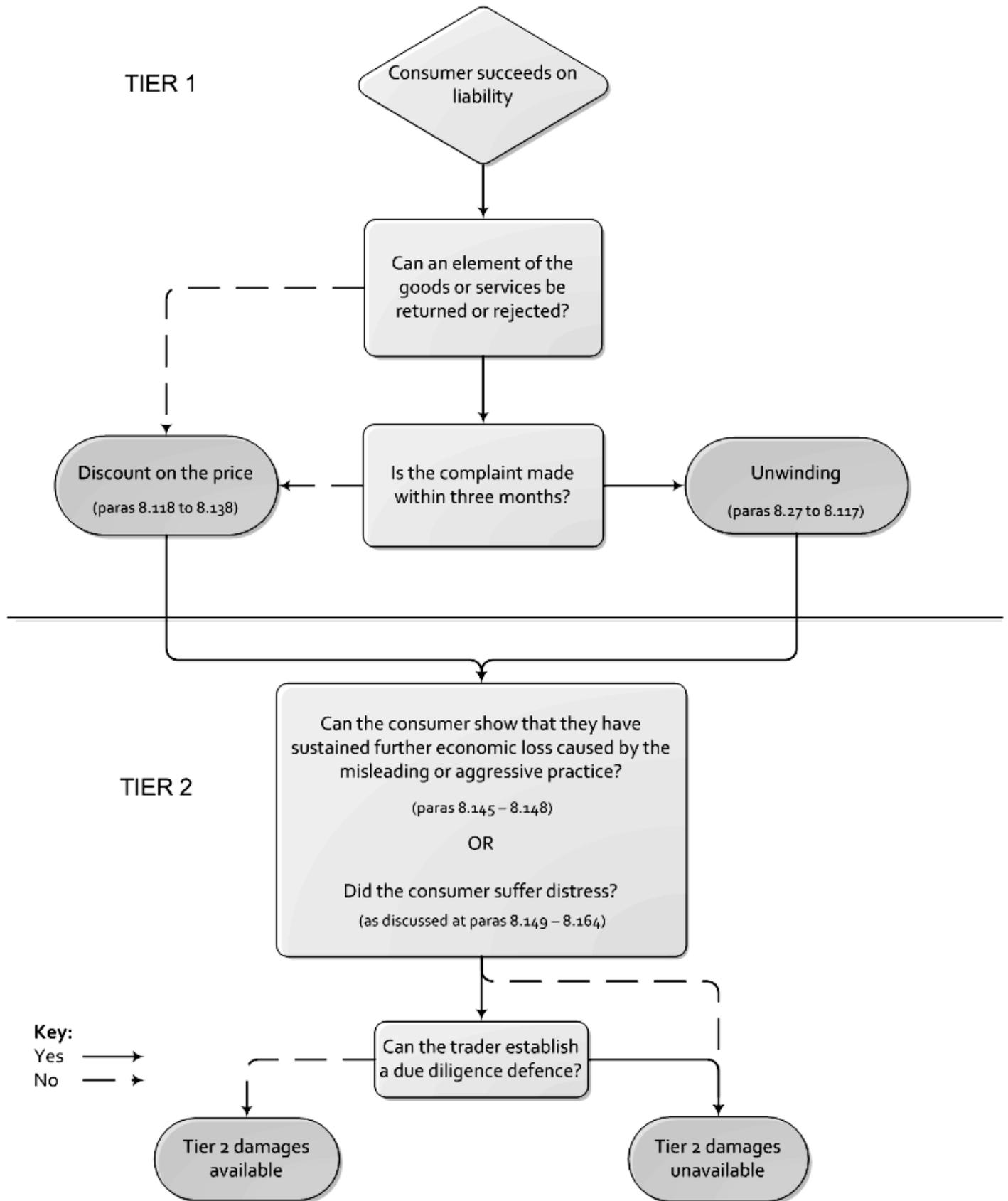
- (1) The standard Tier 1 remedies would be provided in all cases, with no additional proof of loss. They are designed to be applied in a variety of settings, including small claims, criminal court compensation orders, and after intervention from an advice agency. There are two types:
  - (a) *The right to unwind.* If the goods or services have not been fully consumed, and the consumer acts sufficiently quickly, the consumer is entitled to “unwind” the contract or payment, receiving a full refund of the price paid.
  - (b) *The right to a discount.* If the goods or services have been fully consumed, or there is delay, the consumer is entitled to a discount on the price. We propose bands of discounts, depending on the severity of the misleading or aggressive practice.
- (2) Tier 2 remedies would be provided only if the consumer can prove that the practice caused actual loss. They would also be subject to a due diligence defence.<sup>7</sup> Under Tier 2, the consumer may claim damages for:
  - (a) indirect economic losses; and/or
  - (b) distress and inconvenience.

8.25 The flow diagram overleaf illustrates the remedies that could be available to a consumer who successfully shows the trader is liable for a misleading or aggressive commercial practice under the new Act.

8.26 This is followed by a discussion of each tier. We start with the right to unwind, before looking at the right to a discount. We then consider the Tier 2 remedies.

<sup>7</sup> See the Consultation Paper, paras 14.66 to 14.69.

# PROPOSED NEW REMEDIES FOR CONSUMERS



## **TIER 1A: THE RIGHT TO UNWIND**

### **A new term**

- 8.27 This would be the standard remedy. We introduced a new term – the “right to unwind” – because we wanted to use a term without existing legal baggage. We also wanted to use everyday language, so far as possible. We thought the word “unwind” would be generally understood to mean the restoration of the parties to the position in which they were before entering into the contract or making the payment.
- 8.28 “Unwinding” is similar to “rescission” in England and Wales or “reduction” in Scotland. However, the current terms are confusing: for example “rescission” has different meanings in Scotland and England. Legal texts often use words such as “restitution” or “*restitutio in integrum*”, which advisers who are not legally qualified find difficult to understand.
- 8.29 Unwinding attempts to undo the contract. The consumer is entitled to a refund of the price paid, but must return at least some element of the goods, or reject some element of the service. It also releases both parties from any further obligations.
- 8.30 The current remedy of rescission (or reduction) may be lost easily and there is uncertainty over how long it lasts. Our provisional proposal sought to provide clarity over these issues. First, we asked how long the right should last. We then asked to what extent the consumer must return the goods or services. Finally, we asked whether consumers should give an allowance for their use of the product.
- 8.31 We start by considering these issues in the typical case, where the consumer has received goods or services in return for payment. We then consider how “unwinding” would work in cases where the consumer has sold goods to the trader or has made a payment.

### **How long should the right to unwind last?**

- 8.32 In our Consultation Paper, we asked three questions about how long the right to unwind should last:
- (1) Should it last for a fixed period?
  - (2) Should it last for three months (90 days): if not what other period would be preferable?
  - (3) Should there be a discretion to extend the fixed period in some circumstances, such as those involving vulnerable consumers?

### ***Should the right to unwind last for a fixed period?***

- 8.33 We explained that there are two possible approaches: to say that the right lasts for a reasonable time, depending on the circumstances of the case; or alternatively to specify a set time.

- 8.34 We considered a similar issue in our Report on Consumer Remedies for Faulty Goods.<sup>8</sup> The current law requires consumers to reject faulty goods within “a reasonable time”. In that Report, we thought this was too uncertain, and recommended that consumers should normally exercise the right to reject within 30 days.<sup>9</sup>
- 8.35 We consider that the same arguments apply to this project. Consumers would be more confident in asserting their rights if they could rely on a fixed time, rather than ambiguous concepts of reasonableness.
- 8.36 About three-quarters of those who responded agreed that the right to unwind should last for a fixed period, for clarity.

***Should the fixed period last for 90 days?***

- 8.37 In the Consultation Paper, we suggested three alternatives for the length of the fixed period: one month (30 days), three months (90 days) or six months (180 days). On balance, we thought that 90 days was an appropriate period, but we invited views on this.
- 8.38 Consultees’ views were split. A slight majority agreed that the right to unwind should last 90 days. Among the dissenters, half thought that the period should be longer; the other half thought that the period should be shorter.

**A SHORTER PERIOD?**

- 8.39 The advantage of the shorter 30 day period is that it would be the same as the period we recommended for consumers to reject faulty goods, so it would reduce confusion between the two provisions. In the Consumer Remedies for Faulty Goods Report, we recommended 30 days as sufficient time for consumers to inspect the goods and to test them for a short period in actual use.<sup>10</sup>
- 8.40 We think, however, that 30 days is too short for the purposes of this project. It often takes longer to find out that what a trader said was untrue. Indeed, in the most serious scams, the trader may take steps to conceal the truth for as long as possible. For faulty goods, the breach is usually innocent, while misleading and aggressive practices are criminal. We therefore think that a longer period is justified.
- 8.41 We were also concerned that 30 days would not be sufficient for some groups of consumers, particularly elderly people living alone who have suffered the effects of aggressive practices. We were told that many older consumers who have fallen victim to an aggressive practice feel upset and embarrassed, and that it often takes relatives some time to discover the scam. This suggests that three months would be more appropriate.

<sup>8</sup> Consumer Remedies for Faulty Goods (2009) Law Com No 317; Scot Law Com No 216, Recommendation 8.2, available at <http://lawcommission.justice.gov.uk/areas/consumer-remedies-for-faulty-goods.htm>.

<sup>9</sup> Above.

<sup>10</sup> Above.

8.42 Age UK concurred with our view. They wrote:

... with regard to older people, it is often only when a child or friend discovers the situation that any action is likely to occur and this may take longer than thirty days.

A LONGER PERIOD?

8.43 On the other hand, we think that six months is too long, especially if (as we discuss below), consumers are not required to give an allowance for the use they have had from the goods or services.

8.44 During this project, consultees submitted more than one hundred case studies to us, concerning a wide range of misleading actions and aggressive practices. In virtually all cases, it appears that the misleading action or aggressive practice became apparent to the consumer within 90 days. We understand that cases will occur from time-to-time where the misleading action or aggressive practice is not discovered within 90 days, but it would seem that those cases are relatively uncommon.

8.45 In the interest of clarity and certainty, we are persuaded that the fixed period should last for 90 days as, in the vast majority of cases, this is long enough for the consumer to discover that an action was misleading. For aggressive practices, we accept that vulnerable consumers may not realise that they should complain until they have spoken to a neighbour or relative. Nevertheless, even in those cases, the consumer typically realises they have cause for complaint within 90 days.

8.46 **Recommendation 27: The right to unwind should last for a fixed period of 90 days.**

***A discretion to extend the fixed period in some circumstances?***

8.47 In our Consultation Paper, we considered the option of having a fixed period with the possibility of extending it in some circumstances, such as when the consumer is vulnerable. We pointed out that whilst this option would add greater flexibility, it would also add a layer of complexity because different periods of time would apply in different circumstances.

8.48 There was a low level of response to this question, with only about one third of consultees responding. A majority of consultees who responded to this question felt that there should be a discretion to extend the period in order to protect vulnerable consumers.

8.49 On the other hand, strong arguments were put forward against such a discretion. The Bar Council felt that it would undermine certainty. It may be confusing to have different time limits for different categories of consumers. The main issue, however, was whether it is possible to produce a working definition of “a vulnerable consumer”.

8.50 North East Trading Standards Association summed up the problem:

Issues surrounding vulnerable consumers – particularly those living alone or away from family / friends support mechanisms – may not be identified for many months and could conceivably extend beyond the three month cut off point. This could be a reason to extend the time limit to six months. However it would be preferable if any limit was set for all consumers. The use of “vulnerable” consumer would raise issues regarding definitions which could be used to absolve a business from its responsibilities.

- 8.51 A discretion to extend the period in order to protect vulnerable consumers would only be feasible if we could find a workable definition of what makes a person vulnerable. There is considerable debate on this issue, as we explore below

#### WHAT IS A VULNERABLE CONSUMER?

- 8.52 The Regulations recognise that some consumers may be vulnerable due to “their mental or physical infirmity, age or credulity”.<sup>11</sup> In Part 2 we referred to the criticisms made of this test, but noted that TSS officers were now becoming familiar with it. The average consumer test, together with the vulnerable consumer exception appeared to work well, if applied in a broad way, focusing on fair outcomes. If a practice is clearly fraudulent, but would not deceive a circumspect consumer, it is right to look at the practice from the viewpoint of the average victim. In Part 7 we recommended that the new legislation should follow the Regulations in including both the average consumer test and the exception for vulnerable consumers.
- 8.53 The question is whether the test is suitable for an additional purpose. Should an individual consumer be entitled to a longer period to unwind the contract because of mental or physical infirmity, age or credulity?
- 8.54 This list of just four factors seems arbitrary,<sup>12</sup> and overlooks economic vulnerability due to factors such as low income or degree of financial pressure.<sup>13</sup> Furthermore, we have been told that many elderly people do not regard themselves as vulnerable because of their age, and they dislike that assumption.

<sup>11</sup> Reg 2(5)(a).

<sup>12</sup> J Stuyck, E Terryn and T Van Dyck, “Confidence through fairness? The new Directive on unfair business to consumer commercial practices in the internal market” (2006) 43(1) *Common Market Law Review* 107, 121-122.

<sup>13</sup> C Cathcart and J Williams, “The highly detailed general principles of the Consumer Protection from Unfair Trading Regulations 2008”, (2009) 77 *Scottish Law Gazette* 24, 28.

- 8.55 The concept of vulnerability due to “credulity” is particularly difficult to pin down. The European Commission’s Guidance states that “credulity” covers groups of consumers “who may more readily believe specific claims ... because of particular circumstances”.<sup>14</sup> An independent report considered that language skills could make a group prone to credulity, for example tourists or asylum seekers, but noted it would be hard to identify clearly any group by virtue of their naivety.<sup>15</sup>
- 8.56 In 1998 the Office of Fair Trading (OFT) published a report on vulnerable consumers.<sup>16</sup> They defined a vulnerable person as being within the following groups: the unemployed; those suffering from a long-term illness or disability; those with a low level of educational attainment; members of ethnic minorities; older people; those from low income households; and the young.<sup>17</sup>
- 8.57 In a 2004 report for OFCOM on the digital switchover, consumers were considered vulnerable if they were likely to experience difficulties arising from a range of issues including: physical abilities (dexterity and mobility); sensory abilities (vision and hearing); cognitive abilities; linguistic abilities; geographic location; and economic resources.<sup>18</sup> It is interesting that this list includes geographic location, as those in remote locations or those without access to the internet might find it particularly difficult to exercise their legal rights.

#### CONCLUSION

- 8.58 The problem is that anyone can be vulnerable at some stage in their lives, particularly if facing a difficult life event, such as illness, unemployment, bereavement or divorce. On the other hand, not all elderly people or those with physical disabilities view themselves as vulnerable when it comes to consumer transactions. They may be offended by the assumption that they need additional protection.

<sup>14</sup> European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (December 2009) 1666, p 30, available at [http://ec.europa.eu/consumers/rights/docs/Guidance\\_UCP\\_Directive\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf).

<sup>15</sup> See C Twigg-Flesner, D Parry, G Howells, A Nordhausen, *An analysis of the application and scope of the unfair commercial practices directive*. A report for the Department of Trade and Industry (18 May 2005), para 2.65, available at <http://www.bis.gov.uk/files/file32095.pdf>.

<sup>16</sup> The Office of Fair Trading, *Vulnerable Consumer Groups: Quantification and Analysis* (April 1998) OFT 219, available at [http://80.86.35.165/shared\\_offt/reports/consumer\\_protection/oft219.pdf](http://80.86.35.165/shared_offt/reports/consumer_protection/oft219.pdf). Also see the Office of Fair Trading, *Vulnerable Consumers and Financial Services: The Report of the Director General’s Inquiry* (January 1999), OFT 255, available at <http://www.hm-treasury.gov.uk/d/oft255.pdf>.

<sup>17</sup> The Office of Fair Trading, *Vulnerable Consumer Groups: Quantification and Analysis* (April 1998) OFT 219, para 1.1.3, available at [http://80.86.35.165/shared\\_offt/reports/consumer\\_protection/oft219.pdf](http://80.86.35.165/shared_offt/reports/consumer_protection/oft219.pdf).

<sup>18</sup> i2 Media Research Ltd, prepared for the OFCOM Consumer Panel, *Vulnerable Consumers In Switchover – Who Are They And Where Do They Live?* (31 August 2004), p 5, available at [http://www.digitaltelevision.gov.uk/pdf\\_documents/publications/cp\\_dso\\_report\\_annex\\_1.pdf](http://www.digitaltelevision.gov.uk/pdf_documents/publications/cp_dso_report_annex_1.pdf).

