



Department  
for Business  
Innovation & Skills

**MISLEADING AND AGGRESSIVE  
COMMERCIAL PRACTICES – A NEW  
PRIVATE RIGHT FOR CONSUMERS**

Government response to  
consultation on the draft  
regulations

APRIL 2014

# Contents

<b>Introduction .....</b>	<b>3</b>
<b>Table 1: What rights will consumers have? .....</b>	<b>4</b>
<b>Table 2: Summary of views raised to the consultation and the Government’s response .....</b>	<b>5</b>
<b>Consultation on the Consumer Protection from Unfair Trading (Amendment) Regulations 2013 – Detail of Respondents .....</b>	<b>17</b>

# Introduction

Misleading and aggressive commercial practices are a major problem for consumers. A large proportion of the victims are among the most vulnerable in society, with housebound and older people facing a particular threat from high-pressure sales techniques. Existing laws mean it is very difficult for victims of rogue traders to get their money back.

In May 2008, the Consumer Protection from Unfair Trading Regulations (the CPRs) implemented the Unfair Commercial Practices Directive into UK law. They provide that traders must not use “unfair commercial practices” against consumers. Whilst the Regulations cover many of the unfair practices consumers complain about, they can only be enforced by the Competition and Markets Authority (which took over this function from the Office of Fair Trading from 1st April 2014) or Trading Standards.<sup>1</sup>

The Law Commission and Scottish Law Commission published a joint consultation into current consumer rights in this area in July 2011<sup>2</sup>. The Commissions’ report and associated recommendations were published in February 2012<sup>3</sup>. The Commissions found that the law providing redress for victims of misleading and aggressive commercial practices was outdated, complex and that there were gaps in consumer protections resulting in consumer detriment (particularly amongst the most vulnerable consumers) and undermining the operation of the legitimate market.

The Commissions recommended that the Government introduce:

- a private right of redress for consumers who have been victims of misleading or aggressive practices;
- standard remedies for those victims; and
- entitlement to seek damages.

The Government accepted almost all of the Commissions recommendations and published draft regulations for consultation in August 2013<sup>4</sup>.

A total of 28 responses were received, including 16 representing business views, 5 from consumer organisations and 7 representing other groups, including local authorities and legal representatives.

The Government is very grateful to everyone who has taken the time to contribute. The information and comments received have been used to refine and finalise the regulations. All the responses have been carefully considered and a small number of changes have been made to the proposals as a result of issues raised by stakeholders. Table 2 contains

---

<sup>1</sup> The Regulations are also enforced by the Department of Enterprise, Trade and Investment in Northern Ireland.

<sup>2</sup> [http://lawcommission.justice.gov.uk/docs/cp199\\_consumer\\_redress.pdf](http://lawcommission.justice.gov.uk/docs/cp199_consumer_redress.pdf)

<sup>3</sup> [http://lawcommission.justice.gov.uk/docs/lc332\\_consumer\\_redress.pdf](http://lawcommission.justice.gov.uk/docs/lc332_consumer_redress.pdf)

<sup>4</sup> <https://www.gov.uk/government/publications/misleading-and-aggressive-commercial-practices-the-draft-consumer-protection-from-unfair-trading-amendment-regulations-2013>

a summary of the most substantive issues raised together with the Government’s response.

Table 1 below sets out when the rights will apply and the actions consumers can take when they have been the victims of these types of practices.

## Table 1: What rights will consumers have?

Case	The consumer has the right to:	Regulation
A consumer is misled or bullied into a business to consumer contract	Unwind from the contract	Regulation 27F
	Seek a discount on the price paid	Regulation 27I
	Seek damages for detriment caused	Regulation 27J
A consumer is misled or bullied into entering into a consumer to business contract	Unwind from the contract	Regulation 27G
	Seek damages for detriment caused	regulation 27J
A consumer is misled or bullied into making a payment which was not owed	The right to unwind the payment	Regulation 27H
	Seek damages for detriment caused	Regulation 27J
A consumer is misled or bullied into making a payment which was owed	Seek damages for detriment caused	Regulation 27J