- 8.59 The many definitions of vulnerable consumers currently used in consumer protection serve to illustrate the potential for dispute in this area. If the definitions are too wide they could include a substantial proportion of the population. If they are too narrow they could exclude some people facing particular difficulties.
- 8.60 On balance, we do not think that there should be a discretion to extend the fixed period for vulnerable consumers. We think the uncertainty that this would create would undermine the clarity and simplicity of the new Act. Although the vulnerable consumer test in the Regulations was thought to be a useful way of softening the harshness of the average consumer test, we do not think it is sufficiently clear to be used for a new and different purpose.
- 8.61 It is important to bear in mind that the 90 day period only relates to the right to unwind. It does not limit the consumer's right to seek a discount after the three month limit has expired. As recommended below, in some circumstances the discount may be 100%.<sup>19</sup>
- 8.62 Further, there is some additional protection for vulnerable consumers in the current general law, in particular the Scots law of facility and circumvention. This protects a "facile" person who, owing to age, bodily infirmity, distress or mental health, is of a weak state of mind and thus susceptible to intimidation or persuasion. It allows a contract to be annulled where they are induced to enter into a contract as a result of fraud and circumvention.<sup>20</sup>
- 8.63 **Recommendation 28: There should not be a discretion to extend the fixed period.**

***When should the unwinding period start?***

- 8.64 Where the consumer has entered into a contract,<sup>21</sup> we proposed that the unwinding period should start on the latest of the following alternative dates:
- (1) when the consumer enters into the contract;
  - (2) when the goods are delivered; or
  - (3) when the performance of the service is started.
- 8.65 We asked consultees whether they agreed that the period for the right to unwind should start from the latest of those three dates. The majority agreed.
- 8.66 Citizens Advice gave a response which was typical of the majority view:

We believe that the latest of these dates is fair because it will allow the consumer to have sufficient time to experience and examine the product.

<sup>19</sup> See para 8.137.

<sup>20</sup> For further discussion, see the Consultation Paper paras 7.45 to 7.47.

<sup>21</sup> We consider payments separately, at paras 8.102 to 8.117 of this Report.

8.67 **Recommendation 29: Where the consumer has entered into a contract, the unwinding period should start on the latest of the following alternative dates:**

- (1) when the consumer enters into the contract;
- (2) when the goods are delivered; or
- (3) when the performance of the service is started.

***How should consumers exercise the right to unwind?***

8.68 We proposed that consumers should be able to exercise the right to unwind by making a complaint, indicating a desire to reject the remaining goods or services. As most consumers act without advice, we did not propose any formal requirements. For example, we did not propose that the complaint must be in writing.

8.69 Some consultees, including the OFT, were concerned that consumers would find it difficult to prove that they had asserted their right if they did not do so in writing. For example British Sky Broadcasting Group plc stated:

Whilst Sky records its customer complaints, we imagine that there may be disreputable traders whose unfair practices will be targeted by this new Act and who do not keep such records. Therefore we would question how a consumer would be able to prove that they had made a complaint and asserted their right to unwind the contract if they do not record that assertion in writing.

8.70 Age UK also thought that there should be a formal requirement for making a complaint:

We agree that the notice to unwind the contract would be generated by the consumer giving notice of their desire to reject the goods or services. However, we disagree there should not be some formal requirement on how this should be done. ... We think it should not be left to industry to determine the method consumers must use to indicate rejection.

8.71 On the other hand, a majority of consultees supported our proposal. As Which? put it:

We also agree consumers should be able to assert their right to unwind by making a complaint. It should be as easy as possible for consumers to exercise their right: traders should not be encouraged to place unnecessary burdens in the way of genuine complaints.

## CONCLUSION

- 8.72 We agree that it is best practice for consumers to complain in writing, so that there is a written record, and we expect that most consumer advisers would advise consumers to do so. In practice, consumers may find it difficult to prove that they made a complaint unless they complained in writing. We do not think, however, that consumers should be penalised for not making a complaint in writing where the court has other evidence of the complaint.
- 8.73 We do not think that the new Act should prescribe how the consumer should make a complaint. That would be too restrictive, as most consumers act without advice. They might not be aware of the requirements, or they might find it difficult to comply with them, for example, if they have literacy problems or do not have access to the internet.
- 8.74 **Recommendation 30: Consumers should be able to assert their right to unwind the contract by making a complaint, indicating a desire to reject the remaining goods or services.**

### **Restoring benefits to the trader**

- 8.75 One problem with the current law is that the right to unwind the contract can be lost if the consumer cannot restore the goods to the trader. Given that the trader has committed a misleading or aggressive practice, we thought there should not be a requirement for total restoration. All that should be required is that the consumer can return some element of the product, or alternatively, reject some element of the goods or service. Where the service is on-going (such as an internet service provider contract) the three month deadline would apply: the consumer must seek to undo the contract within three months.
- 8.76 In the case of goods, it is already accepted that consumers may, in some circumstances, return faulty goods in a used condition because they have had to test the goods.<sup>22</sup>
- 8.77 The concept is less familiar for services. We suggested that the right to unwind should last until the services have been completed. This would mean that a consumer who is misled about a theatre performance would have the right to full refund at any time up to the final curtain call. We were conscious that people are generally reluctant to reject services in mid-performance, for example walking out of a restaurant early. If they do so where the trader has acted misleadingly or aggressively, we think they should be entitled to a full refund of the purchase price.

<sup>22</sup> As we said in our Consultation Paper on Consumer Remedies for Faulty Goods: "... the consumer will only be able to discover that the wine is bad after they have opened the bottle, or that a pie contains a dead mouse after they have cut into it. This is a necessary part of the testing process." Consumer Remedies for Faulty Goods (2008) Law Commission Consultation Paper No 188; Scottish Law Commission Discussion Paper No 139, para 8.57, available at <http://lawcommission.justice.gov.uk/areas/consumer-remedies-for-faulty-goods.htm>.

8.78 In some cases, it will be impossible to reject goods or services before they are fully consumed. Goods (such as double glazing) may have been installed in the consumer's house. Consumers on a package holiday may not realistically be able to leave early as flights are pre-booked. As we discuss below, a consumer who has fully consumed goods or services would be able to claim a discount on the purchase price.<sup>23</sup> In the worst cases, the discount may be 100% and identical to a refund, but this would not be an entitlement in all cases.

8.79 We asked whether consultees agreed that the right to unwind should be available where the consumer can return some element of the goods, or rejects some element of the service.

8.80 The majority of respondents agreed with this proposal, generally on the basis that it was a fair and reasonable approach. As Which? put it:

We absolutely agree that the right to unwind should not be dependent on the consumer being able to return the trader to his pre-contractual position. In the vast majority of consumer cases, this will be impossible or nearly so – certainly in the context of services, but also with goods as they will often have been used or tested or packaging will have been damaged: in any event, it's unlikely the returned goods could be resold 'as new'. Clearly where the consumer is able to return goods (or part of them) they should do so if the trader so requests. Similarly, the consumer should cease to use an ongoing service once the breach of the CPRs comes to light.

8.81 Richard B Mawrey QC was among the small minority who disagreed, on the ground that the "some element" test would be "unworkable in practice". Whilst we agree that there may be occasions where this could prove to be a problem, in the vast majority of cases, we think this test is clear enough to operate satisfactorily.

8.82 **Recommendation 31: The right to unwind should be available where the consumer can return some element of the goods, or rejects some element of the goods or service.**

**Should consumers give an allowance for their use of the product?**

8.83 In some cases, consumers will have had some value from the product, despite the misleading or aggressive practices. Should the consumer be entitled to a full refund, or should they make some allowance for their use of the product?

<sup>23</sup> See paras 8.118 to 8.138.

- 8.84 This is a similar issue to whether consumers should give a deduction for use when exercising the “second tier” remedy of rescission under the European remedies for faulty goods.<sup>24</sup> When we researched this question as part of our work in remedies for faulty goods, we found that this concept was unpopular with consumers: in fact, it was a rather “inflammatory topic”.<sup>25</sup> As we said:

Consumers felt that if they had been unfortunate enough to find themselves with a faulty product, and repairs and/or replacements had been unsuccessful, they would feel aggrieved if they were then charged for use of the product. They suggested that no reputable retailers would attempt to make a deduction for use.<sup>26</sup>

- 8.85 The same is true here. If consumers are misled about a week’s holiday, and endure it for four days before finding their own way home, any suggestion that they should give an allowance for their four days’ use would add fuel to the flames of the dispute. We do not think a requirement to give an allowance for use is compatible with the objective of providing a clear, simple remedy with minimal opportunity for argument.
- 8.86 In the Consultation Paper, we asked whether consultees agreed that a consumer who exercises the right to unwind a contract within three months should not be required to give an allowance for their use of the product.

***What consultees said about an allowance for use***

- 8.87 Approximately two-thirds of respondents agreed that the consumer should not be required to give an allowance for use if they unwound the contract within three months.
- 8.88 Age UK, Craig Cathcart and Jane Williams wrote about the difficulties in calculating the benefit gained by the consumer. Which? added that valuing use would lead to disputes:

It runs counter to the expectation of virtually every consumer. Our experience shows that consumers simply do not recognise they have gained any value under a contract they were misled or bullied into and do not see why the trader should be compensated for such misleading or aggressive behaviour.

- 8.89 The BRC agreed that the consumer should not be required to give an allowance for use, provided that they exercised the right to unwind within the period permitted, but they suggested a 30 day period.

<sup>24</sup> Section 48C(3) of Sale of Goods Act 1979 states that “if the buyer rescinds the contract, any reimbursement to the buyer may be reduced to take account of the use he has had of the goods since they were delivered ...”.

<sup>25</sup> Consumer Remedies for Faulty Goods (2009) Law Commission Report No 317; Scottish Law Commission Report No 216, para 6.43, available at <http://lawcommission.justice.gov.uk/areas/consumer-remedies-for-faulty-goods.htm>.

<sup>26</sup> Above, para 8.152.

- 8.90 Two respondents were concerned that this proposal would lead to unjust enrichment of consumers and encourage consumers to acquire goods, use them for a period, then return them.

### **Conclusion**

- 8.91 We believe that in most cases, requiring an allowance for use would remove the simplicity and usefulness of the remedy. Any over-compensation would be limited because the complaint must be made within three months. Given that the trader has acted in a misleading or aggressive way, this is not wholly inappropriate.
- 8.92 On the other hand, we think that an exception should be made for continuous supplies of goods or services which have been consumed for more than a month. Examples are utility, telephone and internet services. Take a case where a gas company had falsely claimed that it was 10% cheaper than its rival, whereas in fact it was the same price. This falls within the definition of a misleading practice: the statement contained false information which would cause an average consumer to switch suppliers. It is right that consumers should be entitled to escape the contract. On the other hand, it seems excessive to allow consumers free gas for up to three months. This might force the company into significant financial difficulties, and the courts would be extremely reluctant to bring about such a result.
- 8.93 We therefore think that the courts should have a discretion to require consumers to give an allowance for use in ongoing supply contracts. The power would apply where consumers have been supplied with goods or services on an ongoing or regular basis, and have consumed those goods or services for more than a month. This definition includes goods (such as gas) as well as services (such as broadband). It would also include a daily milk delivery, or where the consumer had lived in a rented home, residential home or hotel.
- 8.94 The service should be valued on whichever basis is lower - either the market price for the quality actually provided, or the price the trader had led the consumer to believe they would pay. In the example of the gas company above, the consumer would pay only 90% of their previous bill.
- 8.95 **Recommendation 32: In normal circumstances, a consumer who exercises the right to unwind a contract within three months should not be required to give an allowance for their use of the product.**
- 8.96 **Recommendation 33: There should be an exception in contracts for the continuous or regular supply of goods or services, where the consumer has consumed the goods or services for more than a month. In these circumstances, the court should have a discretion to require the consumer to give an allowance for use. This should be valued on whichever basis is lower: the market price for the quality of goods or services actually provided; or the price the trader had led the consumer to believe would be paid.**

### **Unwinding the contract where the consumer has sold goods to the trader**

- 8.97 In some cases, the consumer will have sold goods to the trader as a result of a misleading or aggressive practice. An example would be where a trader has offered “a fair price” for gold, but has valued it at a fraction of its true value.
- 8.98 Clearly, where possible, the trader should return the item, and the consumer should return the price paid. If this is no longer possible, we think that the trader should make a money payment equivalent to the value of the item, offsetting any payment already made to the consumer. We asked if consultees agreed with our proposal that:
- (1) consumers who have sold goods to a trader as a result of misleading or aggressive practices should, where possible, be entitled to the return of the goods within three months, in exchange for the price paid; but
  - (2) where this is not possible, the trader should provide a monetary equivalent.
- 8.99 For both questions the overwhelming majority of those who responded agreed. There were few substantive comments. East of England Trading Standards Association agreed to both parts, but pointed out that calculating the monetary equivalent might be a complex exercise. We would reply that the basic principle is clear: the trader must give the consumer what the goods were worth, less the price paid.
- 8.100 On further reflection, however, we do not think these proposals should be limited to complaints made within three months. Where goods have been sold to the trader, the idea of a “discount on the price” does not apply. These remedies will be the only ones available. Consumers should have a right to return of the goods (or the monetary equivalent) at any time within the normal limitation or prescriptive periods (six years in England and Wales, and five years in Scotland respectively).<sup>27</sup>
- 8.101 **Recommendation 34: Where consumers have sold goods to a trader as a result of misleading or aggressive practices:**
- (1) If it is possible to return the goods, the goods should be returned, in exchange for the price paid.**
  - (2) If it is not possible to return the goods, the trader should provide a monetary equivalent.**

<sup>27</sup> In England and Wales, the limitation period starts to run from the time the right of action arises. See eg Limitation Act 1980, s 2 (actions founded on tort) and s 5 (actions founded on contract). In cases of fraud, the period would not start to run until the consumer could discover the fraud, or could with reasonable diligence have discovered it: Limitation Act 1980, s 32. In Scotland, the prescriptive period begins to run when the obligation becomes enforceable. Any period during which, due to fraud or error, the consumer was induced to refrain from making a relevant claim is not counted as part of the period. See the Prescription and Limitation (Scotland) Act 1973, section 6(4).

## **The right to recover a payment**

### ***Where the payment was not owed***

- 8.102 Someone who has been misled or threatened into making a payment which was not owed is entitled to get the money back under the law of unjust or unjustified enrichment. Consumer groups told us, however, that the law of unjust enrichment is complex and difficult. We thought that it might be helpful to provide a statutory remedy to make the law more accessible.
- 8.103 In the Consultation Paper, we asked whether it would be helpful to provide a new statutory right to the return of the payment where a consumer makes a payment which was not owed, as a result of a misleading or aggressive practice.
- 8.104 We saw no reason to limit the right to three months. As discussed above, consumers would have a right to return of the payment at any time within the normal limitation or prescriptive periods.<sup>28</sup>
- 8.105 The vast majority of respondents agreed, with only two disagreeing. Consumer groups tended to feel strongly that this was an important measure. Once again, few substantive comments were made. The Ombudsman Services represented the majority view when they wrote:

It would be both helpful and appropriate to provide a new statutory right for the return of money paid mistakenly as a result of a misleading or aggressive practice.

- 8.106 **Recommendation 35: Where a consumer makes a payment which was not owed, as a result of a misleading or aggressive practice, there should be a new statutory right to the return of the payment.**

### ***Where the payment was owed***

- 8.107 The more difficult issue is where someone has been misled or threatened, and as a result has paid money that was owed. In these circumstances, if the money were repaid, the consumer would still be liable to pay the debt. Money repaid to the consumer should be paid back immediately, turning the “unwinding” of any payment into a meaningless exercise.
- 8.108 In the Consultation Paper, we asked whether the debt should be offset against the payment. Where the money was owed, this would permit the trader to retain the money paid. The consumer may be entitled to Tier 2 remedies, including damages for distress and inconvenience, but would receive no benefit from the right to unwind.
- 8.109 Views were split on this question, with half of the respondents thinking that the debt should be offset, and the other half thinking that it should not.
- 8.110 Mike Hembry of Slough Borough Council Trading Standards expressed views commonly shared by those that agreed:

<sup>28</sup> See para 8.100.

This appears satisfactory as the debt is owed and this is all about the method of collecting the debt. We believe the Commission is right that second tier remedies should be available in these scenarios.

8.111 Also in support, the North East Trading Standards Association wrote:

Yes. As long as further remedies exist for distress etc. so that the trader does not see a benefit in the use of such tactics.

8.112 On the other hand, Derby Citizens Advice and Law Centre summarised the views of many of those that disagreed. They felt that offsetting the debt would disadvantage consumers:

We strongly oppose the proposal that debts (that are genuinely owed) paid as a result of misleading or aggressive practices will not be refunded, but will be offset from the total amount of debt owed. This is unfair, as it means the consumer is not able to unwind the transaction, and is often left in a worse position than they would have been if the misleading or aggressive practice had not taken place. For example, they may have paid the debt with money that should have gone to pay priority debts, and this could lead to knock-on problems such as eviction or court proceedings

The proposal acts as no deterrent to debt collectors who use misleading and aggressive techniques, and gives the message that these types of practices might be justified.

8.113 Also, summarising the views of several dissenters, the National Consumer Federation argued that offsetting the debt would validate poor conduct:

Allowing a trader to retain money to offset a legitimate debt when he has engaged in misleading or in particular aggressive practices is validating his/her conduct. It may also mean that he jumps the queue for payment as against other reputable traders.

8.114 Similarly, the Direct Marketing Association (UK) Ltd (DMA) disagreed, arguing that the proposal would send the wrong message to rogue traders:

The DMA believe that allowing a trader to offset a payment made as a result of a misleading or aggressive practice would not provide the right message that these tactics should not be used to invoke a payment even if money is due.

### **Conclusion**

8.115 The question of whether debts should be offset against payments in these circumstances is difficult, as illustrated by the split views of consultees. The consultees who objected to offsetting made strong arguments about fairness and the importance of sending the right message to rogue traders.