## Table 2: Summary of views raised to the consultation and the Government's response

Issue raised	Views of business and business representatives	Views of consumer representatives	Other responses
<p>The new rights potentially undermine existing self regulation so where these exist the sector should be outside the scope of the regulations.</p>	<p>There was concern that the new right could undermine existing self-regulatory codes, in particular in relation to advertising. It was felt that consumers could use the decisions made by a regulator as a reason to take action under the rights, even when the actions of the business did not constitute a breach of the CPRs.</p>	<p>-</p>	<p>-</p>
<p><b>The Government Response:</b> A finding that a trader had breached a self-regulatory code of practice would not mean that a consumer had an entitlement to get redress using the new rights. The legislation is distinct and separate – for a consumer to take action under the new rights, the trader must have breached the CPRs. The new rights are not sector specific and will apply across all sectors, except those specifically excluded.<sup>5</sup></p>			

<sup>5</sup> Financial Services such as pensions and mortgages, land sales, the provision of social housing, stand alone credit agreements such as personal loans and second charge mortgages.

<p>Consumers unlikely to be able or willing to take civil action in the courts, particularly vulnerable consumers.</p>	<p>-</p>	<p>There was concern that consumers would not be able to understand the new rights and that it would be too difficult for them to bring actions in the civil courts.</p>	<p>-</p>
<p><b>The Government Response:</b> If at all possible, the Government encourages consumers and traders to settle their differences out of court. However, the Government recognises that many rogue traders refuse to engage with their victims so in some cases consumers may have to go to court to get their money back.</p> <p>The Government is also aware that there are sometimes real problems for families of elderly consumers who have been targeted by rogue traders. There would be nothing to stop a family member or friend helping a consumer to fill out forms to start the action off in their parent’s name. It might also be possible to take legal action on behalf of an elderly relative who for example had dementia if they had been appointed a power of attorney. Consumers can seek help and advice from Citizens Advice or charities such as Age UK.</p> <p>The Gov.UK website contains advice on how to bring an action in the civil courts.</p>			
<p>The 90 period is too long and will be used by consumers to get out of legitimate contracts, including tenancy agreements.</p>	<p>It was felt that the 90 day period to unwind from a contract was too long and would give consumers an opportunity to get out of legitimately sold contracts. In particular representatives from the private rental sector thought that this right would be abused by consumers seeking to unwind from tenancy agreements, even where there had been no breach of the CPRs by the landlord.</p>	<p>-</p>	<p>-</p>
<p><b>The Government Response:</b> Given that many of the victims of these types of practices are vulnerable, and the offences are sometimes not discovered until some time later, the Government agrees with the Law Commissions’ recommendation that 90 days is a suitable time limit for consumers to take action.</p>			

<p>The new rights introduce an unnecessary additional burden on business and lead to a U.S style litigation culture.</p>	<p>There was a view amongst some respondents that the new rights would lead to an increase in costs to business and placed an unacceptable regulatory burden on them. Some respondents were concerned that the rights would ‘open the floodgates’ to numerous court actions by consumers.</p>	<p>-</p>	<p>-</p>
<p><b>The Government Response:</b> For a consumer to take action under the rights they will have to be able to show that the business has misled or bullied them in breach of the CPRs. Only businesses that engage in these types of practices will be impacted by the new rights. Unlike the U.S, the UK does not have a collective actions regime for breaches of consumer law. Studies have shown that consumers sometimes receive little or no benefit and can be bound with a low settlements with legal fees eating up much of the redress they were expecting.</p>			
<p>The change to the definition of trader could inadvertently narrow the scope of the CPRs</p>	<p>-</p>	<p>-</p>	<p>Academics, regulators and public enforcers who responded thought that the proposed definition of trader in the draft regulations which refers to persons ‘acting through an agent’ could result in a narrowing of the scope of the Consumer Protection Regulations (CPRs). It was pointed out that the current definition in the CPRs which refers separately to anyone ‘acting in the name of’ the trader might include persons who were not agents but still acting in the name or on behalf of the trader. There was concern this would make it more difficult to enforce the regulations and for consumers to seek redress.</p>