8.116 On the other hand, the remedial system we are recommending is based on unwinding. This principle suggests that a consumer who receives the return of a payment should pay the debt. Under our recommendations, whilst the consumer will receive no benefit from the right to unwind, the consumer may be entitled to damages for distress and inconvenience under Tier 2. Also, public enforcement might be available as a sanction.

8.117 **Recommendation 36: Where the payment was owed, the trader should retain the money paid.**

#### **TIER 1B: A DISCOUNT ON THE PRICE**

8.118 In our Consultation Paper, we provisionally proposed that consumers should have the right to a discount on the price in cases where the right to unwind was no longer available. This would apply where goods have been fully consumed, or the three month period has expired.

8.119 The traditional remedy for a consumer who has suffered a misleading practice under current law is damages. As discussed in the Consultation Paper, the current law on calculating damages is extremely complex. There is also an evidential problem when trying to prove the amount by which the misrepresentation has affected the value of the product or service.<sup>29</sup> We thought that a discount would be a simpler and more appropriate remedy.

8.120 Under the current law, where the practice is aggressive, damages may not be available at all. Our proposal provided new rights in these circumstances.

#### **Consultees' views on the principle of a discount**

8.121 There was strong support for the proposal that consumers should have the right to a discount on the price in cases where the right to unwind was no longer available. More than three-quarters of the respondents to this question expressed agreement.

8.122 The OFT, Which? and other consumer groups felt strongly that it was essential that consumers should not be left without a remedy where unwinding was not possible, and that the proposed discount was a fair and sensible approach.

8.123 Age UK gave the example of double glazing where the fault is discovered after the time limit for unwinding has expired. Similarly, the Legal Ombudsman said that the nature of legal services meant that rejecting the service and unwinding would often not be appropriate:

In those cases where redress is sought after the event, the discounting you propose is in line with the remedies the Ombudsman can require.

<sup>29</sup> See generally discussion in J Devenney and J Poole, "Reforming damages for misrepresentation: the case for coherent aims and principles" *Journal of Business Law* (May 2007) 269.

8.124 The British Retail Consortium (BRC) concurred that a discount was a “sensible solution”, and wrote:

Traders would not be forced to take back old items that have had excessive use and then provide a full refund. The issue would be how to decide what an appropriate deduction to reflect the misrepresentation made is. The product may well have been useful in all material respects.

### **Pre-set bands**

8.125 In the Consultation Paper, we proposed that the new Act should use broad bands of discounts on the purchase price reflecting the level of detriment, as follows:

- (1) 0% if negligible;
- (2) 25% if minor;
- (3) 50% if serious; and
- (4) 100% if very serious.

8.126 More than three-quarters of respondents to this question agreed that pre-set bands would be a good idea. The main advantages respondents highlighted were clarity, simplification and consistency in the small claims courts. The response from the Consumer Credit Counselling Service summarised the majority view:

Pre-set bands would set a clear expectation and require less mediation or the need for regulatory bodies to be included in dispute resolution.

8.127 Among the minority of those that disagreed, Which? and the OFT, expressed concern that set bands would be too restrictive and could cause difficulties. They supported the idea of consumers using the proposed bands for fixed levels of compensation in their negotiations with traders, but thought that the bands should only be a guide for the courts and alternative dispute resolution. They argued that courts and alternative dispute resolution proceedings should be able to award compensation that is appropriate in all the circumstances of the particular case.

8.128 The BRC also thought that the bands should be in the form of guidance:

While this would provide certainty, it would be a challenge to have a small number of bands that have to accommodate different magnitudes of misrepresentation and different product types. For example, a 25% discount could be quite punitive for a very minor issue. Guidance would be needed and it might be better to not have bands but merely deal with the issue in guidance.

### ***Are the proposed bands set in the right place?***

8.129 We asked whether the proposed bands of 0%, 25%, 50% and 100% were set in the right place. The response to this question was more mixed. Several respondents, such as local citizens advice bureaux, Which? and Consumer Focus, suggested that a 75% band should also be included.

8.130 The East of England Trading Standards Association was concerned that the bands were too wide, especially for high value items:

For example, a £10,000 motor vehicle sold with a full service history, which is subsequently found not to have the history may lose up to 10%-15% of its value. This loss would fall between the bands and as such could represent a significant penalty for either party if the discount was determined using these bands.

***Conclusion on pre-set bands***

8.131 A large majority of respondents agreed that a discount on the price would work well in cases where unwinding was no longer possible. Respondents thought the bands would be particularly useful in providing a framework for negotiations between the parties. The complexity of the law of damages and the evidential difficulties of proving loss militate against resorting to damages to resolve consumer disputes.

8.132 On the other hand, we have been persuaded that the scheme needs some adjustment. We agree that the jump from 50% to 100% is steep, and that an extra band at 75% would add proportionality to the scheme, without over-complicating it.

8.133 We also agree that the scheme could operate unfairly in purchases, where there is clear evidence of the difference between what the product was worth and what the consumer paid for it. The example given by the East of England Trading Standards Association illustrates the problem: in a £10,000 purchase, where the trader can show that the loss was 10%, the court may be faced with a harsh choice if it was only able to give 25% or nothing.

8.134 In most cases, the parties should negotiate on the basis of the bands. Consumers should not be deprived of a remedy simply because they cannot value the precise loss. On the other hand, we think the court should have a power to award another amount where the amount at stake justifies a different approach and the evidence is available. We think this should only apply to expensive items. The sort of case we have in mind is where the consumer paid £1,000 or more, though we would not wish to include a figure in the legislation. There would also need to be evidence of loss: in the absence of evidence, the court would simply apply one of the pre-set bands – which we hope, would encourage traders to provide evidence.

8.135 **Recommendation 37: The consumer should have the statutory right to a discount on the price where the right to unwind has been lost.**

8.136 **Recommendation 38: The level of discount should depend on the following factors:**

- (1) **the impact of the commercial practice on the value of the product;**
- (2) **the trader's behaviour; and**
- (3) **the amount of time that has passed between the commercial practice and the consumer's complaint.**

8.137 **Recommendation 39: In cases where the right to unwind has been lost, the level of discount should be the most appropriate from the following options:**

- (1) 0% if negligible;
- (2) 25% if minor;
- (3) 50% if serious;
- (4) 75% if very serious; or
- (5) 100% if extremely serious.

8.138 **Recommendation 40: In cases involving high-priced goods or services, where the court has sufficient evidence of the level of the loss, the court should have the power to award a different amount.**

#### **Terminating the contract**

8.139 Some consultees asked us to clarify the effect, if any, that a discount would have on the underlying contract.

8.140 Unlike the right to unwind, the right to a discount leaves the underlying contract in place. In sales of goods, for example, the consumer would continue to own the goods. This may cause a problem, however, in ongoing service contracts (for example, phone or utility contracts). Would the trader and consumer be obliged to continue the contract in the future? In some cases the consumer may not wish to continue the contract because trust has evaporated. In others, the trader may not wish to continue because the contract has become unprofitable at the discounted price.

8.141 **Recommendation 41: A consumer who can show that the misleading or aggressive practice has taken place should have a right to terminate future performance under the contract.**

### **TIER 2 REMEDIES**

#### **Introduction**

8.142 In our Consultation Paper we suggested that consumers should also be able to claim damages under Tier 2, for other consequential losses.<sup>30</sup> The consumer would, however, be required to prove that the loss occurred, and was caused by the trader's actions.

<sup>30</sup> See the Consultation Paper, Question 44, p 219.

- 8.143 The trader would have a due diligence defence. This means that the trader would not be liable if it could show that the misleading or aggressive practice was for a cause beyond its control and that the trader took all reasonable precautions against it. This broadly follows the approach currently taken in the Misrepresentation Act 1967, whereby a trader is not liable for damages if it can show that the misrepresentation was innocent.
- 8.144 We provisionally proposed two types of Tier 2 remedies. The first would compensate the consumer for further economic losses they may have suffered because of the aggressive or misleading practice. The second would provide redress if the consumer has suffered distress as a result of the trader's conduct.

#### **Damages for consequential economic loss**

- 8.145 The law already provides damages for consequential losses caused by misrepresentations. In a consumer context, examples might include losses caused by disposing of an existing product, such as the consumer who is sold a new bed in an aggressive way and then throws away the old bed to make room for it. Under our proposal, the consumer would need to show not only that this has happened, but that it would not have happened but for the misleading or aggressive practice.
- 8.146 The courts are already used to awarding damages for consequential losses for misrepresentations and other torts/delicts. Therefore, we thought that most issues raised by consequential losses can be left to general legal principles. Our proposal sought to clarify the existing position rather than introduce new legal concepts.

#### ***What consultees said about damages for consequential economic loss***

- 8.147 There was overwhelming support for this proposal. All but three respondents agreed.
- 8.148 **Recommendation 42: Damages for consequential economic loss should be available, provided that the consumer shows that they would not have incurred the loss but for the misleading or aggressive practice.**

#### **Damages for distress and inconvenience**

- 8.149 Compensation is usually only awarded for financial loss, and not for distress and inconvenience. There are, however, two exceptions to this general rule.

- (1) Where a major or important object of the contract was to give pleasure, or peace of mind,<sup>31</sup> or to avoid distress.<sup>32</sup> The key cases in this area concern contracts for entertainment, particularly spoiled holidays.<sup>33</sup>

<sup>31</sup> *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

<sup>32</sup> For example, *Heywood v Wellers (A Firm)* [1976] QB 446 where solicitors were held liable for the distress caused to their client through their failure to get a restraining order against a man who was harassing her.

- (2) Where some physical inconvenience and discomfort have been caused by the breach.<sup>34</sup> Damages for physical inconvenience are common where the landlord has failed to repair the consumer's home.<sup>35</sup>

8.150 Scots law also recognises these exceptions.<sup>36</sup>

8.151 In England and Wales the courts have repeatedly stressed that awards should be "restrained and modest".<sup>37</sup> They have set informal tariffs, which are typically low. The Financial Ombudsman Service takes a similar approach. It has established three bands of damages: (1) nominal, for example, making an apology or sending vouchers; (2) significant, £300 - £900; and (3) exceptional, £1,000 plus.<sup>38</sup>

8.152 We thought that damages for distress and inconvenience should be available for misleading and aggressive practices, in the same way as they are currently available for breach of contract. Such damages would not generally be available for the hassle of having to obtain redress itself (which applies in every case) but would have to be related to the experience of the aggressive or misleading practice and the product purchased as a result.

#### ***What consultees said about distress damages***

8.153 In the Consultation Paper, we asked consultees whether damages for distress and inconvenience should be available, provided the consumer could show that an important object of the contract was to give pleasure, relaxation or peace of mind, or that the practice caused them alarm, distress, physical inconvenience or discomfort.

8.154 The overwhelming majority of respondents supported this proposal. Consumer groups generally thought that damages for distress would be an important remedy, particularly where vulnerable consumers are targeted, and in debt collection.

8.155 Citizens Advice wrote:

<sup>33</sup> *Jarvis v Swan Tours Ltd* [1973] QB 233; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468; *Milner v Carnival plc (t/a Cunard)* [2010] EWCA Civ 389, [2010] 3 All ER 701.

<sup>34</sup> *Watts v Morrow* [1991] 1 WLR 1421, by Bingham LJ at 1445, cited with approval (in this respect) by the House of Lords in *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

<sup>35</sup> See eg *Wallace v Manchester City Council* [1998] 3 EGLR 38.

<sup>36</sup> See *Report on Remedies for Breach of Contract* (1999) Scottish Law Commission No 174, para 3.3; W W McBryde, *The Law of Contract in Scotland* (3rd ed 2007) paras 22-98 to 22-105. Examples include *Diesen v Samson* 1971 SLT (Sh Ct) 49; *Colston v Marshall* 1993 SCLR 43. See also *Mack v Glasgow City Council* 2006 SC 543, Extra Division.

<sup>37</sup> *Milner v Carnival plc (t/a Cunard)* [2010] EWCA Civ 389, [2010] 3 All ER 701, by Ward LJ at para 41, quoting the words of Lord Steyn in *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 at para 28 and Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421 at 1445.

<sup>38</sup> See [http://www.financial-ombudsman.org.uk/publications/technical\\_notes/distress-and-inconvenience.htm](http://www.financial-ombudsman.org.uk/publications/technical_notes/distress-and-inconvenience.htm).

Bureaux often report that clients who are subjected to misleading and aggressive practices experience alarm, distress, physical inconvenience or discomfort. The availability of the tier two option may provide a valuable tool in negotiating settlements and stopping unfair practices in these cases.

- 8.156 The Faculty of Advocates agreed, but expressed some concern about a possible increase in the number of dissatisfied consumers with weak cases seeking redress if distress damages were made more widely available. The Council of Her Majesty's Circuit Judges shared this concern:

We have some reservations about extending the right to compensation from its present well-defined limits to include cases of alarm, distress and discomfort, although we recognise the desirability of the objective of providing modest compensation in deserving cases. Alarm, distress and discomfort are subjective feelings, which are easy to allege and difficult to refute. One area of concern is that extending the right to compensation could encourage speculative and nuisance claims by disgruntled consumers and provide a new market for claims firms specialising in low value personal injury claims.

- 8.157 With respect to damages for distress and inconvenience, we also asked consultees whether they agreed that damages should be modest and in defined bands.

- 8.158 Approximately two-thirds of respondents agreed with that proposal. For example, the response from the Ombudsman Services was supportive:

Banding of awards would have the advantage of giving certainty, (a key objective of the proposed Act) as well as providing consistency and it would manage consumer expectations.

- 8.159 The Institute of Consumer Affairs, however, pointed out that:

Distress can be a major issue to consumers and damages should include an adequate amount which may not necessarily be modest.

### **Conclusion**

- 8.160 There is clearly strong support for including damages for distress and inconvenience. The balance of opinion also favours the current approach taken by the courts which is to provide "restrained and modest" damages, set on the basis of an informal tariff.

- 8.161 We considered whether there should be statutory guidance on this issue, possibly setting out bands for different types of distress. This would be administratively complex, however, and involve costs. It would appear that the courts and ombudsman services are already reaching the right result without the need for official guidance.

8.162 We understand the concern expressed by the Faculty of Advocates and the Council of Her Majesty’s Circuit Judges that dissatisfied consumers may misunderstand the nature of distress damages and bring weak cases. We therefore think it would be helpful if the legislation echoed the words used by the courts that damages for distress and inconvenience should be “restrained and modest”. This would clarify that the current approach used by the courts would continue to apply.

8.163 **Recommendation 43: Damages for distress and inconvenience should be available, provided the consumer could show that an important object of the contract was to give pleasure, relaxation or peace of mind, or that the practice caused them alarm, distress, physical inconvenience or discomfort.**

8.164 **Recommendation 44: The new Act should follow the courts in stating that damages for distress and inconvenience should be “restrained and modest”.**

#### **The due diligence defence**

8.165 We provisionally proposed that a trader should be able to rely on a due diligence defence to avoid Tier 2 remedies. This defence would not apply to Tier 1 remedies.

8.166 This reflects the current law. Under the Misrepresentation Act 1967, a right to rescind exists for all misrepresentations,<sup>39</sup> but damages are restricted. Under section 2(1), the trader has a defence if:

he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.

8.167 The Regulations state that traders are not guilty of a criminal offence if they can establish a “due diligence” defence, though it is put in more specific terms. Under Regulation 17(1) it is a defence for the trader to prove—

(a) that the commission of the offence was due to—

(i) a mistake;

(ii) reliance on information supplied to him by another person;

(iii) the act or default of another person;

(iv) an accident; or

(v) another cause beyond his control; and

<sup>39</sup> At common law a trader might sometimes have a defence to repayment. In cases of unjust/unjustified enrichment for example, the trader could assert a change of position defence. See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, [1991] 3 WLR 10; *Credit Lyonnais v George Stevenson & Co Ltd* (1901) 9 SLT 93. The applicability and scope of these defences is, however, highly uncertain.

(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

8.168 In the Consultation Paper we proposed that the defence should use the wording in Regulation 17 (except that instead of referring to “the commission of the offence” it would need to refer to “the misleading or aggressive practice”).<sup>40</sup> We thought that traders would already be familiar with that defence, and we considered that it would be simpler to use the same concept for both public and private law.

***What consultees said about the due diligence defence***

8.169 The majority of respondents supported the due diligence defence. For example, the BRC welcomed the proposal. Similarly, the Faculty of Advocates agreed that:

Traders who have acted honestly require protection; the due diligence defence appears to provide them with appropriate protection.

8.170 Citizens Advice and Which? also agreed that traders should have a defence but were concerned that in practice consumers would find it hard to overcome the defence.

8.171 The defence puts the burden of proof firmly on the trader who must show that “they took all reasonable precautions and exercised all due diligence” to avoid the practice.

8.172 Over half of respondents agreed that the due diligence defence should track the wording in the Regulations. There were very few substantive comments on this issue. Some respondents were concerned about the complexity of a due diligence defence, which is more often used in a criminal context than a civil one. We think it would be helpful, however, for the two tests to follow each other so that a trader who succeeds in establishing a defence in the criminal courts knows that it will not be liable for civil damages.

8.173 **Recommendation 45: The due diligence defence within the new Act should mirror the due diligence defence in the Regulations.**

<sup>40</sup> See the Consultation Paper, para 14.69.