<p><b>The Government Response:</b> The Government agrees that the change could result in a narrowing of the scope of the CPRs for the reasons outlined. The Government will therefore amend the Regulations to refer once again to persons acting in the name or on behalf of the trader.</p>			
Misleading omissions should be included in the new right	-	-	Some respondents felt that the proposed rights should be extended to include misleading omissions.
<p><b>The Government Response:</b> The Law Commissions looked carefully at this issue and the Government agrees with their findings that it would be too uncertain to introduce a private right of redress specifically for all misleading omissions. The scope of such a right would be difficult to define and would mark a departure from the current approach in UK private law where there is currently no liability for pure omissions.</p>			
Guidance will be required to enable consumers, business and the courts to interpret the definitions in the regulations.	A number of respondents felt that guidance should be issued to ensure that the courts and business were aware of the definitions in the regulations and to ensure consumers did not take unmerited court action. In particular business wanted guidance and examples of what constitutes minor, significant, serious and very serious prohibited practices.	Respondents thought that guidance would be essential to ensure that consumers were made aware of when and how they could take action against rogue traders.	-
<p><b>The Government Response:</b> The Government will work with business and consumer organisations and will publish guidance on the new provisions in due course.</p>			
Right to unwind should not cover digital content	Some respondents felt that digital content was unsuited to the regulations and it should not be covered. It was also highlighted that including digital content in the new rights was inconsistent with the proposals in the Consumer Rights Bill.	-	-



<p><b>The Government Response:</b> The Government believes that the new rights should apply to digital content and consumers should have the right to unwind a contract for digital content if they have been misled or bullied into signing up to it. The new rights are only available to consumers who have been the victims of a misleading or aggressive commercial practice. A consumer will have to show that the trader has misled or bullied them into entering the contract. The trader will have had to have broken the law for the consumer to exercise this right.</p>			
<p>Deduction for use.</p>	<p>Some respondents felt that the 90 day period was too long. There was a risk that a consumer could drive a new vehicle hundreds of miles or that someone could sign a tenancy agreement and live in a property, and then 90 days later claim they have been a victim of a misleading or aggressive practice. It was suggested that there should be a deduction for use.</p>	<p>-</p>	<p>One respondent felt that the court should have more discretion in deciding when the deduction for use applied.</p>
<p><b>The Government Response:</b> The Government agrees with the Law Commissions' that providing for a deduction for use in all cases where the consumer exercises the right to unwind would undermine the objective of providing clear and simple set of remedies for consumers. The Government also agrees however that an exception should be made for continuous supply contracts where the goods or services have been consumed for more than a month. The Government agrees on reflection that that this exception should not apply as a blanket rule as there may be some cases where the trader has behaved particularly poorly or where the impact has on the consumer has been such that the consumer should still get a full refund. The Regulations now provide that the deduction for use will not apply if it is not appropriate due to the behaviour of the trader and the impact on the consumer.</p>			
<p>Consumers should not be able to claim damages for merely being 'inconvenienced'.</p>	<p>There was concern that consumers that had been 'inconvenienced' by a misleading advert would seek to take action for damages.</p>	<p>-</p>	<p>-</p>
<p><b>The Government Response:</b> It is not the Government's intention that consumers should be able to claim damages for merely being inconvenienced. The Government has changed the regulations to make clear that inconvenience means physical inconvenience or discomfort.</p>			

<p>Consumer credit, including second charge mortgages, should not be within the scope of the new rights.</p>	<p>Respondents believed that there was no need for consumer credit agreements to be included in the new rights given the transfer of credit regulation to the FCA.</p>	<p>-</p>	<p>-</p>
<p><b>The Government Response:</b> The Government has reformed and strengthened regulation of consumer credit by transferring regulatory responsibility for consumer credit to the FCA from the OFT. This brings conduct regulation of financial services under a single regulator. The FCA will have stronger powers, more resources, and take a risk-based approach to focus resources on areas most likely to cause consumer harm. It has a far broader, tougher and more flexible enforcement toolkit, including the power to make unlimited fines and to take action against individuals in firms. These enforcement powers will act as a strong deterrent for non-compliance, as well as robustly punishing non-compliance where it does occur.</p> <p>The FCA’s enforcement powers will apply to authorised persons/firms. In the case of a person without appropriate authorisation breaking FCA rules, that person would be subject to criminal (or regulatory) action. In addition the FCA will have a tougher approach to policing the gateway to the consumer credit market by proactively identifying risks to consumers and focusing its supervisory resources on those areas most likely to cause consumer harm.</p> <p>The Government believes that the FCA’s more proactive monitoring, stronger enforcement and redress powers and the ability for consumers to bring individual complaints to the Financial Ombudsman Service provide substantial consumer protections against mis-selling in the consumer credit market. These are the same protections available in other financial service markets where the new rights will not apply.</p> <p>However, many of the worst cases of misleading practices identified by the Law Commissions involved the provision of consumer credit alongside the sale of an often expensive good or service. Consumers were often being bullied or misled in their own homes into signing credit agreements to pay for goods they could not afford or did not need. The Government has therefore decided the new rights will apply to those credit agreements taken out by consumers to specifically pay for goods or services that they have been misled or bullied into signing. This will mean a consumer can bring a case to court to unwind and seek redress for both the good (or service) and the credit agreement taken out to pay for it.</p>			

<p>Section 75 of the CCA</p>	<p>Some respondents felt that there needed to be a strong case for amending Section 75 of the Consumer Credit Act and were concerned that the proposed change could lead to considerable uncertainty and increase disputes between business and consumers.</p>	<p>-</p>	
<p><b>The Government Response:</b> Since the Law Commissions carried out their review, the Government has asked the FCA to undertake a comprehensive review of the retained provisions of the Consumer Credit Act, including Section 75, by 2019, and has enshrined this commitment in legislation. The Government will ask the FCA to consider the Law Commission’s proposed change in the context of this review.</p>			
<p>The Regulations should make clear who has responsibility for returning goods after a successful court action by a consumer.</p>	<p>-</p>	<p>-</p>	<p>Some respondents thought that it was important that the Regulations made clear who should be responsible for returning goods after a successful action by a consumer. There was a risk that the consumer gets burdened with the cost of returning goods.</p>
<p><b>The Government Response:</b> The Government agrees that when a consumer brings a successful action using the new rights they should not be responsible for returning the goods and should only be required to make the goods available for collection.</p>			
<p>Residential lettings and the provision of social housing should be outside of the scope of the new rights.</p>	<p>Respondents thought that as a new statutory redress scheme is being introduced for lettings agents there was no need to include residential lettings within the scope of the new rights.</p>	<p>-</p>	<p>-</p>
<p><b>The Government Response:</b> The Law Commissions received a number of examples of consumer detriment caused in the residential lettings market. The new rights will be available to consumers who have been the victims of misleading or aggressive practices in this sector. However, there was no evidence of issues in the provision of social housing and the Government has decided to exempt this sector from the new right.</p>			

<p>Rogue traders will ignore court orders</p>	<p>Some respondents thought that regardless of what rights consumers have, rogue traders will simply ignore court orders.</p>	<p>-</p>	<p>-</p>
<p><b>The Government Response:</b> If a trader ignored a court ruling then the consumer would be able to take action to enforce the judgment as with any other civil claim. Advice and guidance on enforcing civil court judgements can be found on the Gov.UK website<sup>6</sup>.</p>			
<p>The definitions will make civil recovery from those accused of crimes such as shoplifting more difficult and undermines the work of retailers to deter business crime.</p>	<p>Respondents involved in the civil recovery industry thought that the new right would give those accused of shoplifting or other minor offences, the ability to avoid civil recovery as they could claim that any claim for a damages as a result of their actions was aggressive and they were being bullied by the loss prevention company.</p>	<p>Respondents felt that consumers were often at risk of being bullied by business and civil recovery agents. In particular passengers without a valid ticket for travel who are threatened with court action unless they pay large administration fees, even when the business has suffered no loss.</p>	<p>One respondent thought that the regulations were giving too many rights to those accused of a crime.</p>
<p><b>The Government Response:</b> The Government does not believe that the new right makes it more difficult to recover civil damages from those accused of shoplifting or other crimes. To use the new rights a consumer would have to show that they had been the victim of a misleading or aggressive practice by a trader. To seek compensation the consumer would have to prove their case in court. It would not be enough for them to just say that they were ‘aggrieved’ by being asked to compensate a business they had shoplifted from.</p>			
<p>There is a risk of increased litigation as on high value goods it will be unclear to consumers and businesses what the level of the discount should be.</p>	<p>Some respondents thought that it would be too difficult to include high value goods in the new rights as it will be unclear to consumers and businesses what the level of the discount should be.</p>	<p>-</p>	<p>-</p>