# PART 9

## UNFAIR PAYMENT COLLECTION

### INTRODUCTION

9.1 In this Part, we begin by looking at how consumers are affected by misleading and aggressive practices in the collection of debts and other payments. Next we summarise our views on whether the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) apply to unfair payment collection.<sup>1</sup> Then we go on to look at what consultees thought about unfair payment collection. We finish by setting out our recommendations for this sector.

9.2 The Regulations cover unfair practices which are likely to cause the average consumer to take a range of different “transactional decisions”. These include paying money.<sup>2</sup> Some of the specific rules appear pertinent to debt collection. For example:

- (1) Under Regulation 5(4)(k), the trader must not mislead consumers about their rights or the risks they may face.
- (2) Under Regulation 7(2)(e), in deciding whether a commercial practice is aggressive, account should be taken of “any threat to take any action which cannot legally be taken”.
- (3) It is a banned practice to make “persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified to enforce a contractual obligation” (the Regulations, schedule 1, banned practice 26).

9.3 The European Commission’s Guidance explains that:

Debt collection activities should be regarded as after-sales commercial practices regulated by the Directive. Indeed, when a consumer owes a trader a certain amount of money (as a consumer debt), the collection of this debt (in-house or by a third party) is directly connected with the sale or supply of products.<sup>3</sup>

9.4 There is no doubt that where the consumer has bought a product, traders’ activities in obtaining payment fall within the scope of the Regulations. Consumer groups, however, are also concerned about cases where debt collection does not follow a contract, such as where a trader claims money from a consumer as compensation for an alleged wrongful act. Examples include parking charges, illegal downloads or shoplifting. There is some debate about whether the Regulations extend to these cases.

<sup>1</sup> SI 2008/1277. For a fuller discussion, see Part 3 of our Consultation Paper.

<sup>2</sup> Reg 2 states that a “transactional decision” includes “whether, how and on what terms to ... make a payment in whole or in part”.

<sup>3</sup> European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (December 2009) 1666, pp 7 to 8, available at [http://ec.europa.eu/consumers/rights/docs/Guidance\\_UCP\\_Directive\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf). The Directive referred to is the Unfair Commercial Practices Directive 2005/29/EC (OJ 2005 L 149).

- 9.5 A demand for payment can arise in a wide variety of ways. In some cases, it can arise out of a contract. In other cases, such as the utilities example in paragraph 9.12 below, money is not owed at all. Another example is where payment is classified as damages for a tort or delict claim, such as alleged copyright infringement. We thought that legislation should not seek to impose distinctions between demands for payment where there has been a contract, and other demands for payment. Payment collection may be misleading or aggressive, whether or not it is preceded by a contract.
- 9.6 In our Consultation Paper, we concluded that there is an arguable case that the Regulations cover all commercial demands for payment made to private individuals, but the issue is not beyond doubt. We asked whether the Regulations should be amended to clarify that the definition of a “commercial practice” includes commercial demands for payment.
- 9.7 We provisionally proposed that payment collection should be within the scope of our new Act, whether or not it follows a contract. In other words, all those who act commercially in making demands for payment should not behave in a misleading or unduly aggressive way.
- 9.8 We did not suggest that demands for compensation from wrongdoers were necessarily unfair in themselves. We thought, however, that they should be subject to the same duty that applies to all other traders who deal with private individuals, which is not to act in a misleading or aggressive way.

#### **HOW CONSUMERS ARE AFFECTED**

- 9.9 Misleading and aggressive debt collection is perceived to be a widespread and serious problem. We were given many examples of payment collection where the consumer felt that demands were threatening or misleading. Often, the collection followed from a consumer contract: the debt collection was an after-sales practice to enforce a consumer debt.
- 9.10 There were also several categories, however, where the demand did not follow a contract. These included:
- (1) utility companies demanding payment from people who had never been their customers;
  - (2) private car-clampers demanding payment before releasing vehicles;
  - (3) debt collection agents chasing unpaid parking charges on behalf of local authorities;
  - (4) companies demanding standard fixed sum settlements for alleged illegal downloads; and
  - (5) agents acting for retailers demanding fixed penalties for “civil recovery” from alleged shop-lifters.
- 9.11 In some of these cases the demands made unjustified threats to take action that could not legally be taken. Below, we briefly look at each example.

## Utility companies chasing people who had never been their customers for unpaid bills

- 9.12 A common complaint was that traders sent out persistent demands for money where the debt was not owed.<sup>4</sup> For example, we were given examples of complaints about utility providers pursuing people for money, even though they had never been customers.

Example: demands for debts that are not owed

A couple in their 80s were invited to sign up with a new utility provider. They refused, but the utility provider acted as though they were customers. Eventually, the provider acknowledged the error and said the account would be closed and all debts removed. But for the next three years, the debt was passed from debt collector to debt collector who wrote aggressively to demand payment.

## Parking, clamping and towing on private land

- 9.13 In England and Wales, wheel-clamping is currently lawful if certain conditions are met.<sup>5</sup> For example, the charges must be reasonable and the warning signs must be clear. The courts have interpreted the basis of the clamping charge as damages in tort, not as a payment for a service. In *Arthur v Anker*, the vehicle owner was characterised as a trespasser. The Court of Appeal held that he had parked on private land in full knowledge of the consequences and could not complain of any reasonable charge.<sup>6</sup>
- 9.14 English consumer groups receive many complaints about misleading and aggressive clamping and towing. The complaints are about a range of improper practices: that no signs were put up, that the signs were unclear, that fees were excessive, or that demands were made using aggressive and threatening behaviour. Here is a typical example:

Example: car-clamping

A consumer found her car being clamped before she had even left the car park. She was immediately charged £250, which also covered towing away. There were no obvious signs about parking, the clampers did not have any identification, and her receipt did not contain any details of the clampers or private parking company.

<sup>4</sup> For example Ofcom's investigation into TalkTalk and Tiscali in July 2010. This resulted in almost £2.5 million in refunds and goodwill payments to some 62,000 consumers who were incorrectly billed for cancelled services. See <http://consumers.ofcom.org.uk/2011/02/compensation-for-talktalk-and-tiscali-uk-customers/>.

<sup>5</sup> In Scotland, wheel-clamping on private land is illegal; it amounts to extortion and theft - see *Black v Carmichael* 1992 SLT 897.

<sup>6</sup> [1997] QB 564.

- 9.15 In August 2010, the Government announced that it would introduce legislation in England and Wales to prohibit clamping a vehicle or towing it away on private land.<sup>7</sup> In the meantime, several trading standards services have successfully used the Regulations to prosecute wheel-clampers that use unfair practices. For example, Wolverhampton City Council reported that it had successfully prosecuted a wheel-clamper “who tried to con Black Country motorists out of more than £32,000 in illegal charges and employed bouncers to intimidate victims”.<sup>8</sup>
- 9.16 The courts have accepted that the Regulations apply to wheel-clamping. In this context, we are not aware that any argument has been raised that the Regulations only apply to after-sales debt collection and do not cover demands against alleged trespassers.

### **Debt collectors chasing unpaid parking charges for local authorities**

- 9.17 *The Times* investigated complaints about debt collectors using persistent letters to chase people for unpaid parking charges on behalf of local authorities.<sup>9</sup> Some recipients denied they had driven the car in question and asked for more information about the alleged contravention, to little avail.
- 9.18 The British Parking Association Code of Practice states that correspondence for recovering unpaid parking charges should give the recipient information on how to challenge the charge, yet, in many cases, no such information is given.<sup>10</sup>
- 9.19 Typically, in these cases, the demands for money were passed on from one agency to another. This led to repeated demands, and the amounts claimed escalated. The article noted that fixed fees were added to the original amount claimed, as administration costs. Former employees of the debt collection agencies also raised concerns about their practices in collecting council tax arrears. For example, they noted that bailiffs’ charges would be added as standard to the amounts originally owed, even where there was no evidence that the visit had actually occurred.

<sup>7</sup> The announcement was made on 17 August 2010: see <http://www.homeoffice.gov.uk/media-centre/press-releases/ban-on-wheel-clamping>. See also Part 3, Chapter 2, “Vehicles left on land” of the Protection of Freedoms Bill (introduced into the House of Commons on 11 February 2011).

<sup>8</sup> See: [http://www.wolverhampton.gov.uk/business/trading\\_standards/rogue/clamper\\_jailed.htm](http://www.wolverhampton.gov.uk/business/trading_standards/rogue/clamper_jailed.htm).

<sup>9</sup> See for example *The Times*, *Debt collectors’ tactics exposed*, 5 February 2011; following an earlier report, *The Times*, *Businessman tells parking firm: “Stop hounding me”*, 20 January 2010.

<sup>10</sup> See <http://www.britishparking.co.uk/Approved-Operator-Scheme-Code-of-Practice>.

- 9.20 Another problem is that sometimes debt collectors pursue the wrong person. This can happen because of identity theft, or simply by mistake where more than two people share the same name. However, people have reported being harassed and threatened even after they have explained the error to the debt collectors.<sup>11</sup>

### **Online file sharing and illegal downloads**

- 9.21 Media attention has been given to traders using wholesale letter writing campaigns to generate revenue by threatening legal proceedings. Letters are sent to internet users of peer-to-peer networks, demanding payment for alleged copyright infringement, for example concerning pornographic films.<sup>12</sup> The law firms that make these demands have come under judicial criticism for using misleading and aggressive tactics.
- 9.22 For example, *Media CAT Ltd v Adams and others* came before the courts because Media CAT was suing individuals for copyright infringement.<sup>13</sup>

#### **Court Case: Media CAT Ltd v Adams and others**

Media CAT used its lawyers to send letters to tens of thousands of alleged file sharers threatening legal action unless they paid £495 as compensation for copyright infringement.

Some of those contacted paid up, but it later emerged 65% of all revenues collected would go to Media CAT's lawyers, 15% would go to Media CAT with only the balance passed back to the copyright holders in question.

Consumer group *Which?* said it had found several instances where plainly innocent people had received the demands.

- 9.23 The court found that Media CAT's letters misrepresented its standing to bring copyright proceedings.<sup>14</sup> Moreover, the court doubted whether the data used by Media CAT to identify the users of peer-to-peer networks could prove any copyright infringement.

<sup>11</sup> See for example, T Hetherington, *It's not our debt but we fear the bailiffs*, 5 February 2011, <http://www.thisismoney.co.uk/money/article-1354041/TONY-HETHERINGTON-Its-debt-fear-bailiffs.html>. See also several threads on the consumer online forum of [www.consumeractiongroup.co.uk](http://www.consumeractiongroup.co.uk).

<sup>12</sup> See for example BBC News, 8 February 2011, <http://www.bbc.co.uk/news/technology-12396443>.

<sup>13</sup> [2011] EWPC 6.

<sup>14</sup> The senders stated they were a "copyright protection society" and that they represented the owners of copyright, whereas they merely had agreements in place with certain copyright owners.

- 9.24 The letters sent to ordinary members of the public were long, and contained complex legal and technical language. There was no breakdown of the figure demanded as compensation. The letters also relied on untested points of intellectual property law and portrayed news reports in a misleading way.<sup>15</sup> The letters ended by citing a non-existent pre-action protocol for intellectual property disputes.
- 9.25 As Judge Birss QC commented, many would simply pay to avoid embarrassment and publicity, given that the allegation concerned pornography. Others would pay just to avoid a costly legal fight.
- 9.26 Of the over ten thousand letters threatening legal action, only 27 cases were actually pursued in the courts. This caused the judge to comment:
- Why take cases to court and test the assertions when one can just write more letters and collect payments from a proportion of the recipients?<sup>16</sup>
- 9.27 The court found no evidence that Media CAT would press cases beyond applications for a default judgment.<sup>17</sup> The proceedings were overtaken by events, as Media CAT became insolvent and ceased trading. Its lawyers, ACS:Law, also permanently closed down in January 2011.

#### **Civil recovery for alleged shoplifting**

- 9.28 Similar concerns arise in the context of alleged shoplifting. Typically, the retailer sends details of alleged shoplifters to agents, who write to the alleged shoplifter demanding payment for the goods stolen, together with fixed sums in compensation.

##### Example: civil recovery for alleged shoplifting

A young mother with two small children was shopping, when one of the children took a drink from a shelf and opened it. The mother was then detained by the shop's security guard, despite her offer to pay for the drink. The police were not called to attend, and she was allowed to leave.

Two weeks later, she received a letter from an agent, demanding approximately £90 for staff and management time, administration costs, and security costs. The value of the goods allegedly stolen was listed as "nil". The letter added that the company would accept £70 in settlement if the consumer paid promptly. The consumer paid that amount because she felt threatened.

<sup>15</sup> [2011] EWPC 6, paras 21 and 52 to 55.

<sup>16</sup> Above, para 100.

<sup>17</sup> Above, para 101.

- 9.29 Citizens Advice reports that it has received over 10,000 complaints about “civil recovery” since 2007, and has investigated 450 cases in detail.<sup>18</sup> In most cases, there was no criminal prosecution or police action.
- 9.30 Shoplifting is a major problem and retailers are clearly entitled to take any reasonable and lawful measure necessary to protect their stock and discourage theft. If someone has stolen goods, there can be no objection to a demand that they should pay for the goods which have been stolen. Equally, there can be no objection to the retailer requiring compensation for any additional loss caused by the theft.
- 9.31 However, civil recovery is problematic. One problem is that the recipients often deny that they have committed theft. Another is that agents demand that the recipient pays a fixed sum for “investigation”, “security” or “administration” costs.<sup>19</sup>
- 9.32 Consumer groups told us that the letters demanding fixed penalties for alleged shoplifting may be misleading or aggressive within the meaning of the Regulations. They may mislead recipients about their rights or the risks they may face,<sup>20</sup> or threaten action which cannot legally be taken.<sup>21</sup>
- 9.33 Some people pay because they fear court action. In some cases, recipients are vulnerable. Citizens Advice reports that out of the cases it has received, one in four recipients was a teenager, typically aged 14 to 16. Others suffered from mental health problems.<sup>22</sup>

#### **WHICH COLLECTION ACTIVITIES ARE COVERED BY THE REGULATIONS?**

- 9.34 In our Consultation Paper we argued that the policy behind the Unfair Commercial Practices Directive 2005 (the Directive) was that all commercial payment collection should be covered.<sup>23</sup> We said this for three reasons:
- (1) The Directive is intended to be a very general measure, applying to all sectors. Recital 12 states that “both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts”. If payment collection agents were not included, it would be necessary to enact separate protections against misleading or threatening practices, which would undermine the single regulatory framework.

<sup>18</sup> Citizens Advice Bureau Evidence, *Hollow Demands* (Summer 2011), pp 8 to 9, available at <http://www.citizensadvice.org.uk/index/policy/evidence-journal.htm>.

<sup>19</sup> There is considerable debate about whether these fixed sums are acceptable. See the Consultation Paper, paras 3.19 to 3.21.

<sup>20</sup> Contrary to the Consumer Protection from Unfair Trading Regulations 2008, Reg 5(4)(k).

<sup>21</sup> Above, contrary to Reg 7(2)(e).

<sup>22</sup> Citizens Advice Evidence Briefing, *Uncivil Recovery* (December 2010), p 3, available at [http://www.citizensadvice.org.uk/index/policy/policy\\_publications/uncivil\\_recovery.htm](http://www.citizensadvice.org.uk/index/policy/policy_publications/uncivil_recovery.htm).

<sup>23</sup> Directive 2005/29/EC of 11 May 2005 (OJ 2005 L 149). Any other directives mentioned in the text will be distinguished appropriately.

- (2) The Directive is not confined to practices within the context of a contractual relationship. Recital 13 states that the Directive “should apply equally to unfair commercial practices which occur outside any contractual relationship”. It applies even when no transaction or sale takes place. As the European Court of Justice has commented, “the Directive gives a particularly wide definition to the concept of commercial practices”.<sup>24</sup>
- (3) The Directive is aimed at commercial practices that influence consumers’ transactional decisions. Transactional decisions are defined to include decisions “whether, how or on what terms to ... make payment in whole or in part”. Clearly, misleading or unduly aggressive demands for payment may distort consumers’ decisions about whether to pay, and whether to give priority to one payment rather than another.

9.35 That said, the definitions in the Directive are complex and untested. Their scope is controversial and not beyond doubt. The issue is ultimately one for the European Court of Justice. The Court would take a purposive approach to the issue, looking at the intention behind the Directive, as set out in the Recitals.

#### **Civil recovery: a contentious issue**

9.36 In December 2010, a civil recovery agent, Retail Loss Prevention Ltd (RLP), publicised a legal opinion from Richard B Mawrey QC. Mr Mawrey described the idea that civil recovery falls within the scope of the Regulations as “untenable”.<sup>25</sup> He concluded that:

Putting it baldly, even if RLP lied like a trooper when dealing with the shoplifter and threatened him with all the tortures of the Inquisition, it would not amount to an offence under Regs 5 or 7 because:

- (a) RLP is not acting in the course of a commercial practice;
- (b) the shoplifter is not a consumer for the purposes of the Regulations;
- (c) there is no “product”;
- (d) the supposed “consumer” is not engaged in making or refraining from making a “transactional decision”.<sup>26</sup>

9.37 In our Consultation Paper, we examined each of these arguments and concluded that there is an arguable case that demands for damages against alleged wrongdoers are products within the meaning of the Directive.<sup>27</sup>

<sup>24</sup> Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I – 2949, para 49.