<sup>6</sup> <https://www.gov.uk/make-court-claim-for-money/enforce-a-judgment>

<p><b>The Government Response:</b> The Government has clarified the regulations to make clear that for high value items the discount will simply be the difference between the price paid and the market price. The Government believes that the amount at stake and the evidence from the Commissions consultation justify taking a more precise approach. In such cases it is appropriate that the court should have the power to award a different amount which reflects the actual loss to the consumer. The Government agrees, for example, that in a £10,000 purchase, where a trader can show that the loss was 10%, then the statutory discount would produce unfair outcomes as the court would only be able to award a 25% discount or nothing.</p>			
<p>Claims management companies will use the regulations to pursue numerous claims against traders.</p>	<p>Some businesses and business representative organisations thought that there was a risk that consumers would be pursued by claims management companies who would offer to take action on their behalf.</p>	-	-
<p><b>The Government Response:</b> Only individual consumers will have access to the new rights. To bring a case a consumer will have to show that the trader has breached the CPRs.</p>			
<p>The proposed change from “undue influence” to “abuse of position” may result in a narrowing of consumer protections and confusion for the courts.</p>	-	-	<p>There was concern that the proposed change departed from the Unfair Commercial Practices Directive.</p> <p>There was also concern that there may be confusion with the concept of “abuse of position” in the Fraud Act 2006.</p>
<p><b>The Government Response:</b> The proposal to change ‘undue influence’ to ‘abuse of position’ was to avoid confusion with existing domestic law concepts. However, respondents to the consultation have highlighted that the proposed change may result in similar confusion with other domestic law concepts. The Government has therefore decided to retain the existing labels in regulation 7 of the CPRs.</p>			

<p>There should not be a significant factor test as it will be very difficult for the consumer to satisfy. The burden should first be on the trader to show that the practice did not affect the consumer.</p>	-	-	<p>There was concern that introduction of the ‘significant factor’ test may be difficult and confusing to use in practice. It was felt that if consumers have been affected, that should in itself be sufficient grounds for them to seek redress</p>
<p><b>The Government Response:</b> The significant factor test will be retained. As set out in the Government response to the Commissions’ recommendations, the “significant factor” test would require the consumer to show that the misleading or aggressive practice was a significant factor in their decision. The “significant factor” test ensures there is a sufficient causal link between the practice and the consumer’s decision. Consumers will need to put forward some evidence that they were influenced by a misleading or aggressive practice before making the decision to enter a contract or make a payment. If this threshold is met, the next stage will be to show that the practice was sufficiently serious such that it would be likely to cause the average consumer to enter the contract or make the payment.</p>			
<p>Contracts which commence before the rights come into force should also be covered by the new right</p>	-	<p>Two respondents felt that the new rights should apply to any commercial practice which occurs on or after the coming into force date.</p>	-
<p><b>The Government Response:</b> The new rights will not apply retrospectively to contracts or payments made before the regulations come into force. The Government has however simplified the provisions on commencement and made clear that consumers will be able to rely on the new rights if a misleading or aggressive practice started before the coming into force date provided that the contract or payment was made after that date.</p>			
<p>There should not be a limitation that damages are to be “restrained and modest”. The court should have the option to order higher damages in particularly egregious cases</p>	-	-	<p>Some felt that there was little point in having this limitation in the regulations as the courts will be well aware that damages should not be substantial except in very extreme cases.</p>
<p><b>The Government Response:</b> The Government accepts that it is unnecessary to include this limitation in the Regulations as the courts will be well aware that damages should not be substantial except in very extreme cases. The courts already take a cautious approach to non-financial damages both in the breach of contract and misrepresentation cases and there is no reason to think they would take a different approach to cases brought using the new rights.</p>			