<sup>25</sup> Opinion provided to Retail Loss Prevention Ltd (dispute with the Citizens Advice Bureau), 1 December 2010, at para 55. We are very grateful to Retail Loss Prevention for allowing us to quote from the opinion. A summary of the opinion can be found at <http://www.lossprevention.co.uk/RichardMawreyArticle.aspx>. Also see an updated Advice by Richard B Mawrey QC (11 May 2011) which can be found at <http://www.lossprevention.co.uk/RichardMawrey.aspx>.

9.38 Here, we briefly look at the relevant definitions in the Regulations, using civil recovery as an example.<sup>28</sup>

#### **“A commercial practice”**

9.39 The first question is whether civil recovery is a commercial practice. A “commercial practice” is defined as:

any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.<sup>29</sup>

9.40 Sending a letter would constitute an act or representation. This leads to two further questions:

- (1) Is civil recovery “directly connected with the promotion, sale or supply of a product”?
- (2) Are individual alleged wrongdoers “consumers” within the meaning of the Regulations?

#### **Directly connected with the supply of a product**

9.41 The crucial issue is whether civil recovery can be considered to be a “product”. Article 2(c) of the Directive defines a “product” as “any goods or service including immovable property, rights and obligations”.

9.42 Our view was that settling rights and obligations in return for payment could amount to a product, if done commercially. “Product” is a wide concept which includes “rights and obligations”. A settlement contract exchanges rights and obligations for payment. We thought that this may be a product within the extended meaning of the Directive.

#### **To or from “consumers”**

9.43 A consumer is defined as “any individual who in relation to a commercial practice is acting for purposes which are outside his business”.<sup>30</sup> We think that the alleged shoplifter is a “consumer” in relation to the demand for payment under this definition.

<sup>26</sup> Above, at para 59.

<sup>27</sup> See the Consultation Paper, paras 3.47 to 3.70.

<sup>28</sup> A more detailed examination is set out in the Consultation Paper, paras 3.37 - 3.71.

<sup>29</sup> The Consumer Protection from Unfair Trading Regulations 2008, Reg 2(1).

<sup>30</sup> Above, Reg 2(1).

### **Likely to cause a transactional decision**

- 9.44 A “transactional decision” is widely defined, and includes “whether, how and on what terms to ... make a payment in whole or in part”.<sup>31</sup> In the case of civil recovery, the recipient of the demand would make a decision whether to make a payment as a result of the demand.

### **Conclusion**

- 9.45 The key issue is whether civil recovery is “a product” within the meaning of the Regulations. On balance, we think that it is, on the ground that it is a settlement contract, exchanging rights and obligations for money. The same argument applies to wheel-clamping, where the courts have held that clampers who intimidate motorists into paying unreasonable charges have committed criminal offences under the Regulations. We accept, however, that the current wording is not ideal.
- 9.46 The Regulations should be interpreted with a purposive approach, in accordance with the decisions of the European Court of Justice. In *Office of Fair Trading v Purely Creative*,<sup>32</sup> Mr Justice Briggs referred to the twin objectives of the Directive as reflected in the recitals. The Directive aims to ensure a “high” level of consumer protection, and to harmonise EU laws on unfair commercial practices in order to avoid undesirable barriers to cross-border marketing.

### **SHOULD THE REGULATIONS BE AMENDED?**

- 9.47 In our Consultation Paper, we asked whether the Regulations ought to be amended to state that all commercial demands for payment are included within the definition of commercial practices. A large majority of respondents were in favour of such an amendment. Only three respondents disagreed.
- 9.48 Most respondents thought that the Regulations covered commercial demands for payment, and agreed it was important for this issue to be clarified. They also thought there should be no distinction between the collection of payments where there has been a contract and where there has not.
- 9.49 Many respondents pointed out that unfair demands for payment cause significant consumer detriment. Consumer groups provided numerous examples of misleading and aggressive practices concerning parking, clamping, alleged shoplifting and alleged copyright infringements.
- 9.50 The response from Which? summarised the majority view:

It is clear the CPRs cover the collection of payments of a contractual debt. There is no doubt then that consumers should be entitled to redress if the CPRs are breached in relation to such collections.

<sup>31</sup> Above.

<sup>32</sup> In *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106 (Ch), [2011] WLR (D) 34 the court made it clear that because the Regulations used words that were identical or very similar to the Directive, they should be interpreted independently of national law concepts. See paras 27, 28 and 40, by Briggs J. In this case, the appeal and cross-appeal were stayed by the Court of Appeal in July 2011 and a reference was made to the European Court of Justice (C-428/11).

We believe the same principle should apply to the collection of other, similar debt even if there is no contractual basis for collection. To the extent it's not clear the CPRs cover all these practices, we would support an appropriate amendment to the CPRs to address this. Our experience supports the findings in the Citizen's Advice report "Uncivil Recovery" that there is significant consumer detriment in this sector. For example, we have been closely involved with investigations into aggressive practices in respect of alleged copyright infringements, while our members have reported aggressive practices in the collection of parking ticket fines, amongst others.

In addition, many such situations if not contractual are quasi contractual in nature. They are also closely related to the sale of goods and services that clearly fall within the scope of the CPRs. We also believe there is considerable force in the argument that failing to clarify that such practices are covered would leave open a loophole which could not easily be closed elsewhere.

9.51 North East Trading Standards Association added:

Whether demand for payment is justified or not consumers regularly end up paying just to get the trader off their back.

9.52 The Direct Marketing Association (UK) Ltd responded:

The DMA feels that companies should pursue payment of these sums in a legal and decent manner. Although some of the behaviour used may come under existing legislation, it would be helpful to have it specifically laid down in regulations.

9.53 The British Retail Consortium also agreed:

It would seem reasonable provided there are no potential unintended consequences.

9.54 The Bar Council thought that the issue required clarification:

For what it is worth, we are not convinced by the analysis that such payments already fall within the ambit of the CPUTRs and therefore we consider it is appropriate to make this clear.

9.55 On the other hand, RLP disagreed strongly. They are involved in civil recovery on behalf of retailers, and thought that civil recovery is a useful tool:

If the definition were to be extended to cover every commercial demand for payment, ... it would encompass law firms, insurers, claims management companies and similar agents in every claim for damages against an individual. These sectors are already more than adequately regulated.

9.56 BT was also among the small minority that disagreed, and warned against gold-plating:

There is a clear definition of what amounts to a “commercial practice” for the purposes of a claim under the CPRs. If the proposed reforms go beyond this clear and well established definition, it would amount to gold-plating the current Directive which would create further inconsistency and confusion about what constitutes a breach of the CPRs.

### **Conclusion**

- 9.57 A large majority of respondents agreed that the Regulations should be amended to state that commercial demands for payment are included within the definition of commercial practices. Many felt that this was very important to ensure consistency and clarity.
- 9.58 As discussed, we think there is an arguable case that the Directive already covers all misleading and aggressive commercial demands for payment, including those that do not follow from contract debts. We accept, however, that the issue is not beyond doubt. We think that it may be helpful for both the civil and criminal liability to be co-extensive on this issue. We, therefore, conclude that the Regulations should be amended to clarify this issue.<sup>33</sup>
- 9.59 **Recommendation 46: The Regulations should be amended to state that all commercial demands for payment are included within the definition of commercial practices.**

### **SHOULD MISLEADING OR AGGRESSIVE DEMANDS FOR PAYMENT BE COVERED BY THE NEW ACT?**

- 9.60 In our Consultation Paper, we asked whether consultees agreed that the new Act should include misleading or aggressive demands for payment.
- 9.61 There was a strong consensus among consultees in favour of our provisional proposal that the new Act should cover misleading or aggressive demands for payment. The only respondents that expressed reservations were BT and Richard B Mawrey QC.<sup>34</sup>
- 9.62 As noted from paragraph 9.47 above, generally consumer groups concluded that the Regulations do cover misleading or aggressive demands for payment; and they thought that the new Act should also cover them. For example, Consumer Focus expressed strong support:

Aggressive demands for payment (debt collection) clearly fall within the scope of the Regulations and should thus be included in the new Act.

<sup>33</sup> The Directive is based on maximum harmonisation. The policy of including all commercial demands for payment is compatible with maximum harmonisation: if they are products within the meaning of the Directive, then such a clarification would correctly implement the Directive. If they are not products, then the issue is outside the maximally harmonised field, and the UK has competence to include them. At this stage, we have not considered how an amendment to the Regulations would be effected. We think it may require primary legislation.

<sup>34</sup> See paras 9.66 and 9.67 below for their comments.

We fully agree with the Law Commissions that particular problems of aggressive practices occur in respect of debt collection. In seeking remedy for these, the Law Commissions point to the common law of unjust enrichment (where consumers pay money which is not owed) as well as to the statutory protections provided under the Protection from Harassment Act 1997 and the unfair relationships test found in the Consumer Credit Act 1974. Again, when seeking remedy, consumers are faced with a number of pathways to redress with each establishing a different legal doctrine, but equally where it appears as if there is starting to be an increasing convergence of authority or opinion.

- 9.63 The Consumer Credit Counselling Service (CCCS) were also in favour of our proposal, and said that aggressive practices were a real problem:

CCCS clients sometimes receive aggressive demands for payment, combined with misleading threats that court action is imminent. Occasionally creditors will quote a list of enforcement options, such as an attachment of earnings, a visit by a bailiff or even the seizure of goods for public sale, without acknowledging that a county court judgment would need to be obtained first. These demands are often in writing and can lead to debtors taking on further sub-prime borrowing in an attempt to prevent enforcement.

- 9.64 Devon County Council Trading Standards thought that this was the best proposal of the Consultation Paper:

At present there seems, other than criminal sanctions, to be very little action a consumer can take about this sort of thing, which only encourages e.g. rogue debt collectors to continue their practices. This is the best proposal within the new legislation.

- 9.65 The Direct Marketing Association (UK) Ltd agreed that this is “an important area to be included”:

It is in some ways irrelevant whether or not the payment is due, what is important is that companies should not be able to use any illegal method or tactic to acquire payment.

- 9.66 BT expressed reservations:

If the new Act is introduced contrary to our wishes, we agree that misleading or aggressive demands for non-contractual payments should be included which we envisage will deal with consumers accused of things like parking offences, copyright infringement or shoplifting. However, we are very concerned that the scope of these provisions should not be defined so widely as to unfairly prevent traders from making legitimate and firm demands for payment from consumers when a debt is owed.

- 9.67 Richard B Mawrey QC made the following point:

One assumes that the question pre-supposes that the demand itself is legally justified. Misleading: yes. Aggressive: No. The reason for not including aggressive demands is not to encourage aggression but because it is quite impossible to arrive at a satisfactory definition of an aggressive demand for a payment that is lawfully due. To some consumers *any* demand is aggressive and certainly any threat of civil action. This would be a recipe for multiple “gold-digging” actions.

### **Consumer credit debt collection**

9.68 We note the concerns expressed that debt collection involves firm action. The line between legitimate threats and inappropriate coercion may be a fine one. It is important to draw this line, however, in a variety of contexts.

9.69 In the area of consumer credit, the OFT issues Debt Collection Guidance for the use of debt collectors licensed under the Consumer Credit Act 1974.<sup>35</sup> Consumer credit debts are “debts arising from regulated consumer credit or consumer hire agreements”.<sup>36</sup> We look briefly at this Guidance, to see whether these principles could also be applied to debt recovery where there is no consumer credit element, such as civil recovery.

9.70 The Guidance sets out six overarching principles. Businesses should:

- (1) *treat debtors fairly* – debtors should not be subjected to aggressive practices, inappropriate coercion, or conduct which is deceitful, oppressive, unfair or improper, whether unlawful or not;
- (2) *be transparent in their dealings with debtors and others* – information provided should be clear and should not be confusing or misleading;
- (3) *exercise forbearance and consideration* – in particular towards debtors experiencing difficulty;
- (4) *act proportionately when seeking to recover debts*, taking into account debtors' circumstances;
- (5) *establish and implement clear, effective and appropriate policies and procedures* for engaging with debtors and other relevant parties, including having appropriate mechanisms for responding to reasonably queried and disputed debt and (other) complaints; and
- (6) *establish and implement clear, appropriate and effective policies and procedures* for identifying and dealing with particularly vulnerable debtors.<sup>37</sup>

9.71 The Guidance breaks down unfair or improper business practices into eight areas:

<sup>35</sup> The Office of Fair Trading, ‘Debt Collection’: OFT guidance for all businesses engaged in the recovery of consumer credit debts, OFT 664Rev (July 2003, updated October 2011), available at <http://www.of.gov.uk/about-the-of/legal-powers/legal/cca/debt-collection>.

<sup>36</sup> Above, at para 1.10.

<sup>37</sup> Above, at para 2.2.

- (1) *Communication*: businesses should communicate in a clear, accurate and transparent manner;
- (2) *False representation of authority and/or legal position*: businesses should accurately and truthfully represent their authority/status and the correct legal position with regard to debts and the debt recovery process;
- (3) *Physical/psychological harassment*: businesses should not engage in physical or psychological harassment of debtors, or relevant third parties;
- (4) *Deceptive and/or unfair methods*: businesses should be truthful and fair in their dealings with debtors and others;
- (5) *Charging for debt recovery*: charges should not be levied inappropriately or unfairly;
- (6) *Debt collection visits*: those visiting debtors must not act in a threatening or unclear manner;
- (7) *Statute barred debt*: businesses should not use unfair methods (including misrepresenting the legal position) if seeking to recover statute barred debt; and
- (8) *Data accuracy*: businesses should have appropriate processes in place with a view to ensuring that customer data is accurate and take reasonable steps to ensure that it is adequate, with a view to only the actual debtor and valid debts being pursued for repayment.<sup>38</sup>

9.72 If debt collectors breach the Guidance, the OFT may take various measures, including revocation of the debt collector's consumer credit licence, variation of the licence or limitation of the life of the licence.<sup>39</sup>

### **Conclusion**

9.73 There was strong support for our proposal that the new Act should include misleading or aggressive demands for payment. The many examples submitted by consumer groups illustrate that consumers would benefit from clearer and more certain rights to redress in these cases.

9.74 We note that consultees, such as BT and Richard B Mawrey QC, consider that legitimate threats of litigation might be deemed to be aggressive. There is already Guidance for debt collectors engaged in the collection of consumer credit debt, and we think that other areas of debt collection would benefit from similar guidance.

9.75 **Recommendation 47: The new Act should cover misleading or aggressive demands for payment.**

<sup>38</sup> Above, at para 3.1.

<sup>39</sup> Above, at paras 4.10 and 4.11.

- 9.76 **Recommendation 48: The new Act should provide that in deciding whether debt collection is misleading or aggressive, the court may take into account guidance issued by the OFT or its successor on good practice in debt collection.**

**SHOULD DEMANDS FOR DAMAGES AGAINST ALLEGED WRONGDOERS BE COVERED BY THE NEW ACT?**

- 9.77 In the Consultation Paper, we went on to ask two related questions:

- (1) Do consultees agree that demands for damages against alleged wrongdoers should be covered by the proposed new Act?
- (2) In particular, should demands for payment following parking offences, alleged copyright infringements, wheel-clamping and civil recovery also be covered?

- 9.78 The vast majority of those who responded to these questions agreed with both propositions. Only four respondents disagreed.

- 9.79 Citizens Advice gave an affirmative answer for both questions. They pointed out that an objective of the Regulations was to be future proof and that aggressive practices in debt collection were a real problem:

The Citizens Advice service strongly believes that the proposed Act should include misleading and aggressive demands for payment. This must include demands against alleged wrongdoers. We believe that the CPRs already cover these transactions. If this is not the case, we are concerned that the objective of the Unfair Commercial Practices Directive to be future proof would not be met. Misleading and aggressive demands for payment cause huge consumer detriment. The impact on individuals and their families can be devastating ... .

... The charges being claimed often appear to be hugely disproportionate to the losses suffered, so that people do not understand how the business making the claim decided on that figure. The claims are also very aggressive in nature and threaten court action as a matter of course, but often no court claim is made.

- 9.80 Wealden Citizens Advice, Derby Citizens Advice and Law Centre, and Merton and Lambeth Citizens Advice Bureaux also agreed with both questions, and said that aggressive practices cause real hardship to consumers.

- 9.81 Highland Council Trading Standards wrote:

We support strongly the inclusion of all of these matters which are sources of significant consumer detriment.

One particular point: many private car parking companies making aggressive or misleading claims for “penalty” payments do so on the basis that these are contractual matters. We take the view that their claim to the existence of a contract with a consumer is often flawed and that no such contract exists. Therefore, we think it important that the new Act covers these situations.

- 9.82 UK Cards Association expressed reservations with regard to regulated agreements:

Part 3 [of the Consultation Paper] makes reference to debt collection practices. For regulated agreements UK lenders are required to comply with guidelines issued by the OFT (currently under review) and the provisions of the Lending Code. We would therefore suggest that the regulatory framework to protect the consumer from a lending perspective already exists in the case of debt collection.

- 9.83 The Council of Her Majesty’s Circuit Judges disagreed, on the following ground:

Aggressive demands in respect of parking offences etc. should be a matter for public-law enforcement and should not be covered.

- 9.84 Richard B Mawrey QC did not agree that demands for damages against alleged wrongdoers should be covered by the new Act:

The question ignores the wider context. However phrased such a provision would make most litigation where the proposed defendant is an individual virtually impossible.

- 9.85 With respect to the second question, in which we asked whether demands for payment for parking offences, alleged copyright infringement, wheel-clamping and civil recovery should be covered, Richard B Mawrey QC argued that parking and wheel-clamping should be covered, but civil recovery should not:

Parking offences: clearly yes.

Wheel-clamping: also clearly yes; these payments are normally wholly illegal to start with and should be stamped on.

Copyright infringements: probably no because this is far too technical for a broad-brush approach.

Civil recovery: emphatically no. Civil recovery is the making of a claim in tort coupled with an offer to settle on payment of a stated sum, leaving the customer free to pay, to negotiate a lower sum, to deny liability or to refuse payment leaving the trader to sue if he wishes. It is entirely separate from the transactions covered by the 2008 Regulations. Again, those who oppose civil recovery ignore the wider considerations. Theft is a major scourge of the retail trade and costs billions. All the losses are eventually passed on to the honest customer in price rises. Criminal prosecutions for retail theft are now very rare indeed. If the retailers cannot protect themselves against theft and the police will not protect them, then there will be no effective sanction for retail theft of any kind and the problem will quickly escalate out of control. The attacks on civil recovery are entirely misconceived and nobody will benefit from encouraging theft.

9.86 RLP objected and wrote:

It is imperative to point out the very significant differences however between civil recovery and the other categories.

Parking offences presumably result in fines. A claim for damages is not a fine. A fine is punitive. A claim for damages is compensatory.

Those who seek damages for copyright, provided they follow the correct law and procedure, need not be covered by the Act. These again would be claims for damages and provided they can be properly quantified and evidenced, would not fall within the remit of the new Act.

Wheel clamping is significantly different. A motorist is forced to pay a sum in order to have the clamp removed. There is no choice if you wish to release your vehicle, other than going through the courts which is not an option, when you require the use of your vehicle.

This is in complete contrast to a claim for civil recovery. The Defendant receives a letter which he has the chance to respond to. He can either admit the claim and settle it. He can make a counter-offer. He can deny the claim and ultimately, ask the court to assess liability and quantum if he so wishes.

... If nothing other than purely as a matter of public policy, thieves should not be afforded the same protection as an innocent consumer who has a defective product, or indeed an innocent consumer who falls on hard times and cannot afford to pay for goods or services obtained.

## **Conclusion**

- 9.87 A large majority of consultees agreed that the new Act should cover demands for damages against alleged wrongdoers: in particular, demands for payment following parking offences, alleged copyright infringements, wheel-clamping and civil recovery. In our view, legislation should not operate in an arbitrary way between demands for payments arising out of contracts, and demands for payments against alleged wrongdoers.
- 9.88 We do not consider demands for payment to be wrong in themselves, and we fully accept that they have a role to play in discouraging theft. In terms of the proposed new Act, it will be possible to claim compensation only when the trader has behaved in a misleading or aggressive fashion. This is no different to any other commercial activity and we are not convinced that an exception should be made here. As mentioned above in paragraph 9.74, however, we accept that it would be useful to have guidance with respect to what constitutes an aggressive practice in the context of non-credit debt collection.
- 9.89 **Recommendation 49: Demands for damages against alleged wrongdoers should be covered by the new Act.**
- 9.90 **Recommendation 50: Demands for payment following parking offences, alleged copyright infringements, wheel-clamping and civil recovery should also be covered.**

# PART 10

## CREDITOR LIABILITY

### INTRODUCTION

- 10.1 In this Part we consider the liability of the creditor when a consumer has entered into a credit agreement to buy goods and services that have been sold in a misleading or aggressive way. To what extent should a creditor be liable for a supplier's wrongful actions?
- 10.2 The issue is important because rogue traders are often difficult to trace or become insolvent. Consumers, therefore, find it easier to claim against the creditor than against the original supplier. The Consumer Credit Act 1974 (CCA) imposes various liabilities on creditors.
- 10.3 The government is consulting on the reform of the consumer credit regime.<sup>1</sup> Its preferred option is to transfer responsibility for consumer credit from the Office of Fair Trading (OFT) to the new Financial Conduct Authority.<sup>2</sup> The CCA would be repealed and consumer credit would be regulated under a new Financial Services and Markets Act 2000 style rulebook alongside other retail financial services.
- 10.4 Our Consultation Paper was based on the current law, but the principles discussed will also be relevant to the revised regime. The government has indicated that it does not intend there to be any overall dilution of consumer protection in consumer credit. It stated:

A key cornerstone of any transfer of responsibility for consumer credit would be to at least maintain – and where possible strengthen – overall levels of consumer protection, while recognising the role of consumer responsibility and that all risk will not be eliminated. The Government recognises that the current CCA regime provides for a number of important consumer protections that are valued by many stakeholders. These include, for example ... provisions for joint liability of creditors for certain breaches by suppliers of goods and services.<sup>3</sup>

<sup>1</sup> HM Treasury and Department for Business, Innovation & Skills, *A new approach to financial regulation: consultation on reforming the consumer credit regime* (December 2010), available at <http://www.bis.gov.uk/Consultations/consultation-reforming-consumer-credit>.

<sup>2</sup> A new approach to financial regulation: securing stability, protecting consumers (January 2012) Cm 8268, available at [http://www.hm-treasury.gov.uk/d/fin\\_fs\\_bill\\_policy\\_document\\_jan2012.pdf](http://www.hm-treasury.gov.uk/d/fin_fs_bill_policy_document_jan2012.pdf).

<sup>3</sup> HM Treasury and Department for Business, Innovation & Skills, *A new approach to financial regulation: consultation on reforming the consumer credit regime* (December 2010), para 2.9, available at [available at http://www.bis.gov.uk/Consultations/consultation-reforming-consumer-credit](http://www.bis.gov.uk/Consultations/consultation-reforming-consumer-credit).

## **DIRECT LENDING AND CONNECTED LENDING**

10.5 Part 15 of the Consultation Paper explains the current law and the policy behind it in detail. Here we shall set out a very brief summary of the law for the purposes of this Report, focusing on direct lending and connected lending:

- (1) *Direct lending* is where the supplier is also the creditor.
  - (a) This is typically a hire purchase or a conditional sale agreement.
  - (b) Liability arises under section 56 of the CCA.
  - (c) Although the trader physically provides the goods, in law they are supplied by the creditor. Thus the creditor bears all the responsibilities of the trader. For example, the creditor is liable for breach of contract if the goods fail to meet the implied terms of the contract (such as where the goods are not of satisfactory quality).
  - (d) The deemed agency provision in section 56(2) of the CCA means the creditor is liable to the consumer for things said or done by the supplier during antecedent negotiations.
- (2) *Connected lending* is where the loan is made under pre-existing arrangements between creditor and supplier, and the creditor knows that the loan will be used to finance the purchase.<sup>4</sup>
  - (a) The CCA refers to this as a “debtor-creditor-supplier agreement”. Importantly, the category includes credit cards.<sup>5</sup>
  - (b) Liability arises primarily under section 75 of the CCA. This applies where the price of the item is more than £100 and not more than £30,000.
  - (c) A consumer who has a claim for misrepresentation or breach of contract against a supplier may claim against the creditor instead. The consumer has the choice of suing either supplier or creditor.
  - (d) If the supplier was liable to the consumer, the creditor is liable to the same extent. The creditor must pay the consumer and obtain repayment from the supplier.<sup>6</sup>

## **A PROBLEM WITH DIRECT LENDING**

10.6 In the Consultation Paper, we thought that in direct lending cases, the CCA provided adequate redress against the creditor.

<sup>4</sup> Consumer Credit Act 1974, s 12(b) and (c).

<sup>5</sup> *Office of Fair Trading v Lloyds TSB Bank Plc* [2007] UKHL 48, [2008] 1 AC 316.

<sup>6</sup> Consumer Credit Act 1974, s 75(2).

- 10.7 We did however, express concern about a potential loophole in section 56. This was exposed in 2007, in the case of *Black Horse Ltd v Langford (Black Horse)*.<sup>7</sup> The consumer and car dealer had negotiated over the sale of a car, in which the car dealer agreed to buy the consumer's old car as part of the transaction. The car dealer sold the new car to an intermediary, who sold it on to the creditor. The creditor then entered into a hire purchase transaction with the consumer. At this stage, the car dealer went into liquidation, before paying for the part-exchanged car. The High Court found that section 56(1)(b) did not apply as the car dealer had not sold the goods directly to the creditor, but had sold them through a third party.
- 10.8 The implication of *Black Horse* is that if the supplier makes a misrepresentation to the consumer, and then sells the goods to an intermediary, who sells them to a creditor, the consumer has very little redress.<sup>8</sup> The consumer cannot bring a claim under the Misrepresentation Act 1967 or section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 against the supplier because the consumer does not have a contract with the supplier.<sup>9</sup> The consumer cannot bring a claim against the creditor, because the creditor did not make the misrepresentation.
- 10.9 This contravenes the policy behind the Act, as set out by the House of Lords in *Office of Fair Trading v Lloyds TSB Bank Plc*.<sup>10</sup> We think the *Black Horse* case is unlikely to be endorsed by the appeal courts. We did, however, welcome views on the issue.

#### **OUR PROPOSALS: DIRECT LENDING**

- 10.10 In direct lending, the creditor also sells the goods, usually under a hire purchase or conditional sale agreement. This form of lending is less common than it was, but it is still used to finance car sales, for example. Under section 56, the creditor is responsible for the supplier's misleading or aggressive actions, due to deemed agency.
- 10.11 In the Consultation Paper, we asked consultees whether they agree that section 56 provides sufficient protection for consumers when goods have been supplied under hire purchase or conditional sales agreements in a misleading or aggressive way.
- 10.12 Just under one-third of consultees responded to this question, so the response rate was rather low. The majority of those agreed, including some consumer groups and trading standards services.

<sup>7</sup> [2007] EWHC 907, [2007] RTR 38. See also E Furniss, "Carte Blanche for hire purchase sharks?" (2007) 157 NLJ 734.

<sup>8</sup> Above.

<sup>9</sup> The consumer may however have a common law claim in negligence under the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, discussed at para 5.27 of the Consultation Paper.

<sup>10</sup> [2007] UKHL 48, [2008] 1 AC 316.

- 10.13 We then went on to ask whether legislation is needed, in the light of *Black Horse*,<sup>11</sup> to confirm that the supplier acts as agent of the creditor even if the sale from supplier to creditor takes place through an intermediary.
- 10.14 Once again, under one-third of consultees responded, the majority of which agreed. Among those that agreed, the OFT thought that legislative clarification might be beneficial on the following basis:

Yes, the High Court case of *Black Horse v Langford* appears to have raised questions about the level of protection afforded to consumers under section 56 (1)(b) where a third party (and not the credit broker) sells the goods or proposes to sell the goods to the creditor.

We agree with the initial judge's comments that:

"The purpose of the Act is to protect consumers and it would seem [to me] to make a serious inroad into that protection if the sale by the dealer of the motor car to an intermediary before its sale to the finance company renders section 56 of no assistance to the customer."

- 10.15 The Council of Her Majesty's Circuit Judges thought that "it would be desirable to take the opportunity in the proposed legislation to clarify the law" in light of the *Black Horse* case. The Faculty of Advocates concurred with that view.

### **Conclusion**

- 10.16 We think that section 56 generally provides sufficient protection for the consumer against the creditor. There is a strong argument, however, that the law should be clarified to the effect that the supplier acts as agent of the creditor even if the sale from supplier to creditor takes place through an intermediary.
- 10.17 **Recommendation 51: When the CCA is replaced, the opportunity should be taken to clarify that the supplier acts as agent of the creditor even if the sale from supplier to creditor takes place through an intermediary.**

### **OUR PROPOSALS: CONNECTED LENDING**

#### **Is a connected lender liable for the aggressive practices of a supplier?**

- 10.18 Section 75(1) of the CCA provides that:

If the debtor under a debtor-creditor-supplier agreement ... has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.

<sup>11</sup> [2007] EWHC 907, [2007] RTR 38, discussed at paras 15.11 to 15.12 of the Consultation Paper.

- 10.19 In the Consultation Paper, we concluded that section 75 does not apply if an item has been sold through duress.<sup>12</sup> This is because section 75 applies to “misrepresentation or breach of contract”, which does not appear to include duress. We thought, however, that there would be a remedy under section 56.

#### **A remedy under section 56**

- 10.20 The deemed agency provision in section 56(2) applies to connected lending. In connected lending cases, however, the effect of section 56(2) is limited. The section does not impose contractual liability on the creditor but makes the creditor responsible for the supplier’s “antecedent negotiations”.
- 10.21 Threats made by the supplier in antecedent negotiations are deemed to have been made by an agent of the creditor. The consumer would be able to show that the creditor made threats through its deemed agent, which resulted in a contract with the creditor. Both the supply contract and the credit contract would be considered to be induced by duress, and the consumer would be entitled to rescind both.

#### **A remedy under section 140A**

- 10.22 In these circumstances, however, the consumer’s most effective remedy would probably be under section 140A of the CCA. This gives courts a general power to declare a consumer credit relationship to be unfair. In particular, the relationship may be unfair because of anything “done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement)”.<sup>13</sup>
- 10.23 This might include the supplier’s aggressive behaviour (which is deemed, under section 56, to be done on behalf of the creditor). If a relationship is unfair, the courts have considerable discretion to offer a remedy, including reducing or discharging any sum payable under the agreement or requiring the creditor to repay any sum paid by the debtor, in whole or in part.<sup>14</sup>

#### **Our provisional proposal on section 75**

- 10.24 In our Consultation Paper, we set out three possible approaches:
- (1) *Leave the law as it currently stands.* This would give consumers strong protection under section 75 for misleading practices but would provide weaker protection for aggressive practices. Consumers’ main remedy would be a discretionary one under section 140A. This is limited to the amount of the credit agreement, together with interest paid.

<sup>12</sup> See the Consultation Paper, para 15.25.

<sup>13</sup> Consumer Credit Act 1974, s 140A(1)(c) (inserted by the Consumer Credit Act 2006, s 19). In the Consultation Paper we noted the case of *McGuffick v Royal Bank of Scotland Plc* [2009] EWHC 2386 (Comm), [2010] 1 All ER 634, which held that a practice was not automatically unfair if the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) had been breached. That said, we think a misleading or aggressive practice would also be unfair under the Consumer Credit Act: see *Harrison v Link Financial Ltd* [2011] ECC 26.

<sup>14</sup> The Consumer Credit Act 1974, s 140B.

- (2) *Hold connected lenders responsible for all breaches by traders.* This would amend section 75 to include all breaches of the proposed new Act. Where section 75 applies, consumers would have a “like claim” against connected lenders in respect of any claim against the supplier.
  - (3) *Give consumers a limited claim.* This would give consumers a clear and non-discretionary “like claim” against connected lenders for all breaches of the Act, which fall within the section 75 limits. The lender’s liability, however, would be limited to the amount of the credit agreement, together with interest paid.
- 10.25 We preferred the third option, as we thought it provided an effective compromise. It would treat misleading and aggressive practices in the same way, providing consumers with certain and non-discretionary “like claims” against connected lenders for all breaches of the proposed new Act that fell within the limits of section 75 (that is, for items more than £100 and no more than £30,000). It would, however, follow the recommendation of the Director General of Fair Trading in 1995, by limiting the lender’s liability to the amount of money lent (plus interest paid).
- 10.26 Thus, we provisionally proposed that section 75 should be amended with the result that, where section 75 applies, consumers should have a like claim against the connected lender for any misleading or aggressive act by the trader, although connected lenders’ liability should be capped.
- 10.27 We asked two questions:
- (1) Should connected lenders be liable for the supplier’s misleading or aggressive acts where section 75 applies; and
  - (2) Should that liability be capped at the amount of the loan, plus interest?

**What consultees said about extending section 75**

- 10.28 More than three-quarters of those that responded agreed with our provisional proposal that connected lenders should be liable in these circumstances, generally for the reasons set out in the Consultation Paper.
- 10.29 Consumer Focus wrote: “section 75 should include, as well as misrepresentation and breach of contract, both misleading and aggressive practices.”
- 10.30 Citizens Advice wrote:
- We believe that both misleading and aggressive practices should be covered under section 75 and believe this was the original policy intention.
- 10.31 On the other hand, the OFT expressed doubts about our provisional proposal, in particular whether it would be appropriate for creditors to be held responsible for suppliers’ criminal acts:

However, whereas misrepresentation and breach of contract may be seen as primarily civil matters, aggressive practices are potentially “criminal” matters under the CPRs. It is questionable as to whether it would be justified for a creditor to be held liable for the criminal acts of a supplier by virtue of what may be nothing more than indirect commercial arrangements between the creditor and supplier.

- 10.32 Although only a minority disagreed, their disagreement was very strong and they put forward pertinent arguments. For example, the UK Cards Association disagreed strongly with this proposal. They argued that the proposal would operate too harshly against creditors because they would find it difficult to defend claims of misleading and aggressive practices:

At present, although we may not agree with it, the application of section 75 is relatively clear — if a customer has a claim for breach of contract or misrepresentation against a retailer then section 75 will apply. Clarity over the application of the law is key, as where card issuers have no relationship with the retailer there needs to be a fairly clear picture of when misrepresentation or breach exists so that issuers can assess whether a refund is justified.