<p>Traders should not be able to use the defence of 'due diligence'.</p>	<p>-</p>	<p>Respondents thought that the inclusion of the 'due diligence' defence within the rights would make it more difficult for consumers to seek redress.</p>	<p>Respondents felt that as a due diligence defence did not prevent civil liability under the CPRs, only criminal liability, it should not be available in the new private rights for consumers.</p>
<p><b>The Government Response:</b> The Government agrees with the Law Commissions' recommendation that the due diligence defence within the proposed new legislation should mirror the due diligence defence in the Consumer Protection Regulations. This means that the trader would not be liable if they could show that the misleading or aggressive practice was for a cause beyond their control and that they had taken all reasonable precautions against it. This offers the most simple and consistent approach.</p>			
<p>Consumers should get right to redress when misled as to their legal rights</p>	<p>-</p>	<p>-</p>	<p>Respondents felt that consumers should have the right to seek redress when they had been misled as to their legal rights.</p>
<p><b>The Government Response:</b> The Government accepts that such behaviour is serious and detrimental. However, the Government agrees with the Law Commissions that where a consumer has a legal right (such as the right to return faulty goods), redress should be obtained by enforcing that right rather than via a secondary cause of action. The Government also agrees that in many cases it will be difficult to quantify the loss. Many of the problems highlighted in the Law Commissions consultation involve face-to-face discussions where 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. Public enforcement action may be taken under the CPRs against traders who engage in serious or regular unfair practices. .</p>			
<p>The way right to unwind applies to part-exchange contracts is unclear.</p>	<p>-</p>	<p>-</p>	<p>Respondents felt that the proposals on the way that the right to unwind applied to part-exchange contracts was too unclear.</p>

<p><b>The Government Response:</b> The Government agrees that the draft regulations were unclear in the way the right to unwind applied in respect of part-exchange contracts. The regulations have been amended to make clear how the new rights work. For example, to ensure that where the consumer has transferred something in addition to paying money, or has transferred more than one thing, then the new rights will apply. In addition the Government has made clear that where a consumer transfers goods under a barter or part-exchange contract, and the goods cannot be returned in their original state, then the consumer is instead entitled to a refund equating to the market value of whatever the consumer has transferred.</p>			
<p>The proposed levels of discount were unclear and will result in increased litigation.</p>	<p>Respondents felt that it was not clear what “minor”, “significant”, “serious” and “very serious” meant. It was felt that it would lead to increased litigation.</p>	<p>-</p>	<p>-</p>
<p><b>The Government Response:</b> A majority of respondents to the Law Commissions consultation thought that the bands would be particularly useful in providing a framework for negotiations between the parties. It was felt that given the complexity of the law of damages and the evidential difficulties of proving loss, the bands would be helpful in ensuring clarity and consistency. The Government will include further explanation in guidance including with examples of what minor, significant, serious and very serious detriment might look like.</p>			



# Consultation on the Consumer Protection from Unfair Trading (Amendment) Regulations 2013 – Detail of Respondents

<b>Category</b>	<b>Respondent</b>
Business Representatives	Resort Development Organisation The Newspaper Society Society of Motor Manufacturers and Traders Finance and Leasing Association Institute of Practitioners in Advertising. IBSA Association of Residential Lettings Agents The Property Interest Stakeholder Group The Advertising Association RICS
Business	Crystal Windows LexisNexis HSBC The Ombudsman Service BT Retail Loss Prevention
Consumer Organisations	Which? Citizens Advice Scotland Passenger Focus Which? London Travel Watch
Regulators	OFT
Local Government	East of England Trading Standards ACTSO
Other	Huw Evans Cardiff University Advertising Standards Authority Association of Chief Police Officers The Bar Council

© Crown copyright 2013

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. Visit [www.nationalarchives.gov.uk/doc/open-government-licence](http://www.nationalarchives.gov.uk/doc/open-government-licence), write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

This publication available from [www.gov.uk/bis](http://www.gov.uk/bis)

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills  
1 Victoria Street  
London SW1H 0ET  
Tel: 020 7215 5000

If you require this publication in an alternative format, email [enquiries@bis.gsi.gov.uk](mailto:enquiries@bis.gsi.gov.uk), or call 020 7215 5000.

**BIS/14/692**