“Misleading” and “aggressive” practices are not as easy to define in relation to a potential claim (should section 75 be extended) — this would place card issuers in a very difficult position.

The majority of section 75 claims are raised where a retailer has gone out of business. In such cases there is usually clear evidence of breach of contract or misrepresentation, e.g. failure to deliver goods or marketing goods/services in the knowledge that the business is going out of business. In the case of misleading or aggressive practices, there would not be such evidence available and any extension places an unfair burden on card issuers to defend such claims ... . Claims will presumably relate to events at the point-of-sale, where the issuer cannot be party to the experience, and where memories become clouded and events exaggerated by time.

... Any level of uncertainty or ambiguity in interpretation of the law gives rise to the threat of potential “mass” claims against the industry. This is something we have seen happen more frequently in recent years with the growth in, and raised profile of, Claims Management Companies. ... In addition to the administration difficulties, there would also be evidential issues, as trying to disprove an “aggressive practice” will be very difficult as it requires lenders to prove a negative where they have no knowledge of what actually happened. This then creates the potential for abuse.

- 10.33 Similarly, the British Bankers’ Association (BBA) objected strongly to the proposal, submitting that lenders’ liability should not be extended as the connection between lenders and suppliers is not strong enough:

For a number of years the BBA and its members have been calling for amendment to the scope of this section of the Act to limit or remove its onerous consequences, including those noted by the Law Commission in Part 15 of the consultation. ...

The Crowther Report considered the liability that a “connected lender” should assume, and section 75 is intended to impose that liability and provide the appropriate customer protection. However, the BBA believes that its current application to the use of credit cards as a payment mechanism, where a “joint venture” between the creditor and supplier can no longer be said to exist, extends this protection beyond its intended purpose. We do not therefore support the extension of a lender’s liability to encompass the misleading or aggressive acts of a supplier with whom the lender has only the most nebulous of connections.

- 10.34 The Financial and Leasing Association also objected, arguing that the proposal would unnecessarily complicate the law:

We do not consider the proposals to change Section 75 are necessary. The Law Commission has stated that its intention is to simplify the law. However, we believe that the opposite will in fact ensue, resulting in further confusion for consumers. In rejecting this proposal we do not consider that we are opposing consumer protection as we believe that the consumer is adequately protected by a number of alternative measures.

- 10.35 The Bar Council disagreed on the ground that the proposal would add greater complexity to this controversial provision.

#### **What consultees said about the proposed cap**

- 10.36 There was no consensus among consultees on this question. A very slight majority disagreed with our provisional proposal and felt that liability should not be capped.
- 10.37 Many of those that disagreed pointed out that a cap would be confusing, such as Central England Trading Standards Authorities, and Citizens Advice which wrote “if the equal liability were to be capped in this way, we believe it would be confusing.”
- 10.38 Devon County Council Trading Standards said the cap “would be unnecessarily complicated.”

#### **Conclusion**

- 10.39 Although there was strong support for our provisional proposal that connected lenders should be liable for the supplier’s aggressive acts, we find the arguments against amending section 75 to be persuasive. Section 75 liability is highly contentious. There was a strong desire to make no further changes. It was thought that amending the provision in the way we suggested would add undesirable complexity to the provision.

- 10.40 We have concluded that the law in this area should be preserved. In Part 7 we recommended that a misleading practice under the new Act should be considered a “misrepresentation” under section 75.<sup>15</sup> On the other hand, the section should not be extended to aggressive practices.
- 10.41 Even without this change, consumers would be protected. It has been pointed out that where an aggressive practice has taken place, it is highly likely that it will have been accompanied by one or more misrepresentations, so that the consumer would be able to use section 75 in any event.
- 10.42 Furthermore, as discussed above, the consumer would have a remedy against the creditor under section 56(2), which makes creditors liable for the supplier’s antecedent negotiations.<sup>16</sup> This means that the consumer would be entitled to rescind the credit contract if it was induced by an aggressive practice.
- 10.43 In addition, the consumer would have a remedy under section 140A. A court would have the power to declare the consumer credit relationship to be unfair; and offer the remedy of reducing or discharging any sum payable under the agreement, or requiring the creditor to repay any sum paid by the debtor.
- 10.44 **Recommendation 52: Section 75 should not be amended to provide that connected lenders should be liable for the supplier’s aggressive acts.**

<sup>15</sup> See para 7.139.

<sup>16</sup> See paras 10.20 to 10.21.

## **PART 11**

### **ASSESSING THE IMPACT OF REFORM**

- 11.1 In this Part, we summarise the main benefits and costs of our recommendations to reform the law of misleading and aggressive commercial practices. Alongside this Report we have published a full impact assessment on our websites.<sup>1</sup>
- 11.2 Our final impact assessment is similar to the draft impact assessment we published alongside the Consultation Paper. We have, however, taken into account the comments we received from consultees. Several commentators thought that we had over-estimated the effect of legal changes: it was thought that the impact on consumer behaviour would be less than we originally suggested. In light of the comments we received we have reduced our estimates of both the benefits and the costs of reform.
- 11.3 Our policy objectives are to:
- (1) reduce administrative costs on businesses through clearer, simpler law;
  - (2) combat aggressive practices which undermine competitive markets; and
  - (3) provide consumers with more avenues for redress against rogue traders.

#### **BENEFITS**

- 11.4 We anticipate three benefits from the proposals and discuss each below:
- (1) Easier complaint handling. Legitimate traders and advice agencies would find it easier to deal with complaints of misleading practices and trading standards services (TSS) would benefit from simpler, easier ways of valuing consumer loss.
  - (2) Consumers who have suffered a misleading or aggressive practice would receive more compensation.
  - (3) Combating aggressive practices more effectively would increase consumer confidence, and therefore lead to increased sales.

#### **Easier complaint handling**

- 11.5 Complaints about misleading and aggressive behaviour by traders are common. In 2009 Consumer Focus commissioned research into consumers' experience of unfair commercial practices. The study found that almost two-thirds of the population had been targeted by such practices within the last two years.<sup>2</sup> Based

<sup>1</sup> <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm> and [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk) - please see project page.

<sup>2</sup> Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2008), p 3, available at <http://www.consumerfocus.org.uk/files/2010/12/Waiting-to-be-heard.pdf>.

on the information provided by Consumer Focus we have calculated that traders receive 7.7 million complaints a year about misleading or aggressive practices.<sup>3</sup>

- 11.6 Legitimate traders incur unnecessary costs because they need to understand two separate systems of law. They need to understand the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) to avoid action by public enforcers; and the law of misrepresentation to deal with individual complaints.<sup>4</sup>
- 11.7 It is difficult to calculate the benefit of this simplification of our recommendations for traders. However, if clearer and simpler law were to save traders 5 minutes for each complaint, this would reduce the costs of complaint handling by 90p.<sup>5</sup> It seems reasonable to assume that there would be a reduction of this kind in at least half of the complaints received, leading to savings of around **£3.5 million** a year for traders.
- 11.8 The study by Consumer Focus also suggested that consumers made 3.4 million complaints to other organisations, such as TSS, Citizens Advice or Consumer Direct. Again, assuming that clearer law reduced the time taken to deal with complaints by 5 minutes in half of all cases, this would suggest savings of **£1.53 million**. We also think that TSS may find the simpler standardised remedies would reduce the work involved in seeking compensation orders before the criminal courts.

#### **More consumer compensation**

- 11.9 The evidence suggests that misleading and aggressive practices lead to considerable consumer detriment. Consumer Focus calculated that the total detriment suffered by consumers as a result of misleading and aggressive practices was around £3.3 billion. In 2008, the Office of Fair Trading (OFT) conducted a broad survey of consumer detriment across all practices in which traders might treat consumers unfairly, whether accidentally or deliberately. The OFT also found high levels of consumer detriment. It calculated that consumers suffered £6.6 billion of consumer detriment, with 17% of financial losses resulting from “misleading claims and incorrect information”.<sup>6</sup> This suggests just over £1 billion of consumer detriment from misleading practices alone.
- 11.10 Although many claims are relatively minor, some misleading and aggressive practices can cause considerable loss. Consumer Focus found that in 7% of cases the consumer claimed to have suffered more than £500 worth of loss, and

<sup>3</sup> The survey found that the total sample of 1,867 adults claimed to have experienced a total of 1,760 separate instances of unfair commercial practice in the last two years – of which 598 were taken up with traders. This suggests that each year, for every 100 adults in the population, there were 16 complaints to traders over alleged unfair practices.

<sup>4</sup> SI 2008/1277.

<sup>5</sup> This is calculated on the basis that median pay for customer services occupations is £8.17 per hour, plus one-third non-wage labour costs.

<sup>6</sup> Office of Fair Trading, *Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services* (April 2008) OFT 992, para 4.4 and p 32, available at [http://www.oft.gov.uk/shared\\_oft/reports/consumer\\_protection/oft992.pdf](http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft992.pdf).

in 3% of cases the consumer claimed to have suffered more than £1,000.<sup>7</sup> The OFT found that claims involving more than £1,000 of loss were particularly difficult to resolve, with consumers reporting spending a median of 26 hours putting things right and experiencing high levels of stress, anger and frustration.<sup>8</sup>

- 11.11 At present, the use made of compensation in criminal proceedings appears particularly low. In April 2010 to March 2011, TSS brought 308 prosecutions for breaches of the Regulations in the UK, which led to £68,361.15 in compensation orders.<sup>9</sup> We hope that the simpler standardised remedies would increase this sum, possibly by an additional £500,000.
- 11.12 The reforms would also provide better redress for consumers who bring actions on their own behalf. We do not estimate more initial complaints, but those who do complain will be more likely to be successful.
- 11.13 In the Consultation Paper we tentatively estimated possible additional compensation payments of £5 million to £10 million to consumers who have suffered detriment as a result of a misleading or aggressive commercial practice. This included compensation through compensation orders, civil sanctions and around 1,100 to 5,500 additional court actions; though most compensation would be gained through individual negotiation in the shadow of the law.
- 11.14 We received little comment on this figure, though it was pointed out that the pilot on civil sanctions is not scheduled to go ahead. As we discuss below, several consultees also commented that we had over-estimated the number of additional court cases likely to be brought. It was thought important not to over-estimate the amount of additional compensation. Given the uncertainties involved, we have kept the estimate low.
- 11.15 We have therefore reduced the estimate of additional compensation to consumers to between **£2 million and £5 million**.
- 11.16 Consumers would also receive benefits in terms of fewer hours spent pursuing claims and less stress and aggravation, though we have not quantified these.

#### **Improved consumer confidence leading to increased sales**

- 11.17 The press, media stories, and word-of-mouth about aggressive selling reduce consumer confidence, and make consumers less prepared to buy. Although some legitimate traders abide by a code of practice they may still be tarred with the same brush.

<sup>7</sup> Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2008), available at <http://www.consumerfocus.org.uk/files/2010/12/Waiting-to-be-heard.pdf>. Consumer Focus helpfully provided us with the original tables used in the study, which we have used in order to obtain these figures. See the Impact Assessment accompanying the Consultation Paper (April 2011), Chart 1 which can be found at [http://lawcommission.justice.gov.uk/docs/cp199\\_consumer\\_redress\\_impact\\_assessment.pdf](http://lawcommission.justice.gov.uk/docs/cp199_consumer_redress_impact_assessment.pdf)

<sup>8</sup> Above, para 5.3.

<sup>9</sup> Office of Fair Trading, Annual Report 2010 to 2011, Annex G, Table G-1, available at <http://www.offt.gov.uk/about-the-offt/annual-plan-and-report/annual-report/>.

- 11.18 The reduction in confidence produced by aggressive practices may affect all markets in which aggressive practices are known to be a problem. In 2004, the OFT found that the greatest market for doorstep selling was for double-glazing and conservatories, a market worth £1.85 billion a year.<sup>10</sup>
- 11.19 It is not possible to provide a precise estimate of the effect of reduced consumer confidence on lost sales. However, the Consultation Paper provided an order of magnitude. It argued that, given the major worries with the mobility market, aggressive practices may deter at least 1% of customers from entering the market, which would result in £5 million in lost sales in that market alone. If 0.5% of customers were deterred from buying double-glazing or conservatories on the doorstep, the lost sales would be £9.25 million, making a total across both markets of £14.25 million. On this basis we estimated that lack of consumer confidence may lead to lost sales of between £10 million and £20 million year. We asked for comment.
- 11.20 On consultation, many agreed that aggressive practices undermined consumer confidence and reduced sales. The OFT commented that the effect could be substantial.
- 11.21 That said, these figures are uncertain, and we think it is important to keep the estimate low. On the basis that at least one in four hundred people who could benefit from mobility aids or from doorstep sales of double-glazing or conservatories is deterred by lack of legal protection, improved protection would boost the market by **£5 million**.

## **COSTS**

### **Transitional costs**

- 11.22 All legal and regulatory changes require businesses to take time to become familiar with the new law. In 2008, when the Regulations were introduced, the Department for Business, Enterprise and Regulatory Reform (BERR) estimated that businesses would incur one-off familiarisation costs of between £12 million and £27 million, based on 770,000 enterprises.<sup>11</sup> BERR thought that between one and two hours of a manager's time would be spent on this function, though in larger businesses this would take longer.
- 11.23 The transitional costs for this change would be less. Businesses are already familiar with the concepts behind the Regulations. The main changes are the remedies. Only businesses which think they may infringe the Regulations would need to become familiar with these remedies.
- 11.24 We therefore think that it would be enough for businesses to spend 15 minutes to half an hour to read a simple guide to the changes, though some operating at the margins of legality may need longer to reconsider their business model. This

<sup>10</sup> Office of Fair Trading, *Doorstep selling: A report on the market study* (May 2004), p 67, Table 5.1, available at [http://www.offt.gov.uk/shared\\_offt/reports/consumer\\_protection/off716.pdf](http://www.offt.gov.uk/shared_offt/reports/consumer_protection/off716.pdf).

<sup>11</sup> The Department for Business, Enterprise and Regulatory Reform, *Impact Assessment: The Consumer Protection from Unfair Trading Regulations*, (March 2008), p 99.

suggests one-off familiarisation costs of between **£3.25 million and £6.5 million**.<sup>12</sup>

11.25 There will also be a cost in TSS officers and consumer advisers. There are currently 150 TSS in England, 32 in Scotland and 22 in Wales. We have estimated familiarisation costs for enforcement agencies and consumer advisers at **£0.5 million to £1 million**.

11.26 We have also considered whether judges would need to receive training. On further consultation and reflection, we do not think that the changes would require special training.

### **On-going costs**

11.27 We have not considered the costs which would fall on rogue traders, who would be forced to pay increased compensation to consumers. We do not consider this to be a true cost. Better enforcement will bring some rogue traders into compliance, while others may no longer be able to continue trading. The loss to rogue traders will be a gain to legitimate traders.

### **More court cases?**

11.28 We have assumed that the number of initial complaints made to traders about misleading and aggressive practices will remain fairly static. However, it is possible that of those consumers who fail to resolve the issue initially, more may take further action.

11.29 In the Consultation Paper we attempted to estimate the number of additional court cases which may result from the reforms. This was difficult to do. We looked at court data from 2009 to see how many consumer claims are brought to the county court (in England and Wales) or the sheriff court (in Scotland). We estimated 1,000 to 5,000 possible new actions in England and Wales, with between 150 and 750 additional hearings. We thought that there may also be between 100 and 500 new actions raised in the sheriff court in Scotland.

11.30 Several consultees thought that these estimates were too high. The British Retail Consortium did not think there would be any additional litigation.

11.31 Mike Hembry of Slough Borough Council Trading Standards commented that while improved law might lead to more claims, "the other side of the coin is that if the law is well defined with appropriate approved guidance then claims to the courts ought to reduce". With regards to Scotland, Cowan Ervine thought that any increase in Scotland would be more likely to be at the lower end of the range.

11.32 The Council of Her Majesty's Circuit Judges was critical of the figures, describing them as a "stab in the dark".

11.33 It is impossible to predict the effect of socio-economic change on court cases. We note that the number of money claims issued in the county courts in England and

<sup>12</sup> The median pay for a manager or proprietor in agriculture or services in 2010 was £12.61 per hour. Assuming one-third non-wage labour costs, the cost would be £4.20 per 15 minutes.

Wales has been falling since 2008; and that there has been a 16% fall since our Consultation Paper estimate.<sup>13</sup>

- 11.34 We accept the arguments put to us that the original estimates are likely to be too high. Successive studies have shown that consumers are extremely reluctant to go to court.<sup>14</sup>
- 11.35 On the precautionary principle, however, we have considered that there may be some increase, though less than the number proposed in the Consultation Paper. We estimate an additional **500 to 1000 court cases issued in England and Wales**, leading to **75 to 150 additional court hearings**.
- 11.36 Assuming that the effect in Scotland would be similar, this would suggest an additional **50 to 100 new actions** would be raised in the sheriff court.

#### ***The effect on public funds***

- 11.37 In most cases, the costs of the court hearing would be covered by the summons and court fees paid by the consumer (and in winning cases) recouped from the trader. However, some consumers (especially those on state benefits) will qualify for fee remissions, met by court funds.
- 11.38 In 2009, PricewaterhouseCoopers LLP researched court fee remissions for the Ministry of Justice.<sup>15</sup> They found that from October 2007 to October 2008, full or partial remissions were provided in around 160,000 cases at a total cost of £23 million (or £143.75 per case). This was equivalent to 7.3% of all county court family and non-family actions started in 2008. If 10% of the new actions in England and Wales involve a remission of court fees, this would suggest between 50 and 100 grants of remissions, at a cost to the Ministry of Justice of between **£7,000 and £14,000**.
- 11.39 In Scotland, figures provided by the Scottish Courts Service show that in 2009 to 2010, 11% of cases involved a remission of court fees, at a cost per case of £65.80. Assuming the same proportion of cases would involve a remission of fees at the same average cost, the cost to the Scottish Court Service would be between **£375 and £750**.

#### ***The effect on traders***

- 11.40 The main worry for traders is that a change in the law may encourage consumers to bring frivolous or ill-founded claims. The proposals are designed to limit this by restricting the right of redress to clear cases of misleading or aggressive practices. A study of small claims found that 30% of claimants had the case

<sup>13</sup> From 1.46 million in 2009 to 1.23 million in 2010, see Ministry of Justice, *Annual Judicial and court statistics* (2010), Chapter 1, Table 1.1, available at <http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual>.

<sup>14</sup> See, for example, H Genn, *Paths to Justice* (1999) and P Pleasence and others, *Civil Justice in England and Wales 2009*, (2010) Legal Services Research Centre, available at <http://www.justice.gov.uk/downloads/publications/lsrc/2010/2010CSJSAnnualReport.pdf>.

<sup>15</sup> PricewaterhouseCoopers LLP, *Is the 2007 court fee remission system working?* Ministry of Justice Research Series 15/09 (December 2009), available at <http://webarchive.nationalarchives.gov.uk/20110201125714/http://www.justice.gov.uk/publications/2007-court-fee-remission-system.htm>.

decided in their favour at the mediation stage, and a further 39% won in court, leading to an overall success rate of 7 out of 10.<sup>16</sup>

- 11.41 This suggests that of the additional 550 to 1,100 new cases, between 165 and 330 may be ill-founded. If each case were to cost the trader £1,000 to defend (in management time and legal costs), this would lead to costs on businesses of **£165,000 to £330,000**.

## CONCLUSION

- 11.42 The main costs on businesses will be the one-off familiarisation costs of finding out about the new law. We tentatively estimate transitional costs at between **£3.25 million and £6.5 million**. If the law generates additional court cases, there may also be some on-going costs where the trader eventually wins the case under the small claims procedure. We have suggested costs of up to **£330,000 a year**. Given that these costs will be spread over the whole retail sector, including goods and services, we do not think that it will involve a substantial burden on traders.
- 11.43 We have estimated the savings to businesses as a result of simpler complaint handling at **£3.5 million a year**. A conservative estimate suggests that there will be **£5 million** in increased sales generated by more confident consumers.
- 11.44 We have not included the costs which fall on rogue traders involved in paying greater compensation payments. The aggressive practices covered by the reforms already amount to criminal offences.
- 11.45 We tentatively suggest that the reforms may increase compensation payments by between **£2 million and £5 million**. There is also likely to be a deterrent effect. Furthermore, consumers would find it less time-consuming and stressful to pursue claims.
- 11.46 Consumer advice agencies would need to incur initial costs of familiarisation and training. We have not been able to cost these, but we do not think that they would be large as TSS and consumer advice agencies are already familiar with the Regulations: we tentatively estimate **£0.5 million to £1 million**. This would be off-set by savings of **£1.53 million a year** in easier complaint handling.
- 11.47 Other costs to the public purse would be minimal. If consumers bring additional cases through the small claims procedure, this may lead to some additional grants of remissions, in both England and Wales and in Scotland. As we have seen, however, these costs are low: less than **£15,000** in both jurisdictions.

<sup>16</sup> IFF Research, prepared for Consumer Focus, *Research Report, Consumer Experience of the Small Claims Court* (October 2010), p 46, available at <http://www.consumerfocus.org.uk/files/2010/10/Research-Report.pdf>.

# PART 12

## LIST OF RECOMMENDATIONS

*We make the following recommendations:*

### THE CASE FOR REFORM

- 12.1 **Recommendation 1:** There should be new legislation to simplify and clarify consumer redress for misleading practices. (Paragraph 4.16)
- 12.2 **Recommendation 2:** Consumers who suffer aggressive practices should have a right of redress under the terms of the new legislation. (Paragraph 4.33)
- 12.3 **Recommendation 3:** The new legislation should apply to aggressive and misleading payment collection against private individuals. (Paragraph 4.39)
- 12.4 **Recommendation 4:** There should not be a right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008. (Paragraph 4.62)
- 12.5 **Recommendation 5:** The Department for Business, Innovation and Skills should review whether to extend a right of redress to other breaches of the Regulations five years after the new Act is brought into force. (Paragraph 4.63)

### RECOMMENDATIONS I: SCOPE

- 12.6 **Recommendation 6:** We recommend that:
- (1) the new legislation should apply to consumers in their dealings with traders;
  - (2) the definition of consumer should be consistent with other consumer legislation; and
  - (3) in defining consumers generally, the new legislation should specify that an individual acts as a consumer if they act for purposes which are wholly or mainly outside their business, trade or profession. (Paragraph 6.21)
- 12.7 **Recommendation 7:** It is not necessary to include a specific provision to protect unemployed individuals who are mis-sold training courses. (Paragraph 6.22)
- 12.8 **Recommendation 8:** The new Act should not provide redress for all “transactional decisions”, such as the decision to visit a shop. (Paragraph 6.38)
- 12.9 **Recommendation 9:** The new Act should provide redress where the consumer has:
- (1) entered into a contract with the trader; or
  - (2) made a payment to the trader or its agent. (Paragraph 6.46)

- 12.10 **Recommendation 10:** The new Act should not provide redress for consumers against traders who mislead them as to their legal rights or make their exercise more difficult than necessary. (Paragraph 6.60)
- 12.11 **Recommendation 11:** The consumer's rights should lie only against the other party to the contract, or against the party to whom the payment was made. (Paragraph 6.75)
- 12.12 **Recommendation 12:** The new Act should not give consumers a right of action against the directors and officers of a limited liability company or against the partners in a limited liability partnership. (Paragraph 6.92)
- 12.13 **Recommendation 13:** The new Act should exclude land transactions (other than residential lettings) and financial services (other than credit and debt collection). (Paragraph 6.118)

## **RECOMMENDATIONS II: LIABILITY**

- 12.14 **Recommendation 14:** Traders should not be liable for omissions as a specific category, but should be liable where the overall presentation of a product or service would be likely to mislead the average consumer. (Paragraph 7.36)
- 12.15 **Recommendation 15:** Five years after the introduction of the new Act, the Department for Business, Innovation and Skills should review the test, "the overall presentation of a product or service was likely to mislead the average consumer". (Paragraph 7.37)
- 12.16 **Recommendation 16:** The new Act should follow the substance of the definition of misleading practice in Regulation 5(2). That is, a commercial practice is misleading if it contains false information, or if it is likely to mislead the average consumer in its overall presentation. (Paragraph 7.59)
- 12.17 **Recommendation 17:** The new Act should not reproduce Regulation 5(3) to (6). (Paragraph 7.60)
- 12.18 **Recommendation 18:** The new Act should not include examples of practices that are misleading (unless the contrary is shown). (Paragraph 7.61)
- 12.19 **Recommendation 19:** The new Act should:
- (1) provide redress for aggressive practices;
  - (2) include our proposed definitions of coercion, abuse of position and harassment; and
  - (3) include our proposed list of examples of aggressive practices. (Paragraph 7.84)
- 12.20 **Recommendation 20:** A trader should only be liable for a misleading or aggressive practice if it would be likely to cause the average consumer to make a decision that they would not have made otherwise to enter into a contract or to make a payment to the trader or its agent. (Paragraph 7.105)

- 12.21 **Recommendation 21:** The definition of “average consumer” should include provision for vulnerable consumers, mirroring the Regulations. (Paragraph 7.106)
- 12.22 **Recommendation 22:** To obtain redress the consumer would need to show that the misleading or aggressive practice was a significant factor in their decision to enter into the contract or make the payment. (Paragraph 7.116)
- 12.23 **Recommendation 23:** The Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (in Scotland) should be disapplied for consumers in transactions covered by the new Act. (Paragraph 7.138)
- 12.24 **Recommendation 24:** For the purposes of section 75 of the Consumer Credit Act 1974, the definition of misrepresentation should encompass misleading commercial practices in the new Act. (Paragraph 7.139)
- 12.25 **Recommendation 25:** The proposed new statutory framework would operate without prejudice to existing common law or contractual remedies, though consumers would not be entitled to recover twice for the same loss. (Paragraph 7.140)

### **RECOMMENDATIONS III: REMEDIES**

- 12.26 **Recommendation 26:** Remedies under the new Act should aim to restore consumers to the position in which they were before they entered into the contract or made the payment. (Paragraph 8.15)
- 12.27 **Recommendation 27:** The right to unwind should last for a fixed period of 90 days. (Paragraph 8.46)
- 12.28 **Recommendation 28:** There should not be a discretion to extend the fixed period. (Paragraph 8.63)
- 12.29 **Recommendation 29:** Where the consumer has entered into a contract, the unwinding period should start on the latest of the following alternative dates:
- (1) when the consumer enters into the contract;
  - (2) when the goods are delivered; or
  - (3) when the performance of the service is started. (Paragraph 8.67)
- 12.30 **Recommendation 30:** Consumers should be able to assert their right to unwind the contract by making a complaint, indicating a desire to reject the remaining goods or services. (Paragraph 8.74)
- 12.31 **Recommendation 31:** The right to unwind should be available where the consumer can return some element of the goods, or rejects some element of the goods or service. (Paragraph 8.82)
- 12.32 **Recommendation 32:** In normal circumstances, a consumer who exercises the right to unwind a contract within three months should not be required to give an allowance for their use of the product. (Paragraph 8.95)

- 12.33 **Recommendation 33:** There should be an exception in contracts for the continuous or regular supply of goods or services, where the consumer has consumed the goods or services for more than a month. In these circumstances, the court should have a discretion to require the consumer to give an allowance for use. This should be valued on whichever basis is lower: the market price for the quality of goods or services actually provided; or the price the trader had led the consumer to believe would be paid. (Paragraph 8.96)
- 12.34 **Recommendation 34:** Where consumers have sold goods to a trader as a result of misleading or aggressive practices:
- (1) If it is possible to return the goods, the goods should be returned, in exchange for the price paid.
  - (2) If it is not possible to return the goods, the trader should provide a monetary equivalent. (Paragraph 8.101)
- 12.35 **Recommendation 35:** Where a consumer makes a payment which was not owed, as a result of a misleading or aggressive practice, there should be a new statutory right to the return of the payment. (Paragraph 8.106)
- 12.36 **Recommendation 36:** Where the payment was owed, the trader should retain the money paid. (Paragraph 8.117)
- 12.37 **Recommendation 37:** The consumer should have the statutory right to a discount on the price where the right to unwind has been lost. (Paragraph 8.135)
- 12.38 **Recommendation 38:** The level of discount should depend on the following factors:
- (1) the impact of the commercial practice on the value of the product;
  - (2) the trader's behaviour; and
  - (3) the amount of time that has passed between the commercial practice and the consumer's complaint. (Paragraph 8.136)
- 12.39 **Recommendation 39:** In cases where the right to unwind has been lost, the level of discount should be the most appropriate from the following options:
- (1) 0% if negligible;
  - (2) 25% if minor;
  - (3) 50% if serious;
  - (4) 75% if very serious; or
  - (5) 100% if extremely serious. (Paragraph 8.137)
- 12.40 **Recommendation 40:** In cases involving high-priced goods or services, where the court has sufficient evidence of the level of the loss, the court should have the power to award a different amount. (Paragraph 8.138)

- 12.41 **Recommendation 41:** A consumer who can show that the misleading or aggressive practice has taken place should have a right to terminate future performance under the contract. (Paragraph 8.141)
- 12.42 **Recommendation 42:** Damages for consequential economic loss should be available, provided that the consumer shows that they would not have incurred the loss but for the misleading or aggressive practice. (Paragraph 8.148)
- 12.43 **Recommendation 43:** Damages for distress and inconvenience should be available, provided the consumer could show that an important object of the contract was to give pleasure, relaxation or peace of mind, or that the practice caused them alarm, distress, physical inconvenience or discomfort. (Paragraph 8.163)
- 12.44 **Recommendation 44:** The new Act should follow the courts in stating that damages for distress and inconvenience should be “restrained and modest”. (Paragraph 8.164)
- 12.45 **Recommendation 45:** The due diligence defence within the new Act should mirror the due diligence defence in the Regulations. (Paragraph 8.173)

#### **UNFAIR PAYMENT COLLECTION**

- 12.46 **Recommendation 46:** The Regulations should be amended to state that all commercial demands for payment are included within the definition of commercial practices. (Paragraph 9.59)
- 12.47 **Recommendation 47:** The new Act should cover misleading or aggressive demands for payment. (Paragraph 9.75)
- 12.48 **Recommendation 48:** The new Act should provide that in deciding whether debt collection is misleading or aggressive, the court may take into account guidance issued by the OFT or its successor on good practice in debt collection. (Paragraph 9.76)
- 12.49 **Recommendation 49:** Demands for damages against alleged wrongdoers should be covered by the new Act. (Paragraph 9.89)
- 12.50 **Recommendation 50:** Demands for payment following parking offences, alleged copyright infringements, wheel-clamping and civil recovery should also be covered. (Paragraph 9.90)

#### **CREDITOR LIABILITY**

- 12.51 **Recommendation 51:** When the CCA is replaced, the opportunity should be taken to clarify that the supplier acts as agent of the creditor even if the sale from supplier to creditor takes place through an intermediary. (Paragraph 10.17)
- 12.52 **Recommendation 52:** Section 75 should not be amended to provide that connected lenders should be liable for the supplier’s aggressive acts. (Paragraph 10.44)

*(Signed)*

LAW COMMISSION

SCOTTISH LAW COMMISSION

JAMES MUNBY  
*(Chairman)*

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PATRICK LAYDEN

DAVID ORMEROD

HECTOR L MACQUEEN

FRANCES PATTERSON

ANDREW J M STEVEN

ELAINE LORIMER  
*(Chief Executive)*

MALCOLM MCMILLAN  
*(Chief Executive)*

20 February 2012

# APPENDIX

## LIST OF RESPONDENTS

List of those who responded to *Consumer Redress for Misleading and Aggressive Practices (2011) Law Commission Consultation Paper No 199; Scottish Law Commission Discussion Paper No 149.*

Advertising Standards Authority

Age UK

Professor Neil Andrews

Association of Chief Trading Standards Officers

Birmingham City Council Trading Standards

Dr Gillian Black

Zoe Bremer

Brighton & Hove City Council Trading Standards

British Bankers' Association

British Retail Consortium

British Sky Broadcasting Group plc

British Standards Institute

BT

Professor Andrew Burrows QC (Hon), FBA

Canine Health Concern

Craig Cathcart

Central England Trading Standards Authorities

Mindy Chen-Wishart

Citizens Advice Bureau and Citizens Advice Scotland

Michael E Collins

Consumer Credit Counselling Service

Consumer Direct Scotland

Consumer Focus

Council of Her Majesty's Circuit Judges

Derby Citizens Advice & Law Centre  
Devon County Council Trading Standards  
Direct Marketing Association (UK) Ltd  
East of England Trading Standards Association  
W C H Ervine  
Faculty of Advocates  
Federation of Small Businesses  
Felixstowe and District Citizens Advice Bureau  
Finance & Leasing Association  
The General Council of the Bar  
Highland Council Trading Standards Service  
Independent Park Home Advisory Service  
Institute of Consumer Affairs  
Rachel M Jebbett  
Timothy J Jebbett  
Sebastian Kornhauser  
Legal Ombudsman  
Legal Services Board  
Legal Services Consumer Panel  
Fiona MacMillan  
Richard B Mawrey QC  
Siobhan McConnell  
Merton & Lambeth Citizens Advice Bureaux  
Professor Rachael Mulheron  
National Consumer Federation  
National Federation of Property Professionals  
Northamptonshire County Council Trading Standards  
North East Trading Standards Association

OFGEM

Office of Fair Trading

Ombudsman Services

Park Home Residents Action Alliance

Powys County Council Trading Standards

The Property Ombudsman

Retail Loss Prevention Ltd

Professor Duncan Sheehan

Slough Borough Council Trading Standards (Angela Satterly)

Slough Borough Council Trading Standards (Mike Hembry)

Professor Peter Sparkes

Staffordshire County Council Trading Standards

Trading Standards South East Ltd

The UK Cards Association

Wealden Citizens Advice

West Sussex Trading Standards Service

Which?

Jane Williams

Kirsty Williams AM

Keiran Wilson

Wolverhampton City Council Trading Standards Service

**CONFIDENTIAL RESPONSE**

We received one response from a consultee who did not wish to be identified.



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